RESERVED

Case No. 2402518/2015
2405561/2013
2405298/2012

EMPLOYMENT TRIBUNALS

Claimant: Dr Tattersall

Respondents: (1) Liverpool Womens Hospital NHS Trust
(2) Liverpool University

HELD AT: Liverpool **ON:** 12- 31 January 2018
1-9, 15-16 February 2018
8-9, 15 March 2018
9-10, 13, 18 April 2018 (in chambers)

BEFORE: Employment Judge Shotter

MEMBERS: Mr M Gelling
Mr P Gates

REPRESENTATION:

Claimant: Mr Mensah, counsel
Respondent 1 & 2: Mr Boyd, counsel

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is as follows: -

1. The claimant was given leave to adduce in evidence the handwriting expert report prepared by Margaret Webb dated 5 February 2018. It was not just and equitable and in accordance with the overriding objective to grant the claimant leave to commission a further expert report and his application for leave is refused.

2. The claimant was not unfairly dismissed and his claim for unfair dismissal brought against the first and second respondent is not well-founded and is dismissed.

3. The claimant was not automatically unfairly dismissed and his claim for automatic unfair dismissal brought under Section 103A of the Employment Rights Act 1996 against the first and second respondent is not well-founded and is dismissed.

4. The claimant was not subjected to any detriments on the ground that he had made protected disclosures under Section 43B of the Employment Rights Act 1996 and the claim for detriments brought against the first and second respondent are not well-founded and dismissed.

5. Detriments 23 and 29 were not presented before the end of the period of 3 months beginning with the date of the act or failure to act to which the complaint relates, or, where the act or failure to act is part of a series of similar acts, the last such act or failure to act. The Tribunal was satisfied that it was reasonably practicable for a complaint to be presented before the end of that period of 3 months, the Tribunal does not have the jurisdiction to consider the complaints which are dismissed.

6.The first Respondent did not deprive the claimant of the right to be accompanied under Section 10 Employment Relations Act 1999.

7. The alleged acts of disability discrimination occurring before or on 6 December 2012 were not lodged within the statutory time limit of 3-months, the claim was not presented within such other period as the Tribunal thinks just and equitable, it is not just and equitable to extend time and the Tribunal does not have the jurisdiction to consider those complaints which are dismissed

8. The first respondent did not unlawfully discriminate against the claimant under Section13 by treating him less favourably than a hypothetical comparator on the grounds of his disability, the claimant's claims for direct disability discrimination and disability related discrimination brought under Sections 13 and 15 of the Equality Act 2010 are not well-founded and are dismissed.

9. The First Respondent did not engage in unwanted conduct related to the claimant's disability, the claimant's complaint of harassment brought under Section 26 of the Equality Act 2010 is not well-founded and is dismissed.

10. Detriments 1 and 2 claimed under Section 27 of the Equality Act 2010 were not presented within the statutory limitation period, they were not presented within such other period as the Tribunal thinks just and equitable, it is not just and equitable to extend the time limit and the Tribunal does not have the jurisdiction to consider those complaints, which are dismissed.

11. The Claimant raised protected acts numbered 4 to 6 to satisfy the requirements of Section 27(2) of the Equality Act 2010 within the statutory time limit and the Tribunal has the jurisdiction to consider detriment 3.

12. The First Respondent did not subject the Claimant to a detriment because he had done or might to a protected act or because the First Respondent believed that the Claimant had done or might do such an act and the claimant's complaint of victimisation brought under Section 27 of the Equality Act 2010 is not well-founded and is dismissed.

13. The claimant's claim for unpaid accrued holiday pay brought under Regulation 13 of the Working Time Regulations 1998 is not well-founded and is dismissed.

14. The claimant's claim for a redundancy payment is dismissed upon withdrawal.

15. The First Respondent failed to issue the Claimant with a statement of main terms and particulars of employment in accordance with Section1 of the Employment Rights Act 1996.

REASONS

Preamble

The pleadings

1. By three claim forms received on 21 June 2012 (claim 2405298/2012), 10 May 2013 (claim 2405561/2013 and 6 March 2015, (claim 2402518/2015) the claimant brings the following complaints:

1.1 **2405298/2012** - failure to provide a written statement of terms of employment and a declaration of whether the claimant's written contract enables the respondent to request "medical documentation/tests that are in excess of those required by the Department of Health Guidance…[relying] on 'local policy'…not specifically provided for in writing, relying upon an occupational health questionnaire. Discrimination and/or victimisation due to the claimant "requesting union input into this procedure, for attempting to exert statutory rights" and unlawful deduction of wages. These claims were further clarified in a letter dated 17 December 2012 that referred also to detriment under the PIDA and age discrimination.

1.2 In a Scott schedule dated 5 March 2013 the claimant included claims of age and disability discrimination, detriment under PIDA, detriment arising out of "requesting of trade union assistance/representation and detriment for asserting a statutory right".

1.3 **2405561/2013** - the claimant alleged that his exclusion on 27 November 2012 may be a breach of contract following a binding agreement reached between the parties that an investigation would not take place. He claimed disability

discrimination and detriment under the PIDA, maintaining it was an implied/express term of the contract of employment that his exclusion would be managed in accordance with policy, and it was an implied term the Chief Executive could not refuse to accept, without good reason, the panels decision that he return to work on 8 March 2013. The claimant alleged disability discrimination and detriment under PIDA, on the basis that there was a "prolonged pattern of discrimination."

1.4 With reference to the first respondent, the claimant provided further information in a letter dated 5 June 2014, further particulars and Scott schedules setting out the disclosures he relied upon; namely, to Mrs O'Brien in April 2012 and subsequently to Ms Turner, Dr Topping (30 March & 17 April 2012) and Mr Herod (on 4 April 2012), 18 June 2012 grievance to Angela O'Brien, 27 July 2012 Michelle Turner, 25 July 2012 to Ms Thompson, 14 September 2012 to Ms Turner and Ms MC Morran, and then on 14 September, 24 October, 26 November 2012, 7 May and 23 June 2013 to the Care Quality Commission ("CQC"), NHS Protect 18 November 2013 and the Trust's counter-fraud specialists Baker Tilly on 19 November 2012/2013.

1.5 With reference to the second respondent, the claimant provided further information concerning the protected disclosures he allegedly made to Professor Alfirevic on 13 February 2013, in his grounds of appeal and to Professor Greer by emails dated 12 August, 18 September and 16 December 2013.

1.6 In relation to his disability, the claimant relied on depression and anxiety and he relies upon a hypothetical comparator who is a non-disabled lecturer in obstetrics and gynaecology.

1.7 With reference to the claim of harassment, the claimant asserted the conduct was unwanted conduct related to his depression.

1.8 With reference to victimisation the claimant relied upon a number of protected acts as follows; letter to Ms O'Brien dated 21 June 2012, submission to Employment Tribunal dated 25 June 2012, email to Dr Topping dated 9 July 2012, letter to Tribunal copied to first respondent dated 17 September 2012, Scott schedule dated 5 March 2013 and Employment Tribunal claim 2402518/2015.

1.9 The claimant set out a number of detriments a "pattern of discrimination" that ran to 25 points, which were finally subsumed into the agreed list of issues.

1.10 In a letter dated 24 December 2014 the claimant alleged he had made further disclosures of information to Mr Herod on 4 April 2014.

1.11 **2402518/2015** - the claimant claimed unfair dismissal under S.94 of the Employment Rights Act 1996 as amended ("the ERA"), automatic unfair dismissal and detriment, redundancy pay and holiday pay. The claimant did not claim disability discrimination. The claimant also asserted that he had been informed on

27 August 2014 that he had been made redundant, when Andrew Sharp, the claimant's colleague who worked in the same role as the claimant, was not.

1.12 The claimant claimed detriment as a result of making protected disclosures and automatic unfair dismissal the principal reason for dismissal was because he had made a protected disclosure.

1.13 The claimant clarified that in relation to 2405298/2012 he was bringing claims of disability discrimination under S.13, 15, 20, 27 and 26 of the EqA, detriments for having made protected disclosures under S.47B ERA, failure to provide a written statement of terms under S.1 ERA and the right to be accompanied by a trade union representative under the Employment Relations Act 1999 ("ERA 1999").

1.14 In relation to 2405561/2013 the claimant brought claims of disability discrimination under Sections 13, 15, 20, 27 and 26 of the EqA, and detriments for having made protected disclosures under S.47B ERA.

1.15 In relation to 2402518/201 the claimant brought claims for automatic unfair dismissal under S.103A ERA, detriments for having made protected disclosures under S.47B ERA, unfair dismissal under S.94 ERA, redundancy pay under s.13 ERA and unpaid holiday under S.13/18 ERA.

2. The claimant's claims were further clarified at case management preliminary hearings, numerous further particulars and numerous Scott Schedules; these have been subsumed into the agreed issues.

3. The respondents dispute the claimant's claims, contending that a number where out of time and the Tribunal did not have the jurisdiction to consider them. Further, it is disputed the claimant had made a disclosure of information falling within the ERA on 4 and 25 April 2012, 22 January 2015 or at all, and if he did raise issues, they were issues the respondent was aware of and already dealing with, and such issues were not raised in good faith.

4. With reference to the concerns raised to the CQC in September 2012, May 2013 and 7-8 July unannounced inspection, the respondent pleaded it was not advised who had raised the concerns.

<u>The liability hearing</u>

5. This has not been an easy and straightforward hearing to conduct, even though the Tribunal has had the benefit of two very competent barristers acting in the best interest of their clients and the Tribunal. A number of documents have been adduced late by both, resulting in a number of short adjournments. All documents except for two were allowed in evidence, even those produced by the claimant on the last days of evidence. The claimant had by this stage decided no longer to instruct Mr Mensah, he produced 38-pages of documents marked "C4" and "C5" on the basis that they should have been in the bundle and were not. The respondent

sought to adduce documentary evidence by way a rebuttal dealing with what had happened to doctors on the same contract as the claimant over a period of 20-years past. The claimant objected following an adjournment, and Mr Boyd withdrew the application in order that the proceedings could go ahead without further delay.

6. An issue arose concerning documents marked "C3" produced by the claimant together with a handwriting expert report. The Tribunal dealt with the claimant's application providing oral reasons for their order that the claimant be given leave to adduce a draft expert report prepared by Margaret Webb dated 5 February 2018, reflecting the agreed fall-back position held by both parties. The Tribunal did not give leave for the claimant to instruct Margaret Webb or any other expert to prepare a part 35 compliant report. The claimant requested written reasons having dismissed Mr Mensah as his counsel for at least the third time. In the hearing the claimant castigated Mr Mensah, whose response was that the position he had been put in was "intolerable". This followed a number of earlier incidents, including that on 6 February 2018 when the claimant requested security to be called, alleging Mr Mensah had assaulted him. When asked to clarify how he had been assaulted the claimant alleged Mr Mensah had thrown a file. The claimant continued to be represented by Mr Mensah, who at all times in the hearing acted professionally. Mr Mensah's instructions were withdrawn and reinstated on more than one occasion and he appeared at the end of the hearing to give full and effective oral submissions in the absence of the claimant, who did not attend.

7. Given the complexity of the agreed list of issues and vast amount of evidence involving two respondents' over a period of years, the Tribunal has dealt with many the alleged disclosures and detriments within the chronological factual matrix in order that a full understanding was reached, before reaching their conclusion. In doing so it has applied the law set out below.

Agreed issues

8. The issues agreed between the parties are as follows:

8.1 Failure to Provide Statement of Main Terms and Particulars of Employment

(1) Has the First Respondent failed to issue the Claimant with a statement of main terms and particulars of employment?

(2) It is admitted that, at the point the Claimant submitted his claim (12th June 2012) the First Respondent had not issued the Claimant with a statement of main terms and particulars of employment.

8.2 Did the First Respondent Deprive the Claimant of the Right to be accompanied under Section 10 Employment Relations Act 1999?

(1) Did the first respondent hold a disciplinary hearing with the claimant on 17 April 2012?

(2) Did the First Respondent deprive the Claimant of the right to be accompanied at this meeting?

(3) If so, has the claim been made within the relevant time limit?

8.3 Detriments for making protected disclosures under the ERA.

(1) Have the claims been made within the relevant time limit?

(2) Did the claimant make the following disclosures of information to the first respondent?

(3) In respect of each purported disclosure, does the disclosure qualify for protection under Section 43B ERA?

(4) In respect of each purported disclosure, are the requirements of section 43C-43H ERA complied with?

List of alleged protected disclosures made to the First Respondent

no	Date	To whom	Details of disclosure	Section 43B ERA 1996 failure relied upon	Detriment
1	30 Mar 2012	Dr Joanne Topping	The Claimant was due to work on Friday 30 March 2012. During a discussion which took place in Dr Topping's office with Dr Topping on that day about the issue of the Trust's lack of pre-employment checks the Claimant asked Dr Topping orally whether legal requirements were in place for him to work that evening and over the weekend in a clinical role because pre-employment checks had not been done and OH clearance had not been provided. Dr Topping told the Claimant that there was a verbal contract and confirmed that the Claimant could work that evening and over the weekend. Dr Topping also asked the Claimant to provide	(1)(b) Breach of any legal obligation: the legal obligations on a Trust to ensure appropriate HR and OH policies are in place and applied consistently (1)(d) Danger to the health and safety of any individual: risks to patient safety	1-41

			any previous CRB disclosure to HR and to make an appointment to see Occupational Health.		
2	4 April 2012	Mr Jonathan Herod ,Medical Director	During a meeting at around 15:00h with Mr Herod in Mr Herod's office the Claimant raised issues concerning the following matters, orally: - breach of mutual Trust and confidence between the Trust and the Claimant; - lack of pre-employment checks; - lack of OH screening and document checking for all staff, in particular for those with honorary contracts and those seconded to the Trust from other organisations; - the Trust's attempts to cover up its failings to the Board and regulators; - a bullying culture at the Trust; - poor staffing levels, referring to a letter from the midwives about this; - lack of staff breaks; - medication delays; - delays in getting patients to the theatre; and - the resulting risks to patient safety The Claimant prepared a typed note for this meeting with Mr Herod and annotated that note during the meeting on 4 April 2012. He did not show the note directly to Mr Herod, but it would have been clear to Mr Herod that the Claimant was raising issues from the note and adding points in pen to it during the meeting.	(1)(b) Breach of any legal obligation: the legal obligations on an NHS Trust to ensure appropriate HR and OH policies are in place and applied consistently, in compliance with Department of Health requirements, the duty of care owed by an employer to an employee, the legal obligation of mutual Trust and confidence, and the legal obligation to comply with CQC regulations, particularly those in relation to patient safety and staff (1)(d) Danger to the health and safety of any individual: risks to patient safety (1)(f) That information tending to show any matter falling within s43B(1)(a)-(e) is being or is likely to be deliberately concealed	1-41

3	17 April 2012	Ms Angela O'Brien, HR Business Partner	During a telephone call on 8 June 2012, when the Claimant called Ms O'Brien back in response to a telephone message she had left for him, the Claimant made disclosures to Ms O'Brien concerning the Trust's: - lack of pre-employment checks; - lack of OH screening and document checking for staff, particularly those with honorary contracts or seconded to the Trust by other organisations; - the Trust's attempts to cover up its failings to the Board and regulators; - concerns around staffing levels, particularly on the Labour Ward; and - resulting risks to patient safety. I was returning the telephone message she had left. I raised my concerns that the Trust seemed to be making up policies as things went along and the manner in which there seemed to be a cover up to ensure that the Board did not find out what was really going on, I said my concerns about staffing levels had been treated in the same regard, i.e. minimised and covered up. She did not really offer any response, saying she would note my concerns with the relevant people and get back to me.	(1)(b) Breach of any legal obligation: the legal obligations on an NHS Trust to ensure appropriate HR and OH policies are in place and applied consistently in compliance with Department of Health requirements and the legal obligations to comply with CQC regulations, particularly those in relation to patient safety and staff (1)(d) - Danger to the health and safety of any individual: risks to patient safety (1)(f) - That information tending to show any matter falling within s43B(1)(a)-(e) is being or is likely to be deliberately concealed	1-41
4	20	Dr Joanne Topping,	The Claimant wrote a letter to	(1)(b)	9-41

	May 2012	Clinical Director	Dr Topping expressing his concern that the Trust lacked express policies to cover the blood borne virus pre-employment screening process of staff and raised his concern that he felt like he was being treated differently to other employees of the Trust.	- Breach of any legal obligation: the legal obligations on an NHS Trust to ensure appropriate HR and OH policies are in place and applied consistently in compliance with Department of Health requirements and the legal obligations to not discriminate against an employee because of their disability	
5	6 June 2012	Ms Angela O'Brien Ms Joanne Topping, Mr Jonathan Herod and Ms Michelle Turner	The Claimant emailed Ms Angela O'Brien, Ms Joanne Topping, Mr Jonathan Herod and Ms Michelle Turner again expressing his concern with regard to a lack of Trust policy covering the blood borne virus screening of employees of the Trust. The Claimant also states he feels he is being treated differently to other employees in similar positions.	(1)(b) - Breach of any legal obligation: the legal obligations on an NHS Trust to ensure appropriate HR and OH policies are in place and applied consistently in compliance with Department of Health requirements and the legal obligations under the Equality Act 2010 to not discriminate against an employee because of their disability	11-41

6	18 June 2012	Ms Angela O'Brien, HR Business Partner	The Claimant submitted a formal written grievance to Ms O'Brien which complained that the Trust had failed to provide him with written statement of terms and conditions and that it had suspended payment of his banding supplement on 10 May 2012 in breach of contract.	(1)(b) - Breach of any legal obligation: breach of the legal obligation under ERA 1996 to provide a written statement of terms and conditions of employment	13-41
7	25 July 2012	Ms Kathryn Thompson, Chief Executive	The Claimant raised concerns during a telephone conversation with Ms Thompson which took place in the afternoon. The Claimant called Ms Thompson because he had asked to have a conversation with her, in hope she would listen to his concerns, as no one else in the Trust appeared willing to do so. The call lasted for around 20 minutes. During the call the Claimant made disclosures to Ms Thompson regarding the following concerns: - patient safety issues, referring to the OH screening issues; - the Trust's attempts to cover up its failings to the Board and regulators; - a bullying culture at the Trust; and - poor staffing levels, in particular on the Labour ward. The Claimant prepared a transcript of what he said to Ms Thompson during the call and extracts of that transcript are contained in the Claimant's FBPs of 29 April 2016.	(1)(b) - Breach of any legal obligation: the legal obligations on an NHS Trust to ensure appropriate HR and OH policies are in place and applied consistently in compliance with Department of Health requirements and the legal obligations to comply with CQC regulations, particularly those relating to patient safety and staff (1)(d) - Danger to the health and safety of any individual: risks to patient safety (1)(f) - That information tending to show any matter falling within	15-41

				s43B(1)(a)-(e) is being or is likely to be deliberately concealed	
8	27 July 2012	Ms Michelle Turner, Director of HR	The Claimant made disclosures to Ms Turner orally, during a meeting in her office, regarding what he believed to be the Trust misleading the Employment Tribunal by its provision of untrue information through its solicitors in a letter from the Trust to the Tribunal of 26 July 2012. The letter stated that the Trust had never received the Claimant's claim form. However, the Claimant believed this was not true and was done to extend its time limit to respond. This was because a version of his claim subsequently disclosed by the Trust shows a copy of the ET's covering letter date-stamped as having been received on 28 June 2012, three days after it was sent by the ET.	(1)(a) - Criminal offence: Deliberately misleading the Employment Tribunal and perverting the course of justice (1)(b) - Breach of any legal obligation: Deliberately misleading the Employment Tribunal and perverting the course of justice (1)(f) - That information tending to show any matter falling within s43B(1)(a)-(e) is being or is likely to be deliberately concealed	17-41
9	27 July 2012	Ms Michelle Turner, Director of HR	The Claimant made another disclosure to Ms Turner orally during their meeting of 17 July 2012 stating that incorrect information had been provided to the press, namely the Liverpool Echo, by the Trust management. The Claimant said [the Trust had inaccurately stated that it was compliant with all its obligations, that the issue was with the recording of information rather than that the appropriate testing had actually been performed or not and a suggestion that the responsibility for this was with the doctors. The Claimant was	(1)(f) - That information tending to show any matter falling within s43B(1)(a)-(e) is being or is likely to be deliberately concealed	17-41

			very concerned at the attempt by the Trust to suggest that doctors had failed in their professional responsibilities, rather than the Trust being transparent and open about their failings.		
10	14 Sept 2012	Ms Michelle Turner, Director of HR and Ms Julie McMorran, Trust Secretary	The Claimant raised concerns during a telephone call initially with Ms Turner and then with Ms McMorran, after the Claimant's request to be passed on to Ms McMorran during the call. The Claimant made a transcript of his call with Ms Turner and McMorran and extracts from this are contained within the Claimant's FBPs of 29 April 2016. During the call he made disclosures about the Trust's: - lack of pre-employment checks; - poor governance arrangements in the OH Department; - lack of proper procedures; - poor staffing levels, particularly on the Labour ward; - making up of policies as the Trust went along; - attempts to cover up its failings to the Board and regulators; - risks to patient safety; and - culture of bullying	(1)(b) Breach of any legal obligation: the legal obligations on an NHS Trust to ensure appropriate HR and OH policies are in place and applied consistently in compliance with Department of Health requirements, the duty of care owed by an employer to an employee and the legal obligations to comply with CQC regulations, particularly those relating to patient safety and staff (1)(d) - Danger to the health and safety of any individual: risks to patient safety (1)(f) - That information tending to show any matter falling within s43B(1)(a)-(e) is being or is likely to be deliberately concealed	19-41
11	14 Sep 2012, 24 Oct and 26	Care Quality Commission	The Claimant raised concerns with the CQC as more fully set out at paragraph (3) of the Claimant's FBPS of 29 April 2016. He made three calls to the CQC on these respective dates, which he relies on as	(1)(b) - Breach of any legal obligation: the legal obligations to comply with CQC	19-41

	Nov 2012		protected disclosures. The Claimant made disclosures about the following during the three calls. He provided more detail in his later calls than in his earlier calls, but cannot recall what he said in verbatim in each. The CQC may hold recordings. - the Trust's OH processes and lack of checks; - the subsequent attempts by member so senior staff, including the Director of HR and Chief Executive to try to ensure that the Board and, particularly, the Non-executive Board members did not become aware of the OH issues; - poor staffing levels, particularly on the Labour ward - bullying culture; and scapegoat culture at the Trust - the culture by which every time there was an adverse event at the Trust, investigations would be manipulated to ensure that an individual was found to be the sole cause of the problem and usually then forced to leave the Trust via bullying. No blame was ever attributed to system failures or failures of senior management.	regulations, particularly those relating to patient safety and staff (1)(d) - Danger to the health and safety of any individual: risks to patient safety (1)(f) - That information tending to show any matter falling within s43B(1)(a)-(e) is being or is likely to be deliberately concealed	
12	7 May 2013	Care Quality Commission	The Claimant made disclosures via a telephone call that 66,000 patient test results had not been reported or reviewed by	1(b) - Breach of any legal obligation: the legal	28-41

			the Trust in breach of professional obligations, presenting a risk to patient safety. He was put through to Ms Debbie Cocoran, the inspector covering the Liverpool Women's Hospital, during the call. Emails regarding the Claimant's disclosures followed between the Claimant and Ms Cocoran of the CQC.	obligations to comply with CQC regulations, particularly those relating to patient safety and the provision of a safe service (1)(d) - Danger to the health and safety of any individual: risks to patient safety	
13	12 Aug 2013	Ms Kath Thomson, Chief Executive	The Claimant wrote to Ms Thomson and stated that he believed the Trust had failed to meet their legal obligation to provide him with information requested under a subject access request in line with the Data Protection Act 1998.	(1)(b) - Breach of any legal obligation: Breach of legal obligation to comply with Data Protection Act and Freedom of Information legislation	31-41
14	Circa 18 Nov 2013	NHS Protect	The Claimant made an oral disclosure to NHS Protect during a telephone call to the NHS Protect, using a public telephone number. He disclosed that the Trust had misled the Employment Tribunal by providing it with untrue information in a letter from the Trust to the Tribunal of 26 July 2012. The letter stated that the Trust had never received the Claimant's claim form. However, the Claimant believed this was not true and was done to extend its time limit to respond. This was because a version of his claim subsequently disclosed by the Trust shows a copy of the ET's covering letter date-stamped as having been received on 28 June 2012, three days after it was sent by the ET	(1)(a) - Criminal offence: Deliberately misleading the Employment Tribunal and perverting the course of justice (1)(b) - Breach of any legal obligation: Deliberately misleading the Employment Tribunal and perverting the course of justice (1)(f) - That information tending to show any matter falling within s43B(1)(a)-(e) is being or is likely to be deliberately	32-41

				concealed	
15	18 – 19 Nov 2013	Mr John Baker and Mr Gavin Ball	The Claimant made oral disclosures during a telephone call to the Trust's counter-fraud specialists, Mr Baker (on 18 November) and Mr Ball (on 19 November) both of Baker Tilly, asserting that the Trust had misled the Employment Tribunal by providing it with untrue information in a letter form the Trust to the Tribunal of 26 July 2012. The letter stated that the Trust had never received the Claimant's claim form. However, the Claimant believed this was not true and was done to extend its time limit to respond. This was because a version of his claim subsequently disclosed by the Trust shows a copy of the ET's covering letter date-stamped as having been received on 28 June 2012, three days after it was sent by the ET	(1)(a) - Criminal offence: Deliberately misleading the Employment Tribunal and perverting the course of justice (1)(b) - Breach of any legal obligation: Deliberately misleading the Employment Tribunal and perverting the course of justice (1)(f) - That information tending to show any matter falling within s43B(1)(a)-(e) is being or is likely to be deliberately concealed	32-41
16	19 Mar 2014	Mr Steve Burnett, Senior Independent Director	During at meeting with Mr Burnett at 16:00h at the BMA North West office, the Claimant made disclosures orally to Mr Burnett regarding his concerns relating to: -staffing levels, particularly on the Labour Ward; -lack of pre-employment checks; -the Trust trying to cover up its failings in this respect; -management of test results; -blood testing; -patient confidentiality; -governor elections; and -the culture at the Trust in breach of professional obligations, presenting a risk to patient safety.	(1)(b) - Breach of any legal obligation: the legal obligations on an NHS Trust to ensure appropriate HR and OH policies are in place and applied consistently, in compliance with Department of Health requirements, the duty of care owed by an employer to an employee, the legal obligation	33-41

			A 10 page written summary of the disclosures made by the Claimant during this meeting was subsequently produced by Mr Steven Burnett, which is a document in the Respondent's control.	of mutual Trust and confidence, and the legal obligation to comply with CQC regulations, particularly those in relation to patient safety and staff, corruption relating to the issues over the governor elections and data protection regulations (1)(d) - Danger to the health and safety of any individual: risks to patient safety (1)(f) - That information tending to show any matter falling within s43B(1)(a)-(e) is being or is likely to be deliberately concealed	

List of Disclosures to the Second Respondent

No	DATE	To whom	DETAILS OF DISCLOSURE	SECTION 43B ERA 1996 FAILURE RELIED UPON	DETRIMENT
1	13 Feb 2013	Professor Zarko Alfirevic	The Claimant spoke to Professor Alfirevic about his concerns around being informed that his contract would not be renewed. Professor Alfirevic made it	(1)(b) Breach of any legal obligation: breach of legal obligation in Employment	9-21

			clear to the Claimant (orally) that his best option would be to leave the University and Trust as soon as possible and with as little damage to an NHS career as possible. The Claimant was told in, no uncertain terms, that the University would not support him because of the position that the University had been placed in subsequent the Claimant making his disclosures. The Claimant believed that the issues between himself and the Trust, namely his protected disclosures, were taken into consideration by the University in deciding not to renew his contract. Professor Alfirevic stated that the University had met with Professor Graham (Postgraduate Dean) and obtained assurance that the Deanery would support them in not-renewing the contract and trying to ensure that Dr Tattersall was moved into a non-academic post. The Claimant told Professor Alfirevic that the University could not act like this simply because he was making things uncomfortable for the Trust by raising issues of concern like patient safety. The Claimant expressed that he believed that if the University were to dismiss him, this would be unlawful and constitute unfair dismissal. The Claimant made this disclosure orally in Professor Alfirevic's office during a meeting which took place at 11:30am. The	rights Act 1996 to not dismiss someone unfairly and/or to not dismiss someone because they had made protected disclosures	

			Claimant followed up by email later that day to thank Professor Alfirevic for his "honest views".		
2	12 Aug 2013, 18 Sept 2013 16 Dec 2013.	Prof Ian Greer	The Claimant made disclosures to Professor Greer by emails on the dates listed regarding his alleged unfair treatment by the Trust and the University's failure to support him under the duty of care an employer has for its employees. On 12 August 2013 the Claimant wrote to Professor Greer requesting assistance from the University and for it to ensure that the Trust treated him fairly. The Claimant received a response the same day from Professor Greer stating that it would be inappropriate for the University to intervene in the issues between the Claimant and the Trust as it deemed the Claimant was being treated fairly. The Claimant responded to Professor Greer on 18 September and specifically referred to protected disclosures that he had raised with the CQC and the Trust, for which he did not receive support from the University for. On 16 December 2013 the Claimant wrote to Professor Greer again by email and made a number of disclosures concerning the Trust's failures to meet legal obligations as well as potential breaches of contract. The Claimant made clear that he was seeking assistance from the	(1)(b) - Breach of any legal obligation: employer's duty of care to its employees	13-21

			University.		
3	23 Oct 2014	The Claimant submitted his grounds of appeal to Lee Steward in HR at the University via his BMA rep.	The Claimant received a letter from Mr Lee Stewart of the University giving notice to end the Claimant's employment dated 29 September 2014. The Claimant submitted grounds of appeal against this dismissal which made it clear that he believed that his dismissal was primarily due to "his making public interest disclosures whilst in his post" [[2] grounds of appeal].The Claimant further discloses in his grounds of appeal that Professor Alfirevic made it clear that the University saw him as a "troublemaker" and this was the reason for not renewing his contract. The Claimant further disclosed that he believed the University had failed to have regard to its 'Redundancy Procedure' in coming to a conclusion to end the Claimant's position, [14] grounds of appeal.	1)(b) Breach of any legal obligation: breach of legal obligation in Employment rights Act 1996 to not dismiss someone unfairly and/or to not dismiss someone because they had made protected disclosures	18-21

8.4 Detriments alleged

(1) Do the incidents described below amount to detriments?

(2) If the detriments below have been suffered, did they occur on the ground that the Claimant made the protected disclosure(s) referred to above?

Detrimental treatment alleged against the First Respondent

1.	From April 2012 to Sept 2012	Refusing and failing to provide the Claimant with a copy of his written terms and conditions of employment
2.	17 April 2012	Refusing to allow the Claimant to have Trade Union Representation at a disciplinary meeting
3.	From 17 April 2012	Excluding the Claimant from conducting clinical and

		research work with Trust patients
4.	From April 2012	Requiring the Claimant to comply with local health screening policies which did not apply to the Claimant's position and/or were not in existence or ratified
5.	From 17 April 2012 - 8 June 2012	Refusing to redeploy or to consider redeploying the Claimant to a non-EPP role and refusing to provide a written risk assessment to the Claimant
6.	From April 2012	Refusing to clarify the Trust's view on the Claimant's contractual position with the Trust
7.	4 May 2012	Humiliating the Claimant, acting through Dr Topping, on the Labour Ward
8.	10 May 2012	Instructing the University of Liverpool (the University) to withhold payment of the Claimant's banding supplement
9.	From 20 May 2012	Refusing and/or delaying its decision to allow the Claimant to return to work with patients and restricting his work to non-EPP duties despite his provision of health screening documents
10.	25 May 2012	Failing to provide the Claimant with all documents he is entitled to under Data Protection legislation and refusing to comply with Freedom of information obligations
11.	June 2012	Failing to arrange a stage 1 grievance hearing in breach of the Trust's grievance policy
12.	From 15 June 2012	Providing inaccurate and/or confidential information about the Claimant to the University and other staff members – the Claimant believes all information the Trust held should have not been disclosed to the University and other staff members without good reason. When he queried the sharing of information, the Trust (via Michelle Turner) made it clear that they took the view they could share any information without providing him with the specific legal grounds which allowed them to do this
13.	From 18 June 2012	Conducting an unfair grievance procedure (see paragraph (5) a-i at page 11 of the FBPs of 29 April 2016 which explains why he asserts it was unfair)
14.	From 27 June 2012	Refusing to answer the Claimant's request for the status quo to be preserved per the Trust's grievance

		policy and failing to preserve the status quo
15.	9 July 2012	Humiliating the Claimant, acting through Dr Schofield, on the Labour Ward
16.	On or around 26 July 2012	Providing inaccurate and confidential information to the press, namely the Liverpool Echo. The Trust inaccurately stated that said it was complaint with all obligations, that the issue was with the recording of information rather that appropriate testing having been performed and a suggestion that the responsibility was with the doctors
17.	July 2012	Arranging a stage 2 grievance hearing for a date when Ms O'Brien knew she was due to be on leave in the knowledge that the chair of the hearing would determine her attendance to be essential and postpone the hearing to allow further preparation time
18.	27 July 2012	Bullying the Claimant through Mr Herod's actions – calling the Claimant and accusing him of going to the press (see paragraph (4) FBPs of 29 April 2016)
19.	From around August 2012	Preventing non-executive members of the Board and the Senior Independent Member from becoming aware of the Claimant's patient safety concerns and from contacting the Claimant
20.	From 14 September 2012	Excluding the Claimant from the Trust premises
21.	14 September 2012 –April 2014	Invoking a disciplinary procedure against the Claimant – an internal investigation commenced 14 September (put on hold in October) and formal investigation restarted on 27 November 2012
22.	From 14 September 2012	Conducting an unfair disciplinary procedure against the Claimant (see paragraph (5) a-v at pages 9-11 of the FBPs of 29 April 2016 which explains why he asserts it was unfair)
23.	17 September 2012 – 3 October 2012	Making it clear that the Trust wanted to exit the Claimant during conversation with the National Clinical Advisory Service
24.	From 27 November 2012	Excluding the Claimant from the Trust premises
25.	27 November 2012– 17 June 2014	Breaching the MHPS policy by continuing the Claimant's exclusion beyond 6 months

26.	21 December 2012 – 17 June 2014	Failing to review and properly consider lifting the Claimant's exclusion, in breach of the MHPS policy –in particular paragraphs 2.9 and 2.34
27.	From 7 March 2013	Failing to comply with the Exclusion Appeal Panel's recommendations in its letter of this date to lift the Claimant's exclusion
28.	From 24 May 2013	Refusing to investigate or deal with the Claimant's grievance of 24 May 2013 and failing to deal with it in a timely manner
29.	17 July 2013	Finding the Claimant's nomination to the Council of Governors invalid in breach of the Model Election Rules (although the Claimant did not receive this notification on 17 July 2013, Mr Herod confirmed to the Claimant it was deemed invalid on this date via an email of 24 July 2013). The breach related to the fact that there was no rule which provided that a nomination paper must be subscribed by at least two supporters
30.	24 July 2013	Refusing the Claimant's request of 24 July 2013 to attend a meeting of the Council of Governors that day, acting through Mr Herod who emailed the Claimant confirming the refusal
31.	20 September 2013	Continuing to directly communicate with the Claimant despite the Claimant specifically requesting that all communication be directed through the BMA due to the stress it was causing him
32.	17 December 2013	Bullying the Claimant through Mr Herod's actions – insisting on holding a meeting even when the Claimant was not fit for it and without an OH assessment (see paragraph (4) FBPs of 29 April 2016)
33.	12 June 2014	Bullying the Claimant through Mr Herod's actions –Mr Herod's actions and words during the meeting (see paragraph (4) FBPs of 29 April 2016)
34.	28 July 2014	Bullying the Claimant through Mr Herod's actions – making untrue allegations, stating that the Claimant had failed to provide an agreement when the Claimant had done so (see paragraph (4) FBPs of 29 April 2016)
35.	4 August 2014	Causing the Claimant stress and anxiety, resulting in him becoming ill and being signed off sick for one week from 4 August 20123 and then from 11 September until his dismissal
36.	26 August 2014	Bullying the Claimant through Mr Herod's actions-

		making untrue allegations, stating that the Claimant had failed to provide an agreement when the Claimant had done so (see paragraph (4) FBPs of 29 April 2016)
37.	27 August 2014	Bullying the Claimant through Mr Herod's actions – making untrue allegations, stating that the Claimant had agreed to an OH referral during a meeting when the Claimant had not done so (see paragraph (4) FBPs of 29 April 2016)
38.	From 14 November 2014 – 27 February 2015	Failing to properly and fairly deal with the Claimant's appeal of the decision to terminate his contract. The Claimant provided comments objecting to his dismissal by letter dated 14 November. The appeal hearing was not arranged until 27 February 2015.
39.	From 23 November 2014	Refusing to investigate or deal with the Claimant's grievance of 23 November 2014 – see letter from the Trust to the Claimant of 18 December 2014 "…As such, I am not going to progress your grievance any further."
40.	From 31 December 2014	Failing to extend or renew the Claimant's employment causing him detriment to his career path
41.	27 February 2015	Dismissing the Claimant's appeal against his dismissal (a post-termination detriment) – see letter from Ms Dianne Brown

Detrimental treatment alleged against the Second Respondent

1	17 April 2012 – 8 June 2012	Failing to provide alternative arrangements for the Claimant to allow him access to patients in order to conduct clinical research and for clinical training, causing significant detriment to his career
2	1 May 2012	Withholding payment of the Claimant's banding supplement
3	From 25 May 2012	Refusing and/or failing to comply with Data Protection legislation in respect of the Claimant's Subject Access Request which sought all information held by the University regarding the Claimant which would be disclosable under the DPA
4	27 July 2012 – 31 December 2014	Failing to take action to end the Claimant's bullying or to deal with its consequences
5	14 September 2012 – 17 June 2014	Failing to take action to support the Claimant in overcoming his exclusion
6	On or around 17	Liaising with the Trust with regard to intentions to

	September 2012	remove the Claimant from his position. This is shown in hand written notes made of a call between the Trust and the National Clinical Advisory Service which indicates involvement by Professor Ian Greer and Mr Robin Harrison, HR Manager
7	28 November 2012 Onwards	Removing the Claimant or allowing the Trust to remove the Claimant from his University workplace
8	17 December 2012	Making an inaccurate referral about the Claimant to the GMC
9	8 January – 13 February 2013	Failing to provide the Claimant with a place of work to undertake his academic work in a timely manner and failing to make arrangements to allow the Claimant to return to work despite the report of the University's OH doctor stating on 8 January 2013 that the Claimant was fit for work. Arrangements were required to be made, as the University leased the University Department in the Hospital from the Trust and the Trust refused to allow the Claimant to access the University Department
10	13 February 2013	Advising other academics not to collaborate with the Claimant – During a meeting between the Claimant and Professor Alfirevic on 13 February 2013, Professor Alfirevic informed the Claimant that he was advising other academics within the department and University not to work with the Claimant. He told the Claimant that he would not wish the other academics to be involved in the Claimant's problems as this would only cause the other academics problems they could do without. The Claimant cannot be certain by what means this information was delivered by Professor Alfirevic to the other academics.
11	From 13 February 2013	Failing to comply with and/or ensure that the Trust complied with the decision of the Exclusion Appeal Panel which determined that the Claimant's exclusion should be lifted in February 2013 – On 7 February 2013 the Exclusion Panel recommended that the Claimant's exclusion should be lifted on 8 March 2013. The Panel also recommended that the Claimant be given access to the on-site University premises and that this could be implemented with immediate effect as it had already been agreed with the University. This

		implies the University was already aware of the Exclusion Appeal Decision. The Exclusion Appeal outcome letter dated 11 March 2013 confirmed the decision in writing. Carol Mills, Director of HR at the University, was copied to the letter and therefore she was specifically aware from at least this point. The Claimant asserts that Mr Robin Harrison, HR at the University. He is aware of this as a result of conversations the Claimant had with him. The Claimant believes the University owed a duty of care to him as an employee to act in good faith and to ensure the decision about lifting his exclusion was upheld. The University failed to intervene when his exclusion was not lifted. The Claimant believes the responsibility to do this lay with senior employees of the University including Professor Alfirevic and Professor Greer.
12	19 July 2013	Making untrue allegations that the Claimant had been asked to attend a meeting with Professor Alfirevic on the morning of 19 July 2013, that the Claimant was taking more annual leave than he was entitled to and alleging he had not properly followed holiday request procedure, in a letter from Mr Robin Harrison to the Claimant
13	From 12 August 2013	Failing to take action or intervene when the Claimant was forced to attend meetings with the Trust on days which the University had agreed that he did not need to work (for instance, after the Claimant requested that the University intervene "…to ensure [he] is treated fairly by the Trust…."in an email to Professor Ian Greer on 12 August 2013, and in an email to Professor Alfirevic on 13 December 2013)
14	From 14 September 2013	Failing to support the Claimant as a whistle-blower in accordance with its policies and/or accepted practice in publicly funded institutions and/or government guidelines
15	From 14 September 2013	Failing to provide academic opportunities, collaborations and support in a manner which was provided to other employees of the University- The Claimant alleges that Andy Sharp, an employee of the University, was supported by Professor Alfirevic. Mr Sharp's employment contract with the University was renewed or extended and he is now Senior Lecturer at the

		University.
16	29 September 2014 – 31 December 2014	Failing to comply the with the University's redundancy policy
17	13 October 2014 – 31 December 2014	Delaying dealing with the Claimant's dismissal appeal. The appeal was submitted on 13 October and a hearing date was set for 17 December 2014. A delay of 2 months meant the hearing would be held just 2 weeks before the proposed dismissal date
18	24 October 2014	Attempting to use a biased and non-independent appeal panel, including Mrs Costello and Professor Greer who had previously been involved in the Claimant's matter
19	19 December 2014	Dismissing the Claimant's appeal against his dismissal
20	31 December 2014	Failing to renew or extend the Claimant's employment with the University
21	From 31 December 2014	Causing detriment to the Claimant's academic career by failing to renew or extend his employment with the University, resulting in him becoming de-skilled, restricting his future opportunities

(3) If the detriments outlined above have been suffered, did they occur on the ground that the claimant made the protected disclosure(s) referred to above?

8.5 Disability Discrimination (against the First Respondent only)

It is admitted the Claimant had a disability, namely Depression, throughout the period of his employment with the First Respondent, namely 1st January 2011-31st December 2014.

(1) Did anyone from within the First Respondent have knowledge of the Claimant's disability? If so, whom and from what date?

(2) Have the claims claim been lodged within the relevant time limit?

(3) Did the First Respondent discriminate against the Claimant on the grounds of his disability as outlined below, contrary to:

i. Section 13 of the Equality Act (direct discrimination); (i.e., was the Claimant treated less favourably than hypothetical non-disabled Clinical Lecturer in Obstetrics/Gynaecology?)

ii. Section 15 of the Equality Act (discrimination arising from disability);

(4) Did the Claimant act in an anxious and irritable manner as a consequence of his disability?

(5) If yes, can the Claimants behaviour at the material times be classified as behaviour which was anxious/irritable at the material times?

(6) If yes, did the First Respondent treat the Claimant unfavourably as a consequence of the Claimants anxious/irritable behaviour?

(7) If so, can the First Respondent show that its treatment was a proportionate means of achieving a legitimate aim? The Respondent contends that the legitimate aim was the need to have regard for the safety and welfare of its employees, patients and the Claimant himself.

8.6 Section 26 of the Equality Act (harassment);

(1) Did the First Respondent engage in unwanted conduct related to the Claimants disability?

(2) Did that conduct have the purpose or effect of violating the Claimants dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

8.7 Section 27 of the Equality Act (victimisation)

(1) Do the Claimant's alleged protected acts referred to below satisfy the requirements of s.27(2)?

(a) Letter from the Claimant to Ms O'Brien alleging victimisation – 21 June 2012

(b) Submission of Employment Tribunal claim alleging discrimination – 25 June 2012

(c) Email from Claimant to Dr Topping at 10:26h alleging discrimination/victimisation – 9 July 2012

(d) Letter from Claimant to the Tribunal, copy to the First Respondent, alleging discrimination – 17 September 2012

(e) Provision of Scott Schedule alleging discrimination - 5 March 2013

(f) Employment Tribunal claim alleging discrimination - 10 May 2013

(2) Did the First Respondent subject the Claimant to a detriment because he had done or might to a protected act or because the Respondent believed that the Claimant had done or might do such an act?

(3) Are any of the detriments out of time, such that the tribunal has no jurisdiction to hear them or is there a continuing course of conduct?

Date	**Act/Detriment**	**Particulars**	**Statutory provision(s) relied upon**
Around 16 March 2012	Contacting the GMC, even after confirming that this would not be done	Michelle Turner sent a letter to the GMC in or around March or April 2012. On 16 April Ms Turner enclosed a copy of the GMC's response to her earlier letter. The Claimant was concerned about Ms Turner's action in writing to the GMC because she had informed the Claimant that the Trust would not be taking such action. The Claimant found this action humiliating and degrading and feels he was treated less favourably because of his disability.	Disability discrimination: • Direct s.13 EqA 2010 Harassment: s.26 EqA 2010
From 14 September 2012	Excluding the Claimant from the Trust	The Trust wrote to the Claimant on 14 September 2012 stating "…I am concerned that you are demonstrating behaviours that suggest you are not currently fit to be in work…". It explained that it was excluding him from the Trust for a period of two weeks on "health grounds".	Victimisation: s. 27 ERA 1996 Direct: s.13 EqA 2010 Arising from: s.15 EqA 2010 Harassment: s.26 EqA 2010
From 27 November 2012	Excluding the Claimant from the Trust premises	The Claimant was informed of his exclusion from the Trust's premises by letter dated 27 November 2012. In that letter, the Trust explained that it was conducting a formal investigation into the Claimant and formally excluding him from duties and the premises. The Trust stated his exclusion was in order "…to allow the	Victimisation: s. 27 ERA 1996 Direct: s.13 EqA 2010 Arising from: s.15 EqA 2010 Harassment: s.26 EqA 2010

		investigation to proceed smoothly."	
From 7 March 2013	Failing to comply with the Exclusion Appeal Panel's recommendations to lift the Claimant's exclusion	On 7 February 2013 a panel was convened to determine the Claimant's appeal against his exclusion. The Panel recommended that the Claimant's exclusion from the University department should be immediately lifted, and the exclusion from the remainder of the Trust's premises be lifted on 8 March 2013. On 11 March the Chief Executive wrote to the Claimant to confirm that she would not be accepting the recommendation to lift the exclusion on 8 March 2013.	Victimisation: s. 27 ERA 1996 Direct: s.13 EqA 2010 Arising from: s.15 EqA 2010 Harassment: s.26 EqA 2010

8.8 Unfair Dismissal

1. It is admitted that the Claimant was dismissed.

2. Was the reason or principal reason for the Claimant's dismissal by the First Respondent and/or Second Respondent the fact that he had made protected disclosures pursuant to s.103A ERA 1996?

3. If the dismissal was not by reason of the Claimant having made a protected disclosure, was the dismissal by the First Respondent and/or Second Respondent for a fair reason?

4. The First Respondent says dismissal was for SOSR, namely the conclusion of the academic training assignment with the Second Respondent. The Second Respondent also says that dismissal was for SOSR, namely the Claimant's completion of his academic training.

5. If the dismissal by the First Respondent and/or the Second Respondent was for a fair reason, was the dismissal fair in all the circumstances?

6. Was the Claimant dismissed by reason of redundancy and if so, is he entitled to a redundancy payment?

8.9 Holiday pay

1. Was the Claimant to entitled to a payment in respect of holiday entitlement accrued but untaken on termination of employment?

The Preliminary Hearing

9. The claimant sought to introduce a number of documents into evidence, including a draft handwriting report prepared by Margaret Webb dated 5 February 2018. Oral judgment was given, following which the claimant made a request for written reasons, which have been set out below. The Tribunal came to a unanimous decision on this application that leave is given to the claimant to adduce the draft report into evidence, and these are the reason.

10. This is the claimant's application for leave to adduce the expert evidence of an expert report prepared by Margaret Webb dated 5 February 2018 in to Mr Herod's handwriting dated 4 February 2018. The Tribunal has not read the report and it has not been allowed in evidence to date.

11. On 31 January 2018 the claimant adduced a three-page document marked "C3" into evidence that consisted of an anonymous letter and two handwritten notes. The claimant under oath explained he had been sent the documents by email via a secretary working in an unknown Trust who had, it was alleged, received the documents via the internet from another unknown person working at the first respondent. The emails were not produced to the Employment Tribunal, although it appears the email received by the claimant was copied to Mr Boyd. Mr Mensah received his copy of "C3" in an envelope posted to his chambers immediately before Mr Herod was timetabled to give oral evidence having travelled from Qatar to do so.

12. Turning to the handwritten notes marked "C3", there is a covering letter and two documents marked "C1(2)" and "C1(3)" dated 4 April 2012 and 27 July 2012 respectively. The Tribunal heard evidence under oath from the claimant who denied the covering letter was his handwriting, and he explained as best as he could the providence of the documents. Under oath Mr Herod also denied it was his handwriting and gave explanations as to why it was not.

13. Without leave of the Tribunal, the claimant, who did not see fit to put first and second respondents on notice, unilaterally produced Margaret Webb's report; the subject matter of this application. He now seeks leave in order for leave of the Tribunal to commission a full expert report, given the objections to the draft report produced by Mr Boyd.

14. The Tribunal has heard, after a number of difficulties well known to the parties, all of the evidence in this case. All that remains was for it to hear oral submissions and in anticipation of this the Tribunal set aside two days next week, 15 and 16 February 2018, to commence their decision-making process whilst the evidence was still fresh in its mind. The Tribunal has heard a substantial amount of evidence over a period of 18 days which includes time spent reading documents set out in eleven lever arch files. The Tribunal is concerned that justice will not be done if the matter is delayed, say to August/September 2018, when the benefit of reading all the documents (which had taken three days) and hearing all of the oral evidence will be diluted; the minutiae may be very difficult to recollect given the passage of

time and intervening cases. In addition, we have one member who is retiring in April 2018.

15. The Tribunal has experience with dealing in part-heard cases, but this case goes beyond the norm in its complexity and volume of conflicting evidence. Mr Boyd in one of his seven objections made the point that if the Tribunal were to go down the route of a joint expert report or in the alternative, a single report prepared with part 35 certified compliance on behalf of the claimant (which the present report is not), the case cannot be closed and there will be a delay of many months. The Tribunal agreed. In view of the Tribunal's experience of this case over the past month it can also foresee difficulties in an agreed letter of instruction being formulated and it has no optimism that a report, together with questions put to the expert by the parties dealing with the report, will take months even if closely case managed. Every innocuous step taken within this litigation become contentious and drawn out, and it appeared to the Tribunal a lengthy delay could cause an injustice to all parties, outweighing any injustice that may or may not be caused by a lack of handwriting expert report.

16. The Tribunal agrees with Mr Boyd that it is imperative for the case not to go part heard, and it is concerned that if we return to this matter, say in August/September 2018, a fair process may not be possible taking into account the balance of prejudice to both parties. The Tribunal did not agree with the claimant that "further delay is not a big deal". It is a "big deal", especially given the circumstances of this case, including the number of witnesses the Tribunal has heard from, the thousands of pages it has read and been taken to and the substantial number of alleged conflicts in the evidence.

17. Turning to the report itself, the Tribunal is aware of the following:

(1) There is no part 35 declaration.

(2) Solicitors were not involved in its commission from the outset or thereafter; all of the instructions have come from the claimant who selected Margaret Webb.

(3) Margaret Webb confirmed it was "a provisional professional opinion not intended for legal purposes or third party".

(4) It appears Margaret Webb considered Mr Herod's handwriting with reference to a copy document from the bundle and no reference to the claimant's handwriting. No original samples were viewed i.e. original samples from Mr Herod who is based in Qatar or from the claimant himself. It is not disputed that a handwriting expert would ordinarily seek to source original sample writing over a period. This has not been done here, which is unsurprising given the speed at which this report was prepared seemingly over a weekend at a cost of £90.

18. On behalf of the claimant it was submitted by Mr Mensah on instruction, that the respondent had earlier referred to the possibility of a handwriting report, and it was disingenuous for the respondent to make submissions that the draft report has little value when the claimant was offering to obtain a full expert opinion in compliance with part 35 as opposed to a brief one. Mr Mensah conceded the draft report was "not a thorough report" and the limitation of the report could be dealt with by oral evidence of the expert, as floated by the Tribunal yesterday.

19. Yesterday, the Tribunal had not envisaged Margaret Webb adding to her draft report, but to clarifying how she came to write it and what evidence was before her when she did. This has now been clarified in the submissions dealing with the claimant's application.

20. Mr Mensah submitted the Margaret Webb report dated 5 February 2018 goes to the issue of credibility and would be informative on this point. He argued it was key evidence important for the trial and should therefore be admitted. The Tribunal has thought long and hard about this aspect of the claimant's application balancing the evidential value of a handwriting expert's report against the prejudice that could be caused to either party if the trial was substantially delayed. The Tribunal has brought into the equation how the documents marked "C3" came into being by a series of incidents via an unknow person who was in the position to pluck the documents out of the many thousands that had already been disclosed to the claimant on a number of occasions following his subject access requests, just before a key witness who had allegedly written the "C3" documents, Mr Herod, was about to give evidence. That unknow person was then in the position to send the "C3" documents to Mr Mensah's chambers together with a person employed by the claimant's present employer, a separate health authority whose name has not been disclosed to the respondents. It is not disputed the he has kept his new employer secret.

21. As indicated earlier to the parties, on the issue of credibility we have heard lengthy oral evidence on cross-examination given by both the claimant and Mr Herod dealing with "C3"; not forgetting we have heard the whole of their evidence dealing with a variety of factors over a period supported by contemporaneous documents, all of which will give the Tribunal the ability to assess credibility of witnesses, particularly that of the claimant and Mr Herod. In short "C3" are not stand-alone documents and they will be viewed in context with the factual matrix in mind when the Tribunal comes to its deliberations. Mr Boyd was correct in stating that the two witnesses who spent the longest time giving evidence were the claimant and Mr Herod, and the Tribunal repeats the point it has made above concerning credibility of witnesses and how the Tribunal will come to assess that credibility, given the entire factual matrix and contemporaneous documents.

22. Mr Boyd has submitted the draft report was more prejudicial than probative, a position disputed by the claimant. Mr Boyd reminded the Tribunal that when an expert comes to consider handwriting stroke pressure pattern is often critical and original documents are required to assess this. "C3" are not original documents but copies, and it is clear the claimant will be unable to obtain the originals, if indeed

they exist, as he has given evidence under oath that he does not know the source of the "C3" documents. The Tribunal is aware from its own experience expert hand-writing do not always provided sufficient evidence on the balance of probability as to the handwriting in question, there are usually caveats and it may be the case a report would not assist the Tribunal in any event and it would not be proportionate to grant leave.

23. Touching on the issue of whether the draft report should be adduced in the first place, the Tribunal has in mind the overriding objective set out in rule 2 to deal with cases fairly and justly, including dealing with cases in ways that are proportionate to the complexity and importance of the issues, avoiding delay and saving expense. With reference to expert evidence, the Tribunal must be careful to admit evidence that is relevant, taking into account professional qualifications and independence and the basis on which the expert was instructed. The Tribunal, given what we know of the draft report, would have to deal with it cautiously given that the provisional opinion reached was not for litigation purposes; there is no part 35 declaration and the evidence considered by the expert was incomplete to say the least. The Tribunal does not know whether the claimant's viewpoint was given and whether the report reflects his instructions or was objective. It made no sense to the Tribunal Dr Herod's notes would be held back when his other hand-written notes were not, given the adverse inferences which could be raised. The post-it stickers were easily removable and yet they remained. Further, legally privileged documents setting out the legal advice give to the first respondent by its solicitors were disclosed, and the claimant could rely on the first respondent's legally privileged documents despite the potential damage to its case and did so.

24. The Tribunal took into account the parties' fallback position, and agreed with the suggestions put forward, including that on behalf of the claimant. Both agreed as an alternative the draft report should go in as evidence; the parties make final oral submissions and the Tribunal decide with the benefit of having read the report (which we have not to date) and hearing submissions, what weight to give the report and what effect that report has on credibility of the witnesses, particularly the claimant and Mr Herod. Given the parties' agreement on this and taking into account Mr Mensah's submission the report was key to credibility the Tribunal concluded on balance, despite its reservations as to how the draft report came into being, it would be in the interests of justice to consider the draft report. The claimant was granted leave to adduce the draft report only.

25. Leave was refused for the claimant to obtain a further expert report for the reasons already stated. With reference to an extended report by the same expert, the respondent having made it clear their preference would be not to have a joint report at a substantial cost to it. Taking into account the fact that Dr Herod now resides in Qatar and may have to be recalled to deal with the expert evidence, and fundamentally, with the overriding objective in mind particularly on the issue of substantial delay for the reasons set out already, leave is not granted to the claimant for him to obtain a further expert report at this very late stage of the proceedings when closing submissions are just about to be given.

26. To reiterate, the Tribunal can assess credibility in a number of ways and it will do so when it comes to making its findings of fact in this case.

Witness evidence

27. There are a number of conflicts in the evidence and credibility of witnesses is a fundamental issue in this case. The Tribunal agrees with the observation of Mr Boyd that the "reason why" question in whistleblowing cases was key, the outcome frequently turning on the credibility of witnesses, particularly so in the claimant's case.

28. The Tribunal heard evidence from the claimant on his own account. On behalf of the respondent it heard from Joanne Topping, associated medical director, Michelle Turner, director of workforce and marketing, Angela O'Brien, HR business partner until she left the first respondent in December 2012, Jonathan Herod, medical director until 12 February 2012, Caroline Thursfield (nee Salden), chief operating officer until July 2013, Gail Naylor, director of nursing and midwifery and director of operations until 1 May 2014, Steve Burnett, senior independent non-executive director until November 2015, Liz Cross, non- executive director to January 2016, and Vice Chair from 2012 until January 2016, Kathryn Thompson, chief executive officer, Paul Thornburn, HR business partner until January 2014, Susan Westbury, deputy director of workforce until June 2015, Lyn Greenhalgh, consultant clinical geneticist until 1 February 2017 and Julie McMorran, trust secretary until June 2015.

29. The Tribunal was also referred to the unsigned written statement of Helen Schofield, Dianne Brown and the witness statement of Cheryl Barber, occupational health manager, signed on 7 January 2015, who was too ill to attend the hearing, which the Tribunal gave some weight as she provided an occupational health expert view which the claimant was not in the position to dispute with credible evidence. The Tribunal read the remaining statements to which it was not taken by the parties during the hearing and very little weight was given to them, given evidence was disputed and the claimant's inability to cross-examine those witnesses. It is notable Dianne Brown's (referred to as "Di Brown") evidence was more relevant to remedy issues than liability.

30. Julie McMorran was too unwell to give evidence, and it was accepted by Mr Mensah that she had suffered from a cerebral vascular accident on the 27 December 2017 and there was no denying this sounded serious. The Tribunal was invited to give her written statement limited weight. Taking into account most of the information provided was not in the claimant's knowledge and could not be disputed by reference to any concrete evidence, the Tribunal gave it considerable weight where relevant, accepting Julie McMorran's evidence concerning the election issue as set out below.

31. On behalf of the second respondent the Tribunal heard from Lee Steward, HR business partner for the faculty of health and life sciences, Professor Zarko Alfirevic,

head of department of women and children's health and Caragh Molloy, deputy director of HR since 2014.

32. The Tribunal was also referred to the unsigned witness statement of Professor Robert Burloigne, who heard the claimant's appeal which the claimant was unable to attend and thus he was not in a position to dispute what took place at the appeal hearing. The Tribunal has given this statement some weight as it deals with decision making process of the panel on appeal and the Tribunal was not informed any part of the statement was disputed.

33. The Tribunal found many aspects of the claimant's evidence less than credible for the reasons set out below. With reference to the pleadings the particulars of claim are not supported by the facts in this case. It is pleaded on 30 March 2012 the claimant was informed pre-employment checks had not been carried out and "the claimant agreed to undertake such checks as required by his contract of employment…because of the claimant's reasonable concerns about the respondent's failing to carry out pre-employment checks, and other patient safety issues, he raised several concerns…with the medical director in April 2012…" The facts as supported by the contemporaneous documentation reveal that the claimant far from agreeing to undertake the checks flatly refused to do so, and this was the nub of the conflict that arose between him and the first respondent.

34. The claimant's contemporaneous emails were inconsistent, and his interpretation of events skewed to fit into the claimant's argument that he was a whistleblower and not a troublemaker. The claimant found it difficult to answer a question put to him on cross-examination in a straight forward manner; he was reluctant to commit himself and looked to understand what lay behind the question to avoid being caught out. Straight-forward questions were not met with straight-forward answers. As submitted by Mr Boyd, the claimant was unable to accept any propositions contrary to the interests of his case in direct contrast to a number of the first respondent's witnesses, particularly Dr Herod, who gave evidence in an open and honest way that was potentially harmful to the first respondent's defence.

35. It was evidenced from the copious number of contemporaneous documents set out within eleven level arch files, which were an important feature in the Tribunal's analysis of the case, the claimant had not raised protected disclosures alleged in 2012 with the first respondent (as opposed to the CQC), and yet all of the claimant's answers were geared to give that impression.

36. It was notable a number of the documentations produced by or on behalf of the claimant reflected self-interest and the claimant's poor attitude to colleagues. The claimant's evidence in chief and on cross-examination revealed his contempt of people who he perceived was beneath him, particularly the female witnesses and this came across in his mannerisms on the stand including his altercations with Mr Mensah. Mr Boyd submitted that in terms of credibility the Tribunal could not ignore the reactions of a significant number of the first respondent's employees to the claimant during the course of their day-to-day dealings with him. Mr Boyd has helpfully taken the Tribunal to the relevant evidence, reminding it the claimant had

covertly recorded a number of conversations and yet when the Tribunal requested him to produce the recording made on the 17 December 2013 meeting and its aftermath, the claimant was unable to produce it.

37. A considerable number of employees encountered difficulties with the claimant's aggressive and intimidatory attitude towards them as set out in tabular form by Mr Boyd. In oral submissions Mr Boyd referred to the identical experiences of a number of people ranging from the chief executive to security guards, staggering in its sheer quantity, of the claimant acting badly, when as a doctor his behaviour should be held to a higher standard. It is not disputed the claimant faced disciplinary action for which he could have been dismissed as a result of his behaviour towards staff and a number of the alleged incidents are set out in the findings of facts below. It is also not disputed that the claimant possesses an argumentative personality, and on a number of occasions during his dealings with the first respondent this was acknowledged by the claimant offering up apologies (but not quite giving them) for his behaviour.

38. The Tribunal recognised the behaviour described by Julie Dorman by its own experience during the liability hearing, and the claimant's aggressive behaviour particularly that aimed at his counsel, Mr Mensah, who he dismissed on at least three occasions, causing much embarrassment and distress to Mr Mensah ultimately leading to Mr Mensah's comment "this is now becoming intolerable." The claimant gave the distinct impression before the Tribunal that Mr Mensah was beneath him. At more than one point he informed the Tribunal that he was withdrawing instructions from Mr Mensah "because he wouldn't ask the questions I want asking." There were instances at the hearing when the claimant attempted to take over control of the Tribunal process, talking over Mr Mensah, and insisting on evidence being considered in private and not in public.

39. The Tribunal express our gratitude to Mr Mensah for enabling it to complete the evidence on time. Mr Mensah proceeded to give full and objective oral closing submissions, despite the manner in which he had been treated by the claimant. The Tribunal has never witnessed such behaviour from a party before towards their own legal representative; and it was made very clear the claimant would "stop at nothing to win the argument" as submitted by Mr Boyd. The Tribunal took a conscious step back from the claimant's behaviour, and consider the evidence before it objectively, on the basis that the behaviour of a party at a liability hearing (whether it be good or bad) does not necessarily denote he or she did not make protected disclosures, was caused a detriment or had behaved aggressively towards colleagues. Mr Mensah in oral submissions argued that it would be unconscionable for the Tribunal to hold the claimant's behaviour at the Employment Tribunal against him and this cannot be the basis for any determination by the Tribunal. The Tribunal agreed with this observation, and yet it cannot completely ignore the description given by various witnesses throughout this hearing of the claimant's behaviour which strikes a chord with the Tribunal's own experience, albeit the claimant was understandably under stress as a result of the litigation and being cross-examined by Mr Boyd. Even were the Tribunal to disregard completely the claimant's behaviour, the less than open way the claimant presented his evidence when the cross-examination went against

him and his attempts at deflection, raised substantial question marks over credibility and the reliability of his evidence.

40. Mr Boyd submitted the Tribunal could gain some insight into the claimant's credibility by a review of the 2013 medical reports, particularly that of Dr Borthra. The reports have been referred to comprehensively in the findings of facts; they were key agreed documents from which the Tribunal could conclude it was more likely than not the claimant had behaved unreasonably and aggressively towards his colleagues and the disciplinary investigation was not a sham aimed at causing the claimant a detriment as a result of him whistleblowing. The Tribunal was satisfied, having taken into account the views of the claimant expressed within both medical reports, that it was highly unlikely he had made the protected disclosures relied upon in this litigation. The medical reports of two experts provided objective evidence from which the Tribunal could conclude the claimant behaved erratically, "relishes academic arguments; he can be assertive especially when it comes to his principles as he finds it difficult to let go of arguments, however small they may be." Dr Bothra referred to the claimant as "aggressive and intensively paranoid," having a "history of conflict with other doctors and health professionals that may impact his professional advancement." Dr Tabaniat's opinion was the claimant "perceived injustice in what he felt being cornered to go through these screenings. He now described the whole conflict as 'a bit silly, unnecessary and petty.' He described it as him 'being petty over them not complying with department of health guidance…He tries to argue to win to make himself feel better…"

41. Mr Mensah submitted that for all the claimant's faults there was no evidence of dishonestly emanating from him, and the Tribunal should take this into account especially when considering the "C3" document. The Tribunal did not agree with this observation; there was ample evidence of dishonesty when the claimant referred to the transcript of a telephone conversation with Cheryl Barber when it was put to him on cross-examination he had misrepresented himself in order to obtain confidential information about a nurse. The claimant was dishonest in two ways; the first was the act of misrepresentation as further clarified below in the finding of facts, the second was the claimant's attempt at obfuscating this fact before the Tribunal by giving evidence that he had made it clear he was not from the Nursing and Midwifery Council (the "NMC") during the conversation. The transcript reflects the claimant had made the misrepresentation initially, and only after Cheryl Barber put him on the spot did he withdraw from this position and confirm he was not representing the NMC.

42. With reference to the first respondent's witnesses the Tribunal took the view that honest evidence was given in the main, and it was highly unlikely they had conspired either to cause the claimant detriments for whistleblowing or to hide the fact that mistakes had been made when the claimant and two of his colleagues had failed to undergo occupational health ("OH") screening fundamental for the safety of patients. The clear evidence before the Tribunal was from the outset of the error being discovered the first respondent never hid from their oversight, which it admitted and then proceeded to take the necessary steps to put it right as touched upon in the finding of facts below.

43. With reference to Joanne Topping, the Tribunal found her to be a believable and credible witness whose evidence was supported by contemporaneous documents. At one point the claimant presented Joanne Topping as a colleague who he trusted, but as the cross-examination appeared to weaken his case, he withdrew from this position. The Tribunal took the view that Joanne Topping was trustworthy, and she gave cogent evidence of the difficulties she had faced with the claimant and how she handled him. More importantly, the Tribunal did not accept Joanne Topping took part in any conspiracy with senior management against the claimant either as a resulted of his disability or protected disclosures.

44. The Tribunal considered the oral evidence given by Dr Topping on cross-examination by Mr Mensah, a very effective advocate, and it is in no doubt Dr Topping would have accepted HR guidance, but she would not be told what to do by any person including HR whether they be officer or director of HR. The claimant's position concerning Dr Topping was confusing, on the one hand she was a trusted colleague, and on the other hand she was capable of following decisions made by others, against her better judgment for the benefit of her career. The Tribunal want to make it very clear that there was no evidence to support such an allegation other than the claimant's attempt at undermining Dr Topping's credibility, which he failed to do.

45. With reference to Michelle Turner, there were issues of credibility as to whether she had input into the disciplinary investigation carried out by Dr Greenhalgh, which was denied. Michelle Turner's emails to Paul Thornburn revealed she had input, she read the daft report and witness statements, and made suggestions as to what further investigation could take place. The Tribunal accepted Michelle Turner's evidence when it was supported by contemporaneous documents and evidence from other witnesses. With reference to the claimant's belief was that Michelle Turner had conspired with others against him; there was no evidence of this. The fact Michelle Turner read the draft investigation report and made suggestions was what one would expect from a director of human resources; she was head of HR and investigations are part of HR duties. The issue for the Tribunal was that Michelle Turner had not been forthcoming about the part she had played, and as a result it looked closely at all the evidence given by her.

46. The fact is that the final report, despite input from HR at various levels, clearly reflected the views of Dr Greenhalgh after she had carried out a thorough and objective investigation. The Tribunal found Dr Greenhalgh to be honest witness, who dealt with the claimant forcibly and firmly, but fairly. He did not like the fact that she stood up to him, and this caused conflict. Dr Greenhalgh worked out of Alder Hey Hospital, on a different site, and she had no preconceptions of the claimant whom she had never met or heard of previously. The manner is which she dealt with the claimant, and the fact she stood up to him, led to the claimant instigating the conflict between them. As indicated below, Dr Greenhalgh gave every impression of a professional who could not be easily be bullied or swayed, either by the claimant, HR partners or indeed, the director of HR herself. She followed a logical process without deviation, despite the best efforts of the claimant to engineer conflict and raise arguments/excuses to put a stop to the investigation process.

47. At the liability hearing the claimant maintained Dr Greenhalgh was controlled by Dr Herod and she had in mind personal advancement when she prepared the investigation report with senior management's instructions in mind. The Tribunal found no evidence of self- interest motivation on the part of Dr Greenhalgh, who carried out a lengthy investigation process during which, on numerous occasions, she unsuccessfully sought to interview the claimant who put barriers in her way. The Tribunal concluded that the claimant's position concerning Dr Greenhalgh's motivation undermined his argument that she was motivated by whistleblowing and his disability when preparing her investigation report.

48. The Tribunal listened to a tape recording taken at the 17 December 2013 investigation meeting between Dr Greenhalgh and the claimant that clearly revealed the claimant's overly assertive and aggressive attitude towards her, which was denied by the claimant during cross-examination when he was of the understanding following an earlier Preliminary Hearing that tape recordings were not going to be considered. It became clear to the Tribunal as evidence was given that the actual tape recordings were very relevant, and with the parties consent the Tribunal listened to one. The actual recording raised real credibility issues over the claimant recollection of conversations. The Tribunal found he was an inaccurate historian, and the recording confirmed the first respondent's version of events. The Tribunal has dealt with that evidence below in its findings of facts.

49. Angela O'Brien's evidence was credible and unremarkable. She made the appointment for the grievance hearing in the knowledge that she would not be attending; and the impression given to the Tribunal was that she could not cope with the claimant's demands on her and reacted accordingly. There was no evidence Angela O'Brien's actions were motivated by whistleblowing or disability discrimination. There was no evidence she was aware the claimant may be disabled, she had no clinical background and in the claimant's eyes, she was not an equal to him and he made this position very clear to her.

50. With reference to Jonathan Herod, on balance the Tribunal found him to be largely a credible witness for the reasons set out below. The evidence before the Tribunal was that he was initially supportive of the claimant but his attitude changed and he lost patience as he could not understand why the claimant continually refused to be screened Dr Herod's critical attitude towards the claimant was blatant; his view was that the claimant was not fit to be a doctor. Dr Herod admitted the post-it notes and other hand-written notes referred to below were his, and the Tribunal accepted on the balance of probabilities, that the hand-written notes produced and referred to in "C3"by the claimant immediately before Dr Herod's cross-examination were not his. To is credit Dr Herod said words to the effect that he was not saying they were definitely not his, "of course there is a chance I wrote it, it would be unrealistic to say no chance" but he believed they were not because of certain characteristics in the way the words were presented, i.e. he did use bullet points and certain abbreviations, he did not need to record conversations with Kath Thompson because they had them all of the time and did not understand the diagram set out.

The Tribunal accepted, on the balance of probabilities, the notes were not produced by Dr Herod and it cannot say with any certainly who had produced them.

51. The Tribunal accepted as credible Dr Herod's evidence, which was supported by contemporaneous evidence, that the "whistleblowing was a side-show; it was all about screening" and the first respondent were addressing issues which the claimant was allegedly whistleblowing to the CQC. The Tribunal accepted Dr Herod believed the claimant was not fit to be a doctor; the post-it notes reflected this attitude, and there was no causal link between the claimant's lack of fitness to be a doctor and whistleblowing. Quite early in the chronology, Dr Herod believed the claimant had mental health problems, and even though the occupational health reports including that obtained by the second respondent, confirmed otherwise, Dr Herod still had his suspicions because of the claimant's extreme behaviour towards staff and intransigence over the screening which were incomprehensible to Dr Herod. Dr Herod's motivation was a difficult one to untangle; the clear evidence before the Tribunal was that the claimant had gone over the line of behaviour expected from a doctor and that it was this issue that was Dr Herod's sole motivation. He had known earlier that the claimant had suffered depression in the past and prescribed medication in the past and Dr Herod had been supportive; Dr Herod's evidence that he had no knowledge the claimant was on medication during the relevant period was borne out by the contemporaneous evidence. The claimant did not informed Dr Herod he was back on anti-depressants. By December 2012 Dr Herod became aware the claimant's behaviour was even more serious; bad behaviour towards other members of staff particularly women, employees of a perceived lower status and breaking into legalise which some found upsetting and threatening.

52. Dr Herod, did not to see the claimant as a whistleblower but as someone who had made inaccurate statements to the press that could have caused serious reputational difficulties for the respondent. He believed the claimant had embarked "on a course that made no sense…determined to continue his dispute," the real issue being screening. Dr Herod's description was borne out by the contemporaneous documentation and the specialist medical reports. The Tribunal noted the claimant would report or threatened to report an individual to their professional body if and when he was not getting his own way and was being crossed.

53. In analysing Dr Herod's credibility, the Tribunal took into account his explanation of the hand-written note dated 17 September 2012 which followed the claimant contacting the CQC on 14 September 2012 when he made disclosures. Dr Herod's evidence on cross-examination was (a) the hand-written note had been written over a period, (b) he did not know the claimant had contacted the CQC at the time, and (c) Professor Greer may have told him about the claimant contacting the CQC. On the balance of probabilities, the Tribunal did not accept Dr Herod's explanation concluding he was inaccurate in is recollection. On a common-sense interpretation on the 17 September 2012 note the Tribunal found the entire note reflected a telephone conversation between Dr Herod and Professor Greer; it was not written over a period of time. Dr Herod was aware 3-days after the claimant had telephoned the CQC contact had been made. Dr Herod's evidence was not credible,

and the Tribunal spent a considerable amount of time deliberating whether Dr Herod's incorrect recollection of the 17 September 2012 telephone conversation brought into question his honesty and evidence on other matters, including document "C3." On the balance of probabilities, the Tribunal found that it had not, when weighing and balancing Dr Herod's evidence that was supported by contemporaneous documentation and other credible witnesses. The Tribunal accepted Dr Herod's evidence that without reference to his witness statements, which was written much earlier, he had a poor recollection of the events in the claimant's case. Dr Herod described how busy he was managing the first respondent, practicing as a clinician and managing a number of other doctors who were causing him difficulties; the claimant was not the only case in his mind at the time. It is notable Dr Herod's witness statement does not mention the note or telephone conversation of 17 September 2012, and on balance, the Tribunal conclude Dr Herod had miss-recollected due to the passage of time how the 17 September 2012 note had come to be written, and when he was first made aware of the claimant's contact with the CQC.

54. Caroline Thursfield referred to as Caroline Salden in these reasons, Gail Naylor, Steve Burnett, Liz Cross, Kathryn Thompson, Susan Westbury and Julie McMorran were credible witnesses and there were no issues on their reliability.

55. With reference to Paul Thornburn the Tribunal preferred his evidence supported by Dr Greenhalgh that he had not produced the final report, although he had helped to draft the versions leading to the final report, the claimant's suspicion being that Paul Thornburn and Michelle Turner had colluded in the writing of the investigation report. The Tribunal accepted the claimant's criticism of Paul Thornburn in one respect, namely the conclusions he inserted in the initial draft report overstepped his role as HR advisor. Nevertheless, Dr Greenhalgh's evidence that she was satisfied the final draft investigation and its conclusions were her own was accepted as reflecting the truth of the matter. The Tribunal is critical of the position adopted by Paul Thornburn when he prepared the first draft of an investigation report on behalf of Dr Lynn Greenhalgh; it is satisfied however that the contents of that report were not causally linked in any way to whistleblowing or the claimant's disability.

56. Turning to the second respondent's witnesses, the Tribunal found Lee Steward to have been a credible witness, who admitted he made an error in describing the claimant as being redundant when his fixed term contract had come to an end. The Tribunal was satisfied Lee Steward's actions had no causal connection with whistleblowing or disability discrimination. Lee Steward's explanation that doctors normally got another job or a placement was credible, and borne out by the evidence. Finally, the Tribunal accepted Lee Steward's evidence that he was not involved in the withholding of the supplement pay/banding as there was no evidence pointing to Lee Steward's involvement; clearly the claimant was not paid because he refused to undertake screening and therefore could not carry out clinical duties and work overtime for which the banding payment remunerated.

57. Professor Alfirevic gave credible evidence, which the Tribunal preferred to the less credible evidence given by the claimant as to whether he raised protected disclosures and the allegation that he was dismissed as a result. The claimant's version of events, as set out below, was uncorroborated by any contemporaneous document and did not logically fit into the factual matrix as the conversation allegedly took place approximately half way through the claimant's fixed term contract. The Tribunal, taking into account Professor Alfirevic oral evidence, accepted had the claimant discussed the expiry of his fixed term contract and the protected disclosures/detriment, Professor Alfirevic would have referred the matter to HR. Professor Alfirevic's primary concern was the reputation and success of his department. He wanted the claimant to return to productive work and for his career to get back on track which in turn reflected positively on the department; this is what was discussed with the claimant as reflected in the contemporaneous evidence.

58. Caragh Molloy adopted the statement of Professor Burloigne; she was the HR advisor to the appeals panel and the Tribunal accepted her statement was an accurate reflection of what had taken place and rationale for the decision. In total, Caragh Molloy gave evidence on cross-examination from 5pm to 5.30pm, and nothing was said that undermined Professor Burloigne's written evidence. The Tribunal accepted the evidence that whistleblowing had nothing to do with the fixed term being ended; it was a standard academic contract ending as always expected. It is notable the claimant's complaint regarding the redundancy was withdrawn after the evidence had closed, Caragh Molloy and Lee Steward giving evidence that it was not a redundancy situation.

59. The Tribunal was referred to eleven agreed bundles of documents together with a number of additional documents duly marked produced by both parties marked C1, C2 and C3 in respect of the claimant's documents, and R1 and R2 in respect of the respondent's documents. It also took into account oral submissions and written submissions presented by the parties which the Tribunal does not intend to repeat, but has attempted to incorporate the points made within the body of this Judgment with Reasons, we have made the following findings of the relevant facts.

Facts

The contract

60. In April 2010 the second respondent advertised two post of lecturer (clinical) in obstetrics and gynaecology located at the first respondent's premise where the second respondent had offices, for 4-year fixed term tenure. The application form stated the second respondent was committed to the employment of disabled people, and guaranteed an interview of disabled applicants who met the essential criteria.

61. The claimant did not declare he was disabled on the application form.

62. The advertisement made it clear the claimant must already be in the possession of a national training number, and the post comprised of" 50% clinical training and 50% academic work (research and education). The post was 100%

funded by the post-graduate Dean from the MADEL Levy, better known within these proceedings as "the Deanery." The advertisement confirmed "…the post holder will be expected to develop a programme of high quality and distinctive research. The School take supervision and mentorship seriously…the new lecturer will be expected to participate in teaching. You will make an appropriate contribution to undergraduate education including leading a PBL group and contributing to student assessments." Reference was made to CRB checks and bio hazard immunisation. It was made clear the appointment "will be subject to medical assessment by occupational health" and the appointee would be subject to "joint annual appraisal between the university and the relevant NHS trust."

63. New employees were required to undergo health screening by the first respondent. For doctors who were to be working in obstetrics, gynaecology and maternity department occupational health screening was fundamental to safeguard the patients, especially in exposure prone procedures ("EPP"). Since October 2010 the first respondent's screening requirements went over and above those required by the Department of Health ("DoH"). The first respondent was proud of its screening requirements described as the "gold standard" and this requirement was set out in the "New Employee Health questionnaire." The undisputed evidence before the Tribunal is that other health authorities have since adopted a similar screening process.

64. Previously, between 2003 and 2004 the claimant had been recruited by Dr Herod for the first respondent as senior house officer working in the first respondent. It is notable from the claimant's curriculum vitae that from 2001 to 2010 he worked a total of 9 different contracts from 6-months to 24 months. It was normal practice for a doctor in training moved around various hospitals within their discipline working under fixed term contracts.

65. The claimant applied for the position with the second respondent. The claimant supplied referees and one reference from Gordon Smith of the University of Cambridge who confirmed "rather unfortunately, Mark has been referred to the Professional Conduct Committee of the GMC by the Medical Director…based on his behaviour when attending for care or accompanying his wife when she attended for care, both at this Trust and elsewhere. However, there have been no concerns about his behaviour when working in my department as a clinical research fellow."

66. The claimant, who did have a training number (this was an issue with the claimant denying that he did), was successful in his application, as was his colleague Dr Sharp. Both had different specialities and in this regard they cannot be true like for like comparators. The claimant's speciality was pre-term labour in twins, and by the end of his fixed term contract his academic training had been completed. The training number was a requirement for the application to be made in the first place; the claimant was a doctor in training and whilst the training number may change to reflect the geographic area, it remained relevant until he had completed his training and achieved a Certificate of Completed Training (referred to as the "CCT") whereupon he would then be in a position to apply for consultant vacancies within

the NHS, or senior lecturers post in academia. The responsibility for the claimant's training rested exclusively with the Deanery.

The General Medical Council ("GMC") decision and the date of the second respondent's knowledge as at 2 June 2012 with the claimant's disability.

67. The claimant provided Professor Nielson, who was to be his line manager, on 2 June 2010, with the GMC decision dated 27 May 2010 that referred to the claimant having "suffered depression since 2002." The decision confirmed the panel was "not satisfied that that there may be an impairment of your fitness to practice...it is the opinion that you have shown insight into your health issues and any upset that your behaviour may have caused…" As at 2 June 2010 the second respondent was aware the claimant may be disabled due to a long-term mental health issue and this did not go against the claimant in his application, which was successful. There was no evidence before the Tribunal that the first respondent was aware of the claimant's long-term medical health condition until much later. The first respondent had no say in the claimant's recruitment.

68. On the 13 July 2010 Caragh Molloy, HR, made the claimant an offer of employment as lecturer (clinical) in the School of Developmental Medicine for "the fixed-term period of 4 years from a mutually agreeable start date to be arranged." There was no satisfactory evidence the claimant was promised an extension of the fixed term from the outset or at all. It was not the first respondent's practice to extend fixed term contracts as a matter of course. Dr Weeks was appointed on a fixed-term contract. He obtained his Certificate of Completed Training qualification and Professor Nielson made an application to extend Dr Weeks' contract by 3-months pending him taking up a new post with the second respondent following competitive interview. The contemporaneous correspondence reflects the extension was not automatically granted; it was applied for and justified. Dr Hapangame was appointed to a 3-year fixed term contract in November 2003, following maternity leave her projected CCT was April 2008 and an application was made by Dr Graham to the Deanery for extra funding in order that the contract could be extended, which was granted "given she has taken maternity leave." The extension was formalised in correspondence.

The contract between the claimant and second respondent

69. The claimant signed a document prepared by the second respondent "Conditions of Appointment as a full-time member of the academic staff on a short-term contract" on the 4 August 2010. Handwritten on the contract were the following words; "a banding payment will be made for out-of-hours clinical duties." The contract set out the claimant would be employed by the University of Liverpool as a full-time member of academic staff for a fixed term period of 4 years. The commenced date was to be1 January 2011 as confirmed in a letter from Caragh Molloy to the claimant dated 26 October 2010. The letter made it clear "your appointment will therefore be for the fixed term period 1 January 2011 to 31 December 2014." There was no suggestion of any extension and no evidence, apart from the claimant's say so, that an agreement had been reached with regards to an

extension. The Tribunal, on the balance of probabilities, found the parties had agreed a 4-year fixed term contract expiring on 31 December 2014 with no extension discussed or agreed as borne out by the contemporaneous documentation.

70. Paragraph 7 within the contract set out the claimant's contractual duties being "research, to take such instruction and take part in university examinations as shall be assigned to them and to perform such administrative duties as shall be assigned".

71. In the equal opportunities form completed by the claimant he ticked "prefer not to say" in relation to whether he had any disabilities or not. There was a box that related specifically to mental health conditions. The claimant signed the form on 4 August 2010 declaring "I certify that the information given in this form is true and correct. I agree to the University of Liverpool using personnel data contained in this form for any purpose connected to my employment or my health, welfare and safety and for monitoring the Equal Opportunities Policy."

72. It was not the first respondent's practice to issue a contract to those doctors holding a honorary position by virtue of the employment contract with the second respondent, and for approximately twenty years a statement of terms and conditions of employment had not been provided by the first respondent in these circumstances. The claimant was not treated any different from past and present doctors on honorary contracts.

Failure to Provide Statement of Main Terms and Particulars of Employment

73. The first respondent did not issue the claimant with a statement of terms and conditions of employment because it considered him to be an employee of the second respondent who recruited without any input from the first. The claimant was on an honorary contract and the first respondent's practice was not to issue a statement of terms and conditions of employment to those doctors working under an honorary contract. In this regard the claimant appeared not to have been treated any differently to other doctors in training recruited by the second respondent, working under honorary contracts in hospitals and indirectly being paid via the Deanery. It cannot as a matter of logic is the case that whilst the first respondent failed to issue the claimant with a statement of main terms and particulars of employment in accordance with S.1 of the ERA it did so because the claimant had made protected disclosures. The first respondent had no say with reference to the second respondent's decision to recruit the claimant. Its practice was not issue to issue a statement of terms and conditions of employment to doctors holding honorary contracts; and the claimant was treated no differently from any other doctor working under an honorary contract in this respect.

The claimant's first communication with the first respondent

74. In an email sent 22 September 2010 the claimant reminded Dr Topping of who he was, and informed her "I have been appointed to a lecturer post from January. I was just emailing to touch base with you about the clinical part of my post."

Pre-employment checks

75. The first respondent required all new employees to undergo pre-employment checks before they could start working on site, including screening beyond the Department of Health (referred to as "DoH") guidelines to enable Exposure Prone Procedures ("EEP") to be carried out. New employees were required either to produce the appropriate validated documentation or undergo a blood test taken by occupational health, and the claimant had been made aware his appointment had been subject to medical assessment by occupational health and yet he (and two of his colleagues) remained silent when the screening tests were not carried out with the result that three doctors worked on the first respondent's site and the claimant conducted EEP's without undergoing the requisite pre-employment checks.

76. The first respondent's Recruitment and Selection Procedure and Guidance dated 2 June 2010 provided at paragraph 4.2 that the recruiting manager must complete a new employee risk identification form that must be retained within the employee employment records and for reference following the job offer.

The Exclusion Policy.

77. The first respondent had issued a Policy for handling concerns about the Conduct, Performance and Health of Medical staff employed by it, known as "PHCS" and agreed with the local negotiating committee. PHCS provides the following:

1. At paragraph 1.6 temporary restrictions on practice, referred to as "exclusions" were possible if "serious concerns" about the practitioner existed; "this might be to amend, or restrict their clinical duties, obtain undertakings or provide for the exclusion…from the workplace."

2. Paragraph 1.8 provides the case manager is to identify the nature of the problem, assess the seriousness on the information available and the "likelihood it can be resolved without resort to formal disciplinary procedures. This is a difficult decision and should not be taken alone but in consultation with the Director of HR and the Medical director and the National Clinical Assessment Service ("NCAS"). The NCAS asks that the first approach to them should be made by the Chief Executive, Medical Director or Director of HR…The case manager should explore the potential problem with NCAS to consider different ways of tackling it themselves, possibly recognise the problem, or see a wider problem needing the involvement of an outside body other than NCAS."

3. With reference to the investigation, the case investigator must according to paragraph 1.15 inform the practitioner in writing "as soon as it has been decided, that an investigation is to be undertaken, the name of the case investigator and made aware of the specific allegations or concerns that

have been raised. The practitioner must be given the opportunity to see all correspondence reading to the case together with the list of the people that the case investigator will interview. The practitioner must be afforded the opportunity to put their view of events to the case investigator…"

4. Contrary to the claimant's case, the Tribunal found the NCAS procedure does not provide for any restrictions on people who could give evidence limited to employees of the first respondent only. It was irrelevant whether the prospective witness was employed by the first and/or second respondent. The case manager had discretion to speak with any witness to ascertain the facts in a non-biased manner, including exploring the possibility of whether the problem was a wider one outside the organisation. The Tribunal finds in accordance with the procedure it was not for the claimant to determine the relevant witnesses in the investigation; this was a matter exclusively for the case investigator and the claimant could make suggestions if he wanted a witness to be questioned.

5. Paragraphs1.7 & 1.9 provides the case investigator has discretion on how the investigation was to be carried out, they should complete the report within 4 weeks of appointment and submit their report to the case manager within a further 5 working days. This time limit was not adhered to by the first respondent for reasons out of its control, and so the Tribunal finds.

Exclusions from Work

6. With reference to exclusion from work, these are seen as "interim measures whilst "action to resolve the problem is being considered…this can be up to but no more than 4 weeks at a time. All extensions are reviewed and a brief report provided to the Chief Executive and the Board" – paragraph 2.3.

7. Exclusion was a "temporary expedient…precautionary measure and not a disciplinary sanction… [and…will only be used to protect the interest of patients or other staff; and/or to assist the investigative process where there is a clear risk the practitioner's presence would impede the gathering of evidence"– paragraph 2.6.

8. Alternatives to managing risks and avoiding exclusion were set out in paragraph 2.7, including the restriction of duties and medical or clinical supervision.

9. Paragraph 2.9 provided the "justification for continued exclusion must be reviewed on a regular basis and before any further four-week period of exclusion is imposed…"

10. Paragraph 2.15 provided a "formal exclusion may only take place after the case manager has first considered whether there is a case to answer and then considered, at a case conference, whether there is a reasonable and proper cause to exclude".

GMC letter dated 12 April 2011

78. Dr Herod, the medical director for the first respondent, received a letter from the GMC on 12 April 2011 informing him the claimant had been arrested and seeking information about the claimant's fitness to practice. Dr Herod consulted with the claimant, he was not informed the claimant had a mental health condition or that he was taking medication for depression and he had no concerns about the claimant's health or fitness to practice. In oral evidence under cross-examination Dr Herod described how the claimant was at "great pains" to reassure him there was nothing to be concerned with, and Dr Herod accepted this. The Tribunal accept as credible Dr Herod's oral evidence that he had no knowledge the claimant was on anti-depressants at the time, and the first he knew of this was in December 2012.

79. Dr Herod responded to the GMC by letter dated 2 May 2011 that he had "taken the time to investigate matters…I am happy to confirm that I have no concerns whatsoever, about Dr Tattersall. He is highly regarded within the Trust and there are certainly no causes that we would have for any concern." The Tribunal accepted Dr Herod's oral evidence that he was unaware of the claimant's mental health condition at this stage. Taking into account Dr Herod's evidence the Tribunal is satisfied had he concerns with the claimant's health at the time he was under a statutory obligation to have declared these to the GMC and would have done so in no uncertain terms.

80. In an email from the claimant sent 18 May 2011 to Mr Herod, he referred to a discussion concerning the GMC letter and that "my wife is now suggesting that my mental health is deteriorating to such an extent…and has filed a statement in court stating this." The claimant requested a copy of the 2 May 2011 reply to the GMC or "some form of separate letter saying that you/the Trust has conducted appropriate inquiries and it appears that I am able to perform the demands of my clinical role without any concerns and **that it has not appeared to anyone in the Trust that I am currently suffering with any significant mental illness** [my emphasis]." The Tribunal accept Dr Herod's oral evidence that he was assured by the claimant that he was not suffering from mental illness, and it was on this basis he wrote again to the GMC. Mr Herod, who was supportive of the claimant, would not have held back to the GMC about the claimant and/or his medical condition and so the Tribunal found.

81. Mr Herod accordingly wrote a letter to the GMC copied to the claimant dated 19 May 2011 referring to the marriage breakdown and the previous allegations that his mental health "is deteriorating and that is he is 'unstable." Mr Herod, who the Tribunal accepted gave credible evidence to the effect that he did not consider the claimant to be disabled by reason of poor mental health wrote; "There is no record in the Hospital of any complaints or adverse event reporting that would support these allegations…I have taken the trouble to speak to members of the staff here in the Hospital. I have asked their opinions about his recent behaviour. I have also specifically asked if they had any concerns or worries about his mental health or…if

there had been any deterioration in his performance at work. Feedback has been consistently complementary about Dr Tattersall…no one has raised concerns about his mental health or performance and indeed most appeared surprised that I should be asking such questions about him. I can therefore state that our experiences of working with Dr Tattersall would provide no evidence to support these allegations and may infer that such concerns are unjustified."

82. The GMC confirmed in a letter dated 8 February 2012 the case was closed and no action was to be taken against the claimant.

Anonymous letter 2012 ("the first anonymous letter")

83. An undated anonymous letter was sent to the first respondent in or around late February/early March 2012 making serious allegations of inappropriate behaviour against the claimant. The letter alleged the claimant was "exhibiting increasingly aggressive, malicious, abusive, vindictive, litigious, threatening and bizarre behaviour against social services and NHS staff…immediate suspension, investigation and psychiatric assessment required before he does more harm."

The meeting of 5 March 2012

84. The claimant was contacted by Dr Topping, the claimant's line manager who informed him of the first anonymous letter. A meeting then took place between the claimant, Dr Topping and Michelle Turner to discuss the letter. The outcome was confirmed in an email sent 5 March 2012 at 13.22, in which sight of the claimant's honorary contract with the second respondent was requested. There was a reference to the claimant's mental health issues as follows: "This doctor described **previous** [my emphasis] mental health issues (depression) and I therefore wanted confirmation of occupational health clearance at the point at which he started with us. Clearance may well have been by the University of Liverpool, we should have a record of such written…and I have asked for sight of this. It may well be that we take the view that this doctor should be referred back to our in-house occupational health service for ongoing support and a view on current fitness to practice. You were going to obtain any written information held by Prof Alfrevic relating to the GMC referral so I can hold this on the doctors personal file…I will write to the GMC asking for an up-date from them and sharing which them a copy of the anonymised letter." It was confirmed the claimant had been offered occupational health and counselling support.

85. The email of 5 March 2012 reflects what went on at the meeting. In oral evidence the claimant stated he had informed Dr Topping and Michelle Turner that he had suffered from depression since 2002. The claimant did not inform the first respondent that he was still suffering from depression, and he had not informed the second respondent of this in his application form. The Tribunal found the information before the first respondent as at March 2012 was the claimant had previous mental health issues of depression, and Michelle Turner was unclear as to whether he was still affected hence her request for confirmation that he had obtained occupational health assessment at the commencement of his employment. It is the Tribunal's view

that by early March 2012 the first respondent was put on notice that the claimant may well have a mental health problem, an issue they shared with the second respondent at the time. This was the full extent of their knowledge, namely, that the claimant had a mental impartment of depression in the past, which was under control.

86. Having taken into account the evidence given by Dr Topping and Michelle Turner, in addition to the contemporaneous email of 5 March 2012, the Tribunal concluded on the balance of probabilities the claimant had not been told at the 5 March meeting Michelle Turner would not write to the GMC as alleged. There was no reason for Michelle Turner to make this promise; she was aware of the GMC's earlier involvement hence the reference to contacting Mr Herod and Professor Alveric relating to the GMC referrals in a similar matter. The anonymous letter referred to the GMC investigations and it would clear to any HR professional that the GMC was key. It did not make sense to the Tribunal that Michelle Turner would have made such a promise to the claimant; it would have been a dereliction of duty for the first respondent not to have communicated with the GMC in the circumstances. Further, the Tribunal found there was no causal connection between Michelle Turner making the GMC referral, whistleblowing and/or disability discrimination; she made the referral because she was under a duty to do so.

The letter to the GMC dated 6 March 2012.

87. The 6 March 2012 letter to the GMC Michelle Turner referred to the "recognition of the difficult personal issues this doctor is facing…his clinical director will be meeting with him regularly to review his fitness to work." She requested GMC confirmation that the case had been concluded and outcome.

88. The Tribunal took the view that Michelle Turner, who was on notice that the claimant could be disabled, accepted the claimant's statement that he had previous mental health issues and there was no requirement for her to establish via occupational health whether or not he was suffering from depression in March 2012. The clear impression given by the claimant to the first respondent during this period was that his mental health issues were under control, and there was no reason for the e first respondent to question this, especially given the claimant's duty as a doctor to divulge any matters that may impinge upon his fitness to practice.

No occupational health or CRB checks

89. By email 8 March 2012 the first respondent became aware that occupational health or CRB checks had not been carried out on the claimant before he commenced working on 1 January 2011 for the second respondent. The first respondent's view at this stage was checks should have been carried out by the claimant's employer; who they believed to be the second respondent. The second respondent's response to the request from the first respondent for information relating to "one of your employees" was "I can confirm that no occupational health or CRB checks were done as part of Mark Tattersall's appointment paperwork."

90. By 8 March 2012 it had become clear that the claimant had fallen through the net and three parties involved in the claimant's employment; namely the first and second respondent and the Deanery liaised over what to do next. The Deanery's view was set out in an email of 13 March 2012; "as employer the University should carry out all OH and CRB checks and the Lead employer will issue honorary contracts." The lead employer was a reference to the second respondent. It was a shamble; the triumvirate relationship had been going on for some twenty-years, neither party understanding the other's legal obligation with possible serious consequences as a lack of these checks could have put patients and staff at risk. It is accepted throughout the duration of his employment the claimant was under a personal and professional obligation as a doctor to disclose any health risks, and he was aware from the recruitment documentation occupational health clearance was necessary and yet he remained silent on this point as did two of his colleagues who had not received occupational health or CRB clearance before commencing their employment with the first respondent and dealing with members of the public.

The first respondent's failure to carry out pre-employment checks

91. By 19 March 2012 the claimant had been made aware that he, together with two colleagues who had also been recruited by the second respondent, had commenced clinical duties more than 18-months previously, and the first respondent's pre-employment checks which the first respondent required any new employee to be carried out were not complied with. The claimant had carried out EPP duties on patients, and this was a key issue for the first respondent given the fact that occupational health clearance to carry such procedures had not been given.

92. In an email sent 23 March 2012 the second respondent remained of the view that the first respondent as the Trust/lead employer was responsible for arranging and funding the CRB and occupational health check for clinical staff "in their capacity as the employer for the purposes of clinical activity via an honorary contract." Confusion reigned; however, occupational health clearance was given for two of the claimant's colleagues who agreed immediately to comply with occupational health screening. The claimant did not, and from thereon in his case spiralled out of control through to these Tribunal proceedings. Had the claimant undergone occupational health clearance, as had his colleagues, and as he knew was required from him according to the recruitment documentation, it may be that events which led to this litigation would not have transpired.

93. In short, the claimant's colleagues complied with the request and continued with their duties. The claimant objected on the basis that the first respondent's procedures exceeded Department of Health ("DoH") requirements, he was not a "new" employee and did not accept he was contractually required to comply with the first respondent's local practice. In respect of failing to have his occupational health checks, which the claimant had undergone on a number of occasions in the past carried out by different trusts, it cannot be said that the first respondent's insistence that the claimant comply with a reasonable management request that he satisfied occupational health requirements, was related to either the claimant's disability or to any protected disclosures having been made. The claimant's pleaded case is that

the first disclosure was made on 30 March 2012. It was prior to this that the issue concerning occupational health clearance and legal responsibility under honorary contracts were raised as an issue that affected the claimant, and therefore it follows there cannot be a causal connection between the two.

94. Leading up to the alleged first protected disclosure the contemporaneous evidence before the Tribunal points to the first respondent supporting the claimant in whatever way it could. For example, Dr Herod offered to support the claimant in what he was he perceived was a personal problem with his wife that impacted on the GMC. In oral evidence on cross-examination Dr Herod described how he was supportive of the claimant, and explained he had been through a divorce himself and had considerable sympathy for him, evidence which was entirely credible. The claimant thanked Dr Herod for his support at the time.

95. The GMC confirmed on 30 March 2012 no action was being taken against the claimant.

First alleged protected disclosure made at the 30 March 2012 meeting with the claimant, Michelle Turner and Dr Topping in relation to the first respondent

The claimant alleged on 30 March 2012 he was due to work on Friday 30 March 2012. During a discussion which took place in Dr Topping's office with Dr Topping on that day about the issue of the Trust's lack of pre-employment checks the Claimant asked Dr Topping orally whether legal requirements were in place for him to work that evening and over the weekend in a clinical role because pre-employment checks had not been done and OH clearance had not been provided. Dr Topping told the Claimant that there was a verbal contract and confirmed that the Claimant could work that evening and over the weekend. Dr Topping also asked the Claimant to provide any previous CRB disclosure to HR and to make an appointment to see Occupational Health.

The S.43B ERA failure relied upon was (1) (b) Breach of any legal obligation: the legal obligations on a Trust to ensure appropriate HR and OH policies are in place and applied consistently (1) (d) Danger to the health and safety of any individual: risks to patient safety.

30 March 2012 meeting

96. Having met two of the claimant's doctor colleagues, Dr Topping discussed the lack of pre-employment screening with the claimant, and requested that he undertook occupational health screening on the 2 April 2012. A discussion took place concerning the claimant working over the weekend, and it was agreed the claimant would continue to work despite the checks not being in place as he had been working since January 2011. The claimant agreed to work accordingly, which he did. The claimant did not agree to undergo the tests, and indicated that he would "run it past the BMA.". Dr Topping took a "pragmatic view" that as the claimant had already been working for some15-months he could work the weekend but no longer on direct patient contact.

97. What is in dispute is whether the claimant questioned the "legality" of working the weekend with Dr Topping or whether he asked if it was "okay" to work. The claimant's evidence is that he said; "If OH checks had not been carried out I thought that it was likely to be a breach of the Trust's duty of care to patients and health and safety law for me to work with patients. I asked whether legal requirements were in place for me to work over the weekend in the light of the lack of pre-employment checks and OH clearance. Dr Topping said that there was a contract was in place and confirmed that she wanted me to work over the weekend despite the trust having done no checks against me…I concluded that working the weekend was likely to be a breach of the law and put patient's health and safety at risk. I believe it was in the public interest to make this clear to Dr Topping and did so."

98. If the claimant had not have worked it would have been more credible that the claimant made the points as alleged; he did work and the Tribunal did not accept on the balance of probabilities he had made the protected disclosure as described above. The Tribunal took the view the claimant had questioned working the weekend as described by Dr Topping. It preferred Dr Topping's evidence to that of the claimant's, on the balance of probabilities, for the reasons already given above. It is a matter of fact that the claimant thereafter was not have been required to work until his compliance with occupational pre-employment checks. The 30 March 2012 meeting was not minuted.

99. The claimant, who was quick to be critical of the respondents and sent hundreds of complaining emails, on his own account worked a weekend in breach of health and safety regulations and yet we have no contemporary correspondence on file from the claimant complaining about this, which is surprising given the claimant's habit of sending copious emails, either on his own account or via the BMA, on every subject which concerns him. It is notable there was no correspondence during this period that referred to the alleged disclosures made on 30 March 2012 to Dr Topping, had there been such a disclosure the Tribunal believes this would have been confirmed in writing. The claimant's position as set out in his witness statement was that he was being asked to commit an offence against patient safety, and the Tribunal's view is the claimant would not have accepted that lightly.

100. It is notable that the claimant, when discussing this period with Dr Tabanit in May 2013, described in detail a dispute in work where by March/April 2012 the first respondent realised that they had not done the appropriate screening prior to him taking up his post. He described how he reacted to being told to undergo occupational health screening, and made no reference at any stage to whistle-blowing, referring to the whole conflict as 'a bit silly, unnecessary and petty.' He described it as him 'being petty over them not complying with department of health guidance' He admitted to reacting 'more sensitively and taking issues about this when I am depressed.' This evidence was very relevant in that it reveals the truth of what transpired in 2012 as recollected by the claimant in discussions concerning his employment dispute in 2013. The Tribunal has referred to Dr Tabanit's report in greater detail below; it reveals the claimant made no reference to protected disclosures, whistleblowing or disability during the period prior to May 2013 and

reflects Dr Herod's belief that the conflict revolved around occupational health screening and nothing else.

101. The claimant refused to provide the occupational health screening on the basis that he was not contractually obliged to do so. The claimant did however provide CRB clearance on 2 April 2012. In an email sent 2 April 2012 from the claimant to Michelle Turner the claimant did not refer to an agreement having previously been reached that the anonymous letter should not be sent to the GMC. The claimant was not aware the anonymous letter was to be forwarded to the GMC. It is notable that no reference was made to an agreement that it should not be sent to the GMC, contrary to the claimant's position before this Tribunal. Had such an agreement been reached the claimant's reaction would not have been the one set out in the 2 April 2012 email "but I guess the Trust feels obliged to send it to the GMC."

102. It is notable the claimant made it clear that did not consent to information being exchanged with the second respondent without his consent and he made his position clear, which undermines his argument put forward at this liability hearing, with little satisfactory supporting evidence, that the first respondent informed the second respondent of the protected disclosures at various stages throughout the term of his employment.

Conclusion – 30.3.12 alleged disclosure.

103. In conclusion, the Tribunal found there was no disclosure of information at the 30 March 2012 meeting and the claimant had not made a protected disclosure. A qualifying disclosure" means any disclosure of information which, in the reasonable belief of the claimant making the disclosure tends to show (b) that the respondent has failed, is failing or is likely to fail to comply with any legal obligation to which and/or (d) that the health or safety of any individual has been, is being or is likely to be endangered. The Tribunal accepts that had he made the disclosures as alleged by him, they would have been protected. Merely questioning if it was "okay" for him to work the weekend was not a disclosure of information in accordance with Cavendish Munro Professional Risks Management Ltd v Geduld [2010] I.C.R. 325 and the Tribunal found a protected disclosure had not been made.

Second alleged disclosure made at the meeting with Mr Herod on 4 April 2012 [first respondent only]

The claimant alleged during a meeting at around 15:00h with Mr Herod in Mr Herod's office the Claimant raised issues concerning the following matters, orally:

- *breach of mutual Trust and confidence between the Trust and the Claimant;*
- *lack of pre-employment checks;*
- *lack of OH screening and document checking for all staff, in particular for those with honorary contracts and those seconded to the Trust from other organisations;*
- *the Trust's attempts to cover up its failings to the Board and regulators;*
- *a bullying culture at the Trust;*

- *poor staffing levels, referring to a letter from the midwives about this;*
- *lack of staff breaks;*
- *medication delays;*
- *delays in getting patients to the theatre; and*
- *the resulting risks to patient safety*

The Claimant prepared a typed note for this meeting with Mr Herod and annotated that note during the meeting on 4 April 2012. He did not show the note directly to Mr Herod, but it would have been clear to Mr Herod that the Claimant was raising issues from the note and adding points in pen to it during the meeting.

The claimant relied on S43B ERA (1)(b) Breach of any legal obligation: the legal obligations on an NHS Trust to ensure appropriate HR and OH policies are in place and applied consistently, in compliance with Department of Health requirements, the duty of care owed by an employer to an employee, the legal obligation of mutual Trust and confidence, and the legal obligation to comply with CQC regulations, particularly those in relation to patient safety and staff (1)(d) Danger to the health and safety of any individual: risks to patient safety (1)(f) That information tending to show any matter falling within s43B(1)(a)-(e) is being or is likely to be deliberately concealed.

4th April 2012 meeting between the claimant and Dr Herod

104. It is not disputed a meeting took place between the claimant and Dr Herod on 4 April 2012. The Tribunal was referred to the claimant's hand-written notes set out within the documents marked "C3", which it considered.

105. The passage of time has dimmed memories of what took place at that meeting, and what was said is very much in dispute. It is disputed the claimant went into the meeting with a document that set out issues to be discussed, and on which he wrote during the meeting. Some of the handwritten annotations in the document that allegedly reflect what had been said were disputed by Dr Herod. The Tribunal does not intend to go through each one. In short, in oral evidence under cross-examination Dr Herod denied the fact that staffing levels were referred to in letter from midwives to Cathy Atherton/ Gail Naylor and ignored, was discussed. Dr Herod denied "delays in getting patients to theatre was discussed, poor outcome on night SAW in duty, obs and medication delays, staff not getting breaks and issue of bullying …scapegoat…No responsibility from managers" were discussed as alleged by the claimant. Dr Herod disputed he warned the claimant against Michelle Turner, and denied stating that she was not "being helpful to me (going behind my back to GMC). He said be very careful" as alleged by the claimant. Dr Herod's evidence that he did not recognise the contents of the note as his, and on cross-examination he confirmed the abbreviations were "never" used by him. One the balance of probabilities this evidence was accepted by the Tribunal. It also accepted Dr Herod's explanation that "overall" the note did not ring true, he accepted people could write differently one day to the next, but he did not understand the abbreviations and the diagram at the top of the note.

106. Mr Boyd accepted Dr Herod's oral evidence was confused as to what had been discussed, but this does not mean the claimant's version reflects the reality. The Tribunal reminded itself of Dr Herod's oral evidence given on cross-examination. It noted he accepted the claimant had raised an allegation of bullying in a "non-specific manner" and when asked to do so the claimant was unable to give examples. By way of an aside, the Tribunal notes that no examples have ever been given, save for the reference to Dr Herod's alleged bullying which came later as set out in the list of detriments.

107. The Tribunal took into account the surrounding contemporaneous written documentation not in dispute in order to arrive at the truth of the matter. The following is relevant to that exercise:

1. The purpose of the meeting was to discuss with the claimant the lack of pre-employment checks, and the fact that three doctors employed by the first and second respondent had not received occupational health clearance. It is agreed Dr Herod acknowledged to the claimant there had been a failing on the part of the first respondent.

2. It is not disputed the claimant alleged a bullying culture existed in the Trust numerous times, and when asked for further specifics the claimant did not give any examples.

3. It is not disputed the claimant complained the first respondent went beyond the DoH guidance, to do so was "illegal" in his opinion, and it was unfair for new employees to undergo an enhanced level of screening when existing employees had a lower standard.

4. The claimant was informed the need for him to complete heath screening was a reasonable request in the interests of both patients and staff, and it would not be possible for the claimant to carry out exposure prone procedures ("EPP's") until he had been successfully screened.

108. In relation to the 4 April 2012 notes allegedly taken by Dr Herod of the 4 April 2012 meeting, there is a reference to the claimant's matrimonial problem, referrals to GMC, false claim of assault, CRB and OH against which there are words "no policy. CB didn't know. AO didn't know. Confusion. Worked weekend as suited." There is also a reference to staffing "DS" (delivery suite), midwives and SAW; all matters which Dr Herod denies were discussed. Mr Herod's view of the meeting was that they were discussing "a simple thing" that it was a reasonable requirement for the claimant to be tested by occupational health, and the conversation centred around why the claimant believed that was not the case, and how is was "illegal" to have a higher standard than that dictated by the DoH, and contract law. In oral evidence Dr Herod stated they may well have discussed the anonymous letter and the GMC, but the primary issue for him was that the claimant was not acting in his own best interests and the interests of his patients.

109. The claimant relies on two documents to support his version of events; the first lists issues to be discussed at the meeting and hand-written notes allegedly taken by the claimant during the meeting. The second is the document marked C3(2) which the claimant maintains, are the handwritten notes taken by Dr Herod of the meeting that came to light for the first-time late last week, just before Dr Herod was to give evidence. The parties do not know the provenance of these handwritten notes ostensibly sent to the claimant and Mr Mensah by an unknown person employed by the first respondent via email sent to a person employed by the Trust who presently employs the claimant, and by post to Mr Mensah's chambers.

110. Under oath the claimant described how he received a PDF file from a secretary of another consultant employed in the same Trust as the claimant. The claimant confirmed employees working in the first respondent did not have the details of his dispute and would have been unaware of the name of his new employer. The claimant assumed that an unnamed secretary with access to Mr Herod's files had provided him with documents in secret as she had done in the past. The claimant confirmed he had not given anybody authority to act as they did, and nor did he ask her to send to Mr Mensah a copy of the letter, even before the claimant had received his copy. The Tribunal finds it is a matter of logic that the letter must have been posted before the email was sent out. In short, the claimant maintains Mr Herod is not telling the truth when he denies having made the notes and further, denies that whistle-blowing was raised during their meeting and the newly disclosed documents provides evidence of this.

111. The Tribunal was of the view that these were a series of incredible coincidental events which undermined the legitimacy of the documents produced. The Tribunal was confused how a person working in the Trust where the claimant is now working would know (a) to send it to a barrister's chambers the day before cross-examination of a particular witness, (b) how would an unknown person working at the first respondent know where to send the email when the claimant informed this Tribunal in oral evidence that he did not want anybody to know where he was working, particularly the first and second respondent, and (c) how would the unknown person know precisely that there existed specific documents relevant to Dr Herod that had not been disclosed out of the thousands of documents disclosed to the claimant over a period of time as set out below.

112. Mr Mensah accepted the report of Maragret Webb will be of limited value and limited weight because it was not specifically provided for the Tribunal and was not CPR 35 compliant. He referred to Dr Herod's evidence he "didn't get the feeling from the page" that this was his writing, and given the note was taken 6-years ago and the lack of "flat-out" denial, the Tribunal was to accept Margaret Webb's opinion that she had compared "every hand-writing feature" and there were "similarities in almost all handwriting features when compared." The Tribunal considered Margaret Webb's report in detail, concluding it preferred the evidence of Dr Herod on whether it was his handwriting or not taking it in context with the factual matrix supported by contemporaneous documents which the Tribunal has been at pains to consider in detail.

113. The first respondent's position is that the notes in question have fraudulently been produced mimicking Mr Herod's writing, and that was a serious act committed either on the part of the claimant, on his behalf or by an unknown third party.

114. The Tribunal have now had the opportunity of considering in detail the draft handwriting report prepared by Margaret Webb dated 5 February 2018, which it has given no weight, and have the following observations to make:

(1) The claimant, as a result of his subject access request and disclosure within these proceedings, had been provided with thousands of documents, including two key documents consisting of hand-written notes and two post-it stickers on which Mr Herod made handwritten notes. It is notable Mr Herod did not deny the notes were his, despite the adverse inferences that could be raised from their content. He did however deny the notes provided anonymously were his, and gave cogent reason for this. In short, Mr Herod having already accepted the post it notes when he could have denied that to have been the case, and knowing how the notes could detrimentally impact on the case it, makes it even more persuasive that he would have admitted to "C3(2)" had they been his notes.

(2) Mr Herod gave reasons why there were differences, for example, he would not use DS for Delivery Suite and would normally use LW for Labour Ward accepting people would write differently over a period. Mr Herod maintained it was not his habitual way of writing, and abbreviations were referred to that he would never use.

115. The Tribunal took cognisance of the correspondence and documents that followed the 4 April 2012 hearing in an attempt to establish the veracity of the witnesses' different recollections of events that afternoon. It is notable the claimant sent to the second respondent's HR two emails dated 10 April 2012 alleging it was unlawful for the second respondent to communicate the existence of the anonymous letter with the first respondent without his consent and he rhetorically questioned; "Is the only route available for me to go outside the University and lodge the matter with the Employment Tribunal?" The claimant made it clear he had taken advice, and during this period union support had been given to him. The claimant did not refer to any of the protected disclosures he had allegedly made in the 4 April 2012 meeting, or to his belief that he had made protected disclosures and was whistleblowing, and it is notable there was no such reference in the medical reports referred to below. The Tribunal concluded on the balance of probabilities, the disclosures allegedly made by the claimant did not occur with the exception of his reference to there being a "bullying culture" in the first respondent, going beyond the DoE requirements was illegal and new employees were required to undergo an enhanced level of screening compared to existing employees.

Conclusion: 4.4. 2012 alleged disclosure

116. The claimant was unable to give examples of the alleged bullying culture, and the Tribunal took the view that bulling could fall under (1)(b) and 1(d) and qualify as a protected disclosure but it did not because the claimant was not disclosing information. An unparticularised allegation of bullying is insufficient; the claimant was

asked to explain what he meant and failed to do so. The Tribunal found by the lack of particularity, the claimant objectively could not have had a reasonable belief he was making the disclosure in the public interest and it tended to show the first respondent had failed to comply with a legal obligation and/or the health or safety of any individual has been, is being or is likely to be endangered and/or (f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed. Assessing whether a belief is reasonable involves both a subjective element - did the claimant genuinely believe that the disclosure was of information tending to show a relevant failing? - and an objective element - was it reasonable for the worker to hold that belief? Guidance was given by the EAT in Darnton v University of Surrey [2003] I.C.R. 615 as to what constitutes a reasonable belief. An unsubstantiated expression of opinion is unlikely to amount to a reasonable belief and it does not amount to a disclosure of information. The claimant's reference to a "bullying culture" was an unsubstantiated expression of opinion.

117. With reference to the claimant's internal disclosure made under S.43C, as it was made before 25 June 2013, it is a requirement that a disclosure must be made *in good faith* in order to be protected. In the well known case of Street v Derbyshire Unemployed Workers Centre [2004] EWCA Civ 964; [2004] 4 All E.R. 839, the Court of Appeal held that making a disclosure in good faith did not mean simply being honest, but rather referred to the motive of the person making the disclosure. The Tribunal found the claimant had an ulterior motive for making the disclosure other than the public interest. He was angry with the first respondent's managers for forcing him to undergo health screening and the disclosure was not made in good faith because his dispute with the first respondent concerning health screening was the dominant reason for it. In accordance with Dr Tabaniat's report the claimant "perceived injustice in what he felt being cornered to go through these screenings." According to Dr Bothra the claimant found it "difficult to let go of arguments, however small they may be."

118. The Tribunal found on the balance of probabilities, having preferred the more credible evidence of Dr Herod to that of the claimant and taking into account the factual matrix, there was no disclosure of information and the claimant had not made a protected disclosure. It did not even cross Dr Herod's mind the claimant was whistleblowing and as far as he was concerned the conversation centred around the disputed health screening with the claimant raising issues with the first respondent's attempts to "corner" him into carrying out the tests.

119. There was no evidence whatsoever Dr Herod or anybody else employed by the first respondent informed the second respondent the claimant had made whistleblowing allegations and/or protected disclosures and so the Tribunal finds.

Alleged protected disclosure - various dates from "at least April 2012" in relation to the second respondent only.

The Claimant asserts that the University also became aware of his disclosures to the Trust (as set out in "Claimant's Scott Schedule – Whistleblowing Allegations against

the First Respondent (the Trust)") from at least April 2012 when the University was instructed to withhold the Claimant's banding supplement. He further submits that the University subjected him to detriments as a result of the protected disclosures made to the Trust from April 2012, when he asserts the University became aware.

120. Robin Harrison, on behalf of the second respondent, sent an email to Angela O'Brien copied to Michelle Turner and others on 5 April 2012 regarding the "local clinical lecturers" observing "It seems that there is considerable confusion as to responsibility in some of these areas. The university…does not automatically undertake registration, CRB and occupational health checks. It is my understanding that this has been usually undertaken by trusts." There was no suggestion in the email or any communications that followed, that the second respondent was aware of any disclosures the claimant may have made to the first respondent.

121. The second respondent in an email sent 17.49 on 11 April 2012 to the claimant, clarified a number of matters as follows: it was deemed appropriate to discuss the anonymous letter with the first respondent and it was not unlawful to disclose the letter. The claimant was employed substantially by the second respondent, based at the first respondent hospital. Robin Harrison wrote; "it is a requirement for you to hold honorary status with them," and the 'intrinsic' link requires that both the first and second respondent share information. Professor Alfirevric (who shared the anonymous letter) was an honorary consultant jointly governed by the first respondent, and deemed by the second respondent "obliged professionally" to share the contents.

Conclusion: alleged disclosure against second respondent

122. There was no hint in any of the documentation the second respondent was aware of any protected disclosures the claimant may have made to the first respondent, which the Tribunal finds unsurprising. As far as the first respondent was concerned the claimant had not made any of the protected disclosures and as a consequence, they would not have been reported. The Tribunal found no disclosure had been made to the first respondent and there was no evidence before it that the second respondent had been made aware of any whistleblowing allegations when it took the decision at the first respondent's request to withhold the claimant's banding supplement when the claimant was unable to carry out on work call.

123. With reference to the claimant's internal disclosure made under S.43C, as it was allegedly made before 25 June 2013, it is a requirement that a disclosure must be made *in good faith* in order to be protected. In the alternative, had the claimant established a qualifying disclosure had been made the Tribunal found that it was not made in good faith, the claimant was motivated by the anger he felt as set out above, and therefore had the first respondent informed the second respondent of the disclosures (which, for the avoidance of doubt the Tribunal did not find occurred) due to his lack of good faith the claimant would not have been protected.

124. Michelle Turner in an email sent to the claimant at 14.51 on 4 April 2012 confirmed the second respondent had not carried out pre-employment checks. She

wrote; “You will recall that when we met I asked you if you had had occupational health clearance and you indicated that you thought you had but could not recall this accurately. This affects a group of academic staff- not just yourself- and we are now in order to comply with our requirements of our pre-employment checking policy and what is required prior to issuing an honorary contract…I have asked my team to arrange a meeting with HR colleagues from the University to ensure that we have a smoother pathway in turns of pre-employment screening/checks for staff employed by them but working at our hospital.”

125. The contents of the email is instructive; not only did it refer to the earlier meeting when pre-employment checks were discussed, there was no reference to any of the alleged protected disclosures and the claimant was made aware that the failure to carry out pre-employment screening on him and his two colleagues was being treated seriously. Further, it was confirmation for the claimant that there was no attempt on the part of the first respondent to hide the issue and steps were being taken to resolve it. The claimant had been made aware as early as April 2012 occupational health checks had been carried out in relation to other doctors holding honorary contracts, the first and second respondent were working together to resolve the confusion around screening and the issue was “not been brushed under the carpet” as alleged later by the claimant. The claimant did not question the steps taken by the first respondent with the exception of him complaining about the inter-communication between the first and second respondent. The claimant expressly did not consent to the first and second respondent discussing the anonymous letters.

126. In an email reply sent 11 April 2012 to the first respondent, the claimant referred to his recent attendance to occupational health and being asked to undertake new employee screening which he stated was not appropriate as he had been employed for 15-months. In a second email sent 11 April 2012 at 15.24 from the claimant to Michelle Turner he referred to having provided CRB clearance and attended occupational health, but the latter had indicated they had been asked by HR to undertaken “new employee screening but this was not appropriate for someone who had held an honorary contract (albeit verbal) for considerable time.” The Tribunal found this paragraph to be misleading as it was the claimant who had refused to undergo the additional screening for the reasons given, not occupational health. The claimant’s emails underline the fact that the real issue for the claimant was being instructed to undergo new employee screening and not protected disclosures or disability; had these been the issue this would have bene recorded by the claimant in no uncertain terms. It is notable the claimant referred in that email to “complex issues and variety of organisations involved with disciplinary/regulatory powers…I do not wish to make any further comment regarding any issues with respect to my employment at this time”, yet there was no mention of disability or whistleblowing and this was because these were not issues raised by the claimant at the time and so the Tribunal finds.

127. Michelle Turner emailed the claimant on the 13 April 2012 stating “I will be in touch on Monday as, given we have now identified a gap in your required pre-employment screening, and we need to close that down…we do intend to meet the University HR department on Monday to discuss the arrangements between our two

organisations in terms of pre- employment screening…to ensure there is no breakdown in the process in future." The claimant responded that it was "sensible that the Trust meet with the University to ensure that better arrangements are in place in the future." The claimant also sent an email on 13 April 2012 referring to union advice, breach of data protection and confidentiality, and seeking information concerning the lodging of a grievance indicating his grievance does not concern Professor Alfirevic's involvement. Again, there was no reference to whistleblowing or disability discrimination and no attempt by the first respondent to brush their mistake over the screening issue under the carpet as alleged by the claimant.

The second anonymous letter 14 April 2012

128. A second anonymous letter was received by the second respondent and copied to the claimant and Michelle Turner on 16 April 2012. The undated anonymous letter made numerous serious allegations against the claimant, including an allegation that he had a non-molestation order against him and court order that a full psychological assessment should be undergone before increased child access could be considered. Reference was made to the claimant being litigious and unfit to be a doctor. The letter included matters even more personal to the claimant, whom the Tribunal does not intend to repeat, and an intention to disrupt the claimant's career was clear for all to see.

First respondent's letter of 16 April 2012

129. Michelle Turner wrote to the claimant on 16 April 2012 informing him that she had been provided with a copy of the second anonymous letter addressed to Dr Alfirevic whilst working at the Women's Hospital. She wrote; "You have indicated that you are not willing for the University of Liverpool and Liverpool Women's Hospital to exchange information relating to your employment. You are an employee of the University of Liverpool, holding the post of clinical lecturer. However, you work clinically here at the Women's on an honorary basis. At no stage have I indicated that I will not share information with the University."

130. Michelle Turner referred to the earlier meeting held on 5 March 2012 in the following terms; "You and I met in the presence of Dr Topping…following receipt of an anonymous letter by the Trust. Upon asking for sight of your personnel file following that discussion, it became clear that we had no evidence on file with respect to your having undergone the per-employment checks we require for any person who is going to work clinically here at the Women's. From investigation, it would appear that this has been due to some confusion with respect to who was responsible for undertaking those checks, given your substantive contract was with the university and you hold an honorary position in the Trust. As soon as it became clear you had not undergone these checks, and in fact that two colleagues had also not undergone those checks, I asked that the appropriate checks were undertaken and concluded as soon as possible. I think it is reasonable we undertake those urgently. This is to ensure the Trust complies with NHS employer's pre-employment checking standards and with DH guidelines. You will appreciate these are in place to ensure the safety of patients. I understand Dr Topping will be discussing our

requirements, your concerns and the potential implication of failing to comply with this reasonable request with you directly tomorrow. You ask what would the consequences of failing to comply with our requirement…there **would be no option but to remove you immediately from the clinical area** [my emphasis] having discussed that with your clinical director and your substantive employer…"

131. It is the Tribunal's view that the letter of 16 April 2012 was a marker for the claimant; unless he complied with the pre-employment checks he would not be carrying out clinical duties in the first respondent. All of the evidence points to this being the result of the claimant's refusal to undergo the pre-employment checks and there is no evidence whatsoever to suggest a causal link with whistleblowing or disability.

132. The claimant responded by return email indicating he had been advised not to comment and "if forced to attend any meeting, I should refuse to make any comment…" The claimant, despite a reference to the issue having become formalised and the GMC involved, remained silent about any protected issue having been made earlier. The claimant had a genuine concern about the effect two anonymous letters may have on his career reflected in his correspondence and this issue becomes conflated with the claimant's refusal to undergo occupational health pre-screening. The Tribunal is in doubt this was a stressful time for the claimant, and yet, it does not explain away the total absence in his written communications of any reference to protected disclosure having been made earlier, or the fact that by this stage the claimant considered himself to be disabled with depression and discriminated against. The Tribunal concluded on the balance of probabilities, the total absence to any reference concerning protected disclosures/whistleblowing and disability discrimination within the party-to-party written communications is because no protected disclosures were made and the claimant did not give any indication he was suffering from depression. The fact that the claimant acted in the way he did, particularly his refusal to undergo screening, did not put the respondents on notice and not can it be said they possessed constructive knowledge that his behaviour was a result of depression. The first respondent was entitled to conclude, which they did, the claimant was a doctor acting unreasonably because it was in his nature to do so.

<u>17 April 2012 telephone conversation between the claimant and Dr Herod</u>

133. Dr Herod was frustrated by the claimant's refusal to undertake occupational health pre-screening; his role as medical director was to ensure the claimant's compliance. Dr Herod believed, with good reason, the claimant was putting himself in a difficult position professionally. A telephone conversation took place on 17 April 2012 that was not minuted by Dr Herod. The claimant produced notes of that conversation which are not accepted by Dr Herod as a true reflection of what had been discussed. The claimant and Dr Herod agreed on the following that was included within the handwritten note:

1. Dr Herod warned the claimant there is no future in trying to take on Michelle Turner and it would only end badly because the Trust was not willing to return

him to his clinical duties. The claimant incorrectly interpreted this to mean Michelle Turner was keen to get rid of troublesome doctors.

2. Dr Herod indicated he may not be able to continue to support the claimant in the future when he was refusing to comply with a reasonable request.

134. The claimant's note refers to Dr Herod allegedly warning him that there was a "big risk to career if [he] raises patient safety." On the balance of probabilities, the Tribunal found from the evidence before it that at this point in time patient safety was an issue raised by the first respondent in relation to the claimant's refusal to comply with pre-employment screening and this was the sole reason for the claimant being unable to carry out PPR, and therefore it must follow as a matter of logic the claimant's note on this is wrong. Patient safety was raised, not by the claimant but by Dr Herod who informed him there was a big risk to his career refusing to do something that would protect patients. This comment was made with the claimant's refusal to undertake screening in mind as Dr Herod was unable to comprehend the position adopted by the claimant, who continually refused to obey a reasonable management request. Dr Herod's treatment of the claimant thereafter flowed from his genuine belief that the claimant was a difficult employee and this belief had no causal link with any protected disclosures or the claimant's disability. The Tribunal accepts Dr Herod's oral evidence on this point in preference to that given by the claimant; it is supported by the emails sent to the claimant before this meeting when he was told in no uncertain terms of the risk to patients and the fact that the claimant would be unable to carry out his clinical duties. Given the contemporaneous correspondence the Tribunal prefers the evidence of Dr Herod than the slant given by the claimant in his handwritten note of the 4 April 2012 discussion, on the balance of probabilities.

135. With reference to detriment 5 raised against the first respondent only, the Tribunal found the claimant was warned and then excluded from conducting clinical work with patients for the sole reason that he had refused to obey reasonable management requests and undertake the health checks necessary for patient safety. The exclusion was not a detriment that flowed from any protected disclosure having been made.

Detriment 4 [detriment 2 in claimant's the list] against the first respondent only - 17 April 2012 refusing to allow the Claimant to have Trade Union Representation at a disciplinary meeting

17 April 2012 meeting with Dr Topping

136. A morning meeting took place between the claimant and Dr Topping concerning the consequences to claimant if he continued to refuse to undertake screening. The meeting was not minuted, however, it was confirmed in correspondence that followed.

137. Following the 17 April 2012 meeting with Dr Topping and telephone conversation with Dr Herod, the claimant was emailed a letter at 21.08 by Joanne

Topping. Dr Topping had been made aware of the claimant's telephone conversation with Dr Herod. The claimant states that he asked Dr Topping if he could have a union representative present, and that he was told there was no need as disciplinary action was not being taken, and this was accepted by the claimant. The Tribunal finds that was the full extent of the claimant's request.

138. The claimant's case before the Tribunal is that it was a disciplinary hearing resulting in him being informed of a restriction on his practice, and being removed from clinical work. In his witness statement the claimant stated he was "denied BMA representation." The Tribunal did not find this to be credible, and preferred Dr Topping's version of the conversation as more credible.

139. It is not disputed between the parties that Dr Topping told the claimant he was being removed from direct patient contact due to his failure to comply with the first respondent's requests because of patient risk. She confirmed the claimant was not suspended but could undertaken research, and his pay would not be stopped "at the moment." Dr Topping did not deal with whether the claimant requested union support or not in her witness evidence, but under cross-examination she confirmed the claimant had asked if he needed a BMA representative to which Dr Topping replied that she was not taking disciplinary action.

140. The 17 April 2012 letter from Dr Topping sent immediately following the meeting is instructive in that it relates to the dispute in question, namely a request for "documentary validated evidence" to be sent to the occupational health manager as soon as possible. This information is deemed approximate to your job role…As I explained to you, until we have sight of the above information you cannot undertake any work at the Women's which involved direct patient contact." The letter listed 6 items of information outstanding including "EEP…-HIV, Hep B Surface Antigen, Hep C…" DoH guidance was referred to, and the claimant was informed arrangements had been made to cover his on call shift.

141. The claimant sent emails after the meeting and telephone call at 1.57 on 17 April 2012 to Michelle Turner copied to Dr Topping and Dr Herod. The email stated, "I **am writing to ensure that my understanding of the current situation is correct**, [y emphasis] following both Dr Topping and Mr Herod speaking to me this morning." The claimant set out his understanding that he was not suspended, no disciplinary or "other action" was being taken against him by the first respondent, and he had been instructed "not to have any contact with trust's patients." The claimant confirmed he had "agreed to abide entirely by the Trust's decision." It is notable that the claimant's understanding at the time was that no disciplinary action was being taken against him and yet, detriment number 4 against the first respondent was Dr Topping's refusal to allow him to have trade union representation at a disciplinary hearing.

142. The claimant, despite his evidence that he had made a protected disclosure about patient safety, did not refer to this or his belief that the first respondent was causing him a detriment as a result of him making a protected disclosure. There was no hint the claimant has made a protected disclosure, or considered himself to be

disabled and discriminated against as a result. The claimant is forthcoming in correspondence, and had this been an issue for him he would have said so in no uncertain terms. The claimant's sole concern was whether the respondent was entitled to see the evidence from him in respect of occupational health clearance, and emails which followed i.e. on 24 April 2012 referred to the claimant requesting sight of the first respondent's occupational health policy or other documents.

Conclusion: detriment 4

143. With reference to detriment 4 the Tribunal concluded the claimant had been caused no such detriment. Trade union representation was not refused; the meeting was not a disciplinary hearing and even if it had been one, the Tribunal would have gone on to find Dr Topping's reference to the not being a disciplinary one where union representation was not required, was made in good faith and without any causal connection to whistleblowing or disability discrimination.

144. The Tribunal found the first respondent was not taking disciplinary action against the claimant; in short it was a health and safety/safeguarding issue with the result that the claimant was limited in the type of work he could perform. This is completely different to a disciplinary hearing, and the claimant was aware of this at the time as evidenced by his email that followed. The Tribunal took the view that the claimant had misrepresented what had taken place, blowing the meeting (in which he had asked if he was to be redeployed into alternative duties) out of all proportion in order to advance this claim. Further, the claimant had been put on notice that the outcome of him refusing to comply with the pre-employment screening was that he could no longer carry out clinical duties. The claimant continued to work, continued to be paid, and it was completely in his own power to resolve the issue, as the claimant had all of the necessarily documentary evidence to hand which he chose not to pass onto the first respondent.

145. In conclusion, the Tribunal did not accept the claimant genuinely believed from his point of view he had suffered a detriment; this was a fabricated complaint and a reasonable worker would not have taken the view the treatment was in all the circumstances to their disadvantage. In the alternative, had the claimant shown he genuine was upset by Dr Topping's alleged refusal, it would not have been objectively reasonable in the circumstances.

Detriment 1 against second respondent only – 17 April 2012 – 8 June 2012 failing to provide alternative arrangements for the Claimant to allow him access to patients in order to conduct clinical research and for clinical training, causing significant detriment to his career

Detriment 3: [4 in the claimant's list] first respondent only: from April 2012 requiring the Claimant to comply with local health screening policies which did not apply to the Claimant's position and/or were not in existence or ratified

Detriment 5 [numbered 3 in the claimant's list] against the first respondent only – from 17 April 2012 excluding the Claimant from conducting clinical and research work with Trust patients.

Detriment 6 [numbered 5 in the claimant's list] against first respondent only - From 17 April 2012 to 8 June 2012 refusing to redeploy or to consider redeploying the Claimant to a non-EPP role and refusing to provide a written risk assessment to the Claimant

Conclusion: detriment 1, 3, 5 and 6

With reference to detriment 1 and 6 the evidence before the Tribunal was that the claimant had not been subjected to any detriment by the first respondent failing to redeploy him, provide a written risk assessment or providing alternative arrangements to access patients for clinical training. In short, had the claimant complied with the screening requirements access to patients would not have been limited. A reasonable worker could not have concluded that they were disadvantaged by the treatment given the claimant was intent on proving from the outset that there was no need for him to comply with the first respondent's local health screening Policy which were not applicable to him, exceeded DoH requirements and had not been ratified come what may, and whatever damage he caused to his relationships with colleagues and to his own career.

146. The claimant was excluded as a result of the first respondent carrying out a risk assessment and advised in writing that patient safety was an issue, and he continued carrying out research work without any deduction in pay. The Tribunal found the claimant had not been caused the alleged detriments 1, 5 and 6, and in the alternative, if it is wrong on this point, it would have gone on to find there was no causal link between redeployment, alternative work arrangements and written risk assessments to whistleblowing or disability as the sole reason for the claimant's exclusion from non-clinical work and its impact on his career was solely attributed and causally linked to the claimant's continued refusal in relation to the first respondent's screening compliance.

147. The claimant's argument that he was not contractually obliged to comply with the first respondent's health screening policies had no basis. As indicated above, the claimant was made aware, prior to taking up his position, his appointment would be subject to occupational health assessment. The OH screening obligations were contained in the health questionnaire that had been in place since October 2010, and the Tribunal did not accept the first respondent's screening policies did not apply to the claimant and yet, they were applied to and accepted by the claimant's colleagues also on honorary contracts. Even setting aside the contractual arguments the position taken up by the claimant was incomprehensible given his obligations as a doctor to ensure patient safety one would have assumed health screening would not have been an issue. It was undisputed that the first respondent carried out a greater number of EPP in comparison to other trusts, and it took the view that enhanced screening was necessary. This should not have been an issue for the claimant, and Dr Herod's consternation was understandable.

148. Turning to detriment 5, Mr Boyd submitted the claimant's argument that he should be re-deployed to patient facing non-EPP work was "ludicrous" bearing in mind he had agreed to abide by the Trust's decision and not have patient contact. By 20 May 2012 the claimant had provided some information concerning screening and on 27 May 2012 he was informed that he was considered fit to undertake none-EPP work as indicated below. There was no satisfactory evidence the claimant had requested redeployment and no evidence that the first respondent had refused such a request, and it cannot therefore be said the detriment as set out by the claimant took place, and so the Tribunal found.

149. In conclusion, the Tribunal did accept the claimant genuinely believed from his point of view he had suffered the detriments alleged when he was required to comply with local health screening policies which be believed did not apply to his position and were not in existence or ratified. The Tribunal took the view that the claimant had an unjustified sense of grievance and had he stepped back and considered the position objectively he would have realised his treatment was no different from that of his colleagues for which the first respondent had given good reason for compliance. The claimant's mental distress at being instructed to undergo screening was not objectively reasonable, an objective worker would have understood he could not access patients without the screening in place due to patient health and safety, there had been no inappropriate action on the part of the first respondent and no basis for the claimant's sense that he was being subjected to an injustice.

150. Numerous emails were exchanged between the claimant and first respondent during this period in which the claimant referred to BMA advice concerning trust policy on occupational health screening, and no reference was made by him or on his behalf to any protected disclosures, disability, patient safety or staffing numbers. In one email sent 12.32 from the claimant he wrote **"the BMA did say I needed to ask for a written contract from the Trust,**" [my emphasis] which became another issue for the claimant. It is notable that the claimant claims in detriment 1 against the first respondent that from April 2012 he was refused a copy of written terms and conditions of employment and yet the written contract was requested in or around 25 April 2012 for the first time in the knowledge that a dispute existed concerning the named employer, both the first and second respondent taking a view that it was the second respondent and not the first.

151. In response to the claimant's emails Angela O'Brien emailed at 9.41 the claimant a letter dated 25 April 2012 setting out the first respondent's rationale, which encapsulated the first respondent's position at the time. The letter referred to an admission being made with respect to pre-employment checks as follows; "Whilst it is normal for these checks to be conducted prior to the commencement in post, in your case, it has been identified that at appointment the pre-employment screening, including the occupational health check was not undertaken. This came to light during March 2012. There has therefore been a clear breach of the expected standards on your appointment which prevents us from assuring ourselves that patient safety would not be compromised by your working in a clinical capacity. Our aim therefore in requesting your consent to occupational health check is to enable

the Trust to be assured that the safety of patients has not been compromised and so that you may continue to work clinically in the Liverpool Women's Hospital."

152. The claimant responded at 10.37 thanking her for the letter and stating, "what I really wanted was local procedures and /or the relevant policy on recruitment and selection procedures." It is notable the claimant was not seeking any other type of policy, such as the respondent's whistleblowing procedure. During this period, in accordance with a number of emails sent by the claimant to the first respondent, the only policies the claimant sought access to were occupational health and recruitment, and this was because he subsumed by a belief that that the screening request was not appropriate to him as he had been working for the last 15-months or so without screening. Despite his medical qualification and previous experience in other hospitals (and the first respondent) he failed to comprehend that the first respondent was attempting to ensure patient safety by its insistence that he be screened.

153. Managers in first respondent were gradually losing patience with the claimant and his attitude towards pre-employment screening. Dr Herod was aware that the claimant held some if not all of the documents required and he did not understand why the claimant was intent on disrupting his career in this way. There are numerous emails, far too many for the Tribunal to set out in these reasons, concerning the claimant's position, BMA's full response on the matter and whether he should be attending occupational health or not. Dr Herod took a dim view of the claimant's actions, which were incomprehensible to him given a doctor's responsibility in securing patient safety and as time went by his opinion that the claimant was not suitable for the medical profession gained momentum and became more concrete.

Detriment 7 against first respondent only: humiliating the Claimant, acting through Dr Topping, on the Labour Ward 4 May 2012

4 May 2012 incident with Dr Topping

154. Following the claimant's exclusion, it was understood he was not allowed to work in areas where EPP/clinical practices took place as there was a risk of patient contact, such as the labour ward.

155. On 4 May 2012 the claimant was present in the labour ward at the midwife station, regarded as a clinical area by Dr Topping who was also there at the time. On seeing the claimant, she said; "This is a clinical area" and suggested he should wait in the staff/coffee room. It is possible that this was said in front of other employees.

Conclusion: detriment 7

156. The Tribunal accepts the claimant was genuinely upset by Dr Topping's comment given his professional position. However, it finds that the sole reason for Dr Topping's comment was the fact that she believed the claimant may have been disobeying instructions and creating a potential risk to patients, and there was no causal connection between this incident, protected disclosures or disability. In any

event, the Tribunal did not accept the claimant objectively had been caused a detriment by this comment; he was not allowed in clinical areas and Dr Topping was merely reminding him of this. A reasonable worker would not have taken the view the treatment was in all the circumstances to their disadvantage.

157. Mr Boyd submitted had the claimant in fact felt humiliated as alleged on 4 May 2012 he would have raised a grievance on the 31 May when one was intimated and then on 18 June when his grievance was lodged. The claimant was not cross-examined on this point, and on the balance of probabilities the Tribunal accepts the claimant would have felt anger as he did not like to be questioned or crossed in any way. The Tribunal agreed with Mr Boyd that had the claimant truly believed Dr Topping humiliated him on the 4 May 2012 on the ground that he had made a protected disclosure a grievance would have been raised, and it is notable that there was not a hint of this in the 18 June 2012 grievance that followed on the heels of this incident.

158. If the Tribunal is wrong on this point, in the alternative, had the claimant established detriment 7 the Tribunal would have gone on to find the claimant was in an area where it was likely he would come into contact with patients against a direct management instruction, and Dr Topping's response was unconnected with any whistleblowing. Mr Boyd put the matter succinctly in submissions; the question had everything to do with the state of affairs the claimant had brought on himself by his obstinacy around failing to comply with contractually obligated occupational health screening.

10 May 2012 email from Cheryl Barber to the claimant

159. On 10 May 2012 at 10.19 Cheryl Barber, health and well-being centre manager, emailed Michelle Turner regarding the claimant as follows: "OC Health have contacted all medics who do not have evidence of measles immunity. In this cohort was Mark Tattersall who was emailed individually along with all those who need to attend OH."

160. On the 10 May 2012 Michelle Turner sent a letter to clinicians and managers referring to the problem of individuals "slipping through the net." During this period the issue was placed on the risk register where it stayed until resolution as indicated below, and it was raised at management level meetings. The claimant may not have been aware of all the steps taken by the first and second respondent concerning the OH screening oversight; however, he was made aware that steps were being taken and as time went by, it was clear to him managers and clinicians were aware of the situation, for example, when the claimant was pulled up for waiting by the nurses station on the maternity ward when he had not been screened.

Detriment 8 against first respondent only - instructing the University of Liverpool (the University) to withhold payment of the Claimant's banding supplement

Detriment 2 against second respondent only – 1 May 2012 withholding payment of the Claimant's banding supplement

161. The afternoon of 4 May 2012 Michelle Turner emailed Robin Harrison, HR at the second respondent as follows; "This doctor has failed to comply with our requests to provide evidence to our occupational health department as clearly iterated to him on more than one occasion. The Trust is now incurring costs covering his clinical activities given that we have asked that he doesn't work clinically until OH clearance is ascertained. We are advising Dr Tattersall that we are stopping his on-call payment given that he is not participating in on call. Given this doctor is a university employee I would appreciate a steer from the University as to the next steps from the perspective of the substantive employer. I am not clear what activities Dr Tattersall has been undertaking since being advised that he should not work clinically in the Trust. Clearly this is an unsatisfactory position for the Trust to be in and there are consequences for other employees who are covering Dr Tattersall's activities and potentially for patients."

162. A letter dated 10 May 2012 was sent by Michelle Turner to Carol Mills, director of HR for the second respondent making a similar point but emphasising there was a "gap in patient safety…we cannot be certain that patient safety would not be compromised by his continuing to work for us in a clinical capacity…Due to his ongoing refusal, we have been forced to prevent his continuing to work in clinical capacity by formally suspending him from such duties." Reference was made to the need for an understanding to be reached between the first and second respondent, and the Deanery in connection with future recruitment. She concluded "In the absence of any mutually agreed process, we have determined that in future anyone entering the Trust premises without the required assurance will be prevented from entering a clinical area and may be asked to leave…"

163. The first and second respondents were grappling with a problem that had not been encountered before, and it is clear from the correspondence, they were at a loss as to how to deal with the claimant's refusal to undergo the necessary screening and its consequences on the type of work the claimant could carry out and impact of his responsibilities, duties and pay as the claimant was receiving pay for work that was not being undertaken by him i.e. on call duties when he could not be on call, in circumstances where the first respondent was strapped financially as borne out by the staffing pressures in the maternity department concerning which the first respondent was well aware of having received reports from various midwives and doctors regarding the pressure they were under.

164. In the third letter sent 10 May 2012, Michelle Turner wrote to the claimant and informed him as he had failed to cooperate with the "reasonable request that you attend occupational health to provide evidence or be screened for communicable diseases including EPP screening…your suspension from clinical duty and your continuing refusal to comply with what I believe was a reasonable request made in the interests of patient safety and welfare, leaves me now with no option but to suspend any payment that you have previously received for participation in on call duties. This will be actioned with immediate affect." Michelle

Turner wrote that she regretted these actions; the Tribunal accepted it was unsatisfactory for the first respondent to no longer have the claimant on call, and it put pressure on the organisation a result. The claimant was made aware that Michelle Turner had informed the second respondent of the position.

Conclusion: detriments 2 & 8

165. It goes without saying withholding of and/or a reduction in pay can amount to a detriment. Turning to the first respondent's decision to withhold payment of the claimant's banding supplement for being on call, the Tribunal concluded the claimant was not caused detriments 2 and 8 as alleged, a reasonable worker would not have taken the view the treatment was in all the circumstances to their disadvantage. The payment was withheld for the sole reasons set out in Michelle Turner's 10 May 2012 letter. Had the claimant undergone satisfactory occupational health screening he would have continued to work on call, received the banding supplement and no payment would have been withheld. There was no causal nexus between whistleblowing, disability discrimination and the fist respondent's actions in connection with withholding payment of the claimant's banding supplement.

166. The Tribunal finds claimant was the author of his own misfortune, but for his unreasonable intransigence the claimant would have received the banding supplement which he could no longer expect to be paid when the work was not being carried out through nobody's fault but his own. The Tribunal did not accept the claimant genuinely believed from his point of view he had suffered a detriment; a reasonable worker would not have taken the view the treatment was in all the circumstances to their disadvantage.

167. Mr Boyd submitted this was a "completely hopeless allegation." The Tribunal agreed having heard evidence from the first respondent's witnesses as to the importance of screening, hence the first respondent's enhanced policy and the fact the claimant's colleagues agreed to be screened immediately when requested. Mr Boyd is correct when he stated the claimant's refusal to be screened set in hand a train of events; these findings of facts are based partly on the contemporaneous documents that passed between the parties reveal this. The claimant's refusal resulted in him being unable to have face-to-face contact with patients for health and safety reasons, as a result he was unable to take part in the on-call work that involved face-to-face patient contact for which the banding supplement was payable. It is not disputed the second respondent paid the claimant's salary (hence some of the confusion as to whether the claimant was an employee of the first respondent or not) and the first respondent would need to inform the second respondent to stop the claimant's on-call pay. The alternative would have been for the claimant to have been paid for work not carried out as a result of his failing to obey a reasonable management request aimed at protecting the health and safety of patients. The communications between the first and second respondent managers on this matter were not motivated or causally linked to any whistleblowing allegations as alleged and so the Tribunal found.

168. A letter was sent to non-directly employed workers dated 10 May 2012 from Michelle Turner that referred to serious concerns being raised regarding risks associated with the entry off non-directly employed workers, including staff employed on honorary contracts, and the requirement that minimum pre-employment check standards were to be completed. Reference was made to a Corporate Risk Committee Meeting held in May in which the issue had been discussed. There was a suggestion within these proceedings by the claimant that he had raised this issue; the reverse was in fact the case. All the contemporaneous correspondence points to it being raised exclusively by the first respondent, and it is clear from a number of contemporaneous communications the first respondent was not hiding from the fact that minimum pre-employment checks had not always been carried out, as in the case of the claimant and his two colleagues, and action had been taken to address the situation. The claimant would have known the first respondent, at least, had taken steps to address the issue.

169. In a letter 15 May 2012 from the first respondent to the second confirming the claimant had been removed from clinical duties and for his on-call payments to be suspended from 10 May 2012 until further notice. Thereafter, the claimants on call payments ceased and this became a real issue for the claimant and served to increase the animosity he felt for the first respondent's higher-level management.

Third alleged protected disclosure [described by the claimant as the fourth] 20 May 2012 to Joanne Topping [relating to the first respondent only]

The Claimant wrote a letter to Dr Topping expressing his concern that the Trust lacked express policies to cover the blood borne virus pre-employment screening process of staff and raised his concern that he felt like he was being treated differently to other employees of the Trust.

S.43 B ERA- (1)(b) Breach of any legal obligation: the legal obligations on an NHS Trust to ensure appropriate HR and OH policies are in place and applied consistently in compliance with Department of Health requirements and the legal obligations to not discriminate against an employee because of their disability

Detriment 9 against first respondent only - From 20 May 2012 refusing and/or delaying its decision to allow the Claimant to return to work with patients and restricting his work to non-EPP duties despite his provision of health screening documents

Claimant's letter dated 20 May 2012 to Dr Topping

170. In a letter dated 20 May 2012 from the claimant to Dr Topping the claimant enclosed laboratory reports dated January 1999 to February 2008 as evidence of his occupational health clearance, on the basis that it was "reasonable" for the first respondent to have requested the documents. He refused to provide other information and sought confirmation of "the basis on which the Trust believes it is reasonable to ask me to provide HIV serology, Hepatitis B…Hepatitis C serology" setting out his concerns that "my treatment may be different to that provided to other

employees in the Trust." The claimant made no mention of his belief that he was being singled out because he had made protected disclosures and or was or disabled. The Tribunal found had this been the claimant's view at the time, he was would have made the position clear, concluding it was not the claimant's view.

Conclusion third alleged protected disclosure 20 May 2012

171. The Tribunal found the letter did not set out the same concerns as those referred to by the claimant in the detail of his alleged disclosure as set out above. The claimant was not providing any information. In conclusion, the Tribunal did not accept the claimant had made the third alleged protected disclosure to Dr Topping as described above. He had merely asked for the basis on which the first respondent believed it was reasonable to ask him to provide the serology against a background of the claimant repeatedly refusing to provide the necessary evidence for occupational health clearance. He did not provide any information to the effect that the first respondent was in breach of its legal obligation as alleged.

172. Had the claimant made a protected disclosure as alleged, the Tribunal would have gone on to find it had not been made in good faith and in the public interest. The claimant's sole motivation was the dispute concerning screening and the claimant's belief that his treatment was different to that of other employees when clearly it was not if one were to compare the claimant with his colleagues.

173. Cheryl Barber was asked to comment on the claimant's documentation and observations. She wrote in an email sent 22 May 2012 "I think Mark is a tad confused. What I said was that I would not be performing a 'New Employee/Pre-employment screening' (as he has been on post for over a year), OH normally requests screenings or evidence of the above, HIV etc, of all employees at recruitment stag as do all other occupational health departments that I have an association with. Mark received the same request as would anybody else." Her position was borne out by some of the earlier correspondence. After the claimant had provided the health screening documentation Cheryl Barber wrote to the first respondent's HR department confirming he had been assessed as "fit for work: direct contact/social contact with patients. The employee has not been assessed fit for EPP." The reference to EEP related to the evidence the claimant had yet to provide, and was questioning the validity of being asked to do so. Cheryl Barber's view, and that of the first respondent, was that this was required for all employees on an honorary contract and the Tribunal found the claimant was not treated any differently.

174. Given Cheryl Barber's advice that the claimant was fit to work but had not been assessed for to undertake EEP Dr Topping agreed to allow the claimant to return to restricted clinical duties, but as he could not undertake any Exposure Prone Procedures he could not return to on call work and as a result, his pay remained reduced.

Conclusion: detriment number 9

175. With reference to detriment numbered 9, it goes without saying excluding employees from the workplace, restricting an employee work and not paying for on call duties to take account of the restrictions, can all objectively amount to a detriment being caused. The Tribunal did not accept the claimant genuinely believed from his point of view he had suffered a detriment and a reasonable worker would not have taken the view the treatment was in all the circumstances to their disadvantage. Given the claimant's decision to ignore the reasonable management instruction the first respondent was entitled to allow the claimant to return to work by restricting him to non-EPP duties, given Cheryl Barber's professional view that the claimant had not supplied the necessary clearance for EPP. Dr Topping took into account this given Cheryl Barber's expertise in occupational health matters. Cheryl Barber concluded the claimant's health screening documents were not sufficient valid to cover EPP, and this resulted in another spate of acrimonious correspondence from the claimant, who had been warned numerous times beforehand of the consequences to his actions Alleged detriment 9 would not have come as a surprise to him..

176. In conclusion, the Tribunal found the claimant had not suffered a detriment; had he provided valid health screening documents necessary for EPP Dr Topping would have ensured his return to all clinical duties including those involving EPP and the claimant had failed to do so. The claimant objectively could not reasonably complain about the treatment, and any other employee in the same circumstance would have been treated the same. The obligation was on the claimant to ensure valid health screening documentation sufficient for EPP clearance was provided, he had failed to do so and the consequences were a restriction in his duties and thus pay as he could not safely carry out on call work. The adverse treatment was not "done on the grounds" had the claimant had raised protected disclosures, and had any whistleblowing taken place, the Tribunal would have found in the alternative, it did not influence in any way the treatment meted out to the claimant.

Detriment 10: 10-25 May 2012 failing to provide the Claimant with all documents he is entitled to under Data Protection legislation and refusing to comply with Freedom of information obligations

Claimant's first request for information 25 May 2012.

177. The claimant's first request for information was made on 25 May 2012 and not 10 May 2012, and this request resulted in a substantial amount of party-to-party communications, a number of which have been set out below.

178. The claimant was unhappy with his reduction in pay, and in an email sent 25 May 2012 at 12.52 he made his position clear. The claimant was very critical as he believed the Trust was wrong to reduce his pay when he was getting advice from the BMA. He wrote; "I do not understand your reference to payment, as I have only an honorary contract…and do not receive any salary from the Trust." A request for documents was made as follows: "details of any discussion/correspondence held

with the University by either yourself/the Trust…. any documentation held by the Trust regarding such discussions and…any documentation held by the Trust regarding myself." It is conceded by the first respondent that some (but not all the information sought) was provided after a period of 2-months had passed. The 25 May email sets out the claimant's case as he perceived it at May 2012 and there was no hint of the payment being withheld as a result of him whistleblowing or being disabled.

Conclusion: detriment 10

179. The claimant's request for information was very general and it was not clear on the face of the email in which the claimant had not referred to the DPA, FOIA, the first respondent's Policy or the fact he was making a subject access request. It is not disputed the first respondent does not deal with the request in good time, and the claimant does not chase it up. The Tribunal on the balance of probabilities found the claimant was not prejudiced by any delay, and in the alternative, had he been so prejudiced it would have gone on to find the first respondent's dilatory response was not motivated or causally linked to any whistleblowing. The adverse treatment being the time it took for the respondent to deal with his request, was not "done on the grounds" the claimant had raised protected disclosures (on the theoretical assumption that one had been made).

180. The Tribunal was not in a position to adopt the approach suggested by Mr Boyd, which was to pose the question what documents eventually emerged that had not been originally disclosed, and were they 'material' documents to the whistleblowing allegations. The Tribunal did not know; there was no evidence before them as to what documents that should have been disclosed were relevant to the whistleblowing, and nor was there any evidence of detriment caused to the claimant by the none or late disclosure.

181. In an email sent 27 May 2012 to the claimant Angela O'Brien set out in detail the first respondent's position concerning the requirement that the claimant should provide the necessary information for health clearance in order that he could carry out EPP procedures, because the discovery that he had not been cleared at pre-employment stage was a recent one. The claimant was informed that he was unfit to participate in clinical duties until EPP clearance. She concluded "therefore, until a risk assessment can by undertake you are considered to be unfit to participate in clinical duties."

182. The claimant had obtained clarification of DoH guidelines in April 2012 for healthcare workers moving to a post, and 29 May 2012 email he was informed that "The DH guidance does not recommend routine blood borne virus screening of HCW's who move from EEP post to EEP post. Any policy a Trust has on such screening will be a local one." On the same date the claimant emailed Karen Murrell to the effect that "the Trust seems to be in no rush and seems to be potentially locked in a battle with the BMA over legal issues/contractual matter! I think everyone else is enjoying all the locum pay its generating…and I get more time for research so it only seems that the Trust are the ones who lose out as they end up spending more

money." There was no evidence before the Tribunal at this point of time that the first respondent was locked in a legal battle with the BMA, and what this email reflects is the claimant's state of mind with no thought given to whistleblowing or disability discrimination.

The claimant's first grievance 31 May 2012

183. A grievance was raised by the claimant in an email sent to Michelle Turner as follows; "in respect of your current deployment of myself to non-patient contact duties. I **believe it is unreasonable of the Trust to try and have my salary paid by the University in order to try and force me to accept the Trust's health requirements, which I believe to be unreasonable and potentially contrary to any contract between myself and the Trust**, [my emphasis] given that they are contrary to Department of Health guidance…I regard the trust's failure to do so as a breach of contract, and specifically state that my grievance includes such a breach of contract." The claimant did not raise his alleged belief at the time that withholding the May salary was an act of retribution for making a protected disclosure or was in any way related to his disability, and the 31 May 2012 grievance reveals the true state-of-affairs as perceived by the claimant whose issue with the first respondent was EPP clearance, his access to patients and pay.

Fourth alleged protected disclosure [described by claimant as fifth] to Angela O'Brien, Dr Topping, Dr Herod and Michelle Turner 6 June 2012 email [relevant to the first respondent only]

The Claimant emailed Ms Angela O'Brien, Ms Joanne Topping, Mr Jonathan Herod and Ms Michelle Turner again expressing his concern about a lack of Trust policy covering the blood borne virus screening of employees of the Trust. The Claimant also states he feels he is being treated differently to other employees in similar positions.

S.43B ERA (1)(b) Breach of any legal obligation: the legal obligations on an NHS Trust to ensure appropriate HR and OH policies are in place and applied consistently in compliance with Department of Health requirements and the legal obligations under the Equality Act 2010 to not discriminate against an employee because of their disability

The claimant's email of 6 June 2012

184. In an email sent on 6 June 2012 to the recipients as set out above, including Angela O'Brien and Dr Topping, the claimant alleged the first respondent "has failed to provide a response to my email of 29 May 2012 and that as such I am still being prevented from conducting research activities involving patients within the Trust". The claimant attached a copy of the DoH email dated 29 May 2012 referring to a local screening policy and he wrote "I understand that the Trust has no Policy that details that any testing of employees will be carried out outside of the Department of Health guidelines. I would be grateful if the Trust could confirm this?"

Conclusion fourth alleged protected disclosure 6 June 2012

185. The Tribunal found the 6 June 2012 email did not include the alleged fourth protected disclosure referred to above; it expressed no concerns and provided no information to the effect that the first respondent was in breach of any legal obligation as now alleged by the claimant. The claimant was seeking information and not providing it, information the claimant had been seeking for some time, and his request for confirmation of the Policy was not the claimant expressing concern in the terms set out within the protected disclosure allegedly made.

186. The alleged disclosure relied upon by the claimant in this email is that the first respondent had no policy that confirmed testing of employees was outside DoH guidelines. The email does not reflect this; the claimant's real complaint was that he was being required to be tested outside DoH guidelines, and his refusal to do so had resulted in his pay being adversely affected. It is notable he had not been carrying out clinical duties for over a month yet his normal pay had continued without any complaints being raised by the claimant. The Tribunal concluded on balance, the 6 June 2012 email was sent in the claimant's self-interest because he was aggrieved at the reduction in pay and it was not a protected disclosure.

187. Had the Tribunal concluded the 6 June 2012 email was capable of amounting to a protected disclosure (which it did not) in the alternative it would have found as the disclosure occurred before 25 June 2013 good faith was required on the part of the claimant. It would have found the claimant's motive was not that of public interest but the grudge he held against the first respondent and its managers due to their insistence for health screening and the consequences to the claimant for his refusal to be screened.

188. There were numerous emails, too many to record, concerning the issue of the claimant's duties and the requirement that he could not undertake EPP, and what he perceived to be the unlawful withholding of wages and contractual dispute over which he raised a grievance with the second respondent on 31 May 2012. The grievance went no further when the claimant was informed the payment could not be reinstated by the University until confirmation was received from the first respondent. At no point did the claimant state to either respondent payment was being withheld as a result of him making protected disclosures and/or being disabled. The Tribunal concluded as a matter of logic, this can only be because the claimant did not think this was the case at the relevant time as borne out by the May 2013 medical reports.

Fifth alleged protected disclosure [disclosure number three in the claimant's list] - 8 June 2012 conversation with Angela O'Brien [relevant to the first respondent only]

The claimant alleges that during a telephone call on 8 June 2012, when the Claimant called Ms O'Brien back in response to a telephone message she had left for him, the Claimant made disclosures to Ms O'Brien concerning the Trust's:

- *lack of pre-employment checks;*

- *lack of OH screening and document checking for staff, particularly those with honorary contracts or seconded to the Trust by other organisations;*
- *the Trust's attempts to cover up its failings to the Board and regulators;*
- *concerns around staffing levels, particularly on the Labour Ward; and*
- *Resulting risks to patient safety.*

I was returning the telephone message she had left. I raised my concerns that the Trust seemed to be making up policies as things went along and the manner in which there seemed to be a cover up to ensure that the Board did not find out what was really going on, I said my concerns about staffing levels had been treated in the same regard, i.e. minimised and covered up. She did not really offer any response, saying she would note my concerns with the relevant people and get back to me.

The claimant relies on S. 43B1)(b) Breach of any legal obligation: the legal obligations on an NHS Trust to ensure appropriate HR and OH policies are in place and applied consistently in compliance with Department of Health requirements and the legal obligations to comply with CQC regulations, particularly those in relation to patient safety and staff (1)(d)- Danger to the health and safety of any individual: risks to patient safety (1)(f) That information tending to show any matter falling within s43B(1)(a)-(e) is being or is likely to be deliberately concealed.

8 June 2012 conversation between the claimant and Angela O'Brien

189. By the 8 June 2012 the claimant was aware that he could undertake clinical/patient orientated work at the Women's hospital, but no EPP. A telephone conversation took place between the claimant and Angela O'Brien which lasted over 30 minutes. There is an issue over what was said by the claimant during that call. The claimant alleges that he raised concerns that the Trust made up policies as it went along, it appeared to be covering up its wrongdoing to ensure the Trust board did not find out what was going on, concerns about staffing levels were being covered up and minimised, and Angela O'Brien did not offer any response but noted his concerns.

190. Angela O'Brien disputed the claimant's version of events. Angela O'Brien discussed the screening of the claimant's two colleagues, and the claimant queried whether the Board was aware of this. Angela O'Brien informed the claimant that it was on the risk register, and she took it that the claimant was challenging the need for him to undertake further screening. Angela O'Brien had no recollection of the claimant raising the issue of staffing levels, and the letter which followed the discussion recorded the claimant's concerns as he had raised them. She denied the claimant had raised an issue concerning staffing levels on the labour ward and risk to patient safety.

191. The satisfactory evidence before the Tribunal was that the conversation centred around the claimant seeking clarification around the first respondent's policy requiring him to consent to an occupational health check, and Angela O'Brien explained how it had come about the Trust was asking for the claimant's consent. The Tribunal accepted Angela O'Brien's oral evidence that "I was open explaining

what had happened. The board was aware there were gaps as it was on the risk register." The claimant had a lot to say, and Angela O'Brien was unable to recall all of it.

192. The resolution in the conflicts of evidence by the Tribunal rests with the contemporaneous documents that passed prior to and after this meeting. There exist the emails in the bundle exchanged on the 8 June 2012 and following this date they related to contractual matters such as on-call rota, and EPP/occupational health. For example, the claimant wrote "I assume…the Trust may wish me to undertake clinical duties from Tuesday 19th June…obviously noting that 21st and 26th June are 'zero hours days." There was no reference whatsoever in any exchange from this date through to the written grievances on 18 June 2012 referred to below. All of the claimant's written communications up to this date are concerned with occupational health checks/screening, contractual matters and pay. The evidence before the Tribunal as indicated earlier was that the first respondent was open about their failures in the screening process and had taken steps to put it right; there was no hint of a cover up as alleged by the claimant in the alleged disclosure and had there been the Tribunal is in no doubt the allegation would have been put in writing, as was the claimant's way.

193. During the conversation the possibility of the claimant bringing a grievance was discussed, Angela O'Brien referred to meeting with the claimant and his representative. The Tribunal accept she envisaged an informal meeting under the Policy.

194. Angela O'Brien in a letter dated 15 June 2012 referred to the 8 June 2012 discussion and the "issues you have raised" which she set out as return to non-clinical duties, grievance relating to stopping payments for on-call duties and clarification of Trust's position. She provided the information sought, and suggested a meeting with the BMA representative "as discussed during our telephone conversation last week." She also clarified the Trust's position as to the requirement that he be screened, as this had also been challenged by the claimant. It is telling that nowhere in the letter was there a reference to staffing levels or the protected disclosures allegedly raised by the claimant.

195. The claimant in an email sent 18 June 2012 referred to contractual issues and EPP, and he did not pull Angela O'Brien up on failing to refer to the protected disclosures as the claimant now describes were allegedly made in the 8 June conversation, or remind her of them. It was as if the alleged disclosures had never been made and so the Tribunal finds they were not. The claimant did not challenge what was said, and his response was to put in two grievances.

<u>Conclusion fifth alleged protected disclosure 8 June 2012</u>

196. The Tribunal found the claimant did not make the protected disclosure as alleged, preferring the more credible evidence of Angela O'Brien supported by contemporaneous evidence that the claimant had not disclosed any information, he was seeking information from the first respondent concerning his non-clinical duties,

on-call payments and clarification of the Trust's position on screening and the Board's knowledge of the first respondent's failure in respect of screening.

Sixth alleged protected disclosure to Angela O'Brien -18 June 2012 grievance [first respondent only]

The Claimant submitted a formal written grievance to Ms O'Brien which complained that the Trust had failed to provide him with written statement of terms and conditions and that it had suspended payment of his banding supplement on 10 May 2012 in breach of contract.

S.43B ERA - (1) (b) Breach of any legal obligation: breach of the legal obligation under ERA 1996 to provide a written statement of terms and conditions of employment.

18 June 2012 grievances

197. The claimant emailed Angela O'Brien attaching two grievances. He concluded in the email "I have tried to telephone you to see if there is any likelihood of this matter being resolved without formal procedures, but I'm happy to discuss the matter by telephone in a 'without prejudice' fashion if you might think this might help."

198. The two formal grievances submitted on 18 June 2012 concerned the first respondent's failure to provide a written statement of employment, and unlawfully implementing Trust Policy regarding EPP without notifying the claimant of this contractual obligation at the start of his employment. To resolve the matter the claimant sought a formal apology, the Policy to be formalised in writing making the DoH guidance clear.

199. The second grievance related to the suspension of the claimant's banding supplement "due to its decision to redeploy me" and he sought an apology, repayment of monies owned and payment of legal costs. It is notable the claimant was not raising any allegations to the effect these detriments had flowed from him making protected disclosures or he had been discriminated against on the grounds of disability, and the Tribunal came to the view that this was because he did not believe either of these events had taken place. The claimant's evidence setting out the detriments and discrimination he had allegedly suffered during this period is not at all credible; it was not supported by any satisfactory contemporaneous evidence and the Tribunal took the view that the claims were an afterthought aimed at strengthening an otherwise weak case. The claimant's complaint essentially revolved around the fact that he is no longer in receipt of on call pay, despite not working any on call sessions.

Conclusion sixth alleged protected disclosure 18 June 2012

200. The claimant asserts that his grievances were protected disclosures raised in the public interest, the first respondent was in breach of its legal obligation under S.1 of the ERA and the claimant's contract of employment, and it was in the public

interest for the claimant to disclose this. The Tribunal did not agree. There was no suggestion in the grievance documents that the claimant had public interest in mind; his sole concerns related to his own employment position and loss of salary.

201. In the alternative, had the Tribunal accepted the claimant made a protected disclosure as alleged, it would have gone on to find the claimant the claimant lacked good faith. His motive was not that of public interest but the resolution to his satisfaction of the employment/contractual dispute he had with the first respondent and its managers, and the consequences to the claimant for his refusal to be screened.

202. Had the claimant made the protected disclosures on 18 June 2012 as alleged, the Tribunal accepted submissions made by Mr Boyd to the effect that he was not subjected to any detrimental treatment. The first respondent was confused about the claimant's contractual status, genuinely believing he was the employee of the second respondent who had recruited him and this resulted in a delay before the contractual status was clarified and a statement of terms and conditions of employment provided, as set out in the factual matrix. Turning to the suspension of on-call payment, the Tribunal found this was not a detriment on the basis that the first respondent was entitled to request the non-EPP duties given the fact the claimant could not work on call and this state of affairs was solely attributable to the claimant's actions; in short, he was the author of his own misfortune. Finally, in the alternative, the Tribunal found there was no causal connection between the 18 June 2012 alleged disclosure and any detriments alleged after this date.

Detriment 11 relating to first respondent only: June 2012 failing to arrange a stage 1 grievance hearing in breach of the Trust's grievance policy

The respondent's Grievance Policy

203. The Grievance Policy dated 19 May 2010 provided a framework for dealing with employment problems. The following paragraphs are relevant:

(1) Paragraph 6.1.1 provided if a grievance is raised with this policy and procedure the status quo will apply until the procedure has been completed or the grievance resolved. The status quo is defined as the working and management arrangements which apply prior to the grievance.

(2) Paragraph 6.3 provided an informal procedure.

(3) Paragraph 6.4 provided a formal procedure sets out a number of requirements including the requirement that a formal meeting be held within 5-working days.

204. The Tribunal accepted Angela O'Brien interpreted the claimant's 18 June 2012 email to read that he hoped to deal with the grievances informally, and she did not get back to him until the 25 June 2012. However, Angela O'Brien had made it clear in her letter of 15 June 2012 that the matter could be resolved informally and she was of the understanding the claimant agreed with this. On the 21 June 2012

(referred to below) the claimant wrote to Angela O'Brien confirming the informal stage of the grievance procedure had been exhausted and requested a formal hearing, which suggests Angela O'Brien's interpretation was the correct one, and there had been no failing on her part to arrange a stage 1 grievance hearing at the outset given the informal procedure was being followed.

Conclusion: detriment 11 June 2012

205. Given the references by both the claimant and Angela O'Brien to the informal stage procedures, the Tribunal accepts on the balance of probabilities the 5-days for stage 1 could not realistically have been met by the time the claimant confirmed on 21 June 2012 the informal stage had been exhausted as this was 4 days after the grievance report had been submitted. The Tribunal accepts any delay was caused by the parties reasonably exploring an informal resolution and thereafter the dates and availability of the parties for the formal process to be arranged. Bearing in mind the substantial delays caused by the claimant's inability to attend numerous meetings and hearings as detailed below, the Tribunal finds the claimant's claim that he was subject to a detriment surprising.

206. Even had the grievance hearing been delayed as alleged by the claimant without reference to any attempts at an informal meeting there was no evidence that the claimant had suffered a detriment as a result. The Tribunal did not accept the claimant genuinely believed from his point of view he had suffered a detriment; this was yet another fabricated complaint and a reasonable worker would not have taken the view the treatment was in all the circumstances to their disadvantage.

207. In addition, the Tribunal would have gone on to find, had the claimant established detriment, it was not on the grounds of the claimant having made a protected disclosure.

208. Dr Topping was concerned about the first respondent's stance on the EPP and the claimant's clearance. She emailed Angela O'Brien expressing her concern referring to morally and legally shaky ground. The Tribunal finds Dr Topping was looking at the issue objectively and according to the claimant's oral evidence on cross-examination, she was somebody he could trust. Dr Topping's concerns were put to rest by Angela O'Brien who, in an email sent the following day stated "I've taken advice on the matter regarding local policy…I am assured…we have [been] conducting EEP screening for all relevant new starters…by requiring them to provide us with evidence that they had been screened previously and by requiring them to answer the section of the appropriate health questionnaire. Our recruitment procedures (which follow NHS employer's guidance) require occupational health screening – although the detailed requirement of the occupational health screen is not written into the policy document this does not diminish the fact that this is in fact our policy." There is a reference to October 2012, which clearly was an incorrect date given the email was dated 14 June 2012, but nothing hangs on this. Reference was also made to the possibility of offering the claimant an informal grievance meeting to resolve his pay issue.

209. Numerous emails were exchanged concerning the claimant's working pattern and his request for zero hours which was denied on the basis that zero hours were compensatory rest days in respect of on call only, and as the claimant was not working on call there was no requirement for zero hours to be in place. The claimant was informed of this, after an exchange of emails with Karen Murrell on 14 June 2012. He complained about the change in working hours made without his agreement, despite the first respondent's position that compensatory rest day were compensation for working additional on call hours, and as the claimant was not working the on-call hours he did not need the compensatory rest days. In short, the claimant was required to be available for work and meetings within the workplace. This did not suit the claimant as he wanted the freedom to attend meetings and carry out his research. During this period the claimant was put on the rota to work, and he acknowledged that by email sent 15 June 2012.

210. In an email sent 15 June 2012 by the claimant to Karen Murrell the claimant maintained that deployment to different duties i.e. initially non-clinical and now non-EPP performing, "does not allow the Trust to change my working hours, i.e. make me work on the days when contractually I am off and have other commitments…" During this period the claimant continued to seek confirmation of the first respondent's position with respect to the guidance provided by DoH, and there were emails exchanged in relation to this also.

<u>21 June 2012 letter: victimisation allegation</u>

211. On the 21 June 2012 the claimant wrote to Angela O'Brien as follows: "I note…that you have communicated with the University of Liverpool, the latter action which I believe to be unreasonable and potentially an act of victimisation, breach of contract and unlawful…the Trust's actions in attempting to change my hours of work…and to make me work during time when I was not previously not contracted to work for the Trust. I believe this action of the Trust is unreasonable and potentially an act of victimisation, breach of contract and unlawful." This was the full extent the claimant's victimisation complaint and so the Tribunal found; there was no reference to disability discrimination. The claimant continued; "**I believe we have exhausted the informal stage of the grievance procedure** [my emphasis] and request that the formal part of the proceedings is undertaken. I note that the grievance meeting should be held by 25 June 2012." As indicated in its conclusions below, the Tribunal found that the 21 June 2012 letter from the claimant was not a protected act under S.27 EqA; the reference to victimisation was unspecified and not linked to disability discrimination but union detriment and assertion of a statutory right as set out in the first ET1 referred to below.

212. "Under protest" the claimant provided the outstanding documentation relating to screening" informing the respondent that he would continue Employment Tribunal proceedings. This was the day on which the first claim was issued with the Employment Tribunal.

Employment Tribunal proceedings: 2405298/2012 (victimisation allegation)

213. The claimant's claim essentially mirrored his grievances: failure to provide a written statement of terms of employment and a declaration of whether the claimant's written contract enables the respondent to request "medical documentation/tests that are in excess of those required by the Department of Health Guidance… [relying] on 'local policy'…not specifically provided for in writing, relying upon an occupational health questionnaire. Discrimination and/or victimisation due to the claimant "requesting union input into this procedure and for attempting to exert statutory rights" and unlawful deduction of wages.

214. Angela O'Brien, having taken advice from Cheryl Barber, responded in an email sent 21 June 2012 at 12.41 to the effect that one of the documents provided by the claimant for EPP clearance "does not stipulate or confirm that it was from a validated sample. The other 2 documents clearly state identified and verified samples. I can not clear on that basis." It is not disputed that at 21 June one document was not validated, and the claimant was asked to provide a validated blood sample for the one remaining screening.

215. Angela O'Brien in a letter of 25 June 2012 concerning the grievance referred to her confusion as she believed from the claimant's letter of 18 June and hers of 15 June agreement had been reached that the informal grievance process would be followed. She suggested the claimant provided BMA contact details in order that a formal meeting could be arranged, a reasonable suggestion given the fact the claimant was supported by the BMA.

216. During this period there was an exchange of email correspondence between the claimant and Cheryl Barber concerning immunisation updates. The claimant was informed on 28 June 2012 "staff who attended occupational health for an immunisation update, for i.e. Hep B 5 yearly booster, measles screening, if they are in the role of EPP they are offered screening, to date no member of staff has declined."

217. In an email sent 25 June 2012 to Angela O'Brien the claimant complained "…as I have heard nothing about the grievance meeting which should be held today…whilst I am willing to try and resolve matters informally, I have been very disappointed by the Trusts apparent unwillingness to do so, and this is the reason for my having begun formal proceedings…but the formal processes must progress onwards…I must insist the formal processes are carried out to the appropriate timescales…I am happy to attend a grievance meeting…this afternoon, as I understand such a meeting should take place by the end of today if the 5-day timing is to be met." The Tribunal notes the claimant wrote this letter without responding to the earlier request for his trade union representative's details.

218. Angela O'Brien responded on 27 June 2012 at 12.29 "I wrote to you on Monday explaining my confusion regarding your letter of 21 June…if you wish to proceed to the formal grievance procedure I will now take steps to organise this…it would help to have the names of all parties (including your BMA representative. The

Tribunal noted that the significance of the claimant's BMA representative and her availability became apparent in time, as it was at times difficult to arrange meetings due to the fact the BMA representative worked part-time. It is common industrial practice for HR to involve the BMA when planning meetings, including those dealing with grievances, and it was not unreasonable for the claimant to be asked to provide his BMA representative contact details if he intended to be accompanied at the meeting.

219. As indicated above, the Tribunal found the claimant had not suffered any detriment as a result of the grievance hearing not taking place within 5-days of receipt on the basis that the parties had agreed to deal with the grievance informally at the outset, and when it became clear the claimant wished for the matter to be dealt with formally, steps were taken to arrange a meeting between the first respondent and the claimant who was to be supported by the BMA.

Detriment 14 relating to first respondent only - from 27 June 2012 refusing to answer the Claimant's request for the status quo to be preserved per the Trust's grievance policy and failing to preserve the status quo

27 June 2012 email – the claimant's wish for the first respondent not to liaise with BMA.

220. There was a further exchange of emails concerning the contractual position with Cheryl Barber. The claimant was seeking clarification and it is against this background the Stage 2 grievance hearing was arranged for 23 July 2012 at 12.30pm before Dr Herod. The claimant had requested the Trust move to a second stage grievance hearing in his email sent 27 June 2012, which was agreed to. The claimant also wrote "I assume the Trust is not willing to invoke the 'status quo' procedures detailed in the grievance policy?" The status quo referred to was the payment of full salary and zero hours despite the claimant's failure to comply with screening and as a consequence being unable to work on call and accrue zero hours. The claimant was seeking payment for work he had not carried out as a result of his own intransigence.

221. Immediately prior to the claimant's grievance he was on restricted duties unable to perform EPP and on call duties; his pay had been reduced accordingly but only after approximately a one-month period since being unable to carry out clinical duties and then being placed on restricted duties. This delay of a month was to ensure the claimant received his full pay in the expectation that he would satisfy the occupational health screening process quickly in the same way as had his colleagues. The claimant had known from 10 May 2012 his pay would be affected, five weeks before he raised his grievance.

222. The commonsense meaning of the words "working and management arrangements which apply prior to the grievance" must refer to the period immediately prior to 18 June 2012 during which the claimant was limited to working on non-clinical duties as he could not work on EPP due to patient safety. The claimant's interpretation is either that he should have been put in the same position

he had been before refusing to provide EPP clearance even though he continued in his refusal and it was not possible for him to carry out his full duties, or that he could not carry out clinical duties but should still be paid for it. The claimant's position is illogical, the status quo cannot be the claimant (whose decision it had been not to provide the screening) returning to work on EPP duties, possibly putting patient safety at risk in order that he would be in receipt of full pay, and so the Tribunal found.

Conclusion: Detriment 14

223. With reference to detriment 14 the Tribunal found the claimant had not suffered a detriment in that the first respondent had not failed to preserve the status quo. The non-EPP patient contact was in place prior to the grievance and that was the status quo.

224. Mr Boyd submitted for the claimant was to carry out EPP's whilst the grievance was ongoing, even though he refused to be screened a "silly and ignorant argument." The Tribunal accepted the evidence before it that the first respondent genuinely believed the claimant could not safely carry our EPP (notwithstanding the weekend he worked when the issue first came to light) for health and safety reasons. It is a moot point whether the claimant made a request for the status quo to be preserved or merely made a statement; the Tribunal finds that an assertion was made but this could have been properly interpreted as a request. The issue before the Tribunal was whether any detriment had been suffered by the claimant and it found none; the claimant's working arrangements had not changed. In the alternative, even if the status quo had not been maintained the Tribunal would have gone on to find it had nothing to do with whistleblowing and everything to do with patient safety. In short, the claimant was the author of his own misfortune by the decision he had taken not to be screened.

225. If the Tribunal is wrong on this point, it would have gone on to find there was no causal connection between the claimant's reductions in pay occasioned by the respondent's failure to preserve the status quo and whistleblowing and/or disability discrimination. The sole reason for the claimant's predicament was self-generated; the claimant had failed to provide a validated screening document as a result he was unable to conduct EPP duties and could not be on call.

226. It is notable in the email sent on 27 June 2012 the claimant made it clear that he did not want the first respondent to "liaise directly with the BMA…I am willing to consider any informal proposal to settle this matter…" In short, the claimant was seeking a financial settlement and tis remained the position throughout.

227. As Dr Topping had made the decision in relation to the claimant's health clearance and EPP, she prepared a document summarising why she made the decision and it was expected she would present this at the stage 2 hearing.

Detriment 15 relevant to first respondent only - 9 July 2012 humiliating the Claimant, acting through Dr Schofield, on the Labour Ward

9 July 2012 Dr Schofield incident

228. On the 9 July 2012 the claimant was asked whether he was permitted to be in clinical areas by Dr Schofield when the claimant was on the labour ward standing next to the midwifery station. The claimant immediately raised a complaint with Dr Topping copied to Dr Herod on the same day, maintaining Dr Schofield had asked him whether he had been screened for infectious diseases. He stated that he had been humiliated in the presence of other staff. The complaint was investigated.

229. Dr Schofield provided a witness statement but was not called to give evidence at the liability hearing. There is a dispute between her and the claimant as to whether any other person was present near the midwifery station on the 9 July 2012, and on this issue the Tribunal prefers the claimant's evidence that other people were around and they could have heard the claimant's presence being questioned. There is an issue as to whether Dr Schofield asked had the claimant been screened for infectious diseases or according to Dr Schofield, whether he should be walking thought the labour ward given his current status. Again, the Tribunal preferred the evidence of the claimant, and further, it accepts the claimant who is status conscious, would have been very upset by these comments and by the fact that he was challenged.

9 July 2012 email claimant to Dr Topping (victimisation allegation)

230. The claimant emailed Dr Topping as follows; "I write to express how upset I am by the way in which I have just been humiliated on the labour ward…when one of your consultant colleagues…asked me…whether I was permitted to be in clinical areas and whether I had yet been screened for infectious diseases…I am already upset by the way in which the Trust is restricting my work…and I feel this is unfair and discriminatory behaviour…"

Conclusion: detriment 15

231. The Tribunal accepts the claimant suffered a detriment, had it not been the case that the claimant raised no protected disclosures. The Tribunal found there was no causal connection between whistleblowing and Dr Schofield's humiliating comment. Taking into account the factual matrix of the claimant's limited responsibilities and the fact he was unable to carry out EPP duties, Dr Schofield's comment was directly linked to this. The Tribunal found there was no causal connection between the 9 July 2012 incident and whistleblowing, and the words were not said on the ground that the claimant had blown the whistle. There was no evidence before the Tribunal taking into account that surrounding circumstances that Dr Schofield had any whistleblowing on the part of the claimant in her mind given the fact the claimant had not blown the whistle.

232. During this period the claimant complained about a number of other matters, including the respondent's failure to disclose documents. It is notable that what the claimant does not refer to at any stage was whistleblowing, disability or EqA

victimisation on the grounds of his disability. The Tribunal found, on balance, the email communication from the claimant to Dr Topping was not protected so as to satisfy the requirements of section 27(1) EqA.

Detriment 16 [numbered 17 in the claimant's list] relevant to the first respondent only – arranging a stage 2 grievance hearing for a date when Ms O'Brien knew she was due to be on leave in the knowledge that the chair of the hearing would determine her attendance to be essential and postpone the hearing to allow further preparation time

233. The claimant was informed by letter dated 13 July 2012 the stage 2 grievance was scheduled for 23 July 2012. Angela O'Brien confirmed that "the Trust is refusing permission for you to work in any area where you may be required to perform an exposure prone procedure…I will be taking holiday for a period of 2 weeks." It is clear Angela O'Brien was of the understanding the ET1 had yet to be served.

234. Susan Westbury, HR, was to provide HR support for Dr Herod at the grievance hearing, and Angela O'Brien in an email sent 13 July 2012 emailed her stating she would provide a statement setting out the management response and "I have made Jo Topping and Michelle aware that the hearing is going ahead on this date, but have not requested they attend. You might want to discuss with Jonathan beforehand how he wants the hearing to progress and whether he needs the presence of either Jo or Michelle…?" By 16 July 2012 the management statement of case had been prepared by Angela O'Brien and forwarded to Susan Westbury and Dr Topping. Dr Herod wanted to hear from them both.

235. The claimant was informed by email sent 19 July 2012 "due to unforeseen circumstances" the grievance hearing would be postponed, and the reason being "due to a family illness affecting the attendance of Dr Topping." The claimant was not happy with the postponement and in a return email stated, "Whilst I can see that Dr Topping has had some involvement in this matter I cannot really see that her being present at the grievance hearing is essential…given that it has mainly been Ms O'Brien who has represented the Trust." He suggested moving on to a Stage 3 grievance." In cross-examination the claimant would not at first accept the reason put forward by Dr Topping for her unavailability because he saw her at the Trust on the 23 July, or the proposition that her mother lived in Barrow in Furness and had suffered from a stroke.

Conclusion: detriment 17

236. The Tribunal accepted Dr Topping's explanation as credible; it was borne out by the evidence and the claimant had been informed of the true position at the relevant time. Mr Boyd described this allegation as delusional; the Tribunal took the view that it reflected the total breakdown in the employment relationship on the part of the claimant, who suspected every decision taken by the first respondent's managers, even if they were favourable to him. The first respondent could not do right for wrong, and the claimant's less than objective interpretation of events spiralled out of control with the result that he saw everything as a threat and

conspiracy against him, even the most logical explanation such as somebody's mother being hospitalised for which there was no empathy on the part of the claimant.

237. The Tribunal found the claimant had not suffered a detriment. On the balance of probabilities, it did not accept the claimant genuinely believed from his point of view he had suffered a detriment and it found a reasonable worker would not have taken the view the treatment was in all the circumstances to their disadvantage.

238. Dr Herod responded almost by return that he had questions to put to Dr Topping and Ms O'Brien; it would therefore be in appropriate to proceed on the day planned and he would "endeavour" to identify an early date.

239. The Tribunal finds from Dr Herod's oral evidence, his written statement and the contemporaneous documentation that as time progressed, and the more he became involved with Dr Tattersall's issues, the less sympathetic he became. It is notable when Dr Tattersall emailed Dr Herod on 20 July 2012 stating that his wife had been issued with a non-molestation order by the police, Dr Herod's brief response 3-days later was "I have heard nothing from her." This is in marker in contrast with earlier communications in which he appeared to have been more supportive. In a second email short and to the point Dr Herod informed the claimant safeguarding would be in touch with him.

240. On the 20 July 2012 the claimant forwarded the respondent a bundle for the grievance hearing that included a 4-page chronology, a brief overview that ran to 3-pages and a 2-page index. In the overview the claimant referred to actions on the part of the first respondent constituting unreasonable and potentially unlawful behaviour. The only reference to discrimination was in paragraph 8, and that was in connection with people who worked under the first respondent's local policy before and after 2008; the claimant alleging that this was likely to amount to discrimination under the EqA. It is notable that nowhere in the body of these detailed allegations set out over a number of pages was there any reference to whistleblowing or disability discrimination. The final paragraph 11 encapsulated the claimant's true feelings at the time, which is: "Dr Tattersall is concerned the Trust has behaved in this way in order to force him into accepting their requirements without the matter being subjected to full legal scrutiny," an issue highlighted by the claimant as soon as pay was removed from him. The information provided by the claimant on the 20 July 2012 reinforced the Tribunal's view gathered from earlier contemporaneous documents that whistleblowing and disability discrimination were not issues that concerned him. Had the claimant made the protected disclosures as alleged, and had he suffered the detriments as a result, the claimant would not have been silent on the point and it further brings into question the hand-written documents set out within the three-page document marked "C3" and the expert hand-writing report.

241. The Tribunal finds there was nothing to put the either respondent on notice that the claimant had made protected disclosures in this period and was disabled for the purpose of S.6 of the EqA.

23 July 2012 claimant's threat to go to the press

242. Dr Topping's elderly Mother was admitted to hospital. At Dr Topping's request the first respondent cancelled all of her managerial commitments, including the grievance hearing. As her mother's condition stabilised Dr Topping returned to work on 23 July 2012 and it was at that point she saw the claimant 15 minutes before the hearing would have taken place, who commented on the fact that she was at work. The claimant immediately contacted Michelle Turner "very angry" and suggested the Trust had misrepresented the position to avoid a hearing and this indeed remained the claimant's position before the Tribunal at this liability hearing. The claimant demanded to speak to the chief executive and chairman of the Trust regarding his grievance, and that they are updated immediately. He threatened to go to the press.

Michelle Turner's briefing note

243. Michelle Turner prepared a briefing note for the chief executive and the chair reporting how she had had a "long and difficult conversation" with the claimant… [He] was very angry and demanded that I update the chairman and chief executive immediately. He was demanding an immediate conversation with both of you but I indicated that you were unavailable…he remains keen to speak to either/both of you 'prior to going to the press'…the University of Liverpool are awaiting the outcome of the grievance procedure prior to reaching a view on any action they may take in terms of his employment." She made it clear that "this case identified a weakness in our recruitment processes; hence the escalated risk in the BAF around non-directly employed workers. This has now been closed following development of a framework with the University of Liverpool an all recruiting managers…audits will be conducted regularly to monitor compliance. It has also identified a need to more clearly state screening requirements in our recruitment policy as this currently sits within the Occupational Health Policy (this has been actioned)."

First respondent's concern that the claimant may whistleblow to the press

244. The Tribunal found the first respondent had rectified the anomalies within the screening policy, and the only outstanding matter was the claimant and his refusal to provide evidence for EPP screening. The evidence before the Tribunal was the first respondent, from the outset, had acknowledged a mistake had been made, and had made their position clear on this to the claimant as indicated above. There is no reason to doubt the contemporaneous evidence that the mistakes, which the first respondent had communicated to the claimant and not visa versa, had been put right. Michelle Turner was concerned the claimant may go to the press about the weakness in the first and second respondent's recruitment process.

245. The grievance hearing was rearranged for 2 August and the 12 August due to difficulties with the claimant's BMA representative's availability. Susan Westbury on 24 July 2012 forwarded the management response to all relevant parties. The email reveals that positive actions were being taken in connection with the debacle involving screening of employees on honorary contracts.

24 July 2012 telephone conversation between the claimant and Caroline Salden

246. On the 24 July 2012 Caroline Thursfield nee Salden, who had been employed as the first respondent's chief operating officer, had a telephone conversation with the claimant. The claimant alleged he was being prevented from speaking with Steve Burnett, the Senior Independent Director (responsible for whistleblowing and referred to as the "SID)" and non-executive directors. He complained that he was being put under pressure to undergo occupational health screening, and requested Steve Burnett's mobile telephone number which she refused to provide. In the conversation with Caroline Thursfield there was no reference to whistleblowing or disability discrimination. Caroline Thursfield found the claimant's attitude towards her to be challenging and aggressive.

247. An exchange of emails took place which reflects the claimant was attempting to speak to the SID as a result of what had transpired concerning his grievance hearing, over which he remained very angry convinced Dr Topping had avoided taking part in order to allow the first respondent's HR managers more time to prepare. The claimant did not have in his mind any thought of public interest, and was consumed by his belief that his grievance was a genuine one, it had been delayed and he should be paid in full for on call duties despite the ban on on-call work.

248. Michelle Turner was particularly concerned that the claimant would whistleblow to the press as he had threatened to do about the matters which gave rise to his grievance, and the poor light the respondent would be seen in if it became public knowledge that the first respondent had not screened clinical staff involved in EPP. She emailed Steve Burnett on 24 July at 18.08 informing him "there is potential for you to be approached by an aggrieved doctor, Mark Tattersall's, who is indicating he may well opt to speak to the SID as he is unhappy with the handling of an issue relating to his honorary employment…there is a formal grievance schedule to be heard on…2 August…Dr Tattersall is threatening to go to the press **on this issue** [my emphasis]…I am not sure whether he will he will even contact you but it is a potential."

249. Michelle Turner and Steve Burnett's attitude towards the claimant making contact with Steve Burnett appeared to be relaxed, the latter saying he was happy to be involved. In the last email in the chain there is a reference by Michelle Turner to the following: "It is not urgent. I am meeting…again tomorrow to see if we can resolve this informally. It is unlikely he will be in touch very soon, if at all…I will speak to Ken about clarification of what lands where with respect to SID/Vice chair – I think Mark T was arguing it was a PIDA issue and the SID is referred to in the Whistleblowing procedure." Michelle Turner was of the view the PIDA issue was the failure by the first respondent to screen doctors on honorary contracts.

250. It appears to the Tribunal that the first respondent's concern was that once the claimant went outside the Trust his internal grievance could potentially become a

PIDA issue. Michelle Turner's intention was to try and resolve the grievance issue informally and legal advice was obtained on the prospect of the claimant whistleblowing to the press.

Legally privileged note 24 July 2012 – "Discussion with Michelle T re Dr T."

251. Included within the documents disclosed following the claimant's subject access request was a legally privileged document setting out legal advice that had been given to the first respondent. The first respondent waived privilege at the liability hearing with a view to avoiding extending already lengthy proceedings by further legal argument. The Tribunal took the view that the note reflects what was truly in the mind of the first respondent and the solicitors at the time; neither had any idea a privileged document setting out the legal advice given would end up being read by this Tribunal. Had the solicitors and first respondent been of the view the claimant had already raised protected disclosures, as the claimant alleges, coupled with the second privileged note of legal advice (referred to below) the advice would have said so.

252. Bearing in mind the factual matrix, this legal advice was sought and provided on 24 July 2012 following the claimant's threats to go to the press made earlier to Michelle Turner.

253. The note recorded the following; "Solicitors concerned Dr T has raised patient safety concerns (inc non-OH issues) and are actions are subsequent to this. Must not admit they are, as exposes us to serious risk of PIDA claim. HD very concerned Re: this, particularly given he has been asking to speak to Steve B [this is reference to the Deputy Director Steve Burnett] under the whistle-blowing Policy. Need to change statement that risk not new and remove mention of 2007, as will not be helpful in long run. Also, letter accepts he raised risks which we should not do on paper. Solicitors feel allowing him grievance was a good plan as will allow us to regard it as routine employment dispute and make him look like difficult character refusing reasonable management request, rather than someone raising safety risks. HD feel will make it much easier to take action against him if needed due to risk of him going outside Trust if contained dispute within grievance (?) disciplinary if necessary – he has much less legal protection if we can argue not PIDA case. Need to ensure JT aware not to send letter. To redraft letter when Triona has full advice from HD".

254. Mr Mensah submitted that this note set out very clearly the plan to demonstrate the claimant was to be made out to be complaining about an employment dispute and not his legitimate position as whistleblower. The Tribunal did not agree taking into account the entirety of the evidence before it and context in which the note was written.

255. The Tribunal found the note was nothing more than a record of general advice given in connection with the claimant and the respondent's risk should he "go outside the Trust" i.e. to the press as previously threatened, and for the safer option to be for the claimant's grievance to be resolved internally without the claimant going outside

the Trust. The Tribunal considered the contents of this note very carefully, and attempted to give it the claimant's interpretation, which was that he had made a protected disclosure in the past and this was the respondent's attempt to paint him as a difficult character refusing reasonable management requests, when in reality he had been making protected disclosures. The problem with this interpretation was that it was unsupported by any evidence leading up to the 24 July 2012 for the reasons already set out above. The claimant's behaviour is a hurdle for him; the first respondent took the view that he was stubbornly refusing to accept a reasonable management request. Dr Herod genuinely believed the claimant's behaviour to be damaging and inexplicable for any doctor. Even at the 24 July 2012 the key issue for the claimant was being forced to undertake screening for EPP and the knock-on effect the refusal had on his pay and so the Tribunal found.

The alleged seventh protected disclosure: 25 July 2012 telephone conversation with Kathryn Thompson, chief executive [first respondent only]

The Claimant raised concerns during a telephone conversation with Ms Thompson which took place in the afternoon. The Claimant called Ms Thompson because he had asked to have a conversation with her, in hope she would listen to his concerns, as no one else in the Trust appeared willing to do so. The call lasted for around 20 minutes. During the call the Claimant made disclosures to Ms Thompson regarding the following concerns:

- *patient safety issues, referring to the OH screening issues;*
- *the Trust's attempts to cover up its failings to the Board and regulators;*
- *a bullying culture at the Trust; and*
- *Poor staffing levels, in particular on the Labour ward.*

The Claimant prepared a transcript of what he said to Ms Thompson during the call and extracts of that transcript are contained in the Claimant's FBPs of 29 April 2016.

S.43B ERA (1)(b)Breach of any legal obligation: the legal obligations on an NHS Trust to ensure appropriate HR and OH policies are in place and applied consistently in compliance with Department of Health requirements and the legal obligations to comply with CQC regulations, particularly those relating to patient safety and staff (1)(d)Danger to the health and safety of any individual: risks to patient safety (1)(f) That information tending to show any matter falling within s43B(1)(a)-(e) is being or is likely to be deliberately concealed

Telephone conversation between claimant and Kathryn Thompson 25 July 2012

256. Kathryn Thompson spoke to the claimant on the telephone on 25 July 2012, during which she found him to be aggressive, rude and agitated, maintaining she had been subject to a tirade about occupational health screening, the fact he was being forced to undertake it and patient safety in respect of that issue.

257. There is an issue as to whether or not the transcript in the bundle is a true one. The first respondent says it was not, as the claimant in the transcript was much calmer and not shouting, unlike the conversation that took place. The claimant's position is that the tape and the transcript were a true record, and he denies re-

recording it and making changes. The only agreement between the parties was the date the conversation took place, it was even disputed whether the transcript fully record all of the time spent in conversation. The Tribunal was not asked to listen to the tape as there was little point, the respondent's position being the recording produced was different from the actual conversation that took place, especially in the claimant's behaviour and tone.

258. The Tribunal compared the claimant's notes of the telephone conversation, which was clearly not a transcript of what was said, as the notes do not flow and there are large gaps which make little sense. For example, right at the outset of the conversation, with no introduction into the subject matter, the claimant notes "…I've been trying to speak to…er…yourself…because I think that, you know, its patient safety, this is a big patient safety issue that can't simply be ignored…I have to be clear, yes, that I'm doing what I should, which is put the information…before the senior members of the board and not allow the Trust to just simply brush it all under the carpet…and people get just scapegoated. Get rid of people."

259. The claimant's note referred to Kathryn Thompson responding as follows; "Ok. I'm sorry you understand how… [Inaudible]." This response which made no sense to the Tribunal, as the comment seems totally unrelated to that what the claimant had said before. This was a regular feature of the" transcript", which does not flow and gives the impression of the claimant making comments and remarks about a variety of totally unconnected issues, for example, the claimant referred to the "Trust running scared" and Kathryn Thompson's response to that comment was "Well, of course you…" Towards the end of the conversation the claimant jumps to an allegation concerning a consultant allegedly accosting him and Caroline Salden.

260. It is indisputable when comparing both sets of notes the claimant did not refer to his disability.

261. The claimant's version was not mirrored in the joint notes made on behalf of the respondent as follows; "Dr T outlined his concerns. View the Trust was acting unlawfully in requiring him to submit to health screening above and beyond department of health guidance…KT of the view that the Trust's processes did exceed DH minimum but that was local policy…and not unreasonable as it enhanced patient safety." Given the factual matrix the Tribunal found the respondent's notes to be more believable. Whilst the respondent's note of the conversation is clearly not a transcript, it makes sense and reflects some of the words and phrases referenced in the claimant's notes i.e. "patient safety." There is also a difference in interpretation; for example, the claimant records saying, "Your HR department are bullies" and the respondent's note referred to "Dr T alluded to MT being dishonest and bullying in nature."

262. On the balance of probabilities, the Tribunal preferred the note taken on behalf of the respondent to that of the claimant as being more credible and fitting into the factual matrix leading to the 22 August 2012 meeting. The Tribunal accepts a conspiracy as to what transpired during a telephone call witnessed by three people is always possible; however, in this case, given the factual matrix supported by

contemporaneous correspondence passing between the parties, the Tribunal took the view that Kathryn Thompson, Vanessa Harris and Michelle Turner produced a note which reflected their perception of the telephone conversation. The Tribunal prefers their more credible version of events to that of the claimant, who it had found was a less than reliable witness and an inaccurate historian.

263. The Tribunal accepts as credible that the claimant screamed and shouted down the telephone at Kathryn Thompson. The claimant was upset. He believed the respondent was acting unlawfully by insisting that he undertook the health screening "over and above DH guidelines" and the fact that his grievance had been adjourned. The reference to patient safety was in respect of the respondent's health screening policy. It is undisputed between the parties that the claimant threatened to take the respondent to court and the press concerning the screening. It is undisputed a conversation took place along the following lines; should the claimant go to the press the respondent would state that its health screening policies went over and above DoH guidance in the interests of patient safety, and the issue was one doctor who was not prepared to be screened. In response the claimant stated that he would go to the press "if necessary... and saying there are these…you've got lots of staff, well certainly three, staff weren't screened, you didn't know any health status and you know, that's a serious risk…"

264. The Tribunal does not accept on balance, the claimant threatened to go to the regulator CQC. It is notable in the claimant's witness statement there was no reference of any threat to go to the regulator in the telephone conversation, and on the balance of probabilities, the Tribunal found this was not said. The claimant's motivation behind his threats was to undermine the respondent's insistence that he undertook the screening over and above the DoH requirements, which he considered to be unlawful and a breach of his employment contract, and for full payment of salary to be made and so the Tribunal finds.

265. The Tribunal preferred the version put forward on behalf of the first respondent to that of the claimant's, having also listened to the tape of the investigation hearing during which the claimant denied he behaved aggressively when the tape revealed otherwise.

266. The Tribunal accepts on the balance of probabilities the claimant may referred to a bullying culture as he believed he was being bullied to comply with occupational health screening, but provide no details of any bullying. The Tribunal does not accept the claimant referred to poor staffing levels and the Trust covering up its failings to the Board and regulators, however, if it is wrong on this point and this comment was missed in the tirade, which is possible but improbable, it would have gone on to find the disclosure was not protected despite Section 43B being met i.e. it was information in the reasonable belief of the claimant that poor staffing levels was failure of a legal obligation (43B(1)(b) and health and safety (43B(1)(d) given the requirement of good faith under sections 43C (internal disclosures). The claimant's motive was other than the public interest; he was exclusively concerned with his own position, believing the first respondent was forcing him into a corner when it came to occupational health clearance and was prepared to use any means to prove that he

was right and the first respondent wrong. The tone of the call was important in assessing the claimant's motivation in addition to the factual events that had occurred before and after this point in time.

267. The call was on loudspeaker and unbeknown to the claimant it was witnessed by Vanessa Harris and Michelle Turner. On the claimant's part he recorded the call, unbeknown to the other three people. The Tribunal took the view that the actions of all individuals concerned reflected a deteriorating relationship between the claimant and managers as a result of the way the claimant had conducted himself, his attitude towards employees in the first respondent and threat of the press. The Tribunal on the balance of probabilities accepts the claimant was angry, rude and shouting at Kathryn Thompson; one would not expect a doctor reporting to their chief executive about poor staffing levels or patient safety to behave in such a manner. In addition, the claimant when making such allegations should have been able to substantiate them and provide detail, for example, of the bullying culture, which was not forthcoming. The Tribunal has dealt with this aspect of the disclosure earlier in respect of the allegation made to Dr Herod above. The claimant's disclosure was motivated exclusively his employment dispute, and the Tribunal took the view on the evidence before it, the claimant did not hold a genuine belief the first respondent was attempting to "coverup its failings." He had been made aware of the steps taken to resolve the issue, including the first respondent's communications with the University, evidence that the issue was out in the open and being dealt with as such. With reference to staffing issues, particularly on the maternity ward, the clear evidence before the Tribunal was poor staffing levels was not a recent phenomenon and had been an issue, known by managers and staff alike, for a considerable amount of time. Given the claimant's position, he would have been aware of this and the fact that the first respondent had been and continued to address the difficult situation of labour ward staffing; he would have known there had been no "cover up" and poor staffing levels was common knowledge.

Conclusion alleged protected disclosure 25 July 2012

268. In conclusion, the Tribunal found the claimant did not make the protected disclosure as alleged, preferring the more credible evidence of Kathryn Thompson, Vanessa Harris and Michelle Turner. In the alternative, as there is a possibility the detail was lost in the tirade, especially if he was angry and shouting, and the Tribunal would have gone on to find the disclosures were not protected on the ground the claimant lacked good faith and there was no causal nexus with the events that followed as set out below in the factual matrix.

Detriment 17 [numbered 16 in the claimant's list] relevant to first respondent only - on or around 26 July 2012 providing inaccurate and confidential information to the press, namely the Liverpool Echo.

26 July 2012 communications with Liverpool Echo

269. At 11.41am a reporter, Ms Hunt, from the Liverpool Echo emailed the respondent the strap line being "Doctor moved to outpatient's clinic after being

screened for HIV/AIDS." The emailed referred to her being told from a "reliable source that a male doctor had been suspended…He was working in obs and gynae which he is no longer able to do and has been put on duty in outpatients clinic…He has been working at the Women's for between one and half and two years, and is one of six doctors who have been screened for HIV…it is alleged that the hospital did not realise it hadn't screened these 6 doctors and he was found to have been carrying either HIV or Hepatitis and therefore moved to outpatients duty…"

270. It is not disputed the first respondent denied the allegations, maintaining it had complied with all obligations.

Conclusion: detriment 17

271. The Tribunal found the claimant was not caused any detriment. He denied being the anonymous source and it was not disputed between the parties the information provided to the Echo did not name him or any other doctor. The Tribunal agreed with the question posed by Mr Boyd; how could it conceivably be connected to the claimant's allegation that he was a whistleblower? The Tribunal did not accept the claimant genuinely believed from his point of view he had suffered a detriment; this was a fabricated complaint and a reasonable worker would not have taken the view the treatment was in all the circumstances to their disadvantage

272. The Tribunal found the first respondent acted for a legitimate reason responding to what could have been a serious public relations issue for it, and the claimant could not have reasonably taken the view the response, which did not reference him in any way, was on the ground that he had made a protected disclosure.

Detriment 18 [17 in the claimant's list] relevant to first respondent only 27 July 2012 bullying the Claimant through Mr Herod's actions – calling the Claimant and accusing him of going to the press (see paragraph (4) FBPs of 29 April 2016)

273. It was assumed by Katherine Thompson, Michelle Turner and Dr Herod the claimant was involved in the press report. Dr Herod was concerned with the report of a male doctor carrying HIV or Hepatitis and contacted the claimant on the 27 July 2012 about the press release. The claimant refused to answer his questions asking that they be put in writing. The claimant did not deny anything, and on the same date Dr Herod emailed the claimant with a letter asking him if he had any knowledge or concerns that or any other member of staff would be likely to test positive for HIV and/or Hepatitis. In the letter reference was made to the claimant as follows: "You did wish to discuss a number of these issues with me regarding the Trust procedures for occupational health screening…It was clear to me you are extremely agitated and upset by the current situation." A formal referral to counselling or occupational health was offered at the University. Dr Herod acknowledges in this offer the claimant had issues with the first respondent.

274. The claimant ignored Dr Herod's offer, and in his response sent by return confirmed that he had no concerns. This brought back into sharp focus his unhappiness about being screened and so the Tribunal finds. The claimant's response reflects his mind set during this period; "I do have concerns…that the way in which the screening of staff for infectious diseases is implemented is inconsistent, variable and not appropriately rigorous. It also appears to me that the Trust management and occupational health staff are unclear as to their responsibilities or the contents of the relevant department of health requirement/guidance. I do believe that it is possible this could endanger the welfare of patients within the Trust and am not clear the Trust is dealing with these matters in an appropriate fashion."

275. The Tribunal took the view that this encapsulated the claimant's position during this period; on the one hand he was saying the respondent's screening policy was excessive because it went over and above DoH requirements, and on the other hand it was not rigorous enough and could endanger the welfare of patients. These were the matters discussed by the claimant in his earlier conversation with Kathryn Thompson on the 25 July 2012. Dr Herod was frustrated by the claimant's behaviour; he did not understand why any doctor would not participate in a more robust screening processes.

276. The Tribunal finds that the relationship between the claimant and his senior colleagues working in the first respondent (including Dr Herod) deteriorated to such an extent that a huge rift had developed. All the evidence pointed to a breakdown of trust and confidence, and this was never regained. The reality was that it deteriorated rapidly as time went on, to such an extent that Dr Herod at least, did not consider the claimant suitable for the role of doctor. The Tribunal notes that the claimant ignored the existence of all of the remedial steps taken by the first and second respondent to put right the errors made when it came to light the claimant and two of his colleagues had not been screened in March earlier that year, despite having been informed of the steps taken by the first respondent and its communications with the second respondent concerning the future screening of doctors jointly employed by them.

Conclusion: detriment 18

277. Dr Herod had legitimate grounds for asking the claimant if he had gone to the press given Dr Herod's knowledge of the claimant's threat to do so on two occasions leading to the press report, and the specific information the press intended to publish. The Tribunal accepted Dr Herod genuinely believed the claimant was the anonymous source, and he was concerned with the reference to HIV etc, and needed assurance that there was no such issue in the hospital. Far from bullying the claimant when he refused to answer the questions and insisted they were put in writing, Dr Herod complied with the claimant's request despite his frustration that a medical doctor refused initially to disclose whether as member of staff had tested positive for HIV. Dr Herod's letter far from being bullying in tone was sympathetic in that he made the offer of access to counselling or occupational health.

278. The Tribunal accepted the claimant genuinely believed from his point of view he had suffered a detriment by Dr Herod's treatment of him; this however given the content and tone of the conversation held against the backdrop of a serious allegation being made concerning a HIV positive doctor carrying out EPP on patients, a reasonable worker would not have taken the view the treatment was in all the circumstances to their disadvantage

279. In or around the end of July 2012 a number of midwives raised the issue of staffing levels on the maternity ward with the first respondent, an issue that had been ongoing and out in the open for some time. It was not disputed by the claimant that none of the midwives were treated detrimentally for raising patient safety concerns. The reports resulted in further discussions between the Executive Team about staffing levels. The issue remained a live one and was regularly brought up at board meetings and staff briefings which referred to reviews of staffing levels, resources and recruitment, documents which the Tribunal has had sight of and does not intend to repeat.

Eighth and ninth alleged protected disclosure to Michelle Turner 27 July 2012 [first respondent only]

Eight: *The Claimant alleged he had made disclosures to Ms Turner orally, during a meeting in her office, regarding what he believed to be the Trust misleading the Employment Tribunal by its provision of untrue information through its solicitors in a letter from the Trust to the Tribunal of 26 July 2012. The letter stated that the Trust had never received the Claimant's claim form. However, the Claimant believed this was not true and was done to extend its time limit to respond. This was because a version of his claim subsequently disclosed by the Trust shows a copy of the ET's covering letter date-stamped as having been received on 28 June 2012, three days after it was sent by the ET.*

S.43B ERA (1)(b) Breach of any legal obligation: the legal obligations on an NHS Trust to ensure appropriate HR and OH policies are in place and applied consistently in compliance with Department of Health requirements and the legal obligations to comply with CQC regulations, particularly those relating to patient safety and staff (1)(d) Danger to the health and safety of any individual: risks to patient safety (1)(f). That information tending to show any matter falling within s43B(1)(a)-(e) is being or is likely to be deliberately concealed.

Ninth: *The Claimant made another disclosure to Ms Turner orally during their meeting of 17 July 2012 stating that incorrect information had been provided to the press, namely the Liverpool Echo, by the Trust management. The Claimant said [the Trust had inaccurately stated that it was compliant with all its obligations, that the issue was with the recording of information rather than that the appropriate testing had actually been performed or not and a suggestion that the responsibility for this was with the doctors. The Claimant was very concerned at the attempt by the Trust to suggest that doctors had failed in their professional responsibilities, rather than the Trust being transparent and open about their failings.*

S.43B ERA (1)(f) that information tending to show any matter falling within s43B(1)(a)-(e) is being or is likely to be deliberately concealed

The 27 July 2012 conversation between the claimant and Michelle Turner

280. The claimant contacted Ms Hunt, the Liverpool Echo reporter, on the afternoon of 27 July 2012 to find out what she had been told by the first respondent, after which he met with Michelle Turner who made notes of the 27 July 2012 meeting later on 30 July 2012. It is notable at the end of the meeting Michelle Turner sought assurances from the claimant that he had no issues with her behaviour at the meeting, and recorded; "relating to MT's behaviours in the meeting. Dr T confirmed that for today, he had no issues," supporting the Tribunal's conclusion that the claimant's employment relationship with managers employed by the first respondent had deteriorated substantially with neither trusting the other.

281. The meeting was informal, its aim to resolve the issues relating to the claimant's grievance, which was to go ahead the following week. The claimant complained that the restrictions on his practice were excessive and he felt he should be able to work in the emergency room undertaking non EEP work. The claimant queried why the three documents relating to his health screening had not been accepted by the first respondent when they had been accepted by other previous employers. The claimant brought up the first respondent's failure to produce an honorary contract and insisted there should be no transfer of information between the first and second respondent. He referred to the Employment Tribunal proceedings maintaining the respondent was out of time, and alleged that the Trust had not been honest with the press. With reference to the last allegation concerning the press Michelle Turner's understanding was the claimant had been in contact with the press which reinforced her belief he had made the initial approach to Ms Lunt alleging a HIV doctor had been in contact with patients. Michelle Turner was very concerned a doctor working in the Trust was capable of such an action with the intention of brining the Trust into disrepute and causing a loss of trust by its patients and community. The situation was a serious one, a fact that seemed to escape the claimant who was unconcerned with the undermining of trust and confidence between himself and the Trust, and patients.

282. In the claimant's witness statement before this Tribunal reference as made to a protected disclosure being made during this meeting with Michelle Turner to the effect that the first respondent had provided untrue information misleading the Tribunal to order an extension of time in which to file the defence. The claimant's version of the conversation set out in his witness statement is completely different to the note of the discussion which was "MT confirmed that the Trust had asked the Tribunal office for a copy of the claim. Dr T said the Trust was out of time and the judge would reach a view on whether the default position should apply. MT asked Dr T to specify what he had gone to Tribunal on…" In the note of the conversation the claimant did not say the first respondent had not been honest as alleged.

Conclusion – the eighth and ninth protected disclosure 27 July 2012.

283. The Tribunal was satisfied the claimant had not made a protected disclosure as alleged. The full extent of the conversation on the out of time point is set out above, the claimant was merely expressing a view and it cannot be a public interest disclosure. There is no indication the claimant alleged the Trust lied to the Tribunal; the allegation was the Trust was late in responding. The Tribunal preferred the more credible evidence of Michelle Turner to that of the claimant. Mr Boyd submitted that despite being invited to do so, the claimant failed to properly explain precisely what is was that was said to Michelle Turner that would amount to a protected disclosure; the Tribunal agreed with this observation. Paragraph 65 in the claimant's witness statement provided the "gist", and the Tribunal agrees with Mr Boyd that this was insufficient to establish a protected disclosure had been made.

284. With reference to the ninth alleged protected disclosure, in the alternative, the Tribunal found even if it had been the case that Michelle Turner had given incorrect information to the Liverpool Echo as alleged, which the Tribunal did not accept, the Tribunal agreed with Mr Boyd that it would not be a disclosure of information that tended to show one of the relevant failures set out in S. 43B ERA.

285. Michelle Turner in an email sent 1 August 2012 raised a number of points arising from the informal meeting with the claimant. The email clearly indicates Michelle Turner's understanding of the issues raised by the claimant, which did not include any protected disclosure relating to the first respondent allegedly lying to the Employment Tribunal so as to get an extension of time. The issues were data protection, health screening, EPP and the evidence submitted by the claimant for occupational health purposes. The Tribunal finds those were the key issues raised by the claimant, and during this period these were the only active issues and that includes those raised earlier with the Chief Executive.

Grievance Step 2 hearing held on 2 August 2012

286. The Step 2 grievance hearing went ahead on 2 August 2015 before Dr Herod, the decision maker. The hearing was recorded. Three issues and 12 points were considered, including the decision to cancel the grievance hearing earlier. The hearing essentially centred the screening and unlawful deduction of wages. The claimant believed he was being bullied to submit to the Trust's screening requirements. The claimant was accompanied by his union representative; discrimination was referred to on the grounds of age and sex only; no reference was made to disability. There was no suggestion the claimant had suffered a detriment on the grounds that he had made protected disclosures. The claimant made no reference to his disability, he did not attempt to raise any public interest concerns, and nor did he refer to protected discloses made prior to the grievance hearing taking place.

287. Dr Herod's outcome letter dated 7 August 2012 set out details of the hearing. It recorded that the claimant had withdrawn his allegations of bullying on the basis that "this grievance is not about bullying, ignore this for the purpose of this hearing

and I will raise it later." Dr Herod confirmed the first respondent would issue a written honorary contract; "the Trust does not accept that, legally speaking, you are an employee…You are an honorary contract holder with the Trust, whilst being an employee of the University." The claimant's complaint in respect of the first respondent's failure to provide a statement of employment particulars was partially upheld.

288. Dr Herod went into great detail concerning the first respondent's policy in relation to EEP screening, which the Tribunal does not intend to set out. Dr Herod confirmed in order for the honorary contract to have been issued the claimant was required to produce satisfactory completion of pre-employment screening. This did not occur at the commencement of his employment, and it was reasonable for the Trust to ask for compliance and "your failure to do so means that you were unable to fulfil all of the duties required for you to complete your contractual obligations. In these difficult circumstances, the Trust appears to have made substantial efforts to find a way to allow you to continue in employment whilst the matter regarding your screening is resolved…a decision had been made that prior to completion of your health screening it would not be possible for you too undertake on call duties…. I consider it is a reasonable decision to withhold payments to your on-call duties."

Claimant's appeal of step 2 grievance outcome

289. The claimant appealed the outcome of his stage 2 grievance in a letter dated 11 August 2012 setting out numerous grounds, including the unlawful actions of the Trust in not providing a written statement of employment particulars "relevant in determining the legality and reasonableness of the Trust's requirements of me... I believe it is unreasonable and potentially unlawful for the Trust to attempt to force me to comply with a Policy that is not contained within any written documentation…" In the penultimate paragraph the claimant requested that the first respondent "allow the status quo to apply until the grievance procedure has been completed…I think it unreasonable that the Trust took the action of asking the University to reduce my salary payments contrary to this provision of the procedure." The Tribunal concluded that up to this point this was the nub of the claimant's complaints against the first respondent and all the steps he took were geared at resolving the conflict in his favour, including at the very least making contact with Ms Hunt of the Liverpool Echo to establish what response had been given by the respondent to the story.

290. The outcome of the grievance and continued withdrawal of the claimant's salary prompted him to make contact with the Board. It is notable that this was the catalyst when he was silent about earlier alleged detriments connected to whistleblowing.

Detriment 19 relevant to the first respondent only – from around August 2012 preventing non-executive members of the Board and the Senior Independent Member from becoming aware of the Claimant's patient safety concerns and from contacting the Claimant

291. There is an issue whether the claimant attempted to speak with Steve Burnett prior to sending an email on 14 August 2012, but nothing hangs on this. It is uncontroversial Steve Burnett was aware of the issues relating to the claimant during this period, but he was not clear the nature of concerns the claimant wanted to raise with him. The 14 August email was the claimant's first attempt at written communication, which Steve Burnett asked Julie Morran, the Trust secretary, to respond to, which she did on 29 August 2012. Steve Burnett was responsible for whistleblowing matters, and Julie Morran sought clarification from the claimant as to whether it was regarding whistleblowing, and she provided the claimant with an electronic link to the first respondent's whistleblowing policy. She confirmed if it was not about whistleblowing "I will be glad to help direct you accordingly."

292. There was no immediate response from the claimant, and Steve Burnett sent an email to him on 2 September 2012 confirming Julie Morran had requested clarification, and he would be "happy to drop in to Liverpool to meet up if I am the right person." Given the position of non-executive directors, i.e. they were not employees of the Trust, the Tribunal found it was not unreasonable for the claimant to be expected to have confirmed as requested, what issues where he wished to discuss with Steve Burnett, and if they encompassed whistleblowing, an area Steve Burnett was responsible for. A reasonable employee, objectively analysing the situation, would not have considered himself to have suffered a detriment in the circumstances.

Detriment 1 against the first respondent only: From April 2012 to Sept 2012 - refusing and failing to provide the Claimant with a copy of his written terms and conditions of employment

Detriment 2 [6 in the claimant's list] first respondent only: from April 2012 refusing to clarify the Trust's view on the Claimant's contractual position with the Trust

Honorary contract

293. In a letter dated 7 September 2012 the first respondent conceded the claimant was an employee of the Trust and a copy of his honorary contract was provided for the first time. The Tribunal accepted there was a failure on the part of the first respondent to provide the claimant with a copy of his written terms and conditions of employment and clarify the contractual position amounted to a detriment, and reasonably considered to be so by the claimant who required the contractual position to be clarified in order to show he was not required to undergo enhanced screening.

294. The Tribunal accepted evidence given on behalf of the first respondent, supported by a number of contemporaneous documents, that the first respondent had no issue in the past with honorary contract holders for which there were two potentially different employers; the first and second respondent, being provided a statement of terms and conditions of employment. This relationship was further complicated by the role of the Deanery and it is clear from the documentation that the HR department struggled with the complexity of the legal and contractual

relationship, initially being of the view that as the claimant had been recruited by the second respondent he was its employee. This confusion resulted in the claimant not being provided with a statement of terms and conditions in accordance with S.1 of the Employment Rights Act 1996 by the first respondent until much later into his employment. The delay in providing the terms and conditions of employment was not on the grounds of the claimant having raised a protected disclosure but incompetence on the part of the second respondent.

Conclusion: detriment 1 & 2

295. Failing to provide a statement of terms and condition of employment can amount to a detriment, and the claimant felt he was disadvantaged by this because he believed the contractual position would be clarified to show that he was not contractually required to comply with the first respondent's screening procedure.

296. It was submitted on behalf of the first respondent that as the claimant was unable to point out in cross-examination to any document which demonstrated that he had asked for his written terms and conditions and the first respondent had refused to provide them, this allegation must fail. Mr Boyd was incorrect in his interpretation of the events which led to the claimant being provided a copy of his honorary contract., Upon considering numerous documents and the evidence before it, the Tribunal took the view the claimant had made it clear to the first respondent he sought clarification of the contractual position and the copy of the contract was provided on 7 September 2012 as a result. It is irrelevant that the terms and conditions of employment finally provided to the claimant were left unsigned. The Tribunal took the view that the first and second respondent ought to have better understood the contractual position; their confusion as to whether the claimant was an employee or not of the first respondent and the effect of him working under an honorary contract was a genuine one, and the resolution of this confusion, over time, was the sole reason the claimant was not issued with a S.1 statement or clarification as to the contractual position, and there was no causal connection with whistleblowing or for that matter, the claimant's disability. The Tribunal was satisfied on the balance of probabilities, the length of time it took for the claimant to be provided with a copy of his contract was excessive but it was not causally connected with any whistleblowing and the Tribunal concluded it was not done on the ground the claimant had blown the whistle.

297. In an email sent marked "Dear all" on 13 September 2012 the claimant complained that Trust staff "**continue to bully and harass me in an attempt to try and force me with the Trust's requirements** [my emphasis] …it is very sad that it is becoming clear that the matter will only be resolved through lengthy legal process…and it is becoming clear to me that my position within the Trust is bordering upon becoming untenable." Reference was made to the possibility of resignation and "pursues the Trust for the significant financial damages…and makes a formal request that the Trust board members are provided with a copy of this email." Nowhere in this email does the claimant answer the queries put to him by Julie Morran, and there is no suggestion he wants to discuss with Steve Burnett any matters relating to whistleblowing. The claimant's concern was with contractual

terms and pay, and so the Tribunal finds. If there was any doubt, the email shows the deterioration of the employment relationship between the parties, with the claimant on the one hand believing he was in the right adopting the position he had regarding to screening, and the first respondent seeking clarification, not getting it from the claimant but being threatened with legal proceedings and substantial damages. It is notable the only reference to bullying was not in relation to a "bullying culture" but to the claimant's belief that he was being bullied in an attempt force him to comply with the Trust's enhanced god standard screening process. The claimant's communications in this regard reinforced the Tribunal's view that (a) this was the full extent to the "bullying culture" and (b) the first respondent's understanding of the claimant's reference to bullying was regarding screening only.

298. At 10.20am on 14 September 2012 the claimant emailed Dr Herod stating; "I now feel my position in the Trust is becoming untenable and I am considering my options. Given that I may cease to be an employee in the near future, I would be grateful if you could confirm what reference the Trust would be willing to give…" Dr Herod agreed on 17 September a "sensible reference" would be given. The claimant did not resign and no reference was requested. The claimant's email reinforces the Tribunal's earlier finding that by now the trust and confidence between the claimant and employees of the first respondent had all but disappeared replaced by mutual distrust and antipathy. The relationship had totally broken down without any causal connection to whistleblowing or disability, and this in part accounted for what transpired next.

299. In the afternoon of the 14 September 2012 after the claimant had been informed Julie McMorran would arrange a meeting between him and Liz Cross (the vice-chair to the Board) and he was requested to provide "a more detailed indication of the issues you wish to discuss." The claimant asked to speak to Julie McMorran, who was attending a clinical summit at the time. He demanded Mark Roberts, who took the call, use the "exe on call bleep", which was ordinarily used for emergency clinical issues. The claimant alleged he was raising patient concerns, although in the claimant's transcript of the phone call he referred initially to a breaking story about him in the Liverpool Echo; "tell her its important, tell her its about the media." By way of an aside, the Tribunal finds this was yet further reinforcement to the second respondent's genuine believe that it was the claimant who broke the untrue and potentially damaging story to the Liverpool echo in the first place.

Tenth alleged protected disclosure made on 14 September 2012 in a telephone call to Michelle Turner, Julie McMoran and Dr Herod. [relevant to first respondent only]

The Claimant raised concerns during a telephone call initially with Ms Turner and then with Ms McMorran, after the Claimant's request to be passed on to Ms McMorran during the call. The Claimant made a transcript of his call with Ms Turner and McMorran and extracts from this are contained within the Claimant's FBPs of 29 April 2016. During the call he made disclosures about the Trust's:

- *lack of pre-employment checks;*
- *poor governance arrangements in the OH Department;*

- *lack of proper procedures;*
- *poor staffing levels, particularly on the Labour ward;*
- *making up of policies as the Trust went along;*
- *attempts to cover up its failings to the Board and regulators;*
- *risks to patient safety; and culture of bullying*

S.43B ERA (1)(b)Breach of any legal obligation: the legal obligations on an NHS Trust to ensure appropriate HR and OH policies are in place and applied consistently in compliance with Department of Health requirements, the duty of care owed by an employer to an employee and the legal obligations to comply with CQC regulations, particularly those relating to patient safety and staff (1)(d) Danger to the health and safety of any individual: risks to patient safety (1)(f) That information tending to show any matter falling within s43B(1)(a)-(e) is being or is likely to be deliberately concealed.

14 September 2012 telephone call

300. The claimant produced a note of what he purported was said during the phone call that reflects a number of generalised statements having been made, and the Tribunal agreed with Mr Boyd's submission that this could not be a disclosure of information in the legal sense, even if the claimant's note was accepted at face value, which it was not.

301. Michelle Turner took the call in her capacity as executive on call that day, and she made a contemporaneous note. The claimant repeated to her his earlier complaints alleging bullying and harassment, and when it was pointed out to him that he was using the on-call bleep inappropriately because it was for urgent new clinical issues, the claimant became agitated, changed his story and reported a serious clinical concern about patient safety. When asked to clarify what clinical concern he was reporting, he refused on the basis that Michelle Turner was HR not clinical, and he wanted to talk to someone more senior, someone other than Dr Herod (the medical director and most senior medical practitioner in the organisation). Michelle Turner reminded the claimant of his duty as a doctor to declare his concerns, in the interests of patient safety. The claimant emphasised that he wanted to discuss matters that were clinical, and when reminded of his duty to speak to Dr Herod the claimant's response was that he would directly go to the press. Michelle Turner took this to be a real threat, given her belief that the claimant had made the report to the Liverpool Echo after making similar threats.

302. There is very little material difference between Michelle Turner's note and the claimant documents marked "transcript" which was not in fact a true transcript of the conversation as it did not capture everything that was said by both parties. It is notable that he claimant refused to speak to Dr Herod, who he described as a "bully".

303. The claimant spoke with Julie McMorran at the end of the telephone conversation, and the conversation with her lasted approximately 15 minutes. Julie McMorran made a file note from 13.45 onwards recoding that the claimant had requested all names and contact details including personal telephone numbers of

non-executive directors. He asked for a meeting with all non-executive directors in addition to Liz Cross to discuss "concerns about clinical and managerial governance in the Trust." Julie McMorran advised the claimant that he was to discuss clinical issues through the appropriate channels; she requested his telephone number in order that Liz Cross could make contact. The claimant refused, and when Julie McMorran offered to put the claimant through to Dr Herod who was standing by her ready to speak to him, the claimant put the phone down.

304. The claimant alleges he made a number of protected disclosures during the 14 September 2012 telephone conversation. The Tribunal finds that the claimant refused to speak with the relevant people, for example, Dr Herod, during the first telephone call and he refused to clarify the patient safety concerns alleged. The claimant relies on 8 disclosures allegedly made during the first telephone conversation. The Tribunal found, on the balance of probabilities, the claimant's disclosure was limited to "clinical and managerial governance" issues and Dr Herod's bullying of him. The Tribunal finds on the balance of probabilities there is no satisfactory evidence that the claimant made the other protected disclosures as alleged, and it finds those disclosures were not made. Further, the Tribunal found the claimant's motivation for referring to clinical and managerial governance issues flowed from his perception that he could not contact the executive on call; it was not made in good faith as required for disclosures made prior to 25 June 2013. The claimant was aware an executive on call and contactable via the bleep was available to deal with new patient concerns only.

305. The claimant's note records the claimant as saying "…I think it's a governance issue…no exec on call…" The claimant's concerns were those set out within his earlier grievance and he was intent on pursuing the perceived injustice to him with the non-executive directors, the press and regulator. In short, the claimant was convinced the respondent had no legal right to force the pre-employment medical checks on him, and it had no legal right to reduce his pay. The issues were personal, which the claimant attempted to hide behind a raft of broad brush unparticularised allegations used as levers to persuade the first respondent to agree with his viewpoint. It is notable when the claimant was asked to be specific as to what risk there was in the labour ward, his response was "do I think there is a risk there…of course there is a risk there today. There's always a risk…if you are asking me the specific question whether there is, I feel there is likely to be a risk on the labour ward today, then the answer I would have to give you is yes…I think you know what the issue is. I've spoken to Jonathan Herod numerous times about the issue."

306. As a result of the claimant's statement that he was reporting an immediate serious clinical matter the clinical director, Joanne Topping, immediately attended the labour ward for about an hour, and found nothing amiss, her team confirming there had been no concerns. When Dr Topping returned to find Dr Herod on the speaker phone to the claimant. Dr Topping could hear the claimant shouting at Dr Herod and not giving a straight answer to what the urgent patient safety concerns there were. The claimant was irate and incoherent, and the call terminated.

Conclusion tenth alleged protected disclosure 14 September 2012

307. The Tribunal found on the balance of probabilities that the claimant had not made the protected disclosures as alleged. The claimant was unable to specify any issue or any risk and in this regard, he could not be said to have disclosed information in accordance with the test set out below under law. An unparticularised allegation of wrongdoing is insufficient, especially given the fact the claimant was unable to provide any information as to how the labour ward was at risk despite being requested to do so.

308. A generalised comment about unspecified clinical and governance issues and describing Dr Herod as a bully in the specific circumstances of the telephone call did not amount to protected disclosures in the legal sense; the claimant was not providing information in the public interest his intention being to justify using the on-call bleep in circumstances where there was no urgent matter for the executive on call to deal with. It is notable when pressed the claimant was unable to provide any details of the risks he was complaining about on the labour ward and the reason for this was that there was no reportable risk that day that justified the use of the on-call bleep. In conclusion, the claimant did not make the protected disclosures alleged.

Detriment 20 relevant to the first respondent only - from 14 September 2012 Excluding the Claimant from the Trust premises

Conclusion: detriment 20

309. The claimant's exclusion arose from the 14 September 2012 incident as set out above; and confirmed in Dr Topping's letter dated 17 September 2012 and in her oral evidence, which the Tribunal found entirely believable. It is not credible to the Tribunal that Dr Topping would have engineered all of the evidence concerning the claimant's "erratic/irrational behaviours" to mask any motivation so to cause him a detriment for whistleblowing. The evidence is overwhelming; the claimant's exclusion was caused solely by his poor behaviour in the workplace and nothing else.

The claimant's exclusion and the first respondent's knowledge of his disability

310. A decision was taken by Dr Topping, who was shocked by the claimant's behaviour and his use of the on-call bleep, to exclude the claimant. Dr Topping and Dr Herod were worried about the claimant's mental health and Dr Topping took the view that the claimant was not fit to be at work. The Tribunal found as at the 14 September 2012 the first respondent, was put on notice that the claimant may have had a mental health issue demonstrating an escalating pattern of behaviour affecting his ability to work.

311. Dr Topping accompanied by Susan Westbury met with the claimant. Dr Topping suggested the claimant should go home, and indicated she did not want to formally exclude him. The claimant resisted and Dr Topping read from a script stating, "following your telephone conversations with executive directors today and the recent email traffic, I am concerned that you are demonstrating behaviours that

suggest you are not currently fit for work." She was unaware at the time the claimant had a diagnosed mental health condition for which he was taking medication, and the claimant did not offer this information up. The Tribunal found Dr Topping's decision was motivated exclusively by concerns for the claimant's health and fears that his behaviour could adversely affect staff and patients and with this in mind she suggested that he attend his GP. The exclusion was for two weeks "whist we obtained a medical opinion." The claimant thought he was going to be dismissed, and it may not have come entirely as a welcome surprise that he was excluded; the fact the claimant believed he was going to be dismissed is an indication of how bad his behaviour had been. The claimant's access to the first respondent's site was revoked.

312. In an email sent 14 September 2012 to all non-executive directors regarding the claimant's earlier email sent 13 September 2012 and marked "Dear all" the non-executive directors were asked not to individually respond to by HR.

Conclusion: detriment 19

313. On the evidence before it the Tribunal does not accept the allegations set out under detriment 19 were made in the 14 September 2012 telephone call as now alleged by the claimant. As indicated above, the Board were already aware of the claimant's concerns and the claimant on the finding of facts above, was not prevented from contacting board members. The claimant has not established he was caused any detriment, and the Tribunal found there was no requirement for board members to respond to a generalised "Dear all" letter. In the alternative, there was no evidence before the Tribunal the actions of Julie McMorran and Steve Burnett were motivated by whistleblowing. Clarification was sought from the claimant as to what his complaint was; he failed to provide it and a meeting was arranged with Liz Cross despite the claimant's intransigence.

Eleventh protected disclosure made to Care Quality Commission ("CQC") 14 September, 24 October and 26 November 2012 [first respondent only]

The Claimant alleges he raised concerns with the CQC as more fully set out at paragraph (3) of the Claimant's FBPS of 29 April 2016. He made three calls to the CQC on these respective dates, which he relies on as protected disclosures. The Claimant made disclosures about the following during the three calls. He provided more detail in his later calls than in his earlier calls, but cannot recall what he said in verbatim in each. The CQC may hold recordings.

- *the Trust's OH processes and lack of checks;*
- *the subsequent attempts by member so senior staff, including the Director of HR and Chief Executive to try to ensure that the Board and, particularly, the Non-executive Board members did not become aware of the OH issues;*
- *poor staffing levels, particularly on the Labour ward*
- *bullying culture; and scapegoat culture at the Trust - the culture by which every time there was an adverse event at the Trust, investigations would be manipulated to ensure that an individual was found to be the sole cause of the*

problem and usually then forced to leave the Trust via bullying. No blame was ever attributed to system failures or failures of senior management.

S.43B ERA (1)(b) Breach of any legal obligation: the legal obligations to comply with CQC regulations, particularly those relating to patient safety and staff (1)(d) Danger to the health and safety of any individual: risks to patient safety(1)(f) That information tending to show any matter falling within s43B(1)(a)-(e) is being or is likely to be deliberately concealed

14 September, 24 October and 26 November 2012 contact with CQC

314. The claimant made telephone contact with the CQC on 14 September, 24 October and 26 November 2012. The conversation was not noted and the claimant in oral evidence had difficulty recollecting what he had said. The Tribunal accepts the claimant's evidence that contact had been made and some form of complaint followed. The issue is what that complaint consisted of.

315. Mr Boyd submitted the letter from the CQC dated 5 July 2013 which referred to "concerns you have raised with us from September 2012" cited the first respondent's occupational health policy, staff screening and recruitment process. Mr Boyd submitted that this was the extent of the claimant's disclosures made on 14 September 2012 until his email of 23 June 2013 which was referred to in the 5 July 2013 letter as follows; "with regards to the concerns you raised recently regarding the staffing levels and culture of the Trust…" the Tribunal accept Mr Boyd's arguments on this point, taking into account the factual matrix borne out by the contemporaneous documentation.

Conclusion tenth alleged protected disclosure 14 September 2012

316. The Tribunal concluded that disclosure related to occupational health policy, staff screening and recruitment process as at 14 September 2012, which were all matters the claimant was aware remedial action had been taken by the first and second respondent. The disclosure was made by the claimant against a background where he believed he was being was being "forced" to undertake screening beyond the DoH minimum requirement against his will and in breach of his contract. The claimant was raising issues that had already been raised with him by the first respondent, and there was a long-running dispute about the claimant working face-to-face with patients and their health and safety.

317. The Tribunal appreciates an employee or worker raising facts already within the knowledge of his or her employer can amount to a disclosure of information, it matters not that the first respondent was already aware of the claimant's position. It is clear that complaints about the first respondent's occupational health policy, staff screening and recruitment process which cumulatively gave rise to a mistake in a failure to screen three doctors working under honorary contracts fell under category (b) and (d) relevant failures of S.43B(1). On the balance of probabilities, the Tribunal found the claimant had made a disclosure of information relating to his own personal circumstances and that of his two colleagues for which the first respondent had

admitted their error and thus the claimant held a reasonable belief, subjectively and objectively, the relevant failures had taken place. The disclosure was made under S43C to a prescribed person in whom the claimant reasonably believed that the relevant failure fell within matters in respect of which the CQC was so prescribed.

318. However, in the claimant's case because the disclosures occurred in 2012 there is a requirement under SS.43C and S.43E-H that the disclosure must be made in good faith in order to be protected. The Tribunal found the claimant's motivation was not the public interest but his annoyance and anger at the way he was being treated by the first respondent insisting he complied with its screening policy and the consequences to him for his failure to comply with a reasonable management request. The claimant had an ulterior motivation for making the disclosure other than in the public interest and that was the favourable resolution of his employment dispute and so the Tribunal found. Accordingly, given the Tribunal's finding that the disclosures were not made in good faith they cannot amount to protected disclosures.

319. The first respondent was not immediately aware the conversation with the CQC had taken place, and it was unaware of what had been said until the 5 July 2013 letter from the CQC. They could only guess what information the claimant had reported from their dealings with him, issues well known to exist in the labour ward involving staffing and the press report.

320. In the alternative, the Tribunal finds had a protected disclosure was made under Section 43C(1)(b) ERA there was no causal link to whistleblowing. The first respondent's decision to exclude the claimant made by Joanne Topping prior to the first respondent's knowledge of the CQC communication was totally unconnected to the 14 September 2012 contact with the CQC. The decision to exclude arose directly as a result of the claimant's behaviour as set out above and confirmed in Dr Topping's letter of 17 September 2012. The claimant's evidence was that he made an anonymous call to the CQC, and it is notable the CQC contacted the first respondent for the first time on 19 September 2012 concerning the anonymous concerns, and the occupational health screening process of non-directly employable staff was the only matter referred to.

Detriment 23 relevant to the first respondent only - 17 September 2012 – 3 October 2012 making it clear that the Trust wanted to exit the Claimant during conversation with the National Clinical Advisory Service

Dr Herod's contact with the NCAS

321. Under the first respondent's procedures Dr Herod contacted Steve Boyle at the National Clinical Assessment Service ("NCAS"), an external organisation run by the NHS providing advice regarding handling concerns about doctors. Dr Herod sought advice on what he could do about the claimant's behaviour after the incident of 14 September 2012 and Dr Topping's decision to exclude the claimant for 2-weeks and refer him to occupational health.

322. The claimant alleges Dr Herod was seeking advice concerning terminating the claimant's honorary contract. The Tribunal has considered Dr Herod's handwritten note of the telephone conversation and conclude the advice on terminating the honorary contract came voluntarily from Steve Boyle, advice that was not ultimately followed by the first respondent who did not accept they could pass the claimant back to the second respondent. Steve Boyle referred to Dr Herod's belief that "there may be underlying mental health issues" and later he confirmed his advice given to Dr Herod in writing that "it may be open to bring the honorary arrangements to and in certain circumstances within the terms of the contract." It is clear from the letter which followed Steve Boyle had discussed the case with his colleagues concerning termination, and he also advised that an occupational health report should be obtained to identify if there is a health component in the claimant's behaviour.

323. Dr Topping confirmed the exclusion in a letter dated 17 September 2012 referring to her concerns for the claimant's medical well-being based on the "erratic/irrational behaviours that you had demonstrated throughout the day…Robin Harrison, HR manager of the University of Liverpool…is aware that you have been offered two occupational health appointments with the Trust's occupational health department. **The first one was today but you declined that** [my emphasis]. We have another appointment reserved for Friday 21 September 2012…Mr Harrison has also stated that if your preference is to attend the University's occupational health service, then he will arrange this immediately."

324. There is no dispute during this period the claimant did not attend the first respondent's occupational health for a medical report to be prepared clarifying whether or not his behaviour was linked to any mental health issues.

Detriment 6 relevant to second respondent only - On or around 17 September 2012 liaising with the Trust with regard to intentions to remove the Claimant from his position. This is shown in hand written notes made of a call between the Trust and the National Clinical Advisory Service which indicates involvement by Professor Ian Greer and Mr Robin Harrison, HR Manager

325. On the 17 September 2012 Dr Herod contacted Professor Greer of the second respondent concerning the claimant following Dr Topping's decision to exclude. The note set out the following; "Discussed Ian Greer 17/9/2012 15-00." There was a short line and a gap followed by "Evidence rang CQC ?OH issue. LW staffing. KT thinks causes problem being an employee of the Trust. We all try to end honorary contract. NCAS say Ok [arrow] pass to university [arrow] they will ask DG [line break] ? How to end their contract."

326. In oral evidence Dr Herod confirmed the reference to LW staffing was to the labour ward, an abbreviation he used. The abbreviation "LWH" was used for the first respondent by him. "KT" was a reference to the chief executive Kathryn Thompson. Dr Herod explained the claimant did cause a problem; he had no desire to be screened and the conversation with Professor Greer was about what happened next. Dr Herod's view was the first respondent had been doing the claimant "a favour" by

allowing him access to a clinical environment on an honorary contract under which it did not think it had primary responsibility.

327. On the balance of probabilities, the Tribunal found Dr Herod's oral evidence that the entire note was not of the telephone conversation with Professor Greer but made over a period, was not credible, given the natural and common-sense interpretation that could be given to the wording of the note. The note ran as if it were a conversation i.e. the reference to "pass to University…they will ask DG." "DG" was David Graham, post graduate dean and the most senior person in the second respondent dealing with medical training, who Dr Herod indicated in oral evidence, was the person with the knowledge of honorary contracts, line-management responsibility, the contractual obligation of the first respondent and what could/could not be done under the contract including whether there was a method for ending it.

328. In oral evidence under cross-examination Dr Herod explained that he had no evidence at the time of this conversation of the claimant's call to the CQC. His recollection was Professor Greer may have had this information. The matter was far from clear for the Tribunal as there was no evidence before it that the second respondent was aware of the claimant's call to the CQC, and it made no sense why it should have been so aware. The claimant's reports to the CQC concerned the first respondent and not the second. It is impossible to state with any certainty from this note when the first respondent became aware of the call to the CQC. There was no evidence the first respondent monitored the claimant's calls until later in the chronology, other than in this note and the Tribunal concluded, on the balance of probabilities, that by the 17 September 2012 Dr Herod had been made aware of the claimant's first contact with the CQC. How he was made aware, the Tribunal cannot say with any certainty and it can only surmise that as the claimant's calls to the CQC were monitored later, that monitoring may have taken place earlier by the first respondent to establish when the claimant reported to the press as threatened. The Tribunal takes a very dim view of the claimant's calls being monitored without his knowledge or presumably consent (the Tribunal was not taken to the relevant Policy) and an adverse inference has been raised on the basis that someone in the first respondent was prepared to act in such a way; keeping tabs on the claimant because he and/or she believed the claimant would cause difficulties for the Trust if he went to the press.

329. The Tribunal deliberated long and hard on the evidential implications of Dr Herod's 17 September 2012 hand-written note. It re-visited Dr Herod's oral evidence on cross-examination noting his concession that he had difficulties recollecting events that had taken place so many years ago; he was the clinical director of a busy hospital dealing with difficult staffing issues in addition to his own specialist clinical practice. The claimant was but one of a number of doctors who were causing him difficulties, and the Tribunal accepted this explanation noting Dr Herod's witness statement did not deal with the 17 September 2012 discussion with Professor Greer. The evidence before the Tribunal is clear, Dr Herod genuinely believed the claimant was a trouble-maker because of his attitude towards health-screening and the fall - out from this, his obstructive attitude and the way he spoke with people coupled with

Dr Herod's conviction that it was the claimant who had made such serious allegations to the press. It is for these reasons only that Dr Herod took the opportunity to explore with Professor Greer, the advice given by NCAS to the effect that the honorary contract could be terminated as a result of the claimant's bad behaviour in the workplace.

330. The claimant's contract was not ended 31 December 2014, and the Tribunal found (a) the fact the claimant made protected disclosures to the CQC on 14 September 2012 was the sole or principal reason for the claimant's dismissal some 2-years later.

331. In conclusion, the Tribunal finds on the balance of probabilities as at 17 September 2012 Dr Herod and higher-level management within the first respondent were unhappy with the responsibility of dealing with the claimant's problem behaviour, when he had not been recruited by him and he worked under an honorary contract. They genuinely believed as the first respondent did not have primary responsibility, according to Steve Boyle of the NCIS there was a possibility the contract could be ended and Dr Herod wanted to explore this option. If the Tribunal is incorrect in its finding that the claimant's disclosure to the CQC was not a protected disclosure, and it had misinterpreted the 17 September 2012 note, in the alternative, it would have gone onto find despite Dr Herod miss-recollected there was no causal link between the claimant whistleblowing to the CQC and detriments alleged after the 14 September 2012 disclosure which were not done on the ground the claimant had blown the whistle.

Conclusion: detriment 23

332. There was no satisfactory evidence before the Tribunal that in or around 17 September 2012 the second respondent liaised with the first respondent with regard to an intention to remove the Claimant from his position. The hand-written notes did not make it clear that Professor Greer, Robin Harrison and Dr Herod wanted to exit the claimant from his employment; this possibility came from the NCAS and it was not acted upon at the time. The Tribunal found the claimant had not been caused any detriment; he did not know of the conversation and no action was taken against him as a result. If we are wrong on this point we would have gone to find there was no causal connection between the respondents exploring the possibility of an exit with whistleblowing against a background of the claimant behaving badly towards his colleagues and his use of the on-call executive bleep.

Detriment 21 relevant to the first respondent only - 14 September 2012 –April 2014 invoking a disciplinary procedure against the Claimant – an internal investigation commenced 14 September (put on hold in October) and formal investigation restarted on 27 November 2012

333. Dr Greenhalgh, a consultant clinical geneticist, the clinical lead for genetics based in Alder Hey Children's hospital was asked by Michelle Turner investigate concerns regarding the claimant's conduct. Dr Greenhalgh had never met or herd of the claimant before, ad agreed to undertake an investigation under the first

respondent's Maintaining High Professional Standards Policy (the "MHPS") with the assistance of an external consultant and Paul Thornburn, HR business partner ("HR").

334. There were various communications between the first and second respondent, including Professor Alferevic, during this period concerning a number of matters relating to the claimant, not least the occupational health appointments arranged for him and the requirement that claimant undertook the appropriate health screening so that he could return to full practice, including carrying out EPP.

19 September 2012 CQC contact with the first respondent concerning anonymous concerns raised and its certain knowledge that the claimant had made disclosures.

335. The CQC contacted the first respondent on 19 September 2012 for the first time concerning the occupational health screening process of non-directly employed staff, the anonymous allegation reported to it by the claimant.

336. Two briefing papers were sent to the CQC setting out the first respondent's position on 28 September and 28 November 2012 prepared by Michelle Turner, who thought it was likely the claimant had raised the anonymous concern, but she was unaware that the claimant anonymously contacted the CQC again on 24 October 2012.

337. Professor Alfirevic wrote to the claimant on the 21 September 2012 emphasising the "importance of complying with all Trusts request to undergo occupational health assessments." Reference was made to the claimant's allegations of discrimination by the second respondent, and further details were sought in order that an investigation could take place by the second respondent.

338. In an email sent 24 September 2012 to Dr Topping the claimant complained about the inappropriate behaviour of Michelle Turner writing to him as; "I have serious concerns regarding her integrity and await details of any professional bodies she is a member of." With reference to occupational health reports the claimant observed "I note that I have not agreed for any OH report to be provided to the Trust and as stated previously am unlikely to provide this until the Trust case is formally set out and a hearing provided…" The Tribunal finds the claimant refused to be examined by occupational health during this period, despite Dr Topping's request. It was his habit to threaten to report people who crossed him to their professional bodies.

339. Dr Topping wrote to the claimant on the 27 September 2012 providing a list of appointments dates for his examination by doctors employed by an external health provider known as Healthwork Ltd based in Manchester, confirming the first respondent would meet travel costs.

The allegations

340. Caroline Salden in her capacity as chief operating officer/case manager, wrote to the claimant on 27 September 2012 advising him the first respondent was investigating his conduct in the workplace under the Policy for Handling Concerns about Conduct, Performance and Health of Medical Staff. A number of allegations were set out arising from the claimant's behaviour on 14 September 2012 including an allegation that the claimant acted rudely and aggressively towards staff, made unfounded allegations with respect to clinical safety and inappropriate use of the bleep. Included within the remit for investigation was an allegation that the claimant "may have made" misleading and inaccurate disclosures to the Liverpool Echo on two occasions, was inappropriate, had shown verbally aggressive behaviour towards staff during telephone conversations and failed to cooperate with a reasonable request to allow an occupational health report on fitness to work.

Detriment 24 relevant to first respondent only - from 27 November 2012 excluding the Claimant from the Trust premises

Detriment 25 relevant to first respondent only - 27 November 2012– 17 June 2014 Breaching the MHPS policy by continuing the Claimant's exclusion beyond 6 months

341. Caroline Salden and Michelle Turner at the end of September 2012 had agreed the claimant should be excluded from practice pending an investigation in which Caroline Salden would perform the role of case manager. The Tribunal is critical of Caroline Salden's involvement in both the exclusion decision and taking on the role as case manager. The Tribunal accepts the management team is small, nevertheless, if Caroline Salden was earmarked to carry out the role of case manager she should not have been part of the decision-making process to exclude the claimant.

342. In an email sent 19.49 to Dr Topping the claimant confirmed he would attend the occupational health appointments in October 2012. The claimant did not say he had already attended the respondent's occupational health provider. The claimant referred to occupational health evidence suggesting there were no health issues. 18 minutes later the claimant told a different story to Caroline Salden. The claimant responded to the letter of 27 September 2012 by email sent 28 September 2012 at 20.08 to Caroline Salden maintaining he should have been allowed to attend a meeting to make representations regarding exclusion, and "I feel your letter is misleading in suggesting that I have failed to cooperate…I offered to ask my GP to provide a health report…I have also attended the only OH appointment offered by the Trust…"

343. The claimant gave a clear indication that he wished the grievance hearing to be put off until he had been provided with full disclosure of documents previously requested. This became a running theme in respect of the first respondent's attempt to arrange a variety of hearings and meetings with the claimant.

Michelle Turner's briefing to the Care Quality Commission Inspection 28 September 2012

344. The brief set out the history of three doctors, recruited by the second respondent, commencing clinical duties without having completed the full range of employment checks due to a communication breakdown between the two organisations. Reference was made to the first respondent's "gold standard practice" of screening and how one doctor had objected to it and "remains highly aggrieved." Under the heading "actions" the she confirmed internal controls have been tightened and the Trust and University of Liverpool "have set up a Task & Finish group (which now includes HR representatives from other Merseyside hospitals) to develop a more robust framework…" The evidence before the Tribunal was that these steps were taken, and when the issue arose in April 2012 the first respondent in particularly was proactive in sorting it, never hiding from the problem.

345. It is not disputed that claimant requested "all information held by the Trust regarding myself" and the first respondent agreed to hand across the claimant's file.

346. The claimant's appeal against exclusion was listed on short notice for 3 October 2012.

347. On the 3 October 2012 Dr Herod had a telephone discussion with Steve Boyle of NCAS who expressed a view that if the claimant was being difficult the first respondent should "pass him back" to the University and "our processes should be as short as possible to exit him from the organisation." The claimant argued before the Tribunal this was Dr Herod's view; the Tribunal found this not to be the case. It was advice given by Steve Boyle, which was not dissimilar to that given earlier. Apart from the earlier conversation with Professor Greer, there was no evidence before the Tribunal that Dr Herod took any positive steps to action Steve Boyle's advice.

348. On the 3 October 2012 the claimant was informed the Step 3 Grievance Appeal Hearing was to take place on 10 October.

The claimant's medical condition – 1st medical report from occupational health physician at Healthwork dated 4 October 2012.

349. The 4 October 2012 medical report was disclosed with the claimant's authority. The claimant was found to be fit and well with "**no underlying medical conditions**" [my emphasis]. It was confirmed "from my assessment today I found him to be fully fit for all duties of the post including undertaking exposure prone procedures. He provided all appropriate evidence for this." It was apparent the respondent did not have a copy of the report until around the 12 October 2012.

350. As at 12 October 2012 the medical advice before the respondents was that there was no underlying medical condition, and given the claimant's position that there was nothing wrong with his health, there were no grounds for the first and second respondent to conclude the claimant disabled by reason of depression despite Dr Herod's suspicions to the contrary. The claimant did not dispute the

medical evidence, having authorised its release to the first respondent. It was not unreasonable for the first respondent to accept the expert advice of occupational health especially given the fact that it was supported by the claimant, who was under a statutory obligation to divulge any health issues that could affect his fitness to practice.

Michelle Turner's letter to BMA dated 10 October 2012

351. The claimant was represented by Joanne Alliston of the BMA, who, it appears to the Tribunal, co-wrote with the claimant a number of the emails and letters that passed between the parties.

352. Michelle Turner, in her letter of 10 October 2012 to the BMA, made it clear the claimant would require occupational health reports/clearance of satisfactory screening, she acknowledged there had been "failings in the recruitment process" between the first and second respondent, apologised for the confusion and upset caused to the claimant as a result and confirmed the first and second respondent were working together "to address weaknesses in systems" and were also working with the Deanery to ensure "consistency of practice and clear communications." This reflected the true position at the time and so the Tribunal finds.

353. In addition, Michelle Turner made reference to the first respondent asking the claimant to participate in "a learning exercise with the BMA and a senior healthcare professional, not employed by the Trust, to consider his approach and behaviours as a doctor, and how he might behave differently in the future if presented with a similar difficult situation." She confirmed in good faith "The trust would also be prepared to participate in this learning exercise and a senior clinician will attend on behalf of the Trust." This offer encapsulates the first respondent's view of the claimant's behaviour and its response to it; neither whistleblowing or disability played any part in this. The key issue concerned behaviours in the workplace and managing them in the future. The Tribunal's view was reinforced by Michelle Turner's reference to the claimant agreeing to withdraw his grievance and Tribunal claim "and any complaints he had brought against any individual officer of the Trust" in return for which the first respondent "was prepared to consider the concerns relating to conduct as addressed informally and will not therefore proceed with a formal investigation…[and] is prepared to reimburse the monies withheld…subject to the completion of re-employment checks and the agreements outlined above." It is marked that the first respondent preferred to hold out the olive branch and reach a resolution to the benefit of both parties rather than go down the route suggested by NCAS.

The agreement reached between the parties

354. By the 11 October an agreement to this affect had been reached as confirmed in the BMA email which referred to assurances being sought that the claimant will not be "discriminated against in any matter in the future as a result of his actions of whistleblowing or any other action he has taken against the Trust or University." Despite Ms Allison's reference to whistleblowing, there was no satisfactory evidence before the Tribunal that the claimant had made any protected disclosures directly to the first respondent up to and including the email of 11 October 2012. In her letter

Joanne Allison did not specify any disclosures that had allegedly been made; it was a broad-brush comment. The Tribunal concluded that the only disclosures made were to the press and to the CQC regarding health-screening of non-directly employed staff in September which resulted in Michelle Turner produced the two briefing papers for the CQC.

355. In a letter dated 12 October 2012 Michelle Turner confirmed the first respondent would follow its Policy with regard to whistleblowing providing the employee was "acting in good faith." Reference was made to the Healthworks report that confirmed the claimant's fitness for work. Discussions continued about a way forward enabling the claimant to return to work upon receipt of occupational health clearance with respect to EPP.

356. On 12 October 2012 Dr Greenhalgh and Roger Wilson were in the process of preparing terms of reference for the investigation that included a list of interviewees which did not include university staff. The ongoing negotiations between the BMA and Michelle Turner, which if successful, would obviate the need for an investigation, and this would benefit all of those involved, not least the claimant.

Staff briefing 18 October 2012

357. On 18 October 2012 Gail Naylor briefed staff concerning the demands in "all areas of our Maternity and Neonates Division" confirming staff would be regularly informed of progress around staffing levels "workforce redeployment and pathway redesign" emphasising "in the meantime, we want to hear any concerns you have and would encourage you to continue to raise any issues or worries that you have with your line manager or through the appropriate systems." The Tribunal heard oral evidence from a number of the second respondent's witnesses, including Gail Naylor and Dr Herod, on its positive attitude to disclosures being made within the workplace, especially with regards to any matters that could compromise patient safety, which it accepted as entirely believable. The Tribunal concluded why else would a bleep be available for individuals to call executives on duty if they suspected patient safety was being compromised, and accepted as credible the first respondent positively encouraged staff to make disclosures involving patient safety.

The agreement that the claimant return to full clinical duties

358. In an email sent to Michelle Turner Joanne Alliston confirmed an agreement had been reached; timescales and an amended letter were requested. The Tribunal took the view that the existence of this agreement whereupon the formal investigation against the claimant would be put on hold, was evidence that undermined the claimant's contention that the entire upper layer of management within first respondent wanted to secure his exit from the organisation. Had that been the case there was sufficient evidence before the first respondent to proceed down the disciplinary route with the high possibility that at the very least the claimant may have received various warnings and eventually dismissed for refusing to obey a reasonable management instruction and at its highest, summary dismissal due to his behaviour in the workplace.

359. In a letter dated 23 October 2012 Michelle Turner captured all of the issues agreed in her communications with Joanne Alliston including an exclusion review on 26 October 2012, a requirement that the claimant complete his employment checks with a view to lifting his working restrictions enabling the claimant to return to full practice, retraining and refreshing and a requirement that the claimant was "asked to reflect on his behaviour throughout this process and to **formally acknowledge to the Trust his regret for any upset or distress caused to any Trust employee as a result of his action** [my emphasis]." Payment of the claimant's pay would follow 14-days after satisfactory conclusion of the steps to be taken by the claimant under the agreement. The reference to a formal acknowledgment is clear and any employee acting reasonably would have understood by this a formal acknowledgment should be in writing. This distinction is important because later in the chronology Dr Herod took the view a formal apology had not been given. There is a distinct difference between an apology and a formal apology, and a person such as the claimant, who was highly qualified and talented academically, would have appreciated this bearing in mind it was his behaviour under scrutiny.

360. The first respondent did not accept the view taken by Healthworks Ltd that the claimant was fit for EPP, as it required evidence of an "identified validated sample…. from another occupational health service [and] the claimant had agreed to attend that service to complete his checks" One of the samples provided by the claimant had not been validated as it had been written on by the claimant. Given the prospect of the claimant returning to full duties, it was not unreasonable for managers employed by the first respondent to communicate with the claimant directly and so the Tribunal finds.

361. As at the 26 October 2012 the first respondent expected the claimant to be working on call from January 2012, thus returning to his full duties. Caroline Salden in a letter dated 26 October 2012 sent directly to the claimant (and not the BMA) confirmed the exclusion was to be lifted given the advice form Healthworks, the claimant could not undertake EPP until he had provided the appropriate health screening and the investigation was being put on hold for 10 days from the 26 October, in order to give the claimant time to complete the screening failing which the investigation would proceed.

362. Joanne Alliston responded that the BMA did not agree with the 10-day period. Subsequent correspondence from the claimant questioned the first respondent's definition of EPP and he sought to return to clinical duties. The claimant did not say in his email sent 2 November 2011 that he would complete the test necessary in order that he could undertake EPP. Instead, the claimant raised allegations of unreasonable, discriminatory and detrimental treatment even though there was still one item outstandinding before the claimant satisfied the respondent he could carry out EPP duties. It had been explained to the claimant on numerous occasions his attendance in theatre and the delivery suit was conditional on him providing evidence of EPP clearance. The position was made clear again in an email sent 1 November 2012.

363. The claimant sent a number of letters and emails reflecting his unhappiness with being offered restricted duties, which he perceived to be less favourable treatment in comparison to his colleagues. It is notable the two doctors on honorary contracts had undergone screening immediately, and continued to work unfettered. The issue the first respondent came up against was the insurmountable obstacle of the claimant refusing to provide the necessary information in order that he could undertake EPP and the claimant's restricted work continued.

364. Despite having requested a broader range of duties, in an email sent 2 November 2012 to Caroline Salden from the claimant he made it clear that "**I do not think it is reasonable that I be expected to return to clinical duties** [my emphasis]…" It appears to the Tribunal the claimant accepted the course of action taken by the first respondent that he should not be undertaking clinical duties involving EEP and this undermined his assertion that a detriment was caused as a result.

365. In a letter dated 7 November 2012 to the claimant from Michelle Turner she set out (following communications between her, the claimant, Dr Topping and Dr Watkins, senior consultant obstetrician and college tutor) the duties the claimant could safely carry out without EPP clearance. If the claimant was in any doubt about the terms of his EPP restriction he was advised that the consultant on-call should be contacted immediately. Michelle Turner concluded "for the sake of clarity, until such time as you are cleared for EPP, you will not work on delivery suit or participate in the on-call."

366. Caroline Salden in a letter of 8 November 2012 extended the deadline for the claimant to provide further evidence of EPP clearance by 10-days and offered to make the occupational health appointment for the claimant. She sought formal confirmation that the claimant had made an appointment at St Helen's & Knowsley occupational health department.

<u>ET Case management hearing 9 November 2012</u>

367. Susan Westbury reported to the first respondent following a preliminary hearing held in this matter at the Liverpool Employment Tribunal. She provided a witness statement dealing with the claimant's treatment of her at the hearing, alleging the claimant objected to her and Michelle Duckworth being present and asked the judge to call security. Susan Westbury confirmed she and her colleague were "shocked" by the claimant's actions, including his behaviour towards the first respondent's female solicitor.

368. The claimant confirmed he would attend occupational health on 15 November 2012 in an email sent 12 November 2012. The claimant was concerned the investigation would proceed and sought clarification of this. He was informed by Caroline Sadden on 13 November once he had attended occupational health they could ascertain how long the clearance would take, and the first respondent would be prepared to wait for clearance.

369. The claimant attended the appointment with occupational health on 20 November 2012 but stopped the first respondent from being informed of the result.

Incident at occupational health 20 November 2012

370. The claimant attended the first respondent's occupational health department on the 20 November 2012, the 15 November 2012 appointment having been cancelled by the hospital. The claimant's attendance resulted in an incident form being completed by Julie Dorman, senior occupational health advisor. She described how the claimant attempted to "tie me in knots" he undermined her and she felt bullied and intimidated. She recorded "I was physically shaking, very anxious" and asked Rebecca Rogan, administrator to enter into the room to observe, which the claimant objected to and she left.

371. Julie Dorman described the claimant as "overbearingly intimidating, threatening. He constantly sought verbal rationale for being there and having to undergo the procedure…there was a controlled anger in his voice and demeanour…he continued to be verbally obstructive and contentious…I felt as though he was thriving on making me squirm and asking questions above my clinical knowledge base…I felt anxious…physically shaken and to the point of tears…I felt he was being overbearingly obstructive and manipulative…I was physically trembling…I felt physically sick and just wanted to cry." She reported that the claimant continued to tape all verbal dialogue, and when she asked him to leave, he refused, Julie Dorman attempted to call HR, and the claimant threatened her with legal proceedings, which scared her.

372. Rebecca Rogan also provided a witness statement relating to what she had witnessed of the incident, concurring with Julie Dorma as to the claimant's behaviour and its effect, including her upset stating; "she looked as though she was about to burst into tears." Rebecca Rogan called security when the claimant refused to leave. Both employees were left shaken by the claimant's behaviour. She confirmed on the two occasions the claimant had attended the occupational health department he had made her and her colleagues "feel uneasy and upset." The Tribunal took he view the allegations were serious, bearing in mind the claimant had previously agreed to formally acknowledge his regret for any upset or distress caused to any Trust employee, the formal acknowledgment was still outstanding and the claimant was repeating his behaviour.

373. Julie Dorman confirmed to the first respondent the claimant had been screened clear for EPP without obtaining the claimant's authority to release this information. Julie Dorman's actions had consequences for the claimant later on in the chronology, as he had attempted to report her for breaching confidentiality to her regulator, the NMC, had been unable to do so and misrepresented himself in order to gather the necessary information for a formal complaint.

The claimant's meeting with Michelle Turner on 26 November 2012

374. The claimant had been given until 4pm 26 November 2012 to confirm the results of his health screening.

375. Michelle Turner was aware from discussions with Julie Dorman the claimant had been cleared for EPP, and she informed the claimant of this at a meeting when he brought health screen related documents to her office, finding him unnecessarily rude and aggressive towards her.

376. The claimant had presented himself at Michelle Turner's office on the 26 November 2012; the meeting was taped and transcribed in part. The conversation concerned the agreement reached previously, that the investigation would not proceed providing the claimant provided "documentary evidence of certain blood tests." The claimant sought the removal of Julie Dorman from the premises because she breached confidentiality by bringing in Rebecca Rogan, alleging she had been "inappropriately abusive towards me." Michelle Turner refused to name the nurse who had confirmed the claimant had been cleared for EPP. The claimant demanded the director of nursing and midwifery be immediately informed, nurse suspended and referred to her regulatory body (the NMC). The claimant was so angry Michelle Turner felt anxious for her own safety and asked him to leave her office, which he refused to do.

377. The claimant instructed Michelle Turner not to deal with the BMA when she offered to speak to his representative about the arrangements to be made for his return to work, health screening having been concluded making it clear that "I am trying to progress this matter. I thought you wanted to progress this matter." The claimant responded, "I want to move outside of the Trust…because I think you know, **now there is going to be obviously big litigation between us** [my emphasis]." When asked why, the claimant made no reference to disability discrimination or whistleblowing, his explanation was "because you bullied and harassed me and, and you bullied me into having tests done."

378. The Tribunal found that the claimant's explanation as at the 26 November 2012 was in line with all the events that had taken place beforehand; this was not a case concerning protected disclosures and disability discrimination. It centred exclusively on the claimant's perception that he was being "bullied" into "having tests done"; a requirement of his employment which the claimant disputed was contractual. The Tribunal took the view that the claimant's behaviour at the meeting was further evidence of intransigence, his aggressive and dismissive attitude with which he regarded employees in the first respondent. The transcript portrays how the claimant conducted himself during this period.

379. Following the meeting there was an exchange of emails concerning beach of confidentiality that culminated in the claimant's email of 26 November 2012 sent 16.59 making it clear (a) the first respondent did not have his authority they had gained from occupational health concerning his clearance and (b) he could continue in the non-EPP role and obtain clearance. The claimant made it clear "I am cleared

for a non-EPP role" only. Michelle Turner, who was understandably concerned with the position adopted by the claimant, accepted the claimant had not given his permission to use the occupational health clearance confirmation and he should therefore not be considered cleared for EPP duties. The claimant continued working on clinical duties that did not involve EPP.

380. Caroline Salden wrote to the claimant on 26 November 2012 setting out the agreement reached with the BMA and her view that "occupational health have confirmed your health clearance…you also agreed to a series of other undertakings (detailed in the letter to BMA dated 23 October 2012) the Trust would need formal confirmation from you that you have agreed to those undertakings, and where applicable, complied with the actions required, before it would consider this issue informally resolved…if these issues are not concluded within 14 calendar days…the Trust will commence a formal investigation." A meeting was suggested to agree the process for the claimant's return to work.

381. Caroline Salden received emails from the claimant sent at 19.17 and 19.44 on 26 November 2012 which made it clear that he was unhappy. He asked for specific details of the conditions/undertakings and requested "if you would destroy any documentation on my EPP clearance status and ensure that my list of queries with respect to the EPP status…is responded to…I believe that documentation obtained by dishonest means should not be held by the Trust and the Trust should only consider me cleared for EPP's according to the non-LWH/DoH standards." In other words, the claimant was prepared to carry out non-EPP only, and the Tribunal took the view that the claimant's attitude towards the first respondent's "gold standard" screening and his contractual obligation to undertake all clinical duties was incomprehensible and only served to further undermine further his relationship with managers in the first respondent, particularly Dr Herod. The evidence taken cumulatively points to the fact the claimant's intention was not to return to EPP clinical work; he never did, but to lay the ground for this litigation and it is difficult for the Tribunal to understand in those circumstances how the claimant was caused any detriment when it was he who avoided returning to full contractual duties offered to him by the first respondent.

382. At 22.42 on 26 November 2012, the claimant emailed Linda Watkins stating it was "not appropriate that I am required to partake in any clinical service commitments…whilst there is ongoing litigation" confirming he had been in contact with the Deanery to facilitate a transfer and "**forcing me to work in this environment would be detrimental to patients** [my emphasis] …" It appeared to the Tribunal that the claimant, despite having occupational health clearance status in respect of EPP work and the first respondent seeking to facilitate his return to full duties, was having none of it.

383. It is notable the claimant had the opportunity to return to work on full duties including on-call. Michelle Turner worked hard to achieve this aim, she wanted to progress matters and get him back into the department working clinically. It is incomprehensible to the Tribunal why the claimant at this juncture, when his future looked more positive, refused to formally release the screening results which he

made clear, the first respondent could not rely upon. The Tribunal infers from the claimant's reference to the "big litigation" that in some way the claimant was seeking to build up a legal case against the first respondent in order to prove that he was right all along, and he did not wish to return to work on full duties having been "bullied" into the health and safety test carried out on 20 November 2012. The claimant's email of 26 November reflects the knowledge he possessed at the time concerning the Deanery facilitating a transfer.

Claimant's exclusion 26 November 2012

384. As a result of the position adopted by the claimant in his 26 November 2012 email, particularly the reference to patient safety, Caroline Salden took the decision to exclude him, concluding the investigation should recommence given the claimant had not complied with his side of the bargain. She genuinely took the view the claimant believed he posed a risk to patients (on his own account) and she was also concerned he may interfere with the disciplinary investigation.

Incident arising from the claimant's exclusion

385. The claimant' was informed of his exclusion by Jo Keogh, deputy director of operations in the first respondent. An incident report form was filed with the first respondent by security guards concerning an incident that arose. The report referred to the claimant's attitude towards staff as "very obnoxious" and his behaviour was so bad he was threatened with the police being called. It was alleged the claimant made his way "towards the female member of staff [Jo Keogh] in an intimidating and threatening manner, the male member of the HR staff [Paul Thornburn] attempted to take hold of his arm in order to restrain/stop him getting any closer to her…"

386. A security guard, Richard Kawar, provided a statement to the first respondent referring to the claimant's aggression that had reached the "point of no control" and referred to the claimant's threats to prosecute them for assault, which Richard Kawar and his colleagues found distressing as they did not want to lose their jobs "when we were only doing our job."

387. Paul Thornburn, who was present throughout the entire incident, made a statement as did Jo Keogh, in which she described the claimant as "extremely angry, loud and irritated" when he was informed further complaints had been made about his behaviour. Jo Keogh went to find Professor Alfirevic so that he could calm the claimant down as his agitation and anger became "even more pronounced." and she witnessed the claimant screaming and crawling down the corridor on his hands and knees. An ambulance and a paramedic crew were called as the claimant complained of chest pains; the police arrived and had a discussion with the claimant. Carol Mills from the second respondent also spoke with the claimant, and eventually he agreed to leave.

388. In an email sent on 27 November 2012 from Dr Herod to Michelle Turner, written on reading the claimant's emails sent on 26 November 2012, he wrote "I am now of the opinion that MT has not engaged as was indicated/promised in a process

of resolution. We need to determine a way forward but I don't think we can carry on like this." The claimant invites the Tribunal to infer from Dr Herod's comment "I don't think we can carry on like this" that the first respondent's intention was to dismiss him. The Tribunal did not agree; it is undisputed the claimant was not dismissed for his behaviour and on the face of the evidence before the Tribunal, it cannot be said that continuing with the disciplinary process was "done on the ground of" the claimant raising any protected disclosures. Dr Herod was merely stating the obvious, faced with a doctor who could not be managed no matter how they tried, causing difficulties for the Trust.

Dr Herod's handwritten note affixed to the email sent 27 November 2012 and the list of 5 calls made by the claimant to the CQC

389. A post-it sticker was attached to two emails, the last being from Dr Herod sent to Michelle Turner on 27 November 2012 as recorded above. The post-it note written by Dr Herod stuck was on top of the document undated and stated in his hand-writing "**He spoke to the CQC again yesterday**! [!] [my emphasis] Need to act to stop this continuing." Dr Herod agreed the note had been written by him.

First respondent's knowledge of the claimant's calls to the CQC 26 November 2012

390. The Tribunal was referred to a document produced by the first respondent showing "Calls made by MT to…CQC." Two calls were reported to have been made on 14 September 2012, one on the 18 September, one on 24 October and the last on 26 November 2012. It must follow as a matter of logic the document listing these calls was produced after the 26 November 2012, which was the last call referred to.

391. Dr Herod handwrote a note "check his email also!" and the suggestion given by Dr Herod in oral evidence was that it was not as an instruction. The Tribunal did not accept Dr Herod's explanation as credible; it was clear the claimant's calls to the CQC were being monitored without the claimant's knowledge. The reason for this was that Dr Herod was concerned with the claimant's CQC communications and the possible damage he could cause to the first respondent's reputation. There was no evidence before the Tribunal the claimant's emails were checked; and it appears they were not.

392. It was not disputed by Dr Herod that he had received a list of dates from 14 September 2012 to 26 November 2012 when the claimant had made contact with the CQC and he was concerned about this. With reference to the words Dr "RT [a reference to Paul Thornburn] check his emails also!" under cross-examination Dr Herod explained he had not requested the note of CQC telephone calls and it had been left on his desk. The Tribunal accepted this evidence at face value; it was not satisfactory that the first respondent was unable to confirm who had compiled the call log, but this does not establish a conspiracy took place. Clearly, somebody other than Dr Herod from the first respondent had gone to the trouble of obtaining this information on the understanding that it would be of interest to Dr Herod, and it was. The Tribunal, on the balance of probabilities, did not accept Dr Herod's oral evidence that he "almost jokingly responded 'check his emails also' as a throw away comment.

The situation did not lend itself to jollity; the evidence before the Tribunal was of Dr Herod's concern with the claimant's behaviour and communications (particularly to the press) against the background of a complicated internal employment dispute. The Tribunal concluded that this was a "knee jerk" reaction by Dr Herod. The instruction given to Paul Thornburn was not acted upon and nor was it chased up by Dr Herod, and the Tribunal conclude the claimant's emails were not monitored.

393. In oral evidence Dr Herod indicated his concern was to put the first respondent's side of the story to the CQC and it was his belief that the claimant had already provided the press with misleading information. Dr Herod did not believe the claimant could be stopped in his tracks, and his hand-written notes reflect his frustration with the claimant. It is notable thereafter none of the evidence pointed to the claimant's calls or emails being monitored, despite the fact he continued to communicate with the CQC.

394. In oral evidence under cross-examination Dr Herod stated he was concerned, and was of the opinion at the time the CQC should be contracted "to put context around what was happening" concerning the claimant's "difficult dispute" with the Trust, on the basis of the first respondent's past experience with the CQC was that they took some reports on face value. The Tribunal found on the balance of probabilities, taking into account the undesirability of monitoring the claimant's emails (for which the first respondent can be criticised) the Tribunal concluded Dr Herod's issue was not with the claimant raising concerns with the CQC per se, but his drivers to do so, and the manner in which the concerns were raised. The Tribunal accepted, from the contemporaneous documentation before it, Dr Herod did not take any steps to try to stop the claimant from reporting to the CQC. His concern was the claimant would give a one-sided view and would have not have shared with the CQC his own behaviour. Dr Herod wanted to ensure the CQC had the full picture.

395. Taking the 27 November 2012 email and post-it sticker in context with what else was going in at the time, the Tribunal having considered in detail whether Dr Herod possessed a conscious or unconscious motivation to cause the claimant detriment(s) on the grounds that he had whistleblown to the CQC, on balance, the Tribunal concluded that he had not and Dr Herod's evidence concerning his thoughts about the claimant's behaviour, was accepted as credible given all of the circumstances in this case.

<u>The second privileged document dated 27 November 2012.</u>

396. The Tribunal were taken to a legally privileged document in the bundle dated 27 November 2012 sent by Susan Westbury to Hill Dickinson solicitors at 17.44 requesting a suggested letter of exclusion. Hill Dickinson provide advice that of the two grounds for exclusion, danger to patients, "gives a slight PIDA risk as he discloses that the working environment created by the Trust has caused him to be unable to work safely."

397. The claimant's evidence at this liability hearing was that the advice was evidence of him having made a protected disclosure; the Tribunal did not agree. It

found the advice reflected a solicitor undertaking his role and responsibility by considering all possibilities and permutations, and nothing hangs on the fact that the privileged legal advice was that there was a "slight risk" in the claimant's reference to the first respondent "forcing him to work in an environment detrimental to patients" could be seen as a protected disclosure. In oral submissions Mr Boyd described both professionally privileged documents as tactical sound advice. The Tribunal agreed but went further, had the first respondent's solicitors suspected the claimant had made the protected disclosures he now alleges i.e. to managers and/or CQC the risk factor would not have been quantified as "slight," and it reinforces the Tribunal's findings that no protected disclosures were made to the first respondent until much later.

Exclusion letter 28 November 2012

398. Caroline Salden wrote to the claimant on 28 November 2012 confirming "you say that the Trust should only consider you cleared for exposure prone procedures according to the Department of Health Standards and not to the standards set by…LWH…You have been afforded every opportunity to comply with LWH's policy in respect of health screening…as you now telling me that you are not to be regarded as EPP screened…I…take the view that an informal resolution on the issues between you and the Trust is no longer possible….The Trust attempted to contact the BMA yesterday to discuss these issues. **The BMA informed us you have instructed them not to speak to us** [my emphasis] …. Reluctantly the Trust consider that it must exclude you to allow the investigation to proceed smoothly. The Trust is of the view that there is a significant risk that you will seriously hinder the investigation if you are allowed to remain at work whilst the investigation is ongoing…. You feel that to continue to require work would be detrimental to patients. Patient safety must take precedent in the first instance, and if requiring you to work would cause risk to patients, this must be avoided…You may make representations about your exclusion to Ms Cross."

399. The Tribunal found Caroline Salden had taken the decision to exclude, and the Tribunal accepted her oral and written evidence that the reasons for exclusion were those set out in the 28 November 2012 letter, and there was no evidence of any causal connection to whistleblowing or disability. There was ample evidence before her that there was a risk of the claimant interfering with witnesses in the investigation, given the manner in which he had treated the first respondent employees who were carrying out their normal day-to-day duties and so the Tribunal found.

400. There followed an exchange of correspondence with the claimant in which he made similar if not identical points raised on numerous occasions previously as set out above, which the Tribunal does not intend to repeat although it has read the relevant documents and taken them into account.

Detriment 7 relevant to the second respondent only - 28 November 2012 onwards removing the Claimant or allowing the Trust to remove the Claimant from his University workplace

401. Carol Mills, director of HR for the second respondent, emailed the claimant on 28 November 2012 requiring him to attend the first respondent's occupational health at the request of Professor Ian Greer and Professor Alfirevic. She wrote "Zarco and I (and Robin to a more limited extent) have witnessed clear signs of stress in your behaviour…on the basis that you told me you would not attend the appointment…I had to advise you that if you fail to follow a reasonable management instruction, I will have no option but to suspend you from your role at the university…" The claimant was offered counselling.

Conclusion: detriment 7

402. The Tribunal did not find the claimant had been caused a detriment by the second respondent's actions; the second respondent had no say in the claimant's exclusion by the first and it refused to get involved in the dispute, taking the view that resolution lay with the claimant, which was not unreasonable. There was no question of the second respondent "allowing" the exclusion; once the first respondent had made the decision to exclude the second respondent was not in a position to grant the claimant access onto the Trust's premises.

The second respondent allegedly keeping the claimant off work.

403. The claimant maintains the second respondent kept him off work on "gardening leave" after his exclusion when MPHS Policy excludes this, and he did not return to work when the OH report in January 2013 (see below) was positive, and this amounted to detrimental treatment.

CQC briefing 28 November 2012

404. In a second briefing to the CQC Michelle Turner set out the actions taken by the first respondent following the earlier briefing on 28 September 2012, including an update to the recruitment procedures, controls being put in place for honorary contract holders and a procedure for agency workers confirming "this issue remains on the Trust's Risk Register and Board Assurance Framework with a risk rating of 6 until such a time as audits demonstrate assurance is in progress. The risk is regularly reviewed..." Reference was made to the claimant's exclusion pending disciplinary investigation and his continued refusal to complete pre-employment checks.

First and second respondent's knowledge of the claimant's disability in late November/early December 2012.

405. In an email sent to Dr Herod by Professor Alfirevic on 30 November 2012 he attached the claimant's email dated 30 November 2012. In the 30 November 2012 email the claimant referred to his medication being increased, and his GP was referring him to Dr Craig, a psychiatrist who the claimant had seen previously. He wrote "I am honestly trying to show that I realise it would be more sensible to work with the Trust/University and build bridges between us all. **There may be people I**

need to apologise/explain my problems to but I am prepared to do that [my emphasis] …I hope that you are able to realise that I have truly changed my approach to being open and want to get better and back to productive academic work…" The implication behind the claimant's email of 30 November was (a) he recognised his behaviour in the workplace necessitated an apology and (b) there were people to whom he had not explained his problems, which accords with the evidence given on behalf of the first respondent concerning the claimant's behaviour in the workplace and his silence around medication being taken for depression.

Advice from NCAS

406. On 3 December 2012 Dr Herod took advice from NCAS on the exclusion, GMC referral and the disciplinary investigation, all of which Steve Boyle supported.

407. Dr Herod responded by email sent 3 December 2012 to Professor Alfirevic "at this late stage nothing can be done as a referral to the GMC has already been made…in truth Mark must bear the responsibility for that. I recall spending very large amounts of time with Mark when we received the original anonymous letter…I was entirely supportive…We talked about how important it was to work with myself and the Trust…Sadly, events have spiralled out of control over what should have been a trivial matter. To this day I cannot understand Mark's behaviour and have repeated voiced my opinion and concerns about his mental health. It is therefore no surprise to me that I would appear to have been correct. There is little that is rational in the way Mark has behaved and at this point of time we cannot simply undo the things he has done. **He should have declared any health concerns at a much earlier point in time** [my emphasis] …We cannot undo the referral to the GMC and the formal disciplinary hearing will progress…I am concerned that we may once again find ourselves embroiled in a less cooperative and more damaging process."

408. The BMC in an email to Michelle Turner sent 2 December 2012 referred to the claimant's mental health issues and asked that they be taken into account when "considering his current exclusion, the formal investigation…and proposed GMC referral…I would request that the Trust takes a compassionate approach."

Tripartite meeting

409. A tripartite meeting took place between the first and second respondent and the Deanery concerning the claimant. It was attended by eight people including Michelle Turner, Kathy Thomson, Dr Herod, the Dean, David Graham and the head of School/executive pro-vice chancellor for the second respondent, Professor Greer. Six actions were agreed, including a joint GMC referral made by the three parties, that the claimant "must not work elsewhere…and a request for an 'alert notice' should be made to the SHA by the Trust."

Detriment 8 relevant to the second respondent only - 17 December 2012 making an inaccurate referral about the Claimant to the GMC

The referral to the GMC – 17 December 2012

410. Following the tripartite meeting Dr Herod and Professor Grier made a referral that reflected their genuine view of the claimant to the GMC attaching a document which set out concerns, examples of the claimant's behaviour and the current position that referred to the claimant declaring he had a "longstanding mental health condition for which he had been undergoing medication." It was not inaccurate.
411. The Tribunal found the first and second respondent were made aware of the fact the claimant had been taking medication for depression in or around early December 2012.

412. Carline Salden wrote to the BMA on 14 December 2012 confirming the case investigator into the disciplinary allegations was Dr Greenhalgh supported by Paul Thornburn. The five issues to be investigated were set out. The claimant was asked to confirm whether he wished to continue his grievance appeal and appeal against the 28 November 2012 exclusion. The investigation proceeded and a second draft term of reference was prepared by Dr Greenhalgh on 18 December 2012, which included an expanded list on interviewees from the first and second respondent and the Deanery with a note that this was an "initial list."

Detriment 26 relevant to first respondent only – 21 December 2012 to 17 June 2014 failing to review and properly consider lifting the Claimant's exclusion, in breach of the MHPS policy –in particular paragraphs 2.9 and 2.34

413. The claimant's exclusion was reviewed by Caroline Seldon on 21 December 2012 and extended for further 4-weeks to 21 January 2013. NCAS were not consulted but nothing hangs on this given the fact Steve Boyle had supported the exclusion earlier on 3 December and nothing had changed since then. The Tribunal finds this was the state of play throughout the claimant's continued exclusion, and whilst the strict letter of the first respondent's process was not adhered to i.e. NCAS not being consulted before every extension, this was not on the grounds the claimant had made protected disclosures but simply because the claimant refused to attend the investigation hearing and thus the exclusion could not be lifted; the facts giving rise to the exclusion did not change and on an objective assessment, the claimant could not be said to have suffered a detriment.

414. Availability dates were provided to the claimant for an appeal hearing against his exclusion on 2 January 2013.

Medical report prepared on behalf of the second respondent 8 January 2013

415. Dr Wilson, consultant occupational physician, in his report referred to medical evidence confirming the claimant had "experienced intermittent episodes of depression since 2002…**He is currently in remission** [my emphasis] …he agreed to take maintenance treatment. His behaviour at times has been described as **intimidating and paranoid**…. formal mental state examination on 29/11/12 did not reveal signs of severe mental illness…the medical history, mental state examination and evidence from the treating psychiatrist suggests that Dr Tattersall has an

anxious personality type and that he has experienced intermittent episodes of mild and moderate depression since 2002. **His mental health has been stable since 2009. His personality tends to result in behaviour by which he seeks frequent reassurance about future uncertainties sometimes to an excessive extent**…Based on the totality of the medical evidence available to me, I recommend he is fit to work in a non-clinical lecturer…it is unlikely the Tribunal would conclude that he is disabled as defined by current equality legislation.

416. The claimant authorised the release of the report and retained a copy. Despite suspicions, especially on the part of Dr Herod, that the claimant had mental health issues, when the respondents received Dr Wilson's report which indicated he was in remission and his mental health had been stable since 2009, there was no medical evidence to put the first respondent on notice that the claimant's actions which gave rise to the disciplinary investigation were nothing other than those of a "difficult employee" with an "anxious personality type" whose behaviour, at times, was "intimidating and paranoid."

Detriment 9 relevant to the second respondent only – 8 January – 13 February 2013 Failing to provide the Claimant with a place of work to undertake his academic work in a timely manner and failing to make arrangements to allow the Claimant to return to work despite the report of the University's OH doctor stating on 8 January 2013 that the Claimant was fit for work. Arrangements were required to be made, as the University leased the University Department in the Hospital from the Trust and the Trust refused to allow the Claimant to access the University Department

417. On the 8 January the claimant, who did not question Dr Wilson's conclusions, referred to the report and to the fact he had been found fit for work.

418. Joanne Alliston wrote to Caroline Saldon regarding her decision made on 21 January 2013 to extend the exclusion for a further month; a decision taken prior to Ms Salden leaving the trust. Joanne Alliston confirmed that that claimant had requested her to reconfirm he had not withdrawn his consent for the recent screening for EPP work to be accepted by the Trust. She wrote; "Dr Tattersall is agreeable for the screening results to be used for the required EPP clearance. This should allow him to return to full duties…ASAP…I would request the current exclusion be reviewed as a matter of urgency. Dr Tattersall is not in the position to influence the completion of any proposed investigation, which I understand is the Trusts reason for the current exclusion…"

419. By the 21 January 2013 for the first time, the claimant was medically fit for work, had been cleared for EPP and the only outstanding matter was the disciplinary investigation.

Statement of main terms and conditions of employment

420. The claimant was issued with a statement of terms and conditions of employment by the second respondent that set out his appointment on an honorary

contract commencing 1 January 2011 expiring 31 December 2014. Clause 11 provided "It is a condition of your employment that you comply with the Trust's health screening requirements, including screening for exposure born procedures; this is a requirement of your role."

Medical Practitioners Tribunal Service

421. The Medical Practitioners Tribunal Service (MPTS") wrote to Dr Herod on 21 January 2013 indicated it was "not necessary for the protections of the members of the public, in the public interest or in Dr Tattersall's own interest" to take any action in relation to the claimant's registration. Reference was made to an ongoing investigation by the GMC.

Detriment 5 relevant to second respondent only - 14 September 2012 to 17 June 2014 failing to take action to support the Claimant in overcoming his exclusion

Detriment 9 relevant to the second respondent only – 8 January – 13 February 2013 Failing to provide the Claimant with a place of work to undertake his academic work in a timely manner and failing to make arrangements to allow the Claimant to return to work despite the report of the University's OH doctor stating on 8 January 2013 that the Claimant was fit for work. Arrangements were required to be made, as the University leased the University Department in the Hospital from the Trust and the Trust refused to allow the Claimant to access the University Department

422. As a result of the claimant's exclusion by the first respondent communications between the claimant and the second respondent were exchanged concerning its effect on the claimant's ability to work given he had no access to the first respondent's premises. Robin Harrison wrote to the claimant on 23 January 2013 inviting him to a meeting following the occupational health report in which it was confirmed the claimant was fit to undertake non-clinical duties. He wrote: "Whilst the University is considering the options for you returning to undertake meaningful non-clinical duties, it must be borne in mind that you are, however, on a clinical academic contract in which clinical duties are a key part of the role. As you remain excluded from clinical duties…it is not possible for you to undertake the full clinical lecturer contract…the University has concerns about the impact this situation has on your ability to undertaken clinical training, which it is in discussion with the Deanery about."

423. The second respondent wrote to the claimant concerning the possibility of him returning to academic work at the university campus and the concerns Professor Greer had over access to clinical teaching, clinical samples and patient records. During this period the second respondent was attempting to find a solution to the problems caused by the claimant's exclusion, which the claimant was appealing.

424. By the 24 January 2013 the claimant was offered office space at the second respondent. Robin Harrison wrote on 24 January 2013 "the trust is not prepared for

you to return to the Trust site while you remain excluded pending the conduct investigation. Nor is it prepared to restore your access to Trust IT systems."

425. Professor Greer emailed the claimant on 4 February 2013 following oral discussions. He confirmed "our goal was for you to resume a proper clinical academic role including clinical raining as soon as practicable. An option that you might explore is to ask to be released from your clinical placement at the Women's. The Deanery could then explore alternative placements, subject to any GMC issues. **The University will support your clinical academic training in collaboration with another Trust**. [my emphasis]." The claimant's view (as expressed in his exclusion appeal statement of case) was that the second responded had stated it was "happy" for the claimant to continue working and no action against him was intended.

426. Robin Harrison confirmed the position in a letter dated 6 February 2013, setting out the support put in place in order that he claimant could work "productively on existing clinical research projects."

427. The Tribunal concluded that the second respondent was in a difficult position, and steps were being taken to ensure the claimant's return to work outside the first respondent's premises where he was normally based. It found that following the 8 January 2013 medical report it would have been preferable for the claimant to have returned to work soon thereafter. As indicated in the claimant's description of detriment 9 arrangements had to be made, and this took time. The second respondent was not in a position to force the first respondent to give the claimant access to Trust premises, and contrary to detriment number 5, the claimant was supported in overcoming the exclusion but that support took time to arrange. The Tribunal was satisfied on the balance of probabilities, the second respondent's attempts to get the claimant back to work and the time this took were causally unconnected to any whistleblowing allegations or his disability.

<u>Dr Herod case manager in investigation</u>

428. In a letter dated 5 February 2013 the claimant was informed Dr Herod would replace Caroline Salden as case manager of the ongoing investigation, the latter having left to take up a new role. Dr Herod was listed in the list of interviewees and he acknowledged in his written statement that this was "less than ideal." Dr Herod's explanation was that as the case was complex involving a doctor and he was the most senior doctor in a relatively small trust and given the interaction his colleagues already had with the claimant, he was the only person who could have taken up the role. Dr Herod's explanation was considered by the Tribunal, who accepted the reasons provided were genuine. It is notable that the investigation itself was not carried out Dr Herod.

429. Dr Herod was also responsible for reviewing the claimant's exclusion on a monthly basis. Taking into account Dr Herod's oral evidence, the Tribunal accepted he was genuinely concerned the claimant would harass witnesses. Dr Herod did not

want the claimant to return to work until the allegations, which were "very serious" were properly investigated.

The exclusion appeal hearing

430. The exclusion appeal hearing took place on 7 February 2013 before a panel of three including the chair, Gail Naylor, director of nursing, midwifery and operations, Andrew Drakeley, consultant gynaecologist and Dr Emile Lewis, external doctor.

431. In the management statement of case dealing with the claimant's appeal against exclusion reference was made to the professional medical advice received that the claimant had no underlying health conditions and a request that the exclusion should continue until the investigation was concluded because the claimant had "continually behaved inappropriately with other members of staff [and] we have no evidence these behaviours will change…"

432. The claimant in his statement of case that ran to 17 pages set out his arguments, including those relating to the EPP screening and his longstanding "depression" for which he had been on medication. He described an attempt to reduce the dose of anti-depressants and how "…I have clearly suffered a deterioration in my depression…I accept my recent poor health has made me more argumentative and less compromising than usual. I have never wished to cause distress and have offered my apologies through the BMA for any distress I have caused…. I have been referred for psychotherapy." The claimant referred to the first respondent obtaining "blood results from me under false pretences." And "despite the highly aggressive actions of the Trust against me, I remain willing to try and achieve a negotiated settlement."

433. The claimant's statement of his ill health was at odds with that of Dr Wilson in his report accepted by the claimant unquestioningly. It is notable the claimant's reference to apologies having been offered through the BMA when it had been made clear to him on more than one occasion he was required to apologise formally, and had failed to do so.

434. The claimant set out his view of the exclusion and "recent events" including the referral to the GMC and the "alert notice" which the claimant "remained very concerned as to the motives of the Trust in attempting to prevent me from working outside the Trust." Nowhere in his statement did the claimant suggest the motivation was because he had made a protected disclosure and/or was disability discrimination. The claimant promised he would not hinder or influence the investigation, and concluded "Whilst I accept that I have long standing mental health issues, I strongly believe that I am fit and able to return to my duties…I wish to return to work in order to build bridges…"

435. The notes of the appeal hearing record the claimant as saying he "…had been more argumentative than usual and apologised if he had caused distress and said that he had fallen short of the standards he expects from himself..." The claimant

also referred to contacting the Liverpool Echo and telling Dr Herod "about the shambles of the occupational health department and the issues with staffing levels. With reference to his mental health condition the claimant stated, "he had never withheld it but it was not routinely flagged to HR." When asked if the Trust were aware he was taking anti-depressants the claimant's response was "he thought so though no one had taken a medical history from him and if anyone had concerns they would have referred him to occupational health…. He may have said he had a couple of bad episodes in the past." The Tribunal concluded from all of the evidence before it the claimant had not informed any manager or medical practitioner of the first respondent until this point in time that he had been taking medication.

436. Susan Westbury, HR support, confirmed a referral to occupational health would be the first step and any concerns would be dealt with in line with the Trust Policy on 'Handling Concerns.'"

Exclusion appeal outcome

437. The panel notes reflect the outcome as follows; "In line with the LWH Handling Concerns Policy the panel would recommend to the Chief Executive for her review, the following:

(1) To allow MT access to the on-site University premises to enable you to undertake your clinical academic work…implemented with immediate effect.

(2) To continue with the exclusion until the 8 March 2013. During this time the ongoing management process should be concluded. Following this date, the exclusion will be lifted, notwithstanding any findings arising from the investigation which would make this untenable.

(3) During the next four weeks, the department will establish a return to practice programme…to enable a supported reintegration into clinical practice after 8 March 2013.

438. The reference to the "ongoing management process" was to the disciplinary investigation, which the panel foresaw would take place before 8 March, and it was only after the process was complete would the claimant's exclusion be lifted. The Tribunal accepted the oral evidence of Gail Naylor in this respect.

439. A meeting was arranged by the second respondent to discuss the claimant's work on 11 February 2013. The meeting was cancelled, the claimant objected to it and was of the view it was not needed "given that I will likely now be returning to my normal place of work with full access to the hospital due to be restored in under 4-weeks."

The decision of Kathryn Thompson 11 February 2013

Detriment 27 relevant to first respondent only - from 7 March 2013 failing to comply with the Exclusion Appeal Panel's recommendations in its letter of this date to lift the Claimant's exclusion

440. Kathryn Thompson considered the panel's recommendations. She was the ultimate decision maker and took the view if the investigation was not concluded within the 4-week period by which time the panel expected the investigation to conclude, the exclusion would continue until at least the conclusion of the investigation, and beyond if the investigation "discovered" serious issues. The responsibility for deciding whether the exclusion would continue lay with Dr Herod. Kathryn Thompson took the view the claimant's mental health illness required investigation before a decision could be made whether he was fit enough to return to work as he had only been cleared fit
441. for non-clinical work.

442. In a letter sent to the claimant 11 February 2013 (incorrectly dated 11 March 2013) Kathryn Thompson referred to the panel's recommendations which she accepted save for the recommendation to lift the exclusion on 8 March 2013 as follows: "My view is that it should be formally reviewed on that date with the aim of it being lifted, provided that the findings of the investigation do not make such a course of action untenable and provided that your behaviour has been of a acceptable nature during this time…Your actual return to full clinical practice is dependent upon formal confirmation that the exclusion has been lifted and only after appropriate assurance is gained from all relevant parties that you are competent and have been appropriately supported back to full clinical work..."

443. Kathryn Thompson took the view that as the first respondent was part way through its investigation, and it should be concluded before a decision could be taken regarding a return to duty.

444. Kathryn Thompson's decision was questioned by the BMA in numerous emails e.g. the email sent 12 March 2013; which made the point that the claimant expected to return to full duties whether the investigation had completed or not on the basis that the length of time it took was in the first respondent's hands, and the claimant was not a risk to patients. The BMA did not allege the decision to continue with the exclusion was a result of the claimant whistleblowing and/or disability discrimination, had the claimant suspected this was the case the BMA would have made the point in no uncertain terms as Joanne Alliston gave every impression in correspondence of following the claimant's instructions.

Claimant's request for information despite failing to pick up documents previously collated by the first respondent

445. In an email sent 13 February 2013 by Joanne Alliston to Paul Thornburn the BMA on behalf of the claimant requested disclosure of a number of documents. Paul Thornburn discussed the request with Susan Westbury who handed him documents

collated following earlier requests and not picked up by the claimant. The Tribunal took the view that had the documents been relevant to the claimant's responses in the investigation hearing and/or appeals they would have been picked up. It is difficult to understand in the circumstance, how the claimant can say he suffered a detriment as a result of late and/or the inadequate disclosure of documents under SAR.

446. Prior to the disciplinary investigation meeting the claimant was provided with a document setting out the proposed questions he was to be asked by Dr Greenhalgh.

The first alleged protected disclosure against the second respondent: 13 February 2013 meeting with Professor Alfirevic [second respondent only]

The Claimant alleges he spoke to Professor Alfirevic about his concerns around being informed that his contract would not be renewed. Professor Alfirevic made it clear to the Claimant (orally) that his best option would be to leave the University and Trust as soon as possible and with as little damage to an NHS career as possible. The Claimant was told in, no uncertain terms, that the University would not support him because of the position that the University had been placed in subsequent the Claimant making his disclosures. The Claimant believed that the issues between himself and the Trust, namely his protected disclosures, were taken into consideration by the University in deciding not to renew his contract. Professor Alfirevic stated that the University had met with Professor Graham (Postgraduate Dean) and obtained assurance that the Deanery would support them in not-renewing the contract and trying to ensure that Dr Tattersall was moved into a non-academic post. The Claimant told Professor Alfirevic that the University could not act like this simply because he was making things uncomfortable for the Trust by raising issues of concern like patient safety. The Claimant expressed that he believed that if the University were to dismiss him, this would be unlawful and constitute unfair dismissal. The Claimant made this disclosure orally in Professor Alfirevic's office during a meeting which took place at 11:30am. The Claimant followed up by email later that day to thank Professor Alfirevic for his "honest views".

S.43B ERA (1)(b) Breach of any legal obligation: breach of legal obligation in Employment rights Act 1996 to not dismiss someone unfairly and/or to not dismiss someone because they had made protected disclosures

Detriment 10 relevant to the second respondent only - 13 February 2013 advising other academics not to collaborate with the Claimant during a meeting between the Claimant and Professor Alfirevic on 13 February 2013, Professor Alfirevic informed the Claimant that he was advising other academics within the Department and University not to work with the Claimant. He told the Claimant that he would not wish the other academics to be involved in the Claimant's problems as this would only cause the other academics problems they could do without. The Claimant cannot be certain by what means this information was delivered by Professor Alfirevic to the other academics.

Detriment 11 relevant to the second respondent only - From 13 February 2013 failing to comply with and/or ensure that the Trust complied with the decision of the Exclusion Appeal Panel which determined that the Claimant's exclusion should be lifted in February 2013.

13 February 2013 meeting.

447. The claimant met with Professor Alfirevic, with whom he had a good relationship and trusted. There is a dispute between the claimant and Professor Alfirevic as to what was said at this meeting. The claimant alleges Professor Alfirevic made it clear to him that he would be better off leaving the first and second respondent to mitigate career damage, and the second respondent would not support him "because of the position that the University had been placed in subsequent to my making disclosures…if other senior academics asked about my situation, he felt he owed it to them and the department to tell them to be cautious in working on projects with me…he also told me that the University had the support from the Deanery…in not renewing my contract. I told Professor Alfirevic that the University could not act like this simply because I was raising genuine concerns with the Trust. I said that I believed that if the University were to dismiss me, this would be unlawful and constitute unfair dismissal. I followed up by email later that day."

448. The claimant's actual email sent 20.26 was three lines and there was no reference to what the claimant says was discussed relating to the impact of him raising protected disclosures as set out in the paragraph above. It is clear from the email that the claimant's research was discussed by the reference to foetal membranes and a document the claimant was to write for Professor Alfirevic.

449. The Tribunal concluded, considering the factual matrix and Professor Alfirevic's oral evidence, the claimant fabricated his account of what transpired on the 13 February. Had the conversation been as the claimant described, as was the claimant's practice, it would have been reflected in his emails as undoubtedly, the claimant would have been very upset by such an exchange. It is notable during this period the claimant's view was that the second respondent was supportive in contrast to the first respondent. There was no evidence before the Tribunal that the claimant, during this period, believed the second respondent was trying to dismiss him, quite the reverse as the earlier email made it clear the second respondent were trying hard to place the claimant in an office at campus.

450. Professor Alfirevic denies the discussion took place as described by the claimant, and the Tribunal accepted as credible his oral evidence that he would not have advised the claimant as alleged, and further he was never involved in conversations concerning the expiry of the claimant's fixed term contract. The Tribunal finds the discussion centred on the claimant's work, strengthening his curriculum vita and ensuring it was competitive enough should he apply for substantive academic posts in the future. It may be the claimant inferred from this Professor Alfirevic was looking to the future after the expiry of the fixed term contract, but there was no specific conversation as to a termination of a fixed term contract on 31 December 2014. It made no sense to the Tribunal why the claimant

would seek assurances through Professor Alfirevic concerning the extension or otherwise of the fixed term in February 2013 almost at the mid-way point, and there was no evidence whatsoever the second respondent looked to terminate its contract any earlier.

Claimant returned to work for second respondent 14 February 2013

451. On 13 February 2013 it was agreed the claimant would return to work with immediate effect for the second respondent, and he commenced work for the second respondent on 14 February.

Draft investigation report prepared by Paul Thornburn

452. Paul Thornburn prepared a draft investigation report on behalf of Dr Greenhaigh created 15 February 2013 totalling 2862 words, by which time Dr Greenhaigh had heard from a number from witnesses. Dr Greenhaigh was not an experienced investigator, and she relied upon the HR support provided by Paul Thornburn. In the early part of the investigation, she had the support of an external consultant. Dr Greenhaigh had never met the claimant before and the Tribunal accept, on the balance of probabilities, she was neutral and had the medical expertise necessary when investigating the actions of a fellow medic.

453. The draft report was written within an incomplete framework. The following is of note:

(1) Under the title “Methodology” reference was made to “my conclusions are based on what can be considered acceptable behaviour and conduct, considering MT, staff, the organisation and primarily patients.” The claimant had not been interviewed by this stage of the investigation; the draft confirmed Dr Greenhalgh had started interviewing in January 2013 and she “concluded these in March 2013” i.e. in the future.

(2) Under the heading “investigation findings” Paul Thornburn referred to the investigation highlighting a number of issues relating to the claimant’s behaviour and the time and cost spent by staff dealing with the claimant.
(3) Under the headings “conduct” and “conclusion” it was recorded the claimant’s conduct “has caused concern primarily due to his dealings with other staff and in particular junior and non-medical staff ad the reports that he has spoken to the press…there is evidence that MT has conducted himself in an unreasonable manner with (preference and evidence) HR staff both in LWH and the University…the evidence suggests MT has been disruptive and misled management regarding his willingness to have the screening completed…information gathered during the investigation shows that MT has a consistent theme and patterns to his behaviour and conduct…it is apparent MT's behaviour and conduct has had a serious negative effect upon several staff within LWH and it is likely that working relations are not possible to repair due to the nature of MT’s behaviour and conduct…LWH also has a responsibility towards it staff to ensure they are able to work in a safe environment and not be subject to intimidating and unreasonable behaviour…MT should have his

case heard by a panel to consider these serious allegations and if the panel found these to be proven they are considered gross misconduct (reference policy)." The draft investigation had numerous blanks referencing unnamed witnesses and evidence.

454. At this liability hearing the claimant argued Paul Thornburn's draft was evidence that the investigation was sham and the respondent's mind had already been made up. The Tribunal noted the HR department prepared a number of draft responses and draft letters, for example, the draft response for review dated 13 July 2012. Nothing hangs on this; this is the recognised role of HR to support and assist management in areas where management have little or no expertise. This practice is commonplace throughout a number of businesses, including the NHS, and it cannot be inferred that if a draft document was prepared by a HR officer, the decision/outcome must been made by HR without the investigating officer having any input into the final document.

455. The Tribunal considered a document produced on behalf of the first respondent setting out the "agreed list of changes made to the different drafts of the investigation report" which it does not intend to repeat. It is clear from the agreed differences within the 21 drafts many relate to the format of the report i.e. statements are placed into appendices; the order of statements and paragraphs are re-arranged and so forth. By draft 20 the claimant's responses to the allegations were set out, and by draft 21 the final document ran to 434 pages that would have been considered at a disciplinary hearing had it not been delayed so many times. The Tribunal, having heard oral evidence from Dr Greenhalgh, was satisfied she had the strength of character not to have been swayed by Paul Thornburn's advice, and the final draft of the investigation report was most definitely her own conclusions following her investigation.

<u>CQC visit to the first respondent 19 February 2013</u>

456. During this visit the CQC accepted appropriate pre-employment checks were in place. A report was produced in April 2013 following the date of inspection that found the first respondent had met the required standard, and this was accepted to be the case by the claimant in oral evidence. The report referred to the first respondent's review of staffing levels and the CQC concluded that "the Trust had recognised staffing levels on the maternity ward were stretched but…there had been no impact on patients in terms of clinical care or treatment they received. Action had been taken to increase staffing as a result of the review and the Trust was continuing to monitor the impact…"

457. Mr Boyd submitted that when he put to the claimant that his disclosures concerning staffing levels were "late to the party" and the first respondent had been dealing with the issue for a "considerable amount of time", the claimant's response was that the CQC report reflected the inadequacies of the CQC inspection. When it was put to the claimant that other people had raised the issue of staffing for a considerable amount of time before he did, his response was "well, I can't take all of the credit for raising the issue." The Tribunal accepted Mr Boyd's submission that it

made no sense, and was contrary to the documentation and witness evidence for the first respondent to have treated the claimant detrimentally as a whistleblower when he was "simply regurgitating in a mild fashion, some time down the line, a matter that others had raised considerably earlier" and the first respondent was dealing with.

The claimant's application for Judicial Review

458. On the 28 February 2013 the claimant issued Judicial Review proceedings in the High Court against the first respondent for its decision to investigate seeking the revocation and prohibition of any issues arising prior to 28 November 2012 and a mandatory order that the first respondent compiles with the terms of agreement between the parties.

The claimant adjourning the investigation meeting arranged for 1 March 2013

459. The claimant via the BMA adjourned the disciplinary investigation meeting arranged for 1 March 2013. Despite discussions with the BMA and agreement reached with Paul Thornburn of the 1 March 2013 date for the claimant to meet up with Dr Greenhalgh as part of the investigation process, on the claimant's behalf the BMA postponed the investigation meeting agreed for 1 March due to there being "information within the documentation he has previously requested that will assist the investigation" referring of the need for "quite a lot of documentation" to be sent to the claimant to review "early next week." Reference was also made to the claimant's partner breaking her ankle and to the claimant's health. The claimant, following an exchange of email, was informed in an email sent 1 March 2013 the meeting could take place on the agreed dates of 8 or 12 March 2013.

460. By 4 March these dates were unsuitable for the claimant's BMA representative and Lynn Greenhaigh.

Reinstatement of the claimant's banding payment

461. In a letter dated 4 March 2013 from Robin Harrison, HR for second respondent, the claimant was informed he had been requested by the first respondent to "reinstate your banding supplement with effect from 10 January 2013" which would include back pay.

462. The disciplinary meeting finally re-arranged for 2 April 2013 was cancelled again at the claimant's request, expressly due to the ongoing judicial review and outstanding DPA requests. The 2 April 2013 investigation meeting was postponed at the claimant's request sent via the BMA on 27 March 2013 as follows; "The Trust investigation is now subject to a judicial review application and given the potential court proceedings it is inappropriate for the investigation interview to take place…there remains outstanding FOIA/DPA requests…likely to assist with the investigation."

463. Paul Thornburn and Dr Greenhalgh felt under pressure to complete the disciplinary investigation, which Dr Greenhalgh was unable to do as the claimant's

interview was still outstanding. During this period the first respondent was also attempting to re-arrange the claimant's grievance appeal hearing, and there are numerous emails exchanged regarding a number of issues, including dates for meetings.

464. The Tribunal finds that the claimant, despite the prospect of a return to full duties when the investigation report was completed, caused further delays by his continued refusal to attend the disciplinary investigation meetings arranged with Dr Greenhalgh.

Claimant declared fit to undertake EPP.

465. In a letter dated 4 March 2013 the claimant was declared fit for employment and to undertake EPP by Cheryl Barber.

466. By the 8 March 2013 the investigation had not been completed as the claimant's interview was still outstanding. Dr Greenhalgh had interviewed a number of witnesses throughout January, February and March, and by mid to end March she had interviewed 11 of the 13-people referred to in the final report. Paul Thornburn had formed a view there was sufficient evidence for the allegations to progress to a disciplinary hearing, and if the claimant would not attend an investigatory interview, he could put forward his case at the disciplinary hearing.

DPA disclosure request and provision of documents to the claimant in or around 8/13 March 2013

467. The claimant was handed a number of file boxes of papers in or around 8/13 March 2013. Paul Thornburn asked the claimant to clarify what documents were missing and what he needed for the investigation. The claimant did not respond. Despite Paul Thornburn requesting the assistance of the BMA for clarification as to what documents were missing, none was forthcoming.

The claimant's refusal to consent to access occupational health records/information

468. The BMA in an email to Paul Thornburn sent 2 April 2013 confirmed the claimant was not in a position to provide his consent for the first respondent to access his occupational health records/information as part of the investigation, pending his application for judicial review.

Kathryn Thompson and Dr Herod's decision to extend exclusion to 4 April 2013.

469. Kathryn Thompson and Dr Herod jointly agreed to extend the claimant's exclusion by a further 4 weeks to 4 April 2013, having taken into account "the serious allegation under investigation and the fact that we have been unable to conclude the investigation to date as you were not able to attend the investigatory meeting."

The claimant's concerns raised regarding the involvement of Paul Thornburn

470. The BMA raised concerns as to Paul Thornburn's involvement during the exclusion appeal hearing held on 7 February 2013 which he attended in his capacity as HR advisor, and the conflict of him acting as HR advisor to Dr Greenhaigh which it described as unlawful and unfair. The BMA was advised whilst not ideal, there was no conflict, Paul Thornburn's roles was to interview relevant witnesses and ask them what the facts are in an investigation fact finding exercise. In a response sent 13 March 2013 Michelle Turner explained the position, indicating she had considered if any other HR personnel could take on the role, concluding "we have exhausted appropriate team members." The claimant did not provide any satisfactory evidence at the liability hearing to undermine this position.

471. In a 26 March 2013 email the BMA complained to Dr Greenhalgh about her proposal to interview Deanery and University staff insisting they were removed and making it clear that if there had been an inappropriate influence in the investigation "I will be forced to request a review…with a view to having…evidence withdrawn or the whole process being re-started." It was made clear in the email chain the claimant was not willing to consent to occupational health documents being released "until such a time as either the judicial review proceedings have been considered…or consideration of informal resolution has been explored."

472. Paul Thornburn wrote to the BMA on 2 April 2013 confirming the 2 April meeting had been postponed, and he requested the claimant to detail information or papers he required to be disclosed.

473. Dr Herod in a letter dated 2 April 2013 extended the claimant's exclusion for a further 4 weeks to 2 May 2013 referencing the ongoing investigation, "due to the serious nature of the allegations and potential outcome of the investigation and subsequent hearing, as well as the ongoing concerns that Dr Tattersall may interfere with the investigation." In arriving at this decision Dr Herod took into account his knowledge of the claimant's volatile behaviour towards staff and the upset it had caused individuals who were concerned for their safety.

474. The claimant was unhappy, and following a number of party-to-party emails Liz Cross in her capacity as vice chair/executive director agreed to meet him.

Administrative error in salary

475. On the 8 April 2013 the second respondent's finance department discovered the claimant had been inadvertently overpaid due to an administrative error. The claimant was informed by letter dated 22 April 2013 that apologised for the overpayment.

476. A security officer completed an incident report on the 18 April 2013 alleging the claimant had been taking pictures of him having a cigarette on a mobile phone, he had allegedly spoken to the claimant and felt intimidated by him. CCTV was reviewed which showed the claimant taking photographs as alleged.

477. On the 23 April 2013 the BMA wrote to Liz Cross complaining of a number of matters including the time it had taken to complete the grievance appeal and the first respondent's refusal to comply with disclosure obligations. It is notable the claimant had not by this stage confirmed to Paul Thornburn, following his earlier request, what documents he was missing. On the 24 April the BMA wrote to Dr Greehalgh complaining staff from the second respondent and Deanery were to be interviewed. By 24 April date Dr Greenhalgh had interviewed Professor Alfirevic and Professor Neilson.

MDU letter to second respondent 30 April 2013

478. The BMA emailed Professor Greer on 30 April 2013 concerning the "ongoing delays and exclusion from the majority of Liverpool Women's Hospital site" maintaining that it was having a detriment effect on the claimant's career. The MDU requested confirmation of the second respondent's actions, as his "main employer" … "in trying to progress the situation with the Trust

479. In a letter dated 1 May 2013 Dr Herod extended the claimant's exclusion to 30 May 2013 for the same reasons as previously given. Neither the claimant nor the MDU believed it was necessary, reasonable and in line with the MHPS Policy; it was "punitive" and this was set out in an email of the same date; they did not refer to the fact that had the claimant taken part in the disciplinary investigation meeting as invited the exclusion would have been lifted.

480. The claimant wrote personally to Dr Greenhalgh on 3 May 2013 criticising the legality of her investigation. During this period there was a substantial exchange of part-to-party correspondence, generated by the BMA and the claimant directly the claimant to named recipients and the first respondent's managers.

Twelfth alleged protected disclosure made to CQC 7 May 2013 [relating to first respondent only]

The Claimant made disclosures via a telephone call that 66,000 patient test results had not been reported or reviewed by the Trust in breach of professional obligations, presenting a risk to patient safety. He was put through to Ms Debbie Cocoran, the inspector covering the Liverpool Women's Hospital, during the call. Emails regarding the Claimant's disclosures followed between the Claimant and Ms Cocoran of the CQC.

S.43B ERA 1(b) Breach of any legal obligation: the legal obligations to comply with CQC regulations, particularly those relating to patient safety and the provision of a safe service (1)(d) Danger to the health and safety of any individual: risks to patient safety

Disclosure made to the CQC 7 May 2013

481. In his witness statement the claimant alleges on the 7 May 2013 he raised the issue of 66,000 patient results not being reported or reviewed by the first respondent, as a protected disclosure. The Tribunal accepts the claimant raised the issue anonymously on 7 May 2013 unbeknown to the first respondent, whose managers did not suspect the claimant had made the disclosure, unlike the previous concerns around the screening process when the claimant was thought to have made the reports. The backlog of patient investigation results did not relate to the claimant in any way, and there was no reason why he would have reported the issue to the CQC. The claimant has not put forward a positive case as to who is was within the first respondent who became aware he had made the anonymous disclosure, and there is no evidence before the Tribunal from which it can infer somebody from the first respondent was made aware of it at the time.

Conclusion – 7 May 2013 disclosure

482. In conclusion, the Tribunal accepts on the balance of probabilities the claimant made a disclosure to the CQC regarding the patient results, and it accepts the claimant held a reasonable belief there was a S.43B failure arising out of the first respondent's legal obligation and/health and safety to deal with the backlog of patient results. However, the Tribunal finds on the balance of probabilities the first respondent was unaware that the claimant had made the disclosure at the time, and it follows that he could not have been subject to a detriment as a result.

483. Dr Herod wrote to the BMA on 10 May 2013 explaining that the claimant and MDU directly corresponding with Dr Greenhalgh and himself was creating confusion and delay. He asked if the claimant had agreed to remain excluded whilst discussions were ongoing towards finding an amicable solution, and with reference to the investigation confirmed Dr Greenhalgh was "able to interview which ever witnesses she thinks are appropriate…I will then receive an investigation report, and decide, as case manager, what further action is necessary…if I decide a disciplinary hearing is necessary…Dr Tattersall…will have the opportunity…to dispute the relevance of evidence gathered during the investigation and ask the disciplinary panel to disregard it….there is no need for a fresh investigation."

484. The BMA wrote to Michelle Turner on the 10 May 2013 regarding the 15 May meeting with Liz Cross complaining that Julie McMorran's attendance at that meeting was "a clear conflict of interest" because she had "been involved" in the claimant's employment dispute and investigation.

485. Julie McMorran, the Trust secretary did not attend to record the proceedings; the 15 May 2013 meeting was recorded by Fiona Yates, HR. Liz Cross took handwritten notes and confirmed the points raised by the claimant in a letter dated 20 May 2013. She recorded the 5 points under review (that did not include whistle-blowing or disability discrimination)) and the claimant's perception that "senior management and the Trust board want you to exit the Trust..." The claimant was

invited to a further meeting on 21 June 2013. Liz Cross investigated the claimant's concerns, taking advice from Fiona Yates who assisted in the drafting of letters as was the accepted practice.

Private Eye communications

486. By email sent 16 May 2013 by Andrew Bousefield of Private Eye to Kathryn Thompson a response was sought concerning anonymous information that the first respondent had "currently excluded a university employee from the Trust due to whistleblowing (re staffing levels on labour ward and lack of OH screening of staff) which prompted CQC investigations, allegedly based on his conduct. He won his appeal against the exclusion, but the Chief Exec has determined that this is only a recommendation and so she can choose to ignore it. The Trust is trying to do a deal whereby the staff member will move to another Trust and in return the Trust will not conduct disciplinary proceedings."

The DPA request

487. In a letter dated 20 May 2013 from Paul Thornburn to the BMA he wrote: "We now wish to proceed with the investigation" the most recently arranged interview having been postponed at the claimant's request. Two additional allegations were raised concerning the claimant's conduct towards security staff and his contact with the press in or around May 2013. Reference was also made to the claimant not giving his consent for his occupational health information to be released for investigation purposes and "without this, and also agreement that occupational health staff can provide statements regarding their involvement with the issues being investigated, the investigation will not be complete." The claimant had been provided with a "significant amount of information he has requested and we asked on several occasions for further details of any other information…**Despite this, no details or information requests have been provided"** [my emphasis]. Reference was made to the claimant cancelling two appointments to attend interview and "it is imperative" he attends one of selection of three dates given.

488. Liz Cross requested a list of the information provided to the claimant including clarification as to what was missing. The Tribunal notes thereafter the first respondent attempted to get the claimant and the BMA to list those documents he believed were missing without success. A number of communications passed between the parties concerning what documents were missing throughout this period, which the Tribunal does not intend to repeat. An impasse had been reached; the claimant refused to provide specific details of what he believed was missing and the first respondent did not carry out a search for additional information until much later on in the expectation that the claimant or the BMA would clarify the position. The Tribunal found there was no causal nexus with the delay and whistleblowing; it was purely down to Paul Thornburn's belief that as the claimant had already been provided with a substantial number of documents it was reasonable for him to describe the additional documents being sought as opposed to making a general request, which involved time and expense. Paul Thornburn, who incorrectly but genuinely believed all documentation had been provided, gave uncontested

evidence before the Tribunal of the weeks spent by staff looking for the claimant's documents, and it is understandable he sought input from the claimant even if the first respondent was legally obliged to disclose everything it had without any specification being necessary.

489. Joanne Alliston was unavailable for the dates provided to her for a grievance appeal hearing. In an email sent 21 May 2013 to Michelle Turner, Joanne Elliston raised concerns about what the claimant regarded as a "conflict of interest with Steven Burnett and Vanessa Harris being members of the grievance appeal panel" that was to convene on 23 May, having earlier expressed concerns about Gail Naylor on the basis that she had sat on the exclusion appeal panel, concerns that were rejected by Michelle Turner on the basis that the claimant did not complain about Gail Naylor's conduct during the appeal process.

Detriment 28 relevant to first respondent only - from 24 May 2013 refusing to investigate or deal with the Claimant's grievance of 24 May 2013 and failing to deal with it in a timely manner

The grievance appeal hearing 23 May 2013

490. The hearing took place before Gail Naylor, chair, Vanessa Harris, director of finance, Steve Burnett, non-executive director and Rachael London, HR business partner and advisor to the panel. The claimant, who was accompanied by Joanne Elliston, presented a 7-page skeleton argument. The hearing was minuted, and it is clear from the minutes there were a number of objections on a number of matters from the claimant and the hearing was a difficult one, with the claimant "cross-examining" Dr Herod. The relevant matters are as follows;

(a) The panel made the decision that there was no conflict of interest and the hearing continued.

(b) The claimant disputed that Cheryl Barber could be called as a witness to deal with occupational health policies, which was in breach of policy and "grossly unfair." As a result, Cheryl Barber was not called, and no new evidence would be considered either from management or staff side.

(c) During the claimant's questioning of Dr Herod, who confirmed he had spoke to Cheryl Barber regarding occupational health policy, the claimant requested an adjournment in order to seek legal advice persistently, forcefully and threatening an injunction. The transcript records the claimant stating, "I think it is so prejudiced now…a person managing a two-stage grievance has effectively sought evidence outside the proper process…the panel has already taken the view that Ms Barber's evidence should not be allowed in, but Mr Herod now accepts that his findings were now based upon the evidence of Ms Barber."

491. Dr Herod wrote to the BMA on 24 May 2013 requesting that the claimant "as a matter of urgency" inform the investigation team which documents were outstanding,

confirming he had asked the investigation team to refrain from interviewing the second respondent's staff. Dr Herod had taken the view, after discussion with Dr Greenhalgh, that the investigation team no longer needed to interview the second respondent's staff and he acceded to the claimant's request in this respect. Dr Herod set out his understanding of the claimant delaying the investigation meeting, the amicable solution discussions further delaying matters and an express agreement between the claimant and Paul Thornburn that no complaint would be made regarding the ongoing exclusion in the period of discussion. He also referred to a new issue to be investigated; an inaccurate report made in the Private Eye magazine concluding "there is a concern that a Dr Tattersall may be responsible for that report and this issue does require investigation. If Dr Tattersall's is capable of this type of behaviour, it is inappropriate for him to be at work and exposed to further information about the Trust's operations, whilst the issue is investigated."

492. In or around May/June 2013 the claimant completed a nomination to stand for the role of a governor at the first respondent.

Tri-partite meeting 30 May 2013

493. A meeting took place between the first and second respondent and the Deanery represented by Professor Graham on 30 May 2013 concerning the claimant. The record taken at the meeting reflects the fact the claimant did not want to train elsewhere and the Deanery could find him a replacement hospital to work in. The second respondent confirmed the claimant had been declared fit by occupational health for academic work, and his contract expired in December 2014. Reference was made to the claimant withdrawing his application for judicial review against the first respondent.

494. On 30 May Paul Thornburn emailed a number of documents to the claimant including chronologies and audit of HR. The claimant had yet to the respond to the first respondent's request for details of missing documents.

495. In a letter dated 31 May 2013 from Professor Graham to Michelle Turner the Deanery's position was set out, which included the claimant undertaking occupational health clearance at St Helen's and Knowsley, and if it were not possible for the claimant to continue his clinical training with the first respondent, "the view from Professor Ian Greer was that his clinical training could be carried out at an alternative location and he could continue his academic training on the LWH site...It is of concern Dr Tattersall has undergone limited clinical training since April 2012 and no clinical training since September of 2012. **The clear advice from the Deanery has been consistently that Dr Tattersall should undergo occupational health clearance** [my emphasis] and he should resume his training. Reference was made to an alternative training location and occupational health clearance with St Helen's and Knowsley Hospital Trust as single lead employer.

496. During the liability hearing the claimant was unhappy at the prospect of Professor Graham giving evidence, referring the Tribunal to what was described as "without prejudice" communications which should not be considered by them. The

Tribunal, at the claimant's request, agreed not to hear this evidence unless the claim proceeded to remedy. However, it is apparent from the 31 May 2013 letter from the Deanery that the claimant at that stage could take up training at a location other than with the first respondent and remain employed by the second respondent providing occupational health clearance was obtained by the new hospital. This evidence flies in the face of the claimant's allegation that the second respondent intended to dismiss him.

Medical reports obtained on behalf of the GMC April & May 2013 regarding the claimant

497. The claimant's medical condition was set out in 2-reports accepted by the claimant, and complied on behalf of the General Medical Council.

Dr Bothra, consultant psychiatrist 23 April 2013

498. Dr Bothra was informed by the claimant that he had "a bit of a dip in December 2012 but once he went back to do academic work he started to feel a lot better in himself…he had depression on and off since 2002…had psychotherapy in 2010…In 2011 he saw his consultant psychiatrist…was quite stable and discharged back to the care of his General Practitioner. He continued to take Venlafaine…in 2012 his GP started reducing his Venlafaxine…he started having early signs of depression; **he started becoming irritable and anxious in late 2012**…because of an acute stress reaction…he was then commenced on Olanzapine and Venlafaxine…February 2013…he went back to work and felt a lot better…He is aware that underlying some of his erratic behaviour is poor esteem…**he relishes academic arguments; he can be assertive especially when it comes to his principles as he finds it difficult to let go of arguments, however small they may be** [my emphasis]."

499. Dr Bothra's opinion was the claimant was fit to practice without restriction.

Dr Tabanit, consultant in adult psychiatry May 2013

500. Dr Tabaniat at paragraph 4.5 in this report referred to a psychiatric report prepared by a consultant forensic psychiatrist who assessed the claimant on 7 April 2010 and found "More recently Doctor Tattersall has had a history of conflict with other doctors and health professionals; this may impact his professional advancement. He added that Dr Tattersall's depression and anxiety are likely to be related to his temperament…when he is depressed he is more irritable and angry and these are likely to be expressed. **He does not think Dr Tattersall has a personality disorder, but he does, at times, become aggressive and intensively paranoid"** [my emphasis].

501. Under the heading "Current Psychiatric History" at paragraph 5.10 reference was made to the claimant's "difficult time at work. He described a dispute in work where by in March/April 2012 the Liverpool Women's Hospital Trust realised that they had not done the appropriate screening prior to him taking up post there. They

therefore requested that he undergo some health screening. There then followed a conflict with occupational health, as the Women's Hospital's local policy is to carry out more extensive screening than what Dr Tattersall believes is described in the department of health guidance. He said that this excess screening was not found documented as local policy **however so he perceived injustice in what he felt being cornered to go through these screenings. He now described the whole conflict as 'a bit silly, unnecessary and petty.' He described it as him 'being petty over them not complying with department of health guidance'** [my emphasis] He admitted to reacting 'more sensitively and taking issues about this when I am depressed.'

502. The claimant confirmed to Dr Tabaniat "As he failed to comply with the trust's requests for screening, he was initially advised not to participate in exposure prone duties and hence on-call duties. He said with the BMA's support he started a grievance procedure. He said that he however got more anxious and argumentative as a result of which he was excluded from work on health grounds…He had contested blood tests 'under protest' but was later 'angered' that the results were breached directly to the Director of HR rather than to him to decide whether to disclose them or not."

503. Dr Tabaniat at paragraphs 5.14 and 5.15 records the claimant informing him he had "since won his appeal against the exclusion panel and is back in work at the University department…however **he is still not allowed back for clinical duties as they are still wondering about a formal investigation and that there is an employment tribunal pending…Although Dr Tattersall denied any significant symptoms of low mood that he could detect at the time (i.e. April to September 2012), he however said that with hindsight, that he may have been becoming slightly low** [my emphasis[. He admitted to feeling very sensitive more argumentative as compared to when he was not depressed. He described feeling wound up and very sensitive to 'perceived injustice…he explained that he felt he is a great believer in confidentiality and felt that others were not following the confidentiality rules precisely which was getting him wound up…He tries to argue to win to make himself feel better…following his exclusion in November 2012, more significantly lower in mood…he explained he wanted to tape his interviews by occupational health department as he wanted to make it clear he was having further screening tests 'under protest' and that he wanted to collect evidence for this, for example, if he needed it later for the ongoing grievance process…He returned to his GP who assessed him in low mood…**Dr Craig, wrote that Dr Tattersall had not felt depressed as such and confirmed he was no longer showing signs of depression…**Dr Tattersall described his mood as much better…for the last couple of months and reported feeling back to his normal self when I assessed him…he showed insight into his sensitivity and his argumentative behaviour saying that when he was low he is more sensitive and willing to argue about things that may not be so important. He also said that he feels anxious at these times if he perceives an injustice."

504. Dr Tabaniat's opinion was that claimant did not have a personality disorder, and he suffered from recurrent depressive disorder, currently in remission. When

depressed and stressed he "tends to become aggressive and irritable and can develop paranoia…the stresses at the time and reduction of anti-depressant medication did lead to a relapse, initially, and although he did not feel significantly depressed…he is currently fit to practice…he has partial insight into his behaviour, which results when he is stressed or when depressed and which has resulted in him coming into conflict with others."

The re-arranged appeal hearing to 6 June 2013

505. Following the adjourned appeal hearing on 23 May, arrangements were made to reconvene it on 6 June 2013 and both the BMA and claimant was sent correspondence to this effect.

Version 15 draft investigation report

506. By 6 June 2013 15 versions of the draft investigation had been prepared, and the 15th version was sent to Dr Greenhalgh by Paul Thornburn who wrote "We will need to do a final sense check on these when the report is finished." The Tribunal accepted the draft reports were not exclusively the product of Paul Thornburn, but reflected the views of Dr Greenhalgh as she investigated and interviewed witnesses.

507. The Tribunal heard oral evidence from Dr Greenhalgh as to how the draft reports came about; the claimant's case was they were written by Paul Thornburn who had prejudged him. The Tribunal did not agree, and it did not accept Paul Thornburn, or any other person, could persuade Dr Greenhalgh to set out in investigation report evidence she did not believe in. Dr Greenhalgh may not have been experienced in disciplinary investigations; however, she attended 2-days training in March and clearly had the intellectual capacity and objectivity to carry out an investigation in accordance with the ACAS Code. Dr Greenhalgh was not a person to be easily led by HR, and so the Tribunal found.

508. On the 6 June 2013 Paul Thornburn wrote to the claimant providing "one final set of dates for interview…if you do not confirm availability or attend on these dates, then the investigation will be concluded without your input…As yet Dr Tattersall has not given his consent for occupational health information to be released for the purpose of the investigation…the investigation will conclude without this input…Dr Tattersall has been provided with a significant amount of information he has requested…as no further details have been received we will assume Dr Tattersall's has all the information required." He noted "whilst we appreciated it has been requested that we correspond through the BMA, due to the urgency and to ensure issues are clear we are sending this both to Dr Tattersall and the BMA." The BMA made it clear that all correspondence should be sent to it in a 7 June 2013 response, although Joanne Alliston appreciated "under the circumstances it was also necessary to also send a copy to Dr T on this occasion."

Electoral nomination

509. John Box, the ballot advisor at the Electoral Reform Society acknowledged the claimant's nomination on 11 June 2013.

510. On the 12 June 2013 the claimant's step 3 grievance appeal that had been postponed at the claimant's request, was re-arranged for 4 July 2013.

The claimant's grievance submitted 12 June 2013

511. The claimant submitted a second grievance on 12 June 2013 concerning the first respondent's agreement not to investigate if he provided health screening results, requiring it to abide by the October 2012 agreement.

512. On the 14 June 2013 the claimant was informed Dr Topping would review his second grievance received 12 June 2013 and a meeting for 24 June was scheduled.

Public seat on the first respondent's Council of Governors nomination

513. The claimant was informed in writing by Julie McMorran his nomination would be accepted for election to the staff doctor's seat and not the public constituency as his membership ought to be in the staff constituency doctors' class. The claimant did not question this at the time.

514. 17 June 2013 Michelle Turner had read the first draft of the investigation and responded, "thinks it is very good". In an email to Dr Greenhalgh Paul Thornburn referred to Michelle Turner's suggestion that contact be made with the police and to mention that "an ambulance was called etc. Sure more suggestions to come!" Dr Greenhalgh responded by return "Glad Michelle thinks we are on the right lines." The Tribunal accepted the claimant's argument that this was evidence establishing Michelle Turner's involvement in the preparation of the investigation report, despite her oral evidence before this Tribunal that she was not involved. Michelle Turner's credibility was undermined by this evidence; the Tribunal fund it unlikely she would have forgotten her input given the importance of the investigation report, and her knowledge of the witnesses and their witness statements gathered later in 2013 as indicated below.

515. On 18 June 2013 the BMA referred to the claimant's subject access request having not being "fully complied with." Paul Thornburn responded by email that he had provided "a considerable amount of information…and believe we have supplied all that was requested. If Dr Tattersall can detail specific information he requires we will do all that is reasonable to provide this. A general request is not sufficient." The claimant has put forward arguments at the liability hearing to the effect that a general request was sufficient under the legislation and there was no requirement for him to provide any details to what documents were missing. The Tribunal is not knowledgeable about the Data Protection Act and is not in a position to come down on one side or the other in the argument. The Tribunal considered the mental processes of Paul Thornburn and accepted any delay in providing all of the

documents requested was not causally connected in any way to whistleblowing or discrimination. The fact is the claimant had been provided with boxes of documents by the respondent, and Paul Thorburn understandably took the view that it was reasonable and proportionate, given the many hours already spent by staff looking for documents, the claimant should give some indication as to what documents he thought was missing.

CQC in June 2013

516. On the 18 June 2013 Michelle Turner emailed the CQC concerning her request about health clearance for clinical academics following an earlier routine meeting with Debbie Corcoran, compliance inspector, who requested further information on the respondent's health screening processes. Michelle Turner in the follow up email cited the "information I had shared previously with you" referring to one clinical academic for whom the file was not complete. In a later email sent 24 June 2013 Michelle Turner confirmed that occupational health had cleared the doctor in question.

The decision of Liz Cross dated 21 June 2013

517. Following an independent review of the claimant's concerns (which notably had contained no reference to whistle blowing or disability discrimination) Liz Cross wrote to the claimant (the first draft was dated earlier but nothing hangs on this) in the capacity as chair of the panel setting out a number of findings, including the following:

(a) The number of different processed instigated by the claimant who engaged a number of different people in the Trust made bringing satisfactory conclusions to any of them "difficult."

(b) The CEO having received a recommendation from the exclusion appeal panel acted within her powers.

(c) The failure to complete the investigation was due "at least in part, to the claimant's cancelling two interviews and therefore exclusion remained ongoing.

(d) The Trust had provided information under DPA/FOI and the claimant had not clarified "his needs."

(e) The reappearance of HR in a number of the process had not prejudiced the claimant, and "given the number of concurrent procedures…could not be avoided."

(f) In conclusion, Liz Cross indicated she would seek a report from the BMA and Michele Turner on a fortnightly basis until conclusion to ensure the "on-going processes are timely and fair."

518. In a letter dated 21 June 2013 to the BMA Paul Thornburn referred to the claimant being offered "9 separate dates…to attend for interview" which were all not

acceptable to him despite it being the "final opportunity to attend interview." The second respondent had confirmed the claimant's availability on the dates provided and the claimant had arranged several zero hours days including the 27 June 2013, one of the dates for the proposed investigation meeting. Paul Thornburn pointed out the claimant was aware that when he was not undertaking on-call work he was not entitled to zero hours days and this practice "must stop immediately." The Tribunal was of the view the claimant was fully aware he should ensure he was available to attend the investigation interview, but did not want to do so for reasons of his own despite the fact that this delayed his return to clinical duties.

Detriment 29 relevant to first respondent only- 17 July 2013 finding the Claimant's nomination to the Council of Governors invalid in breach of the Model Election Rules (although the Claimant did not receive this notification on 17 July 2013, Mr Herod confirmed to the Claimant it was deemed invalid on this date via an email of 24 July 2013). The breach related to the fact that there was no rule which provided that a nomination paper must be subscribed by at least two supporters

The claimant's "invalid" nomination for election.

519. In an email sent to John Box Julie McMorran attempted to have two further nominations accepted after close of nominations, which John Box did not accept acknowledging "I understand that this is probably not the decision you would like." The claimant surmised from this comment that the respondent was "very concerned about me being elected and wished to try and prevent it from happening." The Tribunal did not accept this was the only inference that could be made. It is possible that there were two late nominations and that was the end of it. However, it was the more likely on balance given the fact the clamant had as far as the first respondent was concerned made prejudicial and untrue reports to the press and was facing serious disciplinary allegations concerning his treatment of staff. There is no evidence, apart from the claimant supposition, that Julie McMorran put forward two late nominations on the grounds that the claimant had made protected disclosures to the CQC and or was disabled.

520. On 21 June 2013 Julie McMorran confirmed in an email to John Box the claimant was an eligible member in the constituency of staff – doctors and she requested "can you please advise Dr Tattersall…his nomination is being accepted for that seat he must obtain the support of two members of the staff doctors constituency…" A statement of two nominated candidates was issued 24 June 2013, and the claimant was informed by John Box writing on behalf of the electoral Reform Society, that one of his supporters was ineligible as he was not a member of the staff; the claimant's supported doctor was a doctor with a different Trust. Two valid members of the staff were requested. It is not disputed that the claimant's application should not have been deemed invalid. Julie McMorran and John Box had relied on an out-of-date version of the Model Election Rules and this. According to Monitor, "made a material difference to the outcome of the election."

521. An exchange of emails took place on the 24 June 2013 between the claimant and Robin Harrison of the second respondent; the latter advising the claimant "the University has raised concerns with the trust about the length of time that the investigation is taking and has sought reassurance that there are valid reasons for the length of the investigation. The University would like to encourage you to attend an investigatory meeting on one of the dates which has been offered to you." The claimant responded, "I don't think there are valid reasons for the delay – I think its all part of the action the Trust is taking against me due to my whistleblowing…I know the University does not want to intervene in the Trust's actions against me…I would be grateful if the University would try and protect my family interests and health by considering making formal representations to the Trust…please copy me in." The tribunal took the view the claimant misrepresented the position to the second respondent. There were valid reasons for the delay; the claimant's refusal to attend the disciplinary investigation and whistleblowing was not a factor despite the claimant's best endeavours to make it appear as if it was.

522. The claimant was informed in no uncertain terms of the requirement for him to attend the meeting on 27 June 2013, failing which the investigation will conclude without his input. The claimant's consent to information being provided by occupational health was sought. Finally, on the question of disclosure specific details were again sought from the claimant, as these had not been provided to date. The BMA responded on 25 June informing Paul Thornburn the claimant was unable to attend as his partner was due to give birth, and in a later email, she had given birth. The investigation meeting was yet again postponed.

Claimant's email to the CQC 23 June 2013

523. The claimant wrote to the CQC referring to him having raised a "number of concerns…some anonymously…that the Trust's staffing levels were inadequate, putting patients at risk, particularly on the labour ward…I understand that midwives raised their concerns…I am not sure of the outcome as I am currently excluded from clinical areas as the Trust do not **want me exposed to further information about the Trust's operations'** [my emphasis]…the Trust does not have a consistent or written occupational health policy for screening of all the staff working in the Trust for blood borne infections…that the Trust has a large number of tests results (apparently at least 60,000) that have never been reviewed or actioned…there is a culture of staff bullying by management, particularly when staff raised concerns." The first respondent was unaware of this communication.

25 June 2013 extension to exclusion

524. Dr Herod wrote to the BMA on 25 June 2013 extending the exclusion to 25 July 2013 for the same reasons as those given for earlier exclusions.

525. The claimant's grievance appeal was re-scheduled for 4 July 2013. The BMA requested a postponement Dr Herod having confirmed at the earlier hearing he interviewed the occupational health manager "outside of the grievance process…without the knowledge of Dr Tattersall thus not affording him to question

the evidence which Dr Herod confirmed influenced his findings…. there is a potential breach of contract issue" and the grievance was "potentially flawed."

CQC unannounced inspection 7 & 8 July 2013

526. A CQC unannounced inspection took place as a result of the claimant's earlier complaints.

527. The subsequent CQC report referred to receiving a "number of concerns about the service" including concerns about "staffing levels on the maternity unit." The report dated September 2013 recorded "senior managers were aware of the concerns about staffing levels and had been actively trying to address the problems we found prior to our visit…we heard a number of similar complaints about staffing at our last inspection visit but we saw no direct impact on patient care at that time and saw evidence that the Trust had carried out a review of staffing levels." Reference was made to the CQC's ongoing monitoring and earlier discussions with staff. The report indicated staff **"had no concerns about speaking up about staffing** [my emphasis] but they felt that they had no confidence that managers were listening to their concerns…staff did tell us the Trust was in the process of recruiting midwives….senior managers were open and transparent in their response to us and they acknowledged that staffing levels was problematic…a trust board briefing paper was provided to us showing that whilst a proposal to increase the workforce had been made the funding available did not allow for the full numbers required…the trust had secured some funding towards the end of 2012." A number of compliance actions were laid down, including a report. There was no suggestion by the CQC the unannounced visit was a result of any complaint being made by the claimant, and the first respondent did not suspect this was the case the issues having been raised and discussed between it and the CQC previously. It was not unusual for unannounced visits to be made.

528. In a letter dated 19 July 2013 from Robin Harrison, HR manager for the second respondent, expressing the second respondent's concern about the amount of 33 days unauthorised leave the claimant intended to take and that "it appears that 'zero hours' contribute significantly to these periods of absence. Zero hours days are part of he Liverpool Women's Hospital NHS Trust's on call rota. However, as you are currently suspended from the on-call duty, the University does not accept you have any entitlement to zero hour's days. The University expects you to attend work on those days."

529. The claimant responded in an email sent 21 July 2013 alleging the letter was "potentially defamatory…this letter is part of a plan to justify the University's plan to renew my contract of employment at the end of the fixed-term…I have expressed my concern that I have been informed by the Head of Department that the University does not consider it has any obligation to renew fixed-term contracts at the expiry for the majority of staff in the Department…" The claimant disputed the position taken by the second respondent on zero hours, on the basis that his working hours had not changed, and alleged the second respondent's position was "due to my further recent whistleblowing disclosures to the CQC…"

Cancellation of the claimant's grievance hearing due to be heard 23 July 2013

530. The claimant's grievance hearing had been arranged for 23 July 2013. This was cancelled by email sent to the claimant directly from HR who explained the reasons were "due to a family illness affecting the attendance of Dr Topping." The claimant responded pointing out that "I cannot see her being present at the grievance hearing is essential" requesting that it proceed as planned or alternatively moved directly to stage 3 of the grievance procedure. Dr Herod, who was copied in, responded "I do feel that I would benefit from a chance to hear from, and ask questions of, both Angela O'Brien and Jo Topping."

Detriment 12 relevant to second respondent only – 19 July 2013 Making untrue allegations that the Claimant had been asked to attend a meeting with Professor Alfirevic on the morning of 19 July 2013, that the Claimant was taking more annual leave than he was entitled to and alleging he had not properly followed holiday request procedure, in a letter from Mr Robin Harrison to the Claimant

Detriment 30 relevant to first respondent only - 24 July 2013 refusing the Claimant's request of 24 July 2013 to attend a meeting of the Council of Governors that day, acting through Mr Herod who emailed the Claimant confirming the refusal

531. On the 24 July 2013 the claimant emailed Dr Herod stating his intention to attend a governors meeting that evening. In an earlier email the claimant had written;" I assume that you will be aware that I have recently been elected by the Trust's Council of Governors. I am writing to state that I assume that my prohibition from entering the Trust premises (out with the areas leased by the University) does not apply for any need for me to enter the premises to carry out this important role. I assume that the restriction is not to apply in such situations…I do not hope my election will not be seen…as a threat…"

532. Dr Herod informed him by return email that was short and to the point, "Your current exclusion includes the condition that you must not attend the premises of Liverpool Women's Hospital. As such you are not able to attend tonight's meeting…I am informed that your recent nomination for the position of staff Governor (doctors) was not valid…this fact by the Electoral Reform Society on 17 July 2013. This seat will be subject to a by-election which will begin during August 2013." The contemporaneous documents reveal the claimant was so informed by John Box on 17 July.

533. By the 24 July 2013 the claimant's stage 3 grievance appeal was rearranged for 12 August 2013. On the same date Dr Herod extend the exclusion to 22 August 2013 for the same reasons as previously given.

534. The claimant emailed all the medical staff employed by the first respondent giving the reason "As I owe all staff members of the Trust an explanation." He

proceeded to relate the issues concerning his non-election to the Board of Governors and his intention to attend the governors meeting that evening "because I was aware that the governors would be provided with information regarding the Care Quality Commission's recently unannounced inspection…is a matter of particular interest to me, as it occurred subsequent to further information and concerns I had recently relayed to the CQC. Unfortunately…the medical director…was prohibiting me from entering the hospital to attend the meeting. He also informed me **that the Trust had now determined** [my emphasis] that my election as a trust staff governor had been invalid…As some of you are aware I raised concerns about the operational issues within the Trust last summer, particularly relating to issues regarding staffing levels that had already been raised with management by our midwifery colleagues. As I was unable to get the medical director and senior independent non-executive director to listen to my concerns, I felt I had no choice but to escalate the issue in line with the Trust's whistleblowing policy and speak to the CQC…it has become apparent that it is difficult to hope to raise issues and expect there to not be repercussions…I realise that I may face further reprisals due to my actions today…"

535. In an email sent to the claimant only on 26 July 2013 the CQC confirmed, following a request made previously by the claimant, that in response to his concerns the 8 & 9 July inspection was carried out and a copy of the report was attached.

536. In an email sent 29 July 2013 from Dr Herod to the claimant reference was made to the claimant's "inappropriate use" of the on-call system when he attempted to contact the head of governance to express unhappiness at Dr Herod's email. Reference was also made to the claimant "disrupting" the council of governors on two occasions, and the emails sent to all medical staff which Dr Herod criticised as "not constructive and…in parts, possibly seriously inaccurate…your actions also breach the terms of your exclusion…I will ask the investigation team to clarify aspects of your email with you at the investigation meeting. I am concerned that some comments are inaccurate and may have caused unnecessary alarm among medical staff and damage to the Trusts reputation in the eyes of these staff." He concluded "I want to reassure you, there will never be any repercussions for reasonably raising genuine concerns in the public interest."

537. In a letter dated 1 August 2013 to Monitor the claimant raised concerns about the actions of the first respondent to prevent him becoming a member of the council of governors, and "these actions are part of the Trust's campaign against me due to my having raised concerns with respect to patient safety with the Care Quality Commission." The claimant did not refer to any earlier protected disclosures being made, or disability discrimination. He complained the returning officer, Mr Box, "no doubt at the request of the Trust" was in breach of the rules by allowing Ms McMorran to "play a role in determining the validity of nomination." An investigation ensued.

538. An exchange of emails took place concerning re-arranging the investigation meeting, the claimant having indicated on 9 August he was unable to attend to dates in August offered that culminated in Dr Herod writing to the claimant referring to the claimant's 8 August 2013 email in which the claimant had "formally protested" at the

first respondent's continual attempts "to hold meetings with me when I am not work and have other commitments...The University accepts that I am currently on leave…the University accepts that the Trust's change of position with respect to my working pattern including 'zero hours' needs to be resolved…the status quo position should apply." The claimant requested immediate cancellation of the meetings and suggested an amicable solution is agreed in the "prolonged dispute." The Tribunal found the claimant misrepresented the second respondent's position which was not as set out, the second respondent had made it clear the claimant was to attend meetings arranged by the first respondent and he was not entitled to zero hours.

539. Dr Herod in his response confirmed the claimant was under the joint control of the Trust and University and annual leave should be approved by both. He wrote; "LWH does not consider your request for leave has been validly granted and you must remain available for meetings with LWH during August…I feel that it is reasonable the meetings listed…should proceed. It is a matter for you…whether you attend or not…the arrangement of the on-call rota and compensatory rest for participants in the rota is solely a matter for LWH…accordingly the University has no power to intervene."

Thirteenth alleged protected disclosure to Kathryn Thompson 12 August 2013 [first respondent only] accepted by the respondents as amounting to an operative public interest disclosure.

The Claimant wrote to Ms Thomson and stated that he believed the Trust had failed to meet their legal obligation to provide him with information requested under a subject access request in line with the Data Protection Act 1998.

S.43B ERA (1)(b) Breach of any legal obligation: Breach of legal obligation to comply with Data Protection Act and Freedom of Information legislation.

Claimant's email to Kathryn Thompson 12 August 2013

540. The claimant responded not to Dr Herod, but in an email to Kathryn Thompson, that it was "inappropriate" for Dr Herod to review the decision to hold the grievance hearings when he was not in work "as there was a clear conflict of interest…" The claimant also wrote directly to Dr Naylor on this issue, and he argued that as he had not been provided with the evidence heard by Dr Herod outside the stage 2 grievance, and the **"general request under the DPA" remained undetermined, the hearing should not be resumed until the information was provided** [my emphasis].

541. It was accepted on behalf of the respondents that the 12 August 2013 disclosure was a qualifying disclosure and an operative public interest disclosure.

542. Gail Naylor responded re-attaching the notes of the earlier hearing that had already been provided, she confirmed no documented interview took place between Dr Herod and Cheryl Barber who confirmed the "practice of EPP screening at LWH…had been in place when she started in the Trust. This information had been

provided at the hearing by Jo Topping and Angela O'Brien and Mr Herod was seeking confirmation that this information as correct." As this was the third re-arrangement and "your representative had been given numerous opportunities to provide us with dates" the adjournment was not granted.

543. With reference to the DPAS/FOI requests Gail Nayor pointed out these had been dealt with, the claimant had received "some information already" and the position was unchanged from 23 May. It is undisputed the claimant had not clarified what documents he was seeking; the claimant at this liability hearing maintained it was sufficient for a "general request" to have been made. Gail Naylor made it clear that if the claimant did not attend "we will conclude the grievance appeal in your absence based on the information we have available."

544. In an email sent 14 August the claimant confirmed he would "if necessary attend the hearing tomorrow… and will request the panel to determine to make an adjournment…the Trust now appears to accept that it has failed to deal properly with DPA/FOIA requests and that I require this information to continue…it has become clear that Ms Barber provide evidence to Mr Herod and he utilised this…I need to have access to documentation that will make it clear whether the evidence of Ms Barber is correct…"

Dr Greenhalgh' lack of knowledge of Dr Tabanit and Dr Bothra's medical reports 14 August 2013

545. On 14 August 2013 the claimant wrote to Dr Greenhalgh "concerned that you may try to investigate regarding myself without giving me the opportunity to speak to you." The claimant proceeded to outline "relevant" issues regarding his dispute and he attached the medical reports of Dr Tabanit and Dr Bothra with the instruction to her that they must not be disclosed to any other person without the claimant's prior agreement. The claimant wrote; "I do hope that you will be willing to ensure that any investigation conducted by yourself is conducted in a fair manner and not simply performed to the requirements of the Trust management and HR staff, who obviously are upset with me regarding the disclosures **regarding patient safety that I felt it necessary to make to the Care Quality Commission and which I believe, precipitated the Trust's actions against me**. [My emphasis]." This email coupled with the evidence set out above, confirmed the Tribunal's view that the only protected disclosures made by the claimant during this period was to the CQC. It is notable that the claimant, who was careful in his correspondence, made no reference to any other protected disclosures precipitating the first and second respondent taking detrimental action against him. It is notable the claimant made no reference to any other protected disclosures or his disability.

546. Dr Greenhalgh did not acknowledge the email and attachments until February 2014 due to the fact that they did not appear in her in box. No reference was made to the medical reports until Dr Greenhalgh noticed the existence of the email, without attachments and emailed the claimant requesting he forward further copies. The Tribunal was satisfied on the balance of probabilities Dr Greenhalgh first considered the psychiatric reports in or around February 2014 and not on 14 August 2013.

547. The grievance meeting was reconvened to 13 September 2013 for the fourth time and in a letter dated 15 August 2013 Dr Topping agreed to review the information the claimant had been provided with and provide him with any outstanding information. In a separate email she requested details from the claimant as to what documentation he had already received, which the claimant accepted at the liability hearing this was a genuine request.

548. Dr Herod confirmed the position on zero hours in a letter dated 9 August 2013 and in a letter dated 21 August 2013 he dealt with the claimant's request for information under the Data Protection Act and Freedom of Information Act setting out the chronology of documents being delivered, the first respondent's request for what information was outstanding, which the claimant had yet to reply to. Dr Herod assured the claimant "whilst we believe the Trust has made every effort to comply with your DPA request, because you state there is information outstanding, will voluntarily repeat our data search". The claimant was yet again asked to identify what information was outstanding. In the penultimate paragraph he concluded "I assure you that you have not been subjected to any discriminatory action because of this issue, and the Trust's actions are also not related, in any way, to any public interest disclosure you may have made."

549. In an email sent 24 July 2013 Professor Alfirevic suggested a meeting in August following an unremarkable email trail.

Second alleged protected disclosure re: second respondent – made to Professor Greer 12 August 2013 [second respondent only]

The Claimant made disclosures to Professor Greer by emails on the dates listed regarding his alleged unfair treatment by the Trust and the University's failure to support him under the duty of care an employer has for its employees.
On 12 August 2013 the Claimant wrote to Professor Greer requesting assistance from the University and for it to ensure that the Trust treated him fairly. The Claimant received a response the same day from Professor Greer stating that it would be inappropriate for the University to intervene in the issues between the Claimant and the Trust as it deemed the Claimant was being treated fairly.

S.43 B ERA (1) (b) Breach of any legal obligation: employer's duty of care to its employees

Detriment 13 relevant to second respondent only - From 12 August 2013 failing to take action or intervene when the Claimant was forced to attend meetings with the Trust on days which the University had agreed that he did not need to work (for instance, after the Claimant requested that the University intervene "…to ensure [he] is treated fairly by the Trust…."in an email to Professor Ian Greer on 12 August 2013, and in an email to Professor Alfirevic on 13 December 2013)

Claimant's email to Professor Greer sent 12 August 2013

550. On the 12 August 2013 the claimant emailed Professor Greer complaining Professor Alfirevic had granted him leave and the first respondent had said the second respondent did not have authority to grant him leave and he was to remain available for meetings. The claimant referred to previously asking the second respondent to intervene "as Mr Harrison has always assured me the University would ensure that I am treated fairly" and Professor Greer was asked to take action "to ensure that I am fairly treated by the Trust."

551. Professor Greer responded the same day reminded the claimant "as you are aware, it is usual for clinical academic staff to arrange and agree annual leave with the Trust for their clinical duties to accommodate clinical service…I know that the Trust has made significant efforts to arrange mutually convenient meetings…. I would encourage you to make every effort to attend. You have a responsibility with the Trust to resolve these issues and participate in both grievance and disciplinary hearings…From the University perspective it appears…that you are being treated fairly by the Trust, and…it would be inappropriate for the University to intervene at this point." The claimant responded to this email 5 weeks later, as set out below.

Conclusion – alleged protected disclosure 12 August 2013

552. On the balance of probabilities, the Tribunal found the claimant was not disclosing information in the 12 August 2013 email; he was seeking to persuade Professor Greer to intervene on behalf of the second respondent in his employment dispute with the first respondent, and the issue of his availability for the meetings the claimant was continually putting off. In accordance with Cavendish cited below, the claimant was not imparting any information that could be interpreted to fall under S43B(1)(b) ERA. It is notable Professor Greer asked on a number of occasions for the claimant to provide "new" information about how the first respondent was unfairly treating him and the claimant did not do so. Had a protected disclosure been made, in the alternative, the Tribunal would have gone on to find it was not made in good faith as the claimant had an ulterior motive, namely, playing one employer against another in order to achieve the outcome he wanted concerning the screening requirement and to avoid attending meetings, particularly the disciplinary investigation with Dr Greenhalgh. The requirement for good faith was removed for disclosures made after 25 June 2013, however, the claimant's ulterior motive would have become relevant at remedy had the Tribunal found in his favour.

16 August 2013 grievance appeal hearing

553. On 16 August 2013 the claimant attended his grievance appeal meeting. It did not go well. The claimant requested an adjournment on a number of occasions, he objected to the presence of Rachael London from HR, on the basis that her presence should be to advise the panel and not play part in decision making despite assurances from the panel that she was not attending in the capacity of decision maker. The claimant objected to the hearing not being confidential as he had requested Rachael London to leave, and this had not been granted by the panel.

The hearing went on for a time, during which the claimant complained about a number of procedural matters including not being provided with a copy of the transcript from the last hearing, despite having been sent it previously. The claimant was offered an adjournment to 12.30 and the hearing adjourned to another date, the claimant requesting "all the information" held on him maintaining the respondent could not narrow the scope of the search as he did not know what the data missing was and was unwilling to provide a list.

554. When the reconvened hearing was suggested on 11 September 2013 the claimant said he could not attend as he did not work for the first respondent on that day, and he had no availability until 26 September. The date of 13 September 2013 was finally agreed.

DPA request

555. The next day, the claimant confirmed to Dr Topping he had received 150 pages of emails and documents and he had no problem with the first respondent "**starting their search from scratch**. [My emphasis]" The claimant had not provided any indication as to what documents he thought were missing as he took the view a general request was sufficient.

556. It is notable during this period many of the emails were sent by the claimant to a number of managers, medical staff and academics employed by the first and second respondent directly, and vice versa. In an email sent on the 18 August 2013 directly to Dr Topping, the claimant complained about not being entitled to non-working days and he threatened to raise a grievance.

Investigation meeting to 22 August 2013

557. Dr Greenhalgh met the claimant for the first time at the first investigation meeting held on 22 August 2013.

558. In an email sent 20 August 2013 by the BMA to Dr Greenhalgh a request had been made for the investigation meeting adjourned to 22 August 2013 on the basis that the claimant had not been provided with the information under the DPA and FOIA. The claimant raised the issue of non-disclosure with Dr Greenhalgh at the meeting, in additional to a number of other objections, including the presence of Paul Thornburn who was there in his HR capacity. It was explained to the claimant the meeting was a fact finding exercise and would not be adjourned further, although a short break was allowed in order that the claimant could speak with his union representative Ms Alliston. The hearing was adjourned due to the claimant stating he was unwell and unable to continue. Dr Greenhalgh found the claimant to be verbally challenging and legalistic, but not aggressive and she did not feel threatened by him.

559. Following the meeting Dr Greenhalgh referred the claimant to occupational health, Healthwork, and an appointment was arranged for he claimant on 5 September 2013 which he did not attend.

560. Dr Herod wrote to the claimant in a letter of the same date, setting out what had transpired during the meeting and "to save you the potential further stress of attending another meeting, you will be given 21 days…to return your written response to the questions I have sent you…If Lynn decides that the information you have provided…requires a follow up meeting, then a date of 27 September…has been set and you are expected to be available for this…you will also be referred to occupational health to consider any support the organisation can offer you during this difficult time.

561. Dr Herod, on 21 August 2013 extended the claimant's exclusion for the same reasons as previously, until 20 September 2013.

DPA search

562. Paul Thornburn arranged internally for a "further search to ensure Dr Tattersall has been provided with all the information relating to him as defined by the DPA, including all emails, letters and other documents where the claimant was named to be provided by 5 September 2013.There followed an internal email chain which revealed a number of searches were in the process of being carried out including folder structures on the file servers. Paul Thornburn volunteered to carry out another voluntary search with the aim of providing the claimant with the information no later than 6 September 2013. The Tribunal have had sight of internal emails between departments which reflects that this was done.

563. An investigation took place into accessing the claimant's files/documents by the first respondent's ICT department, and it revealed in November 2012 the department undertook migration of files to new server. The search for documents continued throughout this period. By 30 August the claimant had been provided with his occupational health records by Cheryl Barber, and the terms of reference the claimant had requested after reviewing the information provided in 2012. By 5 September 2012 2 boxes of papers were ready for delivery to the claimant.

564. In a letter dated 23 August 2013 Vanessa Harris, director of finance and deputy chair of the appeal panel, confirmed the agreement reached on the adjournment and the claimant's refusal to identify what information he alleged was being withheld from him.

565. On the same date Dr Greenhalgh sent to the claimant the outcome of the investigation meeting which was adjourned after she was made aware the claimant "was feeling stressed by the interview, but not unwell." There was reference to the claimant being referred to occupational health to consider what support was needed. The occupational health referral requested advice on whether the claimant was well enough to attend an investigatory interview, whether he had underlying health issues contributing to his stress and if there was an underlying medical condition was he having appropriate treatment. An appointment was arranged for 23 August 2013 with HealthWorks which the claimant refused to attend setting out his position in an email sent 6 September 2013 that there was a conflict of interest as HealthWorks may have to provide evidence in relation to their earlier assessment of him. As a result,

the claimant was referred to Wellwork Ltd for an appointment on 17 September 2013.

566. On 28 August 2013 the claimant wrote to Dr Herod for confirmation that he could attend a lecture, which was refused "for the reasons previously communicated to you." At the claimant's request Dr Herod clarified his position further as follows; "you were made aware of the reason for your exclusion. As your attendance at trust events would potentially bring you into contact with staff members it would not be appropriate for you to attend."

Meeting 6 September 2013 Claimant/BMA and Professor Graham from the second respondent

567. The discussion that took place with Professor Graham was confirmed in a letter from the BMA dated 6 September 2013. The claimant requested the Deanery provide a temporary placement in order that he could recommence his clinical practice.

Disclosure made by Patricia Sutton in July and September 2013.

568. It is not disputed Patricia Sutton raised an issue with her ward manager and Michelle Turner, who wrote to her on 10 September 2013 regarding steps taken to address the staffing pressures within the maternity unit, and thanking her for being proactive "in putting forward your thoughts around how things can improve for our staff and patients…we all have a duty to ensure that we raise concerns…I encourage you not to hesitate to raise issues again." Michelle Turner reminded her of the executive director on-call for immediate issues of patient safety. The Tribunal accepted as indicated earlier in this Judgment, the first respondent actively encouraged staff to report issues involving patients and there was no evidence any other members of staff had been caused a detriment and /or dismissed as a result.

Detriment 31 relevant to first respondent only - 20 September 2013 continuing to directly communicate with the Claimant despite the Claimant specifically requesting that all communication be directed through the BMA due to the stress it was causing him

569. During this period the claimant wrote to the first respondent's managers and medical staff directly; the first respondent was responding directly to the claimant and writing to the BMA. The Tribunal did not accept the claimant was caused prejudice as a result of the first respondent writing to him directly; further, by writing directly himself the claimant complicated the position further and it should not come as a surprise that any communications he sent were responded to in kind.

DPA request

570. In an email sent 12 September 2013 Paul Thornburn wrote to the BMA setting out the steps taken by the first respondent's IT department information controllers, confirming information held on the claimant was delivered to him on 6 September

2013 and he was "confident the Trust has done everything that it can be reasonably expected to do to comply" inviting the claimant to detail any information he believes had not been disclosed. Two boxes of papers were delivered. 7 days later, on 19 September 2013 the BMA wrote to the respondent stating, "although significant documentation has recently been provided it is clear that the Trust has not yet provide all of the data which he is entitled to." There was no reference to what documents the claimant believed were missing despite it being "clear" that documents were missing.

Step 1 grievance meeting 13 September 2013 recorded by the claimant with notes taken by the first respondent in which the claimant referred to protected disclosures allegedly having previously made to Dr Herod and Steve Burnett.

571. The claimant requested an adjournment as he did not want Rachael London, HR, to be present because she had given advice to the board about "what they could get away with" in an Employment Tribunal, despite this being the fourth attempt at holding the meeting with Dr Topping. When the adjournment was refused the claimant stated he felt unwell and requested an adjournment on that basis, arguing the first respondent should be advised by a HR representative from outside the trust. This was on the basis that all HR representatives had been involved with the claimant at some stage during the long dispute. The claimant alleged the meeting was in breach of his Article 6 HRA rights and initially refused to go through his grievance. When pressed the claimant made the following allegations and the adjournment was granted:

1. The first respondent's decision to withdraw from the 28 November 2012 agreement was an act of disability discrimination and whistleblowing detriment. When asked on what basis the first respondent had not acted appropriately the claimant refused to respond arguing "he was being asked to determine the legal argument."

2. He had been discriminated because he had enforced his right to have a written statement of terms.

3. When asked if he had a disability the claimant responded that he did not "have to declare that," and the first respondent was aware he had a health problem from summer 2010. The Tribunal found even when asked such a direct question the claimant did not inform the first respondent he was disabled and that had been the position from the outset of the claimant's employment to date.

4. As a result of making a "number" of protected disclosures he had suffered detriments including the IT search not being done correctly and no correspondence in relation to the internal whistleblowing allegations. When asked to whom these allegations had been made the claimant responded Dr Herod and Steve Burnett, and subsequent to this he had made a disclosure to the CQC.

5. He had not obtained full DPA disclosure and "was entitled to full audio recordings, all records of who has used passes to open doors and all CCTV information."

572. The grievance appeal hearing was due to take place on 26 September 2013 following the hearing that started on 23 May, some 4 months previous when a number of unsuccessful attempts had been made to reconvene.

573. Gail Naylor in a letter dated 17 September 2013 informed the claimant she would be writing to both him and the BMA "to ensure that information is communicated in a timely manner."

574. Dr Herod extended the claimant's exclusion by letter dated 18 September 2013 to 18 October 2013 for the same reasons previously.

Email to Professor Greer from the claimant alleging detriment as a result of whistle-blowing to the CQC in the summer of 2012.

575. After the passing of some 5-weeks the claimant responded to Professor Greer's email sent 12 August 2013 complaining that Professor Greer had failed to address the concerns raised, maintaining he had been whistleblowing to the CQC from the summer of 2012 and the second respondent was not supporting him "when penalised for raising patient safety concerns." The claimant invited without prejudice discussions with a view to resolve the situation.

Third alleged disclosure relating to the second respondent [disclosure number 2 on the claimant's list] – Professor Greer 18 September 2013 [second respondent only]

The Claimant responded to Professor Greer on 18 September and specifically referred to protected disclosures that he had raised with the CQC and the Trust, for which he did not receive support from the University for.

S.43 B ERA (1)(b) Breach of any legal obligation: employer's duty of care to its employees

18 September 2013 email from the claimant to Professor Greer

576. The claimant alleged on the 18 September 2013 he responded to Professor Greer and "specifically referred to" protected disclosures he had raised with the Trust and CQC.

577. In the email the claimant relies on the following; "the CQC has today published its report into the three issues that arose from my whistleblowing to them since the summer of 2012 and have found the Trust to be non-compliant with all these three standards. Notwithstanding that I continue to feel disappointed that the University did not support me when penalised for raising patient safety concerns, I wonder whether there is currently the potential for a resolution to some of the issues

that continue…if you felt there to be any point in my discussing the options with yourself, I would be keen to do so…only willing to do so on an entirely without prejudice and off the record basis…"

Conclusion alleged disclosure claimant to Professor Greer 18 September 2013

578. The Tribunal concluded the claimant had not made a protected disclosure to Professor Greer on the 18 September 2013 concerning the alleged actions of an employer over which the second respondent had no control and further, did not fall within any of the sections 43C-H ERA. The information provided by the claimant to the second respondent was not a disclosure that fell potentially within S.43B ERA. The claimant claims the disclosures fell under S.43B(1)(b), the Tribunal did not agree. There was no satisfactory evidence before it that the second respondent had failed, is failing or was likely to fail to comply with any legal obligation to which it was subject. The claimant has not established the existence of any legal obligation relevant to the second respondent as opposed to the first. Further, the Tribunal was satisfied, on the balance of probabilities, not only did the disclosure relate to a non-existence legal obligation, which in itself would not be detrimental to the claimant (in accordance with the well-known Court of appeal decision in Babula v Waltham Forest College [2007] EWCA Civ 174 in which it was held there was no requirement for the worker to prove an actual or likely failure), the claimant did not hold a reasonable belief that there was a breach of any legal obligation on the part of the second respondent. He was unable to identify what legal obligation had occurred.

579. In the alternative, if the Tribunal is wrong on this point and the claimant had made a qualifying disclosure to the second respondent, it would have found the claimant did not have public interest in mind and the disclosure was not made in good faith. The claimant's motive for making the disclosure is clearly set out in the email; he was seeking to set up without prejudice negotiations having indicated much earlier in the chronology his intention to exit the employment of the first respondent setting up the claim for a "big litigation.". On the balance of probabilities, taking into account the factual matrix, the Tribunal found the claimant's sole motivation was to achieve some form of settlement beneficial to him hence his apparent reluctance to comply with the first respondent's requirements despite the second respondent urging him to do so.

19 September 2013 meeting between the claimant and Professor Graham

580. A meeting took place on 19 September 2013 between Professor Graham and the claimant to discuss the claimant's future training options, including an alternative training placement which the claimant was reluctant to take.

581. The claimant had yet to attend occupational health, cancelling appointments and insisting he attended the Wellwork clinic in Glasgow with the first respondent paying his expenses.

582. In a letter dated 19 September 2013 sent to the BMA Dr Greenhalgh referred to the claimant being seen by the Liverpool team; previous arrangements having

been made for independent providers within and outside the region. She proposed as the claimant had been well enough to attend his recent grievance meeting, she assumed he was fit to attend the investigation and occupational health referral would not be progressed unless the claimant disagreed with this course of action. The BMA responded to Gail Naylor and not Dr Greenhalgh on 20 September that internal processes were causing the claimant anxiety and stress and "there is a responsibility on the panel to consider any advice the Trust receives from the occupational health provider" prior to the 26 September hearing taking place. Reference was made to an outstanding DPA request, and following documents provided to the claimant there was an issue with Susan Westbury's input into the process. A further postponement was requested. During this period there followed a flurry of emails exchanged between the claimant who wrote directly to Gail Naylor, the BMA and Gail Naylor regarding whether her correspondence was aggressive and caused damage to the claimant's health, requesting that she communicate directly with the BMA even though the claimant was communicating directly with her.

583. During this period Monitor visited the first respondent and was provided with a 5-page document setting out a chronology all the steps taken regarding the claimant's information request starting 15 May 2012 to 6 September 2013 which the Tribunal does not intend to repeat.

584. In a letter dated 20 September 2013 the claimant was informed that all requests for leave would be handled by Dr Herod, and he was required to be available for meetings when available for work, and the second respondent was happy to release him for this. The claimant responded directly to Dr Herod complaining Dr Herod had written to him directly alleging victimisation as a result. He also alleged the first respondent's "aggression against me has increased subsequent to the CQC making their unannounced inspection with respect to my concerns."

585. A number of communications were exchanged on 20-23 September 2013 between the parties. In an email sent 20 September 2013 to the BMA Gail Naylor confirmed the grievance hearing would proceed on 26 September. The BMA responded in a letter addressed to Dr Greenhalgh and Gail Naylor requesting an occupational health referral outside Liverpool if possible, and refusing to provide written responses to the questions raised by the former on the basis that it was not in the claimant's "best's interests" to do so. Gail Naylor responded to the BMA on behalf of Dr Topping on 25 September 2013.

586. Dr Herod in a letter dated 23 September 2013 confirmed the position regarding the claimant attending meetings as set out in his earlier letter. He explained that direct contact had been made with the claimant "to ensure you did not miss any information or dates for meetings. There have been some instances where contact has been missed or arrangements…confused…this summer." It is accepted between the parties the claimant's BMA representative worked part-time, and Dr Herod requested additional contact information at the BMA "to ensure that matters can progress in the event that your primary representative is unavailable." The Tribunal accepts evidence given on behalf of the first respondent that it experienced

some communication difficulties during this period, and the Tribunal finds there was confusion as to whether the claimant should be directly responded to or not.

587. Dr Herod referred to the CQC inspection and the first respondent not being aware of who may have raised concerns. He wrote; "…We encourage all employees to raise any concerns through the appropriate channels…" With reference to the DPA/FOIA request the claimant was asked to confirm if there was any outstanding information. The claimant was urged to cooperate with the investigation process, following completion mediation could be considered.

588. On the 23 September the claimant emailed Dr Herod directly concerning a department meeting due to be held in October assuming his request would be refused, which it was. Two days later the claimant emailed Dr Herod complaining that direct contact with him was worsening his health. The claimant complained the first respondent was trying to change the leave procedure because he had whistleblown and the Trust had failed to properly justify the exclusion in line with MHPS Policy. The thrust of the claimant's email was his belief that the first respondent was doing its utmost to ensure a resignation; it had failed to ensure "any investigation is [was] performed within a reasonable timescale." The claimant maintained this view despite the fact the only reason the disciplinary investigation meeting had not taken place was due to the claimant's refusal to attend it and the Tribunal took the view the claimant was attempting, through his correspondence, to achieve a compromised exist and strengthen the litigation.

589. In an email sent to the BMA Gail Naylor responded to the BMA's 20 September email on 25 September in which she confirmed two separate searches had been made for documents and the onus was on the claimant to inform the respondent of what documents were missing, an approach "recommended by the DPA code…there is an obligation on Dr Tattersall to behave reasonably as well" and so the Tribunal found. Reference was made three attempts to arrange occupational health consultation on 5 September, 17 September and the latest supplier calling the claimant who "stalled the arrangement of the appointment." Gail Naylor concluded the claimant had failed to cooperate and the first respondent, having made reasonable attempts to arrange an appointment, was entitled to "give up."

590. Gail Naylor referenced the grievance process commencing in August 2012, and the attempt to arrange a stage 2 hearing since May 2013 when 13 different dates were offered and made it clear the hearing would proceed as scheduled.

591. Ian Greer informed the claimant in an email sent 30 September that "I have tried to explain consistently that the issues that you have with the Trust will always have to be resolved between you and them. Moreover, in order to make progress with these matters I think it is incumberant upon you to cooperate with the Trust, in terms of any requests that they make of you, as in this way you will have the best chance of resolving these differences as quickly as possible….I would urge you to work with LWH…"

592. During this period Dr Greenhalgh was unsuccessfully attempting to arrange an occupational health referral and was getting frustrated by the reasons given for the claimant's non-attendance.

DPA request

593. In an email sent 1 October 2013 from the BMA to Paul Thorburn a number of documents were listed in categories for production by the first respondent. The head of ICT in an internal email wrote "We have already in the last month had 4 people 4-5 days full time on this…for the work detailed…we are looking at potentially the same timescale…who is going to compensate…what work is going to be postponed whilst this work is carried out once more?" The time spent by the first respondent in addressing the claimant's request for disclosure of information could not be disputed, and the Tribunal accepts that the internal email reflected the genuine time spent and there was duplication in the documents already provided in compliance with the BMA's request. Thereafter, there followed party-to-party correspondence on the subject and solicitors' letters about the matter. There was no satisfactory evidence before the Tribunal the first respondent was dilatory or had intentionally withheld documents from the claimant on the ground that he had made protected disclosures, and it found that it had not.

594. An occupational health assessment at Healthworks was arranged for 9 October, and the claimant agreed to answer the investigation questions in writing. Dr Greenhalgh's investigation meeting was adjourned. The claimant was unable to attend, despite the respondent re-arranging the original time given to suit the claimant. At 13.04 the BMA wrote to Dr Greenhalgh cancelling the appointment that was to be held at 3.30pm with no explanation forthcoming from the claimant.

595. Dr Greenhalgh wrote to the BMA on 7 October 2013 and made the following points;

(1) This is becoming very frustrating…I have asked the University if Dr Tattersall's work commitments can be altered…it is unlikely I will be prepared to arrange a fifth appointment…in that event, should Dr Tattersall still feel that he requires medical advice, he should seek an appointment with his GP". It is notable during this period the claimant was well enough to work on his academic duties without difficulty.

(2) Dr Greenhalgh in the "spirit of reasonable" agreed to postpone the 9 October 2013 occupational health examination and "make one last attempt" requesting three dates to be provided by the BMA when the claimant could attend. She made it clear if an occupational health appointment did not take place in a period of 3-weeks the investigation would proceed without one; and on this basis, she was "prepared to wait for an occupational health report" before concluding the investigation.

(3) She reminded the claimant he was to provide answers to the questions no later than 21 September 2013 and had failed to do so and so the Tribunal also found.

(4) Most importantly, she clarified the investigation process as follows; "in my role as the investigating officer I am responsible for planning, recording and collating investigatory interviews and documentation. My role is then to weight the evidence and produce a report, setting out what I believe to be the facts based on the information I am given. Dr Tattersall's investigatory interview it is to obtain his recollection of events. It is not the forum for him to dispute other people's version of events and facts and it is unlikely that significant amounts of documents will need to be referred to…If Dr Tattersall believes documents, witnesses or other information exists, which I should be aware of in order to conclude a balanced investigation, he should tell me…It is not Dr Tattersall's role to investigate…it is also not appropriate for the investigation to be put on hold whilst Dr Tattersall makes repeated request for information under the Data Protection Act…" Despite being invited to do so, the claimant made no such request and the reason for this was that the DPA/SAR requests were used as an excuse to prevent numerous meetings, including the investigation, from proceeding. The Tribunal found, as indicated below, Dr Greenhalgh had carried out the investigation within the terms she described; it was through, balanced and objective.

596. The claimant wrote to Professor Greer on the 1 October 2013 complaining the second respondent "does not feel it can offer any support to a whistleblower." Professor Greer responded on the same day advising the claimant of the importance "of you and the hospital finding a solution to your issues, as this is the best way to move forward and this will allay your concerns regarding your career and training. You mentioned in your letter of 18th September that the BMA have new information relating to alleged inappropriate behaviour from the hospital towards you – I did respond indicating that I would look at this and consider any issues seriously when I receive it. In the absence of information I cannot take this any further." The Tribunal could find no evidence the claimant had provided "new information" and found he had not done so. With reference to the protected disclosures made to the CQC Professor Greer's view was that he had seen no evidence "to date" of the claimant being mistreated as a consequence, and will "look at anything new that is presented to me." Fundamentally, Professor Greer made it very clear he was keen for the claimant to re-commence full clinical academic duties, "but I am cognisant that it **is not in my power to present a solution to you** [my emphasis] and the Liverpool Women's Hospital as the latter is a completely separate organisation. However I remain committed to working with Zarko and yourself where I can normalise the situation."

597. The claimant and Professor Greer exchanged a number of emails before and after this date and the Tribunal considered all of the docuemtns disclosed by the claimant in "C4" during the proceedings, which it does not intend to refer to in full. The overwhelming evidence before the Tribunal was Professor Greer actively took part in considering the points and issues raised by the claimant in voluminous correspondence, for example, in the 7 October 2013 email Professor Greer set out his understanding as follows: "LWH are progressing all outstanding matters with you through their various HR and related processes. In my view you need to work with them using various trust policies in order to make the sort of progress I have been advocating through my previous replies." It is notable Professor Greer confirmed it

was not possible "at this juncture" to provide the claimant with another honorary contract in another Trust to allow his clinical raining to continue, which would in part depend on the Deanery. The Deanery agreed that the claimant's dispute "may not be helpful…which is again why I consistently urge you to try to work with the Trust to mend relationships and resolve disputes…we understand the Trust is following their appropriate policies to help resolve matters with you."

598. Professor Greer confirmed he would look at anything new which evidenced any allegations of inappropriate behaviour by the first respondent towards the claimant and "in terms of your exclusion…you will need to fully engage with the Trust in trying to move the processes on." He gave authority for the claimant to attend the occupational health appointment arranged for "3.30pm this Wednesday…I believe it is very important that this appointment takes place…given the high level of priority in resolving these issues for you."

Proposal that the claimant took up training in another location

599. In an email sent 9 October 2013 to the BMA Professor Graham confirmed the Deanery's position "which is clear and consistent" that the claimant should return to clinical training as soon as possible. The 1 November was suggested. He wrote "the issue at the Women's Hospital have, and continue, to take a long time to resolve; therefore the only alternative is to train in another location…the University of Liverpool is in agreement with this…head of school has begun discussions with Whiston hospital and there is overall agreement that it would be possible to undergo clinical training at Whiston and continue with academic training…Dr Tattersall should agree to this immediately and take steps to arrange occupational health clearance…it is common for…academic trainees, to rotate to various training locations within the Deanery, thus Dr Tattersall will be treated as any other trainee." The Tribunal found there was no evidence the second respondent was seeking to bring the fixed-term contract to an early end; Professor Graham sought to persuade the claimant to take up clinical training in another hospital for there duration of the contract thus undermining what now appears to be the claimant's case before this Tribunal.

Dr Topping's letter to Dr Greenhalgh 11 October 2013

600. Dr Topping proposed Dr Greenhalgh took over the grievance investigation as it had become apparent the issues raised by the claimant were also included within her remit and "it would not be appropriate for us to be investigating the same issue in parallel under different trust policies as this could result in duplication and confusion. The Tribunal found this suggestion was not made with the intention of causing a detriment to the claimant as alleged by him, it was a practical proposal taking into account all other the management time it was taking to deal with the claimant and his issues by clinicians whose main role was patient welfare. Having considered Dr Topping's motivation and mental processes, she did not make this suggestion on the grounds the claimant had made protected disclosures and so the Tribunal finds.

The claimant's written evidence for the Health Select Committee Accountability hearing with the CQC on 22 October 2013

601. In the document a number of serious allegations were made by the claimant against the Dr Herod and the senior independent non-executive director that both "had made it unclear they were willing to listen to my concerns…I approached the CQC in September 2012 and at this point raised my concerns anonymously." The claimant referred to three issues raised; staffing levels, bullying culture and lack of a written and consistent occupational health policy. He reported "since raising the issues with CQC I have been subject to endless victimisation…particularly my treatment including attempting to suggest I was mentally unwell due to the organisation being aware I had **previously** [my emphasis] suffered from depression…prevention of continuing with my normal duties…providing inaccurate information to the press in an attempt to discredit me…failure by the chief executive to accept the findings of an internal appeal panel…"

602. The claimant's reference to previously suffering from depression reflects the truth of the matter; in his view he was not suffering with depression during the relevant period and more importantly, the only indication given to the first and second respondent was of past depression and so the Tribunal finds. The claimant also set out the history of his communications with the CQC including a communication he had received on 28 June 2013 asking to meet and the unannounced inspection of 7 & 8 July 2013.

The claimant's grievance and attempts at hearing it

603. In an email sent 14 October 2013 from Gail Naylor to the BMA concerning the claimant's third failure to attend the occupational health appointment, the decision of the panel was not to wait for occupational health advice and to consider the documentation obtained so far. The claimant was invited to provide further written information. The claimant was not happy and proposed the hearing be adjourned until after the occupational health appointment arranged for 29 October 2013. The claimant's request was refused by Gail Naylor in a letter dated 29 October 2013 that related the history of cancellations particularly the 9 October 2013 appointment made "within 30 minutes of his stated availability…Dr Tattersall has sought to prevaricate on several issues which has significantly delayed matters…such an approach cannot be tolerated indefinitely…on each of the three occasions the panel have convened, Dr Tattersall has delayed the process by asking for continual adjournments…has behaved unreasonably and been uncooperative…even if Dr Tattersall were afforded another opportunity to present his grievance…the panel have no confidence Dr Tattersall will present his grievance on that occasion and are therefore prepared to delay the process no longer…the deadline for…any additional information has been extended to 6 November 2013."

604. Dr Herod further extended the claimant's exclusion on 16 October 2012 to 15 November 2012 for the same reasons as those given previously.

605. In a 16-page letter dated 25 October 2013 Paul Thornburn dealt with the claimant's request for additional documents under his information request.

606. On the 13 November 2013 and 2 December 2013, the claimant raised a complaint with the GMC about Dr Greenhalgh's fitness to practice.

607. The claimant attended Wellwork occupational health on 29 October 2013, but there were difficulties as first respondent had not provided the claimant with the referral letter and as a result his "informed consent" could not be established. By 19 November 2013 the first respondent was seeking a copy of the report. The BMA's response was to refer Paul Thornburn back to Healthworks.

608. Dr Greenhalgh wrote to the BMA on 15 November 2013 confirming he decision that she would undertake the investigation into his grievance.

Fourteenth alleged disclosure to NHS protect –in or around 18 November 2013 [relevant to first respondent only]

The Claimant alleged he had made an oral disclosure to NHS Protect during a telephone call to the NHS Protect, using a public telephone number. He disclosed that the Trust had misled the Employment Tribunal by providing it with untrue information in a letter from the Trust to the Tribunal of 26 July 2012. The letter stated that the Trust had never received the Claimant's claim form. However, the Claimant believed this was not true and was done to extend its time limit to respond. This was because a version of his claim subsequently disclosed by the Trust shows a copy of the ET's covering letter date-stamped as having been received on 28 June 2012, three days after it was sent by the ET.

S.43B ERA (1)(a) Criminal offence: Deliberately misleading the Employment Tribunal and perverting the course of justice (1)(b)Breach of any legal obligation: Deliberately misleading the Employment Tribunal and perverting the course of justice (1)(f)that information tending to show any matter falling within s43B(1)(a)-(e) is being or is likely to be deliberately concealed.

The claimant's communication with NHS protect in or around 18 November 2013

609. In or around 18 November 2013 the claimant made an oral disclosure to NHS protect alleging the first respondent had misled the Employment Tribunal about its receipt of the claim form.

Fifteenth alleged protected disclosure to John Baker and Gavin Ball of Baker Tilly – 18 November 2013 [first respondent only]

The Claimant made oral disclosures during a telephone call to the Trust's counter-fraud specialists, Mr Baker (on 18 November) and Mr Ball (on 19 November) both of Baker Tilly, asserting that the Trust had misled the Employment Tribunal by providing it with untrue information in a letter form the Trust to the Tribunal of 26 July 2012. The letter stated that the Trust had never received the Claimant's claim form.

However, the Claimant believed this was not true and was done to extend its time limit to respond. This was because a version of his claim subsequently disclosed by the Trust shows a copy of the ET's covering letter date-stamped as having been received on 28 June 2012, three days after it was sent by the ET.

S.43 B ERA (1)(a) Criminal offence: Deliberately misleading the Employment Tribunal and perverting the course of justice (1)(b) Breach of any legal obligation: Deliberately misleading the Employment Tribunal and perverting the course of justice (1)(f) That information tending to show any matter falling within s43B(1)(a)-(e) is being or is likely to be deliberately concealed.

The claimant's communication with NHS direct and Barker-Tilly on18 November 2013

610. The claimant telephoned Baker-Tilly, the first respondent's counter-fraud specialists, on 18 November 2013 raising the same allegation made to NHS Protect alleging the first respondent had misled the Employment Tribunal.

Conclusion 18 November 2013 alleged protected disclosure to NHS protect and Baker Tilly.

611. The Tribunal accepts, on balance, the claimant's evidence that he made the calls despite the absence of any supporting contemporaneous documentation. It does not accept the disclosure fell within S.43B(1)(b) as the alleged incident does not amount to a criminal offence, and nor does it accept the claimant had any information on which to reasonably believe there was a relevant failure. The Tribunal was sufficiently satisfied with the first respondent's explanation so as to grant an extension of time in which it could file the ET3 response. The circumstance surrounding the service of the ET1 was not within the claimant's knowledge. He could only guess that the first respondent had misled the Tribunal, and had no evidence whatsoever to base his suspicion on other than his negative view of the first respondent's higher-level management. No doubt he was disappointed that judgment could not be entered in default, but it does not automatically follow the first respondent mislead the Tribunal.

612. On the 19 November 2013 Paul Thornburn informed Dr Greenhalgh by email that the claimant had been seen by Wellwork on 29 October, but they could only confirm his attendance and was awaiting his consent to release the report. Dr Greenhalgh gave evidence that she was unaware the reason for the claimant refusing to release the report, and found out following disclosure in these proceedings it was because he did not know the purpose of the consultation, which made no sense to her as the claimant was fully aware why she had been attempting to arrange occupational health appointments for a number of months beforehand. The Tribunal agreed that the claimant's objection made no sense in the circumstances; and it resulted in further delay with the investigation process.

613. In a letter dated 21 November 2014 sent to the BMA by Dr Topping concerning the various contractual arguments raised on behalf of the claimant, it was

made clear that the claimant's employment with the first respondent "on an honorary basis, only exists because of the substantive University employment [to whom the claimant himself had referred to on numerous occasions in terms of his "substantive employer"]. The University pay Dr Tattersall's salary. The Trust only pay for any on call duties performed. This decision and timescale is not within the Trust's control." The claimant was invited to a meeting on 27 November as it was the first respondent's intention to confirm its position by 1 December 2014. It was reconfirmed that the claimant had been asked to consent to an occupational health referral and he failed to provide it. Dr Topping wrote "obviously, the Trust cannot compel Dr Tattersall to attend…but it is clearly appropriate…the Trust is not prepared to offer a fourth provider. The Trust expects Dr Tattersall to provide his consent…as previously agreed."

The outcome of Monitor's investigation 25 November 2013

614. Monitor concluded the new version of the Model Election Rules published by the National Health should have been adopted automatically the Trust's constitution and the claimant should not have been asked to provide two supports in support of his nomination. It is not disputed the claimant would have been elected had proper process been followed. The Tribunal found that his non-election was on the ground that the claimant had made protected disclosures, and was a result of a genuine mistake as set out below in the conclusion.

615. In a letter dated 29 November 2013 from Paul Thornburn to the BMA the long year history of the claimant's investigation was set out, including all the occupational health referrals culminating in the examination of 29 October, one month previous and still the claimant had not authorised the release of the medical report to the respondent. The claimant had not provided written responses and following contact with the second respondent concerning the claimant's availability, the investigation meeting was set for 17 December 2013. The claimant was left under no misapprehension that following the 17 December the investigation would conclude.

616. The resulting inter-party exchange of emails reveal the claimant had a problem with disclosing the medical report because he was "unaware of the purpose of the consultation, and hence unable to give informed consent."

Panel decision to the claimant's stage 3 grievance appeal 2 December 2013

617. Gail Naylor set out the outcome in a 6-page letter that included a reference to the three hearings that did take place being disrupted by the claimant for eight reasons, which the Tribunal does not intend to repeat as a number of these have been set out above. The panel considered the claimant's grievance and its investigation into the grounds, including Dr Herod's confirmation obtained via Cheryl Barber, that the practice of EPP screening was in place when she commenced post in 2009 and she had been validating samples of EPP screening or conducting EPP screening on new employees since that date. It was found there was an absence of written information to verify this, but the claimant has "not denied that this was the established practice or produced any evidence to contradict the view…" The panel

referred to the first respondent's Employee Health Questionnaire, the Immunisation and Vaccination Policy, the 2010 and the new 2012 Occupational Health Operating Policy approved in November 2012 and determined it was established practice since 2009 "at least" for all new staff to provide evidence of satisfactory EPP screening, and by late 2010 "at the latest" documentation was in place to confirm this. The panel concluded "the same process has been applied" to the claimant as every other employee, and reference was made to his two colleagues on honorary contracts, there was "no confusion regarding its own Policy…once Dr Tattersall was clearly told of the LWH Policy he was under an obligation to comply with the Policy immediately.

618. The panels' decision on the on-call banding supplements referred to its reinstatement since January 2013 following the claimant giving his consent to the occupational health screening to be released. The claimant had accepted he was not present in the hospital when on the rota to be on call as he was not required to take part in on call. The panel concluded "the restriction of Dr Tattersall's practice was because of Dr Tattersall's own decision not to comply with established Trust Policy and practice and therefore the Trust was entitled to withhold the banding supplement…once Dr Tattersall complied…the banding supplement was reinstated, even though Dr Tattersall remained excluded." Parts 2 & 3 of the grievance appeal were not upheld.

619. Dr Topping wrote to the claimant on 3 December 2013 setting out why she believed the claimant's grievance was "directly related" to the issues being considered as part of the disciplinary investigation and "If I were to investigate these issues, I would need to interview the same people as Lynn Greenhalgh. It does not seem appropriate for me to conduct a parallel investigation under the grievance process…I will pass any paperwork in relation to this case."

620. In or around (December 2013 Dr Greenhalgh was informed by the GMC the claimant had filed a complaint about her fitness to practice referring she had incorrectly indicated that his consent had been given for his home address to e provided to Wellwork. Dr Greenhalgh was shocked and upset, and seriously considered Michelle Turner's offer to take her form the investigation, which she rejected on the basis that it was her professional responsibility and it would not help the investigation.

621. On 9 December 2013 Paul Thornburn emailed Michelle Turner with copies of 21 statements gathered in the disciplinary investigation in accordance with her request.

622. Ken Morris, chairman of the first respondent, wrote to Monitor on 9 December 2013 in response to the 25 November 2013 letter explaining the first respondent engaged Electoral Reform Services as its returning officer to manage elections, and rely upon its expertise. The older model election rules attached to the first respondent's constitution was applied and the newer rules would apply in the future.

623. The BMA emailed Dr Greenhalgh on 11 December 2013 referring to the claimant having arranged an occupational health appointment with Wellwork on 3

January 2014 and seeking an adjournment of the 17 December 2013 re-scheduled meeting on the basis that an occupational health report was outstanding, the claimant was roistered for a "zero-hour day" and not available to attend and DPA request/information was still outstanding following the first respondent providing in the words of Ms Alliston, "a wealth of documentation."

624. Wellwork wrote the Dr Greenhalgh on 11 December 2013 informing her it was not in the position to progress the referral suggesting another specialist was engaged. Dr Greenhalgh was concerned as she had been told a different story by the claimant who had informed her of the 3 January 2014 appointment.

625. Dr Greenhalgh wrote to the BMA on 12 December 2013 that the Trust was unaware Wellwork had any concerns, that the claimant's appointment had gone ahead, and contact having been made chasing up the report which was "awaiting completion." She explained it was not the Trust's practice to copy referral letters to employees, and reminded the BMA when Paul Thornburn chased the report up on 19 November the BMA's response was that the issue was confidential and it could not comment. In short, the first respondent was yet again being given the 'run-around'. Dr Greenhalgh concluded "I am afraid that we have reached a point where the investigation has been on-going for long enough and needs to be concluded." The claimant was invited to attend the 17 December meeting or provide written answers, failing which "I will conclude the investigation on the basis of the information I have." The BMA in response confirmed the claimant would be attending.

626. The claimant's exclusion was extended to 10 January 2014 on 12 December 2013 by Dr Herod for the same reasons as those given previously.

627. In an email sent on 12 December 2013 the BMA requested Paul Thornburn provide the documentation listed over 2-pages, alleging a conflict of interest in Paul Thornburn being involved in the FOIA requests and the disciplinary investigation threatening to refer the matter to the Information Commissioner.

628. During this period Dr Greenhalgh spoke with Dr Herod concerning the planned investigatory meeting with the claimant; both were in agreement that it should proceed. Dr Herod had concluded they had been "more than reasonable" waiting 4-months for an OH assessment.

629. The claimant emailed Professor Alfirevic on 13 December 2013 complaining about the forthcoming investigation meeting conflicting with his zero hours. The email was headed "Trust attempts to force a meeting." The claimant confirmed the first respondent "**accepted that they should not organise meetings on zero hours days as they recognise I may have other commitments organised** (email from Jo Topping which I can dig out) …the BMA have requested that the meeting is not held on this ground, amongst others. The Tribunal found the claimant had yet again misrepresented the position, he was aware the first respondent had made its position on zero hours and meetings very clear and it was the direct opposite to that

described by the claimant, whose practice was to play the first respondent against the second and visa versa.

Fourth alleged protected disclosure [second on the claimant's list] made re; second respondent to Professor Greer 16 December 2013 [second respondent only]

On 16 December 2013 the Claimant wrote to Professor Greer again by email and made a number of disclosures concerning the Trust's failures to meet legal obligations as well as potential breaches of contract. The Claimant made clear that he was seeking assistance from the University.

S.43 B ERA (1)(b) Breach of any legal obligation: employer's duty of care to its employees

Claimant's letter to Professor Greer 16 December 2013

630. The claimant also wrote to Professor Greer in the same vein on 16 December 2013 referring to the University "ensuring that I am treated fairly…there cannot be any doubt as to my requesting the University to formally protest the issue with the Trust."

631. The claimant raised a number of issues including the first respondent's "refusal to allow me to have access to the grievance procedure on the issue upon which my judicial review was withdrawn…and the Trust proposes that their investigation is undertaken for a member of staff for whom I am a key witness in a GMC investigation into their conduct". The claimant requested the second respondent formally object before the hearing due to take place the next day. Professor Greer understandably refused to intervene and offered to pass on the claimant's concerns to the first respondent.

Conclusion alleged disclosure claimant to Professor Greer dated 16 December 2013

632. The Tribunal repeats its findings made above in relation to the alleged disclosure made on 18 September 2013. The judicial review proceedings had nothing to do with the second respondent, and they were powerless to intervene and it would have been inappropriate for the second respondent to have become involved in litigation to which they were not a party.

633. The Tribunal concluded the claimant had not made a protected disclosure to Professor Greer on the 18 September 2013 concerning the alleged actions of an employer over which the second respondent had no control and further, did not fall within any of the sections 43C-H ERA. The information provided by the claimant to the second respondent was not disclosures that fell potentially within S.43B ERA. The claimant claims the disclosures fell under S.43B(1)(b), the Tribunal did not agree. There was no satisfactory evidence before it that the second respondent had failed, is failing or was likely to fail to comply with any legal obligation to which it was subject. The claimant has not established the existence of any legal obligation

relevant to the second respondent as opposed to the first. Further, the Tribunal was satisfied, on the balance of probabilities, not only did the disclosure relate to a non-existence legal obligation, which in itself would not be detrimental to the claimant (in accordance he did not hold a reasonable belief that there was a breach of any legal obligation on the part of the second respondent unable to identify what legal obligation had occurred.

634. In the alternative, if the Tribunal is wrong on this point and the claimant had made a qualifying disclosure to the second respondent, it would have found the claimant did not have public interest in mind. The claimant's sole motive was to persuade the second respondent to pressurise the first respondent with the objective of the hearing due to take place the next day being adjourned, and the disclosure was not made in good faith.

Detriment 32 relevant to first respondent only - 17 December 2013 bullying the Claimant through Mr Herod's actions – insisting on holding a meeting even when the Claimant was not fit for it and without an OH assessment (see paragraph (4) FBPs of 29 April 2016)

The 17 December 2013: second investigation meeting with Dr Greenhalgh.

635. An investigation meeting was held with the claimant accompanied by Ms Alliston with Dr Greenhalgh accompanied by Paul Thornburn.

636. There is a dispute between the parties about whether the claimant acted aggressively or not, which he denied. With a view to resolving that dispute, as the Tribunal listened to one tape recording of the meeting produced by the respondent. The claimant was invited to provide his recording as the first respondent's recording did not capture the end of the meeting, when the claimant was allegedly at his most aggressive. The claimant was unable to produce his tape recording at any time. The Tribunal took into account the transcript and recording considered by it to be key evidence on the case.

637. Prior to the Tribunal listening to the recording, the claimant was cross-examined on what had taken place and he denied acting in an aggressive manner. On listening to the tape, the Tribunal was satisfied the claimant was both agitated early in the meeting, and as the meeting progressed he became louder, more insistent, aggressive and threatening. The claimant's version of these events was not credible, and was not supported by the evidence before the Tribunal, who took the view the claimant could not be relied upon to give the true version of events.

638. The Tribunal found the claimant from the outset of the investigation meeting objected to it taking place. He referred to the non-disclosure of documents and Paul Thornburn's involvement as barriers to answering the investigation questions previously put to him, in addition to raising other objections previously raised. Despite indicating he was recording the meeting, the claimant refused to give Dr Greenhalgh authority to record at the same time and this resulted in a umber of adjournments. Dr Greenhalgh found the claimant to be challenging by his aggressive

attitude towards her , the continual requests for adjournments and repeated references to the fact he had referred her to the GMC.

639. The following points arising out of the recording and transcript are relevant:

1. The transcript before the Tribunal has been agreed between the parties, the claimant's transcript being unavailable. The claimant had been sent all the questions beforehand. The meeting was due to start at 9.30 to give the claimant an opportunity to speak with his union representative. It did not start until 9.50am and went on for approximately 2-hours, of which 20 minutes was taped. There were numerous adjournments at the claimant's request, despite the delayed start. It is clear the claimant did not want to take part in the process; his attitude was confrontational towards Dr Greenhalgh, who was already upset as a result of the claimant reporting her to the GMC for breach of confidentiality when she had inserted the claimant's address on a form instructing occupational health provider Wellworks, without seeking the claimant's consent.

2. At the meeting the claimant raised a number of issues repeatedly, including wanting to seek legal advice on the first respondent taping the proceedings and threatening a court injunction regarding disclosure. When Dr Greenhalgh insisted on continuing with the investigation the claimant alleged he was being "bullied" and "abused" despite the fact he had the questions in advance and was taping the proceedings himself.

3. The claimant criticised the presence of Paul Thornburn on the basis that he was involved in another case, indicating he had managed to get a GP appointment that morning and Dr Greenhalgh was refusing "to allow me to have medical advice…I am happy to attend occupational health here if you find a doctor."

4. Whistleblowing was raised in the following ways; "I should not be here. I should not be being bullied in this way by members of the trust staff because I made a whistle-blow allegation against the trust…this is a meeting where you want to try and bully me because of my whistleblowing Dr Greenhalgh." This allegation followed Dr Greenhalgh's refusal to yet another adjournment insisting the interview continued. She made it clear that "today is going to be the day that we are going to get this, get the details down and then we are going to aim to wrap up the investigation that's now been going on for over a year." In response to that, the claimant threatened Dr Greenhalgh with the GMC stating "…what a farcical investigation this is and I've spoke to the GMC who regard this as highly inappropriate that you are conducting this…but they obviously will consider the actions of dong this and I have spoken to, I mean if you would like to speak to the relevant person who is investigating this case…because of the serious nature of it…I shouldn't when I'm going to have to give the evidence against you, be forced to sit in the same room as you, and effectively have you try and make a determination of spurious allegations about me."

5. Dr Greenhalgh took the claimant's words at face value, and she was entitled to believe that it was direct threat against her and the decision to continue with the investigation after 12 months of delay and prevarication on the part of the claimant.

6. The claimant was aware Dr Greenhalgh had started to produce a report; he requested a copy under the Data Protection Act which was denied as it was unfinished and in draft form pending this interview with the claimant and his responses to the questions he was provided with beforehand. The claimant repeatedly referred to getting legal advice and adjourning, and insisted on being allowed to speak with the GMC even though he acknowledged earlier that "this was not an issue they have jurisdiction over."

7. As Dr Greenhalgh pressed for answer to her first question concerning the claimant's role, the claimant and his union representative returned to the issue of the recording and legal advice. Part way through the transcript the union representative stated, "Dr Tattersall is willing to start answering these questions today" and flagged up her concern with the "Trust's decision to progress with the investigation without the occupational health assessment…we are of the view that really should have taken place before you insist on going ahead with the investigation." This observation ignored the fact that the claimant had been to see occupational health. There is an issue as to whether the claimant refused to authorise the release the report for which the respondent had paid an invoice, or in the alternative, whether the report had yet to be provided.

8. The claimant also repeatedly raised the issue of DPA requests for documents being outstanding, and the need for these to be produced before the investigation continued. As the meeting progressed the claimant became increasingly insistent and raised his voice shouting, which was unacceptable to a fellow professional. The Tribunal accepts Dr Greenhalgh's evidence that she was upset by his behaviour and felt intimidated, particularly in relation to the threats to report her to the GMC a second time. The claimant was told to calm down by his union representative, and as the tone of the conversation was raised by the claimant, it became understandably apparent to Dr Greenhalgh that he was not going to answer any of the questions.

9. The claimant did not answer any of the questions.

640. Dr Greenhalgh was so upset by the claimant's behaviour; she brought the investigating meeting to an end by 11.35. She had spoken with Michelle Turner during one of the adjournments who advised her the first respondent had a duty of care towards her well-being; she was upset and it was suggested she informed the claimant unless his behaviour changed the meeting would be terminated. Dr Greenhalgh informed the claimant of this when she felt increasingly threatened by his "screaming at her" and behaviour. After the meeting Dr Greenhalgh had to wait until the claimant had left the building before leaving it herself, and she was sent

home and accompanied by security as she walked to her car. The incident affected her for a number of weeks after, and it became a serious issue for the first respondent.

641. Dr Greenhalgh did not think the claimant had a disability at this time; he was well enough to work in the University. She was aware he had suffered from stress and anxiety. The claimant alleges he was discriminated against at the investigation meeting, which he argues should not have taken place. The Tribunal accepted Dr Greenhalgh's evidence that she had attempting to progress the investigation fro more than a year, including obtaining an occupational health report which had not proceeded due to the claimant's actions. The Tribunal accepted the investigation meeting that took place on 17 December 2013 was not held on the grounds the claimant had made protected disclosures; it was to resolve the impasse reached in the investigation and the claimant's return to work. The claimant has not discharged the evidential burden necessary in a claim of direct disability discrimination and the burden of proof has not shifted to the respondent. In the alternative, the Tribunal accepts the explanation given by Dr Greenhalgh was untainted by disability discrimination, and it finds the hypothetical comparator relied upon by the claimant would have been treated in the same way. It also finds the claimant was not discriminated against under s.15 EqA and in the alternative, the 17 December 2013 investigation meeting was a proportionate means of achieving a legitimate aim after so much prevarication and delay on the part of the claimant, it was reasonable for Dr Greenhalgh to insist that he answer the questions put to him in writing previously with a view to finishing the investigation.

642. After the meeting Michelle Turner, who was present at HQ, prepared a statement to the effect that Dr Greenhalgh and Paul Thornburn were "visibly shaken by the morning's events." A statement was also provided by Paul Thornburn who was of the view the claimant showed "little respect…I believe MT is prepared to go to almost any lengths to force his agenda, including being prepared to harm the organisation, without any thoughts of the consequences…MT was intimidating and hostile to all in the room particularly LG. He would not allow LG to put a full sentence together…MT continues to make many staff uncomfortable and intimidated within LWH even though he is excluded. I have witnessed and been on the receiving end personally of MT's outbursts an intimidating behaviour and would also state that I believe MT is a dangerous individual who regularly shows behaviours that are unacceptable for someone working in the NHS and as a doctor."

643. Dr Greenhalgh also provided a written statement concerning the interview which she described left her shaking and emotionally exhausted needing extra security measures being put in place when she walked to her car. She described her reaction on arriving home to check if any information concerning her and the family was on the internet commenting "I am aware that this may be an overreaction it shows that underlying feeling of concerns about the behaviour" of the claimant.

644. On the 18 December 2013 Kathryn Thompson wrote to Ian Hislop of Private Eye and the reference to the claimant in the 29 November 2013 published journal. She wrote "I would reiterate to you that no doctor has been excluded from this

organisation for allegedly talking to Private Eye or any other publication. The Trust has presently one doctor excluded from duty pending an investigation which relates to conduct matters…we are concerned that the material you have published is…highly inaccurate."

645. In a letter sent to the BMA on 19 December 2013 a summary of the 17 December 2013 meeting was set out by Dr Greenhalgh who referred to the claimant "continually" speaking over her, making accusations against Paul Thornburn…did not attempt to answer any of the questions…or engage in any way." She described "as informed during the meeting" how that claimant made her feel "very uncomfortable and intimidated" and how he made "continuous reference" to the GMC complaint…displayed a complete disregard for my position and I consider Dr Tattersall's actions as totally unacceptable." The claimant was given until 10 January 2014 to provide a written response prior to the investigation report being concluded.

646. The BMA in a letter of the same date also referred to the 17 December 2013 meeting, attached a GP report stating the claimant was "currently unfit to undergo the investigatory meeting" and recommended an occupational health assessment, which was "unavailable due to the Trust's failure to provide...a copy of the referral."

GP Report 17 December 2013

647. The claimant produced a GP report dated 17 December 2013 that confirmed the claimant was "currently suffering from depression and on treatment for it."

648. After 17 December 2013 the GMC provided Dr Greenhalgh with details the claimant's complaint for the first time.

649. On the 24 December 2013 the claimant raised a complaint against Dr Herod to the GMC, alleging he had been involved in excluding him, had made a referral of him to the GMC and arranged for an internal trust investigation "of myself to be concluded…acting against me primarily due to my actions in raising concerns about patient safety…initially to him internally and subsequently to the CQC…my exclusion from the Trust on 27 November 2012…and the subsequent decision to refer me to the GMC and conduct the investigation was entirely due to Mr Herod's understanding that I had spoken to the CQC the previous day…Mr Herod's acting in such a way against me due to my having 'whistleblowing' against the Trust is a clear breach of the Public Interest Disclosure Act…this may constitute an impairment of his fitness to practice." Reference was also made to Dr Herod "consistently breached the…MHPS Policy…since he is using my exclusion as a punishment for my having whistleblowing to the CQC.

650. The Nursing and Midwifery Council ("NMC") received a referral from the claimant concerning Julie Dorman on the 14 December 2013.

651. The claimant submitted a 45-page response to the disciplinary investigation on 2 January 2014.

652. On the 8 January 2014 the claimant's exclusion was extended to 7 February 2014 by Dr Herod for the same reasons as those given previously.

653. On the 22 January 2014 the claimant made a number of serious allegations to Liz Cross concerning Dr Herod excluding him as a result of whistleblowing and Liz Cross failing in her duties as designated board member.

654. The Tribunal found two elections were being run, one in June 2013 the other in September 2013. Both inadvertently based process on the incorrect version of the Model Election Rules as the October 2010 version should have automatically as forming part of the Trust's constitution from when it was published. The incorrect Model Election Rules made a material difference to the outcome of the June 2013 election.

Psychiatric reports

655. Dr Greenhalgh in an email sent to the BMA 7 February 2014 had requested from the claimant copies of the two psychiatric reports allegedly previously sent to her, she searched her junk email folder and acknowledged receipt of the August 2013 letter on 7 February 2014. A considerable amount of party-to-party correspondence was exchanged during this period, to which the Tribunal was not taken and has not read.

Sixteenth alleged protected disclosure to Steve Burnett 19 March 2014 [relevant to the first respondent only] and accepted by the first respondent as amounting to an operative public interest disclosure.

During at meeting with Mr Burnett at 16:00h at the BMA North West office, the Claimant made disclosures orally to Mr Burnett regarding his concerns relating to:
-staffing levels, particularly on the Labour Ward;
-lack of pre-employment checks;
-the Trust trying to cover up its failings in this respect;
-management of test results;
-blood testing;
-patient confidentiality;
-governor elections; and
-the culture at the Trust in breach of professional obligations, presenting a risk to patient safety.

A 10-page written summary of the disclosures made by the Claimant during this meeting was subsequently produced by Mr Steven Burnett, which is a document in the Respondent's control.

(*1)(b)Breach of any legal obligation: the legal obligations on an NHS Trust to ensure appropriate HR and OH policies are in place and applied consistently, in compliance with Department of Health requirements, the duty of care owed by an employer to an employee, the legal obligation of mutual Trust and confidence, and the legal obligation to comply with CQC regulations, particularly those in relation to patient*

safety and staff, corruption relating to the issues over the governor elections and data protection regulations
(1)(d) Danger to the health and safety of any individual: risks to patient safety
(1)(f) That information tending to show any matter falling within s43B(1)(a)-(e) is being or is likely to be deliberately concealed.

19 March 2014 meeting between the claimant and Steve Burnett in which the claimant raised public interest disclosures.

656. It is not disputed the claimant met with Steve Burnett on 19 March 2014, and he raised the issues set out in the Scott Schedule (see above) except for the alleged disclosure described as the "Trust trying to cover up its failings in this respect" which was denied by Steve Burnett, whose evidence the Tribunal preferred to that of the claimant, for reasons already given. The Tribunal was satisfied the claimant had made a disclosure that tended to show the first respondent was failing or likely to fail under S.43B(1)(b) and (d). There was no satisfactory evidence of S.43B(1)(f) and the Tribunal did not find the claimant held a reasonable belief the first respondent's actions fell under this section. For example, the claimant was aware from his communications with the CQC and that given directly to him by the first respondent action had and was being taken in relation to staffing levels on the labour ward and pre-employment checks. With reference to the latter he had received a number of written communications setting out the steps taken and discussion between the first and second respondents concerning future pre-employment checks.

ICO decision 27 March 2014

657. On 21 March 2014 solicitors acting on behalf of the claimant were in communication with the Information Commissioner ("ICO") following up the claimant's earlier complaint made 12 February 2014. In a decision dated 27 March 2014 the ICO reviewed the first respondent's handling of the SAR of 2 July 2012 it was decided "it is unlikely that the first respondent "has complied with the requirements of the DPA…this is because…a response was not provided until 1 March 2013…a breach…of the DPA." In addition, the Commissioner "considers it is likely that the Trust has not provided…all the personal data" to which the claimant was entitled in response to his SAR of 12 August 2013. The Commissioner set out all of the steps taken by the first respondent and concluded "it is likely that the Trust has provided all the personal data it held in response to the SAR of 2 July 2012" with the exception of one document that could not be recovered. The Commissioner also found there was no exemption for withholding draft documents. Regulatory action was not appropriate, the Commissioner having considered the first respondent's general record of compliance and the information given. The respondent was instructed to liaise with the claimant concerning personal data "he considers outstanding."

658. The case was closed by the ICO on 31 March 2014. On 9 April 2014 the claimant's solicitors requested information concerning named documents.

24 April 2014 letter to claimant from the second respondent concerning expiry of the fixed term contract.

659. The letter from the second respondent confirmed "should authorisation not be obtained to extend your employment by at least 3 months prior to the date your contract is due to expire, you will receive written notice of the expiry."

660. On 28 May 2014 Liz Cross wrote to the claimant in her capacity as designated board member in relation to the MHPS investigation following the claimant's letter of complaint sent 2 January 2014. With reference to Dr Herod's appointment as case manager, she noted the claimant had not objected at the time and "it may not be ideal Dr Herod is involved in the capacity as case manager in circumstances where the GMC may investigate him as a result of information you have provided." She pointed out how he was the most senior doctor in the Trust and if any other doctor was appointed as case manager he/she would be subordinate to him and as "every senior doctor has been involved in your case, it is difficult to identify a candidate to take over the role of case manager."

661. Dr Herod extended the claimant's exclusion to 30 May 2014 giving the same reasons as those previously provided. He confirmed that he was in the process of reviewing Dr Greenhalgh's investigation report.

662. The BMA on 12 May 2014 requested that the exclusion was lifted as it had a detrimental effect on the claimant's clinical training and on his long-term career.

663. Dr Herod responded on 28 May that he may be prepared to consider lifting the exclusion and wanted to meet with the claimant to discuss. The BMA responded on 29 May threatening legal action if the exclusion was not lifted by 30 May 2014. Michelle Turner wrote to the BMA as Dr Herod was on annual leave, and she confirmed a meeting was not unreasonable given the claimant had been absent from work since end of November 2012 and "will need to demonstrate his ability to cooperate with reasonable management requests, which is an important factor in determining his suitability to return to work."

The claimant holding himself out as a representative from the NMC 5 June 2014

664. On the 5 June 2014 the claimant received an email from the NMC who were unable to locate Julie Dorman, the nurse against whom the claimant had raised a complaint. The NMC required her registration number. On the same day the claimant contacted the occupational health department and spoke with Cheryl Barber stating he was from the NMC and in this capacity requested the registration number. When asked, he refused to give a name. Cheryl Barber told the claimant she recognised his voice.

665. At the liability hearing this incident raised serious issues over the claimant's credibility; not solely by the fact he misrepresented himself as being part of Julie Dorman's regulatory body, but he also misrepresented this fact to the Tribunal, swearing under oath that he had not held himself out as the NMC and inviting the

Tribunal to consider the transcript he made of the call to Cheryl Barber without her knowledge or consent (which also raised a question mark over the claimant's credibility). The transcript made it very clear that the claimant had held himself out as a representative from the NMC and withdrew from this position when it became clear Cheryl Barber would not release information about a nurse in her department and questioned him.

666. Cheryl Barber, who believed the caller was the claimant, complained to HR immediately. In the meantime, Dr Herod wrote to the BMA in two letters dated 9 June 2014 concerning the issues to be discussed at the meeting to be arranged, and confirmed there was a disciplinary case for the claimant to answer regarding his conduct and behaviour on which he sought assurances from the claimant pending the disciplinary hearing taking place concerning employees who may be witnesses at that hearing. The second letter confirmed a "personal misconduct" hearing would take place; the allegations were potentially gross misconduct and the hearing could result in the claimant's dismissal. The services of occupational health and staff counselling/support was offered.

Detriment 33 relevant to first respondent only - 12 June 2014 bullying the Claimant through Mr Herod's actions –Mr Herod's actions and words during the meeting (see paragraph (4) FBPs of 29 April 2016)

Meeting between claimant and Dr Herod on 12 June 2014

667. A meeting took place between the claimant and Dr Herod on 12 June 2013 to discuss the lifting of the claimant's exclusion. The Tribunal has considered all the sets of notes produced by the parties. At the outset the claimant was handed Cheryl Barber's notes of the 5 June 2014 call in which it was alleged "a person" had attempted to gain access to confidential information about a member of staff by misrepresenting himself as a representative of the NMC. After an adjournment the claimant confirmed he had made the call but stated he had "made no suggestion" the he was from the NMC.

668. Dr Herod's main concern was the claimant's interactions with employees, especially those who may be witnesses and that the claimant would repeat the type of behaviour that was to be considered the disciplinary hearing, he had threatened a lot of people with regulatory bodies and belittled people. The claimant responded that his behaviour has always been appropriate with most staff, and he was not willing to acknowledge that his previous communication was inappropriate. Dr Herod, who had difficulty understanding the claimant's motivation for his behaviour, asked the claimant "You described yourself as some sort of crusader fighting for some kind of a battle? Do you still see yourself as that?" Later, in the meeting Dr Herod asked whether the claimant would behave in such a way to bring the first respondent into disrepute potentially damaging public confidence which would be harmful to patients, the priority always being the well-being of patients. The possibility of mediation was discussed, and the matter was left that Dr Herod would liaise with the second respondent and Deanery and the phone call to Cheryl Barber would be investigated.

Dr Craig's report 13 June 2014

669. Dr Craig, consultant psychiatrist, reviewed the claimant on 6 June 2014. the report reflected the claimant had "assured" him his mood had been **"pretty normal for 12-months** [my emphasis] …his conflict continues with the Women's Hospital, the BMA are involved...Mark denies that he is feeling it stressful…With regard to early signs, when Mark becomes low in mood he becomes significantly anxious, irritable and is likely to be drawn into conflict with the people around him." This was accepted by Dr Craig.

Agreement to lift the claimant's exclusion

670. Dr Herod wrote to the BMA on 17 June 2014 with his decision that he was prepared to lift the claimant's exclusion providing 4-conditions were met, including the claimant's assurance that he would treat all staff (including witnesses) with courtesy, respect and professionalism and that he would not belittle or threaten, within 7 days the claimant [not the BMA] providing written confirmation that he agreed with all of the conditions and assurances.

671. The BMA and not the claimant provided the assurances by email sent 17 June 2014, which was accepted by Dr Herod who agreed the claimant could enter Trust premises, and requested the claimant "could respond formally in due course." Dr Herod not unreasonably expected the claimant to write to him "formally" confirming his agreement. He did not make it clear that by the words "formally" he meant a signed letter, but the Tribunal took the view that a reasonable and well-educated employee would know the difference between a personal formal letter of apology, an assurance from the BMA and a personal email. The next issue to be discussed was re-integration of the claimant into clinical practice after a lengthy absence, and the Tribunal took the view that despite all that had gone on before, Dr Herod's attempts at getting the claimant back into working on clinical duties were genuine; the Trust needed doctors, the maternity and midwifery services were understaffed and there was no criticism of the claimant's medical practice.

672. During this period the first respondent was still providing information to the claimant under his Freedom of Information request.

673. In June 2014 the CQC provided a report following an unannounced inspection on 9 April 2014 which revealed there remained staffing issues in maternity and midwifery services and enforcement action was to be taken.

674. On 25 June 2014 Dr Herod referred the claimant to occupational health to ensure he was fit for all aspects of the job, reference was made to the claimant having declared a health concern and "we now wish to re-introduce him to clinical practice." The claimant was informed on 26 June; he did nothing and Dr Herod chased the matter up on 4 July requesting a response and referring to Cheryl Barber attempting to contact the claimant and being told she should "not contact you directly but should continue to communicate via Joanne Alliston at the BMA." Dr Herod was disappointed and asked the claimant to re-consider. He wrote "You and I discussed

the need to build bridges and improve working relationships…I do not see this ongoing request to communicate by a third party as either consistent with the commitment you gave…"

675. In an email sent to Dr Herod on 4 July 2014 the claimant confirmed his agreement to the conditions and assurances set out in correspondence. There is an issue as to whether Dr Herod received and/or read the email. What is clear to the Tribunal is Dr Herod expected a formal written apology, in short, a letter signed by the claimant and apologising for his behaviour, this was never forthcoming.

676. Susan Westbury, HR, provided the claimant with occupational health appointments for 25, 29 and 30 July with an external provider Healthworks. The claimant was unhappy with the named provider. In an email sent by the BMA 24 July 2014 the claimant was still arguing about who a suitable provider of the occupational health report should be, having discounted Healthworks on the basis that they will "likely to be a witness to any ongoing proceedings". The Tribunal took the view that this was evidence of further prevarication from the claimant, HealthWorks could not reasonably have been considered as a prospective witness in the Employment Tribunal proceedings and the Tribunal infer from this, and the claimant's attitude overall, that he did not want to return to work for the first respondent, it suited his purpose within the litigation not to do so, and it is undisputed he never returned.

677. Dr Herod responded on the same date that "I do not feel this will be the case and as such I feel that it is appropriate you attend…you did not feel it appropriate to attend for an appointment with our own work, health and well-being team, which we have accommodated. The claimant was informed he was due to attend an induction in early August with a view to returning to work on 11 August 2013.

678. Michelle Turner wrote to the claimant on the 24 July confirming a second conduct investigation against him had been commissioned by her regarding the 5 June 2014 telephone call when he claimed to be from the NMC in order to obtain personal information about Julie Dorman and refused to give Cheryl Berber his name.

Detriment 34 relevant to first respondent only - 28 July 2014 bullying the Claimant through Mr Herod's actions – making untrue allegations, stating that the Claimant had failed to provide an agreement when the Claimant had done so (see paragraph (4) FBPs of 29 April 2016)

679. The claimant emailed Dr Herod on 28 July 2014 complaining "your direct communication with me to be causing me stress and as such I believe there is a risk that it would cause worsening of my health" requesting future communications took place via the BMA. He stated the occupational health appointments were not acceptable due to his "caring responsibilities" and" making me attend an induction programme with staff new to the Trust might put me in a difficult position, cause me stress and risks adversely affecting my health…any retraining/updating required should occur following a full assessment of my needs and based upon an individualised programme with reasonable adjustments…"

680. Dr Herod responded that day, pointing out that if the direct contact with him potentially damaged his heath then "if that is genuinely the case…it is highly improbable that you would be fit to return to work, since direct communication with the Trust would of course be required." He took the claimant's refusal to attend the occupational health appointments as "another example to demonstrate any meaningful attempt to make progress" and he requested three separate times in the next week when the claimant would be available to attend occupational health. Finally, despite the evidence before the Tribunal that the claimant had emailed earlier his acceptance of the terms agreed, Dr Herod requested the formal letter be provided by 1 April 2014 referring to the BMA email only. No reference was made to the claimant's email which had followed it, and the Tribunal accept on the balance of probabilities Dr Herod's evidence he genuinely believed the claimant had not formally apologised at the time and his motivation was not to bully the claimant into providing the formal apology.

681. Dr Herod concluded that he was reviewing the agreement that the claimant should be allowed to return from exclusion and "if there is no evidence of prompt and satisfactory progress being made on the above matters then I will consider whether the agreements that we made have been honoured. If not, I will re-instate your exclusion from Trust premises."

682. In a letter sent 30 July 2014 ostensibly written by Dr Greenhalgh, the claimant was informed she was to act as investigator. In oral evidence Dr Greenhalgh conformed she knew nothing of the letter, she was completely oblivious as to who wrote the letter and the name of the case manager. No explanation was given, and whilst this was not satisfactory the Tribunal took the view that no adverse inferences could be raised as a result.

683. On the 31 July 2014 the claimant was invited to a disciplinary hearing on 21 August 2014 before Diane Brown, executive director of nursing, supported by Lynn Howe, head of workforce.

684. By 31 July 2014 the occupational health review had not taken place; the claimant had failed to confirm any of the appointments were suitable for him and he had failed to provide suitable dates to Dr Herod, with the result that the return to work was delayed. Dr Herod informed the claimant in a letter dated 31 July 2014 appointments falling on University days would be accommodated and no latitude would be given to the claimant, who was expected to attend occupational health on the allocated day and induction, both "imperative in facilitating your return to work. This is because you are currently out of date with a number of mandatory training requirements and also because a number of new modules have been introduced." In the letter of 31 July Dr Herod reiterated the exclusion could be reinstated if the claimant did not evidence prompt and satisfactory progress, and he was not prepared to communicate on matters relating to the claimant's return to work via a third party.

Detriment 35 relevant to first respondent only - 4 August 2014 causing the Claimant stress and anxiety, resulting in him becoming ill and being signed off sick for one week from 4 August 2014 and then from 11 September 2014 until his dismissal

MED3 4 August 2014

685. The claimant submitted a MED3 citing "stress at work" with no reasonable adjustments suggested. It is notable there was no reference to depression. Dr Herod referred the matter to occupational health.

686. The claimant did not attend the induction arranged, and Dr Herod requested that he attend day 2 and 3 on 7 & 8 August. The claimant responded on 6 August disputing the second respondent had agreed to release him. On the 11 August he disputed an agreement had been reached between the first and second respondent as to his availability and requested an occupational health appointment as a "matter of urgency" alleging the first respondent's communications increased his stress recognised by "GP who has said he realises the stress that being a NS whistle-blower can cause and will not hesitate to protect me from excessive stress." The Tribunal notes that this is the first MED3 presented by the claimant during this long history, and there was no indication other than the claimant's say so that his GP took the view the claimant was suffering from stress as a result of whistleblowing.

687. During this period the claimant through the BMA continued to seek documentation under the DPA/FOIA.

688. In an email sent 5 August 2014 by the second respondent, the claimant was invited to a meeting to discuss the fixed term contract due to end 31 December 2014.

689. On the 13 August 2014 Susan Westbury wrote to the claimant requesting his specific consent for the referral to occupational health at the second respondent, providing copies of the referral letters. The claimant refused to provide consent and this resulted in many emails being exchanged between the parties, including the second respondent and Dr Wilson, the consulted occupational physician who was to be instructed to provide the report.

690. The claimant attended the second conduct investigation that was adjourned on the basis the claimant was too unwell to participate.

Note prepared by first respondent HR department dated August 2014 re: bringing claimant's contract to an end

691. The note titled "Update re Dr Tattersall August 2014" referred to a number of matters including adjourned disciplinary hearings of 21 August and 16 September 2014 at the claimant's request, the adjourned second conduct investigation, the outstanding occupational health assessment, and the non-attendance of mandatory training at a 3-day induction amongst other matters. Reference was made to the

second respondent meeting with the Deanery on 2 September 2014 "to discuss the ending of "the claimant's contract and "they are then hoping to meet Dr Tattersall at the end of September 2014 to serve notice of his contract of employment ending with them. Once this is done, it is the Trust's intention to do the same." The claimant was unaware of the first and second respondents' views.

692. Following the claimant's objections to Dr Greenhalgh's appointment as investigator to the second disciplinary investigation, Dr Herod offered an alternative; David Walliker, chief information officer.

693. The claimant objected being referred to occupational health, complaining the second respondent had breached the Data Protection Act by disclosing information to Dr Wilson, and "there may be a conflict of interest in Dr Wilson providing a report for both employers and an alternative provider was requested. The claimant asked for a number of questions set out in the OH referral to be removed as he believed they related to his claim of disability related discrimination.

694. In an email sent 20 August 2014 the BMA requested a re-scheduling of the disciplinary hearing as the claimant was on leave on the 18 September. Immediately before the investigation meeting arranged for 22 August 2014 the BMA informed David Walliker the claimant was too unwell to attend and it was postponed to 26 September 2014.

Detriment 36 relevant to first respondent only - 27 August 2014 bullying the Claimant through Mr Herod's actions – making untrue allegations, stating that the Claimant had agreed to an OH referral during a meeting when the Claimant had not done so (see paragraph (4) FBPs of 29 April 2016)

695. On 26 August 2014 Dr Herod wrote to the claimant declining the annual leave for week commencing 20 September and insisting he attend the offer of the third occupational health provider offered, the purpose of the referral being to "seek confirmation you are fit for work" which had no relation to the Employment Tribunal case. The claimant was asked to complete remote training modules given the mandatory training was still outstanding, and a further request was made for a letter from the claimant agreeing to abide with the conditions agreed on 12 June. The claimant had not informed Dr Herod an email to this effect had been sent earlier.

696. By 27 August 2014 the second respondent had decided not to re-fill the claimant's post at the end of training.

697. By September 2014 the first respondent had completed its search of the email archives and in excess of 30,000 emails were recovered, 3,800 related to the claimant to be made available to him by week commencing 15 September 2013.

698. At the claimant's request the second conduct investigation was postponed to 21 October. The BMA requested mediation.

Detriment 14 relevant to second respondent only - From 14 September 2013 failing to support the Claimant as a whistleblower in accordance with its policies and/or accepted practice in publicly funded institutions and/or government guidelines.

Detriment 15 relevant to second respondent only - from 14 September 2013 failing to provide academic opportunities, collaborations and support in a manner which was provided to other employees of the University

Redundancy

699. In a letter dated 24 September 2014 Lee Steward wrote to the claimant confirming "he has completed his academic training and there is no ongoing requirement for a training role in this area beyond the end of the contract. This is the reasons Dr Tattersall's post is considered to be at risk of redundancy…we are now moving in a period of notice…In cases where CCT [Completion of Clinical Training] had not been achieved within the 4-year period the doctor will normally return to the NHS SpR training scheme in order to complete their clinical training and I understand arrangements regarding his remaining clinical training requirements are being discussed separately with the Deanery."

Fifth alleged protected disclosure [number three in the claimant's list] re: second respondent – 23 October 2014 Lee Stuart and grounds of appeal accepted y the second respondent to amount to a qualified disclosure.

The Claimant received a letter from Mr Lee Stewart of the University giving notice to end the Claimant's employment dated 29 September 2014.
The Claimant submitted grounds of appeal against this dismissal which made it clear that he believed that his dismissal was primarily due to "his making public interest disclosures whilst in his post" [[2] grounds of appeal].The Claimant further discloses in his grounds of appeal that Professor Alfirevic made it clear that the University saw him as a "troublemaker" and this was the reason for not renewing his contract.
The Claimant further disclosed that he believed the University had failed to have regard to its 'Redundancy Procedure' in coming to a conclusion to end the Claimant's position, [14] grounds of appeal.

S.43B ERA 1)(b) Breach of any legal obligation: breach of legal obligation in Employment rights Act 1996 to not dismiss someone unfairly and/or to not dismiss someone because they had made protected disclosures

Third protected disclosure relevant to second respondent only: The Claimant submitted his grounds of appeal to Lee Steward in HR at the University via his BMA rep The Claimant received a letter from Mr Lee Stewart of the University giving notice to end the Claimant's employment dated 29 September 2014.
The Claimant submitted grounds of appeal against this dismissal which made it clear that he believed that his dismissal was primarily due to "his making public interest disclosures whilst in his post" [[2] grounds of appeal].The Claimant further discloses in his grounds of appeal that Professor Alfirevic

made it clear that the University saw him as a "troublemaker" and this was the reason for not renewing his contract.

The Claimant further disclosed that he believed the University had failed to have regard to its 'Redundancy Procedure' in coming to a conclusion to end the Claimant's position, [14] grounds of appeal.

1)(b) Breach of any legal obligation: breach of legal obligation in Employment Rights Act 1996 to not dismiss someone unfairly and/or to not dismiss someone because they had made protected disclosures.

700. Lee Stewart wrote again on 29 September 2014 the claimant being unable to attend the meeting on 30 September, formally giving notice ending the contract, informing the claimant of his right to appeal against the dismissal and placing him on the redeployment register.

701. Following receipt of the 29 September 2014 letter giving written notice to bring the claimant's employment with the second respondent to an end on 31 December 2014, on 23 October 2014 the claimant submitted his appeal to Lee Steward setting out a number of grounds including his belief that his dismissal was due to him making "public interest disclosures whilst in post," and referred to possibility of seeking an order of interim relief disputing that any "meaningful training" had taken place. The grounds ran to 9-pages which the Tribunal does not intend to repeat.

702. The claimant's appeal against second respondent's decision to bring fix term contract to an end was accepted by the second respondent to amount to a qualified disclosure.

703. The claimant remained absent from work. He had not attended occupational health. He had not completed the first respondent's mandatory training modules. He had not attended any disciplinary hearing, and he had not attended the second allegation disciplinary investigation meeting. He was not able to suggest any dates for the appeal meeting, and yet when Lee Stewart proposed 17 December 2014 the BMA responded, "On the behalf of DR T I must raise concern at the delay in holding such important appeal some 2 months after the request has been made…I do not consider this to be reasonable or proportionate…"

704. Professor Greer, Ms Costello and Professor Alfirevic were to hear the appeal; the Tribunal accepts it was not possible to arrange an earlier date due to availability issues from all involved, including the claimant who was too unfit to attend meetings including the one with Dr Topping due to be held on 13 November 2014. It found the delay in arranging the appeal hearing was not on the ground the claimant had made protected disclosures and there was no causal connection with his disability.

MED3 2 October 2014

705. The claimant was signed off with "stress at work" for one month, with no adjustments suggested. There was no reference to the claimant having depression.

706. The second conduct investigation was still outstanding and on 14 October the claimant was asked to provide suitable dates and was offered the possibility of providing a written account of the 5 June 2014 telephone conversation.

707. In an email sent 15 October the claimant was provided with information under the SAR.

Detriment 18 relevant to second respondent only - 24 October 2014 attempting to use a biased and non-independent appeal panel, including Mrs Costello and Professor Greer who had previously been involved in the Claimant's matter

708. In a document dated 30 October 2014 "Response to Liverpool Women's Hospital NHS Foundation Trust Briefing of 22 November 2014 regarding myself sent to the Department of Health" the claimant set out the grounds why he believed action was taken against him due to whistleblowing and not because of his "conduct, behaviour and concerns over his health." It is notable the claimant's position as at 24 October 2013 was that there was no causal nexus between the alleged detriments he had sustained and disability, had it been otherwise the claimant would have said so in no uncertain terms. The Tribunal took the view that during the relevant period, whilst the claimant had a history of depression, he did not consider he was depressed at the time and this is reflected in the MED3's and the reference to stress.

Terminating the honorary fixed term contract 4 November 2014 by the first respondent

709. In a letter dated 4 November 2014 Dr Topping gave the claimant notice that "as the University post is due to terminate, there will be no requirement for you to continue to perform the clinical lecturer role after 3 December 2014 here at the Trust. For that reason, the Trust proposes that it will not renew your honorary fixed term employment contract beyond 31 December 2014…your doctor's note is until 3 November 2014…a referral was made to occupational health in August 2014 in relation to work related stress but I am aware that your consent to the appointment is still outstanding…please provide your consent so that an occupational health report can be facilitated at the earliest opportunity."

710. On 6 November 2014 the CQC responded to the claimant's recent contact, informing him "the local CQC inspection team engages with the trust executive team on a regular basis and the additional concerns highlighted in your latest contact…have been raised with the Trust."

711. Mrs Costello and Professor Greer were removed from the second respondent's appeal panel at the request of the claimant, replaced by Caragh Malloy, deputy director of HR, and Professor Burgoyne, associate executive pro-vice chancellor for the 17 December 2014 hearing.

The claimant's requested to have his appear hearing decided based on documents only.

712. The claimant indicated, due to his health, he was unable to attend various meetings. In an email sent 14 November 2014 to Dr Topping, the BMA questioned why an occupational health referral was needed given the claimant "is not currently well enough to work for the Trust…he has no objection to a referral being made to the Trust's OH department." The claimant made it clear he objected to the dismissal proposal.

713. In a letter of the same date to Lee Stewart the BMA indicated the claimant "does not think it would be helpful to meet to complete a risk assessment. The claimant maintained the stress he was suffering from was caused by the first respondent following his making a protected disclosure. Again, there is no suggestion the claimant was suffering from depression. The BMA requested the appeal hearing took place without a hearing on the papers and without the claimant's attendance, inviting a without prejudice discussion.

Detriment 38 relevant to the first respondent only - From 14 November 2014 to 27 February 2015 failing to properly and fairly deal with the Claimant's appeal of the decision to terminate his contract. The Claimant provided comments objecting to his dismissal by letter dated 14 November. The appeal hearing was not arranged until 27 February 2015.

Detriment 39 relevant to the first respondent only - from 23 November 2014 refusing to investigate or deal with the Claimant's grievance of 23 November 2014 – see letter from the Trust to the Claimant of 18 December 2014 "…As such, I am not going to progress your grievance any further."

714. On 23 November 2014 the claimant lodged a grievance and the resolution he sought was that the first respondent should have abided by the October 2012 grievance and the decision to proceed to a disciplinary hearing by Dr Herod revoked, a rehash of previous complaints brought by the claimant going as far back as 2012.

715. In a document dated 7 November 2014 the claimant responded to David Walliker's investigation alleging there was a conflict of interest in David Waliker acting as investigating officer "given your involvement in the Trust's response to my request for information." With reference to the allegation the claimant accepted he had spoken with Mrs Barber and attempted to obtain personal information of Julie Dorman, which the claimant maintained did not constitute personal data, his request was not unreasonable and there was no basis that it "constitutes any type of misconduct or wrongdoing."

716. The claimant disputed he claimed to be an employee or agent of the NMC and "specifically…stated 'No, I'm not from the NMC…it is clear that I did not claim to be from the NMC. The claimant maintained he did not give his name because he felt threatened by Mrs Barber. It is notable, the claimant's version of the telephone call was different to the transcript where his opening line was "…I am calling…on behalf of the NMC to see if you could provide me with a pin number for one of your staff, Julie Dorman…" Mrs Barber's response was not captured in the so-called transcript,

however it is clear from the claimant's response "Sorry, well that's not really relevant. As I say I'm ringing because the NMC have…tried to get hold of this lady…" There is a pause in the transcript following which the claimant then said he was not from the NMC but ringing because the "NMC have asked me to on their behalf."

717. The Tribunal conclude the claimant's interpretation of the transcript reflects the claimant's habit of twisting the words used in a conversation out of all recognition, missing out important factors and misinterpreting what took place to deceive both the Tribunal and the first respondent at the time the events were taking place. The 5 June 2014 incomplete transcript (it does not reflect what was said by Mrs Barber) encapsulates the claimant's total lack of credibility as he intentionally gave the conversation a completely different interpretation to that which could reasonably have been understood by looking at the plain words. It is undeniable, despite the claimant's oral evidence to the contrary before this Tribunal that he held himself out as the NMC, a serious matter especially given the claimant's position, and the trust required of him as a doctor.

MED3

718. On 5 November 2014 the claimant submitted a MED3 for one month for stress at work with no adjustments, and again there was no reference to depression. The claimant was unable to attend any of the meetings arranged due to his ill health.

719. Dr Topping on the 3 December 2014 wrote to the BMA as follows: "you are employed substantively by the University...on a 4-year fixed term contract, which the University have given notice to terminate and which is due to expire on 31 December 2014. Your employment with the Trust, on an honorary basis, only exists because of the substantive University employment…You have been issued with an appointment letter and a statement of terms of employment, both of which confirm your employment is on a fixed-term basis, terminating on 31 December 2014. Ordinarily, when a clinical lecturer's University employment terminates, the honorary employment with the Trust would also terminate and the employee would return to the Deanery programme, to complete their medical training. I presume this will happen in your case…we do not consider this to be a redundancy situation. You are employed by the Trust to supplement your post at the University. Your post at the University is now due to terminate which means that your employment by the Trust, supplementing that academic employment, is no longer necessary." The claimant was advised of his right to appeal.

Tri-partite meeting 4 December 2014

720. A meeting between both respondents and Jacky Hayden, the Dean at the North-West Deanery, took place to discuss the claimant, Jacky Hayden reported that the claimant was "failing to engage with her…had a disproportionate exposure to academic work to clinical work given that he had been working academically during this period of restricted practice and subsequent exclusion…he did not require further academic training and if he wished to progress his career he would need to work clinically…would require a period of assessment and back to work training…if

Dr Tattersall will not discuss this with her formally then she is not in the position to offer him anything." It was left that Jacky Hayden would write to the claimant "advising him that she has explored options of returning to NW Deanery and he must advise what he wants…in her belief the Deanery has no legal/contractual obligations with Dr Tattersall."

721. On the 15 December 2014 the claimant raised "serious concerns regarding governance and the way the Trust is run" which he sets out in a 4-page document.

722. The first respondent informed the Deanery that the claimant's honorary contract will end 31 December 2014 "this is since his fixed term contract with both the University and the Trust ends there….at the time of his contract ending with us, there are 2 conduct investigations that remain concluded at this point in time."

723. In anticipation of the claimant's appeal against dismissal to be held on 17 December 2014 the BMA emailed Lee Steward maintaining Jacky Hayden had confirmed the Health Education North WEST ("HENW") "has no role to play in employment matters…HENW and herself were not currently involved in making arrangements for Dr Tattersall's future training, and this was currently the responsibility of the University…if the University is able to dismiss…he will be unemployed and unlikely to secure future employment due to the ongoing actions" taken by the first respondent and /his current lack of clinical experience." This was a completely different version of the position to that given by Jacky Hayden at the tri-partite meeting held earlier.

<u>The claimant's appeal 17 December 2014</u>

724. The claimant sent further submission by email on 17 December 2014 to the second respondent stating the Deanery had "always indicated that the funding would continue until I reached CCT…I understand in the main, all clinical lecturer posts have been extended in the past when a member of staff requested this." The claimant maintained he had "ongoing projects which need continuing and Professor Alfirevic previously indicated these were a priority…thus there is no difference in my situation to that of Dr Sharp…I was informed at the time of appointment that the contract would be extended as is the case for all clinical posts…"

725. The second respondent informed Professor Hayden of the claimant's grounds of appeal in which he stated she had confirmed that HENW and herself were not currently involved in deciding the claimant's training. In response the second respondent received an email from Jacky Hayden on 17 December informing it that she had two members of her team had met the claimant on three occasions to discuss his future training, but he refused to have an on-record discussion. A number of offers were made "to allow him to continue training with HENW…he has not responded…" The claimant had also not provided information Jacky Hayden had requested. The information provided by Professor Hayden brought into question the claimant's version of training discussions and the information provided by the BMA, who appeared to have misrepresented the position.

726. On behalf of the second respondent a management response was submitted for the appeal that confirmed the claimant was considered to have fulfilled his research and other academic requirements and completed the clinical lectureship. There was an option for discussions with the Deanery to arrange alternative training to complete the CCT "but this does not require an appointment with a University…Prof Mark Pritchard (chair) ICAT has verified that, if CCT is not achieved within the 4-year period, the doctor would normally return to the NHS SpR training scheme in order to complete their clinical training. CL contracts would not normally be extended beyond 4 years…if the CCT is achieved while in post, the doctor can stay in post (a grace period) for up to 6 months while they try and find another job. This is approved by the Deanery not the University. Dr Tattersall is considered to have completed his academic training, he was submitted to REF, has contributed to teaching and Admin and submitted grants. Although there are no formal requirements written down regarding what is considered to constitute completing academic training, it is rather subjective, but the above would fall to any consideration and again this has been verified by Prof Pritchard who confirmed that it could be concluded that he had completed academic training…"

727. At paragraph 11 and 12 it was stated "an extension would be considered only if a considerable body of research has not been completed and/or academic training has not been completed and failure to do so would put the academic reputation of the department at risk…Dr Sharp fulfils the criteria outlined in point 11 and this is the reason why the HoD Prof Alfirevic has made a request to extend his contract. However, this request still needs to be confirmed via the ICAT Board."

728. There was also reference to the number of training posts being reduced, and the claimant "declining the offer of attending the University Occupational Health Service"; this was admitted to be the case by the claimant during oral evidence given under cross-examination. Having considered the contemporaneous documentation and heard oral evidence given on behalf of the second respondent, the Tribunal concluded the claimant had completed the academic phase of his training and the fixed term contract expired after a period of 4-years academic training. The Tribunal found the sole or principal reason for the first and second respondent's decision to dismiss the claimant was not objectively assessed, because the claimant had made protected disclosures.

729. On the 18 December 2014 the claimant appealed against the fist respondent's decision to terminate his contract of employment.

<u>Dr Topping's decision not to progress the claimant's 23 November 2014 grievance on 18 December 2014</u>

730. Dr Topping was of the view the claimant could raise his concerns about the disciplinary process at the disciplinary hearing, the panel being best placed to decide this issue. She concluded "Even if I hear the grievance and agree with you…I do not think it would necessarily follow that Mr Herod's decision should be revoked. Even if your grievance were upheld, there may still be allegations of misconduct to consider at the disciplinary hearing."

Detriment 17 relevant to second respondent only - 13 October 2014 to December 2014 delaying dealing with the Claimant's dismissal appeal. The appeal was submitted on 13 October and a hearing date was set for 17 December 2014. A delay of 2 months meant the hearing would be held just 2 weeks before the proposed dismissal date

Detriment 19 relevant to second respondent only - 19 December 2014 dismissing the Claimant's appeal against his dismissal

Detriment 20 relevant to second respondent only- 31 December 2014 failing to renew or extend the Claimant's employment with the University.

Detriment 21 relevant to second respondent only - From 31 December 2014 causing detriment to the Claimant's academic career by failing to renew or extend his employment with the University, resulting in him becoming de-skilled, restricting his future opportunities

Professor Burgoyne's decision on the claimant's appeal against the second respondent 19 December 2014.

731. An appeal panel convened before Professor Burgoyne as chair. Professor Alfirevic presented the management's response and various documents were considered before the panel determined the claimant's appeal against redundancy was not upheld. The outcome letter confirmed "it was clear from the outset of your appointment that is was a fixed term contract which was related to your clinical training. The panel found no evidence to support your claim that the issues between you and the Liverpool Women's NHS Foundation Trust impacted on the decision to end your contract at its expiry…it was noted that the University had intervened whilst you were suspended…to enable you to attend the University facilities, on site at the hospital to continue with your Academic work. The panel was satisfied there was no ongoing need for the position and this is the end of a recognised fixed term contract."

732. With reference to the claimant's statement that it was "normal" for contracts to be extended, the panel found, having received information form Professor Pritchard that "he is not aware of any clinical lecturer posts being extended in the past 4 years since ICAT was created, or any requests to do so. Under the current Clinical lecturer programme appointments are for a period of four years or until Completion of Clinical Training (CCT) whichever is sooner. There have been occasions when an individual has completed their CCT and requested the available six months grace extension to allow time to find an alternative position…but this is a separate matter and accepted as part of the training arrangement only on completion of CCT. You have not yet completed your CCT, so this arrangement does not apply to your circumstance…in circumstance such as yours, normally the fixed-term contract would come to an end and the individual would switch to alternative employment to complete their CCT…Professor Alfirevic stated that from the management perspective your academic commitments have been fulfilled and there are no outstanding teaching and assessment duties..."

733. Professor Hayden's email was referred to, and the panel concluded "it cannot accept the…assertion regarding unemployment and your future when paid training opportunities are available to you as would normally be expected…the issues you referred to in respect of your relationship with the Liverpool Women's NHS foundation trust are a separate matter which do not have a bearing on the tenure of the contract." The Tribunal found Professor Hayden's observation was indeed correct, the difficult relationship between the claimant and first respondent had no bearing on the second respondent's decision to dismiss.

Detriment 40 relevant to the first respondent only - from 31 December 2014 failing to extend or renew the Claimant's employment causing him detriment to his career path.

Detriment 16 relevant to second respondent only - 29 September 2014 to 31 December 2014 Failing to comply the with the University's redundancy policy

734. The claimant's contract of employment and honorary contract came to an end 31 December 2014.

735. David Walliker produced an investigation report referred to by Dr Herod in a letter sent to the BMA on 2 January 2015 in which it was confirmed there was a disciplinary case to answer. The allegation was the claimant impersonated an officer of the NMC to obtain personal information about a nurse, "potentially a very serious matter." Given the expiry of the fixed term contract all the allegations and investigation reports "should lie on your personnel file as unresolved issues…if your appeal is successful and your employment with the Trust continues, then the Trust would have the opportunity to hear these disciplinary issues." Reference was made to Dr Herod giving consideration as to whether the GMC should be contacted in respect of the situation. The allegations against the claimant have not been resolved and remain on his file for the sole reason that by 31 December 2013 the claimant's employment had ended.

736. Dr Topping wrote to the BMA on 6 February 2015 in response to an earlier letter, pointing out that the first respondent did not recruit the claimant; he was recruited by the University who informed it the claimant would be taking up an honorary contract and she was not aware "of any other case where the trust has retained a clinical Lecturer, in a clinical position, following the termination of the Clinical Lecturer post by the University…" In oral evidence in cross-examination the claimant accepted his employment with the first respondent only came about as a result of is employment with the second respondent; the former having no role in recruitment and he was allocated to the Trust by the second respondent in conjunction with the Deanery.

737. The claimant did not attend the appeal hearing against the first respondent's decision to terminate his contract set down for 25 February 2014 due to his commitments. In an email sent 13 September 2014 the BMA alleged the decision to

"terminate is contract was due to the first respondent's senior management being upset by his actions raising concerns/whistle blowing." The claimant's appeal was unsuccessful.

Detriment 41 relevant to the first respondent only - 27 February 2015 dismissing the Claimant's appeal against his dismissal

Appeal outcome – 27 February 2015

738. Diane Brown set out the panel's rejection of the claimant's appeal against the decision to end the fixed term contract noting that the panel had "little information from you and it was therefore difficult to understand the basis of your appeal. You said your case was clear from correspondence but I informed you it was not clear to me. You did not clarify the position…the email from your representative…states very briefly that you believed the decision of both the Trust and University to terminate your contract…was brought about due to…your actions in raising concerns/whistle blowing but I had no further information regarding this allegation." The panel was satisfied the claimant's employment with the first respondent exists "only by virtue" of his employment with the second and when one ceases the other does too, the claimant was a doctor in training and expected to return to the North-West Deanery training programme to complete his medical training."

Law

Public Interest Act Disclosure

S47B and S.103A Employment Rights Act 1996

739. S.47B(1) Employment Rights Act 1996 ("the ERA") provides- "(1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.

740. S.103A provides: "An employee who has been dismissed shall be regarded for the purpose of this Part as unfairly dismissed if the reasons (or, if more than one, the principal reasons) for the dismissal is that the employee made a protected disclosure.

741. S.47B(1)A ERA provides "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 (a) by another worker of W's employer in the course of that other worker's employment, or (b) by an agent of W's employer with the employer's authority, on the ground that the worker has made a protected disclosure.

742. S.47B(1B) Where A is subjected to detriment by anything done or mentioned in subsection 1(A) that thing is treated as also done by the worker's employer.

743. S47B(1C) for the purpose of subsection 1(B) it is immaterial whether the thing done is with the knowledge or approval of the worker's employer.

Qualifying disclosures

744. A qualifying disclosure only has to satisfy one of the specified methods of making the disclosure in order for protection to be conferred. For example, a disclosure to a person or body prescribed for the purposes of the whistleblowing provisions which fulfils all the relevant conditions will be protected whether or not the disclosure was first made to the employer.

745. S43A and B sets out the meaning of qualifying disclosures as defined by S.43B ERA.

746. S.43B(1) provides in this part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure; tends to show one or more of the following: (a) criminal offence, (b) That a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject; (c) miscarriage of justice, (d) that the health and safety of any individual has been, is being or is likely to be endangered, (e) environmental damage, and (f) that information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed. The claimant is relying on (a) and (b).

747. It is not sufficient for a worker to have made the qualifying disclosure in order to gain protection; the disclosure must fall within one of the six the requirements set out under ss.43C-43H ERA.

748. S43(C) provides for the disclosure to his (a) employer or other responsible person. The Enterprise and Regulatory Reform Act 2013 s 18 ("the 2013 Act") removed good faith as a formal requirement in Ss 43C and Ss. 43E-43G with effect from 25 June 2013, although under S.s 49(6A) and 123(6)(A) ERA the Tribunal has the power to reduce damages arising out a detriment where the disclosure was not made in good faith. Providing a worker has met the public interest test it is possible he or she may have ulterior motives but still hold a reasonable belief that the disclosure is made in the public interest. In respect of the claimant the Tribunal found she had ulterior motives and held a reasonable belief the disclosure was in the pubic interest.

749. Disclosures to employers have the least stringent conditions, disclosures to any other person whom the worker reasonably believes to be responsible for the relevant failure have "intermediate" conditions and the most stringent conditions cover disclosures to any other person or body including those of "exceptionally serious" failures which the Tribunal will refer to as "external disclosures."

750. S.43F provides that a disclosure can be made to a prescribed person or body charged with the overseeing and investigation of malpractice within certain types of organisation or in particular sectors. Where a person or body has been prescribed for the purposes of this section —a worker who makes the qualifying disclosure to such a person/body will be protected if he or she reasonably believes that the information and any allegation within it are substantially true. In order for a protected

disclosure to be made to a 'prescribed person', that person must be included in the statutory list of prescribed persons, and the disclosure must relate to one of the matters in respect of which that person is prescribed. Among the bodies and individuals prescribed is the Care Quality Commission.

751. Mr Boyd submitted that the principles in Royal Mail v Jhuti [2017] EWCA civ 1632 may be relevant in that when determining the unfairness of a dismissal (insofar as it had been tainted by whistleblowing) the Tribunal has to focus on whether there had been an unfairness on the part of the employer, and the person who took the dismissal decision, not some other person who may have (from the perspective of the decision maker) unwittingly influenced the decision maker. The Tribunal in the case of Dr Tattersall did not find the fact the claimant had made protected disclosures influenced Professor Alfirevic and Dr Topping; nor were they unwittingly influenced by any other person, such as Dr Herod with regards to Dr Topping.

Burden of proof- whistleblowing

752. There appears to be little between the parties as to the burden of proof in whistleblowing claims. S 48(2) ERA provides that it is for the employer to show the ground on which any act, or deliberate failure to act was done. As submitted by Mr Boyd, it does not follow that once a claimant asserts he or she has been subjected to a detriment, the respondent must disprove the claim. Rather it means that once all of the necessary elements of the claimant have been proving on the balance of probabilities, that there was a detriment, and the respondent subjected the claimant to that detriment, the burden will shift to the respondent to prove the worker was not subjected to the detriment on the ground that he or she had made a protected disclosure. The Tribunal was referred to the EAT decision in Boulding v Land Securities Trillium (Media Service) Ltd UKEAT/0023/06 (3 May 2006 unreported), and reminded the Tribunal that the primary contention of the respondents refers to causation i.e. that the claimant was not treated in the way he was because of the disclosure but because he was a troublemaker.

753. In a claim for detriment the claimant must prove that he has made a protected disclosure and that there has been detrimental treatment on the balance of probabilities, the burden is then on the respondent to prove the reason for the treatment. S.48 ERA sets out the burden of proof, s48(2) provides that on a complaint of detriment in contravention of S.47B it is for the employer to show the ground on which any act, or deliberate act, was done — S.48(2). Where a claim is brought against a fellow worker or agent of the employer under S.47B(1A), then that fellow worker or agent is treated as the employer for the purposes of the enforcement provisions in Ss.48 and 49, and accordingly bears the same burden of proof as the employer — S.48(5)(b). Once all the other necessary elements of a claim have been proved on the balance of probabilities by the claimant — i.e. that there was a protected disclosure, there was a detriment, and the respondent subjected the claimant to that detriment — the burden will shift to the respondent to prove that the worker was not subjected to the detriment on the ground that he or he had made the protected disclosure. Despite the burden of proof provisions, the main

line of argument taken by both respondents was one of causation, and the Tribunal has heard a great deal of evidence to satisfy this part of the test.

754. Mr Mensah referred to Serco Ltd v Dahou [2016] EWCA 832 which held that the Tribunal may draw adverse inferences against the employer in whistleblowing cases. The Tribunal in the case of Dr Tattersall has considered the possibility of raising adverse inferences at various junctures within the chronology.

755. If the Tribunal find that the worker was subjected to a detriment it is necessary for the claimant to establish that the detriment arises from an act, or a deliberate act, by the employer. In the well-known EAT decision in London Borough of Harrow v Knight [2002] EAT/0790/2001 it clearly established that the question of the "ground" on which the employer acted in victimisation cases requires an analysis of the mental processes (conscious or unconscious) which caused him so to act. The Tribunal considered carefully the mental process of the respondent's managers as set out in the finding of facts above.

Detriment

756. The term "detriment" is not defined in the ERA, but it has been construed in discrimination law which is applicable to S.47B detriment claims. A detriment will be established if a reasonable worker would or might take the view that the treatment accorded to them in all the circumstances had been to their detriment. It is clear from case law reporting a worker to a professional body can amount to a detriment and on behalf of the respondent this point was conceded.

757. In accordance with Aspinall v MSI Mech Forge Ltd UKEAT/891/01 and NHS Manchester v Fecitt [2012] IRLR 64, the latter to which the Tribunal was referred to by Mr Boyd. In the case of a detriment, the Tribunal must be satisfied that the detriment was "on the ground that the worker has made a protected disclosure" (section 47B(1), ERA 1996). The EAT has held that the detriment must be more than "just related" to the disclosure. There must be a causative link between the protected disclosure and the reason for the treatment, in the sense of the disclosure being the "real" or "core" reason for the treatment.

758. In Fecitt the Court of Appeal held where an employer satisfies the Tribunal that it acted for a legitimate reason, then that necessarily means that it has shown that it did not act for the unlawful reason being alleged. One of the main issues before the Court of Appeal concerned the causal link between making the protected disclosures and suffering detriment, and it was held that s.47B will be infringed if the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistleblower. "Where a whistleblower is subject to a detriment without being at fault in any way, tribunals will need to look with a critical – indeed sceptical- eye to see whether the innocent explanation given by the employer for the adverse treatment is indeed to genuine explanation…if the reason for the adverse treatment is the fact that the employee has made the protected disclosure, that is unlawful." Lord Justice Elias at paragraph 41 set out the following: "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." This test is particularly relevant to the case of Dr Tattersall and was applied by the Tribunal when considering the evidence, the detriments alleged and the explanation given by the first and second respondent's witnesses.

759. Mr Boyd submitted that an employer can lawfully dismiss an employee based upon the manner in which the employee pursues the issues raised, referring the Tribunal to the EAT decision in Panayiotou v Chief Constable Paul Kernaghan the Police and Crime Commissioner for Hampshire [2014] UKEAT 0436/13/1604. Mr Boyd suggested the Tribunal should look carefully to determine whether it is appropriate to draw a distinction between the treatment based on the fact of making protected disclosures and treatment based on the manner of way in which an employee pursues those matters. As can be seen from the factual matrix there exists a very real issue with the manner in which the claimant behaved and pursued his grievances culminating in the first respondent being unable to control him in nay way.

760. A complaint that a worker has been subjected to a detriment for making a protected disclosure must be presented to an employment tribunal before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates, or, where the act or failure to act is part of a series of similar acts, the last such act or failure to act —S.48(3)(a) ERA. In a complaint that a worker has been subjected to a detriment the Tribunal will need to consider the point in time at which the alleged detriment is said to have occurred, and not the point in time at which the disclosure or disclosures relied upon were made — Canavan v Governing Body of St Edmund Campion Catholic School *EAT 0187/13*

Discrimination

Time limits

761. S.123(1)(a) EqA sets out the time limit for presenting a disability discrimination complaint. It provides that the relevant time limit for starting employment tribunal proceedings runs from the date of the act to which the complaint relates. S123(3)(a) states that conduct extending over a period of time is to be treated as done at the end of that period. Failure to do something is to be treated was done when the person in question decided upon it – S123(3)(b). In the absence of anything to the contrary, a person is taken to decide on failure to do something either when the person does an act inconsistent with deciding to do something else, or, if they do no inconsistent act, on the expiry of the period on which they might reasonably have been expected to do it – S.123(4).

762. The time limit relating to any alleged act or failure to act runs from the date or the decision or the act and not from the date when it is communicated to the claimant.

763. Tribunals have a discretion to hear out of time discrimination cases where they consider it is "just and equitable" to so do – S.2123(1)(b) EqA, provided that it is presented within such other period as the Tribunal thinks just and equitable – S.123(1)(b). The burden lies with the claimant to convince the Tribunal it is just and equitable to extend time. The exercise of discretion is "the exception rather than the rule" – Robertson v Bexley [2003] IRLR 434.

764. It was not questioned by the claimant that he must lead evidence as to why discretion should be exercised in his favour, as submitted by Mr Boyd, that evidence will usually speak to the checklist set out in S.33 of the Limitation Act as modified by the EAT in British Coal Corporation v Keeble and ors [1997] IRLR 336 EAT.

Continuing acts

765. The Tribunal was referred to the Court of Appeal decision in Commissioner of Police of the Metropolis v Hendricks [2003] ICR 530, CA in which it was made clear that it was not appropriate for Tribunals to take too literal an approach as to the question of what amounts to continuing acts by focusing on whether the concept of a "policy, rule, scheme, regime or practice" fit the facts of a particular case. In Aziz v FDA [2010] EWCA Civ 304, the Court of Appeal approved Aziz and noted that in considering whether separate incidents form part of an act extending over a period "one relevant but not conclusive factor is whether the same or different individuals were involved in those incidents."

766. On the time limit issue given the fact that three ET1's was received on 21 June 2012, 10 May 2013 and 6 March 2015 bringing different and duplicated complaints amended and clarified in a raft of documents including numerous Further and Better, it had been a difficult, almost impossible exercise to establish the precise dates when claims were made and whether there existed a containing act. No doubt this difficulty contributed to the lack of any coherent evidence and submissions made in respect of time limits. It is notable no evidence was given by the claimant in respect of this, and nor was he cross-examined on out-of-time complaints. The Tribunal approached the issue by accepting theoretically at first the claims were all received in time on the basis that there was, on the face of the evidence, the possibility of a continuing act apart from the three early allegations relating to the victimisation complaint found by the Tribunal to be out of time from the outset. The Tribunal proceeded after that exercise to consider the date individual detriments occurred and time limits.

S.13 Direct discrimination

767. The Tribunal was referred to S.13(1) that deals with the less favourable treatment of an individual, where the difference in treatment is because of a protected characteristic, the claimant is relying on disability.

768. The Tribunal was referred to the EAT decision in Burrett v West Birmingham Health Authority [1994] IRLR 7 EAT confirming the test to be applied was an objective one.

S.15 Discrimination arising from disability

769. Section 15 EqA provides a person (a) discriminates against a disabled person B A treats B unfavourably because of something arising in consequence of B's disability, and A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

Victimisation

770. Section 26 EqA provides (1) A person (A) victimises another person (B) if A subjects B to a detriment because—
B does a protected act, or
A believes that B has done, or may do, a protected act.
Each of the following is a protected act—
(a) bringing proceedings under this Act;
(b) giving evidence or information in connection with proceedings under this Act;
(c) doing any other thing for the purposes of or in connection with this Act;
(d) making an allegation (whether or not express) that A or another person has contravened this Act

771. The Tribunal was referred to the EAT decision in Amnesty International v Ahmed [2009] ICR 1450 in which it was held there was no essential difference between the previous equality regime of "by reason that" and "because of" all meaning practically the same thing. Mr Boyd submitted the essential question for the Tribunal is what consciously or subconsciously motivated the employer to subject the claimant to a detriment, which will necessitate an inquiry into the mental processes of the employer, in particular, the person responsible. The Tribunal considered conscious or sub-conscious motivation when it came to all of the evidence relating to the first and second respondent's decision-making process, concluding there was no causal link between motivation and whistleblowing on the balance of probabilities. In arriving at this finding, the Tribunal did not view the claimant's press reports was an act of whistleblowing, and the claimant cannot be said to have made protected disclosures.

772. Mr Boyd referred to Nagarajan v London Regional Transport [1999] ICR 877 in which the House of Lords held if the protected acts have a "significant influence" on the employer's decision making, discrimination will be made out. Mr Boyd also relied upon Igen Ltd (formerly Leeds Career Guidance) and others v Wong and others [2005] ICR 931 and the clarification from Peter Gibson LJ that for an influence to be "significant" it does not have to be of great importance. A significant influence is rather "an influence that it more than trivial."

773. It was submitted by Mr Boyd that the case potentially raised the argument of "tainted discrimination" dealt with by the Court of Appeal in CLFIS v Dr Mary Reynolds [2015] EWCA 439 in which it was held by LJ Underhill "…the correct approach to a tainted information case is to treat the conduct of the person supplying the information as a separate act from that of the person who acts upon it." The Tribunal found there was no evidence of any "tainted discrimination" in the case brought by Dr Tattersall, and as indicated earlier within the factual matrix it did not find a conspiracy made out.

774. Baroness Hale in Derbyshire and ors v St Helens Metropolitan Borough Council and ors [2007] ICR 841, HL, and Lord Nicholls in Chief Constable of West Yorkshire Police v Khan [2001] ICR 1065, HL, endorsed a three-stage test for establishing victimisation under the pre-EqA discrimination legislation as follows:

a. did the employer discriminate against the claimant in any of the circumstances covered by discrimination legislation?

b. in doing so, did the employer treat him or her less favourably than others in those circumstances?

c. was the reason for the less favourable treatment the fact that the claimant had done a protected act; or that the employer knew that he or she intended to do a protected act, or suspected that he or she had done, or intended to do, a protected act?

Harassment – S.26

775. The general definition of harassment set out in S.26 states that a person (A) harasses another (B) if:

(1) A person A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of (i) violating B's dignity or (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B…

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account –

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.

Burden of proof-discrimination

776. Section 136 of the EqA provides: (1) this section applies to any proceedings relating to the contravention of this Act. (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provisions concerned, the court must hold that the contravention occurred. (3) Subsection (2) does not apply if A shows that A did not contravene the provisions. (4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule."

777. In determining whether the respondent discriminated the guidelines set out in Barton v Investec Henderson Crossthwaite Securities Limited [2003] IRLR 332 and Igen Limited and others v Wong [2005] IRLR 258 apply. The claimant must satisfy the Tribunal that there are primary facts from which inferences of unlawful discrimination can arise and that the Tribunal must find unlawful discrimination unless the employer can prove that he did not commit the act of discrimination. The burden of proof involves the two-stage process identified in Igen. With reference to the respondent's explanation, the Tribunal must disregard any exculpatory explanation by the respondents and can take into account evidence of an unsatisfactory explanation by the respondent, to support the claimant's case. Once the claimant has proved primary facts from which inferences of unlawful discrimination can be drawn the burden shifts to the respondent to provide an explanation untainted by sex [or in the present case disability], failing which the claim succeeds.

778. Mr Boyd submitted that the claimant could not on the evidence demonstrate a shift in the burden of proof, and in the alternative, that the respondents had discharged their burden. The Tribunal agreed for the reasons set out above, the claimant had not discharged the burden of proof and the burden had not shifted. At all relevant times the evidence before the managers and doctors was the claimant had a history of depression; the claimant himself indicated this was the case and apart from Dr Herod's suspicions (and those of his colleagues) as a result of the claimant's behaviour, the medical evidence as at early December 2013 was the claimant was on medication and had suffered from depression. All of the medical evidence gathered at the time supported a view that the claimant was not depressed; from the two occupational health reports, Dr Graham's report and the MED3's. The claimant refused to be examined on behalf of the first respondent and/or did not agree to release the medical report. If the Tribunal is wrong on his point, and the burden of proof has shifted, in the alternative it considered the explanations put forward on behalf of the respondents concluding on the balance of probabilities they were not tainted by disability discrimination.

779. Reference was made by Mr Boyd to the EAT decision in Chief Constable of Kent Constabulary v Bowler [2016] on raising inferences where subconscious discrimination was alleged, and the Tribunal was referred to paragraphs 46 and 97 in that judgment warning that it cannot rely on unproven assertions of stereotyping and there must be evidence from which it can properly infer that a stereotypical assumption operated on the mind of the punitive discriminator consciously or

subconsciously. The EAT found "merely because a Tribunal concludes that an explanation for certain treatment is inadequate, unreasonable or unjustified does not mean by itself the treatment is discriminatory since it is a sad fact that people often treat others unreasonably irrespective of…protected characteristics." In the case of Dr Tattersall, having taken into account the factual matrix and conscious / sub-conscious motivation of individuals the Tribunal concluded there was no evidence of a stereotypical assumption concerning the claimant's depression and poor behaviour within the workplace.

Conclusion – applying the law to the facts

The protected disclosures in relation to the first respondent.

780. Good faith is an important consideration in this case as some of the claimant's disclosures were made before 25 June 2013 and the change to the whistleblowing legislation. Before 25 June 2013 there was a requirement for a disclosure to be made in good faith before it could qualify for protection. After that date the disclosure will be protected if the claimant reasonably believes it was made in the public interest and that the information provided tend to show one of the six failings set out. Good faith is no longer required, although an absence of good faith can be taken into account when it comes to remedy.

781. With reference to the first respondent the Tribunal found the claimant had not made any protected disclosures on 30 March, 4 April, 17 April, 20 May, 6 June, 18 June, 25 July, 27 July, 14 September, 24 October and 26 November 2012 on the balance of probabilities for the reasons set out above. The claimant did make protected disclosures on 7 May 2013, 12 August 2013, circa 18 November 2013 and 19 March 2014. In oral submissions Mr Boyd observed that screening and raising penitent safety were "bedfellows" and this was the main public interest disclosure raised by the claimant i.e. the failure to screen him and his two colleagues. Mr Boyd submitted the claimant was "late to the party" on patient safety. The occupational health screening omission had been dealt with swiftly and the issue of staffing was "old news" to the first respondent generally. He accepted that being a trouble maker and whistleblower was not mutually exclusive, an employee can be both. The Tribunal took the view the fact the claimant was "late to the party" did not mean the disclosures were incapable of protection and in relation to those disclosures that occurred after 25 June 2013 the claimant reasonably believed they were in the public interest and tended to show either breach of a legal obligation and/or a patient's health and safety was being or likely to be endangered.

782. The Tribunal when arriving at its judgment took into account that a disclosure of information will include drawing information to the recipient's attention when the recipient is already aware of it and has knowledge – S.43L(3) ERA.

The protected disclosures in relation to the second respondent.

783. With reference to the second respondent the Tribunal the claimant had not made protected disclosures on 13 February, 12 August, 18 September and 16 December 2013. It found the claimant had made protected disclosures when he, via

the BMA, sent grounds of appeal to Lee Steward on 23 October 2014. For the avoidance of doubt, no other alleged disclosures made against the first respondent were found to be an operative public interest disclosure for the second respondent.

784. Having found a number of protected disclosures were made, and the claimant has discharged the burden of proof in this respect, it remains for the claimant to prove he suffered a detriment and if this was found to have been the case, it is for the first and second respondent to prove on the balance of probabilities, he was not subjected to the detriment on the ground that he had made a protected disclosure. Strictly speaking the Tribunal is required to carry out this exercise only in relation to those detriments alleged after the 7 May 2013 in respect of the first respondent and 23 October 2014 in respect of the second respondent. The Tribunal has not limited itself in this way; instead in the event of it being mistaken as to any of the disclosures alleged and whether they amounted to protected disclosures, the Tribunal has considered each and every detriment relied upon by the claimant to establish whether they amounted to detriments, and if so, did they occur on the ground the claimant had made protected disclosures from the date of the first alleged disclosure made on 30 March 2012 onwards. It was the Tribunal's view that having heard evidence over such a length of time, justice would be done if all of the claimant's detriments were considered.

785. When the Tribunal came to consider the test for causation in relation to the individual claims of detriment it had in mind the Court of Appeal in Feccitt above and its obiter conclusion that S47B ERA would be infringed if the protected disclosure materially (in the sense of more than trivially) influenced the first and second respondent's treatment of the claimant.

Conclusion – the detriments

786. The Tribunal has set out a number of conclusions above dealing with the detriments in context as and when they allegedly occurred. It is notable Mr Boyd conceded there had been a "small deviations in process" in this case but in order to succeed the claimant would need to turn "molehills into mountains." The Tribunal agreed having considered motivation of those witnesses responsible for process.

787. Mr Mensah submitted there was five incidents that demonstrated the true motivation and intentions of the first respondent, which were logging calls made to the CQC, indicating they will check the claimant's emails in relation to his communications with the CQC as per Dr Herod's instructions, monitoring calls made by the claimant to the CQC, warning or threatening the claimant about going to the press and considering in early stages the means of "exiting the claimant." The Tribunal agreed with Mr Mensah that it was difficult to "shrug" off the existence of those documents and the force they have in relation to the claimant's case, and it has not done so. In cases of whistleblowing and discrimination it is difficult to see into the hearts of people, and this case is no different in respect of Mr Herod, who wielded great power within the second respondent.

788. The Tribunal found on the face of the evidence referred to by Mr Mensah a question mark had been raised over Dr Herod's conscious or unconscious motivation, and in respect of S.48(2)ERA had the Tribunal accepted the claimant was subject to the detriments as alleged by the claimant, it would have gone on to find Dr Herod, on the balance of probabilities, satisfied the Tribunal that it was not because the claimant had made protected disclosures despite the fact Dr Herod was unhappy with the claimant contacting the CQC and the press. The claimant does not rely on his contact with the press as a protected disclosure, and it is noted by the Tribunal that whoever made contact with the Liverpool Echo (it is not for the Tribunal to make any findings on whether it was the claimant or not) provided partly untrue information which would have severely damaged the public reputation of the first respondent, and this was in the mind of Dr Herod who genuinely believed it was the claimant due to the immediate threats he had made earlier to do so, and his subsequent contact with the Echo reporter checking what response had been given by the Trust.

789. In oral evidence under cross-examination Dr Herod described how he had concerns over the claimant during 2012; in his view it was not rationale behaviour for a doctor, "who had pretty much everything we required to see" in his possession to comply with the OH screening. Dr Herod, who was frustrated by the claimant's actions, genuinely held the view in 2012 onwards that to have embarked on such a course of action would have made no sense to a reasonable doctor and he had been "enormously disappointed" in the claimant. The Tribunal found as indicated above, Dr Herod's frustration increased with time when he had to deal with staff "seriously upset" by the claimant's actions towards them and his attempts to pressurise people to do what he wanted.

790. Mr Mensah submitted it is rare to find such evidence of a worker being singled out by virtue of his conduct in making disclosures. With reference Serco Ltd cited by Mr Mensah, the Tribunal noted it may draw adverse inferences against Dr Herod as a result of this evidence, which cannot be looked at in a vacuum. Had the five incidents relied upon by Mr Mensah been the only evidence the Tribunal would have agreed with this proposition. It was not. The overwhelming evidence related to the claimant's behaviour and the poor decisions he made in the manner he dealt with occupational health screening, the grievance and disciplinary processes, the managers, senior trust medical practitioners and last but not least, confrontational attitude when dealing with colleagues, showing no empathy and being prepared to misrepresent himself in order to gather information on a nurse colleague for reporting purposes. These are the unfortunate events that gave rise to total breakdown of trust and confidence between the claimant and first respondent, particularly Dr Herod who did not mince his words when cross-examined on his view of the claimant's lack of professionalism. In short, the claimant was at fault and facing the high possibility of dismissal had the disciplinary hearing taken place and it is perhaps fortunate for him that it did not.

791. Mr Mensah submitted the word 'detriment' will be established if a reasonable worker would or might take the view that the treatment accorded to them in all the circumstances had been to their detriment, and there need not be a physical or

economic consequence. Whether the act or deliberate act 'was done' on the ground that the claimant had made protected disclosures required the Tribunal to analyse the conscious and unconscious mental processes bearing in mind the test was not satisfied by the simple question "but for" –Harrow London Borough v Knight [2003] IRLR 140 EAT. The Tribunal analysed the mental process of all witnesses; those of the first and second respondent, who made decisions and took action against the claimant and this was foremost in its mind when the oral and written evidence was considered, particularly the contemporaneous documents. Mr Mensah suggested the Tribunal should consider the rationale behind the respondents' actions, which it did with reference to a vast array of documents.

792. In written closing submissions Mr Mensah referred to a telephone conversation between Dr Herod and Professor Greer on 17 September 2012, the email from Caroline Salden to Michelle Turner on 19 September 2012, the discussion between Dr Herod and Steve Boyle on 3 October 2012, the post it note on the 27 November 2012 email and the log of calls recorded on or after 26 November 2012. Mr Mensah orally submitted that it was "not hard" to link the CQC and Echo with the first respondent wanting the claimant out. Dr Herod's post -it -note on the 27 November 2012 document was a "clear attempt to silence a whistleblower on any straight-forward reading." The Tribunal would have agreed with Mr Mensah's assessment had we been considering all the documents he relies upon cumulatively without reference to anything else that was going on at the time as evidenced by other contemporaneous documents. The Tribunal agreed with Mr Mensah that Dr Herod was unhappy with the claimant contacting the CQC, he said as much in evidence on cross-examination and gave reasons why, which were on the balance of probabilities accepted by the Tribunal as credible. He was concerned the CQC would see the first respondent in a negative light because he believed the claimant would present a one-sided view of a difficult and complex employment dispute.

793. The Tribunal also accepts Mr Mensah's submission that the logging of the claimant's CQC calls was a key document when considering the rationale of the first respondent at the time; however, it was not the only document pointing to whether or not the first respondent and its managers acted legitimately without the taint of detriment on the grounds of whistleblowing. It is prima facie evidence on which the Tribunal can raise adverse inferences. However, it cannot be said as submitted by Mr Mensah that the tactics were "wholly dubious and concerning given the claimant's status as somebody known to make protected disclosures." The "tactic" may be dubious and concerning, but it cannot be said the claimant's status at the time was one of a whistleblower. The first respondent suspected the claimant had improperly reported to the press a story which could have resulted in a serious damage to the first respondent's reputation; this was not whistleblowing. The 19 September 2012 contact by the CQC was first inkling that the claimant was a whistleblower against a background of the difficulties encountered in attempting to manage a doctor who refused to be managed, an inescapable fact for the claimant to circumvent in this case.

Detriments alleged against first respondent

Detriment 1 against the first respondent only: From April 2012 to Sept 2012 - refusing and failing to provide the Claimant with a copy of his written terms and conditions of employment

Detriment 2 [6 in the claimant's list] first respondent only: from April 2012 refusing to clarify the Trust's view on the Claimant's contractual position with the Trust

794. With reference to the first and second detriment the Tribunal found on the balance of probabilities these were not made out.

795. It was submitted on behalf of the first respondent that as the claimant was unable to point out in cross-examination to any document which demonstrated that he had asked for his written terms and conditions and the first respondent had refused to provide them, this allegation must fail. Mr Boyd was correct, however, having carefully worked through numerous documents and considered the evidence before it, the Tribunal took the view the claimant had made it clear he sought clarification of the contractual position and the copy of the contract was provided on 7 September 2012 as a result. It is irrelevant that the terms and conditions of employment finally provided to the claimant were left unsigned. The Tribunal took the view the first and second respondent ought to have better understood the contractual position; their confusion as to whether the claimant was an employee or not of the first respondent and the effect of him working under an honorary contract was a genuine one, and the resolution of this confusion, over time, was the sole reason the claimant was not issued with a S.1 statement or clarification given as to the contractual position, and there was no causal connection with whistleblowing or for that matter, the claimant's disability.

Detriment 3: [4 in the claimant's list] first respondent only: from April 2012 requiring the Claimant to comply with local health screening policies which did not apply to the Claimant's position and/or were not in existence or ratified

796. With reference to detriment 3 the Tribunal found the claimant was given a reasonable management instruction to be screened and the first respondent's screening policy applied to him for the explanation given by the first respondent above, accepted by the Tribunal as credible and reflecting the true situation. The occupational health policy on screening was contained in the local health screening policies and had been in place since October 2010.

Detriment 4 [detriment 2 in claimant's the list] against the first respondent only - 17 April 2012 refusing to allow the Claimant to have Trade Union Representation at a disciplinary meeting

Conclusion: detriment 4

797. With reference to detriment 4 the Tribunal concluded the claimant had been caused no such detriment. Trade union representation was not refused; the meeting was not a disciplinary hearing and even if it had been one, the Tribunal would have

gone on to find Dr Topping's reference to the not being a disciplinary one where union representation was not required, was made in good faith and without any causal connection to whistleblowing or disability discrimination. It is notable the claimant during the liability hearing was reluctant to accept Dr Topping's evidence, which the Tribunal found cogent and persuasive that she visited her mother; there was no reason for Dr Topping not to tell the truth. As indicated earlier, the Tribunal found Dr Topping a cogent and honest witneses. When it came to the 17 April 2012 meeting the truth of what transpired is very clear, even on the claimant's own account at the time and this brings into sharp focus the less than reliable evidence of the claimant.

798. Mr Boyd submitted that he was surprised the claimant was not prepared to concede the point given the contents of his email sent on the 17 April 2012 when he set out his understanding that no disciplinary action was been taken. The Tribunal agreed with Mr Boyd's observation that the claimant's failure to do so was a further example of his unreasonable behaviour and general lack of credibility bearing in mind the claimant's case, which was he had been denied union representation because he was a whistleblower.

Detriment 5 [numbered 3 in the claimant's list] against the first respondent only – from 17 April 2012 excluding the Claimant from conducting clinical and research work with Trust patients.

Detriment 6 [numbered 5 in the claimant's list] against first respondent only - From 17 April 2012 to 8 June 2012 refusing to redeploy or to consider redeploying the Claimant to a non-EPP role and refusing to provide a written risk assessment to the Claimant

Conclusion: detriment 5 and 6

799. With reference to detriment 5 and 6 the evidence before the Tribunal was that the claimant had not been subjected to any detriment by the first respondent failing to redeploy him, provide a written risk assessment or providing alternative arrangements to access patients for clinical training. In short, had the claimant complied with the screening requirements access to patients would not have been limited and a reasonable worker would take the view that the treatment was not, in all of the circumstances, to his disadvantage. Mr Boyd submitted the claimant did not explain the basis on which he could assert that not withstanding his failure to comply with the screening requirement for the benefit of patient safety, it would have been appropriate for him to have face-to-face patient contact. The Tribunal agreed, noting that this was the professional opinion of the medical experts also, not least Dr Herod, who struggled to understand the claimant's attitude and as time went by questioned the claimant's professionalism. This was a fundamental issue for the medics and managers employed by the first respondent; and it was not credible to the Tribunal that they would conspire to treat the claimant less favourably or cause him a detriment because he had whistleblown or was disabled.

800. The factual matrix reveals a pattern by the claimant of actively seeking not to return to his clinical role, and it is difficult to reconcile the claimant's apparent reluctance with what he now describes to be a detriment thus undermining this claim further.

801. Had the Tribunal found detriment, which it did not, there was no causal connection with whistleblowing or disability. Objectively, the straight-forward reason for the claimant's treatment lay exclusively with the way in which he dealt with the reasonable management request to comply with OH screening requirements, his attitude towards the people involved and the way he went about pursuing his own agenda causing confrontation and upset within the organisation. The claimant was intent on proving from the outset that there was no need for him to comply with the first respondent's local health screening Policy which were not applicable to him, exceeded DoH requirements and had not been ratified come what may, whatever damage he cause to his relationships with colleagues and to his own career. In short, the factual matrix reveals the claimant was impossible to manage, the investigation into serious acts of misconduct floundered due to this, and the whistleblowing was not the reason for the claimant's treatment.

Detriment 7 against first respondent only: humiliating the Claimant, acting through Dr Topping, on the Labour Ward 4 May 2012

802. The Tribunal, as indicated above, found that the sole reason for Dr Topping's comment was the fact that she believed the claimant may have been disobeying instructions and creating a potential risk to patients, and there was no causal connection between this incident, protected disclosures or disability. In any event, the Tribunal did not accept the claimant had been caused a detriment by this comment; he was not allowed in clinical areas, a reasonable worker would not have taken the view that the treatment was in all the circumstances to his disadvantage, Dr Topping was merely reminding him of the restrictions on his practice.

803. Mr Boyd submitted had the claimant in fact felt humiliated as alleged on 4 May 2012 he would have raised a grievance on the 31 May when one was intimated and then on 18 June when his grievance was lodged. The claimant was not cross-examined on this point, and on the balance of probabilities the Tribunal accepts the claimant would have felt humiliated as he did not like to be questioned or crossed in any way; a reasonable employee considering the position objectively would not have felt so. The Tribunal agreed with Mr Boyd that had the claimant truly believed Dr Topping humiliated him on the 4 May 2012 on the ground that he had made a protected disclosure a grievance would have been raised, and it is notable there was not a even a hint of this in the 18 June 2012 grievance that followed on the heels of this allegation.

804. If the Tribunal is wrong on this point, in the alternative, had the claimant established detriment 7 the Tribunal would have gone on to find the claimant was in an area where it was likely he would come into contact with patients against a direct management instruction aimed at securing patient health and safety, and Dr Topping's response was unconnected with any whistleblowing. Mr Boyd put the

matter succinctly in submissions; the question had everything to do with the state of affairs the claimant had brought on himself by his obstinacy around failing to comply with contractually obligated occupational health screening.

Detriment 8 against first respondent only - instructing the University of Liverpool (the University) to withhold payment of the Claimant's banding supplement

Detriment 2 against second respondent only – 1 May 2013 withholding payment of the Claimant's banding supplement

805. Turning to the first respondent's decision to withhold payment of the claimant's banding supplement for being on call, the Tribunal, having considered detriment 8 in context, concluded the claimant was not caused detriments 2 and 8 as alleged. The payment was withheld for the sole reasons set out in Michelle Turner's 10 May 2012 letter. Had the claimant undergone satisfactory occupational health screening he would have continued to work on call, received the banding supplement and no payment would have been withheld. There was no causal nexus between whistleblowing, disability discrimination and the first respondent's actions in connection with withholding payment of the claimant's banding supplement. The Tribunal finds claimant was the author of his own misfortune, but for his unreasonable intransigence the claimant would have received the banding supplement which he could no longer expect to be paid when the work was not being carried out through nobody's fault but his own. Objectively, a reasonable employee in the same circumstances would not have taken the view the treatment was to his disadvantage; he could not work the on-call rota and thus was not contractually entitled to a pay supplement for on call work.

806. Mr Boyd submitted this was a "completely hopeless allegation." The Tribunal agreed having heard evidence from the first respondent's witnesses as to the importance of screening, hence the first respondent's enhanced "Gold Standard" policy and the fact the claimant's colleagues agreed to be screened immediately when requested. Mr Boyd is correct when he stated the claimant's refusal to be screened set in hand a train of events; these findings of facts based on the contemporaneous documents that passed between the parties reveal this. The claimant's refusal resulted in him being unable to have face-to-face contact with patients for health and safety reasons, as a result he was unable to take part in the on-call work that involved face-to-face patient contact for which the banding supplement was payable. It is not disputed the second respondent paid the claimant's salary (hence some of the confusion as to whether the claimant was an employee of the first respondent or not) and the first respondent would need to inform the second respondent to stop the claimant's on-call pay. The alternative would have been for the claimant to have been paid for work not carried out as a result of his failing to obey a reasonable management request aimed at protecting the health and safety of patients. The communications between the first and second respondent were not motivated or causally linked to any whistleblowing allegations as alleged. The decision to stop the claimant's banding supplement was not on the grounds that he had made protected disclosures.

Detriment 9 against first respondent only - From 20 May 2012 refusing and/or delaying its decision to allow the Claimant to return to work with patients and restricting his work to non-EPP duties despite his provision of health screening documents

807. With reference to detriment numbered 9 the Tribunal found the first respondent was entitled to allow the claimant to return to work by restricting him to non-EPP duties given Cheryl Barber's profession view that the claimant had not supplied the necessary clearance for EPP, which Dr Topping was entitled to take into account given Cheryl Barber's expertise in occupational health matters. The claimant's health screening documents were not sufficient valid to cover EPP and this resulted in another spate of acrimonious correspondence from the claimant. Objectively, a reasonable employee in the same circumstances would not have taken the view the treatment was to his disadvantage; he could not work the on EPP without the necessary clearance.

808. In conclusion, the Tribunal found the claimant had not been caused a detriment; had he provided valid health screening documents necessary for EPP Dr Topping would have ensured his return to all clinical duties including those involving EPP. The claimant had failed to do so, and there was no causal nexus between whistle blowing and/or disability discrimination. The obligation was on the claimant to ensure valid health screening documentation sufficient for EPP clearance was provided, he had failed to do so and the consequences were a restriction in his duties and thus pay as he could not safely carry out on call work.

Detriment 10 relevant to first respondent only – the claimant had changed this detriment to read "from" 25 May 2012 failing to provide the Claimant with all documents he is entitled to under Data Protection legislation and refusing to comply with Freedom of information obligations

809. The claimant's request for information was very general and it was not clear on the face of the email in which the claimant had not referred to the DPA, FOIA, the first respondent's Policy or the fact he was making a subject access request. It is not disputed the first respondent does not deal with the request in good time, and the claimant does not chase it up. The Tribunal on the balance of probabilities found the claimant was not prejudiced by any delay, and he was unable to point to any other type of prejudice. In the alternative, had he been so prejudiced it would have gone on to find the first respondent's dilatory response was not motivated or causally linked to any whistleblowing; the delay was not on the grounds the claimant had made protected disclosures.

810. Taking into account the factual matrix above, the Tribunal accepts as submitted by Mr Boyd, that it was not until the BMA letter of 1 October 2013 the first respondent was informed what documents were missing, information the first respondent had been seeking from the outset. The first disclosure exercise produced 150 emails, the second 2 boxes, the third 100gb which amounts to a substantial quantity of information supplied. There was no satisfactory evidence before the

Tribunal that the first respondent did not provide the 100gb deliberately because the claimant was a whistleblower, and nor has he shown that certain documents were deliberately kept hidden and he was prejudiced by this in any way and had suffered a detriment. Mr Boyd submitted that it would take a number of people, including those behind the scenes looking for the documents, to conspire and connive against the claimant. The Tribunal found there was no persuasive evidence of any conspiracy in this respect. The ICO found there were failings by the first respondent in the way it dealt with the claimant's requests. The Tribunal agreed with Mr Boyd's observation that the failures were a result of the breadth of the claimant's original request and did not have anything to do with whistleblowing.

811. The Tribunal was not in a position to adopt the approach suggested by Mr Boyd, which was to pose the question what documents eventually emerged that had not been originally disclosed, and were they 'material' documents to the whistleblowing allegations. The Tribunal do not know; there was no evidence before them as to what documents that should have been disclosed were relevant to the whistleblowing, and nor was there any evidence of detriment caused to the claimant by late disclosure. The Tribunal accepts Mr Boyd's submission that the claimant's subject access request was a "fishing expedition" in search for a "smoking gun," the Tribunal agreed with this observation but that is by the way; the fundamental issue for the Tribunal being whether the claimant was subject to a detriment, the burden of proof under S.48(2) ERA was on the claimant, which he failed to discharge.

812. In the alternative, had the claimant discharged the burden of proof, taking into account the explanation given on behalf of the second respondent the Tribunal would have concluded on the balance of probabilities, the prolonged time it took to deal with the claimant's subject access request was not on the ground that the claimant had made a protected disclosure (or the theoretical assumption that one had been made).

Detriment 11 relating to first respondent only: June 2012 failing to arrange a stage 1 grievance hearing in breach of the Trust's grievance policy

813. Given the references by both the claimant and Angela O'Brien to the informal stage grievance procedure, the Tribunal accepts on the balance of probabilities the 5-days for stage 1 could not realistically have been met by the time the claimant confirmed on 21 June 2012 the informal stage had been exhausted as this was 4 days after the grievance report had been submitted. The Tribunal accepts any delay was caused by the parties reasonably exploring an informal resolution and thereafter dates and availability for the formal process to be arranged. Bearing in mind the delays caused by the claimant's excuses and inability to attend numerous meetings and hearings as detailed above, the Tribunal finds the claimant's claim that he was subject to a detriment surprising.

814. Even had the grievance hearing been delayed as alleged by the claimant without reference to any attempts at an informal meeting there was no evidence that the claimant reasonable believed he had suffered a detriment as a result. In addition, the Tribunal would have gone on to find, had the claimant established detriment, it

was not on the grounds of the claimant having made a protected disclosure but for all the reasons previously touched upon by the Tribunal.

Detriment 12 relating to first respondent only - From 15 June 2012 providing inaccurate and/or confidential information about the Claimant to the University and other staff members

815. The Tribunal has considered the information provided to the second respondent by the first respondent from 15 June 2012 onwards, and it does not accept the claimant was caused any detriment by the communications. The allegation is far from clear, and the Tribunal is unsure how either respondent could have breached the claimant's confidentiality as alleged, bearing in mind both were separately the claimant's employer and the second respondent used the first respondent's premises in order for the claimant's clinical training to be provided. In reality, there existed a triumvirate relationship between the respondents and the Deanery; all having a different input into in the claimant's training, clinical work, and pay.

816. The Tribunal accepts Mr Boyd's submission that the communication to the second respondent by the first respondent had "nothing to do with whistleblowing and everything to do with the nature of the relationship between the respective parties."

Detriment 13 relating to first respondent only- from 18 June 2012 conducting an unfair grievance procedure (see paragraph (5) a-i at page 11 of the FBPs of 29 April 2016 which explains why he asserts it was unfair)

817. There are 9 sub-detriments (a) to (i) set out in paragraph 5 of the Further and Better Particulars dated 29 April 2016 setting out 9 allegations of unfairness concerning the first respondent's grievance procedure. The Tribunal wish to point out that the copious amounts of Further Particulars, Sub-Particulars and various Scott Schedules in this case are confusing and time consuming to comprehend, especially given the duplication of older allegations coupled with new ones.

818. Allegations (a), (b), (g) and (f) are duplicates of allegations dealt with by the Tribunal above.

819. Allegation (b) "Permitting Susan Westbury, who was to go on to advise the decision maker at stage 2 hearing, to draft the management case", did not result in a detriment to the claimant; and nor did the claimant point to any detriment caused to him. There was no satisfactory evidence the claimant was caused any disadvantage by Susan Westbury's input into drafting the management case. Mr Boyd submitted that the two versions of this document show no differences that act to the claimant's disadvantage. The Tribunal has not compared one version with the other line by line; it is sufficient for the claimant, on whom the burden lay, not to have put forward evidence that Susan Westbury's drafting prejudiced him.

820. Allegation (d) Permitting Dr Herod at the stage 2 grievance hearing to obtain further evidence from Cheryl Barber via an unrecorded conversation after the stage 2 grievance to support the management's sides response concerning EPP practice, did not cause the claimant a detriment in any way. Cheryl Barber, who oversaw the screening process, merely confirmed the details concerning first respondent's screening requirement and whether the screening required of the claimant was the same for other doctors on honorary contracts, which it was. Under cross-examination Dr Herod explained that he wanted to make sure he was receiving accurate information, and conceded if he went outside process it was his fault. Dr Herod's evidence was accepted by the Tribunal as credible, and it did not find the questions asked of Cheryl Barber, given her area of expertise, was motivated by whistleblowing. It is by the way that Dr Herod should have informed the claimant that he had questioned Cheryl Barber at the time, and he had not noted down the conversation. The issue for the Tribunal was whether the claimant had suffered a detriment as a result; it found he had not on the balance of probabilities. Cheryl Barber had merely confirmed the screening position as it stood (and as reflected in the numerous contemporaneous documents set out above) and Dr Herod was satisfied that he had reliable information from the most qualified person in the organisation. Objectively, a reasonable employee in the same circumstances would not have taken the view the treatment was to his disadvantage.

821. With reference to (e) failing to allow the claimant to fully cross-examine the management side or orally state his case at the stage 3 grievance hearing – Gail Naylor's letter 29 October 2013, the Tribunal found on the balance of probabilities the claimant did not suffer prejudice in that he had the opportunity on numerous occasions beforehand to attend when 13 different dates had been provided since the first respondent's attempts to arrange a hearing from May 2013. In the stage 3 outcome letter set out by the Tribunal above, Gail Naylor referred to three hearings that did take place being disrupted by the claimant. It is clear to the Tribunal from the factual matrix that the grievance outcome reflected the true position; namely, the health screening was a requirement to be met by the claimant, who was under an obligation to comply. The conclusion is self-evident and the Tribunal has difficulty comprehending how the claimant was prejudiced in any way. In the alternative, even if he were to have established prejudice, the Tribunal would have gone onto find there was no causal link between it and whistleblowing. Gail Naylor was intent on ensuring the stage 3 grievance hearing took place against a background of the claimant's prevarication, and that process taken together with the grievance outcome was not due to the fact the claimant had whistleblown.

822. With reference to (h) refusing to investigate or deal with the claimant's grievances of 23 November 2014, 12 December 2014 and 18 December 2014 except for the latter grievance, the Tribunal repeats its observations above. The Tribunal has not been taken to the 18 December 2014 grievance by the claimant, and it is notable from Mr Boyd's written submission that document does not exist and was not received by the first respondent. On the evidence before it the Tribunal found there was no 18 December 2014 grievance and therefore, the claimant cannot have been caused any detriment relating to it.

823. With reference to (i) the Tribunal did not accept the fact the grievances were not heard promptly can be laid at the door of the first respondent. The Tribunal has carefully set out the evidence above from which it can be seen the claimant prevaricated and delayed getting the grievances heard. It cannot be the case the claimant suffered a detriment as a result, bearing in mind the numerous explanations and excludes he gave to the first respondent for being unable to attend meetings, not least, his unavailability which the Tribunal found surprising given for much of the time the claimant was not working a full week and was not on call.

824. In short, Mr Boyd submitted a number of the detriments alleged against the first respondent which the claimant maintains were issues within the domain of the second respondent also, preceded the first alleged disclosure. The evidence before the Tribunal was that the second respondent at no time before or after the claimant made the protected discourse, had any power to intervene with the first respondent running its own internal processes, this had no causal connection with any whistleblowing and could not be said to be done on the ground that the claimant had blown the whistle.

Detriment 14 relating to first respondent only - from 27 June 2012 refusing to answer the Claimant's request for the status quo to be preserved per the Trust's grievance policy and failing to preserve the status quo

825. With reference to detriment 14 the Tribunal found the claimant had not suffered a detriment in that the first respondent had not failed to preserve the status quo for the reasons set out earlier. The non-EPP patient contact was in place prior to the grievance and that was the status quo.

826. Mr Boyd submitted that if by the status quo the claimant was to carry out EPP's whilst the grievance was ongoing, even though he refused to be screened; this was a "silly and ignorant argument." The Tribunal accepted the evidence before it that the first respondent genuinely believed for the claimant to have carried out EPP (notwithstanding the weekend he worked when the issue first came to light) for health and safety reasons. It is a moot point whether the claimant made a request for the status quo to be preserved or merely made a statement; the Tribunal finds that an assertion was made but this could have been properly interpreted as a request. The issue before the Tribunal was whether any detriment had been suffered by the claimant and it found none; the claimant's working arrangements had not changed. In the alternative, even if the status quo had not been maintained the Tribunal would have gone on to find it had nothing to do with whistleblowing and everything to do with patient safety. In short, the claimant was the author of his own misfortune by the decision he had taken not to be screened.

827. If the Tribunal is wrong on this point, it would have gone on to find there was no causal connection between the claimant's reductions in pay occasioned by the respondent's failure to preserve the status quo and whistleblowing and/or disability discrimination. The sole reason for the claimant's predicament was self-generated; the claimant had failed to provide a validated screening document as a result he was unable to conduct EPP duties and could not be on call.

Detriment 15 relevant to first respondent only - 9 July 2012 humiliating the Claimant, acting through Dr Schofield, on the Labour Ward

828. The Tribunal accepts the claimant suffered what could have been a detriment, had it not been the case that the claimant raised no protected disclosures. The Tribunal found there was no causal connection between whistleblowing and Dr Schofield's humiliating comment. Taking into account the factual matrix of the claimant's limited responsibilities and the fact he was unable to carry out EPP duties, Dr Schofield's comment was directly linked to this.

829. During this period the claimant complained about a number of other matters, including the respondent's failure to disclose documents. It is notable that what the claimant does not refer to is whistleblowing or disability.

Detriment 16 [numbered 17 in the claimant's list] relevant to the first respondent only – arranging a stage 2 grievance hearing for a date when Ms O'Brien knew she was due to be on leave in the knowledge that the chair of the hearing would determine her attendance to be essential and postpone the hearing to allow further preparation time

830. The Tribunal accepted Dr Topping's explanation as credible; it was borne out by the evidence and the claimant had been informed of the true position at the relevant time. Mr Boyd described this allegation as "delusional"; the Tribunal took the view that it reflected the total breakdown in the employment relationship on the part of the claimant, who suspected every decision taken by the first respondent's managers, even if they were favourable to him. The first respondent's employees could not do right for wrong, and the claimant's less than objective interpretation of events spiralled out of control with the result that he saw everything said and done as a threat and conspiracy against him, even the most logical explanation involving a hospitalised elderly mother.

Detriment 17 [numbered 16 in the claimant's list] relevant to first respondent only - on or around 26 July 2012 providing inaccurate and confidential information to the press, namely the Liverpool Echo.

831. The Tribunal found the claimant was not caused any detriment. He denied being the anonymous source and it was not disputed between the parties the information provided to the Echo did not name him or any other doctor. The Tribunal agreed with the question posed by Mr Boyd; how could it conceivably be connected to the claimant's allegation that he was a whistleblower? The Tribunal found the first respondent acted for a legitimate reason responding to what could have been a serious public relations issue for it, and the claimant could not have reasonably taken the view the response, which did not reference him in any way, was on the ground that he had made a protected disclosure. In short, a reasonable worker would not have taken the view that the first respondent's response to the Liverpool Echo was in any way treatment to his disadvantage in all of the circumstances.

Detriment 18 [17 in the claimant's list] relevant to first respondent only 27 July 2012 bullying the Claimant through Mr Herod's actions – calling the Claimant and accusing him of going to the press (see paragraph (4) FBPs of 29 April 2016)

832. Dr Herod had legitimate grounds for asking the claimant if he had gone to the press given Dr Herod's knowledge of the claimant's threats on two occasions made less that two days earlier, and the specific details that the press intended to publish. The Tribunal accepted Dr Herod genuinely believed the claimant was the anonymous source, and he was concerned with the reference to HIV etc, requesting assurance that there was no such issue in the hospital, which was not initially forthcoming from the claimant despite his professional duty to the first respondent (and its patients). Far from bullying the claimant when he refused to answer the questions and insisted they were put in writing, Dr Herod complied despite his frustration that a medical doctor refused to disclose whether a member of staff had tested positive for HIV unless the question was put in writing. The claimant's importance placed on written documents is telling; they supported the build-up of the case around the litigation and formalised the matters in issue and yet, no written reference was made to protected disclosures and whistleblowing until much later.

Detriment 19 relevant to the first respondent only – from around August 2012 preventing non-executive members of the Board and the Senior Independent Member from becoming aware of the Claimant's patient safety concerns and from contacting the Claimant

833. On the evidence before it the Tribunal does not accept the allegations set out under detriment 19. As indicated above, the Board were already aware of the claimant's concerns. In or around the end of July 2012 a number of midwives raised the issue of staffing levels on the maternity ward with the first respondent. It was not disputed by the claimant that none of the midwives were treated detrimentally for raising patient safety concerns. The reports resulted in a discussion between the Executive Team about staffing levels and the issue remained a live one and was regularly brought up at board meetings and staff briefings which referred to reviews of staffing levels, resources and recruitment. The Tribunal considered and took into account the documents relating to this within the bundle, which it has not set out in detail given the length of these reasons.

834. It is uncontroversial Steve Burnett did not ask Julie McMorran to deal with the claimant's 14 August 2012 email until 29 August 2012. The Tribunal accepted Steve Burnett's evidence that he was aware of the issues relating to the claimant during this period, but unclear the nature of concerns the claimant wanted to raise with him. Julie McMorran sought clarification from the claimant as to whether it was regarding whistleblowing, provided the claimant with an electronic link to the Whistleblowing Policy and confirmed if it was not about whistleblowing "I will be glad to help direct you accordingly." There was no immediate response from the claimant, and Steve Burnett sent an email to him on 2 September 2012 stating he would be "happy to drop in to Liverpool to meet up if I am the right person." Given the position of non-executive directors, i.e. they were not employees of the Trust, the Tribunal found it

was not unreasonable for the claimant to be expected to have confirmed as requested, what the issues where he wished to discuss with Steve Burnett, and if they encompassed whistleblowing, an area Steve Burnett was responsible for.

835. The Tribunal found the claimant, on the finding of facts above, was not prevented from contacting board members. He was invited to clarify his complaints in order that the right person could deal with it, and the claimant failed to do so. The claimant has not established he was caused any detriment, and a reasonable worker would not have taken the view that the first respondent's communications in any way amounted to treatment to his disadvantage in all of the circumstances. Finally, the Tribunal found there was no requirement for board members to respond to a generalised "Dear all" letter. In the alternative, there was no evidence before the Tribunal the actions of Julie McMorran and Steve Burnett were motivated by whistleblowing. Clarification was sought from the claimant as to what his complaint was; he failed to provide it and a meeting was then arranged with Liz Cross despite the claimant's intransigence. Any delays in the claimant meeting up with members of the Board and/or the Senior Independent Member did not occur on the grounds of the claimant having made protected disclosures, even had the Tribunal found as a matter of fact such disclosures had been made by August 2012, which they did not.

Detriment 20 relevant to the first respondent only - from 14 September 2012 Excluding the Claimant from the Trust premises

836. The claimant's exclusion arose from the 14 September 2012 incident as set out above; and confirmed in Dr Topping's letter dated 17 September 2012 and in her oral evidence, which the Tribunal found entirely believable and supported by credible evidence. It is incredible that Dr Topping would have engineered all of the evidence concerning the claimant's "erratic/irrational behaviours" to mask any motivation to cause him a detriment for whistleblowing. The evidence is overwhelming; the claimant's exclusion was caused solely by his behaviour and nothing else.

Detriment 21 relevant to the first respondent only - 14 September 2012 –April 2014 invoking a disciplinary procedure against the Claimant – an internal investigation commenced 14 September (put on hold in October) and formal investigation restarted on 27 November 2012

837. The Tribunal found that it cannot be the case the claimant was prejudiced by the first respondent invoking the disciplinary procedure and continuing with it after it was put on hold in the circumstances, whether not the claimant had made protected disclosures for the reasons already set out by the Tribunal, which it does not intend to repeat.

Detriment 22 relevant to the first respondent only – from 14 September 2013 conducting an unfair disciplinary procedure against the Claimant (see paragraphs 5 at a-v pages 9-11 of the Further and Better Particulars of 29 April 2016.

838. The first point to note is that the document dated 29 April 2016 was not further and Better Particulars but an addendum that did not enclose the information relied upon in Detriment 22. The Tribunal read through, on more than one occasion, a number of the pleadings etc, and it appears the Further and Better Particulars are dated 21 March 2016. The additional 3-pages of detriments overlap and repeat a number of detriments already made. It is not proportionate for the Tribunal, who has spent a considerable amount of time in chambers on this matter, to work through and resolve the problems caused by an inadequacy of pleadings having spent many days on this case. The alleged detriments (a) to (v) refer to matters which the Tribunal has included in its findings of facts above. In short, the Tribunal on the balance of probabilities found:

(1) (a)The first respondent had not failed to allow the claimant to have trade union representation as alleged.

(2) (b), (n), (o), (p), (q) Caroline Salden and Dr Herod had not properly and fairly considered the relevant criteria for exclusions under the MHPS Policy; they may not have complied with the letter of the Policy but this was explained by the fact that after making the initial decision to suspend the circumstances of the claimant's suspension did not change. Given this fact it is difficult to understand how the claimant could have been prejudiced considering the reasons for the claimant's exclusion; and in the alternative, had the claimant established a detriment (which he did not) there was no causal connection to whistleblowing. There was no evidence before the Tribunal to the effect the claimant was excluded for an unreasonable length of time; cogent reasons were given for the length of the exclusion by Dr Herod and Kathryn Thompson's decision not to implement the decision of the Exclusion Appeal Panel on 7 February 2013, which had no causal connection with whistleblowing and concerned the claimant's poor behaviour within the workplace, and the fact that he could not be trusted to act in a professional manner with regards to his colleagues who were to given evidence against him at the disciplinary investigation, instrumental in the claimant's probable dismissal had a disciplinary hearing gone ahead. The claimant's subsequent actions confirmed Dr Herod's suspicions i.e. when he misrepresented himself as a representative from the NMC in addition to other matters as set out within the factual matrix.

(3) (c), (d), (e), (f), (g), (i), (j), (l), (m), (t) and (v) have no merit. The claimant was given the opportunity to present his case at a disciplinary investigation; he prevaricated over a lengthy period of time during which he was provided with on more than one occasion lists of people who were to be interviewed. The claimant made representations about a number of people in that list and as a result they were not interviewed in circumstances where the Tribunal found the first respondent's Policy did not curtail the investigating officer's ability to interview anybody relevant to her investigation. There was no evidence before the Tribunal that the claimant had been prejudiced in any way by the investigating officer interviewing people outside the Trust. The claimant was made aware of allegations and concerns, he was also provided with a written list of questions to be asked of him at the investigation meeting. The claimant could have suggested information to be considered by the investigating officer; he had no control over what information was considered as this

was within the ambit of the investigating officer. As indicated above, Dr Greenhalgh may not have been experienced, but she was supported by an experienced HR professional and given training. There was no evidence Dr Greenhalgh's appointment caused the claimant a detriment in any way; she had serious allegations to investigate against a difficult employee who was impossible to manage and put obstacles in the way at every turn, and she did so in a thorough and objective manner against the background of responsibilities for her own clinical practice. The report was lengthy, objective and considered.

(4) Any investigator, experienced or otherwise, faced with the evidence before Dr Greenhalgh, including the claimant passing himself off as a representative of a statutory regulator, would have concluded the allegations should proceed to a disciplinary hearing. A hearing did not take place as a result of the claimant's best endeavours and his eventual termination of employment when the fixed term contract came to an end. The Tribunal has dealt with HR representatives assisting in drafting the report above; having heard oral evidence from Dr Greenhalgh it was satisfied the impartial disciplinary investigation report entirely consisted of her own conclusions. She was a strong-minded professional medic who would not easily be swayed by HR or higher level management. From the very outset of the investigation after Dr Greenhalgh had taken evidence from a number of witnesses it was clear to her the evidence pointed to serious allegations that would need to be addressed at a disciplinary hearing, and there was no satisfactory evidence the first respondent had failed to deal with the disciplinary fairly as alleged by the claimant who used whistleblowing as a pretext to pressurise the first respondent to withdraw from the disciplinary investigation and serious allegations of gross misconduct that could have damaged his career in the long-term. The Tribunal did not come to this conclusion lightly; it was an unavoidable finding taking into account the cumulative evidence before it.

(5) The Tribunal was reminded by Mr Boyd in submission of the claimant's allegation against Dr Greenhalgh that she had arrived at her conclusion knowing it was untrue because she had in mind professional advancement, and was prepared to perjure herself at this liability hearing for some unexplained advancement. The Tribunal agreed, and dismissed the claimant's unsubstantiated evidence, it had no basis in reality. The Tribunal accepted Mr Boyd's submission that allegations of fraud unsupported by cogent evidence besmirching Dr Greenhalgh in public brought the claimant's own credibility into question and it reinforced the view taken by the first respondent that the claimant would stop at nothing to achieve his own ends.

(6) (h), (r) The claimant was barred from the first respondent's premises pending the investigation into serious misconduct allegations, and the first respondent's managers reasonably believed, based on the claimant's behaviour towards his colleagues at the time, that he could approach the witnesses and cause difficulties in the workplace. On the balance of probabilities, the Tribunal found there was no satisfactory evidence to the effect that Dr Greenhalgh's investigation was predetermined by an intention to exit the claimant in as short as time as possible as set out in greater detail above.

(7) (k) The decision to obtain an occupational health report was due to the claimant's behaviour on 14 September 2012 and the Tribunal finds any reasonable employer excluding an employee in those circumstances and who had concerns over an employee's health, would have obtained medical evidence to establish the basis of the behaviour. There was no evidence the first respondent in doing so was "trying to ensure that an occupational health report was obtained which came to the conclusion which supported the decision already made." If this was the first respondent's intention they failed dramatically. A more robust employer may have taken a stronger line with the claimant given his failure to obey a reasonable management request and the serious allegations of misconduct, with the result that his dismissal could have been much sooner, well before the fixed term contract had expired. As indicated above, the note of the NCAS conversation did not evidence an intention on the part of the first respondent to exit the claimant; it was the suggestion of NCAS.

(8) (s) There was no satisfactory evidence before the Tribunal that the documents sought by the claimant in pursuant with the DPA/FOI requests were relevant to the disciplinary allegations or his grievances, and the claimant has failed to make this point clear during the liability hearing. The Tribunal is none the wiser why thousands of internal documents were relevant to the allegations concerning the claimant's behaviour towards the first respondent's employees and to the incident when he misrepresented himself in order to gain confidential information about a staff member in the occupational health department.

(9)(u) The claimant, who is not experienced in employment matters, fails to appreciate that it is accepted practice for HR/lawyers to review reports in certain circumstances i.e. if the issues are serious or legally complex. As indicated above, the Tribunal found Michelle Turner's evidence as to whether she had any input into the investigation questionable; she was an inaccurate historian as borne out by the contemporaneous documents that revealed she did have an input. Nothing turns on this given the fact that the final report was most certainly the conclusions of Dr Greenhalgh and it is thus difficult to see how the claimant could have been prejudiced by the fact that she was advised and assisted by HR about process and ensuring the report was in the correct format. The same point applies to the findings of Liz Cross; they were her own conclusions and much like the claimant who was in receipt of advice throughout the whole process, it was not unreasonable for Liz Cross to seek advice, whether it be from HR or specialist lawyers. It is difficult for the Tribunal to see how the claimant was prejudiced in any way given the reports of Dr Greenhalgh and Liz Cross reflect their own findings on the information put before them, the Tribunal concluding that their oral evidence supported by contemporaneous documentation dealing with this point credible on both their parts.

Detriment 23 relevant to the first respondent only - 17 September 2012 – 3 October 2012 making it clear that the Trust wanted to exit the Claimant during conversation with the National Clinical Advisory Service

839. The Tribunal accepted that on 17 September 2012 Dr Herod contacted Professor Greer and discussed the undisputable fact that the claimant was a

problem employee for the first respondent, NCAS had said it was "Ok" to pass the claimant back o the second respondent and he wanted to investigate how to bring the claimant's honorary contract to an end. Clearly, such a communication can amount to a detriment in theory. No action was taken by either respondent following the discussion and thus it had no direct detrimental effect on the claimant.

840. There is an issue concerning time-limits, the relevant date being 17 September 2012 when the cause of action arose. On the information before the Tribunal it appears that this detriment is out of time, and there was no explanation from the claimant regarding any time limit issues. The claimant's overarching position appears to be that there were a series of similar acts; the Tribunal did not find this to have been the case.

841. The complaint relating to detriment 23 for making a protected disclosure must be presented to an Employment Tribunal before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates, or, where the act or failure to act is part of a series of similar acts, the last such act or failure to act —S.48(3)(a) ERA. The point in time at which the alleged detriment is said to have occurred was 17 September 2012— Canavan cited above. The primary limitation period expired on 16 December 2012, the second sets of proceedings were issued on 10 May 2013 and there is no reference in the intervening period to detriment 23. There was no evidence it was not reasonably practicable for the claimant to have issued a complaint in relation to detriment 23 within the statutory time limit, clearly it was reasonably practicable given the claimant had issued proceedings earlier and later with union support. Accordingly, the Tribunal finds detriment 23 was not presented before the end of the period of 3 months beginning with the date of the act or failure to act to which the complaint relates, or, where the act or failure to act is part of a series of similar acts, the last such act or failure to act. The Tribunal was satisfied that it was reasonably practicable for a complaint to be presented before the end of that period of 3 months, and the Tribunal does not have the jurisdiction to consider the complaint which is dismissed.

842. In the alternative, if the Tribunal's conclusion on the time limit point is incorrect, it would have found Dr Herod genuinely believed the claimant did cause a problem; he had no desire to be screened, had caused difficulties in the organisation and made untrue damaging reports to the press, and the conversation with Professor Greer was about what happened next. Dr Herod's view was the first respondent had been doing the claimant "a favour" by allowing him access to a clinical environment on an honorary contract under which it did not think it had primary responsibility. The claimant's report to the CQC concerned him not because the claimant had approached the CQC or that he may have whistleblown, but on the basis the claimant would give a one-sided version in an attempt to make trouble for the first respondent. The discussion took place not on the grounds the claimant had contacted the CQC but because of the way he went about trying to rectify the wrongs he believed had occurred as a result of the first respondent's insistence that he be screened and the fact he was impossible to manage. In accordance with Feccitt the first respondent will have breached the claimant's right not to be subjected to a

detriment if his whistleblowing to the CQC (which the Tribunal did not find to be the case in any event as set out above) materially influenced the treatment he received. On balance, the Tribunal would have gone on to find had any protected disclosures made to the CQC was in Dr Herod's mind; the influence was a trivial one in comparison with the claimant's behaviour evidenced by all that had taken place before the CQC contact and Dr Herod's irritation and loss of trust and confidence in the claimant as a direct result of this behaviour in the workplace.

843. In conclusion, the Tribunal finds on the balance of probabilities as at 17 September 2012 Dr Herod and higher-level management within the first respondent were unhappy with the responsibility of dealing with the claimant's problem behaviour, when he had not been recruited by it and he worked under an honorary contract. Dr Herod genuinely believed as the first respondent did not have primary responsibility, according to Steve Boyle of the NCIS, there was a possibility the contract could be ended and Dr Herod wanted to explore this option. If the Tribunal is incorrect in its finding that the claimant's disclosure to the CQC was not a protected disclosure, and it had misinterpreted the 17 September 2012 note, in the alternative, it would have gone on to find despite Dr Herod miss-recollected there was no causal link between the claimant whistleblowing to the CQC and detriments alleged after the 14 September 2012 disclosure which were not done on the ground the claimant had blown the whistle.

Detriment 24 relevant to first respondent only - from 27 November 2012 excluding the Claimant from the Trust premises

844. The Tribunal does not intend to repeat its findings on the claimant's continued exclusion; in short, the decision to exclude was caused exclusively by the claimant's behaviour and not whistleblowing.

Detriment 25 relevant to first respondent only - 27 November 2012– 17 June 2014 Breaching the MHPS policy by continuing the Claimant's exclusion beyond 6 months

845. Mr Boyd submitted that the NHPS referred to the 6-month time limit in the context of what was "normal" and there was no breach of this on the basis that the claimant's case was "not a normal one." The Tribunal agreed with this last observation. Further, the disciplinary investigation was a long drawn out process as a result of problems arranging meetings with the claimant and his representative. Even if the first respondent had breached the NHPS by excluding the claimant for longer than 6-months, had the claimant attended the investigation hearing earlier the exclusion would have come to an end sooner than it did, because that is precisely what happened after the investigation hearing finally took place. The claimant was invited to return on conditions, failed to do so and went on long-term sick supported by MED3's citing stress having indicated earlier that it was inappropriate for him to return on clinical duties and to do so could compromise patient safety. Taking into account the claimant's behaviour in this entire sorry tale, and his reaction to returning to full clinical duties giving every impression that he did not want to do so, it cannot be said any detriment was objectively caused.

846. Mr Mensah submitted the power was with the first respondent to dictate the time it took to investigate. That is correct in theory, however, it was clear to the Tribunal from the contemporaneous documentation the investigation was dragged out by the claimant for a number of reasons, not least his unavailability and then health (despite the fact that he worked on his research for the second respondent for much of the time) when the reality was that the claimant as a result of his exclusion, was only carrying out part of his duties and should have been available to be interviewed at the earliest opportunity thus avoiding a continuation of his exclusion.

Detriment 26 relevant to first respondent only – 21 December 2012 to 17 June 2014 failing to review and properly consider lifting the Claimant's exclusion, in breach of the MHPS policy –in particular paragraphs 2.9 and 2.34

847. The Tribunal has made findings on this as set out above; it accepted Dr Herod's evidence as truthful and cogent that he did consider the claimant's exclusion prior to confirming it on a month-by-month basis. As time went by, nothing had changed and Dr Herod remained concerned with the claimant's behaviour and whether he would approach the witnesses to the disciplinary allegations. Theoretically it could be said there was a technical breach of the PHCS Policy to which the Tribunal was referred i.e. all extensions reviewed and a brief report provided to the Chief Executive and Board, a requirement for a case conference (paragraph 2.15) and so on. The Tribunal Dr Herod's evidence that the Chief Executive was orally updated; it would be surprising if this had not been the case given the importance to the first respondent of the claimant's compliance with occupational health clearance. The Tribunal was satisfied technical breaches did not prejudice the claimant in any way; and given the position he had adopted against the first respondent's employees and its attempts at unsuccessful attempts at controlling him from a management perspective, any failure to comply with process by the letter was not done on the ground that that claimant had made protected disclosures to the CQC or at all.

Detriment 27 relevant to first respondent only - from 7 March 2013 failing to comply with the Exclusion Appeal Panel's recommendations in its letter of this date to lift the Claimant's exclusion

848. Mr Boyd in submissions argued a recommendation was precisely that, it is not a rubber-stamping exercise and nor was it treated as one by Kathryn Thompson who, in her capacity as Chief Executive, was understandably concerned about the claimant's behaviour and his effect on work colleagues. It is clear from the appeal panel's findings it was expected the disciplinary investigation would have been concluded by 8 March 2013. Clearly, the appeal panel did not factor in the delays caused mainly on the part of the claimant who gave every impression he did not want to attend the investigation meeting right up until the time he did attend but refused to answer questions and behaved in an aggressive, threatening and disruptive manner as recoded by Dr Greenhalgh and reflected in the transcript.

849. The appeal panel when it came to its recommendation was concerned that the claimant may adversely affect witnesses, hence the reference to the 8 March 2013 date and not an earlier one. Mr Boyd submitted Kathryn Thompson made the panel's views "abundantly clear." The Tribunal accepts even though she deviated from the 8 March 2013 date her decision was "rooted in common sense" and whistleblowing was not a motivating factor. The claimant did not suffer a detriment by the fact the exclusion went beyond the 8 March 2013; had he attended the investigation meeting earlier the exclusion would have been lifted earlier on the basis that the disciplinary investigating could only be completed after the claimant had given his evidence at that meeting.

Detriment 28 relevant to first respondent only - from 24 May 2013 refusing to investigate or deal with the Claimant's grievance of 24 May 2013 and failing to deal with it in a timely manner

850. The claimant's grievance related to whether or not the first respondent was in breach of an agreement not to re-commence the disciplinary investigation; which was something the claimant wished to avoid at all cost, hence his strenuous attempts at making sure that the investigation meeting did not happen and the issuing of judicial review proceedings. This issue cannot be hived off and considered out of context and the Tribunal agreed with Mr Boyd's submission that it would logically form part of the disciplinary investigation and the first respondent's decision in this respect was a common sense one and not related to whistleblowing.

Detriment 29 relevant to first respondent only- 17 July 2013 finding the Claimant's nomination to the Council of Governors invalid in breach of the Model Election Rules (although the Claimant did not receive this notification on 17 July 2013, Mr Herod confirmed to the Claimant it was deemed invalid on this date via an email of 24 July 2013). The breach related to the fact that there was no rule which provided that a nomination paper must be subscribed by at least two supporters

851. The Tribunal accepts the claimant suffered a detriment following the incident set out in detriment 29. It does not accept the detriment was done because the claimant had made protected disclosures. The Tribunal had before it the ET1 received 10 May 2013 which was followed by further information from the claimant dated 5 June 2014 but sent 10 November 2014.

852. There is an issue concerning time-limits, the relevant date being 17 July 2013 when the cause of action arose. On the information before the Tribunal it appears that this detriment is out of time, and there was no explanation from the claimant regarding any time limit issues. The primary limitation period expired on 16 October 2013 the second sets of proceedings were issued on 10 May 2013 before detriment 29 and there was no application to amend or introduce detriment 29 into the proceedings within the primary limitation period. There was no evidence it was not reasonably practicable for the claimant to have issued a complaint in relation to detriment 29 within the statutory time limit. Accordingly, the Tribunal finds detriment 29 was not presented before the end of the period of 3 months beginning with the

date of the act or failure to act to which the complaint relates, or, where the act or failure to act is part of a series of similar acts, the last such act or failure to act. The Tribunal was satisfied that it was reasonably practicable for a complaint to be presented before the end of that period of 3 months, and the Tribunal does not have the jurisdiction to consider the complaint which is dismissed.

853. In the alternative, the Tribunal found the detriment objectively disadvantaged the claimant but there was no causal connection with any protected disclosures.

854. It is not disputed John Box was employed by Electoral Reform Services, an independent supplier dealing with ballots and elections within the UK. It is not disputed Electoral Reform Services were employed as an independent advisor by the first respondent who relied upon it for advice. It is not disputed the old Model Election rules had been replaced by New Rules, and should automatically have been subsumed into the existing Rules. It is not credible that John Box applied the old rules requiring the claimant to provide two supports to his nomination in the anticipation that one of the claimant's supports was not valid because he lived out of the constituency. Had the claimant provided two valid supports his nomination may well have been found to be valid, albeit incorrectly so due to the new rules. It is not credible John Box incorrectly referred to the old rules having conspired with the first respondent, who were not experts in elections hence its reliance on an independent supplier.

855. Mr Boyd referred to Julia McMorran's witness statement lodged with the Tribunal and the document attesting her illness. The Tribunal has revisited her statement and given it evidential weight. She described events that were not within the knowledge of the claimant; how she and John Box understood from previous election rounds that in order for an application to be valid it had to be supported by two qualifying members of staff. She explained how the Trust's version of the election rules were outdated and a "honest mistake" had been made by her and John Box, the Trusts constitution which deals with the election process having recently been updated did not reflect the new guidance. The Tribunal accepted Mr Boyd's submission that it was highly implausible Julie McMorran and John Box conspired and took the gamble that the claimant's supporter(s) lived outside the constituency otherwise the claimant would have been elected.

856. The Tribunal finds the claimant did suffer a detriment when John Box mistakenly applied the old Model Election Rules instead of the new ones; however, there is no evidence before the Tribunal that john Box was told to do so, and conspired in the knowledge that the rules he was relying upon no longer had effect. It found the mistaken application of the old Model Election Rules was not on the ground that the claimant had made protected disclosures.

Detriment 30 relevant to first respondent only - 24 July 2013 refusing the Claimant's request of 24 July 2013 to attend a meeting of the Council of Governors that day, acting through Mr Herod who emailed the Claimant confirming the refusal

857. The Tribunal has dealt with Dr Herod's refusal to allow the claimant to attend meetings at Trust premises above, and it found the only reason related to the claimant's exclusion pending completion of the disciplinary investigation. Dr Herod's explanation for his decision was in the same vein as his reasons for excluding the claimant in the first place. The Tribunal accepted his oral evidence on this point as credible. Dr Herod had perceived the claimant in a negative light well before any disclosures had been made, he had come to view the claimant so since his refusal to be screened, his destructive behaviour during the arguments over screening and his communications with the press. Dr Herod was particularly unhappy over the untruthful report made to the press, as he feared the first respondent would be brought into disrepute and this would impact on the trust of patients and their care. On the balance of probabilities, the Tribunal found in relation to Dr Herod that it was not an issue for Dr Herod if employees made protected disclosures, especially those concerning health and safety. He wanted a safely run hospital and in order to achieve this staff were invited to report any problems; such as the midwives who raised complaints about staffing which resulted in no detrimental treatment being taken against them and the use of the executive on-call bleep.

858. Dr Herod's issue with the claimant was how he went about such matters as evidenced by the Tribunal working through many pages of documents included in 11 full lever arch files. Dr Herod was attempting to remedy a dysfunctional situation caused exclusively by the claimant's own making. The Tribunal was satisfied the reasons he gave for his actions, considering the negative view he had of the claimant as reflected in the hand-written notes and post-it stickers, discharged the burden of showing the whistleblowing played no part in his treatment of he claimant consciously or sub-consciously. Dr Herod's refusal to allow the claimant on Trust's premises was not on the grounds that the claimant had made protected disclosure and the Tribunal found on the balance of probabilities, any reservations Dr Herod felt as a result of the claimant making contact with the CQC and "blowing the whistle" did not materially influence his decision in any way taking into account the Feccitt test.

Detriment 31 relevant to first respondent only - 20 September 2013 continuing to directly communicate with the Claimant despite the Claimant specifically requesting that all communication be directed through the BMA due to the stress it was causing him

859. Mr Boyd submitted the claimant had made allegations about some letters sent directly to him, and not others; the Tribunal agreed on the evidence before it. The first respondent's position was that the claimant's BMA representative did not work full-time, this had caused delays in the past and when documents were sent to the claimant in haste they were sent directly and not via the BMA without thought. The Tribunal accepted this explanation as borne out by the contemporaneous emails that passed between the parties. There were a number of occasions when the claimant himself sent correspondence directly and received a response directly, which was to be expected.

860. There was no medical evidence confirming the claimant could not correspond directly; he was working on research for periods covered by his instruction (which

varied at times, for example when he told the first respondent not to communicate with the BMA directly) that the first respondent should not make direct contact. Dr Herod particularly was unhappy with the position adopted by the claimant, who on the one hand indicated an intention to return to working clinical duties and on the other, refused to correspond directly with his the clinical director, his line manager. It is notable the claimant was writing complicated letters, as was the BMA acting on his behalf and sending out letters that, on their face, appeared to have been partly if not wholly drafted by the claimant. The position was confusing to say the least, as evidenced by the party-to-party correspondence. The Tribunal did not find a reasonable worker in the same situation would have taken the same view as the claimant when letters were written to him directly, given the context in which the communications passed between the parties and the BMA.

861. The Tribunal appreciates that the claimant found the process a stressful one; he was involved in a number of lengthy internal procedures that had gone on for some time, partly as a result of his own actions and also due to delays caused by the first respondent for a variety of reasons i.e. Dr Topping's ill mother. The disciplinary process could have well have resulted in his dismissal on the grounds of gross misconduct and this was stressful for him. However, it was not credible that the claimant was caused a detriment when he received letters written to him directly as opposed to copies via the BMA. The Tribunal took the view that the claimant was attempting to dictate process, as reflected in his actions over the disciplinary interview and grievance hearings and it concluded in the alternative, taking into account the factual matrix, had the claimant established detriment 31 it was not done on the ground that he had made protected disclosures.

Detriment 32 relevant to first respondent only - 17 December 2013 bullying the Claimant through Mr Herod's actions – insisting on holding a meeting even when the Claimant was not fit for it and without an OH assessment (see paragraph (4) FBPs of 29 April 2016)

862. The decision was that of Dr Greenhalgh and not Dr Herod and it cannot be the case the claimant was caused a detriment as alleged**.** It is notable the claimant did all that he could within his power to avoid the first respondent obtaining an up-to-date medical report (even to the extent of refusing to authorise a report and/or its release on the basis that he had not been provided with a copy of the letter of instruction to the doctor, and using any argument to avoid meetings and hearings taking place.

Detriment 33 relevant to first respondent only - 12 June 2014 bullying the Claimant through Mr Herod's actions –Mr Herod's actions and words during the meeting (see paragraph (4) FBPs of 29 April 2016)

863. The Tribunal did not accept the claimant was bullied by Dr Herod by his words and actions on the 12 June 2014. The meeting was to discuss the lifting of the claimant's exclusion. The Tribunal has considered all the sets of notes produced by the parties. At the outset the claimant was handed Cheryl Barber's notes of the 5 June 2014 call in which it was alleged "a person" had attempted to gain access to

confidential information about a member of staff by misrepresenting himself as a representative of the NMC. After an adjournment the claimant confirmed he had made the call but stated he had "made no suggestion" the he was from the NMC. It was objectively not a detriment for the claimant to be informed of the allegation and asked about it.

864. Dr Herod's main concern was the claimant's interactions with employees, and motivation for his behaviour concerning screening etc. It is against this background he asked "You described yourself as some sort of crusader fighting for some kind of a battle? Do you still see yourself as that?" The meeting was not an easy one bearing in mind trust and confidence between the claimant had Dr Herod had by this stage been completely eradicated. Dr Herod had formulated a view the claimant's professionalism was undermined by his behaviour, and his priority was not the well-being of patients. The possibility of mediation was discussed, and the matter was left that Dr Herod would liaise with the second respondent and Deanery and the phone call to Cheryl Barber would be investigated.

865. On the balance of probabilities, the Tribunal found there was no evidence the claimant had been "bullied" by Dr Herod as alleged. Dr Herod stood up to the claimant and it may be the claimant incorrectly perceived this as bullying when it was not and in the circumstances no reasonable employee would have held such a view.

Detriment 34 relevant to first respondent only - 28 July 2014 bullying the Claimant through Mr Herod's actions – making untrue allegations, stating that the Claimant had failed to provide an agreement when the Claimant had done so (see paragraph (4) FBPs of 29 April 2016)

866. The claimant is correct that he had provided an agreement by email and Dr Herod insisted he had not. It is interesting to note that when Dr Herod makes this point to the claimant the claimant did not refer to or provide Dr Herod with a copy of the email and thus Dr Herod remained under the misapprehension that the written confirmation to the terms agreed had not been sent. In oral evidence Dr Herod explained that he has expected a hand-written written apology and this was not provided. He did not believe an email was sufficient. The Tribunal was of the view that if this was what Dr Herod was seeking then it should have been made clearer to the claimant; and both were at cross-purpose as to what was required. The Tribunal finds that the attitude of Dr Herod and the claimant during this period reflected the complete breakdown in their relationship; neither trusted the other and Dr Herod understandably sought a promise that the claimant's behaviour would improve and not be repeated. A written letter appropriately couched in apologetic terms would have sufficed, but this was not a step the claimant thought of taking despite Dr Herod making it clear in correspondence a number of times that he wanted a formal written apology.

867. The Tribunal finds bearing in mind the factual matrix that Dr Herod's request was based on his need for assurances as to the claimant's future behaviour; it was not motivated by bullying and was not on the ground that the claimant had made a protected disclosure.

Detriment 35 relevant to first respondent only - 4 August 2014 causing the Claimant stress and anxiety, resulting in him becoming ill and being signed off sick for one week from 4 August 2014 and then from 11 September 2014 until his dismissal

868. This is not a detriment, but the consequences of one and the Tribunal accepts the submission of Mr Boyd in this respect.

Detriment 36 & 37 relevant to first respondent only - 26 August 2014 Bullying the Claimant through Mr Herod's actions- making untrue allegations, stating that the Claimant had failed to provide an agreement when the Claimant had done so (see paragraph (4) FBPs of 29 April 2016)

27 August 2014 bullying the Claimant through Mr Herod's actions – making untrue allegations, stating that the Claimant had agreed to an OH referral during a meeting when the Claimant had not done so (see paragraph (4) FBPs of 29 April 2016)

869. The Tribunal has dealt with this above. It also accepted the evidence on cross-examination from Dr Herod that he believed at the time the claimant had agreed to an OH referral, and he conceded that he may have been mistaken. The Tribunal accepted as indicated earlier, an occupational health report was a sensible step to take before the claimant returned to work, and the fact Dr Herod believed the claimant had agreed to this did not objectively result in any detriment being caused to the claimant, and if one was, Dr Herod's assumption was not motivated by the claimant being a whistleblower. Dr Herod had previously been concerned about the claimant's mental health and the manner in which he acted at work; the medical reports obtained by the first respondent revealed there were no health issues in respect of the claimant carrying out his academic work. It was not inappropriate in the particular circumstances of this case to refer the claimant for an occupational health report to ensure his fitness to work as a clinician.

Detriment 38 relevant to the first respondent only - From 14 November 2014 to 27 February 2015 failing to properly and fairly deal with the Claimant's appeal of the decision to terminate his contract. The Claimant provided comments objecting to his dismissal by letter dated 14 November. The appeal hearing was not arranged until 27 February 2015.

Detriment 39 relevant to the first respondent only - from 23 November 2014 refusing to investigate or deal with the Claimant's grievance of 23 November 2014 – see letter from the Trust to the Claimant of 18 December 2014 "…As such, I am not going to progress your grievance any further."

Detriment 40 relevant to the first respondent only - from 31 December 2014 failing to extend or renew the Claimant's employment causing him detriment to his career path.

Detriment 41 relevant to the first respondent only - 27 February 2015 dismissing the Claimant's appeal against his dismissal

870. With reference to detriment 39 Dr Topping's gave cogent reasons for her decision not to progress the claimant's 23 November 2014 grievance on 18 December 2014. She informed the claimant that claimant could raise his concerns about the disciplinary process at the disciplinary hearing, the panel being best placed to decide this issue; "…Even if I hear the grievance and agree with you…I do not think it would necessarily follow that Mr Herod's decision should be revoked. Even if your grievance were upheld, there may still be allegations of misconduct to consider at the disciplinary hearing." The Tribunal was satisfied the claimant suffered a detriment by the fact that his grievance was not investigated outside the disciplinary investigation and process; however, it did not find Dr Topping's motivation was causally connected to whistleblowing or disability. She believed a separate investigation into the claimant's grievance was duplicate the investigatory work carried out by Dr Greenhalgh, the claimant's grievance was linked to this investigation and it was a better use of time and resources to deal with it in the round. Procedurally, Dr Topping can be criticised, but this does not in itself denote the failure to separately investigate the claimant's grievance was on the grounds that he had made protected disclosures, and the Tribunal found that it was not.

871. A dismissal and unsuccessful appeal can amount to detriment; however the Tribunal was not entirely convinced the claimant truly believed he was dismissed as a result of whistleblowing and/or disability discrimination despite his best endeavours at making out such a case in later communications. The Tribunal has heard a great deal of oral evidence as to the reasons for the claimant's dismissal, and the mistaken belief on the part of the first respondent that he was being made redundant on the expiry of the fixed term contract given the fact that Dr Tattersall's post was not being replaced.

872. The claimant knew he was on a fixed term contact due to expire on 31 December 2014, he has experience of other fixed term contracts in different health authorities, and there was no satisfactory evidence before the Tribunal that an agreement had been reached to the effect that the fixed term would be extended as alleged by the claimant. All the evidence, apart from the claimant's say so, pointed otherwise. The Tribunal has dealt with this in its findings of facts. The Tribunal was satisfied on the evidence it heard and read a trainee doctor on this fixed term contract would ordinarily attain CCT by its conclusion following which they would take part in competitive interviews for positions either as a senior lecturer in a university or clinician within the NHS. It is not disputed the funding for the claimant's post had gone and he was not replaced. The claimant was made aware of this fact, and whilst he may have felt unhappy with the situation he had found himself in (as a result of his own actions which the claimant fails to understand); an employee experienced in the same way the claimant was of numerous fixed term contracts, and looking at the entire circumstances objectively, would not have concluded the respondents' were behaving in such a way so as to cause him a detriment.

873. As a direct result of the claimant's own actions concerning screening and the misconduct events which resulted in a disciplinary process being undertaken, the claimant did not attain CCT given the amount of time he was unable to carry out clinical duties. In this scenario, the claimant who completed his academic training but who had not completed his clinical training would revert to the Deanery, and there were many conversations and meetings to this effect at the time.

874. Mr Boyd submitted only in exceptional circumstances was the default position not followed and the academic contract extended, as it was for Dr Sharp who, according to the second respondent, carried out critical research work that had yet to be completed, unlike the claimant who did not. Dr Hapangama been on maternity leave and as a result her contract was extended. Neither of these exceptions applied to the claimant, who was approached on many occasions by the Deanery concerning the possibility of completing his clinical training elsewhere; the claimant appeared not to progress this option as referred to by communications between the Deanery and second respondent set out above.

875. The Tribunal did not accept the claimant had been subjected to any detriment as alleged at 41; his appeal was dismissed by the first respondent on 27 February 2015 for the sole reason that the claimant was working for the first respondent (who had not recruited him) only because of his contract with the second respondent had come to the end on expiry of the fixed term and completion of his academic training. If the Tribunal is wrong on this point, in the alternative, it would have gone on to find that there was no causal link between the second respondent's dismissal of the claimant on expiry of his fixed term contract and whistleblowing, and in turn, no causal link between the first respondent's dismissal of the claimant and whistleblowing, albeit it obviated a need to take the claimant through messy and confrontational disciplinary hearing, which the Tribunal took the view would have more likely than not, resulted in the claimant's dismissal for his action in misrepresenting himself in order to obtain confidential information about a nurse, coupled the numerous witnesses as to his alleged aggressive and confrontational behaviour towards staff and medical colleagues.

876. In conclusion, the claimant's appeal against dismissal was hopeless in the circumstance of this case given the status of an honorary contract and its inter-relationship with the academic work conducted on behalf of the second respondent; who did not dismiss on the grounds that the claimant had made a protected disclosure.

Detriments alleged against second respondent

877. The claimant alleges 21 detriments in total. In support of the detriments the claimant asserted that the first respondent would have made the second respondent aware of all the protected disclosures he had made against it. This was not put in cross-examination to any of the witneses, and taking into account the voluminous correspondence between the parties, including communications between the first and second respondent, there is no suggestion the second respondent was made aware of any matters that could amount possibly to a protected disclosure until Dr

Herod's telephone conversation with Professor Greer on 17 September 2012 referred to above. The Tribunal found against Dr Herod's interpretation of his handwritten note concluding he had made reference to the CQC with a question mark over whether it concerned occupational health or labour ward staffing, both issues well known to Dr Herod who did not know at the time what issues had been raised by the claimant; he could only but guess There is a suggestion that the claimant made some disclosure to the CQC and as a consequence, the Tribunal is satisfied on the balance of probabilities, Professor Greer was made aware that the claimant could be a whistleblower. The Tribunal did not hear evidence from Professor Greer and it infers from the conversation that took place on the 17 September he would have understood there was a possibility the claimant could be a whistleblower, but like Dr Herod, would not know the content or extent of information disclosed.

878. On this point the Tribunal did not accept Mr Boyd's submission that the second respondent was unaware of the true position until the claimant's letter of appeal sent in October 2014. Mr Boyd argued detriments 1 to 13, and detriment 14 onwards can only apply to the events that post-date 23 October 2014 on the basis that the only protected disclosure made to the second respondent was that of 23 October 2014. The Tribunal found the only protected disclosure made in relation to the second respondent was the appeal to Lee Steward on 23 October 2014. However, it is theoretically possible for the second respondent's managers to have been influenced by its knowledge of the claimant's protected disclosures made in relation to the first respondent, and as a result, caused the claimant detriment on the basis that he was a whistleblowing troublemaker and should be dismissed. As set out in the factual matrix, the claimant at various intervals emailed managers in the second respondent alleging he was a whistleblower and had been treated badly by the first respondent, seeking an intervention that was not forthcoming hence the claimant's allegations of further detriment, for example, Professor Greer's email to the claimant sent on 1 October 2013.

879. Mr Boyd submitted the claimant was at great pains to ensure the first respondent did not breach any of his confidentiality, and the Tribunal accepts that this was the case and further, that the second respondent's witnesses were on the periphery of all that transpired with the first respondent. Professor Alfirevic accepted by the Tribunal as an honest and believable witness for the reasons already stated above, and his evidence that the claimant's disclosures were not on his radar was accepted. The clear majority of the detriments alleged by the claimant relates to the second respondent failing to intervene between him and the second respondent despite the clear indications by the claimant at the time that there was a demarcation between both employers who should not exchange information or discuss him. The claimant's position now is at odds with his exchanges at the time, when he made his position on confidentiality very clear.

Detriments against second respondent only

880. With reference to detriments 1, 2, 4, 5, 7 and 11 the Tribunal found that the employment relationship between the claimant and the first respondent, including

arrangements for the claimant to access patients, was controlled exclusively by the first respondent, whose patients they were, and the second respondent could not legitimately have involved itself in either disciplinary or patient or access issues. The same point applies to all detriments alleged concerning the withholding of the banding payment, subject matter requests, bullying, exclusion, and so on. These matters were not within the power of the second respondent, and as such the claimant could not have suffered a detriment and a reasonable worker would not have taken the view that the position adopted by the second respondent in all of the circumstances was to his disadvantage. As set out within the factual matrix the second respondent's position was made very clear to the claimant, who was advised in no uncertain terms that he should comply with the first respondent's requirements.

881. Mr Boyd submitted that the claimant did not provide evidence to the effect that he had requested the second respondent to become involved in the alternative arrangements for him to have access to patients. There was correspondence on this matter, the Deanery became involved and offered the claimant an alternative arrangement which he did not take up. The Tribunal agreed that it was not within the gift of the second respondent to have taken action so as to allow the claimant access to the first respondent's premises with a view to him carrying out clinical research and live tissue for sampling purposes. The Tribunal found on the evidence before it, the second respondent had no control over the first respondent's premises whatsoever, and in respect of detriment 7, whether or not he was removed from the workplace. The same point applies to detriment 3 and 4. Whether the first respondent complied with Data Protection legislation and produced the information sought by the claimant or not, was not within the power of the second respondent. Mr Mensah submitted the second respondent failed to comply with their obligations to disclose data; no evidence of this has been adduced and it cannot be said the first respondent's Data Protection obligations were shared by the second respondent. With reference to the exclusion this was also outside the power of the second respondent. Professor Greer and Professor Alfirevic emphasised the importance to the claimant of compliance with the first respondent's reasonable management instructions whereupon the exclusion resulting from his refusal to be tested would no longer be in place; this was the objective for the second respondent.

882. With reference to the withholding the claimant's banding supplement, the Tribunal is satisfied the only reason for this was that the claimant was not on call and therefore not contractually eligible to be paid the banding supplement; there was no causal connection between the second respondent's decision and whistleblowing. It goes without saying that theoretically a reduction in pay can result in a detriment being suffered as does being removed from the workplace, but this was not the case for Dr Tattersall given the specific circumstances .

Detriment 6

883. With reference to detriment 6 the Tribunal found the first and second respondent did not liaise with a view to removing the claimant from his position in September 2012. The note has been explored by the Tribunal above. The fact is the claimant's employment continued until 31 December 2014 despite there being ample

opportunity for a hard line to have been taken of his behaviour towards staff, refusal to be tested and misrepresentation, which may well have resulted in dismissal much earlier than 31 December 2014 with another employer.

Detriment 8 relevant to the second respondent only - 17 December 2012 making an inaccurate referral about the Claimant to the GMC

884. It was submitted by Mr Mensah that "much that was written by the Trust and signed by Professor Greer was inaccurate" and that Professor Graham "appeared" to accept that the referral misrepresented the stance of the Deanery and Professor Greer was aware of this. Mr Mensah does not clarify what Professor Graham admitted was misrepresented and the Tribunal does not accept that this admission was made out as submitted on behalf of the claimant. Information was held by the first respondent on which the second respondent was reliant, it was always on the periphery of events looking in. Even if it was the case that the referral to the GMC was inaccurate (which the Tribunal does not accept) fault does not lie with the second respondent. On the issue of causation, the Tribunal finds there is no causal connection with whistleblowing and the referral to the GMC, whether inaccurate or not, was not made on the grounds that the claimant had raised protected disclosures for the reasons exhaustively explored within this judgment.

Detriment 9 relevant to the second respondent only – 8 January – 13 February 2013 Failing to provide the Claimant with a place of work to undertake his academic work in a timely manner and failing to make arrangements to allow the Claimant to return to work despite the report of the University's OH doctor stating on 8 January 2013 that the Claimant was fit for work. Arrangements were required to be made, as the University leased the University Department in the Hospital from the Trust and the Trust refused to allow the Claimant to access the University Department

885. The second respondent had taken steps to arrange for the claimant's return to work, and the Tribunal took the view that whilst an earlier return would have been preferable, the delay was not causally connected to whistleblowing but the practical steps of finding the claimant an office etc within the University.

Detriment 10 relevant to the second respondent only - 13 February 2013 advising other academics not to collaborate with the Claimant during a meeting between the Claimant and Professor Alfirevic on 13 February 2013, Professor Alfirevic informed the Claimant that he was advising other academics within the Department and University not to work with the Claimant. He told the Claimant that he would not wish the other academics to be involved in the Claimant's problems as this would only cause the other academics problems they could do without. The Claimant cannot be certain by what means this information was delivered by Professor Alfirevic to the other academics.

886. Mr Mensah submitted Professor Alfirevic provided a frank and straightforward view to the claimant at the time. The Tribunal accepted Professor Alfirevic was a

frank and straightforward witness, and it is satisfied having heard Professor Alfirevic on this issue he did not have the discussion as alleged by the claimant in detriment 10. As indicated earlier by the Tribunal it accepted Professor Alfirevic was an honest and credible witness; Mr Boyd in submissions described him as a truthful historian and the Tribunal agreed. It preferred Dr Alfirevic's evidence to that of the claimant on a number of issues, having found the claimant was an inaccurate historian and on occasions, intentionally so. As indicated in its findings of facts, the Tribunal found Professor Alfirevic was concerned with the claimant succeeding in his academic endeavours, this would then be reflected in the department, as indeed the claimant's failure could adversely affect the department.

887. It is notable the Deanery became involved in finding alternatives for the claimant during this period, despite the contemporaneous independent evidence to this effect, this was disputed by the claimant who failed to take part in any meetings and did not make any suggestions as to alternative venues to conduct his work. On the claimant's case, which the Tribunal did not accept on the evidence before it, his stance was not logical, given he had an opportunity to continue with his academic and clinical training where presumable other academics had not been warned off due to the problems he was causing at work.

Detriment 11 - From 13 February 2013 failing to comply with and/or ensure that the Trust complied with the decision of the Exclusion Appeal Panel which determined that the Claimant's exclusion should be lifted in February 2013 –
…The Claimant believes the University owed a duty of care to him as an employee to act in good faith and to ensure the decision about lifting his exclusion was upheld. The University failed to intervene when his exclusion was not lifted. The Claimant believes the responsibility to do this lay with senior employees of the University including Professor Alfirevic and Professor Greer.

888. The Tribunal repeats its findings made above that it was not within the second respondent's gift. Mr Mensah submitted that Professor Greer as head of faculty could have taken action; the Tribunal did not agree. There was no evidence before it to the effect that Professor Greer could have ensured the first respondent complied with the Exclusion Panel decision in the way the claimant wanted it to, as opposed to the logical and straight-forward decision taken by its Chief Executive to wait until the disciplinary investigation had taken place before lifting the exclusion. Even had the claimant proven the second respondent had failed as alleged, the Tribunal would have gone on to find there was no causal connection with whistleblowing.

889. Mr Mensah submitted that given the claimant's position at the time it was very likely he would become unemployed following termination of the fixed term contract. This was not supported by the contemporaneous evidence before the Tribunal, and the fact is the claimant was and remains employed. The Tribunal repeats its observations about the illogical action of the claim in respect of alternatives discussed with him, which serves to undermine any detriment claimed.

Detriment 12 relevant to second respondent only – 19 July 2013 Making untrue allegations that the Claimant had been asked to attend a meeting with Professor Alfirevic on the morning of 19 July 2013, that the Claimant was taking more annual leave than he was entitled to and alleging he had not properly followed holiday request procedure, in a letter from Mr Robin Harrison to the Claimant

890. For the reasons already stated the Tribunal preferred Professor Alfirevic's evidence on this point that this had not been said.

Detriment 13 relevant to second respondent only - From 12 August 2013 failing to take action or intervene when the Claimant was forced to attend meetings with the Trust on days which the University had agreed that he did not need to work (for instance, after the Claimant requested that the University intervene "…to ensure [he] is treated fairly by the Trust…."in an email to Professor Ian Greer on 12 August 2013, and in an email to Professor Alfirevic on 13 December 2013)

891. It is clear from the evidence the second respondent had no domain over meeting dates offered to the claimant by the first respondent; it was apparent to the Tribunal the claimant was trying to play one against the other when in reality, all he need have done was attend the meetings as arranged on those days when the claimant was not on call and not eligible for zero hours. It was not for the second respondent to intervene on behalf of the claimant, who had been advised that it was in his best interests to attend the meetings and hearings arranged by the first respondent.

Detriment 14 relevant to second respondent only - From 14 September 2013 failing to support the Claimant as a whistleblower in accordance with its policies and/or accepted practice in publicly funded institutions and/or government guidelines.

892. No satisfactory evidence was given by the claimant to establish this assertion, and the Tribunal has difficulty understanding how this applies to the second respondent. It would not have been a logical possibility for the second respondent to have supported the claimant from 14 September 2013 as alleged. The first possible indication Professor Greer was given of the claimant's CQC contact was 17 September 2013 and the claimant undermines his case when he claims he should have been supported as a whistleblower from the day he made the anonymous telephone call to the CQC. The Tribunal agreed with Mr Boyd's submission that the claimant has failed to properly particularise this allegation as it is not clear what the second respondent was asked to do, and what it failed to do. The Tribunal was not taken to policies, accepted practice in publicly funded institutions or the government guidelines relied upon.

Detriment 15 relevant to second respondent only - from 14 September 2013 failing to provide academic opportunities, collaborations and support in a manner which was provided to other employees of the University

893. In relation to detriment 15 the claimant compares himself with Dr Sharp, who was supported by Professor Alfirevic when his contract was extended. The Tribunal heard credible oral evidence from Professor Alfirevic on this point, which the claimant was unable to undermine by any evidence. Dr Sharp worked on a substantial and expensive national project funded by the Medical Council that was of key important to the second respondent and its reputation, and at the end of the 4-year fixed term contract was unfinished. The claimant had his own projects and was not involved in that of Dr Sharp, who was integral to it. Professor Alfirevic explained the funded project cost £1m and it was important for Dr Sharp to continue with it in order not to risk the non- delivery of the project. The extension was not within the second respondent's gift and required Professor Alfirevic to approach the University and Deanery; it took time before the 6-month extension as granted and this factor, revealed extensions to fixed-term contracts were not automatic, and the claimant's evidence to this effect was not supported by any evidence and not found to be credible.

894. Mr Boyd submitted that at the time Dr Sharp worked on the national project there were no complaints by the claimant; he was concerned with other diverse interests which did not continue beyond the expiry of the fixed term contract. The Tribunal agreed this was the case on the evidence before it, and Professor's Afirevic's expectation, had the claimant not been excluded (which the Tribunal found was entirely of the claimant's own making) was that he would have completed both his academic and clinical training, gain his CCT and apply for vacant posts on a competitive basis.

895. The claimant in oral evidence stated such a post would have been created for him; this was not the case according to Dr Topping and Professor Alfirevic whose evidence the Tribunal preferred when compared to that of the claimant's that there was not always a post, and a CCT was needed to apply for a vacancy in open competition.

896. The Tribunal accepted Professor Alfirevic's evidence that there was no similar basis to that of Dr Sharp on which the University could have extended the claimant's contract, and the default position over the past 15-20 years was for employment to end when the fixed term contract expired. Had the claimant gained his CCT as was the expectation when he commenced the fixed term period, he would then have applied for vacancies, but as the claimant had not achieved this qualification this was not a course open to him unlike Dr Weeks, who had and whose contract was extended for a short period while he waited to take up another position. Instead, at the end of the 4-year period without a CCT the expectation was that the claimant would return to the Deanery for another clinical placement. The Deanery could have made the necessary arrangements but the claimant did not engage, refused to cooperate with Professor Hayden and failed to attend meetings.

Detriment 16 relevant to second respondent only - 29 September 2014 to 31 December 2014 Failing to comply the with the University's redundancy policy

897. It was accepted by Mr Mensah that the claimant as not redundant and as a consequence the claimant cannot have suffered detriment 16.

Detriment 17 relevant to second respondent only - 13 October 2014 to December 2014 delaying dealing with the Claimant's dismissal appeal. The appeal was submitted on 13 October and a hearing date was set for 17 December 2014. A delay of 2 months meant the hearing would be held just 2 weeks before the proposed dismissal date

898. It was accepted there had been a delay. However, there was no evidence the claimant was caused a detriment by this as the delay made no difference to the outcome.

Detriment 18 relevant to second respondent only - 24 October 2014 attempting to use a biased and non-independent appeal panel, including Mrs Costello and Professor Greer who had previously been involved in the Claimant's matter

899. The Tribunal did not accept the second respondent's decision to include Ms Costello and Professor Greer amounted to a detriment; it was the first attempt to constitute a panel which was changed following the claimant's objections. There was no satisfactory evidence the first panel constituted was motivated by the claimant's whistleblowing. In any event, the claimant was not caused a detriment; as both members were removed following representations made on his behalf of the claimant by the BMA. A reasonable employee would not have taken the view that he was disadvantaged in any way; to the contrary, the panel was changed and this was presumably to the claimant's advantage because he accepted the new panel.

Detriment 19 relevant to second respondent only - 19 December 2014 dismissing the Claimant's appeal against his dismissal

900. With reference to detriments 19, 20 and 21 the Tribunal has dealt with this point above. It was submitted by Mr Mensah the claimant never stood a chance, and that may well have been the case given the fact this fixed term contract had come to an end. The reference by the second respondent to a redundancy was less than helpful; it was incorrect in law and confused the situation. It is difficult for the Tribunal to understand the submission that as the disclosures were not "probed in any significant tor meaningful way this was evidence the panel had no concern for the issues the claimant was raising in this regard" given the second respondent's position that the claimant had completed his academic training and the contract had naturally come to an end as agreed between the parties 4 years earlier.

901. In conclusion, had the Tribunal accepted the detriments outlined above in respect of both respondents, had been suffered, it would have gone on to find they did they did not occur on the ground that the claimant made the protected disclosure(s) referred to above.

Detriment 20 – 31 December 2014 failing to renew or extend the Claimant's employment with the University

Detriment 21 - From 31 December 2014 causing detriment to the Claimant's academic career by failing to renew or extend his employment with the University, resulting in him becoming de-skilled, restricting his future opportunities

902. Mr Mensah submitted the second respondent's failure to renew or extend the claimant's contract was "entirely" due to him having made protected disclosures particularly regarding patient safety in the first respondent. The Tribunal did not find any causal nexus as alleged; the contract was not extended because the claimant's training had completed and unlikely Dr Sharp, he was not involved in any ongoing key research that necessitated such as extension.

903. Mr Mensah submitted clinical lecturer contracts had "always" been renewed for as long as necessary when requested by post-holders; this was not the evidence before the Tribunal. The second respondent did not as a rule renew fixed term contract without good reason i.e. pivotal research benefitting the department or maternity leave. It did not extend contracts merely at the request of individual employees for as long as necessary or at all. The Tribunal had dealt with a similar complaint earlier and repeats its observations.

904. If the claimant was deskilled academically as alleged the Tribunal took the view that he should look to himself for the reason why the events set out above took place, and there was no causal connection between the claimant making protected disclosures and the factual matrix in this case. No doubt the claimant was aware given the number of fixed term contracts he had worked under across the country, of the paucity of roles in academic obstetrics if that was indeed the case. It makes his behaviour all the more incomprehensible to the Tribunal; even down to refusing offers made by the Deanery in order that his clinical career could get back on track.

Disability Discrimination (against the First Respondent only)

905. It is admitted the Claimant had a disability, namely depression, throughout the period of his employment with the First Respondent, namely 1st January 2011-31st December 2014.

906. With reference to the first issue, namely, did anyone from within the First Respondent have knowledge of the Claimant's disability, the Tribunal found it had. Dr Herod was aware early in the claimant's employment the claimant had a history of depression which was under control. Mr Mensah submitted that the claimant was appeared to be a "charming, bright and logical man" according to Liz Cross and Gail Naylor, which conflicts with the other behaviours he exhibited and these were symptomatic of his disability. The claimant relies on changes to his behaviour, stress, anxiety and irritability arguing before this Tribunal that those changes are because of his depression into which he had relapsed at the time. The evidence as to the claimant's "relapse" is less than clear. The claimant was less than forthcoming

to the first respondent about his medical condition, giving the impression that it was a past depression and he was well enough to work. Dr Craig, consultant psychiatrist, reviewed the claimant on 6 June 2014. the report reflected the claimant had "assured" him his mood had been **"pretty normal for 12-months** [my emphasis] …his conflict continues with the Women's Hospital, the BMA are involved...Mark denies that he is feeling it stressful…With regard to early signs, when Mark becomes low in mood he becomes significantly anxious, irritable and is likely to be drawn into conflict with the people around him." This was accepted by the claimant who authorised the release of the medical report prepared by Dr Craig. The medical evidence obtained earlier reflected a similar view of the claimant's health during the relevant period.

907. Mr Boyd accepts the first respondent possessed knowledge of the claimant's disability by December 2012, and its knowledge before that was that the claimant had depression in the past which was under control.

908. The claimant relies on the report of Dr Ramalinghan dated 17 December 2013 confirming he was suffering from depression the day of the hearing with Dr Greenhalgh, in addition to the reports of Dr Tabinit and Dr Bothra. He had been prescribed anti-depressants since 2002 at various dosages, and submits Dr Herod was aware of his disability since 2011. The Tribunal found Dr Greenhalgh did not posses actual or constructive knowledge that the claimant was suffering from depression at the 17 December 2013 investigation hearing. In order to constitute knowledge Dr Greenhalgh must have actual or constructive knowledge that the claimant had a mental impairment, which had a long-term and adverse effect on his ability to carry out day-to-day duties. To be clear, there was no evidence before the Tribunal that Dr Greenhalgh (or any other person in the first and second respondent) was made aware of any long-term adverse effect on day-to-day duties, even taking into account the possibility of a deduced effect. Knowledge of past depression was insufficient to establish the claimant was experiencing a depression at the time which fell under section 6 EqA. Dr Greenhalgh thought there may be a mental health issue requiring medical investigation hence the referral to occupational health for a report that never took place due to the claimant's procrastination, but she could not reasonably have known the claimant was taking medication on the basis that (a) he did not tell anybody at the time, and (b) refused to be medically examined.

909. The fact the claimant behaved badly in the workplace would not ordinarily lead an employer to think an employee is disabled, and the medical evidence before Dr Greenhalgh (on the basis that she had not received Dr Tabanit and Dr Bothra's reports until 7 February 2014 after the 17 December 2013 investigation meeting) was provided by Dr Wilson who confirmed the claimant was "currently in remission" his mental health had been stable since 2009 and before that he had experienced "intermittent episodes of mild and moderate depression since 2002." Dr Wilson linked the claimant's behaviour with his personality and confirmed, in his view, the claimant would not be covered by S.6 EqA. Dr Wilson's report had been agreed by the claimant, who would not otherwise have authorised its release, and as the claimant refused to attend further occupational health examinations at the time, it was not unreasonable for the first respondent and Dr Greenhalgh to not consider the

claimant in the terms of a disabled employee. It is notable after the event that the MED3's produced by the claimant fell short of coming under the definition of disability.

910. The Tribunal accepts Mr Mensah's submission that the claimant explained his health and illness to Professor Nielsen in the summer of 2010, and Angela O'Brien in her 5 March 2012 email to Dr Topping referred to the claimant's previous mental health issues. In short, despite the medical evidence being far from clear as to whether the claimant was suffering from depression or not (as opposed to a past depression) the first and second respondent suspected the claimant have mental health issues during much of the relevant period but had no medical information to base this on, either from the claimant himself or medical experts.

911. With reference to the second issue, namely, has the claim had been lodged within the relevant time limit, the Tribunal found that it was the first reference to disability discrimination having been made in the Scott Schedule dated 5 March 2013. It follows that those acts occurring on or after 6 December 2012 were lodged within the statutory time limit of 3-months and acts earlier than this were not. The first claim form received 21 June 2012 made no reference to disability discrimination. There is a reference to discrimination but that confusingly related to union victimisation and detriment for asserting a statutory right which were not issues before the Tribunal, and later on age as a result of an amendment to/clarification of the claim.

912. S.123(1)(a) EqA sets out the time limit for presenting a disability discrimination complaint. Tribunals have a discretion to hear out of time discrimination cases where they consider it is "just and equitable" to so do – S.2123(1)(b) EqA, provided that it is presented within such other period as the Tribunal thinks just and equitable – S.123(1)(b). The burden lies with the claimant to convince the Tribunal it is just and equitable to extend time. The exercise of discretion is "the exception rather than the rule" – Robertson. The claimant had not led lead evidence as to why discretion should be exercised in his favour speaking to the checklist set out in S.33 of the Limitation Act as modified by the EAT in British Coal Corporation v Keeble cited above. The fact the claimant was in a position to issue the earlier set of proceedings and prepare and submit the Scott Schedule goes against him in the balancing exercise. Taking into account the balance of prejudice between the parties and the length of time in 2012 between the issuing of the first and second form ET1, on balance the Tribunal decided it was not just and equitable to extend time in the claimant's favour who would not have suffered prejudice in any event given the fact the Tribunal went on to consider all of the disability discrimination allegations, finding they were not well-founded.

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913. On the issue as to whether not there was a continuing act, the Tribunal found the claimant not to have been subjected to disability discrimination as alleged, and there was no continuing act on the balance of probabilities.

914. In conclusion, the alleged acts of disability discrimination occurring before or on 6 December 2012 were not lodged within the statutory time limit of 3-months, the

claim was not presented within such other period as the Tribunal concludes it is not just and equitable to extend time, and the Tribunal does not have the jurisdiction to consider those complaints which are dismissed.

915. With reference to the third issue, namely, did the First Respondent discriminate against the Claimant on the grounds of his disability as outlined below, contrary to Section 13 of the Equality Act (direct discrimination); (i.e., was the Claimant treated less favourably than hypothetical non-disabled Clinical Lecturer in Obstetrics/Gynaecology), the Tribunal found the claimant's hypothetical comparator would not have been treated any differently to the claimant in the same factual situation as that set out above.

916. With reference to the fourth issue, namely, under Section 15 of the Equality Act (discrimination arising from disability); did the Claimant act in an anxious and irritable manner as a consequence of his disability, the Tribunal found that he did but his behaviour was not limited to this and his behaviour cannot at the material times be classified as behaviour which was anxious/irritable. The First Respondent did not treat the Claimant unfavourably as a consequence of the Claimants anxious/irritable behaviour. In oral evidence under cross-examination Dr Herod described the claimant's behaviour as "brow-beating…intimidation…aggressive" and similar descriptions of the claimant's bad behaviour were reported by a number of staff, who the Tribunal found had not conspired to do so.

917. Mr Mensah reminded the Tribunal of the tape recording as evidence of the claimant's stress, anxiety and irritability and hence his disability. As indicated above, the Tribunal took the view the tape recording revealed in addition, the claimant's aggressive behaviour that went well beyond irritability. Even had it found the claimant's behaviour was limited to this (which for the avoidance of doubt it did not) the Tribunal did not accept there was any causal connection between the claimant's exclusion (taking into account the explanation given by Dr Herod for the continued exclusions) and the claimant's disability. Disability did not have an influence on Dr Herod's mental processes; his main concern was the likelihood of the claimant coming into contact with witnesses and the problems this could cause. The Tribunal looked to see whether or not there was a sub-conscious motivation on the part of Dr Herod to subject the claimant to a detriment when he excluded him, concluding there was not. It is notable Dr Herod, early in the claimant's employment, had been very supportive in the knowledge that the claimant had suffered from depression in the past. The claimant was excluded because of his behaviour which went well beyond anxiety and irritability, a behaviour borne from the claimant's personality in accordance with the expert medical evidence, and he was not excluded on the grounds of his disability. Dr Herod genuinely believed the claimant would interfere with witnesses, and he had a logical basis for holding such a belief given the claimant's attempt at misrepresenting himself to obtain confidential information about a nurse in order to raise a formal complaint about her to the NMC.

918. Mr Mensah submitted the first respondent's refusal to comply with the appeal panel recommendation was a result of the manifestations of the claimant's disability. The Tribunal explored the Chief Executive's motivation for acting as she did, looking

to see whether there was any subconscious link to the claimant's disability and concluding there was not. Kathryn Thompson provided an explanation untainted by disability discrimination to account for the decision she made, and her understanding at the time was not that the claimant's actions towards staff was a "manifestation" of his disability. There was no evidence before the Tribunal that the "manifestations of the claimant's disability" had been demonstrated prior to the exclusions as submitted by Mr Mensah. The Tribunal found the "manifestations" went well beyond those now relied upon by the claimant. Had his behaviour consisted only of stress, anxiety and irritability the facts of this case, and the Tribunal's findings, may have been different.

919. If the Tribunal is wrong on this point, in the alternative, it would have gone on to find the First Respondent has shown, on the balance of probabilities, that its treatment of the claimant was a proportionate means of achieving a legitimate aim. The first respondent contends that the legitimate aim was the need to have regard for the safety and welfare of its employees, patients and the Claimant himself. Mr Mensah submitted the first respondent's actions were disproportionate. The Tribunal did not agree taking into account the effect the claimant's bad behaviour had on his colleagues (as described above) and the organisation. The claimant was not at his worse "belligerent" with a "poor standard of conduct." He was a doctor in a position of authority and power over others, unable to deal with staff that stood up to him. The claimant was confrontational, aggressive, threatening and behaved in a wholly unreasonable way inappropriate for a doctor who had a considerable amount of power and by his very title, demanded respect of those whom the claimant considered to be beneath him. The claimant was a difficult employee, out of control with a dysfunctional relationship within his department, his line manager Dr Herod, and work colleagues.

920. Mr Mensah submitted there was no threat of well being to other staff members, the Tribunal did not agree. Individuals reported on how their wellbeing had been threatened even to the extent of affecting their home life, and the claimant was not in a position to gainsay this. It was evident to the Tribunal the claimant failed to understand, even at this liability hearing, the effect of his behaviour towards others within a working environment where it is imperative positive relationships are upheld and not undermined by aggression and threats to individuals.

921. It was also submitted by Mr Mensah there was no realistic or cogent argument that patients needed to be protected from the claimant. The Tribunal did not agree; the claimant wrote to the first respondent pointing out a return to EPP clinical duties would threaten the health and safety of patients. The Tribunal wish to make it clear there was no evidence before to the effect that the claimant did not directly threaten patients in any way; the fact he refused to be tested was a patient health and safety issue. It was the first respondent's view that without valid test results patients did need to be protected from the claimant and this was also reflected by the claimant's protected disclosures that referred to patient safety in the same breath as the first respondent's failure to deal with and have a proper procedure dealing with pre-employment health screening checks. It is notable when the Liverpool Echo became involved the issue was patient safety and a doctor with HIV working clinically without pre-employment checks having been carried out.

Section 26 of the Equality Act (harassment);

922. With reference to the first issue, namely, did the First Respondent engage in unwanted conduct related to the Claimants disability the Tribunal found that it had not. The conduct as set out within the factual matrix did not have the purpose or effect of violating the Claimants dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant. The first respondent was attempting to manage an unusual and difficult situation, not always acting as effectively as it could have, partly caused by the number of personnel involved when on occasion it appeared to the Tribunal the right hand did not always know what the left hand was doing. The Tribunal accepts the claimant was upset at times, for example the incident when he was asked to leave the midwives station in the maternity ward and the referral to the GMC, but the first respondent's actions in this respect were not causally connected to his disability the Tribunal having considered the conscious and unconscious motivations of the decision makers as set out above. In short, the purpose was not to violate the claimant's dignity or create an intimidating etc environment for the claimant, but to manage an unmanageable doctor, his exclusion and the disciplinary process which included the statutory requirement to report to the GMC.

Section 27 of the Equality Act (victimisation)

923. With reference to the first issue, do the Claimants alleged protected acts numbered 1 to 6, satisfy the requirements of s.27(2), the Tribunal held that they did with the exception of alleged protected acts 1, 2 and 3 in which there was no reference to disability discrimination or EqA victimisation.

21 June 2012 letter: alleged protected act 1

924. On the 21 June 2012 the claimant complained that the first respondent's communications with the University was unreasonable and potentially an act of victimisation, breach of contract and unlawful" and the attempt at changing y hours of work "unreasonable and potentially an act of victimisation, breach of contract and unlawful." The 21 June 2012 letter from the claimant was not a protected act under S.27 EqA; the reference to victimisation was unspecified and not linked to disability discrimination or any EqA act on any interpretation.

Employment Tribunal proceedings: 2405298/2012 alleged protected act 2

925. The claimant's claim does not expressly or impliedly refer to any complaints under the EqA: Discrimination and/or victimisation due to the claimant "requesting union input into this procedure and for attempting to exert statutory rights" and unlawful deduction of wages cannot be interpreted as amounting to an Equality Act claim.

926. There was no suggestion anywhere in the claim form to whistleblowing or disability discrimination; it is insufficient for proceedings merely to have been issued,

they must have been brought under the EqA impliedly if not expressly. In accordance with S.27 the acts that are protected by the victimisation provisions are set out in S.27(2). They are:

-bringing proceedings under the EqA — S.27(2)(a) Bringing any legal proceedings under the EqA will fall within S.27(2)(a) and therefore be protected.

-giving evidence or information in connection with proceedings under the EqA — S.27(2)(b)

-doing any other thing for the purposes of or in connection with the EqA — S.27(2)(c)

-making an allegation (whether or not express) that A or another person has contravened the EqA

927. None of the provisions set out above relate to the claimant until 17 December 2012, when the first reference was made not to disability discrimination but to age.

928. The Tribunal concluded the protected acts relied upon by the claimant (letter 21 June 2012 to Angela O'Brien and Case Number 2405298-2012) were not protected acts for the purpose of S27(1) EqA. The claimant had not brought proceedings under the EqA for disability discrimination. He cited age discrimination and victimisation due to union input being requested for the first time in a letter dated 17 December 2012 and the Tribunal accepts by this date it appears Case Number 2405298-2012 following the amendment was a protected act under s.27 of the EqA as at 17 December 2012. It is notable the claimant did not suggest he was victimised and/or treated less favourably on the grounds of disability discrimination. If the Tribunal is wrong on this point, and the claimant can rely on the reference to age discrimination it would have gone on to find the complaint was received out of time for the reasons set out in the conclusion below. The victimisation alleged in the letter of 21 June 2012 did not refer to any allegation of disability discrimination or victimisation under the EqA.

<u>9 July 2012 email claimant to Dr Topping: protected act 3</u>

929. The claimant reference to "unfair and discriminatory behaviour…" was to a grievance amounting to precisely that. At no stage did the claimant make reference to the EqA or disability discrimination even in the widest terms, and there was nothing to put the first respondent on notice that this was what he meant. The claimant, a few weeks earlier, issued the first set of Tribunal proceedings alleging discrimination and victimisation in relation to statutory rights and union input only; there was no suggestion the proceedings involved disability discrimination or the equality legislation even in the broadest sense. The Tribunal took the view the claimant had not focused his mind specifically on any provision of EqA at the time. The reference to unfair and discriminatory behaviour is to what the claimant perceived to have been the first respondent's acts of general unfairness rather than any detrimental action based on his disability. A grievance by itself cannot amount to a protected act and does not fall under the provisions are set out in S.27(2) EqA. The

claimant is well educated and articulate, he knew sufficient law to bring a claim of victimisation relating to union input and/or asserting statutory right and there is no basis for the Tribunal to find the acts relied upon by the claimant to establish his victimisation complaint were protected. Further, none of the matters raised in his written and oral communications and grievances indicated that he was making a complaint or allegation that the EqA had been contravened in any way.

930. With reference to the second issue, namely, did the First Respondent subject the Claimant to a detriment because he had done or might do a protected act or because the Respondent believed that the Claimant had done or might do such an act, the Tribunal found that it had not. It accepts Mr Mensah's submission that it was within the contemplation of the first respondent that they would face legal action by 21 June 2012, but the Tribunal finds this was not in relation to disability EqA discrimination/victimisation. In the alternative, the Tribunal does not accept the first respondent was motivated by the claimant alleging discrimination to act as it did.

931. On the issue of time limits the Tribunal does not accept there was a continuing act. The allegation of victimisation was received as an amendment to the second claim received on 10 May 2013 when the claimant provided further particulars in response to the case management order of 3 December 2015 on 21 March 2016. As indicated earlier the position relating to the claimant's pleadings is confusing to say the least, and the Tribunal has not received guidance or submissions from the parties on this. In the details at paragraph 5 of case number 2405561/2013 there was no reference to disability victimisation.

932. There was an earlier reference to victimisation in claim number 2402518/2015 but this referred to victimisation due to "requesting union input" as confirmed in the Case Management Order dated 26 November 2012. The Case Management Order dated 6 February 2013 does not refer to a disability victimisation complaint. The Case Management Order dated 6 November 2013 does not, and it appears from the vast array of pleadings, Further and Better Particulars and Scott Schedules before the Tribunal that on the face of it, the disability victimisation complaint now before the Tribunal was first referred to as a head of claim on 21 March 2013 when no details were provided.

933. Mr Mensah referred the Tribunal to Hendricks cited above, which the Tribunal has considered. The Tribunal finds that the first three detriments alleged are out of time, there was not a continuing act three-months having expired between each allegation. The last detriment was within time and The Tribunal has the jurisdiction to consider it. Tribunals have a discretion to hear out of time discrimination cases where they consider it is "just and equitable" to so do – S.2123(1)(b) EqA, provided that it is presented within such other period as the Tribunal thinks just and equitable – S.123(1)(b). The burden lies with the claimant to convince the Tribunal it is just and equitable to extend time. The exercise of discretion is "the exception rather than the rule" – Robertson.

934. The claimant had not led lead evidence as to why discretion should be exercised in his favour speaking to the checklist set out in S.33 of the Limitation Act

as modified by the EAT in British Coal Corporation v Keeble cited above. Notwithstanding the complicated and lengthy factual matrix in this case, the claimant has not discharged the burden of convincing the Tribunal to use its discretion and extend time. No reason was given by the claimant as to why he had failed to raise the victimisation complaint earlier, especially given the fact that Scott Schedules and Further Particulars had been received by the Tribunal, and case management discussions conducted at which no reference was made to this victimisation complaint until 21 March 2013. Taking into account the balance of prejudice between the parties it decided it was not just and equitable to extend time in the claimant's favour who would not have suffered prejudice in any event given the fact the Tribunal went on to consider all of the victimisation allegations, finding they were not well-founded.

935. The Tribunal concludes it was not just and equitable to extend time and it does not have the jurisdiction to consider the first three alleged detriments dated 16 March 2012, 14 September 2012 and 27 November 2012.

936. If the Tribunal is wrong on the time limit point and it had the jurisdiction to consider the detriments alleged to have taken place on 16 March 2012, 14 September 2012 and 27 November 2012, in the alternative the Tribunal would have concluded the claimant had not been caused the detriments as alleged, and if he had, there was no causal connection with the protected acts for all of the reasons already set out above relating to the first respondent's management of the claimant.

937. In short, the Tribunal found Michelle Turner had not contacted the GMC after confirming to the claimant this would not be done (detriment 1), the claimant had not been excluded from the Trust due to him demonstrating behaviours that explicitly referenced stress, anxiety and irritability the manifestations of the claimant's mental health state (detriment 2 &3) for the reasons already stated. The Tribunal accepts the first respondent's "failure" to comply with the Exclusion Appeal Panel's recommendations to lift the claimant's exclusion could amount to a detriment, however it did not accept this was causally linked to the claimant's disability or the fact he had made a number protected acts alleging disability discrimination.

Unfair Dismissal

938. It is admitted that the Claimant was dismissed. The issue for the Tribunal was whether the claimant's disclosures were the reason or principal reason for the dismissal identifying the set of facts or beliefs known to the employer(s) at the time which caused the employer to dismiss. It is not relevant whether the employer believed the disclosures would not qualify as protected disclosures at the time, and it is irrelevant whether the first and second respondent believed the information given by the claimant tended to show one of the six specified failings i.e. breach of a legal obligation and that a patient's health and safety is or is likely to be endangered – only the reasonable belief of the claimant is relevant in this regard and that has been taken into account by the Tribunal above.

939. It is accepted that expiry of a fixed term contract is not one of the potentially fair reasons for dismissal, it is a catch all category. Section 98(1)(b) ERA covers dismissal for 'some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held'. This includes the expiry of a fixed term contract as a potentially fair dismissal which an employer would be justified in terminating the services of an employee'. The SOSR must be of a kind such as to justify the dismissal of *an employee holding the job in question* providing it is a *substantial* reason and not frivolous or trivial; and not be based on an inadmissible reason such as disability. Once the employer has established that the substantial reason for dismissal was a potentially fair one the Tribunal must decide the fairness of the dismissal by asking whether the decision to dismiss fell within the range of reasonable responses that a reasonable employer might adopt. This may involve consideration of matters such as whether the employee was consulted, warned and given a hearing, and/or whether the employer searched for suitable alternative employment.

940. The first and second respondent have discharged the burden of establishing SOSR potentially as the fair reason for dismissal, given that the fixed term contract was due to and had expired. With reference to the Tribunal's overall assessment of the reasonableness it found the first and second respondent exercised judgment when it came to dismiss the claimant having given him sufficient notice of its intention to dismiss, despite there being no need to take any positive steps as non-renewal can terminate the employment on the terms of the contract. The ACAS Code of Practice on Disciplinary and Grievance Procedures specifically does not apply to dismissal on the non-renewal of a fixed term contract, however the claimant was given the right to submit appeals in respect of each dismissal and take part in a dialogue concerning it. In respect of the second respondent the claimant was placed on the re-deployment register from 29 September 2014 where he remained until termination of employment.

941. There was an issue concerning the delay by both respondent's in hearing the claimant's appeal, which was not possible to arrange earlier than 17 December 2014 given the availability of Professor Greer, Ms Costello and Professor Alfirevic, evidence which the Tribunal accepted on face value. As indicated above, all were removed from the appeal panel and replaced at the claimant's request. Prior to the second respondent's appeal hearing Jacky Hayden the Dean of the North-West Deanery confirmed she had attempted to discuss the claimant's clinical training with him and explore options but he had failed to engage. The second respondent did not accept the claimant would be unemployed and unlikely to secure future employment after of the expiry of the fixed term contract; options were available to the claimant and it was for him to decide whether or not to explore them. The option of extending the claimant's contract was considered and rejected for cogent reasons as set out above including the fact the claimant's academic training had been completed and the number of training posts reduced. Taking into account all of the information before the second respondent its decision to dismiss the claimant fell well within the range of reasonable responses and the processes followed were fair.

942. With reference to the first respondent, the decision to dismiss predicated on the second respondent's decision; Dr Topping made the position very clear on 3 December 2014 as to why the honorary contract supplementing the training contract with the second respondent terminated on the basis that supplementing his academic employment was no longer necessary. As in the case of the second respondent's decision to terminate, the reasons given by Dr Topping were not frivolous or trivial, they were important considerations for bringing a fixed-term contract to an end untainted by disability discrimination or whistleblowing.

943. With reference to the first issue, namely, was the reason or principal reason for the Claimant's dismissal by the First Respondent and/or Second Respondent the fact that he had made protected disclosures pursuant to s.103A ERA 1996, the Tribunal found it was not for the reasons already given. In short, the Tribunal accepted the claimant was not dismissed because of the manner in which the disclosures were made, or because he was a difficult employee and went about matters in the wrong way. The reason or principal reason for the dismissal was the expiry of the fixed term contract. The claimant's claim for automatic unfair dismissal is not well-founded and is dismissed. The reasons given by both respondents were substantial and the dismissal fell within the band of reasonable responses open to a reasonable employer and it was not on the grounds of the claimant having made protected disclosures.

944. Mr Mensah referred the Tribunal to the EAT judgment in Eiger Securities LLP v Korshunova [2017] IRLR 115 submitting that the protected disclosures were the reason or principal reason for the dismissal. The Tribunal, who was not taken to any relevant paragraphs by Mr Mensah, considered the entire Judgment of the Honourable Mrs Justice Slade particularly at paragraphs 55 onwards when it was clarified that the tests are different in a Section 47B(1) claim and a section 103A claim as authoritatively determined by the Court of Appeal in Fecitt cited by the Tribunal above. For the claim to succeed under section 103A the Tribunal must be satisfied that the reason or principle reason for the dismissal is the protected disclosure whereas under a section 43B(1) claim the Tribunal must be satisfied that the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's detrimental treatment of the claimant. The Tribunal concluded on the balance of probabilities, the decision to dismiss the claimant taken by both respondents was not influenced, materially or otherwise, by the protected disclosures.

945. Finally, given the claimant's criticisms of the first respondent's HR team, it is notable at paragraph 68 of the Judgment reference was made to it being "unsurprising that a HR advisor would take part in a discussion at a disciplinary hearing" and in the absence of evidence, a reasonable inference may be that HR advised on procedural and HR matters. Mrs Justice Slade's view reflected the Tribunal's experience of HR matters and HR input into employee relations within the workplace.

946. With reference to the second issue, namely, if the dismissal was not by reason of the Claimant having made a protected disclosure, was the dismissal by the

First Respondent and/or Second Respondent for a fair reason, the Tribunal found the claimant was dismissed at the conclusion of the academic training assignment with the Second Respondent. The Second Respondent also says that dismissal was for some other substantial reason ("SOSR"), namely the Claimant's completion of his academic training and was potentially a fair dismissal. The burden is on the respondents to show that the reason was a substantial one, and that burden has been discharged on the balance of probabilities.

947. The claimant was at an end of his fixed term contract, it was not normal for the second respondent to extend the contract although it could choose to do so in exceptional circumstances for good business reasons, i.e. ongoing prestigious international research, the imminent taking up of a new position or maternity. If a CCT was not gained it was normal for the employee to go back to the Deanery. Professor Hayden attempted to engage with the claimant as to alternatives with no success, who in the words of Mr Boyd acted in a "difficult and obstinate way." The first respondent became the claimant's employer at the behest of the second, and funding for the claimant was provided by the Deanery who paid the second respondent who then in turn paid the first. Once the funding came to an end on the expiry of the fixed term contract and the contract with the second respondent was ended, it was not customary for the first respondent to extend the fixed term which had no benefit to it and for which there was no business case.

948. With reference to the third issue, if the dismissal by the First Respondent and/or the Second Respondent was for a fair reason, was the dismissal fair in all the circumstances, the Tribunal found on the balance of probabilities it was fair despite criticisms in the process with reference to the length of time it took for the claimant's appeal against dismissal to be heard and the reference to a redundancy when it was clearly not the case.

949. With reference to the fourth issue, namely, was the Claimant dismissed by reason of redundancy and if so, is he entitled to a redundancy payment, it has been conceded by Mr Mensah following the liability hearing that he was not as the dismissal was not one of a redundancy.

950. Finally, the Tribunal heard submissions on the question of the Polkey no difference rule, which it does not intend to repeat in full the claimant having been found not to have been unfairly dismissed. In short, it agrees with Mr Boyd's submission that the claimant's impersonation of an NMC official was a serious probity matter by a doctor. There is no doubt the claimant committed this offence as reflected in the transcript he relied upon and took the Tribunal to. The Tribunal accepts the evidence of Di Brown, on the balance of probabilities, that had the matter proceeded to a disciplinary hearing there was a one hundred percent chance he would have been dismissed, and this would have taken 6-weeks. The 6-week date in the Tribunal's view would have been predicated on the claimant cooperating, and there was little evidence before the Tribunal that the disciplinary hearing, which had been delayed for so long, would have taken place sooner rather than later.

951. The Tribunal also heard submissions on the issue of contribution, a matter it can consider by substituting its own opinion for that of the first respondent. Without repeating all of the evidence, the Tribunal was satisfied the claimant had committed blameworthy and culpable conduct; he was entirely the author of his own misfortune and had the claimant succeeded in his unfair dismissal claim the Tribunal would have unusually found it just and equitable to deduct 100 percent from the basic and compensatory award bearing in mind the claimant's status as a doctor, the trust and confidence required in an employee holding that position and the fundamental breach occasioned by the claimant's behaviour, especially that towards his colleagues. Mr Mensah argued that a one hundred percent contribution was rare, the Tribunal agreed, and he proposed that a contribution of 25% for blameworthy conduct should be ordered. The Tribunal did not accept this argument; the claimant never suggested during this hearing that his disability had caused him to misrepresent himself as a representative of the NMC. There were a raft of disciplinary matters that went beyond the claimant's stress and anxiety (stress being the only medical condition cited on the MED3), and it is more likely than not the claimant was blameworthy and culpable for some if not all of his bad behaviour towards colleagues.

Holiday pay

952. With reference to the issue, was the Claimant to entitled to a payment in respect of holiday entitlement accrued but untaken on termination of employment, there was no evidence put before the Tribunal that he was and this complaint is not well founded and is dismissed.

Redundancy pay

953. In an email sent 15 February 2018 Mr Mensah confirmed the claim for redundancy pay was withdrawn, and accordingly that complaint is dismissed.

Conclusion

954. In conclusion:

1. The claimant was given leave to adduce in evidence the handwriting expert report prepared by Margaret Webb dated 5 February 2018. It was not just and equitable and in accordance with the overriding objective to grant the claimant leave to commission a further expert report and his application for leave is refused.

2. The claimant was not unfairly dismissed and his claim for unfair dismissal brought against the first and second respondent is not well-founded and is dismissed.

3. The claimant was not automatically unfairly dismissed and his claim for automatic unfair dismissal brought under Section 103A of the Employment Rights Act 1996 against the first and second respondent is not well-founded and is dismissed.

4. The claimant was not subjected to any detriments on the ground that he had made protected disclosures under Section 43B of the Employment Rights Act 1996 and the claim for detriments brought against the first and second respondent are not well-founded and dismissed.

5. Detriments 23 and 29 were not presented before the end of the period of 3 months beginning with the date of the act or failure to act to which the complaint relates, or, where the act or failure to act is part of a series of similar acts, the last such act or failure to act. The Tribunal was satisfied that it was reasonably practicable for a complaint to be presented before the end of that period of 3 months, the Tribunal does not have the jurisdiction to consider the complaints which are dismissed.

6.The first Respondent did not deprive the claimant of the right to be accompanied under Section 10 Employment Relations Act 1999.

7. The alleged acts of disability discrimination occurring before or on 6 December 2012 were not lodged within the statutory time limit of 3-months, the claim was not presented within such other period as the Tribunal thinks just and equitable, it is not just and equitable to extend time and the Tribunal does not have the jurisdiction to consider those complaints which are dismissed

8. The first respondent did not unlawfully discriminate against the claimant under Section13 by treating him less favourably than a hypothetical comparator on the grounds of his disability, the claimant's claims for direct disability discrimination and disability related discrimination brought under Sections 13 and 15 of the Equality Act 2010 are not well-founded and are dismissed.

9. The First Respondent did not engage in unwanted conduct related to the claimant's disability, the claimant's complaint of harassment brought under Section 26 of the Equality Act 2010 is not well-founded and is dismissed.

10. Detriments 1 and 2 claimed under Section 27 of the Equality Act 2010 were not presented within the statutory limitation period, they were not presented within such other period as the Tribunal thinks just and equitable, it is not just and equitable to extend the time limit and the Tribunal does not have the jurisdiction to consider those complaints, which are dismissed.

11. The Claimant raised protected acts numbered 4 to 6 to satisfy the requirements of Section 27(2) of the Equality Act 2010 within the statutory time limit and the Tribunal has the jurisdiction to consider detriment 3.

12. The First Respondent did not subject the Claimant to a detriment because he had done or might to a protected act or because the First Respondent believed that the Claimant had done or might do such an act and the claimant's complaint of victimisation brought under Section 27 of the Equality Act 2010 is not well-founded and is dismissed.

13. The claimant's claim for unpaid accrued holiday pay brought under Regulation 13 of the Working Time Regulations 1998 is not well-founded and is dismissed.

14. The claimant's claim for a redundancy payment is dismissed upon withdrawal.

15. The First Respondent failed to issue the Claimant with a statement of main terms and particulars of employment in accordance with Section1 of the Employment Rights Act 1996.

8.5.18 Employment Judge Shotter

REASONS SENT TO THE PARTIES ON

10 May 2018.

FOR THE SECRETARY OF THE TRIBUNALS