EMPLOYMENT TRIBUNALS

Claimant: Mrs N Johnson

Respondents: 1. Mental Health Care (UK) Limited
2. Mental Health Care (Newton House) Limited

Heard at: Manchester **On:** 19-23 March 2018
26-29 March 2018
3-10 April 2018
1-2 May in chambers

Before: Employment Judge Sherratt
Miss S Howarth
Mr W Haydock

REPRESENTATION:

Claimant: Litigant in person
Respondents: Dr E Morgan, Counsel

JUDGMENT

The judgment of the Tribunal is that:

1. Although the Tribunal has found that the claimant made a number of protected disclosures the Tribunal does not find that the claimant was subjected to any detriment either during her employment or following its termination done on the ground that she had made the protected disclosures.

2. The principal reason for the claimant's dismissal was not that she had made a protected disclosure. The claimant was not unfairly dismissed.

3. The claimant was employed on like work with comparator B from 15 March 2015 until 2 May 2016 and so benefits from the sex equality clause set out in section 66 of the Equality Act 2010.

REASONS

Introduction

1. The claimant is a registered nurse who, until her resignation, was the registered Manager of Newton House which is a 21 bed community locked rehabilitation hospital providing care and treatment for men of working age suffering from mental disorder and illnesses. Newton House has been registered with the Care Quality Commission ("CQC") since May 2014. It provides assessment or medical treatment for persons detained under the Mental Health Act 1983 and treatment of disease, disorder or injury. The claimant was the Registered Manager and Accountable Officer.

2. The first respondent is the parent company of the second respondent. The first respondent operates a number of other hospitals and care homes through separate companies, each of which is wholly owned by the first respondent.

The Claims

3. The claimant had not been employed for two years at the effective date of termination. She alleges that she made a number of protected disclosures and that having done so she was subjected to various detriments. She alleges that when she resigned her resignation amounted to an unfair dismissal with the principal reason being that she had made a protected disclosure. The claimant alleges that she was subjected to post termination detriment on the ground that she had made one or more protected disclosures. The claimant alleges that she was subjected to direct sex discrimination in relation to two matters, and that her pay should have been equal with that of her two comparators for the purposes of a like work claim for equal pay. The claimant's claims are set out in her claim form together with a Scott Schedule dealing with the public interest disclosures, a second Scott Schedule dealing with the claims under the Equality Act 2010 and then a narrative document adding to the particulars of claim with regard to matters post termination.

The Evidence

4. The Tribunal heard evidence from the claimant and her witnesses Joanne Ward, Dr M Qureshi, Dr D Moodley, Lauren Mackie and David Guyers.

5. The respondent called the evidence of Michael Morrison, Alex Crow, Ryan Sandick, Kim Moore, Dr L Kidd, Kevin Shields, Dudu Ngwenya, Mike Pearce, Sean Holcroft, John Bromfield, Kerry McKevitt and Graham Hallows. The Tribunal received the witness statement of Steven Richardson who was not called for cross examination.

6. There were eight lever arch files provided as a joint bundle together with a further lever arch file with the claimant's supplemental documents. There were over 3,500 bundle pages placed before the Tribunal together with 306 pages of witness statements.

The Alleged Protected Disclosures and Detriments

The Relevant Law

7. Section 43A of the Employment Rights Act 1996 provides that:

> "In this Act a "protected disclosure" means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H."

8. Section 43B deals with disclosures qualifying for protection and provides that:

(1) 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) that a criminal offence has been committed, is being committed or is likely to be committed,

(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,

(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,

(d) that the health or safety of any individual has been, is being or is likely to be endangered,

(e) that the environment has been, is being or is likely to be damaged, or

(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.

(2) For the purposes of subsection (1), it is immaterial whether the relevant failure occurred, occurs or would occur in the United Kingdom or elsewhere, and whether the law applying to it is that of the United Kingdom or of any other country or territory.

(3) A disclosure of information is not a qualifying disclosure if the person making the disclosure commits an offence by making it.

(4) A disclosure of information in respect of which a claim to legal professional privilege (or, in Scotland, to confidentiality as between client and professional legal adviser) could be maintained in legal proceedings is not a qualifying disclosure if it is made by a person to whom the information had been disclosed in the course of obtaining legal advice.

(5) In this Part "the relevant failure", in relation to a qualifying disclosure, means the matter falling within paragraphs (a) to (f) of subsection (1).

9. Section 43C deals with disclosure to employer or other responsible person and provides that:

(1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure in good faith –

(a) to his employer, or

(b) where the worker reasonably believes that the relevant failure relates solely or mainly to –

(i) the conduct of a person other than his employer, or

(ii) any other matter for which a person other than his employer has legal responsibility,

to that other person.

(2) A worker who, in accordance with a procedure whose use by him is authorised by his employer, makes a qualifying disclosure to a person other than his employer, is to be treated for the purposes of this Part as making the qualifying disclosure to his employer.

10. Section 47B deals with detriment in relation to protected disclosures and provides that:

"(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.

[(1A) A worker ("W") has the right not to be subjected to any detriment by any act, or any deliberate failure to act, 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 W has made a protected disclosure.

(1B) Where a worker is subjected to detriment by anything done as mentioned in subjection (1A), that thing is treated as also done by the worker's employer.

(1C) For the purposes of subsection (1B), it is immaterial whether the thing is done with the knowledge or approval of the worker's employer.

(1D) In proceedings against W's employer in respect of anything alleged to have been done as mentioned in subsection (1A)(a), it is a defence for the employer to show that the employer took all reasonable steps to prevent the other worker –

(a) from doing that thing, or

(b) from doing anything of that description.

(1E) A worker or agent of W's employer is not liable by reason of subsection (1A) for doing something that subjects W to detriment if –

(a) the worker or agent does that thing in reliance on a statement by the employer that doing it does not contravene this Act, and

(b) it is reasonable for the worker or agent to rely on the statement.

But this does not prevent the employer from being liable by reason of subsection (1B).]

(2) . . . this section does not apply where –

(a) the worker is an employee, and

(b) the detriment in question amounts to dismissal (within the meaning of [Part X]).

(3) For the purposes of this section, and of sections 48 and 49 so far as relating to this section, "worker", "worker's contract", "employment" and "employer" have the extended meaning given by section 43K.]"

11. Section 48 deals with complaints to Employment Tribunals and provides that:

(1A) "A worker may present a complaint to an Employment Tribunal that he has been subjected to a detriment in contravention of section 47B.

(3) An employment tribunal shall not consider a complaint under this section unless it is presented- (a) before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them, or (b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months."

12. The respondents accept that the claimant is a worker for the purposes of bringing proceedings under section 48.

13. When reaching the decisions that follow we have taken into account the oral and written evidence presented and the written and oral submissions made by the parties. We remind ourselves that for there to be a disclosure there must be a disclosure of information not the making of an allegation. The claimant must have a reasonable belief as to the accuracy of the information provided. The burden of proof as to what the disclosure tends to show is on the claimant with "likely" requiring more than a possibility or risk that the employer might fail to comply with a relevant obligation. A possibility of a breach is not sufficient.

14. When looking at detriment the right is not to be subjected to any detriment by any act or any deliberate failure to act by the employer done on the ground that the worker has made a protected disclosure.

15. The schedule of alleged protected disclosures and detriments was prepared for the claimant by her then solicitors, and in the introduction it states that "the claimant asserts she was subject to detrimental treatment because she has raised concerns. Where possible the claimant has sought to link her public interest disclosures with specific detriments. However, the claimant clarifies that from the start of raising concerns she was seen by the respondent as a trouble maker and was treated less favourably in the manner set out in the detriment section".

Protected Disclosure 1

16. The first alleged protected disclosure is that:

> "In or about October 2015 the claimant raised concerns about the respondent's plan to increase patient capacity at the Hospital. The claimant expressed concerns that there was not enough room to accommodate an increase in patients and expressed her concerns that any increase in patients would be dangerous as the hospital building could not be compartmentalised and this would leave all the patient population in a single area without any rehabilitation space which was a requirement for the service. The claimant said that the CQC would not commission a locked rehabilitation centre for 26 patients given the building space. The claimant voiced her concerns about the difficulty in recruiting staff in the area where the hospital was situated. The respondent had already received planning permission for a refurbishment of the hospital and the claimant expressed her concerns that this would be delayed further if the respondent now wanted to increase the capacity of the hospital."

17. The disclosure was allegedly made to Graham Hallows (Vice Chairman). At the time Mr Hallows was working as a consultant for the first respondent. No point has been taken that he was not an appropriate person to receive the alleged disclosure.

18. In her witness statement the claimant repeats the wording used in the schedule.

19. Mr Hallows in his statement refers to attending a meeting at Newton House on 13 October 2015. Present at the meeting were Graham Hallows, Devan Moodley (Medical Director), Nicola Johnson, Tony Millward and Peter Williamson.

20. Mr Millward was the quantity surveyor and Mr Williamson was the architect.

21. Mr Williamson prepared a detailed note of the meeting which started with the claimant providing background information as to the history and why alteration or extension works were necessary. The claimant referred to some requirements of the CQC. Dr Moodley also made reference to how poor the facilities were and that detailed discussions had been held with the CQC as to alterations being made.

22. As the discussion progressed Mr Williamson noted that in July 2015 John Felton of the first respondent informed the design team that he thought the planning permission was not financially viable and the architects had been required to prepare a 25 and later a 26 bed sketch scheme. Mr Felton approved the 26 bed scheme and provided for planning and tender documents to be prepared. The architects proceeded.

23. The next note is that GH/DM were surprised by this news and were not aware of the non viability of the planning permission, and not aware of the MHC instruction to CLA to prepare a 26 bed alternative scheme. GH noted that MA would have been aware of the building deficiencies prior to purchase and would have taken account of the cost of improvement needed to the building without the need to increase beds. DM noted concern with the 26 bed scheme. CQC were concerned with the existing building and lack of shared facilities and it went against this ethos by adding more beds and reducing the size of staff facilities. Furthermore the additional beds would change the building operations and staffing model; additional beds upstairs would require a nurse station and communal living spaces that are not catered for.

24. It was said that GH, DM, TM and PW were to meet on 26 October in Manchester to further discuss the design and layout for both schemes. The meeting note then goes on to refer to the claimant highlighting a need for a secure rear garden area as a matter of urgency as there had been a number of repeat absconding incidents. The architects were instructed to prepare a design/specification for this.

25. There was then a post meeting note of a telephone conversation between Graham Hallows and Peter Williamson in which it was made known that the first respondent felt that 22 beds were sufficient for the site and a 26 bed scheme would be overdevelopment.

26. Mr Hallows prepared his own contemporaneous note of that meeting taking the form of an email to himself, including the phrase “bed numbers stayed at 22”. Then he made reference to being informed of the 26 bed scheme with Dr Moodley saying they were not aware of any of this and that there had been no consultation with the clinical team. At a glance the 26 bed scheme was not a runner. The claimant is noted as raising issues concerning the fence.

27. The claimant was cross examined and said that Mr Hallows was conspiring to mistreat her. Not necessarily all of the detriments were based on conspiracy but it was her case that people had joined forces to mistreat her. The parties to the conspiracy were Hallows, McKevitt, Moore and Shields as a minimum. Thereafter Sandick, Bromfield, Holcroft and Ngwenya. The purpose of the conspiracy was for them to make money – for personal financial gain which they put above their responsibilities. Three of the managers were paid bonuses and/or received substantial pay rises.

28. The claimant said that the October 2015 meeting was one where Mr Hallows took against her and he was the architect of the conspiracy. She did not notice Mr Hallows being surprised at the suggestion of an increase to 26 beds. She agreed that the note he had done to himself was more likely to be right as it was made closer to the event; in particular the note on the first page as to the bed number staying at 22. She did not agree it was as short-lived discussion about the 26 bed

unit although she did agree a subsequent meeting confirmed only 22. She was excluded from another meeting when they wanted to talk about 26 beds to maximise profits. She agreed that Mr Hallows and Dr Moodley were not aware of the 26 bed scheme and it was a surprise to her as well.

29. In his cross-examination Mr Hallows said that the 13 October meeting was the only meeting he attended where the claimant was present. What he had noted was what he was discussed at the meeting. The 26 bed scheme came in at the meeting. As to the 26 bed scheme, there were no dissenting voices. No one individual supported the 26 bed scheme. He had not noted down any comments made by the claimant but she was not a lone voice in objecting.

30. In his view Mr Williamson's note about the future meeting was not to discuss the 26 bed scheme but two different 22 bed schemes because they all left the meeting with the view that the 26 bed scheme was a complete non-runner and ridiculous.

31. We were taken to the minute of a Board meeting held on 15 October 2015 where with reference to Newton House a 26 bed scheme was mentioned and "it was agreed that this scheme is not acceptable and the consensus was that perhaps 22 beds was the optimum number to ensure patients had sufficient recreational space. The only advantage in the revised plans was the new position identified for the lift. The lift is required following historical case of death of patient resident prior to acquisition. There were delays in transporting patient to ambulance due to no lift on first floor. Dr Moodley has to submit report to the coroner regarding installation of lift". The meeting note then went on to refer to the inadequate fencing and the need for new permanent security fencing now rather than awaiting the other building works.

32. Taking into account the evidence before the Tribunal, we can accept that the claimant did raise concerns about the plan to increase patient capacity from 22 to 26 but these concerns were shared by everyone else at the meeting. The claimant provided her professional opinion to the meeting, as did the other participants.

33. If we accept that this opinion amounted to information conveying facts as to the reasons for the inadequacy of the available space for a 26 bed unit, then did the information tend to show, as set out in the Scott schedule, that any person was likely to fail to comply with any legal obligation to which they were subject or that the health and safety of any individual was likely to be endangered?

34. The claimant has not identified any legal obligation that would not have been complied with in respect of this allegation neither has she set out how the health or safety of any individual was likely to be endangered particularly when all parties at the meeting accepted that the 26 bed scheme was not to be pursued. We therefore conclude that the claimant's comments did not constitute a protected disclosure.

35. Having found that the claimant did not make a protected disclosure we do not need to go on to consider the question of detriment but we are satisfied that for having expressed her opinion in the meeting Mr Hallows, who did not support the proposal himself, did not take against the claimant.

<u>Protected Disclosure 2</u>

36. The second alleged protected disclosure relates to 29 October 2015 and it is that:

> "At the Registered Managers' meeting the claimant raised concerns about the respondent's policies and procedures being out of date and not in line with English standards (as they still reference Welsh standards) and regulations. She raised concerns that new policies and procedures had not been ratified by the Policy Review Group ("PRG") despite them being submitted months previously. The claimant raised specific concerns about the Mental Health Act, Mental Capacity Act and the Deprivation of Liberty Safeguarding policies and procedures due to the imminent CQC Provider Information Request ("PIR") submissions that she was required to complete the following day and expected CQC inspection in the fairly near future."

37. The persons to whom this disclosure was made were Kevin Shields (Nominated Individual) and Ryan Sandick (Head of Quality).

38. It should be noted that the first respondent company has its headquarters in Wales and that Newton House is the only English hospital thus the first respondent's Welsh hospitals were inspected by Healthcare Inspectorate Wales ("hiw").

39. We have been provided with notes of the managers' meeting of 29 October 2015 taken by a notetaker. Present at the meeting were Mr Holcroft, Ms Ward, Mr Sandick, Mr Swan, the claimant, Kevin Shields from 12 noon and a notetaker. Mr Bromfield sent his apologies.

40. At item 7 of Queries for Kevin Shields it states:

> "Policies and procedures. Difficult to access by staff. Policies still reference Welsh standards which do not apply to Newton House.
>
> Response: KS – there are two policy databases, one generic and one specific to local hospital. KS advised can set up a sub group for Newton House etc for all local policies. Suggested this to be within independent hospital policies section. Need consistency across formats."

41. In her witness statement the claimant states that:

> "In or around 29 October 2015 I raised concerns with the respondent's nominated individual, Mr Kevin Shields, about the respondent's policies and procedures not being updated and not being in line with English standards and regulations such as the Mental Health Act policy, Mental Capacity Act policy and the Deprivation of Liberty Safeguarding policy. Mr Shields told me that he would address my concerns. I stressed to Mr Shields that this would result in the hospital being held in breach of CQC regulations, and that this placed me as Registered Manager in breach of CQC requirements."

42. Mr Shields in cross examination accepted that the policies that were required for Newton House were not in place.

43. The Tribunal finds that the claimant did make a protected disclosure to Kevin Shields at a meeting on 29 October 2015 that the policies at Newton House in

England made reference to Welsh standards which did not apply to Newton House. We find that this failure amounted to the second respondent not complying with its legal obligation to comply with the requirements imposed upon it by the Care Quality Commission.

44. As to the alleged detriment, it is that:

> "The claimant's concerns were ignored and not taken seriously. The claimant was unable to complete a CQC request for further information in March 2016 when the CQC requested the Mental Health Act policies and procedures, and as Registered Manager this placed the unit in breach of CQC requirements. The subsequent CQC report following an inspection on 21-23 March was critical of the failure to implement changes and policies as this meant that the service (for which the claimant was Registered Manager) did not adhere to the regulated requirement to have updated policies and procedures in line with the new code of practice."

45. We have been taken to the CQC's report on Newton House published on 17 August 2016 (after the claimant left) referring to the inspection visit on 21-22 March 2016. Under "areas for improvement" –

> "The provider must ensure all relevant policies within the hospital are updated in line with Annex B of the Mental Health Act Code of Practice."

46. According to Kevin Shields, he did not ignore the claimant's concerns. He instructed Meryl Roberts, the Mental Health Act manager, to update the policies in use at Newton House, but she clearly had not done this in time for the inspection on 21 and 22 March 2016.

47. It appears to the Tribunal that the claimant's concerns were not ignored initially but having issued the instruction to Meryl Roberts, Kevin Shields did not follow it up with a view to ensuring that the Newton House policies and procedures had been updated by the time of the CQC inspection.

48. Although the claimant claims that she was subjected to a detriment by the publication of the CQC report some months after her resignation this was not anything done by the employer or another worker of the employer or an agent of the employer. The alleged detriment came from the CQC which is an independent statutory inspecting body unconnected with the employer. In such circumstances we are unable to find that the claimant suffered detriment done by the employer for the purposes of section 47B.

<u>Protected Disclosure 3</u>

49. The third allegation also relates to the 29 October 2015 meeting, when it is alleged that:

> "The claimant raised concerns that she was not being informed about changes to the respondent's Board of Directors which she needed so lines of escalation could be clearly established and also to complete the company organograms to the CQC on a PIR due on 30 October 2015 and on the NHS PANs Lancashire Contract tender. On the same day immediately following

the meeting the claimant raised these issues again and at her supervision meeting."

Kevin Shields is said to be involved in both of these meetings.

50. The note of 29 October 2015 meeting has as a query for Kevin Shields:

"New board report structures, date for submission, what information is required? Previous procedure was that hospital reports would be sent to JW for review and then on to Board as a singular report. Need clarity on this.

Response: KS advised should be for individual hospital. KS to clarify who reporting to initially. Copy of reports to go to KS."

51. In her witness statement the claimant says that:

"Around this time in October 2015 I also raised concerns to Mr Shields that I was not being informed about changes to the respondent's Board of Directors. I asked Mr Shields for clear communication about the changes, so lines of escalation could be clearly established. I stressed that this was of concern, as the failure of the respondent to communicate about the changes put the hospital in a precarious position as issues could not be addressed in an effective and timely manner."

52. The claimant makes no reference in her witness statement to company organograms and these are not mentioned in the note of the managers' meeting.

53. According to Mr Shields the lines of reporting had not changed. This was discussed at the meeting and answers were given.

54. We were taken to a chain of emails involving the claimant which ended on 27 October 2015 with an attachment in the form of a Mental Health Care organogram being the final document with changes made.

55. Whilst being satisfied that the claimant raised the issue that was noted at the managers' meeting, we are not satisfied that the claimant has identified the legal obligation which is alleged to have been breached or how this issue involved the health or safety of any individual being or likely to be endangered. We therefore do not find that this amounted to a protected disclosure.

<u>Protected Disclosure 4</u>

56. The fourth alleged protected disclosure also relates to the managers' meeting:

"Again on 29 October 2015 at the Registered Managers' meeting the claimant also raised concerns that there were no corporate risk registers which she knew were required by the CQC." The alleged detriment is that "The claimant's concerns were ignored and not taken seriously and corporate risk registers were not available for the CQC inspection."

57. Looking at the alleged detriment, without considering whether or not a protected disclosure was made, we do not find that lack of availability of corporate

risk registers for the CQC inspection can amount to the claimant being subjected to detriment by any act of the employer for the reason set out at paragraph 48 above.

Protected Disclosure 5

58. The fifth alleged protected disclosure is as follows:

> "On 7 and 8 December at the Nominated Individual site visit the claimant raised concerns about senior clinicians being removed from their posts and how the organisation was going to be able to achieve and demonstrate the mandatory and statutory requirements in the absence of these key personnel."

59. In her witness statement the claimant sets this out but without naming anyone allegedly removed.

60. In cross examination the claimant said that she was concerned that a lot of people left the company generally. Not so much in Blackpool but at Head Office. She could not remember any names.

61. Kevin Shields, the Nominated Individual, did not remember the claimant raising this issue with him on his visit. He prepared a draft report and submitted it to the claimant. He did not make reference to senior clinicians being removed from their posts and neither did the claimant when returning the draft report with her comments.

62. The Tribunal is not satisfied that the claimant raised these concerns on 7 and 8 December 2015 and does not find that the claimant made a protected disclosure.

Protected Disclosure 6

63. This allegation is that between October 2015 and January 2016:

> "The claimant raised a concern that a purpose built protective TV screen (safety cabinet) had been made to the wrong specification by the manufacturer. The unit had been awaiting the cabinet since June 2015 but when the manufacturer fitted the cabinet in October 2015 they realised it was incorrect and they assured the claimant they would remedy the works immediately. However they did not and when the unit was inspected by the CQC in December 2015 this was reported on by the inspector. In December 2015 the claimant requested additional support from Mike Pearce as the manufacturer stated they would not be able to do anything until after Christmas. The claimant explained the gravity of the situation and stated in an email that the manufacturer had the correct measurements on at least five occasions."

64. The allegation is that the respondent had failed to comply with a legal obligation and that the health or safety or any individual had been, was being or was likely to be endangered.

65. The CQC made an unannounced visit to the premises on 30 November 2015 and issued a report on 9 December 2015. Under the heading "Protecting patients' rights and autonomy" it was reported that:

> "The televisions in the lounge and conservatory were contained in cases. We were told that this was because one patient had in the past smashed the televisions."

66. Under a later paragraph in the CQC report there was a need for an action statement stating:

> "What consideration you have given to the pros and cons of this blanket restriction being applied to all patients because of the actions of one patient."

67. The relevant Code of Practice at 1.6 states:

> "Restrictions that apply to all patients in a particular setting should be avoided. There may be settings where there will be restrictions on all patients that are necessary for their safety or that of others. Any such restrictions should have a clear justification for the particular hospital, group or ward to which they apply. Blanket restrictions should never be for the convenience of the provider…"

68. We were not taken to the response by the respondent to the CQC's need for action but it was provided in the bundle. The claimant, as the responsible manager, noted that one patient had smashed two televisions in the communal areas which inconvenienced all the other service users pending the placement of the televisions. The removal of the cabinets, it was said, could represent an increase in the risk to self and others due to the presence of glass and other sharp components from the broken TVs.

69. In her witness statement the claimant says that she raised a concern that the purpose built protective TV screen (safety cabinet) had been made to the wrong specification by the manufacturer. She does not make any reference to a failure to comply with legal requirements or health and safety. She refers to email correspondence concerning the matter and we were taken to her email sent to various people on 21 December 2015. It made reference to the cabinets being made to the wrong specification and the comments of the CQC, but with no reference whatsoever to health and safety or regulatory requirements.

70. We are not satisfied that this amounted to the making by the claimant of a protected disclosure.

<u>Protected Disclosure 7</u>

71. The allegation is that:

> "Between October 2015 and January 2016 following receipt of a coroner's report that identified the service not having a lift to evacuate patients in medical emergencies as a contributing factor to a delay in evacuating the affected service user, and a future potential risk/contributory factor to deaths, the claimant raised concerns about the fact that the hospital still did not have

> a lift and the risk this posed to patient care in person at the refurbishment meeting and at the Nominated Individual site visit and in her monthly report to the Board, (submitted to Graham Hallows), phone calls and emails."

72. Again this is said to relate to the failure to comply with a legal obligation or risk to health and safety.

73. By way of background, when the premises were under a previous ownership a bariatric patient was accommodated upstairs and could not be easily removed by the ambulance personnel due to weight and/or size. On 2 November 2015, following an inquest on 1 October, Her Majesty's Coroner for Blackpool and The Fylde issued a notice under regulation 28 of the Coroners (Investigations) Regulations 2013 with a view to preventing future deaths. It was sent to the second respondent as the current occupier of the premises. The matters of concern involved the paramedics having difficulty in removing a patient who weighed in excess of 30 stones who was found unresponsive in his upstairs room. The premises had no lift. It could not be established whether that increased amount of time contributed to the eventual demise of the patient, but the coroner expressed concern that a risk of future deaths may arise should someone requiring urgent medical attention be accommodated upstairs where that person's physical status was such that safe removal may be compromised and leave paramedics in similar difficulties. It appeared to the coroner that insufficient thought had been given to the prospect of removing such a patient when immobile, particularly in the event of an emergency. The coroner said that action should be taken to prevent future deaths and required a response by 24 December 2015.

74. The response to the coroner dated 22 December 2015 included:

> "The unit have purchased Emergency Evacuation Sledges in both standard and bariatric sizes that allow service users to be evacuated quickly and effectively without the need of mechanical aids through manual handling manoeuvring in the absence of a lift or in the event that the lift cannot be used for whatever reason… All service users with specific daily bariatric and/or mobility needs are placed in bedrooms on the ground floor as appropriate…Newton House is undergoing a full refurbishment and a lift has been included in the architectural design… MHC has consulted with the local Fire Department and North West Ambulance Service as part of the process… Further proposed actions – to have a lift installed as per the architectural design of the refurbishment. The projected timescale of refurbishment commencement is between April and June 2016."

75. The claimant in her witness statement states that on 7 and 8 December 2015 she raised concerns to Mr Shields and Mr Hallows and again in February 2016 about the lack of a lift and the risk this posed to patient care despite recommendations that a lift should be installed after the matter was highlighted in a recent Coroner's report. Despite being assured that the issues would be addressed no steps were taken by the respondent to address these concerns.

76. The claimant also states that she raised concerns about the fact that the hospital still had no lift and the risk this posed to patient care at the refurbishment meeting and in her monthly reports and in emails. Mr Williamson's note of the refurbishment meeting records that Dr Moodley and the claimant explained that there

was a death at the facility in 2014. They had received the report from the coroner highlighting that it took 19 minutes to evacuate a patient from upstairs to the ambulance as there was no lift in the building. Dr Moodley expected that as a result of the coroner's report the lift will be an ongoing matter.

77. According to Mr Shields he understood that the particular risk had been assessed by the claimant, Joanne Ward and Dr Moodley who decided that introducing measures involving personal evacuation plans and evacuation sledges were sufficient. Mr Shields says that the absence of a lift was not mentioned by the claimant on his 7 and 8 December visit to Newton House. His draft report refers to the introduction of sledges to aid the safe evacuation of patients from upper floors following the recommendation of a recent coroner's report. The claimant did not comment on this part of the report when she returned the draft.

78. The Tribunal is satisfied that the claimant did raise this issue of the lift on a number of occasions but did this amount to the making of a protected disclosure? The claimant has not identified the legal obligation that was breached. H.M. Coroner did not require a lift to be provided. It was for the respondent to take unspecified action to prevent future deaths. We do however find that the claimant raised the issue with reference to patient care, and by implication their health and safety having been or likely to be endangered, at the refurbishment meeting. We therefore find that the claimant did make this protected disclosure.

79. As to detriment, the claimant says that her concerns were ignored and not taken seriously and she received no feedback from any of the Board reports submitted.

80. We do not accept that the claimant's concerns were ignored because, as stated in the response to the coroner, steps were taken involving the plan not to put immobile patients upstairs and the acquisition of sledges to remove immobile patients from upstairs. The question of a lift remained under active consideration during the claimant's employment. We do not find the lack of feedback from the board constituted a detriment to the claimant.

Detriment 8

81. The next item on the claimant's schedule, number 8, is a detriment without a corresponding disclosure. The alleged detriment relates to an auditor, Jon Eccles, placing a limit of £10 which the claimant could spend on patient expenses without obtaining authority. As the claimant has nowhere said that Jon Eccles was the recipient of or aware of her claimed protected disclosures, the Tribunal cannot conclude that this limit was placed upon her on the ground that she had made one or more protected disclosures.

Protected Disclosure 9

82. The ninth allegation is that:

> "Between July 2015 and April 2016 the claimant raised further concerns that the alarm system in the hospital garden had not been installed despite the fact that two staff members had been assaulted in the hospital garden and a patient had escaped from the hospital via the garden. The claimant included

> this concern in her monthly Board reports from October 2015 to January 2016 and also by emails and in person at the site meeting with Graham Hallows and on the Nominated Individual's site visits. Despite receiving verbal authorisation on numerous occasions no written authorisation or purchase order number was raised."

83. These allegations are said to relate to failing to comply with a legal obligation and/or health and safety.

84. It is apparent from the documents within the bundle that the claimant did raise the issue of the alarm system in the garden and although the claimant has not specified any legal obligation that was breached we are satisfied that the health and safety of employees was likely to be endangered in the absence of alarms thus making this a protected disclosure.

85. The claimant alleges that by way of detriment her concerns were ignored and not taken seriously and an alarm system was not authorised prior to her resignation. Staff at Newton House began to use walkie talkies as an interim measure but this was clearly inadequate should staff or service users require an immediate response in an emergency.

86. We were taken to a quotation for the installation of the new alarm points, and Mr Hallows gave evidence that he was not aware that the works had not been done. Given that a quotation was obtained we do not find that the claimant's concerns were ignored and that she was not taken seriously. We note the interim measure of using walkie-talkies was put in place. We do not find that the claimant was subjected to any detriment done on the ground that she had made this protected disclosure.

Protected Disclosure 10

87. The tenth item is in or around December 2015/January 2016 and it is that:

> "The claimant raised concerns by email and telephone about the respondent's intention to admit a bariatric patient who weighed almost 30 stone to a room on the first floor of the hospital despite the recent Coroner's Court findings about the lack of a lift."

88. This again is said to relate to breach of a legal obligation and/or health and safety.

89. According to the claimant's witness statement she raised concerns to Mr Shields, her line manager, Jo Ward, and Dr Moodley, Medical Director, about the intention to admit a bariatric patient to a room on the first floor. The claimant goes on to say that she refused to admit the patient on the basis of the coroner's ruling and the fact that there had still been no lift installed. Despite her refusal and pointing out the risk that housing the patient would cause, she was overruled by the respondent who insisted on admitting the patient even though she was ultimately responsible and accountable for the safety of patients.

90. The claimant did not take us any emails in which she raised a concern about the intention to admit this patient, nor did she take us to any particular telephone

calls. Evidence from Dr Kidd was to the effect that she did not remember the claimant complaining about the proposed admission of a patient.

91. Having considered the evidence in relation to this allegation protected disclosure we are not satisfied that it was made.

Protected Disclosure 11

92. The eleventh allegation dated February 2016 is that:

> "By email and by telephone the claimant raised concerns about the policies and procedures database being locked so no-one could access any policies and procedures and also reminded Mr Shields about the respondent's policies and procedures not being in line with English standards and regulations, such as the Mental Health Act, Mental Capacity Act and Deprivation of Liberty Safeguard Policies."

93. Again, this is said to relate to failure to comply with a legal obligation and health and safety.

94. On 29 February 2016 at 12:13 the claimant sent an email to Kevin Shields, Ryan Sandick and Jo Ward with the subject being "Observation Policy". The claimant said:

> "Has anyone got a copy of the most up-to-date observation policy that was recently reviewed, please? I cannot seem to access the database."

95. Kevin Shields replied on 1 March 2016 at 13:00 telling the claimant that the policy database had been locked for some unexplained reason. He was trying to get an answer as to why.

96. At 17:11 on 1 March 2016 Ryan Sandick emailed again to the effect that the policy database should be back online for all staff.

97. Ryan Sandick explained to the Tribunal that there was an intention to cleanse the policy and procedure database which resulted in the IT department making it unavailable to anyone. It was this that the claimant discovered and emailed about. They resolved this and made the database available very shortly afterwards.

98. The evidence before the Tribunal does not go beyond the claimant asking for a copy of the most up-to-date observation policy. This in our judgment does not amount to the claimant making the protected disclosure alleged.

Protected Disclosure 12

99. The twelfth alleged disclosure relates to 18 March 2016 when:

> "The claimant raised concerns when a member of her staff, Moira Harrison, was asked by Kerry McKevitt to scan Disclosure and Barring Service ("DBS") verification documents into emails and send them to the respondent's Head Office in Wales for document verification. The claimant pointed out to Ms Beale that this was not permissible under the DBS verification guidelines as the original verification certificates needed to be verified."

100. It is alleged that this involved failing to comply with a legal obligation and endangering the health or safety of any individual.

101. Kerry McKevitt (HR consultant then Head of People Services) told us that she suggested to members of her team that they centralise the administration of DBS checks intending that it would ensure a better level of compliance. According to her, there was every intention of complying with Government guidance on DBS identity checks. Prospective employees would supply the necessary documents and information for pre-employment checks to the home or hospital offering them employment. They would be verified and kept at the relevant home or hospital and copies would be supplied to People Services who would process the information.

102. According to Ms McKevitt, regrettably Angharad Beale (Recruitment Officer) informed the claimant prematurely about the proposal to make these changes before she had had the opportunity to speak with the claimant on 18 March 2016. She understood it came up in a telephone call between Angharad Beale and the claimant with Ms Beale apparently telling the claimant that the new process would be happening moving forward without explaining the informal consultation that she had intended to have with managers before implementation. Angharad Beale told Kerry McKevitt that the claimant had expressed her dissatisfaction. Ms McKevitt tried to call the claimant the same day but was unable to speak to her so she sent an email at 10:57 on 18 March saying:

> "I have tried to call you this morning but I understand that you are in a meeting. I just wanted to speak to you to clarify the position on recruitment and recruitment admin. I think Angharad has been discussing this with you and I am concerned that you have been told that a process will be imposed on hospitals. This isn't the case. We have identified that there are some gaps in our recruitment admin in various areas of the business and have agreed what we will be doing as we move forward with residential services but I am conscious that hospitals are a separate stream with different resources and needs and so I would want to talk to you about these before we agreed to change processes. I hope this makes sense, please don't hesitate to call me if you have any queries."

103. The claimant did not call.

104. At 17:22 on 18 March 2016 the claimant sent an email to Jo Ward and Devan Moodley saying that one of her team, Moira, had been on the phone to Head Office and she overheard a conversation with People Services. Moira told her that Newton House staff would no longer be carrying out the safer recruitment checks which would be done centrally from Head Office including reference checks and DBS verification. According to the claimant's email, she immediately called People Services and informed them that "we would not be doing this at Newton House as there were robust and rigorous processes in place". She was informed that People Services would be better placed to do this and that DBS would be carried out by Moira scanning the documents to Head Office for verification. She pointed out this was illegal and they would not be doing it.

105. The claimant appears to have spoken to Angharad Beale in the People Services department who reported matters to Kerry McKevitt, the Head of that department.

106. It would appear that the claimant did raise with Angharad Beale, for Kerry McKevitt, a question as to whether or not the proposed policy might be in breach of legal obligations to the Disclosure and Barring Service which we conclude makes this a protected disclosure, notwithstanding Kerry McKevitt's immediate response to the effect that nothing would be done without the claimant's agreement.

107. As to alleged detriment:

> "The claimant felt that she was being undermined in her role as Registered Manager by Ms McKevitt. The claimant was ultimately accountable for compliance with the hospital's DBS procedure and was concerned that her position was being compromised."

108. Given the email from Kerry McKevitt in which she wanted to talk to the claimant before any procedures were changed, we are not satisfied that the claimant's position was undermined. The discussion with Ms McKevitt on this subject never took place and so as far as Newton House was concerned the policy does not appear to have been changed before the claimant's resignation. We do not find any detriment here.

Detriment 13

109. Allegation 13 is another detriment without a disclosure. The alleged detriment relates to Graham Hallows who it is said refused Devan Moodley's request for a pay rise for the claimant despite the fact that the claimant was running one of the respondent's most successful hospitals and was also appointed as NMC Nurse Revalidation Lead.

110. Dr Moodley in his statement says that he did raise this matter with Mr Hallows on 17 March 2016 but Mr Hallows dismissed his submissions.

111. According to Graham Hallows he does not recall Dr Moodley ever discussing the claimant's pay review with him and had such an issue been brought to his attention he would have passed it through the appropriate operational channels for consideration.

112. On the basis of the evidence before the Tribunal we cannot be satisfied that the matter was raised with Mr Hallows, but had it been we are satisfied that Mr Hallows had no improper motive towards the claimant and in any event there was due to be an overall consideration of the salaries of hospital managers shortly thereafter which would have involved looking at the claimant's salary together with those of the other hospital managers.

113. We do not find that the claimant was subjected to the alleged detriment.

Protected Disclosure 14

114. The fourteenth allegation relates to 21 March 2016 and is that:

> "On the first day of the CQC inspection the inspector requested of the claimant the training slide for the MHA training module. The claimant sent an urgent email to Ms McKevitt requesting this information without appropriate

> response and the claimant was unable to provide the information to the regulator. The claimant raised this as a concern with Ms Ward and Dr Moodley via email on the same day."

115. On 21 March 2016 at 15:16 the claimant sent an email to Kerry McKevitt, Paul Boydell/Training, Kevin Shields, Imogene Elie/Training, Terry Boardman/Operations, Ryan Sandick and Meryl Roberts/Clinical, copied to Jo Ward, Devan Moodley and Mark Swann with the subject heading "MHA, MCA and DoLS Training Module". In her email the claimant said:

> "Hi all, please could I be sent the MHA, MCA and DoLS Training Module as a matter of urgency, or even better if this could be opened on the blended learning system for all staff at Newton House. This is one of the things that the CQC are picking up on at Newton House today and I urgently need access."

116. In an email sent at 19:06 on 21 March 2016 the claimant said to Jo Ward and Devan Moodley that she had requested the module to be sent to her "today as a matter of urgency, without appropriate response".

117. On 22 March 2016 at 08:15 Paul Boydell wrote an email to the claimant saying, "Attached as requested", and at 08:33 Kerry McKevitt sent an email to Paul Boydell to thank him for what he had done.

118. The claimant did not disclose any information to Kerry McKevitt to whom the disclosure was allegedly made. The Tribunal does not find that the actions of the claimant in requesting a training module amounted to a protected disclosure.

Protected Disclosure 15

119. Allegation 15 again relates to 21 March 2016 as follows:

> "The claimant updated Dr Moodley and Jo Ward about the CQC inspection and outstanding areas of concern. Dr Moodley agreed to raise the concerns that the claimant had expressed to him to the respondent's Vice Chairman/CEO. He said he was concerned that the claimant was going to leave the respondent's employment due to the fact that her concerns were not being addressed."

120. This matter again is said to relate to failure to comply with a legal obligation and/or health and safety. The complaint was allegedly made to Dr Moodley and Jo Ward.

121. This goes back to the email sent by the claimant to Jo Ward and Devan Moodley on 21 March 2016 at 19:06 referred to above. The subject of the email was "CQC initial feedback" which was said after one day to have been very good. There were a couple of minor things that they had highlighted with regard to care plans and risk assessments but they were on with it and it should all be complete before the inspection was finished and would not go against them once evidenced, but they would be receiving an improvement notice in response to MHA, MCA and DoLS policies and procedures being out of date and not being updated in line with the new English Code of Practice. The CQC stated it was evident that practice at Newton House did encompass the changes and that the acts were being adhered to

including the changes that had been considered, but the policies and procedures needed to be improved on immediately. She then went on to refer to being unable to evidence that training had been completed in these areas by all staff. She then referred to the module that she had asked for that had not been sent. Once the module was in date and/or sent they could quickly and effectively evidence this via workshop delivery, copies being issued to all staff and/or even better if it was on the blended learning system. Needless to say it was disappointing they had worked so hard and evidenced really good practice but they would be failing in this essential area.

122. We have not been taken to any response from either Jo Ward or Devan Moodley to this email.

123. Dr Moodley in his witness statement refers to raising matters with Mr Hallows on 17 March, but he does not provide any evidence that he raised the issues in the claimant's 21 March email with anyone.

124. On the basis that Dr Moodley was the Medical Director and she reported to Jo Ward the claimant might have made a protected disclosure to them.

125. It could be said, therefore, that the claimant had provided information that the respondent had failed to comply with a legal obligation from the CQC because it found the company's policies and procedures out of date which would result in the company receiving an improvement notice.

126. As to detriment, the claimant alleges she received no feedback from senior managers about her concerns which were ignored and not taken seriously. Given the lack of any evidence that the claimant's disclosure was raised with senior managers by Dr Moodley we are unable to find that the claimant was subjected to any detriment done on the ground that she had made this disclosure.

Protected Disclosure 16

127. Allegation 16 relates to 23 March 2016:

> "At a meeting at Newton House the claimant raised her concerns about corporate failings found by the CQC. The claimant said she was deeply disappointed and felt let down by the company as she had worked extremely hard throughout her employment to raise the standards to a very high level, only to be let down by the corporate failings that she had raised months previously. The claimant expressed her concerns about the developing culture of the respondent's Executive Management Team (EMT) who were making it impossible for her to meet the regulated requirements of the regulated activities of the respondent's services as defined by the CQC. The claimant expressed concerns that Kerry McKevitt had assumed the role of training lead without the required training accreditations for any of the courses including first aid, AED and Intermediate Life Support (ILS) training, and Management of Actual and Potential Aggression (MAPA) qualifications which is essential in Mental Health Service to ensure that staff can protect patients and others from acts of aggressive behaviour to self or others. The claimant also raised concerns about the matter with the DBS verification, the £10 limit was being imposed, and the refusal to authorise money for the bariatric patient's weight

> watchers escort. The claimant showed Mr Shields email evidence to corroborate her concerns. The claimant expressed her concern that she was no longer able to perform her role safely, effectively or responsively as per the CQC requirements of her post and complained that the respondent was attempting to force her to work in breach of health and safety laws. The claimant stated to Mr Shields that she was very concerned due to legal implications of the role and the fines and prison sentences that could potentially be imposed on the claimant personally should things go wrong. The claimant said she felt that the EMT were making decisions that were not in keeping with standards and regulations, and demonstrated a gross lack of knowledge and experience in the sector and the impact of the decisions they were making. The claimant stated that it was becoming increasingly impossible to perform the requirements of the role given the behaviour of the EMT. Mr Shields said he recognised the claimant's concerns and assured her that he would address these issues with the respondent's EMT."

128. The claimant again refers to the disclosure as relating to breach of legal obligation or health and safety. The disclosure was allegedly made to Kevin Shields.

129. The claimant's witness statement does not provide any more detail than is to be found in the alleged disclosure, and the claimant has pointed us to no documents that support her allegations.

130. We shall endeavour to break down the lengthy allegation into its component parts and look at each of them in the manner that was done by Mr Shields in his witness statement dealing with this matter.

131. Mr Shields remembers having a discussion with the claimant just before he left Newton House on 23 March 2016. Numerous issues were discussed but none of them came across to him as particularly serious or concerning and none of them were presented to him as particularly pressing concerns for the claimant. She did not request him to take any specific action in relation to the concerns that she raised.

132. The first item identified by Mr Shields is a developing culture within the EMT who were making it impossible for her to meet the regulated requirements of the regulated activities of the respondent's services as defined by the CQC.

133. We do not regard the claimant expressing concerns about the way in which the EMT was developing that she felt made it impossible for her to meet the regulated requirements of the regulated activities amounted to "information", that might lead Mr Shields to take the view that the company was failing to comply with any legal obligation or endangering the health and safety of any individual.

134. The second item is the claimant's expressed concerns about Kerry McKevitt assuming the role of training lead without the required training accreditations.

135. Mr Shields does not recall this matter being raised, but he points out the difference between the role of a person in charge of or having oversight of the delivery of training as a whole and the role of a person delivering training on the ground.

136. In our judgment, for someone to be in overall charge of training does not require that person to have particular knowledge of or qualifications in the subjects in respect of which training is to be given. The important thing is for the trainers themselves to have sufficient specific knowledge of their subject to impart the necessary training to the required standard.

137. The claimant raises an issue here giving her opinion as to Kerry McKevitt, but in our judgment she does not provide any information and thus she does not make a protected disclosure.

138. As to the DBS verification, the claimant raised her concerns although without anywhere stating what those concerns were. The claimant offered her opinion on the proposed change in the way in which things were done, but we do not find that what she said amounted to the provision of information that might lead anyone to think that the company was in breach of a legal obligation.

139. We have found above that the £10 limit was imposed by a person to whom no disclosures were made. This seems to us to be the case for all of the matters relating to expenditure. We do not find that they amounted to protected disclosures when repeated to Mr Shields.

140. As to the claimant expressing her concern that she was no longer able to perform the role safely and that the respondent was attempting to force her to work in breach of health and safety laws, the evidence of Mr Shields is that the claimant did not say anything like this to him. The issues she was concerned with related to her being disempowered as she perceived it, with the emphasis of her concerns being on the DBS checks and the expenses issue.

141. Given the lack of any specific evidence from the claimant, we are unable to find what information, if any, the claimant provided such as would amount to a protected disclosure.

142. As to the legal implications of the role and the fines and prison sentences that could potentially be imposed on the claimant should things go wrong, the evidence of Mr Shields is to the effect that the claimant did not say this and it would have been totally out of the context of their conversation. Had she raised this he would have escalated this issue by bringing it to the attention of the Management Board.

143. Again, given the lack of specific evidence from the claimant on this point we do not find that the claimant made a protected disclosure in this regard.

144. As to the EMT making decisions that were not in keeping with standards and regulations demonstrating a gross lack of knowledge and experience in the sector and the impact of the decisions they were making, thus making it increasingly impossible for the claimant to perform the requirements of her role, Mr Shields again does not specifically recall the claimant saying this. He explains that the EMT were a group of managers making and implementing decisions in the interests of the company which in his view were reasonable decisions not intended or likely to be detrimental to the claimant. Again we do not have any evidence of anything specific put by the claimant to Mr Shields in this meeting, so we were unable to find any information provided by the claimant that might amount to a protected disclosure.

Protected Disclosure 17

145. Allegation 17 is from November 2015 to March 2016:

> "The CQC inspected the hospital in November 2015 and stated that the current furniture was not fit for purpose and needed to be replaced. In the provider response to this report it was highlighted that replacement furniture had already been sourced. Despite the tight timeframe given by the CQC to replace the furniture and numerous requests for authorisation the purchase of the furniture was not authorised for several months."

146. The claimant does not in the schedule state what breach this tends to show, but in any event according to the evidence this matter does not relate to health and safety or breach of regulation. It is a cosmetic issue in relation to furniture which remained perfectly usable.

147. In the document sent by the second respondent to the CQC following the inspection report it states:

> "Proposed new tables and chairs have been sourced and quoted for. We are awaiting a sample to ensure they meet the requirements, are robust and are of a high quality. If the sample is satisfactory adequate numbers will be purchased. If these are not satisfactory then alternative furniture will be sourced."

148. It was anticipated that work would be done by 1 March 2016.

149. We do not regard this as a protected disclosure. There is no breach of legal obligation or health and safety implication.

Protected Disclosure 18

150. The next alleged disclosure, item 18, relates to 31 March 2016 –

> "At the managers' meeting the claimant raised concerns about the feedback received from the CQC inspection and that the CQC would be issuing a 'Requires improvement' for 'Effective', with a possible sanction attached due to non compliance with the MHA policies and procedure.
>
> At the same meeting the claimant also raised concerns about the new company organogram for the Board/EMT provided and the lack of clinical staff on it.
>
> She also raised concerns about the £10 financial limit imposed on her over which she needed to seek authorisation before she could purchase items for the hospital, which could potentially impact on patient care. The claimant also raised a concern about the EMT giving service level direction to junior members of the team at Newton House to change policy and procedure without any form of consultation, appropriate qualification and with a total lack of disregard for the roles, responsibilities and accountability that she held as part of her post. The claimant also raised the building requirement again because as yet appropriate action had not been taken to initiate the works in

relation to such matters as the Garden alarms, refurbishments works and lift installation."

151. According to the claimant, these alleged disclosures related to failing to comply with legal obligations and health and safety. The disclosure was allegedly made to Jo Ward and to Kevin Shields who was not at the meeting but was on what the claimant believes was a list of members of the EMT to whom minutes were circulated.

152. The claimant's witness statement seems to repeat the narrative in the disclosure.

153. Turning to the notes of the managers' meeting held on 31 March 2016, we see that John Bromfield, Jo Ward, Nicola Johnson, Mark Swann and Sean Jones were in attendance with apologies from Sean Holcroft and Kevin Shields.

154. The claimant did refer to the CQC inspection. Three days before it took place a requested list of information was raised, but she was not able to send policy and procedures on various legislation. Some were out of date and they did not reference English Codes of Practice. She provided the most up-to-date information she had. She advised that the policies and procedures were with the policy review group for review. She now had a breach because there was no overarching policy referencing the English Code. She had sent an urgent email but did not receive a response until after office hours. She now had a breach which would affect other parts of the business. The practice in place was legal and they would get an overall "good". The policies had now been revised and finalised and issued. There had been a breach, although minor, but it was still significant. The CQC was happy with the practice.

155. In our judgment the claimant here is bringing her managerial colleagues up-to-date with the outcome of the inspection of her hospital. Although she provides them with information, there is no information provided to Kevin Shields, should he read the minutes, that he was not already aware of. We do not find that the claimant in making her report to her colleagues raised a protected disclosure with either Jo Ward or Kevin Shields. From the previous email referred to above Jo Ward was made aware of matters by the claimant on the day of the inspection.

156. As to the company organogram, there is a note of the claimant asking where does the Board fit into the information provided already, but the raising of a question is not in our judgment the provision of information thus not making this a protected disclosure.

157. There is reference to the £10 limit with Newton House currently unable to authorise any items over £10 potentially impacting on patient care and needs.

158. We have dealt above with the £10 limit which was imposed by someone without any knowledge of the claimant's protected disclosures. We do not regard this provision of information as a protected disclosure as it does not provide information tending to show a breach of legal obligation or health and safety.

159. There is no mention in the meeting notes of the claimant raising a concern about the EMT giving service level direction to the junior members of the team at Newton House. The meeting notes refer to "concerns are that individual members of

staff are having changes enforced without consultation. NJ is overhearing these changes from staff and is unaware of the changes". The notes, a version of which we have in the bundle, refer to a comment added by the claimant that she was not able to authorise anything over £10 and she referred to the purchases for a resident to attend his father's funeral.

160. The notes do not support the claimant raising the EMT giving service level direction to junior members of the team at Newton House to change policy and procedure without any form of consultation.

161. The final issue here relates to the claimant raising the building requirements. Again, the notes of the meeting do not make any reference to this.

162. We do not find this allegation amounted to a protected disclosure.

Protected Disclosure 19

163. Item 19 is from 30 March to 1 April 2016 –

> "The manufacturer of new electronic doors provided a report stating the locks had been incorrectly fitted, meaning that if the mechanism failed there would be no way of opening the doors, thus trapping anyone in the room inside. The installer disputed that the locking mechanisms were unsafe but with mental health patients this risk is significant and so the claimant informed the Estates Manager of her concerns, asking him to have another look at the report and double check the safety elements brought up. She copied in all others listed."

164. This matter again refers to breach of legal obligation and health and safety.

165. On Wednesday 30 March 2016 at 11:29 the claimant sent an email to various recipients with the subject "New doors at Newton House – CFYE".

166. According to the claimant:

> "Primera have been and done the assessment. They will get a report over to me today. Verbal feedback has been given as follows:
>
> - The door locks have been incorrectly fitted.
>
> - The emergency override holes are in the wrong place in relation to the locks meaning the emergency override toolkit will not work on the eight doors with these locks. In context if we have a barricade situation with any of these rooms we would not be able to enter the rooms at all.
>
> Primera will provide a report and quote to complete remedial works but they are not available until the end of next week to complete the work. The override toolkit is not on site and three of how have been shown how to use it, but in essence until the work is completed this tool is useless. What course of action would you like us to take?"

167. Mike Pearce responded on the same day at 12:34 saying:

> "This needs to go back to Tyson. I am on the road but will be back in the office later. " (Tyson were the installers of the locks manufactured by Primera)

168. At 15:44 on the same day the claimant emailed "many thanks" to Mike Pearce and said that she had spoken with Frank from Tyson's who was able to get someone out the next day to assess. She had explained the urgency of the task.

169. On 31 March at 11:12 Frank Brogdon from Tyson Construction emailed the claimant copying in Mike Pearce and others. He had been to Newton House and inspected the doors:

> "The issue seemed to be when you try to unlock the doors with the emergency locking device it was not 100% lined up with the diameter hole, it's slightly smaller and therefore needs a slight adjustment/made bigger. However, this is not an emergency as we have shown Jack that if the locking device fails you can still open the doors by removing the anti-barricade with the Primera lifeline key."

170. He carried on showing areas that required slight adjusting/trimming and there were six doors "requiring fine adjusting that would be attended to as soon as possible".

171. Mike Pearce thanked Frank Brogdon for his quick response at 11:29 on 31 March.

172. The claimant, on 1 April carried on the chain with an email to Mike Pearce saying "could she suggest it was checked with Primera as they had been very clear that it was not the case and should an incident occur where a service user and/or staff come to any harm then this would result in a serious high level investigation.

173. Mike Pearce responded at 13:51 telling the claimant that "Primera have fitted modified locks that do not require the tool to open the door into the corridor, if you fold the doorstop back and pull on the door it should open outwards".

174. Frank Brogdon confirmed in an email at 13:58 that this was the case. It was demonstrated at Newton House where Jack witnessed the door could be opened with the anti-barricade doorstop being removed completely, therefore the door can be opened fully. The joiner would attend next week to modify the holes.

175. Looking at the claimant's first email on 30 March 2016 we find that this did amount to a disclosure of information raising a protected disclosure concerning potential risks to health and safety of the occupiers of the relevant rooms if there had been a barricade situation.

176. As to detriment the claimant says that her concerns were ignored and not taken seriously, that Mr Pearce refused to do as requested by her and instead forwarded her email to the external installer asking him to confirm that he locks were safe.

177. We do not find that the claimant's concerns were ignored and not taken seriously. We are satisfied that the respondent did take the concerns seriously and

that plans were put in hand to have the necessary remedial work done without any undue delay.

Protected Disclosure 20

178. Item 20 relates to 4 April 2016 –

> "At a meeting at Head Office the claimant was informed that the respondent was planning to remove training packages for staff and that Ms McKevitt was going to be responsible for staff training in future. The claimant was informed that staff members would now not be paid to complete their mandatory training. The claimant expressed her concerns about the fact that Ms McKevitt was not qualified to oversee staff training as she did not have the required certifications. The claimant also expressed her concerns about the detrimental impact that the removal of mandatory and e-learning training packages would have on the staff and her ability to comply with CQC requirements. She stated that it was wrong to consider not paying staff for completing mandatory training. On 25 January 2016 Ms McKevitt had sent an email previously to the whole company stating that 'due to the Board's decision' mandatory training would no longer be paid. The claimant raised a concern about this in an email to her line manager Miss Ward on 26 January 2016 stating that she perceived this would cause operational difficulties."

179. The claimant again refers to breach of legal obligation and matters relating to health and safety. The complaint was allegedly made to Gemma O'Malley, a member of the respondent's Executive Management Team.

180. We have been provided with Ms O'Malley's manuscript notes of the 4 April meeting which was held at the company's Head Office in Wales starting at 9.00am.

181. In an email sent by Kerry McKevitt to MHC Home Managers on 25 January 2016 at 17:36 under the heading "Payments for blended learning" Kerry McKevitt writes:

> "Due to the Board's decision not to pay overtime for the blended learning courses payroll must be able to identify what training is being claimed for on the monthly rota."

182. She went on to explain how the training undertaken by employees should be evidenced on the monthly rota. If the information was not provided Payroll would not be able to process the payment and the payroll team would be happy to help with any queries.

183. In the light of this email it is not the case that the company had said that mandatory training would no longer be paid. The decision was not to pay for it at overtime rates.

184. The notes of the meeting in our judgment do not indicate that the respondent was planning to remove training packages. The proposal was to change the way in which training was provided. There is no reference to Ms McKevitt being responsible for staff training in the future in the notes. The claimant was not informed that staff

members would not be paid to complete mandatory training. The claimant expressing concerns about Ms McKevitt is not noted.

185. We do not therefore find that the claimant provided information such as might amount to a protected disclosure in relation to a breach of legal obligation or endangering health and safety at this meeting on 4 April.

186. Had we found that there was a protected disclosure the claimant's alleged detriment amounts to being asked to travel for three hours to attend the meeting even though she would not be reimbursed for her travel costs. This request was made prior to the alleged disclosure.

Protected Disclosure 21

187. This allegation relates to 5 April 2016 –

> "The claimant resigned and in her resignation letter the claimant re-raised concerns previously made."

188. Looking at the letter the claimant does not raise any new concerns. The resignation letter will be looked at again in connection with the constructive dismissal claim.

Protected Disclosure 22

189. Allegation 22 refers to 7 and 8 April 2016 –

> "Following an instruction from Kim Moore the claimant raised concerns by email that she was not legally entitled to carry out the role of the Responsible Officer which was in overseeing, managing and supervising consultants' caseloads and to express her concerns about the inappropriate instruction she had been given by email on 5 April 2016."

190. This allegation again is said to go to failing to comply with a legal obligation or endangering the health and safety of any individual.

191. At 08:44 on 5 April 2016 Kerry McKevitt sent out an all staff communication on behalf of the EMT. The relevant paragraph for the purposes of this allegation states that:

> "As part of the ongoing development of the business there have been some further changes at the management level. Dr Devan Moodley, Medical Director, has left the business whilst Kim Moore, Director of Operations for Residential, will be taking interim charge of our mental health stream whilst Jo Ward takes time out of the business."

192. Dr Devan Moodley provided his services to the respondent companies through his own limited company. As well as being the respondent's Medical Director Dr Moodley was also the Responsible Officer under regulations from the General Medical Council. According to Dr Kidd the Responsible Officer is responsible for submitting the revalidation application on behalf of each Consultant Psychiatrist every five years. Each medical practitioner must have a Responsible Officer, and

she recalled thinking that when Dr Moodley left she needed the name of a Responsible Officer for the purposes of her GMC record.

193. At 09:42 on 5 April Kim Moore sent an email to the hospital managers, John Bromfield, Sean Holcroft, Nicola Johnson and Mark Swann, with the subject "Communication to consultants regarding Dr Moodley". In the body of the email it said:

> "Further to the staff communication sent out by Kerry please can you communicate with the consultants that work at your hospital to let them know that Dr Moodley has left the organisation and that they will be working directly to yourselves with regard to their caseloads. I will be contacting each one of your separately today in order to arrange a time that is convenient to you for me to come out in order to have an introduction to your service. In the meantime if you want to contact me you can either do this through the Highfield Park number or my mobile…. I am looking forward to working with you."

194. The claimant must have sent an email to Dr Kidd on 6 or 7 April which resulted in Dr Kidd replying thanking the claimant for her email and appreciating her discomfort about having to be Dr Kidd's line manager. Dr Kidd would be concerned that a line manager who was not a senior doctor would not be able to provide peer supervision and would not be able to give appropriate advice and support when needed, things which she felt were essential for good medical practice. She believed the GMC requires a Responsible Officer for the doctors and she would be grateful to know who it was now that Dr Moodley had left so she could amend the details on her GMC file. The claimant said that she would raise the issue and seek clarification.

195. On 8 April 2016 at 11:41 the claimant sent an email to Kim Moore saying:

> "I have followed your instructions and discussed for me to line manage and be responsible for the caseload of the consultant psychiatrist and responsible clinician, Dr Kidd, with her. Dr Kidd was unaware of the decision by the EMT to change the line managers of the consultants and had not been consulted by the EMT. I am really sorry but we both feel very uncomfortable with your instruction. I really believe I am not qualified to perform this task. I have tried to double check the regulations with regard to this and I think the Responsible Officer position is the one that is governed by law and not only the GMC. I may be totally wrong about this but I think specialist training is required for this role with reporting directly to the Chief Medical Officer. I am really sorry but on this occasion I don't believe I can carry out your instruction as I do not have the qualifications or experience needed to do so. Would you please advise on an alternate arrangement?"

196. At 12:52 on 8 April Kim Moore's response was:

> "I think you may have misunderstood my email. Following. I have requested that each of you work with the consultant psychiatrists concerning their caseloads for the patients that you are responsible for in your hospital."

197. In our judgment the claimant in her response to the email from Kim Moore, following her communications with Dr Kidd, made a protected disclosure when she

disclosed information on the basis of her reasonable belief that she was being asked to manage and/or become the Responsible Officer for the consultant working in her hospital, which was not in compliance with legal obligations concerning the appointment of Responsible Officers.

198. The respondent may take the view that the claimant misread the email from Kim Moore but it is stated "that they will be working directly to yourselves with regard to their caseloads" and Dr Kidd appears to have reinforced the claimant's views as to the meaning of the email. In our judgment the matter was not helped by Kim Moore's brief response that the claimant had misunderstood and she would be working with the consultant psychiatrists, particularly when there was no response to the claimant's request for clarification on the question of Responsible Officer.

199. As to the alleged detriment, it is that Ms Moore refused to provide details of who would be overseeing the consultant psychiatrists as the Responsible Officer in breach of regulatory and statutory requirements and began to bully and harass the claimant. She failed to confirm whether an appropriate person with appropriate qualifications would be available to cover the two days leave requested by the claimant on 20 and 21 April 2016 as a result of pain and fatigue. As a result of this failure, and despite her pain and fatigue, the claimant had to attend at work on her scheduled days off as she needed to ensure that the hospital had appropriate Registered Management cover to oversee the regulated activity.

200. Looking at the alleged detriment, the claimant states that Ms Moore refused to provide details of who would be overseeing the consultant psychiatrists as the Responsible Officer. In our judgment this was not a refusal but a failure to provide the information. As a matter of fact we are aware that Dr Moodley remained in the role of Responsible Officer until he resigned from it some time later. The email from Kim Moore had clarified matters to the extent that the claimant was to work with the consultant psychiatrist concerning the caseload. In our judgment, although things could and should have been handled with more clarity, this did not amount to subjecting the claimant to any detriment

201. As to the question of leave cover on 20 and 21 April, the claimant in her witness statement says that after this point on 8 April she began to feel she was being bullied and harassed by Kim Moore. The statement goes on to refer to a meeting on 19 April when the claimant asked to have two days off and Ms Moore telling her that she would supply appropriate cover, then failing to confirm whether an appropriate person with appropriate qualifications would be available to cover the two days.

202. On considering the facts before the Tribunal we fail to see any connection between the email exchanges between the claimant and Kim Moore from 5-8 April 2016 and the arrangements to be made to cover two days' leave on 20 and 21 April, so we do not find that the claimant was subjected to detriment done on the ground that the claimant had made a public interest disclosure.

<u>Protected Disclosure 23</u>

203. This refers to 12 April 2016 when:

> "The claimant informed Mr Shields of issues arising with Ms Moore and requested supervision with him."

204. At 09:45 on 12 April 2016 Nicola Johnson sent an email to Kevin Shields with the subject "request to meet" stating:

> "Please can we meet this week, I really need some supervision? I was supposed to meet with Kim yesterday but she cancelled due to other commitments. Please can you let me know when you will be available?".

205. We do not consider this request made by the claimant to Kevin Shields amounts to a public interest disclosure. It provides no information.

Detriment 24

206. Item 24 has no specific disclosure and moves straight to an alleged detriment:

> "Kim Moore began to bully and harass the claimant and failed to confirm whether an appropriate person with appropriate qualifications to oversee the regulated activity would be available to cover the two days' leave requested by the claimant on 21 and 22 April 2016 as a result of pain and fatigue. Ms Moore failed to allow the claimant to undertake the regulated obligation on her to ensure that the cover met the criteria of a fit and proper person as per the regulation. Ms Moore also informed the scheduled cover for 22 April that he did not have to attend. As a result, and despite her pain and fatigue the claimant had to attend at work on her scheduled days off as she needed to ensure that the hospital had appropriate registered management cover to oversee the regulated activity."

207. The alleged detriment repeats the detriment alleged at 22 above. In the absence of any further public interest disclosure relied upon by the claimant we are unable to find any connection between any public interest disclosures made by the claimant and the way in which her leave was or was not to be covered on 21 and 22 April 2016.

Protected Disclosure 25

208. The final disclosure relates to 22 April 2016:

> "In a telephone call and by email the claimant raised her concerns about the behaviour of Kim Moore whom she believed was prepared to allow the hospital to be managed by a person who may not have been qualified to carry out this regulated activity which may have compromised the safety of the patients. The claimant disclosed to Mr Shields that safeguarding incidents had occurred and but for the claimant attending the unit unscheduled the patients would not have been safeguarded."

209. The claimant and Kim Moore met on 19 April and on 20 April Kim Moore under the heading "Thursday/Friday Additional Support" sent an email to the claimant noting:

> "We discussed yesterday that you needed to take a couple of days off this week and although we agreed that the service would operate in the same way as it does at the weekend, I suggested that we put some extra support in as a fall-back position if Lauren (claimant's deputy and a registered nurse) needed some extra support/capacity around management issues. Lisa Bessel and Jason Larkin are going to provide management presence on Thursday, and John Wynne-Hughes is going to be there on Friday. Have a good couple of days off."

210. At 16:08 on Wednesday 20 April 2016 the claimant in an email thanked Kim Moore and reminded her:

> "…that Lauren is on her rest days on Thursday and Friday as per our conversation yesterday. Also please can you let me know if the nurses below have adequate experience in managing a mental health hospital with adequate experience of overseeing the regulated activities of assessment or medical treatment for persons detained under the Mental Health Act 1993 and treatment, disorder or injury, so that I can be reassured that appropriate registered manager cover is in place to allow me to take two days leave."

211. Kim Moore responded at 23:03 on 20 April saying:

> "As we discussed yesterday, the managers that are coming to support at Newton House on Thursday and Friday are providing an extra pair of hands should a management situation occur rather than a clinical situation. You confirmed when we met that Newton House staff on duty were sufficient to cover the service as they would normally cover at a weekend. When we spoke you stated that you did not require anyone extra to manage when you were off, which is why I agreed to you being away from the service for two days this week during your notice period. I suggested that we had managers basing themselves at Newton House to provide general support. If the service is not going to be adequately covered then as registered manager you should not be taking leave during your notice period."

212. This resulted in the claimant responding to Kim Moore at 13:27 on 22 April, copying her email to Kevin Shields, as follows:

> "Further to your email on Wednesday 20 April informing me that John Wynne-Hughes would be providing registered manager cover for me today, Friday 22 April, to take a day's annual leave, and failing to respond to my request for information on 20 and 21 April to allow me to complete my fit and proper persons assessment as per by registered manager obligation, you have not responded to me at all. Therefore I have had no option but to again work today due to your failings. Despite this, John Wynne-Hughes is yet to attend the unit to cover the unit and I note that the time to be 13:21 at the time of writing. You have provided me with no information to indicate that he would not be attending and but for my vigilance you have failed to provide me with fit and proper cover for the unit as you had previously agreed. I have spoken with John Wynne-Hughes who informs me that you instructed him yesterday not to come today via email as his presence was no longer required. I have requested this email and expect to have a copy sent to me. This is clear and apparent bullying, harassment and now sabotage of my impeccable

> reputation on your behalf, Kim; and you have failed to take into consideration the safety of service users at Newton House which is of the utmost concern to me.
>
> Kevin, as Nominated Individual, do you find this treatment of your registered manager and blatant disregard for service user safety at Newton House to be acceptable?"

213. In her witness statement the claimant says she raised serious concerns about the behaviour of Ms Moore with Mr Shields in a further protected disclosure in a telephone call and email on 22 April. She says that she disclosed to Mr Shields that safeguarding incidents had occurred and but for her attending the unit unscheduled the patients would not have been safeguarded.

214. Looking at the emails, Kim Moore appears to have believed that the claimant's deputy would have been present on 20 and 21 April when the claimant was planning to be away, which is why she arranged for management cover by persons with managerial experience rather than cover of a nursing nature. These arrangements would have been satisfactory but when it became apparent that Lauren Mackie was also going to be absent on the days in question, the arrangements made by Ms Moore appeared no longer to be satisfactory which resulted in Ms Moore informing the claimant that if the service was not going to be adequately covered then as registered manager she should not be taking the leave.

215. The chain of emails does not in our judgment suggest that Kim Moore intended to leave Newton House without appropriate cover. Her initial belief was that the claimant's deputy would be there and she would arrange for her to be supported by other managers. When this was not the case Kim Moore indicated to the claimant that she would have to attend. Therefore in our judgment Kim Moore was not prepared to allow the hospital to be managed inappropriately.

216. The claimant's email copied to Mr Shields does not raise safeguarding issues particularly when the claimant makes it clear that she is present in Newton House.

217. In the circumstances we do not find the claimant had a reasonable belief that there was any intention to leave the hospital without appropriate cover or that she raised safeguarding issues to Mr Shields. We therefore do not find that the claimant made a protected disclosure to Mr Shields.

Direct Sex Discrimination

218. The claimant brings two claims of direct sex discrimination under section 13 of the Equality Act 2010 which provides that:

> (1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.
>
> (2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.

(3) If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B.

(4) If the protected characteristic is marriage and civil partnership, this section applies to a contravention of Part 5 (work) only if the treatment is because it is B who is married or a civil partner.

(5) If the protected characteristic is race, less favourable treatment includes segregating B from others.

(6) If the protected characteristic is sex –

(a) less favourable treatment of a woman includes less favourable treatment of her because she is breast-feeding;

(b) in a case where B is a man, no account is to be taken of special treatment afforded to a woman in connection with pregnancy or childbirth.

(7) Subsection (6)(a) does not apply for the purposes of Part 5 (work).

(8) This section is subject to sections 17(6) and 18(7).

219. The first allegation is said to continue from October 2015 to 6 April 2016 with the details of the alleged act being that:

> "The claimant attended a site meeting in or about October 2015 about the plans for the hospital. She had not been given any prior notice of this planned meeting at which Graham Hallows belittled the claimant in front of Devan Moodley, Peter Williamson (architect) and Tony Millward (chartered surveyor) for raising concerns (see whistle-blowing Scott Schedule) which he says were not relevant to the meeting. The claimant felt she was treated as little more than a 'tea girl' and had to organise drinks and lunch for the meeting. Mr Hallows said that the plans would be discussed with Dr Devan Moodley and Peter Williamson without her in the following week and the claimant was not invited to any further meetings about the refurbishment despite her role as registered manager for the hospital until 6 April 2016. Subsequently Mr Hallows bypassed the claimant, contacting the male risk and patient safety officer at the hospital instead. Further two male hospital managers from different hospitals in the respondent's group became involved in the refurbishment plans even though they were not familiar or involved with the hospital that the claimant managed, and the claimant first became aware of this when she was included in an email dated 6 April 2016."

220. The claimant's comparators are John Bromfield and Sean Holcroft who are both registered managers of hospitals run by companies wholly owned by the first respondent.

221. The claimant's witness statement deals with the October 2015 meeting in the context of the protected disclosure referred to above, stating:

> "After this meeting I was not invited to any further meetings about the respondent's refurbishment despite my role as registered manager for the hospital. In fact two male hospital managers from different hospitals in the respondent's group became involved in the refurbishments plans even though they were not familiar or involved with the hospital that I managed. Mr Hallows purposely excluded me from planning meetings and would address his emails to 'gents'."

222. The claimant has not taken us to any emails addressed by Mr Hallows to "gents".

223. From our earlier analysis of this meeting we find that the meeting on 13 October was pre-arranged and the claimant was one of the people invited to attend. There is no evidence of the claimant being belittled when she made her views known on the subject of a change from 22 to 26 beds. The claimant has not provided any evidence as to feeling that she was treated as little more than a tea girl, but from the notes of the meeting prepared by Mr Williamson the claimant appears to have been properly listened to, and indeed the largest item in his note is the background information that she provided.

224. As the meeting was held at her hospital which had a chef the Tribunal does not find it surprising that the claimant, as host, would have arranged for the provision of refreshments by her catering team.

225. A further meeting was proposed on 26 October which did not involve the presence of the claimant, but Dr Moodley was one of the proposed attendees. The claimant's comparators were not involved in this proposed meeting.

226. In cross examination the claimant accepted that she was kept informed of matters relating to the proposed developments by being copied in to various emails, and she accepted that she was wrong to say she was excluded from all meetings. It was that she was not given the involvement she required.

227. The claimant agreed that the architect treated her as an equal participant in the planning process, taking on board her views.

228. The claimant accepted that she had no experience of being a registered manager whilst major construction works were carried out in the registered premises. As to whether Mr Bromfield and Mr Holcroft both had such experience and whether their input would be valuable at and after the tender stage, her answer was "yes and no".

229. Graham Hallows on 6 April 2016 sent an email to Tony Millward, the quantity surveyor, copied to Nicola Johnson, Kim Moore, Kevin Shields, Peter Williamson, Sean Holcroft, John Bromfield, Ian Adey-Jones and Mike Pearce, on the subject of "Newton House. Redevelopment Plan. Internal consultation process on phasing. Clarity." In the email he said:

> "We are nearing the tendering and operational phase for this project. To learn from our experiences at Newhall and St David's, both of which have undergone redevelopment whilst continuing to operate, it would seem to be sensible to involve John and Sean in the planning process. We should also

> consider how we approach the regulator and commissioners in advance of the work commencing, inviting their comments and input as appropriate. Can you please organise a site meeting amongst those copied in to this email, to start the ball rolling. If anybody thinks of others who should be included please shout up."

230. It is apparent from this email that the claimant's two comparators were to be invited to a site meeting together with the claimant and the other people to whom the email was copied. When making this proposal we do not find that Mr Hallows treated the claimant differently from her two comparators.

231. In the circumstances we do not find that the matters alleged amounted to an act of direct sex discrimination against the claimant.

232. The second allegation of direct sex discrimination is said to relate to mid March 2016 when Kerry McKevitt (Head of People Services) advised that there would be a pay review process and that any requests for review should be put forward for consideration. During a supervision meeting the claimant advised her line manager, Jo Ward, that she was not happy with her salary and that she thought that £60,000 was more reflective of the role that she was performing. Jo Ward discussed this with her line manager, Dr Moodley, and advised the claimant that he was agreement with the requested pay rise. Dr Moodley stated that he would raise the matter with Graham Hallows but later informed the claimant that Graham Hallows had refused to consider the claimant's request for salary review and it had been refused, but that the other two male hospital managers had been considered for a rise. Another male employee appointed as interim hospital manager when she was placed on garden leave was also paid more than the claimant.

233. The claimant's three comparators are John Bromfield, Sean Holcroft and Dudu Ngwenya (interim manager).

234. The claimant does not give evidence as to her discussion with her line manager, Jo Ward, in connection with a salary of £60,000.

235. When we considered this question above we were not satisfied that Dr Moodley had discussed the claimant's salary with Graham Hallows.

236. It is apparent from the evidence that there was a review of salaries for hospital managers but this was in relation to all of the hospital managers not just Mr Bromfield, Mr Holcroft and then Mr Ngwenya.

237. We are not satisfied that there was a request to Mr Hallows that he refused to consider involving increasing the claimant's salary. The evidence points to Mr Hallows having no involvement with salary increases.

238. The claimant has not satisfied us that there was any direct sex discrimination in regard to a request for an increase in her salary.

Post Termination Victimisation

239. The claimant was permitted, at an earlier preliminary hearing, to amend her claim to include allegations of post termination victimisation, but not to add further

respondents, and did so over some seven pages of text. The claimant alleges that the respondents did unjustifiably report to safeguarding and regulatory bodies a number of matters in which they named the claimant as a person of concern. They did this without informing her of their intention to do so and without involving her in any investigation despite her being named in the concerns raised. The claimant was unable to defend her good name and reputation with regards to the "vexatious and clearly malicious allegations made to public and regulatory bodies". The claimant believed these acts to have been of malicious intent owing to her whistle-blowing.

240. The second respondent made two reports to the Blackpool Local Authority Safeguarding Team, with the claimant alleging that the actions of the respondent were done by a core group of individuals and as ordered by Graham Hallows, who the claimant alleges had direct involvement in the decision making and discriminatory processes she had been subject to. His smear campaign of her reputation was she said directly motivated due to her public interest disclosures over his actions, instructions and omissions, both directly and indirectly through his EMT.

241. As noted above the claimant gave notice to terminate her employment on 5 April 2016. The claimant was placed upon garden leave on 25 April 2016.

242. The respondent made arrangements for Mr Holcroft and Mr Bromfield to provide some registered manager cover, and then Mr Ngwenya was seconded to Newton House. According to Mr Ngwenya his secondment started on 4 May 2016 and the post was made permanent on 6 June 2016.

243. On 3 May 2016 Kerry McKeviit sent an email to Meryl Roberts, the Mental Health Manager, referring to a safeguarding incident that did not appear to have been recorded at Newton House. She was asked to supply all the details as there would potentially need to be an investigation.

244. Meryl Roberts replied later on 3 May saying that she had been undertaking a planned Mental Health Act legal files audit on Wednesday 27 April when it became apparent to her that on 20 February a returning patient was subjected to a strip search by support workers. The Responsible Clinician, Dr Kidd, was not informed and her consent was not sought. The patient was apparently naked at some time during the search. No illicit substances were found. It appeared that the claimant had not conducted an investigation into the incident. There was no record of it beyond the handwritten entry in the patient's ward file.

245. Meryl Roberts and Dudu Ngwenya appear to have carried out some form of investigation, and on 11 May 2016 Mr Ngwenya in an email to Kim Moore said he would discuss the matter with Dr Kidd and if she had not given her authority he would raise the matter with Blackpool Safeguarding that day.

246. Also on 11 May 2016 Meryl Roberts emailed Kim Moore to say that she had discussed with Dr Kidd an incident where three patients were taken by staff to a pub. She was most unhappy with the decision taken without her authorisation or prior knowledge. There had been a properly authorised group trip organised to the Wild Boar Park which was cancelled due to lack of staffing so a decision was made to go to the pub instead. One of the patients did not have permission from Dr Kidd to go to the pub and another had alcohol without permission. She had asked for matters to be investigated and was told that Lauren Mackie had looked into it and found no

issues. Dr Kidd had emailed the claimant to continue to press that she remained unhappy and Dr Kidd said that "Nicola grudgingly re-opened it" but the incident had still not been reviewed to her satisfaction.

247. Mr Ngwenya did not deal with these matters in his witness statement but was cross examined by the claimant. As part of this he said that he was not instructed by the EMT to submit the reports. It was not a set up. He did not go to find these things. No-one did.

248. At the time the concerns were raised they were able to establish what had happened. He did not feel it necessary to contact the claimant. It was put into the hands of the Blackpool safeguarding officer who would deal with approaching the claimant if necessary.

249. There was another issue, concerning Mr Guyers, that he discussed with the Local Authority Designated Officer and when he was told the matter did not need to be taken further he did not submit a report.

250. On 25 May 2016 there was a safeguarding strategy meeting held at Newton House between Samantha Glover, safeguarding lead with Blackpool Council, and Dudu Ngwenya, interim hospital manager. According to the note Mr Ngwenya reported a matter on 13 May 2016 with reference to an inpatient who alleged that on 20 February 2016 there was a search initiated following suspicion that he had brought illegal substances into the hospital following a visit home. The patient states he was strip searched by a hospital staff member and a support worker. According to the report authorisation was not sought from consultant, Dr Kidd. This was not procedure and was illegal. Mr Ngwenya states the incident was not properly investigated at the time. It had been brought to his attention at an MDT meeting.

251. The record of the discussion continues by stating that Dr Ngwenya advised that it had been reported to Dr Kidd and Nicola Johnson, previous manager. It appeared on first review that no further actions were put in place from a management point of view. This was the only time the claimant was mentioned in relation to this issue.

252. The second matter was discussed at the same meeting. Mr Ngwenya raised an alert on 16 May saying he "had found out two days ago that there was an incident which had not been properly dealt with [by] the previous manager, Nicola Johnson, and he would like to report this incident as a safeguarding alert". The report goes on to refer to the patients visiting the pub and the consumption of alcohol without permission of the responsible clinician.

253. In both cases the meeting note records that a safeguarding investigation was required by the Local Authority.

254. Mr Ngwenya was asked whether he was aware of the claimant having made protected disclosures. He said that he was not.

255. Dr Kidd under cross examination did not know how many safeguarding alerts the claimant had raised but it was more than a couple. She would have thought the claimant would have referred a matter to safeguarding if relevant.

256. Dr Kidd was on annual leave when the strip search was done. She did not know that the claimant had also been on leave at that time. She did not hear about the strip search until some time after it had happened – at least a week. She assumed it had been reported to safeguarding and only after the claimant left was it included in a safeguarding meeting at Newton House.

257. According to Dr Kidd, personal searches are not illegal if there are reasonable grounds to do them and they are done humanely and reasonably. She would think some searches would not be reportable if done in compliance with the Code of Practice. It remained her opinion that the particular strip search should have been reported to safeguarding. She did not communicate her view to the claimant thinking it had been reported.

258. As to the pub trip, Dr Kidd said that it should have been reported to safeguarding.

259. During the course of her evidence the claimant accepted that she had not made her own reports to safeguarding in respect of either of these matters, nor had she placed anything on the records of the respondent concerning either of these matters.

260. Looking at all of the evidence before the Tribunal, in our judgment it was right for the respondents to report the two matters to safeguarding. Dr Kidd was of this view and the safeguarding representative accepted the two reports and confirmed that further investigation was needed.

261. The reports themselves were made as a consequence of the incidents having occurred and, in our judgment, not for any reason connected with the protected disclosures made by the claimant.

262. The claimant's name is mentioned on a factual basis as the person who was the registered manager at the time of the events. This does not in our judgment have any connection with the fact that she claimed to have been a whistle-blower, a matter that Mr Ngwenya who made the reports was not aware of. We do not therefore accept that the claimant was the subject of post termination detriments. Having reached this conclusion we have done so without finding any element of conspiracy on the part of employees of the respondents in relation to the reporting of these items.

Unfair Dismissal

263. The claimant brings this claim section under section 103A of the Employment Rights Act 1996 which provides that an employee who is dismissed shall be regarded as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.

264. Such a claim can be brought by an employee who has not been employed for a continuous period of two years and who therefore does not have the qualifying service to claim ordinary unfair dismissal.

265. As the claimant lacks the requisite period of continuous service to claim ordinary unfair dismissal she has the burden of showing on the balance of probabilities that the reason for her dismissal was an automatically unfair one.

266. The claimant resigned and is claiming constructive dismissal. This is dealt with in section 95 of the Employment Rights Act 1996 which provides that:

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

267. The question for the Tribunal is therefore whether the protected disclosure was the principal reason that the employer committed the fundamental breach of the employee's contract of employment that caused the employee to resign. If it was then this will lead to a finding that the dismissal was automatically unfair.

268. The claimant's letter of resignation dated Tuesday 5 April 2016 sets out the reasons on two sides of A4. The letter is addressed to Jo Ward and copied to Dr Moodley, Kevin Shields and someone from the CQC.

269. The claimant gives four weeks' notice to 2 May 2016. She states that the position of registered manager at Newton House is no longer tenable. Numerous matters have arisen causing her concern. As registered manager with legal responsibility she feels a culture developing that is not in keeping with her professional Code of Conduct as a nurse or her ethical standing. She feels that maintaining her professional integrity is paramount and is not willing to lower her standard. She refers to numerous areas of concern where her professional judgment has been questioned by colleagues in junior and non clinical positions that could have impacted on service user care. She had not allowed these matters to impact on patient care and/or safety but she was now merely able to intervene as and when matters were brought to her attention. She felt woefully unsupported by Central Services and the new Executive Management Teams at MHC.

270. The claimant continued stating that she was unable to make decisions even about the most trivial of things and colleagues were being instructed to take unsafe and illegal actions without prior consultation with herself or other clinical and legally responsible colleagues.

271. The claimant refers to being locked out of crucial policies and procedures and being:

> "…Unable to provide these to our regulatory body and my colleagues being instructed to scan DBS documents to Head Office for verification. Therefore as a result I am no longer able to perform my role safely, effectively or responsibly as per the CQC requirements of this post."

272. As the claimant has legal responsibility she feels the position is no longer tenable without putting herself and her professional registration at risk. She was now unable to make a decision about anything over £10 without having to get authorisation. She felt she was being treated unfairly by members of the company

due to her gender and age, for example being publicly belittled when raising serious health and safety concerns of the environment at Newton House which were not taken seriously in the male dominated culture that is the Central Maintenance Team.

273. Having raised other matters concerning a change in the way in which training would be carried out, the claimant stressed her serious concerns with regard to the recently appointed Executive Management Team and the lack of clinical presence and experience in it. Decisions were being made and communicated by the Team without any appropriate clinical consultations with the registered managers. This might leave patients vulnerable and to questionable decisions being made by a team of lay people which may directly impact on service user safety should it be allowed to continue.

274. In conclusion the claimant reiterated that she felt very disappointed and let down by the Central Teams and the EMT but she fully appreciated the support of Jo Ward throughout her employment. She would like to thank her for the opportunity at Newton House and wished her all the best for the future.

275. Analysing the resignation letter, with regard to her protected disclosures the claimant refers to being locked out of crucial policies and procedures and being unable to provide them to the regulatory body, and the instruction to colleagues to scan DBS documents and forward them to Head Office for verification. None of the other alleged disclosures figure in the letter of resignation.

276. What was the principal reason which caused the claimant to resign? In our judgment it was certainly not matters related to the alleged protected disclosures which do not figure significantly in the resignation letter.

277. In our judgment the claimant has resigned due to the way in which she perceived the respondents' businesses were developing, particularly with the appointment of the EMT which the claimant regarded as being filled by people without clinical experience, and because her professional judgment was being questioned. Whether or not this amounts to a breach of the duty of trust and confidence or any other fundamental breach of the contract of employment is not a matter for determination by this tribunal because the claimant has not been employed for two years.

278. In the absence of the principal reason for the dismissal being that the claimant made a protected disclosures the claimant's allegation that she was unfairly dismissed pursuant to section 103A must fail.

Equal Pay

279. The claimant contends that she was on like work with two male comparators for the purposes of section 65 of the Equality Act 2010 which deals with equal work.

280. Section 65 provides as follows:

> "(1) For the purposes of this chapter, A's work is equal to that of B if it is –
>
> (a) like B's work,

(b) rated as equivalent to B's work, or

(c) of equal value to B's work.

(2) A's work is like B's work if –

(a) A's work and B's work are the same or broadly similar, and

(b) such differences as there are between their work are not of practical importance in relation to the terms of their work.

(3) So on a comparison of one person's work with another's for the purposes of subsection (2), it is necessary to have regard to –

(a) the frequency with which differences between their work occur in practice, and

(b) the nature and extent of the differences.

(4) A's work is rated as equivalent to B's work if a job evaluation study –

(a) gives an equal value to A's job and B's job in terms of the demands made on a worker, or

(b) would give an equal value to A's job and B's job in those terms were the evaluation not made on a sex-specific system.

(5) A system is sex-specific if, for the purposes of one or more of the demands made on a worker, it sets values for men different from those it sets for women.

(6) A's work is of equal value to B's work if it is –

(a) neither like B's work nor rates as equivalent to B's work, but

(b) nevertheless equal to B's work in terms of the demands made on A by reference to factors such as effort, skill and decision-making."

281. The claimant compares herself with comparator A who is the manager of New Hall Independent Hospital in Wrexham, and comparator B who managed New Hall before taking on the management of St David's Independent Hospital. According to the claimant in her ET1 the male comparators earned £60,000 per annum plus bonuses whilst she was paid £50,000 plus a one-off bonus for work on nurse revalidation. In her discrimination schedule the claimant says that she was paid less than two male hospital managers and the male interim hospital manager at Newton House who were all employed on like work with the same job title and job description.

282. As to the male interim hospital manager, we are satisfied from his evidence that he was paid at the rate of £50,000 for the interim role and that he did not take up the substantive role of hospital manager with a further pay rise until 4 May after the

claimant's departure. He was initially paid the same as the claimant and for work done thereafter he, as successor, is not a proper comparator with the claimant.

283. In their initial response to the equal pay claim the respondents aver that any differential at the relevant time between the annual salary of the claimant and the two hospital managers was entirely unrelated to gender. It was a reflection of non discriminatory factors, namely the extent of their service and experience with the respondent's group (one since 2010 and the other since 2006). This is further supported by the fact that one of the two male hospital managers the claimant refers to, namely the one who had been with the respondent's group for longer, was at the relevant time paid at a higher rate than the other one. The respondent submits that a pay review of all hospital managers was taking place during the period March-April 2016. Hospital managers' salaries all rose across the board (for reasons including to ensure they remained competitive in the context of the relevant market). Indeed, had she still been employed by the respondent as at the effective date of the pay increase, 1 June 2016, the claimant would have received a pay rise as all of the other hospital managers. All hospital managers are now paid the same annual salary. The two male comparators the claimant relies upon were not paid £60,000 at the relevant time referred to and were not paid at their new current annual salary until the new pay arrangements were implemented with effect from 1 June 2016.

284. The response goes on to say that any differential in pay was on the grounds of a genuine material factor (including but not limited to length of service, job role and level of responsibility). It is denied that the claimant performed like work.

285. According to the respondent there were four hospital managers, two male and two female (including the claimant) all of whom were paid different rates of pay. The other female hospital manager (Joanne Ward) was paid more than the male managers to reflect the responsibilities she had in managing the hospital with the most complex needs along with her additional duty of being the claimant's line manager. Whilst all hospital managers were responsible for hospital settings, the four hospitals deal with very different patient groups. The hospitals which were managed by the two male managers (and the other female manager) dealt with service users who had more challenging and complex needs than those service users at the claimant's hospital. Due to the higher complexity of the service users' needs in these other hospitals (some of which included locked door wards and high security measures) there were more nurses working within the other hospitals who required management, and one of the male nurses had two deputy managers working under him whereas the claimant had one. Therefore the management responsibilities, service user complexities, regulatory requirements, supervisory requirements, skills needed and the services provided for the role which was undertaken by the male managers and the other female manager were not like work with the claimant.

286. In the response to the claimant's Scott Schedule the respondents repeated the grounds of resistance referred to above then went on to state that the two comparators were employed by different legal entities and so were not appropriate comparators.

287. In his written submission counsel for the respondents noted that the comparators were each employed by associated employers through the first

respondent therefore for the purposes of the Equality Act 2010 the claimant can compare herself with her two male comparators.

288. The first question for consideration by the Tribunal is – was A's work and that of her two comparators the same or broadly similar?

289. We were taken in the bundle to a job description for a registered hospital manager which was said to be the job description given to the claimant. The document would be applicable to managers of hospitals in England as well as Wales because reference is made to the Health Inspectorate Wales as well as to the Care Quality Commission.

290. The job description for comparator A was almost identical to the job description given to the claimant with, in our judgment, no significant differences between the two.

291. The job description for comparator B appears to be the same as the job description provided for comparator A.

292. In the post title A and B are referred to as "Independent Hospital Manager" whereas in the document provided for the claimant the title is "Registered Hospital Manager", but under the paragraph setting out the purpose of the job comparators A and B are both referred to as "Registered Hospital Manager".

293. Each post holder is involved in managing an independent hospital working to the standards laid down by the appropriate regulators. Each hospital receives, assesses and provides care and treatment for their patients all of whom appear to have mental health issues.

294. The person specifications for the post holders appear to be broadly similar.

295. Looking at the work of the claimant and her comparators we find that their work, managing an independent hospital each under the common ownership of the first respondent, is broadly similar

296. Having reached this conclusion, what differences are there between the work of the claimant and the comparators? Are they of practical importance in relation to the terms of their work having regard to the frequency with which differences between their work occur in practice and the nature and extent of the differences?

297. The Equality and Human Rights Commission issued a Code of Practice on Equal Pay in 2011. As to like work:

> "If the woman shows that the work is broadly similar, the second question is whether any differences between her work and that done by her comparator are of practical importance having regard to:
>
> - The frequency with which any differences occur in practice; and
>
> - The nature and extent of those differences.
>
> It is for the employer to show that there are differences of practical importance in the work actually performed. Differences such as additional duties, the

> level of responsibility, skills, the time at which the work is done, qualifications, training and physical effort could be of practical importance. A difference in workload does not itself preclude a like work comparison unless the increased workload represents a difference in responsibility or other difference of practical importance"

298. The Code says that a detailed examination of the nature and extent of the differences and how often they arise in practice is required. A contractual obligation on a man to do additional duties is not sufficient. It is what happens in practice that counts.

299. As to contractual obligations, the claimant was never provided with a contract of employment. Both of her comparators were provided with contracts entitled "Hospital Manager Contract" and looking through the two documents they appear to be identical. We have no reason to believe that had the claimant been provided with a contract of employment it would have been any different from those provided to her comparators other than requiring the claimant to work to the requirements of the CQC rather than HIW.

300. We shall go on to look at the differences that the respondents say there are between the work of the claimant and her male comparators taken from their response to the claimant's claim.

301. The first reference is to the other female Hospital Manager being paid more than the male managers to reflect her responsibilities in managing the hospital with the most complex needs together with her additional duty of being the claimant's line manager. We were not told of the particular needs of the patients at her hospital nor were we told how much of her pay related to managing the claimant as opposed to managing the hospital.

302. The next line of defence is that whilst all Hospital Managers were responsible for hospital settings, the four hospitals dealt with very different patient groups. The hospitals which were managed by the two male managers (and the other female manager) dealt with service users who had more challenging and complex needs than those service users at the claimant's hospital.

303. Comparator A was the manager of New Hall and taken from his witness statement:

> "New Hall is the largest hospital with three distinct wards. There was a 12 bedded low secure unit for patients who present with more complex needs and require a low secure level of physical, relational and procedural security. The ward is secure with patients not free to leave as and when they wish. Some have committed offences such as arson, sexual assault of threats of terrorism whilst others have been deemed unfit for trial having been implicated in such misconduct. Patients suffer from a range of mental health disorders including severe and enduring mental illness, personality disorders and mild learning disability."

304. According to comparator A, he spent the majority of his time on the low secure ward as it had the most complex patients and required the most support and input. There was also at New Hall a 12 bedded locked unit for patients who present

less risk to themselves and to others than those patients in the low secure unit, and an eight bedded open rehabilitation ward for patients who did not require a locked ward and were more able to access the community and other services as they have progressed well on their recovery process.

305. In cross examination comparator A said that although there were 32 beds, only 21 of them were occupied at the time of the hearing. In 2015/2016 the highest occupancy had been 30 and the lowest 21.

306. Comparator B, who managed St David's Independent Hospital, told us that:

> "It is an open rehabilitation unit for male patients located in North Wales. It has one ward and a separate day centre and is purposely set in a rural location three miles from the nearest town. Patients there predominantly have a dual diagnosis of mild/moderate learning disabilities with an associated mental health diagnosis such as schizophrenia. They are regarded as highly complex and challenging mental health patients. On average they stay from 18 months to three years."

307. In cross examination comparator B told us that the registration was for 15 patients and in the day centre they had up to four external patients. In 2014 there was a voluntary agreement with HIW to reduce the number of residents from 15 to 12 and in 2015 there were 12 patients.

308. He said that the patients there were more vulnerable because of learning disability/mental health issues. 50% of them were on one-to-one observation in working hours because of vulnerability in relation to themselves.

309. As to Newton House, we have set out in paragraph 1 above that it is a 21 bed community locked rehabilitation hospital providing care and treatment for men of working age suffering from mental disorder and illnesses. It provides assessment or medical treatment for persons detained under the Mental Health Act 1983 and treatment of disease, disorder or injury.

310. From the claimant's witness statement dealing with the equal pay issue the work done in terms of assessment for medical treatment for persons detained and treatment of disease, disorder or injury is broadly similar to the work carried out in the other two hospitals under the management of the comparators. Although levels of dependency differ throughout any hospital, according to the claimant this has no relationship to the question of like work. All three hospitals admitted patients through assessment and formulation of care. Most admissions were planned. Care and treatment was individualised and within each service there were patients who required either less than two years or more than two years' admission. The character of care for each patient was individualised. Many patients at Newton House had co-morbidities requiring additional physical health support and input. The claimant regards this as minutiae rather than looking more broadly at the value of the work done by the managers.

311. The Tribunal heard evidence from Jo Ward, who was the most senior of the four managers mentioned in the response. She was asked by the Tribunal at the end of her evidence about the three hospitals in question and she said they were similar.

312. In her view Newton House was more difficult to manage. It had a central location in Blackpool and was near to the General Hospital. This location meant that there was a ready availability of drugs and alcohol. There were patients involved with substance misuse and it was easier for them to obtain illicit substances.

313. New Hall was a low secure service which was easier to manage than a locked rehabilitation service. There were different conditions on the residents. New Hall was quite rural.

314. St David's was very remote and tended to deal with people with learning disabilities. There were fewer patients than at Newton House.

315. Newton House was always full. It had a quicker turnover. The population at St David's was more static.

316. Does the fact that each hospital deals with very different patient groups in different settings mean that there are differences between the work of the three managers which are of practical importance in relation to the terms of their work?

317. In our judgment each patient coming to one of the hospitals in the first respondent's group is an individual who is sent to the hospital which is thought to be the best for their particular needs. Before the patient arrives they will have been assessed and a treatment programme will have been prescribed for them to be followed through to the end or until the patient leaves in the interim for other reasons.

318. In our judgment the respondent has not satisfied us that the service users at New Hall and St David's had more challenging and complex needs than the service users at Newton House and so we do not find this to amount to a difference of practical importance in relation to the terms of work of the three managers.

319. The next matter pleaded refers to the higher complexity of the service users' needs in the two other hospitals (some of which included locked door wards and higher security measures), meant that there were more nurses working within the other hospitals who required management and one of the male managers had two deputy managers working under him whereas the claimant had one.

320. According to comparator A, because he has three functioning wards he has to treat each ward separately. He is responsible for three independent staff teams and has to monitor three rotas to ensure each ward is appropriately staffed with trained employees and in keeping with required staffing ratios. This can be burdensome as the number of required staff on any ward at any time may vary due to patient needs. He has to monitor, audit and review three multi disciplinary team meetings each week to discuss the progress of each patient.

321. At New Hall comparator A said he was responsible for in the region of 100 full-time members and he directly line managed a team of senior employees, some of whom held positions unique to New Hall including one Forensic Service Manager, one Rehabilitation Service Manager, one Clinical Site Facilitator and two Consultant Psychiatrists. He met with these employees on a weekly if not daily basis depending on their duties and needs and this took about 20%-30% of his time. Some of these positions would never have existed at Newton House as far as he was aware so the claimant would not have been required to perform the management of these roles as

part of her work. He supervised the senior staff and in turn the senior staff managed their teams. This was a far more hierarchical management structure when compared with Newton House. His line management was of Service Managers, Business Support Manager, Clinical Site Facilitator, Deputy Hospital Manager, Ward Managers, Deputy Ward Managers, Clinical Psychologists, Senior Occupational Therapist, Social Worker, Clinical Administrators and senior nurses. The varying level of professional expertise meant that he tailored their support according to their profession, knowledge and years of experience. He offered both clinical and managerial supervision.

322. At St David's, according to comparator B, in March 2016 there were 60 employees including himself. He managed them and his team included one Clinical Lead Nurse, one Social Worker, one Occupational Therapist, two Occupational Therapist Assistants, one Activities Coordinator, three team leaders, two senior staff nurses, five staff nurses, eight senior support workers, 21 support workers, three bank staff performing nurse duties, one maintenance operative, two cooks, one kitchen assistant, two housekeepers, one receptionist and one administrator. He also was the line manager of Meryl Roberts, the Mental Health Act manager who supervised and managed clinical administrators across the three hospitals.

323. According to the claimant, the whole team equivalent number of nurses at Newton House was ten and she had one deputy manager who was seconded to another hospital long-term leading to her predominantly managing the hospital by herself.

324. The claimant in her witness statement set out her analysis of the duties carried out by comparator A with responsibility for 23 nurses and the support of a rehabilitation services manager and a forensic services manager. According to the claimant this shows that A's job was easier as he had more support. The claimant goes on in her witness statement to look at the ratio of nurses to patients, again suggesting that there were more nurses per patients at New Hall than there were at Newton House. At St David's it was a much smaller establishment, she says, than the one run at Newton House.

325. We were provided in the bundle with a list of the staff at the three establishments in March 2016. At Newton House, including the claimant, there were 54 people employed. At New Hall, including comparator A, there were 119 people and at St David's, including comparator B, there were 61 people.

326. The claimant argues that the manager at New Hall does like work with her because the work is broadly similar given that he has managers working under him whereas the claimant is fully responsible for all that goes on in her hospital.

327. Comparing the managerial role at New Hall with that at Newton House, the number of staff involved is significantly greater with New Hall having more than twice the number of staff at Newton House. There are the employees holding unique positions and three separate wards to be managed. This management responsibility is always A's responsibility.

328. If we were to consider this difference of responsibility on the basis of a hypothetical job evaluation then in our judgment comparator A managing an establishment of 118 employees over three wards including a number of employees

carrying out unique roles would be allocated more points for that responsibility than the claimant managing an establishment of 53. We therefore conclude that with regard to comparator A there is a difference between their work which is of practical importance in relation to the terms of their work, namely the significant difference in the number of staff managed. The claimant's work was not in our judgment equal to that of comparator A.

329. When looking at the responsibility of managing Newton House with a compliment of 54 and St David's with a compliment of 61 we find that this involves work of a broadly similar nature with the small difference between the numbers not being of practical importance in relation to the work of managing the staff.

330. The defence goes on, having referred to management responsibilities and service user complexities, to refer to regulatory requirements, supervisory requirements, skills needed and the services provided for the role undertaken by the male managers which was not like work with the claimant.

331. As to regulatory requirements, looking at St David's comparator B tells us that it is regulated by two regulatory bodies, Health Inspectorate Wales and the All Wales Framework. He notes that Newton House is registered by the Care Quality Commission as it is situated in England.

332. The Tribunal takes the view that HIW in relation to St David's is equivalent to the CQC in relation to Newton House as being the primary regulator of the independent hospital with no differences of practical importance being involved for the managers in complying with regulatory requirements.

333. As to the All Wales Framework, comparator B tells us that this is a quality monitoring service awarding quality assurance marks which can be taken away should the hospital fall below the required standards. It creates additional pressures on him and a significant amount of paperwork with the framework document alone being 38 pages. In extreme cases a hospital's registration may be removed by the AW Framework, which would mean an inability to admit patients or to provide services thus comparator B spends a considerable amount of time ensuring compliance with the AW Framework.

334. In cross examination the AW Framework was referred to but only with the witness confirming it regulates quality and monitors standards of care using a three Q system. The claimant did not ask any questions on the amount of time it took B to comply with the requirements of the AW Framework or how significant it was with the possibility or removing a registration should the hospital fail to comply.

335. We have not been provided with any documentation relating to the AW Framework so we do not know what sort of information B is required to provide on a monthly basis or whether there are any significant monthly differences that require much time being spent on completing the monthly forms.

336. Comparator A, who also manages a hospital in Wales, makes no mention whatsoever in his statement of the All Wales Framework suggesting that it is not of any significance for him as a hospital manager.

337. All hospitals are regulated and the regulated managers have to ensure that their hospitals comply with national and/or local requirements so that they can remain open.

338. On the limited information provided by the respondents we cannot be satisfied that the difference between the work of the claimant and comparator B in respect of the AW Framework is of practical importance in relation to the terms of their work.

339. The defence goes on to refer to "supervisory requirements" but looking at the statements of comparators A and B we see nothing specific as to supervisory requirements. It is not therefore possible for the respondents to satisfy us that there were any differences under this heading.

340. The next matter pleaded is "skills needed". According to comparator B he had autonomy at St David's and was comfortable in making decisions alone and being accountable for them. He chose to work closely with comparator A and the claimant's successor, sharing ideas and trying to manage consistently. This was facilitated by monthly hospital managers' meetings. This was not something the claimant was involved with.

341. It would appear that this was a system invoked following the claimant's departure because we are aware that the claimant was involved in meetings of managers during her employment.

342. Comparator B goes on to say that the claimant ran Newton House as a separate organisation without communicating with him or comparator A, thinking that this was because she was receiving direct supervision from Joanne Ward. He thought that she was receiving regular input from Joanne Ward before making important decisions about the management of Newton House and the care of the patients there.

343. We are aware that the hospitals operated by comparators A and B were both in Wales and much closed to one another than to the hospital managed by the claimant in Blackpool.

344. From the evidence given by the claimant we are satisfied that she did manage Newton House and did liaise with her colleagues at the regular managers' meetings. She may well have been more directly in contact with Jo Ward than her comparators.

345. We do not conclude that in terms of skills the evidence of comparator B shows that there are any differences of practical importance between work done by the claimant and by comparator B in managing their independent hospitals.

346. Comparator B makes reference to his contribution to the wider MHC business and strategic tasks performed for the group. These matters do not fall within the respondent's pleaded case nor do they fall within the job description of comparator B, which was the same as the claimant's job description. It may be that these tasks were allocated to comparator B rather than to the claimant because his hospital was in Wales and near to the Head Office as opposed to offering roles to the claimant whose hospital was in England and who was subject to different national regulations.

347. We have looked at the question of responsibilities which is where we concluded that the work of comparator A did have a difference of practical importance in terms of the numbers of staff managed.

348. We have looked at skills and concluded there was no difference of practical importance.

349. As to qualifications, training and experience, these will be relevant when looking at the genuine material factors explaining the differences in pay, but as to the qualifications each of the claimant, comparator A and comparator B are registered nurses, which is the minimum qualification required to hold a Registered Manager's role.

350. Taking all these matters into account in our judgment the work of the claimant and that of comparator B is broadly similar and such differences as there are between their work are not of practical importance in relation to the terms of their work. In reaching this conclusion we have had regard to the frequency with which the differences between their work occur in practice and the nature and extent of the differences.

351. Having reached this conclusion we must now consider the defence of material factor which is set out in section 69 of the Equality Act 2010 and provides as follows:

> "(1) The sex equality clause in A's terms has no effect in relation to a difference between A's terms and B's terms if the responsible person shows that the difference is because of a material factor reliance on which –
>
> (a) does not involve treating A less favourably because of A's sex than the responsible person treats B, and
>
> (b) if the factor is within subsection (2), is a proportionate means of achieving a legitimate aim.
>
> (2) A factor is within this subsection if A shows that, as a result of the factor, A and persons of the same sex doing work equal to A's are put at a particular disadvantage when compared with persons of the opposite sex doing work equal to A's.
>
> (3) For the purposes of subsection (1), the long-term objective of reducing inequality between men's and women's terms of work is always to be regarded as a legitimate aim.
>
> (4) A sex equality rule has no effect in relation to a difference between A and B in the effect of a relevant matter if the trustees or managers of the scheme in question show that the difference is because of a material factor which is not the difference of sex.
>
> (5) 'Relevant matter' has the meaning given in section 67.
>
> (6) For the purposes of this section, a factor is not material unless it is a material difference between A's and B's."

352. In respect of the material factor defence the burden is on the employer.

353. The three matters pleaded in relation to the genuine material factor defence are said to include but not be limited to length of service, job role and level of responsibility.

354. As to length of service it is apparent from comparator B's CV that he joined the respondent group in February 2011 as hospital manager at New Hall Hospital, following which in June 2013 he moved to manage St David's Hospital. Therefore by the time of the claimant's appointment as a manager in March 2015 comparator B had been with the company for just over four years.

355. From the cross examination of B, he appears to have been paid the same salary of £52,000 plus travel of £3,000 making £55,000 from the start of his employment until he was given a pay rise of £10,000 following the claimant's departure in 2016. Given that his salary had not changed we do not find that his length of service was in any way related to his salary during the period of comparison.

356. As to job role and level of responsibility, we have considered these matters when reaching the conclusion that the claimant and comparator B performed like work, so we do not find them to be genuine material factors.

357. Having rejected the material factor defence we conclude that the claimant should benefit from the sex equality clause set out in section 66 of the Equality Act 2010 and have equal pay with comparator B from 15 March 2015 when she was promoted to the role of manager at Newton House until the expiry of her notice on 2 May 2016.

Remedy

358. We invite the parties to seek to agree the question of remedy which appears to the Tribunal to be a matter of simple arithmetic for the difference in pay over a period of 59 weeks.

359. If the parties are not able to reach agreement on the question of remedy then the claimant should apply for a remedy hearing setting out details of the remedy she seeks. A hearing date will be fixed and Case Management Orders will be made.

Employment Judge Sherratt
11 May 2018

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

24 May 2018

FOR THE TRIBUNAL OFFICE