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EMPLOYMENT TRIBUNALS

Claimant:	**Mr John Burgoyne**
Respondent:	**Midlands Partnership NHS Foundation Trust**
Heard at: Birmingham	**On: 1 to 15 February 2019**
Before:	**Employment Judge Broughton**
Representation	
Claimant:	**In person**
Respondent:	**Ms B Criddle (Counsel)**

JUDGMENT

The claimant's claims of unfair dismissal fail and are dismissed.

REASONS

1 The claimant brought claims of unfair dismissal and automatic unfair dismissal for having made protected disclosures.

2 He had originally brought a number of other claims including for unpaid wages and whistleblowing detriment but these had been dismissed upon withdrawal long before this hearing.

3 The Facts

3.1 The claimant commenced his employment with the respondent as a desk top engineer on 1 November 2004. He was subsequently promoted to senior infrastructure engineer, a grade 7 position.

3.2 In October 2014, the respondent commenced a management of change process (MOC) in their health informatics service. A restructure was proposed which included the removal of the roles of senior infrastructure engineer.

3.3 The claimant applied for and was offered the lower banded role of network and systems engineer (grade 6). This role attracted a lower salary than the claimant's former role but the respondent had in place a pay protection policy. This operated to reduce the impact on downgraded employees for up to 3 years.

3.4 In those circumstances it was the respondent's view that the new role amounted to suitable alternative employment such that, if it were rejected, the claimant would not have been entitled to a redundancy payment.

3.5 The claimant was clearly unhappy about this but, nonetheless, accepted the new role. He did not complain either internally or externally at the relevant time but, before me, he suggested that he felt forced to sign the new contract given that he believed that the option of a redundancy payment had been removed.

3.6 The claimant commenced the new role. On 28 January 2015, on receipt of his pay for the month, he emailed the respondent asking for an explanation of what he believed to be an underpayment. Specifically, he had not received any pay protection that month.

3.7 The claimant had been provided with a copy of the respondent's pay protection policy during the management of change process. He said that it was his understanding, from reading that document, that he would receive a fixed amount of pay protection, £178, every month for 3 years.

3.8 That was not what was provided for by the pay protection policy and would not, ordinarily, be how such protection works. Generally speaking, pay protection operates to reduce, but not necessarily eliminate, the financial consequences of accepting a lower level role for a limited period. The level of protection would normally reduce as the salary in the new role increased and that is what was provided for in the respondent's policy.

3.10 That interpretation was something that the claimant seemed unable, or unwilling, to grasp. That said, I heard that he had conceded this point at an earlier preliminary hearing although he repeatedly attempted to return to it before me.

3.11 The pay protection policy stated that it only applied in relation to basic pay. It also expressly stated that it did not apply to "paid enhancements", albeit these were not defined.

3.12 The nature of the claimant's role was such that he was required, both before and after the MOC, to be part of the respondent's on call rota to provide emergency IT assistance out of hours. His contract provided for additional payments to be made both for being on call and for any work required.

3.13 The respondent's interpretation of their pay protection policy was that these on call payments were paid enhancements. Consequently, it was their view, initially at least, that on call payments increased the amount which an employee was entitled to receive under their contract and, as a result, these "enhancements" would reduce, or potentially eliminate, the level of pay protection in any given month.

3.14 It was not in dispute that this level of detail was not explained to the claimant prior to him accepting the new role but, on 13 February 2015, he received a response to his January email from the respondent's payroll department. The respondent's interpretation of the pay protection policy was explained and the claimant was, perhaps understandably, unhappy about it.

3.15 The claimant subsequently sought to characterise the respondent's interpretation as a deliberate dishonest act, although he struggled to justify that conclusion before me. It seems he was suggesting that the respondent was deliberately misinterpreting their policy to save money to his disadvantage. He could not explain, however, why he had completely

discounted other, more likely, possibilities such as interpretation differences or human error.

3.16 In a further meeting on 13 February 2015, between the claimant, HR and his Line Manager, it was confirmed to the claimant that, at that stage, the pay protection policy would operate in line with the respondent's interpretation. Effectively, the payments for on call work would reduce the level of pay protection by a similar amount until such time as his total pay reached the level of his basic pay under his previous role.

3.17 The claimant alleged that his Line Manager then forced him to work on call that weekend knowing that he may not receive any additional pay in relation to the same.

3.18 The claimant was somewhat vague about what precisely may have been said to him that led him to believe that he was being forced to work for no pay. He suggested that he had been told that he was required to do on call work under his contract and that he interpreted this as a threat of disciplinary action if he refused. However, a contemporaneous email from the claimant appeared to suggest that he could have asked one of his colleagues to be on call, although he hadn't because his colleague was "shattered". It was also clear from contemporaneous emails that the claimant was aware that the pay protection issue was still "live" and so it was at least possible that he may have received some payment in future.

3.19 Whilst it is, perhaps, understandable what the claimant may have felt that he was being required to work for nothing, that is, to some extent, to misunderstand the purpose of pay protection. It wasn't that the claimant wasn't being paid for working on call. Rather, he was being paid for the on call work but the result of that was that the unearned enhancement of pay protection was reducing as a result.

3.20 The claimant continued to raise the pay issue and, on 23 February 2015, he sent an email with an attachment to Richard McCue who, at the time, was the network and systems lead.

3.21 The attachment included the claimant's pay issues but also went on to allege that he considered that he was being required to work on call without pay and that this amounted to forced labour in breach of section 71 Coroners and Justice Act 2009.

3.22 The claimant remained adamant before me that, effectively, all contractual requirements in any employment that provided for compulsory unpaid overtime would amount to such a crime.

3.23 Mr McCue replied to the claimant's complaint by email on 26 February 2015. He was very supportive and expressed his personal opinion that the pay protection model in relation to on-call payments was unfair. He said he would do everything in his power to reach a sensible resolution and that, whilst he hoped that the claimant would continue to provide on call cover, he would understand if the claimant refused.

3.24 As a result, it was effectively conceded by the claimant that he could not suggest that on call work amounted to forced labour thereafter, notwithstanding the fact that, to his credit, he felt morally obliged to continue in any event.

3.25 The claimant's managers all remained supportive of removing the disincentive for on call work and escalated the issue to a senior HR level and kept the claimant updated.

3.26 On 13 April 2015, Mr McCue emailed the claimant and others confirming that on call and overtime payments would no longer be treated as enhancements reducing the level of pay protection. He also confirmed that this would be applied retrospectively and the reductions to protected pay that had arisen from earlier on call payments would be refunded.

3.27 The claimant alleged that he worked on call the following weekend although the paperwork on this was inconclusive and he had previously withdrawn his claim in relation to unpaid wages in this regard. The claimant commenced a period of sickness absence on 20 April 2015. The reason given was "work related stress" and the claimant subsequently attributed this to the alleged criminal actions of the respondent.

3.28 It appears that back in February 2015, when the claimant had raised his alleged protected disclosure, Mr McCue had passed the non-contractual element (the allegation of the crime of forced labour) to his Line Manager,

Richard Storey. The claimant sought to suggest before me that nothing had been done with that complaint. However, an email that he sent to Mr McCue on 18 May 2015 made it clear that the claimant had agreed not to pursue that issue at the time, perhaps holding it in reserve if his pay complaint was not upheld. In May he asked Mr McCue for permission to resurrect that complaint, which he subsequently received.

3.40 In the same email the claimant sought advice regarding which policy to pursue his complaint under. Specifically, he asked whether he should use the grievance policy or the public interest disclosure policy. In relation to the latter, the claimant felt that it didn't appear appropriate as it was not designed for a personal dispute.

3.41 On 22 May 2015, Mr McCue again confirmed to the claimant that the lost pay protection would be paid. Ultimately this was paid in the June payroll. Prior to that, however, on 5 June 2015, the claimant lodged a grievance. This was his second alleged protected disclosure for the purpose of these proceedings.

3.42 The claimant repeated his earlier allegation in relation to forced labour. He also referenced the then recently enacted Modern Slavery Act 2015, albeit that only came into force after the period about which the claimant was complaining.

3.43 The claimant also now alleged that the same circumstances amounted to a contravention of section 11 of the Fraud Act 2006 and,

specifically, that his services had been obtained dishonestly and without making full payment for them.

3.44 The claimant provided an extensive document in support of his complaints referencing the relevant statutes and also enclosing edited guidance from the Crown Prosecution Service.

3.45 The claimant was invited to an informal grievance meeting with Mr McCue which took place on 24 June 2015.

3.46 Mr McCue confirmed the outcome of that meeting by email dated 2 July 2015. He confirmed that the back pay had now been paid and the pay protection policy revised. In addition, the claimant had asked about his sick pay entitlements which were confirmed to be 6 months full pay and 6 months half pay.

3.47 In relation to the claimant's request for a formal response to his allegations in relation to the legality of the respondent's policy this was passed to a representative of the Trust and, on 27 July 2015, Greg Moores, the respondent's HR Director, wrote to the claimant. He thanked the claimant for having raised his concerns about the pay protection policy. He also confirmed that the policy guidance had been amended and backdated payments had been made. As to the claimant's criminal allegations, Mr Moores stated that he was not an expert in criminal law but it was his view that the pay protection policy resulted in an "unintentional ambiguity". That was the most likely explanation and a not unreasonable conclusion. Mr

Moores went on to reiterate that the Trust was grateful for the claimant having raised the issue but denied any criminal offence had been committed.

3.48 Prior to this the claimant had sent in a further email complaining about his pay. It appeared that, at some point in these proceedings, the claimant had accepted that he was actually mistaken in relation to those further complaints albeit he did attempt to reopen them at times before me. That said, they were not relied on as alleged protected disclosures and were not directly relevant to the issues. They largely related to the claimant's stated belief that he was entitled to a fixed level of pay protection which, as mentioned earlier, was incorrect.

3.49 It is worth noting at this stage that, in the claimant's second alleged protected disclosure, he omitted to mention that Mr McCue had informed him that he could elect to refuse to work on call until the pay dispute was resolved. He also failed to mention that he had already been informed that the respondent's policy had been changed, that there would be no reductions to protected pay as a result of on call payments going forward and that this would be applied retrospectively to ensure full payment from January 2015.

3.50 The respondent understandably suggested that these selective omissions illustrated that the clamant was knowingly only presenting the facts which might support his position.

3.51 The claimant maintained, however, that there was still a period of around 2 weeks in the middle of February during which he could be required to work on call with, effectively as he saw it, no additional remuneration for some or all of that work.

3.52 In relation to the fraud allegation the claimant suggested that the respondent had failed to specifically explain to him how on call payments would reduce his protected pay. He was in considerable difficulty, however, in explaining how he concluded that this was a deliberate and dishonest omission to secure his services fraudulently as opposed to an oversight, an error, a lack of knowledge or just a difference of approach or interpretation in relation to a poorly worded policy.

3.53 The claimant responded to Mr Moores letter by email of 5 August 2015 stating that he was dissatisfied with the outcome.

3.54 The claimant was subsequently notified of his right to proceed through the formal grievance process although, in September 2015, there was a further attempt to resolve matters informally. This attempt illustrated genuine attempts on the part of senior managers to help the claimant to understand that he was valued but misguided and, having done all they could in relation to his pay complaints, to assist him in returning to work.

3.55 The claimant met with Richard McCue and Sara Copestake of HR on 18 September 2015 and, in addition to the matters already resolved, the claimant received an apology. The claimant felt that this was an unqualified

apology in the meeting. On 23 September 2015, Mr McCue sent the claimant a letter confirming the discussion at the meeting but the claimant felt that the apology had become qualified. The letter again thanked the claimant for raising the pay issue and apologised for the effect on him of the initial application of the pay protection policy. It then went on to discuss the ways in which the respondent was prepared to support the claimant in returning to work.

3.56 In subsequent emails it appeared that the claimant remained unhappy but nonetheless felt that progress was being made.

3.57 On 7 October 2015 the claimant sent an email to Mr McCue and others asking who in the Trust he should forward it on to and inviting Mr McCue to forward it himself and let the claimant know. I have agreed to be somewhat circumspect in relation to detailing some of the personal aspects contained within that email.

3.58 The claimant stated that significant progress had been made but his work issue remained unresolved. He gave some information about his health and treatment.

3.59 Suffice it to say that the language used by the claimant and the illustrations given gave rise to a significant, genuine and reasonable concern on the part of Mr McCue for the claimant's welfare.

3.60 That said, information subsequently provided by the claimant in relation to his personal history offered a different context to his comments.

3.61 The claimant also recounted a discussion with his GP about the possibility of a return to work. The claimant stated that he was technically capable of taking down some or all of the IT network. He appeared to be suggesting that, if he returned to work and became stressed, there was a possibility that he may do such a thing. He suggested that an earlier letter informing him when he would go on to half pay was an example of a stressor that could cause him to react in such a way.

3.62 The contents of the claimant's email understandably caused members of the respondent's management significant concern, both in relation to the claimant's welfare and what was perceived as a possible threat to sabotage their IT systems. The claimant forwarded his email the next day to the respondent's Chief Executive and Finance Director.

3.63 It was clear that the email was also shared with certain other managers in the Informatics Department and members of HR. Whilst the claimant complained about his personal information being shared in this way I note that he had already sent it to a number of managers within the respondent and, indeed, invited Mr McCue to share it. Moreover, the contents were such that the respondent had little alternative in order to respond appropriately both in relation to the claimant's welfare and also the security of their systems.

3.64 The claimant denied that he was actually threatening to damage the respondent's systems but he struggled to provide any cogent explanation as to why he raised the issue at all. I note that, in the background, the claimant was concerned that he was shortly to drop down to half pay having been absent for almost 6 months.

3.65 The respondent understandably sought to refer the claimant to Occupational Health.

3.66 On 20 October 2015, the day the claimant was due to go on to half pay, he turned up to work unexpectedly. Richard Storey met with the claimant and suggested that, after his Occupational Health appointment he should go home and not return to work as, at the relevant time, he remained signed off by his GP.

3.67 Mr Storey's notes of their discussion suggested that the claimant reiterated the concerns he had raised in his email of 7 October in relation to his health and the risk to network systems.

3.68 It was clear that the claimant was very concerned about going on to half pay and that he attended work in an effort to avoid this. His motivation to remain on full pay appears further confirmed by the fact that the claimant had submitted a further grievance in September raising similar issues to the first. It seems the claimant believed that doing this may have delayed him being moved on to half pay due to the respondent's policy of maintaining the status quo in certain such situations.

3.69 Ultimately, it was clear that the claimant put the blame on the respondent, suggesting that it was their failure to resolve his work issues that was hampering his ability to return, albeit it was far from clear what more he wanted to secure such a resolution.

3.70 Given the above, it seems that the most obvious explanation for the claimant having raised the risk of what he may do to the respondent's systems was that he was hoping to suggest that he was willing to return but, if the respondent then felt that the risk was too great, he would have an argument for remaining off but on full pay. Whilst the claimant did not accept this he could offer no other logical explanation for his actions other than that he was stressed and letting off steam. Of course, if it was sent in anger, the implication may well be that it was a threat after all.

3.71 Ultimately, if money was the claimant's motivation, he was successful as the respondent did maintain him on full pay.

3.72 That appears to show the extraordinary lengths that the respondent was prepared to go, including spending considerable amounts of management time and public money, to endeavor to appease the claimant.

3.73 The Occupational Health Report merely, and unhelpfully, suggested that the claimant was off work with work related stress and the solution was to resolve his work issues.

3.74 As a result of the claimant's comments and the respondent's concerns his network account was disabled on 20 October 2015. There was some dispute about whether this action was fully effective but the respondent believed that it was at the relevant time.

3.75 A subsequent clarification from Occupational Health confirmed that they did not consider that the claimant had any underlying recognised mental health condition.

3.76 On 23 October 2015, Richard Storey wrote to the claimant to confirm that the Trust had authorised full occupational sick pay until the claimant returned to work.

3.77 As the attempts at informal resolution of the claimant's grievance had seemingly failed, a formal grievance hearing was arranged which ultimately took place on 1 December 2015.

3.78 The grievance was to be heard by Pru Hayes and, in the run up to the grievance hearing, Ms Hayes received over 30 emails from the claimant and she was aware of a number of other emails sent to others at the Trust. The correspondence was increasingly difficult to understand. It became clear, however, that the claimant wanted acknowledgement of some level of criminality on the part of the Trust and compensation of "several thousand pounds".

3.79 The grievance hearing took place on 1 December 2015. The claimant was accompanied and Ms Hayes was supported by HR. Mr McCue presented the management case.

3.80 Ms Hayes felt that if she could resolve the claimant's pay issues that would go a long way to resolving the matter but she made clear that she felt unable to respond specifically to the allegations of criminality.

3.81 The claimant was seeking a "money and words" resolution.

3.82 There was also some discussion in the grievance meeting about the claimant's email of 7 October 2015.

3.83 On 14 December 2015, Ms Hayes wrote to the claimant communicating her decision in relation to his grievance.

3.84 It was her conclusion that there had been ambiguity in the wording of the pay protection policy and that it was reasonable for the claimant to have raised this. She felt that the respondent had acted appropriately in relation to clarifying the policy and arranging for back payments to be made and on call payments not to be deducted from pay protection in future.

3.85 To her mind, therefore, the pay and policy issues had all been resolved and the claimant had received an apology.

3.86 An outstanding issue, therefore, was the claimant's ongoing insistence that a crime had been committed. Ms Hayes understandably felt unable to comment further on this. The only other issue was the claimant's request for money which she, quite rightly, felt was not an appropriate use of public funds, especially given that the claimant was already receiving significantly enhanced sick pay.

3.87 Ms Hayes expressly recorded in the grievance outcome that she was extremely concerned that the claimant had again referenced "trashing the network" and stated that she would need to agree appropriate steps to protect patients and staff before allowing the claimant to return to work. She confirmed that his administration rights had been removed temporarily.

3.88 On 21 December 2015, the claimant emailed Adam Cooper, the Associate Director of Health Informatics, to express his intention to appeal. Mr Cooper asked for the claimant's grounds on 4 January 2016 and, on 8 January 2016, the claimant was sent the audio recordings from the grievance hearing.

3.89 On 21 January 2016, the claimant emailed Mr Cooper to state that he was not pursuing his appeal. The claimant asserted that this was because he had received pay protection of £178 in the December payroll which he believed was the right amount.

3.90 That amount was actually paid in error. It was the full amount of potential pay protection per month when the claimant commenced his band

6 role but that role had received a cost of living increment subsequently such that the potential protected pay element was reduced by £30 per month.

3.91 As previously mentioned, the claimant did not accept that this was the correct interpretation of the pay policy at the time, although he did subsequently concede this before attempting to reopen it again.

3.92 The respondent's interpretation was correct, although they never sought to recover the overpayment sum from December 2015 and January 2016.

3.93 In any event, the claimant had elected not to pursue his grievance appeal, even if part of his reasoning was flawed. He wanted to arrange his return to work.

3.94 The respondent had concerns about allowing the claimant's return to work and so he was placed on special leave on full pay in February 2016.

3.95 It appears that there was then a period during which there were attempts to resolve the issues between the parties albeit, understandably, I was not privy to that information.

3.96 Ultimately, by June 2016, the claimant was looking to return to work and risk assessments were completed.

3.97 The claimant returned to work on 4 July 2016 and a role was created for him that did not necessitate restoring his administration rights due to the respondent's concern about the potential risk that he posed to the network.

3.98 The claimant was then informed that there was going to be a disciplinary investigation.

3.99 On 26 July 2016, Adam Cooper wrote to the claimant confirming that he had commissioned an investigation. The scope of the investigation was principally in relation to the alleged threat to trash the network in October and December 2015. The investigation was also to consider whether there had been a breakdown in relationships between the claimant and management and it was also stated that the investigation would consider the claimant's behavior since June 2015 in relation to allegedly questioning and/or failing to comply with reasonable management requests and/or not living the Trust values.

3.100 The investigation was to be conducted by Helen Western who was a sufficiently independent manager working in a different part of the department. She interviewed the claimant on 23 August 2016. She also interviewed the other relevant managers.

3.102 The claimant suggested that others should, perhaps, have been interviewed and that issues dating back to the MOC, his loss of trust in the respondent and his alleged protected disclosures should have formed part of the investigation. Those matters were, understandably, outside the

scope, save to say that the claimant's stress and the alleged causes of it were considered in mitigation.

3.103 Ms Western produced her final investigation report in November 2016 and concluded that only 2 of the allegations should be taken forward, being the alleged threats to trash the network and the breakdown in working relationships.

3.104 The claimant suggested that this meant that she must have concluded that the other allegations were untrue and that those responsible for bringing them should be subject to disciplinary action for dishonesty. However, she only concluded there was no evidence to support those allegations. Her conclusions seemingly support her impartial and objective approach to the investigation.

3.105 It appeared that the dropped allegations really related to perceptions based on the excessive number of emails which the claimant continued to send to numerous managers and the disruption and confusion these caused. It was reasonable to conclude that these were best addressed under the heading of a breakdown in relationships as opposed to the other charges that were originally in scope.

3.106 Miss Western concluded that there was a case to answer in relation to the alleged threats to trash the network which the claimant did not deny, although he sought to offer some context.

3.107 On 19 December 2016, Mr Cooper wrote to the claimant inviting him to a disciplinary hearing to discuss the remaining allegations. That letter incorrectly suggested that the hearing was arranged for 5 December 2016 which obviously pre-dated the letter. This was amended a couple of days later but, for some reason, the claimant still maintained that the disciplinary hearing may have taken place in his absence on 5 December. A disciplinary hearing was subsequently postponed at the claimant's request to give him more time to prepare. There followed a number of exchanges with the claimant about preparations for the hearing, witnesses etc.

3.108 The disciplinary hearing was held on 17 February 2017, and conducted by Melanie Watson. She was supported by Pete Townley, in relation to the technical aspects of the allegations, and also a member of HR although Ms Watson was the sole decision maker.

3.109 The allegations were considered in considerable detail.

3.110 Ms Watson felt it appropriate to refer the claimant again to Occupational Health before making her decision. Again, the response disclosed no diagnosis that would explain the claimant's actions.

3.111 The outcome of the disciplinary hearing was sent to the claimant on 5 April 2017. Ms Watson concluded that the threats had been made and that, whilst the claimant had suggested that he wouldn't carry them out, he also maintained throughout that he couldn't guarantee how he might respond in circumstances where he was subjected to stress. Moreover, he

was unable to clearly identify potential stressors that may have assisted with mitigating or managing the risk.

3.112 As a result, it was also concluded that the claimant's relationship with the relevant managers in the informatics department was seriously damaged as they could not trust him with open access to the network.

3.113 Ms Watson, however, concluded that the claimant was not guilty of gross misconduct as he had not carried out the threat.

3.114 At first sight, that may appear surprising as such a serious threat would certainly appear capable of amounting to gross misconduct.

3.115 However, in the specifics of this case it was an understandable conclusion. It was not necessarily that the claimant had made a direct threat such as to suggest that unless his demands were met he would trash the network. Rather, it was the suggestion that unless his complaints were resolved to his satisfaction he would remain under stress and could not guarantee that he would not do something destructive in those circumstances.

3.116 There was no dispute that the risk of the claimant doing this may well have been relatively small but the potential consequences, had he done so, would have been catastrophic.

3.117 Ms Watson's conclusion was that the claimant's actions could be categorised as misconduct.

3.118 Ms Watson also concluded, however, that there had been a serious and irreconcilable breakdown in relationships between the claimant and relevant managers in the department. Specifically, she concluded that the managers could not trust the claimant with full access rights in his substantive role and, after numerous efforts over a long period of time, there was nothing which could be done to remedy this, not least because the claimant continued to maintain that there could be a risk to the network if he became stressed.

3.119 Ms Watson considered whether there were any suitable alternative roles for the claimant which would not require him to have access rights but, at the time, there were not. The claimant had been working in a manufactured supernumerary position but that was not sustainable.

3.120 As a result, Ms Watson concluded that the breakdown in trust and confidence left her with no alternative but to terminate the claimant's employment on notice for some other substantial reason.

3.121 It was made clear that the notice period would be used to endeavour to locate a suitable alternative role for the claimant which did not have network access rights.

3.122 The claimant was given the right of appeal and was put on the respondent's redeployment register.

3.123 The claimant subsequently asked to be able to access certain acts of parliament whilst at work but this was denied as it was felt that he should be focusing on his work. He could obviously access them from home.

3.124 A possible alternative role for the claimant as a project manager was identified and it was clear that, despite everything, managers within the respondent, including Ms Hayes, were keen to support the claimant in relation to obtaining such a role.

3.125 On 21 April 2017, the claimant appealed against his dismissal and also raised a complaint which included a number of the pay and process issues from 2 years earlier.

3.126 That complaint was referred to the respondent's freedom to speak up guardian.

3.127 On 12 May 2017, the claimant was offered a trial period in the project manager role and, on 15 May 2017, the claimant was informed that his pay issues were being referred to the independent local counter fraud specialist.

3.128 The claimant's appeal was heard by Alison Bussey, the respondent's Director of Nursing and Chief Operating Officer.

3.129 The claimant again sought to raise his historic pay issues and further grievances including allegations of bullying by Ms Hayes which appeared to be almost entirely without foundation. I saw several emails from Ms Hayes to other managers which demonstrated her efforts to understand, assist and support the claimant from his initial pay concerns right up to the possibility of him taking the alternative role as a project manager.

3.130 On 25 May 2017, Ms Bussey wrote to the claimant to inform him that his appeal was not upheld. She was satisfied that an appropriate process had been followed and that the conclusions reached were reasonable. It was clear that she was also very supportive of the claimant obtaining an alternative role without network access.

3.131 The claimant's trial period as a project manager started on 1 June 2017 and was subject to regular reviews.

3.132 Sadly, however, the claimant was regularly distracted and still largely focusing on his historic issues such that, ultimately, he failed the trial period. He did not dispute this outcome and his employment ended on 30 June 2017.

On 25 July 2017, a letter was sent to the claimant confirming that the independent local counter fraud specialists did not consider that there was any reasonable basis for even commencing an investigation of the claimant's complaints.

3.133 A couple of further points merit recording. The claimant had made a subject access request for any information that may relate to him. This revealed that, on 9 November 2015, whilst the respondent's offices were going through a reconfiguration, there was a text exchange between managers that suggested that there were rumours going around that the claimant would not be returning to work. Apparently, the respondent was reducing the number of desks and it appears that, because the claimant had been absent for so long, a junior contractor had incorrectly concluded that he would not be returning and had said as much.

3.134 The claimant sought to rely on this to suggest that the end of his employment was pre-determined but it fell far short of that. It was, of course, possible at that stage that the claimant would not have returned but he subsequently did and, indeed, efforts were made to retain him, so that issue takes me no further.

3.135 The SAR also revealed an email referencing the termination of JB's employment. The respondent was able to prove that this actually related to another employee. The claimant initially made some unjustified allegations in relation to this issue but ultimately accepted the respondent's unfortunate mistake.

The Issues

4 The issues were helpfully agreed at a preliminary Hearing and are annexed to this judgment.

The Law

5 There were no material disputes on the law and the basic principles to be applied are also annexed to this judgment.

Decision

6 Turning first to the issue of whether or not the claimant had made one or more protected disclosures.

7 The respondent conceded that the claimant's email of 23 February 2015 and his grievance of 5 June 2015 both included a disclosure of information. The respondent also accepted that the claimant subjectively believed that his disclosures tended to show and that the respondent had committed a crime. Specifically, it was alleged that the respondent had obtained services dishonestly contrary to section 11 of the Fraud Act 2006 and/or had required a person to perform forced labour contrary to section 71(b) of the Coroners and Justice Act 2009.

8 The question for me was whether the claimant reasonably believed that the information he disclosed tended to show that a criminal offence had been committed.

9 The claimant was clearly an intelligent man and, indeed, he had studied a module on criminal law at degree level. He was also angry and upset about what he saw as his unfair demotion during the MOC process and what he considered to be the unfair application of the respondent's pay protection policy.

10 Whilst there were some inconsistencies in the claimant's evidence it became clear that the only period in which he maintained that he was required to do forced labour was between 13 and 25 February 2015.

11 The reason for this is that it was only on 13 February 2015 that it was confirmed to the claimant that the respondent interpreted their pay protection policy as providing that on call payments made to employees would reduce the level of pay protection in any given month. The claimant suggested that offsetting on call payments in this way meant that he could be required to work for effectively no additional pay. The claimant also suggested that he was informed by his Line Manager that he was required to work on call under his contract which the claimant interpreted to amount to an implicit threat of disciplinary action should he refuse.

12 The claimant acknowledged that, following Mr McCue's email on 25 February 2015, the only obligation on him in relation to working on call was a moral one that he imposed on himself.

13 The claimant had clearly extensively researched the issue of forced labour on the internet and, indeed, subsequently provided edited guidance from the Crown Prosecution Service web site.

14 The claimant was asked whether it was his belief that all unpaid overtime that could be required under a contract of employment would, therefore, amount to forced labour. Whilst he responded in the affirmative it was clear that he did not really believe that it did.

15 When the claimant repeated this allegation, in his grievance submitted in June 2015, he deliberately omitted not only parts of the CPS guidance but also the fact that Mr McCue had told him that he did not have to work on call. Moreover, he did not mention that the respondent had amended their practice in relation to the application of the pay protection policy and had also agreed to backdate that interpretation such that lost protected pay would be reimbursed.

16 Whilst not necessarily fatal to the claimant's claims this selectivity does suggest that he was only presenting information that could potentially support the rather extreme position that he was adopting.

17 Similar considerations apply in relation to his allegation that the respondent had breached the Fraud Act. The claimant confirmed that the way in which he put this allegation was that the respondent must have known that he would lose protected pay when working on call and that they had deliberately and dishonestly withheld this information from him so as to obtain his services by deception. Whilst it may well be that the respondent could, and perhaps should, have provided the claimant with more detailed information it was far from clear how the claimant could translate that potential failure into a deliberate and dishonest act capable of meeting the criminal standard of proof.

18 Indeed, in cross-examination, it appeared that he had not applied his mind at all to the question of dishonesty at the relevant time. It was unreasonable for someone of his knowledge and intelligence not to do so before making such serious allegations.

19 For the claimant's allegation to have any substance he would need to show, on his case, that the drafting of the pay protection policy was deliberately opaque and that the detailed knowledge of its operation in practice was both known and deliberately withheld.

20 The claimant had no evidence to support such a proposition other than the fact that he was provided with no specific detail of the application of the pay protection policy beyond being provided with the policy itself.

21 What the claimant did know, however, was that, by the time that he made his allegation of fraud, managers in his department had lobbied strongly and successfully in support of the claimant's view that the application of the pay protection policy was unfair. That would tend to suggest that they were unaware of this potential issue until the claimant raised it and, once aware, they acted appropriately to attempt to resolve the situation in his favour.

22 In addition to the issues already mentioned, the claimant's allegations appeared to completely misunderstand, deliberately or otherwise, the nature and purpose of pay protection.

23 There is no legal obligation on any employer to offer pay protection to downgraded employees. Accordingly, when pay protection is offered, it can be subject to whatever conditions the employer considers appropriate, subject, as in this case, to agreement with the relevant trade unions.

24 At all times the claimant received his full entitlement to basic pay and on-call payments in his contracted role (subject to a possible error in the January 2015 payroll). The issue was whether he should have received any protected pay on top.

25 Whilst it is not for me to determine whether or not a crime or crimes had been committed it appears abundantly obvious that the circumstances described above fall well short of the criminal standard.

26 Given the claimant's knowledge of the law, his ability to research it, his selectivity in presentation and his failure to properly apply his mind to all the elements of the allegations he was making and their severity on scant evidence I do not accept that he reasonably believed that the information he presented tended to show that a crime had been committed.

27 It was reasonable for the claimant to be unhappy about his demotion. It was reasonable for him to have a different interpretation of the respondent's pay protection policy. It was reasonable for him to believe that the respondent's operation of the pay protection policy was unfair. He did not, however, reasonably believe that a perfectly understandable pay dispute tended to show that a very serious crime had been committed.

28 In addition, when the claimant made his first alleged disclosure in February 2015, he agreed not to pursue his allegation of criminality while his personal pay dispute was being resolved. This appears to suggest that those allegations were only made in support of his personal pay dispute.

29 This conclusion is confirmed when, subsequently, the claimant was considering how to pursue his complaint more formally. He emailed Mr McCue stating that he did not believe a complaint under the respondent's public interest disclosure policy was appropriate because it was a personal, private issue.

30 This appears further confirmed by the fact that what the claimant was seeking as a resolution was "money and words" which effectively amounted to a personal apology and a payment to him of several thousands of pounds. I note that the claimant never sought to pursue his allegations externally. If he reasonably believed they were made in the public interest that is, perhaps, surprising.

31 I would accept that allegations of serious crimes against a public body are more than capable of being made in the public interest and they almost always will be, at least in part. Certainly an employee could often reasonably believe this to be the case. However, I do not believe, on the evidence before me, that the claimant disclosed the information which he did for anything other than his personal interest. As a result, the disclosures were not made in the public interest and the claimant could not, therefore, have reasonably believed that they were. I find, therefore, that the claimant did not make any protected disclosures and, as a result, his claim for automatic unfair dismissal must fail.

32 For completeness, however, I would accept that the alleged disclosures were made to the claimant's employer but I do not accept that they were the sole, or principal, reason for his dismissal.

33 The claimant himself accepted in evidence that he would not have been dismissed had he not sent the email of 7 October 2015.

34 He alleged that the chain of events that ultimately led to his dismissal and the respondent's alleged pre-disposition against him began during the MOC process towards the end of 2014 and hence, on his case, pre-dated his alleged disclosures and cannot, therefore, have been caused by them.

35 That said, for the avoidance of doubt, I do not accept that there was any such pre-disposition. The evidence before me demonstrated that a number of managers within the respondent's informatics department were incredibly supportive of the claimant. They continued to endeavor to be understanding even when the claimant's actions made that increasingly difficult.

36 Furthermore, the claimant accepted that the dismissing officer was not aware of his alleged protected disclosures. As a result, they could not have been the principal reason for dismissal.

37 In any event, I accept her evidence that the reason for dismissal was as stated, specifically, that she genuinely believed that the claimant had threatened to trash the network leading to a risk, however, small, of a catastrophic event for

the respondent, its staff and patients which inevitably led to a breakdown of trust with the relevant managers.

38 In addition, I would accept the evidence of the appeal officer that she had very little information regarding the alleged protected disclosures and that, in any event, they played no part in her decision to uphold the original decision.

39 In this regard, I note that the claimant did not allege, at that time, that the decision to dismiss was because of his alleged protected disclosures. Most tellingly, however, was the fact that the appeal officer was incredibly supportive in attempting to secure alternative employment for the claimant where the network would not be put at risk. She would not have been so supportive if the claimant's alleged protected disclosures had caused her to be in any way negatively disposed towards him.

40 I note that the claimant had previously withdrawn his claims of alleged detriment for having made protected disclosures. However, if he were alleging that the principal reason for the allegations and/or evidence against him was the fact that he had made protected disclosures I would have to reject that proposition also.

41 It seems to me that whether or not the claimant made a threat to trash the respondent's network he clearly raised the possibility that this might happen in certain circumstances. That being the case, the respondent had no alternative but to address the issue.

42 It was not unreasonable for the respondent to remove the claimant's network access and to only address this issue formally once he was due to return to work. It was reasonable for them to use the disciplinary policy given the circumstances.

43 It is worth noting at this juncture that the claimant remained off work on full pay for around 8 months longer than his contractual entitlement. In addition, on his return, the respondent created a role for him.

44 The fact that some allegations were not pursued shows the fairness and independence of the investigation process but otherwise take the matter no further.

45 Ultimately, the claimant did not deny raising and repeating the risk he potentially posed to the respondent's systems. In those circumstances, the respondent had no alternative but to remove his network access and, without such access, he could not continue in his contracted role. That would have been the case whatever the evidence was from his managers.

46 In fact, the evidence before me was that Mr McCue was incredibly supportive throughout. Whilst the claimant felt that the evidence Ms Hayes gave to the investigation was negative about him this has to be viewed in context.

47 The evidence which I saw showed that Ms Hayes was supportive from the outset in relation to the claimant's pay dispute. She also went to considerable lengths to endeavor to resolve his grievance both informally and formally.

Moreover, she was clearly supportive of trying to find a suitable alternative role for him.

48 The comments which the claimant felt were negative within her investigation interview merely reflected her genuine concerns about the claimant's conduct and wellbeing. Whilst there were occasional factual inaccuracies the opinions she expressed were measured and not unreasonable. It was evident that she, and others, found the claimant's assertions and intransigence so incomprehensible that they repeatedly sought a medical explanation. Again, whilst the claimant seemingly could not see it, they were trying to help.

49 As a result, the principal allegations against the claimant were not tainted by his alleged disclosures, nor was the evidence.

50 There must have been a level of increasing frustration within the respondent that the claimant seemed unable to move on from his pay dispute long after the issues were resolved, especially as he continued to send lengthy and difficult to comprehend emails. These often largely repeated earlier allegations and often made unsubstantiated, serious claims against a number of senior individuals within the Trust. The respondent's tolerance and understanding went way beyond the minimum standards expected of a reasonable employer.

51 So, for all of the above reasons, the claimant's claim of automatic unfair dismissal must fail and is dismissed.

52 In relation to the claim of ordinary unfair dismissal I have already found that the respondent genuinely believed that there was a breakdown in trust in the relationship with the claimant that entitled them to dismiss for some other substantial reason. That was the reason given for dismissal and so I do not need to go on to consider their alternative plea in relation to dismissal for the potentially fair reason of conduct.

53 That said, the dismissing officer did conclude that the claimant had threatened to trash the network and, if it were reasonable to conclude that such a threat had been made, I would have little hesitation in concluding that treating such a threat as gross misconduct would have been within the band of reasonable responses.

54 It was arguably not a direct threat although the only logical explanation for the claimant having raised the issue at all appears to have been in the context of negotiations around his pay and return to work.

55 What was clear, however, was that the claimant raised and repeated the possibility that he might trash the network should he be subject to certain unidentified stressors that could include simply receiving a standard letter from payroll.

56 It was, therefore, within the band of reasonable responses for the respondent to conclude that he posed a risk to the network and that his managers could not completely trust him with network access. Given that network access was essential for his role it was, again, within the band of reasonable responses

for the respondent to conclude that he could not remain in that role as he would often be required to work alone.

57 Whilst the respondent had created a role for the claimant during the investigation process there was no obligation on them to continue such a supernumerary position.

58 Given the breakdown in trust on both sides, it would, arguably, have been reasonable for the respondent to simply dismiss. However, they genuinely attempted to seek a suitable alternative role for him that did not require network access. When a possible role was identified it was clear that the claimant was supported and there was a desire on behalf of management to endeavor to retain him.

59 Regrettably, the claimant continued to focus on historic issues that must have contributed to his inability to pass the trial period, a conclusion that he did not challenge.

60 Whilst it is true that the claimant was not warned that he could potentially be dismissed for some other substantial reason I do not consider that, in all the circumstances of this case, this issue took the respondent's response outside the band of reasonable responses.

61 The claimant was aware of the allegations against him and of the possibility of dismissal. The fact that the respondent ultimately decided to dismiss for SOSR

on notice and with the possibility of obtaining suitable alternative employment was to the claimant's advantage and was a reasonable response.

62 I am also satisfied that the respondent followed a fair procedure throughout.

63 The claimant suggested that the respondent was predisposed against him from late 2014 and the MOC process. Whilst it is understandable that the claimant was unhappy about this process resulting in him accepting a lower level role, the fact is that he applied for such a role and was successful whereas some of his colleagues were made redundant.

64 There was no evidence that the respondent's managers were predisposed against the claimant. Rather, they all acknowledged that he was a good worker and there was considerable evidence of him being supported both through his pay dispute and thereafter.

65 The claimant did raise a number of specific challenges to the fairness of his dismissal which I will address in turn.

(a) It was not outside the band of reasonable responses for the respondent to conclude that the claimant's e mail of 7 October 2015 amounted to a threat. Whilst the email was open to interpretation and, indeed, was somewhat contradictory in nature, the fact is that the claimant did raise the possibility of taking down the network and could offer no cogent explanation for having done so.

The fact that the subsequent report from Occupational Health concluded that the claimant had no underlying medical condition to explain his conduct does not assist the claimant's case.

The dismissing officer did consider the fact that the claimant was off with stress at the relevant time but her conclusion was that stress was sometimes unavoidable and the claimant was clearly suggesting that stress could cause him to act destructively.

(b) Whilst it appears that the email from Occupational Health dated 13 November 2015 was not in the disciplinary pack, there was no evidence that this was deliberately withheld nor do I accept that it was. There would have been no reason to withhold the email nor would it have made any difference to the outcome.

(c) The respondent had little alternative but to act on the email of 7 October 2015. The email contained information that gave rise to a legitimate concern for the claimant's wellbeing and also a legitimate concern for the security of the respondent's systems.

The claimant had sent it to a number of senior managers and had invited Mr McCue to forward it to others.

The email did contain personal information but the nature of its contents was such that it would have been a dereliction of duty for the respondent not to forward it to relevant managers and to seek appropriate advice.

I accept the various managers acted out of a genuine concern for the claimant's wellbeing and for the security of their systems.

It is incorrect to suggest that none of the recipients of the email acted on it at the time. The claimant's network access was removed and the claimant was referred to Occupational Health.

It was not unreasonable for the respondent to delay any further action until such time as the claimant was due to be returning to work.

(d) It was clear that all the relevant managers and the dismissing and appeal officers did consider the risk that the claimant could cause damage to the network.

It appears that they all effectively concluded that the risk may well have been small but the potential consequences were catastrophic. In a worst case scenario patients could have died.

It was not unreasonable for the respondent to conclude that the level of risk was more than negligible. Ultimately, the claimant had acknowledged that he could trash the network and he couldn't guarantee that he would not do so in circumstances where he may have been stressed.

(e) The claimant withdrew this allegation as no such discussion took place.

(f) There was no little or no evidence to support the suggestion that the outcome of the disciplinary hearing was pre-judged at a meeting in July 2016 or otherwise.

The terms of reference for the investigation were set and, following the investigation, a number of those allegations were not pursued.

Ultimately, the outcome of the disciplinary hearing, being a dismissal on notice for some other substantial reason, was, seemingly, not even envisaged at the outset.

There was no evidence of any undue influence on the dismissing officer who was not even appointed until later in the process.

The fact that the investigating and dismissing officers were subordinate to other managers who had been involved in the claimant's case did not affect their impartiality, now was the involvement of those managers material to the issues to be determined. In fact, the allegedly negative comments by Ms Hayes were balanced and reasonable and could, arguably, have supported some of the allegations that were dropped.

(g) There was no good reason to include issues relating to the management of change process in 2014 within the scope of the investigation. It was clear that the claimant was unhappy about what he saw as his demotion and, indeed, his subsequent pay dispute, but that could not in any way justify the subsequent threat to the network. The respondent did, however, appropriately acknowledge the claimant's resulting stress in mitigation.

(h) I have already found that it was not unreasonable for the respondent to delay initiating a disciplinary investigation until he was returning to work. He was initially off work sick with stress and so there was no immediate threat to the network and commencing an investigation at that stage may have adversely affected his recovery.

It was not unreasonable for there to be a subsequent period of special leave prior to the claimant's return. It was not unreasonable to initiate the disciplinary investigation upon the claimant's return and whilst the investigation took a few months that is not unusual in cases such as this. The disciplinary hearing was originally scheduled to take place shortly after the conclusion of investigation but it was delayed at the claimant's request.

(i) This allegation was not pursued as the claimant accepted that the disciplinary hearing had been postponed at his request and he had several weeks' notice of the hearing itself.

(j) Pete Townley was present at the disciplinary hearing to advise the dismissal officer on any technical IT matters. He played in no part in the decision making process.

The fact that Mr Townley may have been involved in the management of change process in 2014 was not relevant to the issues to be considered at the disciplinary hearing and so there was no conflict of interest as alleged. There was no evidence of any conspiracy to remove the claimant in 2014 or subsequently. There was significant evidence of attempts to resolve the claimant's issues and retain him.

(k) The same principles that apply in relation to Mr Townley also apply to Sarah Guy. She only provided HR advice to the appeal officer. She was not involved in the decision making process and her involvement in the management of change process in 2014 was irrelevant to the matters under consideration and gave rise to no conflict of interest.

(l) In the course of the investigation and disciplinary process, others may have acknowledged that they had the capability to take down the network but this only arose in response to questions about their technical capabilities and could not be considered remotely comparable to the position adopted by the claimant.

There was no suggestion from anyone else that there were any circumstances in which they might trash the network and that was the important distinction compared to the claimant's position. There was no basis for any action to be taken against them.

(m) There was no evidence that the claimant was dismissed in order to prevent a grievance and/or disciplinary process being conducted in respect of Mr McCue.

I have already accepted the respondent's evidence that the reason for the claimant's dismissal was the risk that he presented to the network and the breakdown in relationships with management that resulted.

It was far from clear, in any event, what grievance the claimant was suggesting that he may have brought and there were no grounds for any disciplinary process being conducted in respect of Mr McCue.

In fact, it was abundantly obvious that Mr McCue was very supportive of the claimant throughout. He agreed with him regarding the pay dispute and ultimately that matter was resolved to the claimant's benefit as a result.

Mr McCue endeavoured to support the claimant's return to work and, in the subsequent investigation, supported the claimant's pursuit of his grievance even when it no longer appeared justified.

87 It is deeply regrettable that the claimant sought to make such serious allegations against a number of managers, some of whom went considerably further than reasonableness would require to support and understand him and resolve his issues.

88 This was a very sad case. The claimant was clearly a loyal and hard-working employee. It is understandable that he was upset about what he saw as a demotion and, indeed, about the subsequent pay issues.

89 It was reasonable for the claimant to raise the pay issues and the respondent responded appropriately amending and clarifying the policy and ensuring that payments were made. They were not necessarily obliged to do so.

90 None of those matters, however, justified the claimant's unreasonable allegations of criminality to support his personal claims, nor his repeated inability or refusal to move on once the pay issue had been resolved and an apology offered.

91 His own conduct demonstrated that he had lost trust with a number of senior managers within the respondent in any event.

92 Having raised the possibility of "trashing the network" the respondent had little alternative but to act as they did, yet considerable efforts were still made to find a resolution / keep the claimant in employment.

93 It is deeply regrettable that the claimant was unable or unwilling to see how the respondent was trying to help him nor the consequences of his actions.

The Law

Unfair Dismissal

1. The statutory test of fairness is set out at s98 Employment Rights Act 1996
2. In determining whether the dismissal of an employee is fair or unfair, it is for the employer to show –

    a. the reasons (or, if more than one reason, the principal reason) for the dismissal, and

    b. that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

    A reason falls within this subsection if it relates to the conduct of the employee.

3. The test of fairness is set out under section 98(4) ERA

    "(4) … the determination of the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer:

        i. depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

        ii. shall be determined in accordance with equity and the substantial merits of the case."

4. A tribunal should not substitute its own factual findings about events giving rise to the dismissal for those of the dismissing officer, nor should it impose its view of the appropriate sanction for that of the employer.

5. The band of reasonable responses test applies equally to procedural fairness as it does to the substantive fairness. The fact that the employer has not followed the terms of a contractual procedure will not automatically entitle a dismissed employee to a legal remedy. Whether the employee asked for a particular step to be undertaken is a consideration in determining whether a particular step was required.

6. Ultimately, I need to consider whether the procedural approach adopted and the sanction decided upon were open to a reasonable employer in the circumstances.

Automatic Unfair Dismissal and Detriment – Protected Disclosures

7. Section 43B of the Employment Rights Act 1996, provides:

   "(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—

      i. that a criminal offence has been committed, is being committed or is likely to be committed,

8. The aim of the provisions is to protect employees from unfair treatment (i.e. detriment and dismissal) for reasonably raising in a

responsible way genuine concerns about wrongdoing in the workplace. The provisions strike an intricate balance between (a) promoting the public interest in the detection, exposure and elimination of misconduct, malpractice and potential dangers by those likely to have early knowledge of them, and (b) protecting the respective interests of employers and employees. There are obvious tensions, private and public, between the legitimate interest in the confidentiality of the employer's affairs and in the exposure of wrong.

9. The words "in the public interest" inserted into section 43B(1) of the 1996 Act in 2013 were intended to reverse the effect of Parkins v Sodexho Ltd [2002] IRLR 109 in which it was held that a breach of a legal obligation owed by an employer to an employee under his or her own contract of employment may constitute a protected disclosure.

10. A worker has the right not to be subjected to an act of victimisation by his employer for making what is termed "a protected disclosure". A qualifying disclosure as defined by section 43B of the 1996 Act becomes a protected disclosure when, for example, as here, made to the employer under s43C. It is the disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show that certain wrongdoing may have occurred.

11. The protection is given to workers and not merely employees. The worker is protected against acts or omissions by his employer. Where the

complaint is that there has been an omission or failure to act, it will need to be a deliberate failure in order to attract the protection. The act suffered by the worker must be done on the ground that he has made a protected disclosure.

12. Where the detriment of which the employee complains takes the form of a dismissal then the protection is afforded not by section 47B but by the unfair dismissal provisions in Part X of the 1996 Act. The unfair dismissal provisions were amended in 1998 and a new section 103A was inserted as follows:

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

13. It is to be noted, therefore, that in the dismissal context it is expressly provided that the protected disclosure must be the reason or the principal reason for the dismissal before that dismissal can be found to be automatically unfair. It is for the employer to show the reason for the dismissal.

Agreed List of Issues

Protected disclosures

1. Did the Claimant make a disclosure of information by an e-mail dated 23 February 2015 with attachment dated 22 February 2015 to Richard McCue?

(a) The Respondent accepts that there was a disclosure of information in this e-mail.

2. Did the Claimant make a disclosure of information by a grievance dated 5 June 2015?

(a) The Respondent accepts that there was a disclosure of information in this grievance.

3. Did the Claimant reasonably believe that each of those disclosures tended to show that the Respondent had committed the offences of obtaining services dishonestly contrary to s.11 Fraud Act 2006 and/or requiring a person to perform forced or compulsory labour contrary to s.71(b) Coroners and Justice Act 2009?

(a) The Respondent accepts that the e-mail dated 23 February 2015 and attachment and the grievance of 5 June 2015 were disclosures of information that the Claimant subjectively believed tended to show that the Respondent had committed the offences set out.

(b) The Respondent does not accept that either the e-mail of 23 February 2015 and attachment or the grievance of 5 June 2015 amounted to disclosures of information which it was objectively reasonable for the Claimant to believe tended to show that the Respondent had committed the offences set out.

4. Did the Claimant reasonably believe that each of those disclosures was made in the public interest?

(a) The Respondent does not accept that either the e-mail of 23 February 2015 and attachment or the grievance of 5 June 2015 were disclosure of information that the Claimant subjectively believed were made in the public interest.

(b) The Respondent does not accept that either the e-mail of 23 February 2015 and attachment or the grievance of 5 June 2015 were disclosure of information that it was objectively reasonable for the Claimant to believe were made in the public interest.

5. The Respondent accepts that if either the e-mail of 23 February 2015 and the attachment or the grievance of 5 June 2015 comprised qualifying disclosures within the meaning of s.43B(1)(a) ERA 1996, such disclosures were protected for the purposes of s.43C ERA 1996 as having been made in each case to the Claimant's employer.

Automatically unfair dismissal (s.103A Employment Rights Act ('ERA') 1996)

6. Has the Claimant put forward evidence to support his positive case that the reason or principal reason for his dismissal was that he had made the alleged protected disclosures as set out above contrary to s.103A ERA 1996?

Unfair dismissal (s.98 ERA 1996)

7. Can the Respondent show for the purposes of s.98(1) and (2) ERA 1996 that the Claimant was dismissed because of his conduct and/or some other substantial reason, specifically a breakdown in trust and confidence in respect of (a) the e-mail of 7 October 2015; and (b) the Claimant's comments at a grievance hearing on 1 December 2015?

8. If (but only if) the Respondent discharges the burden of showing a potentially fair reason for dismissal for the purposes of s.98(1) and (2) ERA 1996, was the decision to dismiss him fair in all the circumstances for the purposes of s.98(4) ERA 1996 and in particular:

(a) Did the Respondent have a reasonable belief in the Claimant's misconduct following a reasonable investigation?

(b) Was the decision to dismiss within the band of reasonable responses open to the Respondent?

(c) Did the Respondent adopt a fair procedure in making the decision to dismiss?

9. The Claimant contends that his dismissal was unfair for the purposes of s.98(4) ERA 1996 because it is alleged that:

(a) The Respondent could not reasonably have concluded that the Claimant's e-mail of 7 October 2015 timed 01.03 amounted to a threat, having regard in particular to an e-mail dated 13 November 2015 from its Occupational Health providers, Team Prevent.

(b) Richard McCue and/or HR withheld the e-mail dated 13 November 2015 from Team Prevent from the disciplinary hearing.

(c) The e-mail of 7 October 2015 should not have been considered at a disciplinary hearing at all because (i) it had been forwarded by its recipients to others within the Trust and to Capsticks, the Respondent's solicitors; and (ii) none of those who received it acted on it at the time.

(d) The Respondent failed to consider and conclude that there was a negligible risk that the Claimant could cause damage to the network.

(e) The Claimant was told by Adam Cooper in January 2016 that he would be subject to a disciplinary process when he confirmed his return to work.

(f) The outcome from the disciplinary hearing was prejudged at a meeting on 18 July 2016 held to set the terms of reference for the investigation.

(g) The terms of reference unfairly excluded issues relating to the management of change process in 2014 from the scope of the investigation.

(h) There was an unreasonable delay (i) in initiating a disciplinary investigation; and (ii) in holding the disciplinary hearing.

(i) The Claimant was not given reasonable notice of the disciplinary hearing.

(j) Pete Townley should not have been a member of the disciplinary panel because he was an author of the management of change process paper from 2014 which gave rise to a conflict of interest.

(k) Sarah Guy should not have been a member of the appeal panel because of her involvement in the management of change process in 2014 which gave rise to a conflict of interest.

(l) No action was taken against Richard McCue (in his witness statement) and Pete Townley (at the disciplinary hearing) when they stated that they were capable of issuing simple commands on a switch to remove a configuration file (inconsistent treatment).

(m) The Claimant was dismissed in order to prevent a grievance and disciplinary process being conducted in respect of Richard McCue.

10. If the dismissal is unfair, did the Claimant contribute to his own dismissal and/or should be any reduction due to the Claimant's conduct?

11. If the dismissal is unfair, what is the percentage chance that the Claimant would have been fairly dismissed in any event and/or that he would have resigned from the Respondent's employment in any event?

Employment Judge Broughton
6 March 2019