EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4105618/2017

Held at Glasgow on 10, 11, 18, 19, 20, 21 and 27 September and 1, 2, 3 and 5 October 2018; and members' meeting 1 November 2018

Employment Judge: **Ms M Robison**
Members: **Mr I MacFarlane**
Mr W Muir

Mr M Daly — **Claimant**
Represented by
Mr C Edward
Counsel

BMI Healthcare Limited — **Respondent**
Represented by
Mr G Millar
Solicitor

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

1. The judgment of the Employment Tribunal, issued orally with reasons on 11 September 2018, is that the claimant is disabled for the purposes of claims under the Equality Act 2010.

2. The judgment of the Employment Tribunal, reserved on 5 October 2018, is that:

i) The claimant was unfairly dismissed in terms of section 94 of the Employment Rights Act 1996;

ii) The claimant suffered detriment on the grounds that he made protected disclosures in terms of section 43B and s47B of the Employment Rights Act 1996.

3. All other claims are dismissed.

4. A further final hearing will now be set down on a date to be assigned to consider the issue of remedy.

REASONS

Introduction

1. The claimant lodged an ET1 claiming detriment and "automatic" unfair dismissal for making a protected disclosure and "ordinary" unfair dismissal, as well as disability discrimination. The respondent resisted the claims.

2. After lengthy correspondence following the case management preliminary hearing on 25 January 2018, the respondent was not able to concede the issue of disability status.

3. It was accordingly decided by the Employment Judge that the issue of disability status should be considered as a discrete issue at the commencement of the final hearing, which took place on 10 and 11 September 2018. The Employment Tribunal issued its decision, orally with reasons, on 11 September 2018, that the claimant was disabled for the purposes of the Equality Act 2010.

4. The issues for subsequent determination by the Tribunal, as agreed by the parties, (paraphrased here) were as follows:

1. Did the claimant make a protected disclosure under s43A and 43B ERA?

2. If so, was the reason or the principal reason for the claimant's dismissal that he made a protected disclosure?

3. Was there a protected disclosure in terms of s43A and 43B ERA?

    i. Was there a qualifying disclosure under s43B?

    ii. Did the claimant's communication with the respondent disclose 'information' to the respondent?

    iii. When the disclosure was made, did the claimant reasonably believe it was made in the public interest; and

    iv. Did the claimant reasonably believe that the information disclosed tended to show (a) that a criminal offence had been/was/was likely to be committed, or (b) that a person had failed, was failing, or was likely to fail to comply with any legal obligation to which he was subject and/or (c) that the health and safety of any individual was or was likely to be endangered?

4. Was the claim presented in time, or if not, within such further period as was reasonable if it was not reasonably practicable? (No submissions were in the event made on this issue).

5. Was the claimant subjected to a detriment by any act or deliberate failure to act by the respondent and if so were these acts/failures to act on the grounds that the claimant had made a protected disclosure?

6. Was the dismissal fair in terms of section 98 ERA?

    i. Was the reason for dismissal misconduct or some other substantial reason (namely the fundamental breakdown in trust and confidence)?

    ii. If so, was the dismissal within the range of reasonable responses?

iii. Was a fair procedure followed?

7. [Preliminary issue on disability status determined as above]

8. In respect of any disability discrimination that occurred before 4 July 2017:

i. Do acts/omissions constitute conduct extending over a period ending on or after 4 July 2017?

ii. If not, would it be just and equitable to extend time? (no arguments were made on this point).

9. In respect of the claim for discrimination arising from disability:

i. Did the respondent know or was the respondent reasonably expected to know that the claimant had a disability?

ii. If so, was there unfavourable treatment?

iii. If so, was that because of something arising in consequence of his disability?

iv. If so, was the treatment objectively justified.

10. In respect of the claim of harassment related to disability:

i. Was there conduct which had the purpose or effect of violating dignity or creating an intimidating environment?

ii. If not the purpose, then was it reasonable for the conduct to have that effect?

iii. Was the conduct related to the claimant's disability?

11. With regard to the claim for failure to make reasonable adjustments:

i. Was a PCP applied to the claimant, if so what;

ii. Did the PCP place the claimant at a substantial disadvantage?

iii. Did the respondent know or was reasonably expected to know that the claimant was likely to be placed at that disadvantage?

iv. If so, did the respondent fail to take such steps as was reasonable to avoid the disadvantage.

5. Although the question of knowledge is relevant for the section 15 claim (para 9), for completeness, that same question at para 9(ii) is also relevant for the reasonable adjustments duty, by reference to Schedule 8, part 3 paragraph 20 (that is as well as whether the respondent knew that the claimant was likely to be placed at the substantial disadvantage specified).

6. The Employment Tribunal heard evidence in respect of these issues over eight days. The claimant gave evidence and for the respondent the following witnesses gave evidence: Jason Rosenblatt (at the relevant time Head of Employment Relations); Angela Mulholland-Wells (Regional Finance Director for the North Region, the claimant's line manager), Chris Buckingham (Regional Director for the North of England, and the line manager of Angela Mulholland-Wells), Liz Sharp (National Director for Clinical Services, who conducted the grievance appeal), and Justin Healy (Commercial Director, who was the decision-maker in respect of the dismissal).

7. The Tribunal was due to hear from James Barr, who determined the claimant's grievance, but he was not, ultimately, able to attend.

8. During the course of the hearing, the Tribunal was referred to a very large number of productions from four joint volumes of productions lodged, referred to by page number in this judgment, as well as an additional bundle (AB) and documents relating to disability status (DS).

9. The Tribunal heard legal submissions on the final day, at which time it became clear that parties had not had an opportunity to discuss the schedule of loss or to determine which issues could or could not be agreed. It was therefore agreed that the Tribunal should determine the issue of liability only, and if

necessary and appropriate a further hearing to determine remedy could be set down at a later date. We have however made findings in fact and reached conclusions which are intended to give an indication of the principles upon which compensation will be assessed, based on the evidence heard at this stage.

Findings in fact

10. The Tribunal finds the following *relevant* facts admitted or proved.

11. The claimant, who is a chartered accountant, commenced employment with the respondent on 15 September 2008 as a Commercial Finance Manager (CFM), and he continued in that role until he was dismissed on 3 August 2017.

12. The respondent is a regulated healthcare company, running 19 hospitals throughout GB. The claimant had responsibility, as CFM, for Albyn Hospital in Aberdeen and Fernbrae Hospital in Dundee, which were managed by an Executive Director.

Relevant policies and procedures

13. The respondent has a number of policies, including a bullying and harassment policy (154-163); various grievance policies and guidelines (documents 13-21); a disciplinary policy (pages 203 - 216); a sickness absence policy (217-238); a public interest disclosure policy (239-245) and a business conduct policy (pages 246-255).

14. The relevant extracts from the disciplinary policy are as follows.

15. At paragraph 4.1.2, “gross misconduct” is defined as “a very serious breach of the company’s rules or other misconduct of a serious nature. It will normally result in summary dismissal ie without any notice or prior first or final written warnings”. A non-exhaustive list of examples of behaviour that would be considered gross misconduct follows and includes at 4.2.13 “serious negligence, or negligence where the actual or potential consequences are or

could be serious, or refusal to carry out a reasonable request in the performance of the individual's duties from a manager".

16. At 6.5, under possible disciplinary outcomes, it is stated that "in exceptional cases where mitigating circumstances exist, demotion may be considered as an alternative to dismissal. However in order to impose a demotion a disciplinary situation must have reached the point of dismissal."

Background

17. On 2 October 2014, the respondent embarked on a project called Reform, with a view to reducing cost base by £30 million, consisting of 18 workstreams, including: outsourcing of the catering function to Compass; a reduction in finance staff and outsourcing HR to an organisation called "Manage", with a reduction from 16 HR advisers to two human resource business partners (at the relevant time Jacqui McGregor and Stephanie Grainger).

18. The claimant was absent from work from 4 May 2015 to 7 September 2015 due to ill-health.

19. The claimant reported to the Regional Finance Director. Prior to his absence, the claimant's line manager was David Taylor, until he left on 30 June 2015. On his return from sick leave, Stuart Brightman was interim Regional Finance Director, until a permanent replacement, Angela Mulholland Wells, re-joined the company on 1 December 2015.

20. With regard to the management hierarchy, the claimant was located in the finance function and the northern region. His line-manager Angela Mulholland-Wells had a "dotted line" in regard to the finance function to Henry Davies, Group Finance Director but her line manager was Chris Buckingham, Director of the Northern Region. He in turn reported to Stefan Andrejczuk, Chief Operating Officer. He was a member of the board along with Henry Davies, Robin Copeland (National Director of People, Performance and Culture), Liz Sharp (National Director of Clinical Services), Paul Kirkpatrick

(Chief Digital Officer), and Catherine Vickery (General Counsel). The board members reported to Jill Watts, who was the Chief Executive Officer.

Grievance

21. On 13 July 2016, at a one to one meeting between the claimant and Angela Mulholland-Wells, Ms Mulholland-Wells raised a number of issues for the first time which she considered required to be addressed with the claimant, namely: "Budget meeting non-attendance without advance request confirmation; general lack of response, communication and engagement with me and the rest of the North finance team and other finance groups; perceived lack of finance induction and support for [Stuart Storey, Executive Director at Albyn Hospital].....holiday taken without pre-approval" (304). The claimant had not been advised prior to the meeting that these issues would be raised.

22. Following discussion about these issues, the claimant advised that he felt victimised and singled out and undermined. He said that he felt he was challenged in front of the team on matters that they were not. He complained about a lack of communication and in particular about the fact that he only had two direct conversations with her in the last six months and no one to one meetings and that he had been completely unsupported since his return to work after his illness. The claimant advised Ms Mulholland-Wells that his health had suffered as a result of her treatment of him; that he was suffering from stress; and that his medication had been increased.

23. Ms Mulholland-Wells stated that she was surprised to hear this and that he had not raised these concerns sooner. She stated that he could get support from HR and that he had the right to raise his concerns about her formally (306).

24. At that meeting the claimant also raised concerns about the fact that Marcus Taylor (at the relevant time, Regional Finance Director) had questioned his integrity, by asking for another member of the finance team to check the validity of one of his assertions, copying in the Executive Director and another CFM into the e-mail (306).

25. On 25 July, the claimant advised that he would like HR involvement with the issues which he raised (313). Although Ms Mulholland-Wells replied that day saying she would get the regional representative to contact him, on 29 July Ms Mulholland-Wells she advised, "As discussed there are a couple of options open to you, firstly, to continue 1-2-1 conversations with me so that we may move forward with addressing concerns and issues directly. Alternatively, you can choose to move into the informal grievance process, which would require you to raise your concerns with Chris Buckingham, as Regional Director of the North region, and follow the process as detailed in the attached [grievance process]" (315).

26. The claimant understood that he was being advised by Ms McGregor, HR business partner that there were no resources for HR to support him as initially suggested by Ms Mulholland-Wells.

27. On 11 October 2016, the claimant raised his concerns with Mr Buckingham following a routine meeting at Albyn Hospital.

28. By e-mail dated 14 October 2016 (413), the claimant sent a password protected letter consisting of 77 pages to Mr Buckingham (333-410), headed up "bullying and harassment; defamation and breach of privacy", and setting out his grievance. The narrative to support the bullying and harassment allegation against Ms Mulholland-Wells was set out over around 30 pages, with 37 pages of supporting appendices. The defamation claim related to the challenge by Marcus Taylor, and included reference to e-mails in support of that claim; and the breach of privacy claim related to the disclosure of the reason for his absence in 2015 to a member of staff.

29. By e-mail dated 17 October, the claimant expressed concern at Mr Buckingham's failure to acknowledge receipt and confirm he could open the document (413).

30. By letter dated 24 October, Mr Buckingham invited the claimant to a meeting to discuss the grievance on 1 November in the board room at Ross Hall Hospital, at which he would be supported by Ms McGregor (417). A copy of a

version of the grievance policy was enclosed. The claimant was asked to confirm attendance with Mr Buckingham's PA Brenda Barnett.

31. By letter dated 26 October, the claimant wrote a seven page letter expressing detailed concerns about matters set out in the letter of 24 October, inter alia, by reference to the details of the bullying and harassment and grievance policy; the importance of respecting his confidentiality by failing to password protect the letter; about the location of the meeting; the lack of reference to an investigation; concerns about the support which Ms McGregor would be giving, given she was referred to in the grievance against Ms Mulholland-Wells in respect of the refusal of HR to become involved when he made his first complaint in July; his right to be accompanied; and general concerns about the handling of his grievance so far, and including additional points of grievance against Ms Mulholland-Wells (428 – 434).

32. Before he had received a response, the claimant sent another six page letter to Mr Buckingham dated 28 October, in which, inter alia, he set out detailed concerns about the process and in particular the involvement of Ms McGregor, and he confirmed repeatedly that he did not wish her to be involved. He stated that the issues raised in the grievance were having a significant impact on his health (435-440).

33. Following a telephone conversation (during which the claimant requested that Mr Buckingham respond to each of the points raised in the letters of 24 and 26 October before confirming whether or not he was willing to attend the grievance meeting on 1 November 2018), Mr Buckingham confirmed by letter dated 30 October 2016 that he intended to respond to these points and in order for him to have sufficient time to do so, he proposed that the grievance meeting should be rescheduled to 16 November, to take place in a neutral location and that Ms McGregor would have no further involvement.

34. The claimant responded by letter dated 1 November (443-468) in which he again repeated many of his concerns, now advising that he did not wish Mr Buckingham to be involved further in the grievance, giving detailed reasons

over around 25 pages including appendices. In that letter, he repeated that his treatment was having a significant impact on his health. The claimant also wrote to Robin Copeland (469-496), setting out his concerns in detail about Mr Buckingham's handling of his grievance, and asking for guidance about next steps.

35. By letter dated 2 November 2016 (519), Mr Buckingham acknowledged concerns the claimant raised about his health and suggested that he make an appointment with his GP and "if required take some time away from work". He also stated that he had made arrangements for him to meet with their occupational health nurse, Sr McGhee, at Ross Hall Hospital to be reassured about his current health.

36. By letter dated 3 November (522), Ms Copeland responded to the claimant's letter of 1 November, advising that the grievance would be escalated to Mr Buckingham's line manager Stefan Andrejczuk, then Chief Operating Officer, who would review the grievance and determine an appropriate person to investigate. In that letter she stated, "I notice on reading your document MD Confidential 4 that you write about having some weeks off in 2015 and that you feel your work is currently impacting on your health. I am pleased to read that you have recently consulted your GP about this. In these circumstances a referral to occupational health is appropriate to ensure that necessary adjustments are in place at work, I strongly recommend that you follow up on an OH referral with Chris Buckingham. I would also take this opportunity to remind you of the support that is available through our employee assistance programme and encourage you to access this confidential service…."

37. By letter dated 4 November 2016 (525), Mr Buckingham confirmed an OH appointment had been made on 11 November. The claimant attended that meeting but the examination did not take place because Sr McGhee did not know why he had been referred as there was no written referral. The claimant had advised that he did not know why he had been referred, and asked if there was an occupational health policy. The claimant raised this with Ms Copeland in a letter dated 17 November (552). By letter dated 17 November,

the claimant forwarded his grievance to Mr Andrejczuk, extending to 67 pages plus appendices, repeating the material previously sent and adding a fourth grievance, “breach of right to a fair hearing”.

38. On 2 December, in a telephone discussion with Mr Andrejczuk, the claimant agreed with his proposal that James Barr (Regional Director for Central and South West Region) investigate his grievances.

39. Following telephone conversations on 7 and 16 December with Mr Barr, by letter dated 16 December (682), the claimant was invited to a meeting to discuss the grievance on 22 December, which was to be conducted by Mr Barr with support from Stephanie Grainger (HR business partner), who would also act as note taker.

40. By letter dated 20 December 2016 (695-708), the claimant made a number of requests by reference to the bullying and harassment policy, including written assurances of Mr Barr’s verbal confirmation of the investigation impartiality and objectivity and compliance with HR policy principles and his right to a fair hearing; written confirmation that he had power and authority to investigate peers and superiors; and requesting that the grievance into the breach of his right to a fair hearing proceed before the initial formal grievance. He further stated that he was requesting for a fifth time any CPID and CQC and ISO guidance or any other relevant regulatory guidance on the conduct of an investigation and fair hearing in advance of the meeting, as well as adding further examples of bullying by Ms Mulholland-Wells.

41. By letter dated 21 December 2017 (clearly dated in error) (709 – 711), Mr Barr sought to respond to each of these queries, seeking to give the assurances sought. He confirmed that external regulatory guidance was not something which they would provide in relation to a grievance.

42. Notes were taken of the meeting which took place on 22 December (712-732), at which inter alia the clamant raised concerns about the lack of fair process and in particular his view that the respondent’s grievance policy was not fit for purpose. The meeting was adjourned to deal with the issues raised.

43. Ms Grainger sent the claimant template documents relating to the grievance policy and guidance, which were primarily guidance for managers (733- 780).

44. By letter dated 23 December, the claimant sent to Mr Barr various documents which had been discussed during that meeting (781).

45. The issue of another OH referral having been raised at the grievance meeting, Ms Grainger e-mailed Mr Buckingham on 10 January 2017 (783) attaching an OH referral form for the claimant. In that referral it was stated that "We are also aware of a previous period of long-term absence for the period 5 May – 6 September 2015 due to headache/migraine, although we do not have any specific information about that absence" (786). Because that disclosed information about his health and it was inaccurate, on 18 January, the claimant asked (818-820) who the information about the 2015 absence came from. He was advised by Mr Buckingham that it was provided by Ms Grainger from the i-trent system (sickness management information).

46. By letter dated 11 January 2017 (788-790), Mr Barr wrote regarding the action points that had arisen from that meeting, confirming that an OH referral had been made; that he had reassurances from Ms Copeland that the grievance policy had been drafted with input from CIPD qualified professionals and in line with CIPD and ACAS best practice; confirmed the correct version of the grievance policy to be used, and attached it, and their view that it was fit for purpose; and proposed to reconvene the adjourned meeting to deal with the grievance in full. In that letter, Mr Barr reminded the claimant of the Employee Assist programme.

47. The claimant responded by letter dated 13 January 2017 (799 –800) inter alia raising a number of concerns about the content of the letter, which Mr Barr addressed in his response of 20 January 2017 (830), again asking for the claimant's availability to reconvene the meeting, and asking if he wanted to delay the meeting until after the OH referral meeting.

48. On 2 February (828), Mr Buckingham wrote to the claimant by e-mail referring to the OH form and saying "I would appreciate it if you could sign it and return

to me for onward referral or otherwise suggest any word changes. As your employer, we are keen to ensure that we provide you with appropriate support and this referral is to seek advice from OH in order to best do that". Again on 6 March 2017 (829), Mr Buckingham asked "I would appreciate it if you could please confirm whether or not you wish to proceed with an occupational health referral". The claimant did not however reply.

49. By letter dated 13 February (838), Mr Barr wrote to the claimant advising that although he had not heard in response, he was keen to progress the grievance and made proposals for dates and venue, again asking if he wanted to defer the meeting pending the outcome of the OH meeting. The claimant did not respond.

50. By e-mail dated 21 February, the claimant forwarded details of his grievances to Jill Watts, Group CEO, in a letter with attachments extending to 100 pages (840 – 940), in which inter alia he indicated that he was seeking her assistance in ensuring that he got a right to a fair hearing.

51. By letter dated 28 February 2017 (942), Mr Barr advised the clamant that he was making one further attempt to progress matters, as he had not had any substantive response to his previous correspondence, advising that the meeting would take place on 28 March in London. The claimant was advised that if he did not confirm his attendance by 3 March Mr Barr would draw the conclusion that he no longer wished to take the grievance forward and the matter would be closed.

52. By e-mail dated 28 February (945) to Ms Watts, the claimant stated "Further to my unanswered email of 21 February…I would be obliged if you can respond as soon as possible but in any event by Friday 3 March 2017, at the latest. If I do not hear from you by then, as I have been placed under a similar time deadline, I will conclude you do not wish to be involved and I will have to take whatever steps I deem necessary, without further reference to you".

53. By e-mail dated 1 March (957), Ms Watts advised that she had not received the e-mail of 21 February; that since he was going through a formal HR

process at present that it would be inappropriate for her to comment; and she suggested that he should submit any documents for consideration directly to Mr Barr.

54. In his response dated 2 March (956), the claimant expressed detailed concerns about the fact that he had not been automatically notified about the non-delivery of the e-mail of 21 February and concluded, while he appreciated that it was a matter for her whether to be involved or not, "I respectfully caution against using ignorance of the issues as a future defence".

55. The claimant wrote to Ms Watts on 8 March regarding the "food safety issue" (1114) (infra). She responded by e-mail dated 9 March 2017 in the following terms: "I have asked Jason Rosenblatt, Head of HR Operations to respond to you directly in relation to the points which you have raised and suggest that you deal with him directly".

56. The claimant wrote to Mr Barr on 2 March 2017 a letter with attachments which was over 120 pages (962 – 1080), setting out his concerns about what he viewed as systematic and individual failures of process, complaining of a breach of his right to a fair hearing, breach of confidentiality and breach of privacy. The claimant also raised formal grievances against Mr Buckingham and Ms Grainger for breach of privacy for disclosing sensitive personal data without the claimant's prior consent.

57. In a response dated 8 March (1106), Mr Barr did not deal with the points which the claimant raised in this and other written communications, but confirmed that the grievance meeting would take place at the London office (and not externally as requested) on 28 March. Despite the claimant's request that Ms Grainger should not be involved, that request was declined since, "On balance as you will have an opportunity to review and make amendments to any notes that are produced". He was advised that if he did not confirm his attendance by 21 March or if he were to cancel or not attend without good reason that they may decide to proceed with his grievance in his absence or conclude that he did not wish to proceed.

58. On 13 March 2017 (1192), the claimant wrote to Catherine Vickery, General Counsel, enclosing a password protected document (totalling 16 MB) bringing to her attention his concerns about a breach of a right to a fair hearing, the fact that he had written to Jill Watts with his concerns and given her response he planned to contact the respondent's two major shareholders. She advised him to bring these to the attention of Mr Rosenblatt (as he had been advised by Ms Watts).

59. A grievance meeting took place on 28 March, Mr Barr having considered his options and decided to proceed in the claimant's absence, given the timescales, the grievance having been lodged 14 October 2016, the comprehensive information submitted and concerns raised about the impact of the outstanding grievance on the claimant's health.

60. In connection with the grievance Mr Barr met Marcus Taylor (1365 – 1370) on 29 March and undertook telephone interviews with Brenda Barnett on 29 March (1348-1350); and on 31 March with Helen Edge, CFM (1351-1353), Darren Moody, Group Commercial Finance Director (1636-1364), Chris Marshall, Regional Finance Director and Chris Buckingham (1372). He also met with Angela Mulholland-Wells on 31 March (1354-1362).

61. By e-mail dated 3 April 2017 (1403), Trinity Brooke, lead occupational health adviser for BMI Healthcare, wrote to the claimant (cc'd Mr Rosenblatt and Mr Buckingham) advising that she had left a message on the claimant's mobile asking him to get in touch to arrange an occupational health appointment on the basis of the OH referral document which she had received; she wrote a follow up e-mail on 11 April (1402) stating she had left another message advising that if she did not hear by the end of that day she would discharge the referral. By e-mail dated 12 April (1402), she advised Mr Rosenblatt and Mr Buckingham, copying the claimant, that she had discharged his OH referral due to his failure to make an appointment.

62. The claimant was advised by letter dated 7 April 2017 that none of the four grievances that he had raised had been upheld (1398-1401). The claimant

was advised of his right to appeal to Liz Sharp, National Director of Clinical Services.

63. On 18 April 2017, the claimant appealed in a letter amounting to almost 70 pages (1404-1470), followed up by another undated letter consisting of almost 160 pages (1470(a)–1470 (jv)).

64. By letter dated 10 May 2017 (1482–1483), Ms Sharp confirmed receipt of the appeal letter and advised that the appeal hearing would take place on 19 May.

65. By letter dated 13 May 2017 (that is after the claimant had been suspended, infra), the claimant advised Ms Sharp that "I am currently unable to meet. I will return when the situation changes".

66. Ms Sharp responded by letter dated 17 May 2017 (1550) in which she stated that the terms of the suspension were that he should be available to attend meetings during normal working hours, and asking him to confirm whether the reason for his inability to attend was ill-health. She wrote again on 19 May (1555-1556) stated to be in response to a letter from the claimant dated 17 May (which was not lodged) to advise that the hearing would take place on 31 May. She advised that she could arrange a telephone conference call or he could put forward a written submission. The claimant responded by letter dated 30 May confirming he was not able to participate and that he did not have access to documentation which would be necessary to have a fair hearing (1557-1559).

67. By letter dated 2 June 2017 (1564), Ms Sharp advised that the grievance appeal hearing went ahead in his absence, but that there were some outstanding questions which she would like to ask prior to finalising the outcome. The claimant did not respond.

68. By letter dated 10 July 2017 (1625-1628), Ms Sharp advised the claimant of the outcome of the grievance appeal, following consideration of all documentation which had been submitted by the claimant as well as Mr Barr's outcome letter, that it was not upheld. With regard to the claimant's claim that

his right to a fair hearing had been breached, she understood this to be the most fundamental issue from the claimant's perspective. She stated that she would have liked to discuss this further, but in the absence of his participation in the appeal hearing, she was unable to fully understand his concerns and not able to make a decision in that regard.

69. Ms Sharp stated in conclusion that she was very concerned about his persistent references in correspondence to the impact the process was having on his health and the lack of support received, making reference to the Employee Assist programme and offering to make a confidential referral for further support advice and assistance from the OH team (1628).

Protected disclosures

Food safety issues

70. On 21 November, the claimant e-mailed Mr Andrejczuk (634-636), having received no response to emails to Ms Mullholland-Wells and Mr Buckingham dated 10 October (328) and 3 November, raising concerns about food safety issues at Albyn Hospital following a failed environmental health audit, subsequently raised with Ms Copeland in correspondence sent on 3 November (517-521). This followed the failure of a second EHO audit and he raised concerns about food safety at Albyn Hospital and in particular the lack of clarity about who has legal responsibility for food safety issues following the take over by Compass of catering at the hospital.

71. He also raised these concerns in an e-mail to Ms Sharp dated 28 November 2017 (647). Ms Sharp responded to this point in an e-mail of 2 December, stating that "The Corporate lead for Compass is Marcus Taylor who manages the contract.This has been put in place from September 2016 and Jason Hessian reports to Marcus. All the policies are available through the DOPs" (652). Dissatisfied with this response, he again raised his concerns in a subsequent e-mail to Ms Watts dated 8 March 2017 (1213). Ms Watts responded by e-mail dated 9 March 2017 (1212) advising that she had advised Mr Rosenblatt to respond to him directly and that he should deal with

him regarding his concerns. By e-mail dated 16 March 2017 (1212), Mr Rosenblatt responded only to the claimant's specific question, "I would be obliged if you could confirm who has overall responsibility and accountability for food hygiene, safety and welfare of all persons at BMI and particularly patients", to which his response was "Jason Hession, Head of Hotel Services has overall responsibility for food hygiene. Jill Watts, CEO has overall responsibility for all staff. In relation to patients, Liz Sharp, National Director of Clinical Services has over all responsibility for patients". He suggested that he should contact him if he had any other questions or queries.

72. Mr Rosenblatt subsequently confirmed in an e-mail dated 26 March 2017 that a full action plan was developed in relation to the EHO visit, which had been implemented and actioned. In response to a question from the claimant, he also confirmed that the e-mail of 16 March was intended to be a full response to the questions which he had raised (1307). The claimant's particular concern was that, following the outsourcing to Compass, neither the respondent nor Compass had clear ultimate responsibility for food safety issues at Albyn Hospital, and he got no answer or assurance in regard to that concern.

Albyn Clinical Leadership

73. The claimant raised concerns over lunch to Ms Sharp on 24 November regarding what he saw as gaps in clinical leadership at Albyn following a "never event" (ie an event that should never have happened, an avoidable error) in November 2016, given that the hospital had an interim Executive Director (covering both Albyn and Fernbrae) (with, in his view, very limited clinical experience), the departure of the Director of Nursing, and the ward manager having been promoted but not replaced. He followed up his concerns in writing in the e-mail to Ms Sharp dated 28 November (649). Although Ms Sharp responded to that letter on 2 December 2017, she did not address this point (653).

74. Following a second "never event" in February 2017, the claimant raised this issue with Ms Watts (1194), who delegated responsibility to Mr Rosenblatt to

reply, although the claimant received no direct communication with him regarding this issue. An audit of the "never events", of which the claimant was not made aware, indicated that they were not caused by any perceived gaps in clinical leadership, but rather were the result of consultant error. The claimant's position was that there was a link between consultants' errors and the gap in clinical leadership, since the consultants in the area were already overworked, so that the lack of clinical support was putting patients at risk. The claimant got no assurances about his concerns.

Theatre Dashboard

75. On 27 October 2016, the claimant e-mailed Michael Logue (Senior Transformation Director for Project Reform) regarding concerns about a new model to analyse efficiency of utilisation of staff in theatre, and in particular that the use of a traffic light system, with red indicating more staff resources were used than required, and green if there were less staff than required. That same day, Kay Ferris, to whom the e-mail had been referred, responded stating that it was a good point to raise, and that she would undertake a review and provide guidance to sites. Ms Ferris did not respond to a follow-up e-mail sent by the claimant on 2 November, who was not provided with a copy of any guidance.

76. By e-mail dated 17 November (631), the claimant e-mailed Mr Logue to re-iterate his concerns and state that he had not had any reassurance regarding them, stating "I would not want any patient to be adversely impacted by resourcing encouraged by such messaging". He raised these concerns with Ms Copeland on 17 November (630), Mr Andrejczuk on 21 November (630), Ms Sharp on 28 November (647) and Ms Watts on 21 March (1254). The claimant received no response except for an explanation from Ms Sharp in her e-mail response of 2 December that "clinical labour dashboards are based on current clinical labour guidelines which comes from AFPP guidelines for theatre and NICE for wards. The CQC standard asks for appropriate levels of care to be delivered according to the individual needs of the patient. There is also a minimum staffing requirement that there must be two registered nurses

available on the wards at all time" (652). The claimant considered that this did not answer his concerns that the system encouraged under-resourced theatres, which put patients at risk.

Breach of Competition Markets Authority (CMA) Inquiry into independent healthcare market and Johannesburg Stock Exchange (JSE) Regulations

77. By e-mail dated 1 March 2017 (950), following a presentation by Henry Davies when delegates were advised of a new consultant fee structure which allowed for exceptions, the claimant raised concerns about whether the new fee structure would comply with a CMA ruling that all consultants were to be treated consistently and equally.

78. The claimant also raised concerns about information imparted at the same presentation, regarding the release of price sensitive information, and asked about the requirements of the JSE in respect of any such announcements.

79. Mr Davies responded by e-mail dated 12 March (1118) advising that these concerns should be raised through the finance function lines and that he had forwarded his e-mail to Ms Mulholland-Wells, who did not reply.

80. On 15 March, the claimant raised these concerns in an e-mail to Ms Watts (1201). He got no response from her to this issue.

Breach of Privacy

81. On 15 March 2017 (1200), the claimant sent an e-mail to Mr Davies headed "data protection" raising concerns about a feedback report sent to him which he said contained patient identifiable information, including patient names and contact details as well as the nature of their complaints, which he asserted was in breach of the Data Protection Act. Mr Davies did not respond.

Events leading to suspension

82. By e-mail dated 16 March 2017 (1205), headed “further correspondence direction”, Jason Rosenblatt stated the following.

83. “Following extensive correspondence from you to BMI Executives and most recently to the company’s CEO, Jill Watts, I am writing to you to clarify how we would like you to communicate with us from this point onwards. This will enable us to address your grievance in a considered and efficient manner…..your recent escalation of communication to the company’s executives is unhelpful. They are not involved in the process, nor should they be at this stage. I request that you desist from any further communication with the executives until your grievance has been considered…... Whilst the grievance process is on-going, should you have any additional issues that you would like to raise, I would ask that you send them to me so that I can appropriately consider and action them. I believe this is a reasonable request and one that I ask that you comply with, with immediate effect. Should you not comply but instead continue to send correspondence about your grievances and complaints to executives who are not involved in the process I will ask that your communications are diverted to me via our IT department. You have mentioned that you are finding the grievance process stressful, and this, coupled with your unusual escalation of correspondence is of concern. Therefore as a supportive measure I will be making a management referral to Occupational Health, details of which will be sent to you shortly. This is designed to support you and I would encourage and request that you comply and engage with Occupational Health at the earliest opportunity so that we can adequately support you moving forward”.

84. The claimant forwarded this e-mail to Ms Watts by e-mail dated 20 March 2017 (1228-1230), as she had not been copied in, expressing concern about this e-mail, referring inter alia to the Francis Inquiry and the Freedom to Speak Up Review, and asking for confirmation that employees should be able to contact the Executive Board as a “key part of the safety and control environment”.

85. On 20 March 2017, the claimant sent a password protected e-mail to Mr Rosenblatt (1233–1253) expressing concerns about his grievance, how it had been handled and highlighting what he believed to be breaches of his right to a fair hearing.

86. On 21 March (1300) Ms Watts responded to the claimant's e-mail of 20 March stating "I will respond to you in due course once I have considered the entire contents of your e-mail".

87. By e-mail dated 24 March 2017, Nicky Georgiou responded on behalf of Ms Watts (1305) stating that she was aware of the instruction given by Mr Rosenblatt, and asked him to comply with that instruction, stating "It is a reasonable management instruction designed to enable the business to respond to your various concerns in a considered and efficient manner. The e-mail continued, "at no point have you been instructed not to raise concerns. Concerns raised via Jason will be escalated as appropriate. BMI takes its healthcare patient safety and regulatory obligations extremely seriously as you know. However, your communications are numerous, extensive and wide ranging and it is felt that because of this they need to be addressed in a systematic and constructive manner. This is not, as you infer, an effort to prevent you raising concerns. I am simply asking that you raise them in a way that enables BMI to consider them and respond appropriately".

88. Jason Rosenblatt responded to the claimant's e-mails of 20 and 21 March on 26 March, headed, "response to your recent communications" (1306-1307) responding to the questions asked, and requesting that he did not password protect documents.

89. The claimant responded on 27 March 2017 (1308) enclosing a password protected document (1311), which Jason Rosenblatt advised he had not opened and requested that he resend without a password (1320).

90. By e-mail dated 27 March 2017, the claimant responded to Mr Rosenblatt (1320) thanking him for the e-mail and advising "this brings to an end our communication on this matter".

91. By e-mail dated 27 March 2017 (1312), the claimant wrote to Catherine Vickery, General Counsel, attaching a password protected document (1313-1319), making complaints about Mr Rosenblatt's handling of his concerns. Ms Vickery replied by e-mail dated 29 March 2017 (1326), suggesting that "the volume of correspondence is becoming difficult for the business to manage and that accordingly Jason has asked you to use him as a 'conduit' for concerns you may have, so that he can investigate where appropriate and respond to you…..I suggest that you write to Jason again. You may wish to consider setting those out in a series of short bullet points so they are easy for him to respond to rather than by means of forwarding lengthy password protected correspondence. BMI Healthcare has policies to deal with staff concerns and I'd highlight our grievance and whistleblowing policies particularly. For the avoidance of doubt, I do not accept that it is necessary or appropriate for you to pursue your concerns outside of the recognised processes and in particular outside of the business, by raising them with shareholders or other third parties. Any such steps will be unauthorised. We have well established processes for dealing with grievances or concerns. I would suggest this includes engaging with the existing grievance processes that are already underway to raise both substantive – and process – concerns you may have, using the route asked of you by Jason, so the business can manage these. The grievance process also sets out an appeal process if you consider it appropriate to use this in due course. Separately I understand from your letter of 27 March that you wish to bring additional grievances. Whilst I respect your right in principle to bring grievances, I am concerned that increasing the number and scope of your grievances will cause you considerable stress, may interrupt with your work, and will not bring the satisfaction which you seek. So I would ask you to reflect before seeking to escalate this situation further".

92. The claimant responded, enclosing with a password protected document dated 29 March (1328-1337).

93. By e-mail dated 29 March (1338) Ms Watts forwarded an e-mail which she had received that day from the claimant headed up "consultants, anaesthetists and clinicians – employment status…." to Mr Rosenblatt, copying in Ms Copeland, Ms Vickery and Mr Davies, asking, "How did the meeting with Michael go", and stating "I am still receiving emails (see below) and they are getting more bizarre. With him also now e-mailing Cathy can we arrange a time for us all to talk tomorrow am so we can have some joined thinking on how to manage him and this situation going forward? I understand from Robin we now have 2 legal opinions and I would like to understand what they both are and have one path going forward so we are all on the same page".

94. On 29 March 2017 (1345) Ms Watts forwarded another e-mail from the claimant relating to "supplier payment terms" to Ms Copeland, Mr Rosenblatt, Ms Vickery and Mr Davies, stating "And more!! Cathy I am not sure if you have actually seen the full extent of what has been coming through?"

95. The proposed meeting to discuss the claimant took place on 31 March and was attended by Mr Rosenblatt, Ms Vickery and Ms Copeland. A decision was subsequently made by the board to endorse the proposal to commence disciplinary proceedings.

96. On 31 March (1373) Ms Watts emailed the claimant advising that she had sent his emails of 27 and 29 March to Mr Rosenblatt, stating that "despite requests to you to direct your correspondence to Jason so that your queries can be answered in a timely fashion, you appear to be ignoring this reasonable request and I am asking you once again to comply with this reasonable instruction."

97. The claimant e-mailed Ms Watts on 3 April (1375) regarding e-mails he had sent to Mr Rosenblatt relating to the food safety issues, the Albyn clinical leadership and the theatre dashboard, expressing concern about the failure of Mr Rosenblatt to address his concerns and his failure to copy her into his responses to him, to ensure she was aware of the situation. Ms Watts

forwarded this e-mail to Mr Rosenblatt, copying in Ms Copeland, Ms Vickery and Mr Davies, stating “Here’s Monday’s email!”

98. On 5 April 2017, the claimant e-mailed Ms Vickery attaching a password protected letter (1388-1390) which concluded “this non-communication by you personally and BMI cannot continue. I would be obliged if you can advise by return, when I can expect a response from you personally and when I can expect a response from BMI”.

99. Ms Vickery responded on 7 April at 10.32 (1394) advising that she was about to go on leave and concluding, “Pending my return I confirm as follows; My instructions that you desist from writing to Jill Watts; my recommendation….that you send e-mails to Jason without password protection, or write to him by post; you continue to address any further urgent concerns which arise with Jason, as previously instructed; you produce a short document (no more than four pages) identifying the key grievances relating to process and the grounds in support of them. I will review this on my return. I will seek your assurance that if we can address and resolve these, then you will use your best endeavours to work with your managers to re-establish a normal working relationship. If you consider that whatever the outcome this is not possible, then we need to have a separate discussion on my return”.

100. The claimant replied the same day at 11.19 (1391), stating inter alia that he considered that she had failed to reply and that his right to fair (sic) speech and a fair hearing was being breached, and expressed concern about a threat of disciplinary proceedings.

101. That same day, Ms Vickery replied at 16.26 stating inter alia “For the record, I do not accept that my recent dealings with you can on any basis be characterised as “corporate bullying” or “corporate assault”. Please understand that using such terminology is counterproductive and unhelpful. I have tried to engage with you constructively whilst balancing the other demands on my time. Again for the record I have not told you that you “cannot

contact anyone outside of the business" – my actual words were that "I do not accept that it is necessary or appropriate for you to pursue your concerns outside the recognised processes" on the basis that there were other routes available to you within the business, such as set out in the whistleblowing policy. So I do not accept that there is any breach of your right to a fair hearing or to free speech".

Suspension and dismissal

102. On 24 April 2017 (1471), Ms Mulholland-Wells advised the claimant that she was to be in Glasgow with Mr Buckingham on 26 April. She suggested a catch up and sent a meeting request for 11 am (1473 and 1474), which the claimant declined, simply stating that "tomorrow is not suitable" (1476). In response to a request to advise why it was not suitable and to provide an alternative time (1476) the next day the claimant replied, "today is not suitable at any time" (1477).

103. Notwithstanding, Ms Mulholland-Wells and Mr Buckingham attended at the office of the claimant and a meeting took place at which the claimant was suspended. Mr Buckingham had prepared a draft letter, which he read out, a version of which was subsequently sent to the claimant (1479 – 1480) and which confirmed that he was suspended whilst an investigation was carried out into the following allegations of misconduct and gross misconduct:

1. That you have repeatedly failed to follow a reasonable management request by persistently contacting the executive team, and have persistently done so in an inappropriate way despite being asked not to on multiple occasions;

2. That you failed to accept a reasonable management request to meet on the 26th April with Angela Mulholland-Wells and myself and refused to provide any reason for this when asked;

3. That you have spent an unreasonable amount of work time dedicated to writing to the executives and others rather than performing the duties of the job that you are employed to do;

4. That you have unreasonably declined to attend occupational health;

5. There is now a breakdown in trust and confidence between you and the organisation; and

6. That there is a breakdown in the working relationship."

104. That letter stated, inter alia that "You must not communicate with any other employees, contractors or customers regarding this matter unless authorised by me to do so. However, you are required to be available to answer any work-related queries".

105. Kevin Haimes, Group Finance Director, was appointed to carry out the investigation. A copy of the disciplinary policy was enclosed.

106. During a telephone call with Mr Haimes, the claimant advised that he did not wish to meet or to participate in the investigation, and this was confirmed, as well as the decision to proceed on the evidence available, by letter dated 5 May 2017 (1481).

107. Mr Haimes interviewed Ms Mulholland-Wells on 12 May (1490-1493) in relation to the six allegations when she confirmed that she believed that the working relationship was broken.

108. Mr Haimes interviewed Mr Rosenblatt on 16 May 2017 (1548-1549) in relation to allegations 1, 3 and 4; Mr Buckingham in relation to allegations 2, 4 and 5 on 18 May 2017 (1551-1552); and Stuart Storey in relation to allegations 4 and 5 by telephone on 19 May 2017 (1553-1554).

109. Mr Haimes finalised his report on 6 June 2017 (1566-1575), in which he concluded that there was a case to answer in respect of all the allegations except allegation 4 (unreasonably declined to attend occupational health).

110. The report and evidence gathered was forwarded to the claimant by letter dated 13 June 2017 (1576-1577), and the claimant was advised that he was to attend a disciplinary hearing on 19 June and that it would be conducted by Justin Hely, Commercial Director. That letter stated that "dependent on the facts established at the hearing the above allegation(s) if upheld, may constitute gross misconduct. Therefore the hearing may result in disciplinary action or dismissal". The meeting was moved to 22 June 2017.

111. The claimant attended that meeting, at which Meg Skinner, executive assistant, took notes (1579-1585). During that meeting the claimant read out a statement, which included his response to each of the allegations. He requested that no notes were made. Mr Hely decided to adjourn the meeting to take advice when the claimant stated that he believed that senior executives were deliberately out to cause him harm; that the meeting should be adjourned and that the local police should be contacted to carry on the investigation. Mr Hely took advice from Ms Vickery and read out a prepared statement (1583) and subsequently the meeting was adjourned to allow Mr Hely to take legal advice and the claimant to consider whether he was prepared to submit the written statement. A follow up conversation between Mr Hely and the claimant took place on 30 June (1586-1587), confirmed by letter of the same date (1588), at which the claimant was invited to submit a formal written response by 7 July, failing which Mr Hely would consider that there had been no response to the allegations.

112. By letter dated 6 July 2017, the claimant expressed concerns about the process and Mr Hely's involvement in it (1589-1594) and reproduced the pre-prepared statement which he had read out at the hearing, but with redactions (1594–1624) (hereafter called "the redacted statement").

113. By letter dated 3 August 2017 (1629–1645), the claimant was advised of the outcome of the disciplinary hearing, namely that all but the third allegation (to use the numbering in para 103 above) was proven. After addressing a number of points raised in the letter of 6 July regarding the process, Mr Hely considered each allegation in turn [number 4 having been deleted, and 5

renumbered 4 and 6 renumbered 5 (see para 103)] . In relation to each he set out the documents upon which he had relied. He did not rely on the contents of the notes of interviews carried out by Mr Haimes with Ms Mulholland-Wells and Mr Buckingham because these were unsigned, inconsistent with the respondent's disciplinary policy.

114. In respect of allegation 1, Mr Hely found that the claimant failed to comply with instructions in the e-mails from Ms Watts dated 9 March and 31 March 2017 to direct correspondence to Mr Rosenblatt.

115. With regard to allegation 2, Mr Hely stated that he was aware that the claimant believed he had experienced systematic bullying by Ms Mulholland-Wells, but considered that was not relevant to his conclusions, and if it had been that he could have stated that when asked for reasons why the date was not suitable. He was therefore satisfied that he failed to accept a reasonable request to meet without providing any reasonable explanation.

116. With regard to allegation 4, Mr Hely concluded that there is now an irreparable breakdown in trust and confidence between him and the organisation, relying on the disciplinary report and the redacted statement, stating that "I have considered extensively and with great care the documents that you and others have prepared as part of this process. You have raised a number of concerns in email communications that have ultimately formed part of the basis for this disciplinary hearing and which date back to May 2016. Furthermore, the detailed content of your redacted statement suggests to me that you have wide-ranging concerns and are dissatisfied with the people involved with managing the company, the processes in place related to the management of the company (more especially workforce management) and that you are dissatisfied with a number of the outcome(s) of these processes….based on the evidence available to me, I believe it is reasonable to conclude that the trust and confidence that you have in your employer is now, sadly, irreparably damaged. In turn, and for the reasons relating to allegations 1 and 2, I believe it is reasonable to conclude that the trust and confidence that your employer has in you is equally sadly, irreparably damaged".

117. With regard to allegation 5, Mr Hely concluded that the claimant had failed to escalate his concerns through the reporting hierarchy because the working relationship had deteriorated from around May 2016. This was on the basis of taking three issues together, namely: 1) e-mailing Mr Andrejczuk on 21 November 2016 regarding the food safety issue without directing that e-mail to Ms Mulholland-Wells in the first instance, then Mr Buckingham; 2) e-mailing Ms Watts on 13 March 2017 regarding food safety and clinical leadership without first e-mailing Ms Mulholland-Wells, then Mr Buckingham, then Mr Andrejczuk and 3) e-mailing Mr Logue on 10 November 2016 regarding the theatre resourcing project, without engaging with Ms Mulholland-Wells, Mr Buckingham or Mr Andrejczuk regarding concerns before forwarding the communications with Mr Logue to Ms Watts on 21 March 2017.

118. Mr Hely concluded in relation to allegation 5 that "It is my view that an effective working relationship is based on a number of factors but importantly trust and confidence…..it is my view that mutual trust and confidence has sadly eroded irreparably. As a consequence, I believe it is reasonable to conclude that the working relationship between BMI Healthcare and you has broken down".

119. The claimant was advised that he could appeal in writing to Paul Kirkpatrick, Chief Digital Officer within five working days. Summary dismissal was confirmed by letter dated 4 August 2017 (1646).

120. By letter dated 10 August 2017 headed "Strictly Private and Confidential – Addressee Only" to Mr P Kirkpatrick (1648-1995) preceded by a three page "warning" notice, the claimant appealed his dismissal. As he received no response, he wrote again on 24 August, again with the heading strictly private and confidential addressee only (1696), and again on 31 August (1699), this time to withdraw his appeal.

121. On 31 August he wrote to Ms Watts (1701-1701) to advise that he had appealed but received no response.

122. Ms Watts responded by letter dated 6 September 2017, advising that Mr Rosenblatt had been asked to respond (AB149). He responded by letter dated

12 September 2017 (AB151) to advise that no response had been sent because Mr Kirkpatrick had been absent from the business over the last few weeks and his post was not opened during his absence. He understood that the claimant intended to withdraw his appeal, and asked for him to confirm by Friday 15 September, concluding that if he did not hear from him he would assume that he did not wish to progress his appeal. The claimant did not reply.

Relevant law

Public interest disclosure

123. The law relating to public interest disclosures is contained in Part IVA of the Employment Rights Act 1996 (ERA). Section 43B states that a "qualifying disclosure" means any disclosure of information which, "in the reasonable belief of the worker making the disclosure tends to show", inter alia, "that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject (s43B(1)(b)) and/or "that the health or safety of any individual has been, is being or is likely to be, endangered" (s43B(1)(d)).

124. A qualifying disclosure will be a protected disclosure if it is made by a relevant worker to an appropriate person. Section 43C(1) ERA states that "a qualifying disclosure is made….if the worker makes the disclosure a) to his employer….."

125. Section 47B(1) ERA states that "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".

126. Section 48(2) states that on a complaint under 47B, it is for the employer to show the ground upon which any act or failure to act was done.

127. Where the worker is an employee and the detriment amounts to dismissal, section 47B does not apply. In that case, section 103A states 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".

Unfair dismissal

128. The law in relation to unfair dismissal is also contained in the ERA. Section 98(1) provides that, in determining whether the dismissal of an employee is fair or unfair, it is for the employer to show the reason for dismissal and, if more than one, the principal one, and that it is a reason falling within s. 98(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. Conduct is one of the potentially fair reasons for dismissal.

129. Section 98(4) provides that where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair, having regard to the reason shown by the employer, 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 dismissal and this is to be determined in accordance with equity and the substantial merits of the case.

130. In a dismissal for misconduct, in **British Homes Stores Ltd v Burchell [1980] ICR 303,** the EAT held that the employer must show that: i) he believed the employee was guilty of misconduct; ii) he had in his mind reasonable grounds upon which to sustain that belief; and iii) at the stage at which he formed that belief on those grounds, he had carried out as much investigation into the matter as was reasonable in the circumstances.

131. Subsequent decisions of the EAT, following the amendment to the burden of proof in the Employment Act 1980, make it clear that the burden of proof is on the employer in respect of the first limb only and that the burden is neutral in respect of the remaining two limbs, these going to "reasonableness" under section 98(4) (**Boys and Girls –v- McDonald [1996] IRLR 129, Crabtree – v- Sheffield Health and Social Care NHS Trust EAT 0331/09**).

132. In considering the reasonableness or unreasonableness of the dismissal the Tribunal must consider whether the procedure followed and the penalty of

dismissal were within the band of reasonable responses (**Iceland Frozen Foods Ltd v Jones 1982 IRLR 439).** The Tribunal's task is to determine whether the respondent's decision to dismiss, including any procedure adopted leading up to dismissal, falls within that band of reasonable responses. One reasonable employer may react in one way whilst another reasonable employer may have a different response.

Disability Discrimination

133. Section 15 of the Equality Act 2010 states that a person discriminates against a disabled person if he treats the disabled person unfavourably because of something arising in consequence of that person's disability; unless it can be shown that the treatment was a proportionate means of achieving a legitimate aim.

134. An employer will not however be liable for such discrimination if they show that they did not know, or could not reasonably have been expected to know, that the claimant had a disability (section 15(2)).

135. Section 20 sets out the employer's positive duty to make reasonable adjustments to address disadvantages suffered by disabled people. This duty broadly arises when a disabled person is placed at a substantial disadvantage by the application of a PCP, by a physical feature, or by the non-provision of an auxiliary aid. A failure to comply with the duty amounts to discrimination under section 21(2). In this case the relevant requirement is to take such steps as is reasonable to avoid the disadvantage where a provision, criterion or practice (PCP) puts a disabled person at a substantial disadvantage. The duty arises only in respect of those steps that it is reasonable for the employer to take to avoid the disadvantage experienced by the disabled person. What is reasonable in any given case will depend on the individual circumstances of the disabled person.

136. An employer will not however be subject to the duty if they do not know, and could not reasonably be expected to know that the claimant has a disability

and is likely to be placed at a substantial disadvantage (Schedule 8, part 3, para 20).

137. Section 26 states that a person harasses another if that person engages in unwanted conduct related to a protected characteristic (here disability) and that conduct has the purpose of effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant.

138. In deciding whether the conduct has the proscribed effect, the Tribunal must take account of the perception of the claimant, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

Claimant's submissions

139. Mr Edward dealt in turn with each of the three heads of claim, namely ordinary unfair dismissal, dismissal and detriment for making a protected disclosure, and disability discrimination, making reference in his oral submissions to legal propositions which he had set out in writing.

140. With regard to ordinary unfair dismissal, he understood the reason for dismissal to be twofold, namely gross misconduct and a breakdown of trust and confidence between parties. He submitted that the respondent acted unreasonably in treating the reasons given as sufficient reason to dismiss the claimant, which in any event were not the genuine reasons for dismissal.

141. With regard to allegation 1, he submitted that the e-mail of 9 March contained a suggestion, but not an instruction, to direct communications to Jason Rosenblatt. No reasonable employer would have concluded that it was an instruction, given the absence of mandatory language. Justin Hely said in cross examination that he considered that breach of the instruction of the e-mail 9 March alone merited summary dismissal, but no reasonable employer would have come to that conclusion.

142. While it is accepted that the e-mail of 31 March is an "instruction" to communicate with Jason Rosenblatt, the sole e-mail which Jason Hely relied

on as a breach of that was an e-mail from the claimant to Jill Watts dated 3 April 2017, which the claimant asserts was not made in disregard of the instruction, rather that the claimant was advising Jill Watts that Jason Rosenblatt was not responding to enquiries, as he was instructed.

143. Even relying on the two instructions, no reasonable employer would have found that this was gross misconduct.

144. With regard to allegation 2, Jason Hely accepted that refusal to attend the meeting was not gross misconduct on its own; but made conclusions in relation to allegations 1 and 2 at the end of the letter that together these constituted gross misconduct. The claimant submitted that this conduct was not sufficiently serious to be categorised as gross misconduct under their policy.

145. Even if it was gross misconduct, no reasonable employer would dismiss for allegations 1 and 2, which is outside the range of reasonable responses.

146. While Jason Hely clarified in relation to allegations 4 and 5 that the sanction was aggregate, he confirmed that he had addressed each individually.

147. With regard to the breach of trust and confidence, the implied term is that the employee (as well as the employer which is usually the focus) shall not conduct himself in the said manner. If the conduct of one party is calculated and likely to destroy the relationship, that is a breach of a material obligation of the contract of employment which entitles *the other party* to terminate it summarily if they wish to. Here it is claimed that the claimant ceased to have trust and confidence in the employer, but that is not how the term operates. The issue is whether trust and confidence between the parties existed and the question whether the conduct breached the implied term is determined on an objective standard. Here the respondent relies on the conduct of the employee, and there would be a breach of the term only if the employee's conduct was calculated or likely to seriously damage the relationship between them without reasonable and proper cause.

148. Jason Hely said that he had looked at the redacted statement of the claimant and concluded that the claimant has lost trust in the employer. However and in any event, it is clear from the redacted statement that while the claimant made criticisms of Angela Mulholland-Wells, that is not surprising since he claims she bullied him, and the criticisms of Chris Buckingham are more limited. In any event, making criticism of Angela Mulholland-Wells and Chris Buckingham, his line managers, does not show a breakdown between the employer and the employee. The claimant was still employed and going through a grievance process but this does not provide evidence of irreparable breakdown. The respondent relied only on the first two allegations to justify their conclusion that the claimant had conducted himself in a manner which had destroyed trust and confidence to justify acceptance of breach; even if damaged, it could not be said that it had been destroyed or seriously damaged the relationship in a way which was irreparable.

149. With regard to allegation 5, Justin Hely stated that he considered this separately, and based his conclusions on the three paragraphs set out at page 1643 of the dismissal letter. He concluded that the escalation of issues outside the reporting line showed that the working relationship must have broken down. However, when cross examined, he agreed that for each area of communication there was a reason for the claimant to go to the person in question. There were no criticisms of the communications generally, there is no criticisms of the content, only that he should have gone through the correct reporting line.

150. When the claimant complained that he had not received responses from Angela Mulholland-Wells, Chris Buckingham and Jason Rosenblatt, Justin Hely responded that he should have asked them again for a response; but the claimant's failure not to do that does not show that the working relationship between the claimant and his employer has broken down. This is supported by two passages of evidence, first that Jason Rosenblatt during evidence in chief stated that while it was unusual for staff at the claimant's level to contact Jill Watts, he said that staff could contact her and were not discouraged from

doing so; and secondly Liz Sharp said that it was normal to receive communications from a colleague at CFM level.

151. Mr Edward pointed to the fact that Justin Hely did not take into account the e-mail dated 7 April from Catherine Vickery to the claimant, but there was no communication from the claimant after that point (see 1391).

152. Mr Edward submitted that dismissal was not appropriate where the claimant was a senior manager with nine years' service and no previous disciplinary record, and where no warnings were given that his behaviour might lead to disciplinary consequences.

153. Turning to protected disclosures, and the question of detriment, and relying on dicta from **Fecitt v NHS Manchester 2012 ICR 372**, para 45, Mr Edward argued that the making of the protected disclosures materially influenced the respondent; and relying on **Shamoon v CC of Royal Ulster Constabulary 2003 ICR 337,** a discrimination case which he submitted applied equally to protected disclosures, he argued that the claimant had suffered detriment. Further under section 48(2), it is for the employer to show that the ground on which any act, or deliberate failure to act, was done, the burden of proof thus being on the respondent.

154. Mr Edward submitted that there were five protected disclosures:

1. Food safety: the claimant submits that he made a protected disclosure to Stefan Andrejczuk in the e-mail of 21 November (see 634 et seq) as well as during the phone call to him on 2 December, referred to at 659, in addition to the disclosure to Liz Sharp on 28 November (647) and to Jill Watts on 8 March (1213);

2. Clinical leadership gaps: disclosed to Liz Sharp at the lunch on 24 November and in the e-mail to her dated 28 November (647) and in the e-mail to Jill Watts on 13 March (1194);

3. Theatre Dashboard: in the e-mail to Michael Logue dated 17 November (631); Robin Copeland on 17 November (630), Stefan

Andrejczuk on 21 November (630), Liz Sharp on 28 November (647) and Jill Watts 21 March (1254);

4. Breaches of Johannesburg Stock Exchange Rules and CMA: in e-mails to Henry Davies on 1 March (950) and Jill Watts on 15 March (1201); and

5. Breach of privacy of patients: to Henry Davies 15 March (1200).

155. He submitted that these were disclosures which in the claimant's reasonable belief were in the public interest in respect of patient safety (in respect of the first three) and in respect of breaches of legal obligations in respect of the protection of shareholders and patient privacy (in respect of the latter two).

156. Mr Edward submitted that no witness had suggested that those were not genuinely made. While it was put to the claimant in cross that it was not his position to raise because it was not part of his job duties, this was not relevant to the question to whether these were protected disclosures.

157. With regard to the detriment question, the claimant submits that there are three areas of detriment:

1. Failure to deal with the disclosures and his concerns can itself amount to a detriment; and here they were either not answered or in the case of Jill Watts redirected to Jason Rosenblatt who did not answer the claimant's concerns;

2. The claimant was subjected to a disciplinary process, which Jason Rosenblatt confirmed was a decision of the board. Mr Edward submitted that making protected disclosures was at least part of the reason for instigating the disciplinary process, and therefore he was suspended and disciplined "on the grounds of" those protected disclosures, all of which were detriments;

3. While dismissal is not a detriment, Mr Edward accepted that to be automatically unfair, the dismissal would have to be for the sole or

principal reason that he made protected disclosures. If the protected disclosures were not the sole or principal reason, then they at least played a part in the dismissal, and he submitted that playing a part in the dismissal could be seen as a detriment short of dismissal.

158. Mr Edward argued in any event that dismissal was because of the protected disclosures; because senior management were clearly irritated with the protected disclosures, as highlighted by the reference to the "situation" with the claimant in the e-mail of 29 March, since they were either passed on or not responded to.

159. The reasons given by Justin Hely for the dismissal are so thin that an inference can be drawn that the real reason is because the claimant repeatedly made protected disclosures to the board. Justin Hely said that he had read over the whole of the claimant's redacted statement and within that the claimant clearly states that he has made protected disclosures so that Justin Hely was clearly aware of them. He submitted therefore that the sole or principal reason for dismissal was the repeated protected disclosures to the board, who decided to instigate a disciplinary process resulting in the dismissal of the claimant.

160. The claimant also makes three claims of discrimination, discrimination arising from disability, failure to make reasonable adjustments and harassment.

161. Mr Edward submitted the respondent had knowledge of the disability because they knew that the claimant was suffering a stress induced illness for which the claimant was receiving medication. In support of that submission he relied on the claimant's repeated references throughout the grievance that the bullying and harassment by Angela Mulholland-Wells was having a significant impact on his health; and on Angela Mulholland-Wells' evidence that he had said this at the one to one on 13 July, and that she told James Barr when she was interviewed for the grievance on 31 March that she had informed him that the claimant had told her that his medication had increased due to stress. Justin Hely had read the redacted statement and he was aware that the

claimant said that the bullying had had a significant impact on his health, but he did not investigate that further.

162. With regard to the claim under section 15, the claimant had a confrontational attitude which was heightened by his anxiety and a distrust of people in general. The allegations against him were that he refused to obey a reasonable instruction (by going outside management lines) and if that was because of his confrontational attitude or distrust, then the unfavourable treatment (dismissal) was because of something arising in consequence of his disability.

163. With regard to the failure to make reasonable adjustments, the respondent failed to take into account the claimant's disability before deciding on the sanction; before deciding if his refusal to obey requests was a symptom of his anxiety; and before making a decision whether the breakdown of trust and confidence was a symptom of his anxiety.

164. With regard to the claim for harassment, the subjecting of the claimant to the disciplinary process and dismissal itself was clearly unwanted conduct related to the claimant's disability, overlapping with his other claims under the Equality Act.

165. While Mr Edward went on to make submissions about remedy, after some discussion with Mr Millar, it was agreed that there had not been sufficient opportunity to consider to what extent the compensation figures could be agreed and those that might require evidence to be led, and consequently it was decided that determination of this issue would be deferred until after the conclusion of the liability hearing.

Respondent's submissions

166. Mr Millar lodged comprehensive written submissions, which he supplemented with oral submissions.

167. In his written submissions, he set out a summary of his submissions, and then set out detailed proposed findings in fact in respect of the three areas of claim.

168. He made detailed reference to the evidence which he said supported his submission that Angela Mulholland-Wells had not subjected the claimant to bullying and harassment, but she was simply taking her responsibilities seriously, whereas the claimant did not like to be challenged or to be told he was wrong. In any event, all of the claimant's complaints were properly investigated and considered by James Barr. Even if any of her behaviour could be regarded as bullying or harassment, there was no evidence to support an argument that the motivating factor was that the claimant was disabled (since she did not know), nor because of the protected disclosures, (because they were not made to her).

169. It was in any event not the fact of the protected disclosures but the way that that the matters were raised, which was the concern. The claimant was aware of the whistleblowing policy but deliberately ignored it.

170. With regard to the "food safety issue", this was in the public domain, and senior managers were aware of the issue, and were dealing with it. The claimant was well aware that the matter had been resolved, so that it was wholly unreasonable for him to e-mail Jill Watts on 8 March regarding this issue, and it could not have been a catalyst for any detriment.

171. With regard to the "theatre dashboard issue", the claimant's concerns were addressed at the time, and the reason the claimant did not receive the guidance was because he was not involved in the clinical side of the business, and he did not follow up this issue with any requests for materials. Again, he did not suffer any detriment because it had already been resolved.

172. With regard to the issue of Albyn clinical leadership, the respondent was well aware of the situation there, and in any event the evidence of Liz Sharp was that the "never events" had nothing to do with clinical leadership but were the result of consultants' errors. Any concerns the claimant raised were properly considered and responded to and the claimant did not suffer any detriment as a result of this issue for these reasons.

173. With regard to the CMA and JSE issue, and the data protection issue, these were only raised with Henry Davies, who was not involved with the grievance or disciplinary, and thus even if this is a protected disclosure, the claimant suffered no detriment.

174. Turning to dismissal, Justin Hely was entitled to rely on the e-mails from Jill Watts of 9, 24 and 31 March 2017, from Jason Rosenblatt of 16 and 26 March and Catherine Vickery of 29 March and 7 April, which clearly contained management requests, yet he willfully and repeatedly ignored those repeated requests. The claimant knew or ought to have known given the terms of the disciplinary policy that he could face disciplinary action without it having to be spelled out to him. Justin Hely was entitled to rely on the claimant's failure to meet on 26 April, which was a clear and reasonable request from a line manager, which he deliberately refused to follow.

175. Mr Millar referred to various passages of evidence showing the level and frequency of the accusations made against a large number of the senior team, which he submitted demonstrated that the claimant had absolutely no trust in BMI or respect or regard for his line managers. He submitted that it was entirely appropriate for Justin Hely to conclude that there had been a complete and irreparable breakdown of trust and confidence between the claimant and the respondent, and that the working relationship was at an absolute end. He submitted that it was "utterly ridiculous" for the claimant to suggest that there was a working relationship to be salvaged.

176. With regard to knowledge of disability, Mr Millar stated that the claimant had accepted in cross examination that he had failed to provide the respondent with any detail about his disability, about his illness or the symptoms, or the impact on his health. His actions of lodging a grievance, taking concerns to the executive board or raising issues which have nothing to do with his job role do not give any clues to suggest he was disabled. The claimant, since returning on 7 September 2015, had no period of absence whatsoever and refused to engage with occupational health. Mr Millar noted that it was never

put to any of the respondent's witnesses that they knew or ought reasonably to have been aware of the claimant's disability.

177. In any event, Justin Hely's evidence that he was not aware of the claimant's disability was unchallenged, although he did acknowledge that the claimant found the process stressful, and he took that into account.

178. Mr Millar then dealt with the legal arguments. With regard to the whistleblowing claims, Mr Millar submitted that even if there was a disclosure of information, there was no reasonable belief in the eyes of the claimant that the information tended to show one of the relevant failures or that it was in the public interest. None of the respondent's witnesses was cross-examined on a potential detriment as being related in any way to the making of these protected disclosures. He submitted that the claimant had raised these to maximise the value of his claim, to support his grievance and create a detrimental situation, rather than because he genuinely felt he was not being listened to, or being treated detrimentally because he was raising some sort of genuine issue. Relying on the definition from **Shamoon** on detriment, he submitted that here he felt an unjustified sense of grievance, which is not sufficient. Mr Millar submitted that none of the examples of disadvantage listed in the Whistleblowing Commission Code of Practice happened here (or where they did, suspension, disciplinary and dismissal they were not because of the disclosure of information).

179. Mr Millar submitted that the question whether detriment is "on the ground that" the worker has made a protected disclosure involves an analysis of the mental processes (conscious or unconscious) of the employer, and it is not sufficient to demonstrate that "but for" the disclosure, the employer's act or omission would have not taken place. It is for the claimant to show he has made a protected disclosure and that there has been detrimental treatment, and the detriment must be more than just related to the disclosure. There must be a causative link between the protected disclosure and the reason for the treatment, in the sense of the disclosure being the "real" or "core" reason for the treatment. Even if he was subjected to detriments, it must be proved that

was materially influenced by the disclosures. That was never put to the respondent's witnesses.

180. With regard the reasonable adjustments claim, Mr Millar submitted that the claimant had failed to specify the PCP or that he suffered a substantial disadvantage. In any event the respondent did consider reasonable adjustments to the grievance and disciplinary procedure, for example by allowing him to submit it in writing, being offered alternative venues etc.

181. With regard to the section 15 claim, Mr Millar set out the relevant legal tests and relied on the relevant legal authorities relating to section 15. If it is not accepted that the respondent did not know that the claimant was disabled, then any treatment of the claimant was a proportionate means of achieving a legitimate aim in ensuring employees perform all aspects of their job role to a reasonable standard; have a fair opportunity to set out their grievance; and for the grievance and disciplinary to be properly considered. Mr Millar did not accept that the claimant's confrontational behaviour was a consequence of his disability because the claimant had a history of raising issues by email in a very confrontational and aggressive way long before he suggested he was suffering from the effects of his disability.

182. Relying on **Abernethy v Mott Hay ad Anderson [1974] ICR 323** and **Governing Body of Beardwood Humanities College v Ham UKEAT/0379/13**, Mr Millar submitted that Justin Hely was entitled to consider matters in their entirety rather than reach individual and separate decisions and impose individual and separate penalties for each of the allegations he considers to be well-founded. Justin Hely had taken account of the redacted statement. His decision was based not just on the two e-mails, and there was no need to have told the claimant that a breach of that would amount to gross misconduct, since he was well aware of the disciplinary policy.

183. The Tribunal should consider the nature and quality of the claimant's conduct in the round, looking at the wider factual background which reveals an exceptionally difficult and challenging employee, who deliberately chose to

ignore instructions on the basis that he considered himself above challenge, above the BMI stated procedure and entitled to follow the path he alone considered to be right. His total lack of respect for anyone apart from himself created a situation that he was completely unmanageable and unemployable within the respondent, believing that staff at all levels were conspiring against him and behaving in a criminal way. It was plain that the employment relationship had become utterly toxic by the time of dismissal, the necessary trust and confidence having disappeared on both sides.

184. With regard to the reason for dismissal, and allegations of detriment, the claimant has failed to show a causative link between the protected disclosures and the disability or the detriments.

185. Regarding the fairness of dismissal, referring to the statutory provisions and the **Burchell** test, and relying on **Sandwell & West Birmingham v Westwood UKEAT/0032/09** and **Wilson v Racher [1974] ICR 428** Mr Millar submitted that Justin Hely had demonstrated that he believed the claimant to have been guilty of gross misconduct, and in turn, the working relationship was fatally damaged, following a reasonable investigation. He submitted that dismissal was within the band of reasonable responses, Justin Hely having considered lesser penalties. He submitted too that dismissal was procedurally fair and in line with the ACAS code. The claimant had been given the opportunity to be involved in the investigation, but chose not to, and in any event he was sent a copy of the report and given an opportunity to respond. Dismissal for gross misconduct was reasonable because this particular behaviour was listed in the respondent's disciplinary policy.

186. Relying on **Polkey v AE Dayton Services Ltd [1987] IRLR 50**, Mr Millar submitted that even if gross misconduct was not established or the procedure found to be unfair that the claimant would have been dismissed in any event for some other substantial reason by virtue of this breakdown of trust and confidence. He submitted that the Tribunal is required to take into account the all of the evidence from both the claimant and the respondent in determining the likelihood of the claimant being dismissed by virtue of his behaviour. Even

if the Tribunal conclude that the decision of Justin Hely is unfair, relying on **Polkey**, the Tribunal should take account of all of the facts, and accept that for the claimant to suggest that he did not know that he was required to desist communications is incredible, particularly given the Catherine Vickery e-mail, and the overall picture is of someone defiantly refusing to follow reasonable management requests. Further, Justin Hely had taken account of the redacted statement, in which the claimant accuses colleagues of being dishonest, suggesting that he is experiencing corporate bullying and corporate assault, and accusing the CEO of acting illegally. This makes it absolutely clear that trust and confidence had gone, and the Tribunal should take this into account, even if there are found to be flaws in the dismissal process, and conclude that dismissal was for "some other substantial reason".

187. Relying on **Nelson v BBC [1979] IRLR 346** and **Robert Whiting Designs Ltd v Lamb [1978] ICR 89,** Mr Millar also argued that the compensatory award should be reduced by 100% for contributory fault, and urged that the claimant was the sole author of his own downfall, given the escalation of his concerns and his unwillingness to engage with occupational health.

188. Further and in any event, relying on **O'Donoghue v Redcar and Cleveland Borough Council [2001] IRLR 615**, he argued that it would be just and equitable to reduce compensation, given that there was up to 100% chance that the claimant would have been dismissed soon afterwards.

Tribunal observations on the witnesses and the evidence

189. In this case, we first considered the claimant's claim that he was disabled in terms of the Equality Act, and so we heard some detail about the claimant's condition which was diagnosed as anxiety. On the basis of the evidence led, we concluded that the claimant was disabled under the Equality Act.

190. It is important to record that we were in no doubt having heard Mr Daly's evidence and having looked carefully at the documents lodged in this case, that it is absolutely clear that Mr Daly was at the relevant time, and indeed continues to be, unwell. This was clear to us not least from the way he gave

evidence as well as the very extensive documentation and the very detailed analysis which Mr Daly included in his correspondence with the respondent. As Mr Daly himself said repeatedly in evidence, particularly in cross examination, it is as a result of his anxiety that what others might consider to be reasonable and appropriate, he does not. Perhaps one particularly illuminating illustration of that trait was the fact that the claimant had complained that his name was mis-spelled by Ms Mulholland-Wells and he confirmed in evidence that he believed this to be a deliberate attempt by her to humiliate and ridicule him. We also noted what might be regarded as "double standards", namely his expectation of a detailed and speedy response to his communications, but on a significant number of occasions he did not reply to correspondence sent to him by his colleagues, or deal with them appropriately.

191. It was therefore unfortunate that a not insignificant number of the respondent's actions (at least so far as he was concerned) reinforced or provided justification for his concerns. For example, he received in error an e-mail intended for another M.Daly; Ms Mulholland-Wells inexplicably failed to deal with his request for annual leave (after encouraging him to take outstanding leave); he was referred to occupational health without a written referral being made; a serious error was made by the mistaken reference to an absence for migraine/headache; and he was asked to appeal to an executive who was due to be out of the office for several weeks.

192. We recognised, as discussed further below, that much of the claimant's behaviour was unreasonable and indeed irrational, and we took that into account in our assessment of the evidence, but we also took account of the fact that he is disabled.

193. Whether as a result of his diagnosis of anxiety or otherwise, the claimant gave his evidence in a heightened state of emotion, finding some of the questions even from his own counsel inexplicably difficult to answer, and having particular difficulty when cross examined. Further, whether as a result of his illness or his disability or otherwise, we considered that the claimant has done

himself a great disservice by his own actions, which as discussed below made a very significant contribution to his dismissal, and in not affording himself the benefit of an occupational health assessment.

194. We did not however thereby consider that he was not telling the truth, and indeed on reflection there was little dispute about the specific facts (beyond the very crucial point about the reason for dismissal, discussed below), and as is often the case, many differences come down to an alternative interpretation or presentation of those facts.

195. With regard to the respondent's witnesses, although we did not think that they were as individuals not telling the truth, overall we considered that they were holding back on a good deal of the details of the background to this case, and in general gave rather careful and limited answers to specific questions. Further, while we could not pin the "sham" on any one individual because it was a collective/corporate response, our central conclusion is that the reason relied on to support dismissal was not genuine, and therefore that there was indeed a coverup. This seems to explain the lack of candidness from some of the witnesses at least about the reasons relied on for dismissal. The result of this was that we did not take everything we heard at face value.

196. We were conscious too throughout the hearing that the respondent in this case operates in the health sector and they therefore should have had a particular awareness of health issues, including mental health issues, and the importance of confidentiality.

197. With regard to Mr Rosenblatt's evidence, we were of the view that Mr Rosenblatt was giving careful, limited answers and playing down or holding back information about how this issue was handled. This is illustrated for example by his answers to questions about whether the behaviour of the claimant had raised alarm bells for him. We got the impression that Mr Rosenblatt was rather disdainful of the whole Tribunal process, and had formed his own view that this was all a waste of time, and that there was no foundation at all to the claimant's complaints, and that they should not have

been taken seriously. Given the outcome of this hearing, it is clear that we considered that the matter should have been dealt with differently, and given Mr Rosenblatt's role, he will now see that there are a number of lessons to be learned.

198. We found Ms Sharp to be the most forthcoming of the respondent's witnesses, and we accepted her evidence about her involvement in the grievance appeal.

199. Mr Buckingham gave the impression of being nervous and uncomfortable while giving evidence. We got the impression that he was trying to understand the intention behind the questions and being careful with his answers, and although that he was trying to tell the truth, he felt constrained (perhaps by the fact that Mr Rosenblatt was in the room) and his answers were tentative, illustrated by his tendency to say that he "would have " done things. We did however accept that he was well-intentioned when it came to his attempt to deal with the claimant's grievance.

200. Ms Mullholland-Wells gave her evidence in a comfortable and measured way about the extent of her involvement, although we did again get the sense that she was holding back. This was illustrated for example by some of her limited answers, such as her initial failure to explain why she had delayed so long replying to the claimant's e-mail of 1 August; the fact that she gave no explanation why she chose not take HR advice given to her to raise her concerns with BMI Manage after the meeting of 13 July; and by the reference to the "current state of play", which indicated to us that much more was going on in the background which we were not being told about.

201. With regard to Mr Hely, we had some serious reservations about his evidence. Again we got the impression that he was holding back and that his answers were in places rather limited. We did not get a sense that he had fully thought through the implications of the decisions he was making and indeed not fully understood them. We got the impression that he was something of a "puppet"; we could not understand why in such a difficult case as this the respondent would appoint someone who had never done a disciplinary hearing before,

and that Mr Rosenblatt was perhaps counting on his inexperience and his status in the hierarchy to deliver the outcome they wanted. Indeed, we believed that he was at least subconsciously aware what was expected of him, and we accepted Mr Edward's submissions that he would feel some pressure in regard to the outcome given that these were "instructions" from his superior, the Chief Executive Officer, and therefore that he was not entirely objective or independent in his analysis. Despite this being his first disciplinary hearing (having only conducted two appeals), his evidence was that he took no advice from human resources, which we found surprising.

202. Had he stepped back and given objective consideration to the specifics of the allegations and the evidence to support them, we assume that he would have himself realised it could not genuinely be said on the specifics that the conduct was gross misconduct justifying dismissal.

203. In particular, we noted that he apologised and corrected his evidence on at least three occasions in respect of important matters relating to the reason for the dismissal: in respect of whether the references in allegation 1 and 2 related to "instructions" or to requests; in respect of his initial clear answer that he was of the view that the upholding of allegations 1 and 2 were gross misconduct in themselves; and linked to that that the "irreparable damage" to trust and confidence was solely because he had upheld allegations 1 and 2. There was also the point which became the subject of an objection during re-examination about whether, in respect of allegation 1, he was relying only on the e-mail of 9 March, or additional e-mails and in particular the e-mail of 31 March which was referred to in the letter of dismissal.

204. While we accept that this is not necessarily indicative of Mr Hely not telling the truth, certainly we were clear that it was indicative of him not being confident himself about the reasons for the dismissal, and how they interplayed.

205. For all these reasons, we did not consider Mr Hely's evidence to be reliable.

"Ordinary" Unfair Dismissal

206. In this case the respondent states that the reason for dismissal is misconduct (for failing to comply with reasonable management requests) or "some other substantial reason", that is a break down of trust and confidence.

207. It was difficult for us to be clear from the evidence of Mr Hely about the reason or rationale which the respondent was relying on to sustain their belief that the claimant was guilty of misconduct. As we understood the evidence, the respondent found the first and second of the allegations of misconduct to have been well-founded, and that as a result of that misconduct, (Mr Millar used the phrase in submissions "in turn", the phrase used in the dismissal letter), there was a breakdown of trust and confidence (allegation 4) leading to or confirming (again the phrase used is "in turn") a breakdown of the working relationship (allegation 5).

208. With regard to allegation 1, Mr Edward relied on the provision at 4.1.2 of the disciplinary policy that gross misconduct "is a very serious breach of company's rules or other misconduct of a serious nature" in support of his submission that it could not be said that the conduct alleged was of this order of seriousness to justify dismissal.

209. While we accepted that Mr Hely had initially in both evidence in chief and cross examination said that he had relied only on the e-mail of 9 March to uphold allegation 1, it is clear from the dismissal letter that he was relying on both the e-mail of 9 March and the one of 31 March. However, his evidence in relation to that simply served to reinforce our view that he himself was not entirely confident about the reasons for dismissing the claimant.

210. Further, we noted that the respondent did not rely on the e-mail of 7 April, which was perhaps the clearest in terms of an instruction to the claimant, but again that failure underlined the lack of clarity about the reason for dismissal.

211. Whatever the rationale of the claimant for writing to the Chief Executive, we accepted Mr Edward's submissions that on any analysis the behaviour relied on could not reasonably have been categorised as "serious" misconduct. This was particularly given that the only misdemeanour was stated to be the fact

of writing to the Chief Executive in the face of two requests by the Chief Executive not to do so; that no concerns were expressed about the content of the e-mails; that these requests were not framed in mandatory or peremptory language; that he did not write again after the e-mail of 7 April; and that no warning was given to the claimant that should he not comply with these requests that he could face disciplinary action, far less dismissal. We did not accept Mr Millar's submission that it should have been obvious to him, given the terms of the disciplinary policy, that this was where such actions would lead. In any event, we were of the view that whether instructions or requests, these were not as clear as Mr Hely asserted they were/believed them to be; and in any event we noted that the claimant was never actually told to redirect his emails to Ms Mulholland-Wells or Mr Buckingham (except on one occasion by Ms Sharp); and it was certainly not made clear that there would be disciplinary sanctions for failing to comply with the request/instruction, nor any specific warnings given before he was suspended.

212. We understood the letter of dismissal to suggest that it was allegations one and two taken together that amounted to gross misconduct. With regard to allegation two, we noted that the suspension letter was dated 26 April and that this allegation was added at the last minute. Again we were of the view that it was not made clear to the claimant that he was being required to provide a reason for not being able to attend the meeting and it was certainly not made clear to him that if he did not give a reason and did not attend that could lead to disciplinary action being taken against him, far less dismissal. Further and in any event, although Mr Hely was aware of the grievance (and the details set out in the redacted statement), he confirmed in evidence that he otherwise did not know the details of the grievance and that he considered it was entirely irrelevant to these disciplinary proceedings. We did not accept that it was irrelevant in this particular case, not least because it may well have suggested that the reason why the claimant did not want to meet Ms Mulholland-Wells and Mr Buckingham was because he had raised grievances against them. (Indeed at a time when the claimant had lodged an appeal against the outcome of his grievance). While we fully accept that the grievance and

disciplinary processes should be kept separate (and indeed we were of the view that the grievance process (including any appeal) should have been completed before disciplinary action was commenced), we did not accept that the grievance was, in the particular circumstances of this case, irrelevant to the question of the disciplinary allegations.

213. Indeed we were of the view that the respondent acted prematurely in taking steps to suspend the claimant so shortly after the outcome of the grievance, but also in the knowledge that the claimant had appealed the outcome of the grievance, which the claimant himself considered was relevant.

214. Even accepting that the claimant did, without reason, refuse to meet, again we accepted Mr Edward's submission that this could not be categorised as sufficiently serious to meet the definition of gross misconduct, especially when the consequences of his response had not been made clear to him.

215. Thus taken together, we were of the view that even if well-founded, allegations one and two did not support a conclusion that the claimant was guilty of gross misconduct (justifying dismissal).

216. As discussed above we understood from the disciplinary letter and from Mr Hely's evidence that it was the conclusion in relation to the first and second allegations which led to the conclusion that allegation 4 (breach of trust and confidence) was well-founded, and in turn allegation 5 (breakdown of working relationship).

217. If we have found that allegations one and two could not support a conclusion of gross misconduct, then on the face of things, it appears to follow that allegation four (and indeed allegation five) could not, in isolation or even taken together, be well-founded.

218. However, we noted from the dismissal letter that Mr Hely had taken into account not only the disciplinary report (and relevant appendices) but also the claimant's redacted statement. Relying on that evidence, he found that "the trust and confidence that you have in your employer is now sadly, irreparably

damaged. In turn, and for the reasons relating to allegations 1 and 2, I believe it is reasonable to conclude that the trust and confidence that your employer has in you is, equally sadly, irreparably damaged". He concluded in respect of allegation 5 that "as a consequence" of mutual trust and confidence having eroded irreparably, "it is reasonable to conclude that the working relationship between BMI Healthcare and you has broken down".

219. We accepted Mr Edward's submission that the respondent's approach to the operation of the implied term of trust and confidence is flawed. It would not be for the employer to rely on their conclusion that *the claimant's* trust and confidence *in them* is irreparably damaged. An employee could accept a breach and continue working and thereby affirm the contract. In this case, the claimant did continue to work and on the facts we found that he believed that the respondent would deal with his concerns. He did not after all take matters outwith the organisation which he would have been entitled to do without reprisal.

220. We did not therefore accept that the reason for dismissal relied upon by the respondent was genuine. We considered that it was a sham. Having heard all of the evidence, we were of the view that the reason for dismissal was something other than the reasons given by the respondent for dismissing the claimant.

221. Further, we accepted Mr Edward's submissions that dismissal for the reasons given of an employee with no adverse disciplinary record who had been employed for almost nine years ought not to have been categorised as sufficiently serious to justify dismissal. We accepted that no reasonable employer for these reasons alone would conclude that dismissal was reasonable.

222. In such circumstances, we did not require to go on to consider the other elements of the **Burchell** test, the onus of proof being on the respondent to show the reason for the dismissal. However it is axiomatic that if the reason for dismissal is not genuine, then it cannot be said that the employer had in

his mind reasonable grounds upon which to sustain the belief that the claimant was guilty of the misconduct alleged. Further, again self-evidently, it could not be said that the respondent had carried out as much investigation into that matter as was reasonable in the circumstances, given that the allegations investigated were not the real reasons for the dismissal. We therefore concluded that dismissal for the reason advanced fell outwith the range of reasonable responses open to the respondent.

223. Mr Millar argued, relying on **Polkey**, that even if gross misconduct was not established or the procedure found to be unfair, that the claimant would have been dismissed in any event for "some other substantial reason" by reason of the breakdown of trust and confidence. As we understood his argument, this was on the basis that Mr Hely would have been entitled to consider all the surrounding facts and evidence, and if he had done so, then he would have found that there was a breakdown of trust and confidence, so that dismissal would have been fair. Likewise, as we understood the argument, the Tribunal should take account of all of the evidence to conclude that there was a breach of trust and confidence and the working relationship had broken down irretrievably. Mr Edward in response argued that this was not a legitimate interpretation of **Polkey**, which permits the Tribunal to consider whether if any procedural flaws were corrected then the claimant would have been dismissed anyway. Here however Mr Millar was arguing that Mr Hely should have looked differently at additional available evidence, and having done so, there was material upon which he could rely and to justify dismissal which would thereby have been fair.

224. We did not accept Mr Millar's submission in this regard. While, as we discuss further below, we believe that there has been a breakdown of the working relationship, that was not for the reasons relied upon by the respondent to dismiss the claimant. We accepted Mr Edward's submission that it was not appropriate for either the respondent or the Tribunal to look at other evidence not relied on at the time to conclude that dismissal would be potentially fair for "some other substantial reason". Dismissal, given the findings in fact, and in

particular the respondent's reliance on their view that it was the claimant who had decided that the implied term had been breached, and it was that which resulted in the irreparable damage to the working relationship, therefore fell outwith the range of reasonable responses.

225. Such a conclusion inevitably invites the question what was the real reason for the dismissal. We should say that we did not accept Mr Edward's submission that given that the stated reason for dismissal was so "thin", and even given that we have subsequently not accepted that the evidence supports the purported reason for dismissal, that it was appropriate on the facts of this particular case, that an inference should be thereby drawn that the real reason for dismissal was the making of protected disclosures.

Disability discrimination

226. However, before coming to the question of protected disclosures, we next considered the claimant's claims of disability discrimination, including whether, having not accepted that the respondent's reason for dismissal was genuine, his disability had anything to do with his dismissal.

227. We did not consider that it was argued with any real force that dismissal was for reasons related to disability and indeed, it was not suggested that the reason for his dismissal was direct disability discrimination, that is it was not suggested that he was dismissed because of his disability. Rather it was submitted that the claimant's treatment and dismissal was unfavourable treatment arising from disability, and that there had been a failure to make reasonable adjustments. Liability in respect of both of these provisions is predicated on the respondent knowing or having imputed knowledge that the claimant was a disabled person.

228. We accept that the onus of proof to show that they did not know or could not reasonably be expected to know is on the respondent, and understood that it was for that reason that Mr Edward did not ask the respondent's witnesses in cross examination whether they knew that the claimant was disabled or

whether the reason for the treatment and/or dismissal had anything to do with his disability.

229. As discussed elsewhere in this judgment, it was quite clear to us, given even the way that the claimant gave evidence, that he was ill, and the medical evidence makes it clear that he is suffering from "anxiety". Indeed, we have found, relying on that medical evidence and the claimant's oral evidence, that he is "disabled". It is a different matter however whether it could be said that the respondent knew, or ought to have known, at the relevant times, that he was disabled. We bear in mind the definition of disability which is essentially a mental impairment which has a more than minor or trivial adverse effect lasting over 12 months on the claimant's ability to carry out normal day to day activities.

230. We take the view from the evidence, not least the documentary evidence, that it was or should have been plain too to the respondent's witnesses that the claimant was ill. We also noted that no issues or concerns were raised about the claimant or his work prior to his return from a lengthy period of illness in September 2015, the claimant having commenced employment some seven years earlier. While we appreciate that he was working with a different line manager, and it may well be that their management style was just to let him get on with his job (as Mr Millar suggested) but still we considered this to be significant when it came to the question of the claimant's mental health. We are of the view that it should have been clear to the respondent that the claimant's behaviour had changed since he returned from his lengthy absence on sick leave, and it would appear that the support that he was given on return was limited or non-existent.

231. The claimant first mentioned his health concerns in his one to one meeting with Ms Mulholland-Wells in July 2016. He mentioned that he was suffering from stress, that he was taking medication, and that it had had to be increased (although we note that this does not accord with the medical records, but we accept that it was said). Although at that time reference was made to support from HR, as we understood the evidence, the claimant was advised, or at

least understood, that it was not possible for him to have HR support in the circumstances. That is unfortunate, because it might be said that this is the point at which it would have been appropriate for the claimant to have been referred to occupational health, and input from HR may well have facilitated that. We considered that Ms Mulholland-Wells should have recognised the signs of stress from the claimant's behaviour and taken more steps, and sooner, to assist the claimant (accepting that she too was constrained by the fact that she was given limited information about the claimant's absence in 2015).

232. The next time the claimant made reference to the impact on his health was in the grievance which he intimated to Mr Buckingham in October 2016, when he suggested that the claimant should see his GP and take time away from work and he set up an occupational health meeting with Sister McGhee. The claimant again raised concerns about his health shortly thereafter when he complained about Mr Buckingham to Ms Copeland who acknowledged his health concerns, and strongly recommended that he follow up on the OH referral and made reference to Employee Assist, their confidential counselling helpline.

233. While the claimant attended that OH appointment, it is very unfortunate that no written referral was made, which it seems resulted in Sr McGhee not appreciating why he was there. In oral evidence, the claimant made a very plausible argument about not knowing why he was there, resulting in the examination not going ahead, but it became clear to us that the claimant himself should have taken the responsibility for explaining his circumstances to Sr McGhee, given that he was the one who was raising issues about his health and this was the respondent's response to those concerns. We noted too, in a letter written by Ms Copeland which was not referred to us in evidence (644), that she explained that on occasions managers could refer their staff to OH without the need for any formal referral, although it is rather unfortunate that Sr McGhee did not seem cognisant with that option.

234. Another OH referral was instigated following the grievance meeting in December, when the correct referral form was completed by Mr Buckingham, with assistance from HR, and sent to the claimant for his approval. Again unfortunately that document contained a significant error in referring as it did to a lengthy absence in 2015 due to "headache/migraine". Mr Rosenblatt tried to explain that this was the result of the electronic recording system and the grouping of conditions which were given codes (designed ironically to reduce errors), but given the claimant's state of mind and his heightened concerns about confidentiality, this was a very unfortunate error. That said, we accepted the respondent's rationale that all that the claimant required to do was to ask for that error to be amended, and to give his consent to the OH appointment going ahead. We did note too that the respondent made other efforts, up to March 2017, for the claimant to attend an occupational health appointment, but he refused or failed to do so.

235. We are of the view that the claimant must take responsibility for having failed to attend occupational health. Given the timing of the appointment, an occupational health adviser may well have concluded that he was likely to be considered disabled for the purposes of the Equality Act definition. Had he done so, then the respondent could not now have argued that they did not know that the claimant was disabled had that been the outcome, and he may well have been entitled to a number of protections of the Equality Act, not least the duty to make reasonable adjustments.

236. Mr Edward argued that the respondent ought to have known that the claimant was disabled because the respondent knew that he was taking medication for stress. We do not accept that submission. While we would agree that the respondent knew or ought to have known that the claimant was ill, even that the claimant had a mental impairment, we could not say that the respondent should have been aware that the claimant had suffered or was likely to suffer from the mental impairment which had a more than minor or trivial impact on his ability to carry out day to day activities for twelve months or more. We noted too that during this whole period, from September 2015 until the

claimant was suspended, he was not absent from work at all with his illness, although we had found that one of the symptoms was insomnia. Absence from work may well have been a further indicator to the respondent regarding his mental health.

237. Although it appears to be a moot point whether or not a claimant can rely on a perceived disability (**J v DLP Piper 2010 IRLR 936; Peninsula v Baker 2017 IRLR 394**), we do not take the view that this is a case where such an argument would be appropriate in any event, and indeed no such argument was made. While it may be understandable, and while we respect the fact that the claimant was very keen to keep such matters private, he cannot then say, not having shared any of his symptoms of his anxiety with his managers, having refused or at least failed to attend occupational health examinations, that he could have expected the respondent to have known that he was disabled. Further, we accept that the respondent made significant efforts to encourage the claimant to attend OH and contact Employee Assist, but as Mr Rosenblatt said, they could not force him to go. We could not say therefore that, without more, the respondent should have concluded that he was disabled for the purposes of the Equality Act.

238. We gave consideration to whether or not the claimant's failure to take up the opportunity to attend occupational health could be said to have been because of his disability. Although, since we are not medical experts, we could not know the answer to that, we accepted Mr Millar's submission that that should not be laid at the door of the respondent, and therefore that we could not in any event rely on that alone to support any conclusion that the respondent's ought to have known that he was disabled.

239. It follows that, since we accept that the respondent did not know or could not be expected to know that the claimant was disabled, the reason for the claimant's dismissal was not because of his disability, or indeed that there was unfavourable treatment arising in consequence of his disability, or that the duty to make reasonable adjustments was engaged.

240. When it comes to the harassment claim, there is an interesting question whether a respondent requires to have knowledge of disability for conduct to be "related to disability" (noting that the Equality Act provisions no longer require the conduct to be related to the claimant's disability unlike the antecedent legislation). We accept that in principle relevant conduct might be said to be "related to disability" even if the perpetrator did not know that the claimant was disabled (for the purposes of the Equality Act).

241. However, we did not in any event accept that the way in which Ms Mulholland-Wells acted could be said to amount to bullying or harassment. While we have no doubt that the claimant would have been a very difficult person to manage, we have concluded that she did not bully him (whatever his perception might have been) and we accepted Mr Millar's submissions that the way that the claimant was treated by Ms Mulholland-Wells was not in any way inappropriate given that she was his line manager. In fact we came to the view that it was her failure to manage him robustly that lead to some of the difficulties in their relationship, and his lack of understanding about what she expected of him. This is reflected in the limited amount of time she spent with him in one to ones, and the fact that she did not robustly address the issue of his non-attendance at meetings or his lack of engagement at meetings, and her lack of clarity about the requirements; in not responding to e-mails; and in failing to deal with his request for annual leave in a timely manner resulting in him taking leave without permission (when she had advised him he had outstanding leave which he should take and when she only had five direct reports). Given the background, it might be said that it is not surprising that the claimant, given his self-confessed different perceptions in light of his condition, might at least came to believe he was being treated differently from others.

242. However, we have concluded that any treatment of the claimant could not be said to amount to bullying. That conclusion holds when it comes to considering whether the conduct amounted to "unwanted conduct related to [disability] [which]….has the purpose or effect of violating [the claimant's]

dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment".

243. While we accept from the claimant's (subjective) point of view, that he found the conduct by Ms Mulholland-Wells to be "unwanted", and that it had the effect of violating his dignity, we do not accept that there was any intention on the part of Ms Mulholland-Wells to "harass" the claimant for a reason relating to disability or otherwise. When it comes to the question of the effect, while we take account of the claimant's perception, and all the other circumstances of the case, we did not consider that it was reasonable for the conduct to have had that effect on the claimant. The claimant's claims under the Equality Act therefore fail and are dismissed.

Detriment and dismissal for making a protected disclosure

244. We then came to consider whether, having not accepted that the reason for dismissal was genuine, dismissal was for making a protected disclosure and/or whether the claimant had suffered detriment (short of dismissal) for making a protected disclosure.

245. The protected disclosures relied on are all as set out in Mr Edward's submission, and the relevant e-mail disclosures referenced in the findings in fact, and we use the numbering set out there.

Qualifying disclosures

246. In respect of both dismissal and detriment, the claimant must establish that there has been a qualifying disclosure (in terms of section 43B ERA).

247. Although he fell short of conceding the point, Mr Millar did not argue with any force that these were not protected disclosures. As we understood it, his focus was on the extent to which any disclosures could be said to have been made in good faith, and that the claimant had not suffered any detriment as a result of having made the protected disclosures. Mr Millar argued (in relation to first the three purported protected disclosures at least) that there would have been no reason to subject the claimant to detriment because a) the respondent was

already aware of these issues; b) the respondent was dealing or had dealt with them; and c) they had not responded to the claimant and not subsequently advised him of the outcome of these developments because the issues were not related to his job.

248. Although we did not understand Mr Millar to argue that the fact that the respondent knew about the issues meant they were not properly categorised as disclosures of information, certainly, we do not accept that the fact that the respondent knew about them, notwithstanding the language of "disclosure", meant they were not qualifying disclosures for the purpose of the legislation.

249. Mr Millar also argued that the fifth disclosure was only made to Henry Davies, who took no part in the grievance or the disciplinary. However, Ms Watts was made aware at least in general terms of that and all of the other disclosures, and further we heard evidence from Mr Rosenblatt that the decision to instigate the dismissal process was a decision of the board.

250. In order to be a protected disclosure, there must be a qualifying disclosure which must be a disclosure of information. The phrase "disclosure of information" is intended to have a wide meaning, and the central requirement is that the disclosures should "convey facts" (**Kilraine v London Borough of Wandsworth 2018 EWCA Civ 1436**). In respect of all five of the purported protected disclosures, we accepted that each had sufficient factual content and was sufficiently specific to show the relevant failures. We therefore accepted, in respect of all five disclosures, that these were disclosures of information, such as to meet the requirements of this provision.

251. Any disclosure of information must also, in the reasonable belief of the worker, be made in the public interest. Mr Millar argued that the disclosures which the claimant made were self-interested. He suggested these were made to maximise the value of his claim, and not because the claimant genuinely did not feel that he was being listened to. We did not accept that submission. The wording of the relevant provision obliges us to consider whether his belief was reasonable and not whether it was the belief of a reasonable worker. While

we came to the view that the persistence of the claimant, and the manner in which he communicated the disclosures of information may have been unreasonable, looking at the matter from his perspective, we readily accepted that it was the claimant's reasonable belief that the issues he was raising were in the public interest.

252. This was notwithstanding the fact that the claimant said on a number of occasions that his illness did result in him acting in ways which might seem unreasonable. We had no doubt that he genuinely believed that the issues which he was raising were in the public interest. We did not even consider it to be as clear cut as the respondent's witnesses suggested that that these were not in any way related to his job, and certainly we thought that they did fall within his area of expertise if not directly relevant to his role.

253. In any event, we understood Mr Millar to be referring to the claimant's motivation in raising these issues, which is of course, following the 2013 amendments to insert the reference to the public interest, no longer relevant in respect of liability. For the avoidance of doubt, since we accept that it may be relevant for remedy, we find that the making of the disclosures were not motivated by self-interest but clearly motivated by the claimant's belief that these were in the public interest, and that it was reasonable view for him to hold.

254. Any disclosure of information, made in the reasonable belief of the worker in the public interest, must also, in that worker's reasonable belief, tend to show one or more of the six relevant failures listed in section 43B. In this case, the claimant asserts that it was his reasonable belief that this information tended to show:

    i. "that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject" and/or

    ii. "that the health or safety of any individual has been, is being or is likely to be, endangered".

255. We did not understand Mr Millar to argue that these disclosures could not be said to relate to the failure to comply with a legal obligation and/or to suggest a danger to health and safety. We accepted that the claimant had in mind concerns regarding patient safety and the respondent's legal obligations when he made the disclosures, and so we accepted that this hurdle was also met.

256. In order for qualifying disclosures to be protected disclosures, the disclosure must also be made by a protected worker to an appropriate person. There was no argument in this case that the information was made by the claimant, as an employee, to an appropriate person, namely to his employer.

257. We therefore conclude in respect all five disclosures relied on were protected disclosures.

Automatic unfair dismissal

258. The claimant argues in this case that the reason for his dismissal is because he made these protected disclosures.

259. Where the worker is an employee and any detriment amounts to dismissal, section 47B does not apply to the dismissal. In that case, section 103A states 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".

260. While there is an evidential burden on the claimant to show that the reason for dismissal was because he had made a protected disclosure, that is he must produce evidence to show that dismissal was for a different reason than that advanced by his employer, the legal burden remains on the employer to show the reason for dismissal, as with other dismissals under the ERA (**Kuzel v Roche Products Ltd 2008 ICR 799 CA).** However, having rejected the reason for dismissal advanced by the employer, the Tribunal is not then bound to accept the reason advanced by the employee, and it can conclude that the reason was not one advanced by either party. While we accept that it is

legitimate to draw inferences from the facts that the real reason for the dismissal was because the claimant had made protected disclosures, as discussed above, we did not accept Mr Edward's submission that we should draw an inference that was the real reason.

261. We do however accept that it is appropriate for us to draw inferences from the facts in this case about the real reason for dismissal. We have concluded, for the reasons which follow, and based on the evidence which we heard, that the reason the claimant was dismissed in his case was not because he had made protected disclosures, but rather because of the manner of his communications and his behaviour generally.

262. We noted the way that the claimant himself gave evidence, and took account of the claimant's evidence regarding how his anxiety affects his behaviour, as discussed above.

263. We noted that two witnesses indicated that their concern was with the way the issues had been raised. Mr Rosenblatt said "it was the way and manner it was raised, not the fact that it was raised, that was the concern; it was the way it was delivered and it was the way it was corresponded to". In re-examination, Mr Buckley said that the difficulty with the claimant was not the fact that he was making challenges but the way the claimant "raises challenges". As Mr Edward pointed out, that allegation was never put to the claimant during the disciplinary process.

264. Referring to the documentary evidence, we noted the extensive communications, and the forensic detail with which the claimant analysed the respondent's actions; the language used which in places was at least inappropriate; the many repetitions within documents and to many different executives; the preambles, caveats and warnings given before commencing to deal with the substantive points in a number of the letters; the fact that the claimant did not make it easy for the recipients of his enquiries to answer his concerns by including extensive, repetitious unfocussed detail, in documents sometimes over 100 pages long; his failure to take the advice of Ms Vickery

that he was more likely to get a response if he summarised his complaints shortly. Indeed, perhaps as many as 1,000 pages of the volumes of productions lodged were letters from the claimant to the various executives on his concerns about the grievance and the protected disclosures. We noted his near obsession with confidentiality and his insistence on password protecting every document, because, as he said in evidence, his condition made him distrustful.

265. We noted too that in respect of his grievance, the claimant became focused, even fixated, on process (his right to a fair hearing) which meant the substance of his complaint became secondary and detracted from the bullying and breach of privacy concerns, resulting in his failure to attend a grievance hearing; his concerns about repeatedly being given the wrong grievance policy, while admitting that the updates were of no substance; the fact of his insistence on being provided with guidelines on grievances by external organisations, and all the documentation which the respondent had relating to the management of grievances, but this meant that he himself put obstacles in the way of it being addressed. Further, he then refused to attend the appeal hearing, apparently taking a very literal interpretation of the conditions of his suspension, and choosing to rely on that literal interpretation even though he was being invited by Ms Sharp to contribute in whatever way he saw fit. With regard to the disciplinary hearing, again we noted that he was difficult to deal with, insisting he was not interrupted, insisting he read out a written statement, then not agreeing to hand it over, making some extreme allegations against the respondent and suggesting that the police be called at one point. His explanations too about why he would not attend occupational health, discussed elsewhere, were ultimately rather inexplicable and as a result in failing to co-operate with that, as well as the other processes, he did himself a disservice.

266. We were aware that we should pause before too quickly concluding that the terms in which a disclosure was made or the manner in which that disclosure

was made would properly be categorised as the reason for dismissal, rather than the fact of making the protected disclosure.

267. The Court of Appeal in **Bolton School v Evans 2007 ICR 641 CA** had however rejected the argument that all of an employee's conduct in disclosing information including any misconduct should be regarded as part and parcel of the disclosure itself, but that in some circumstances, the dismissal may well be for misconduct that was committed during the course of making the disclosure. We have found in this case that the misconduct relied on in the disciplinary investigation, essentially not obeying reasonable management instructions, was not sufficiently serious to justify dismissal, and so we do not accept that it was that misconduct which could be said to be the real reason for dismissal.

268. We were conscious that as a Tribunal we would need to be satisfied that the worker's treatment arose from something that was truly separable from the fact of the protected disclosures. That conclusion was upheld in **Panayiotou v Chief Constable of Hampshire Police 2014 ICR 223 EAT**. In that case, the manner in which the claimant pursued his complaints, campaigning relentlessly if dissatisfied with the action of the employer and seeking to ensure all complaints were dealt with in the manner he considered appropriate, meant that the employer had to devote a good deal of management time to responding to his correspondence and complaint, leading the Tribunal to conclude that the claimant had become completely unmanageable, and the employer was entitled to dismiss the claimant.

269. Based on primary and secondary facts found in this case and as discussed above, we concluded that the claimant had become impossible to manage and that the respondent was looking for a legitimate route to dismiss the claimant, to rid themselves of a very time-consuming problem which was distracting them from their core functions. In such a case, we were of the view that we could, on the facts, separate out the manner of communication from the fact of communication.

270. We concluded that it could not be said that the reason or even the main reason for the dismissal was the fact that the claimant had made protected disclosures. Thus the claimant's claim that he was automatically unfairly dismissed for that reason fails, and must be dismissed.

Detriment

271. With regard to a claim under section 47B, it is for the worker to show that he has been subjected to a detriment by an act or failure to act by his employer.

272. Here the claimant argued three detriments. He argued that the failure to deal with the disclosure was in itself a detriment, because his disclosures were either not answered, or in the case of Ms Watts, redirected to Mr Rosenblatt, who to the extent that he answered his concerns at all, only provided limited responses. We accepted that there was a failure to deal with his concerns. We accepted that where the respondent said they had dealt with the issues, the claimant was not advised of any outcome such as to reassure him (whether he would have been reassured had he been told is a different matter, and did not mean that efforts should not have been made in that regard).

273. We should say that we accepted Mr Edward's submission that the fact that the claimant raised issues which were not related to his job was not relevant to the question whether or not these were protected disclosures or detriments. We could not understand why, if the respondent had dealt with the issues, they could not have advised the claimant in clear and simple terms what the outcome of the concerns which the claimant had raised was.

274. We should add that we did not take the view that the claimant's failure to use the whistleblowing policy as such was anything to the point. It was not initially suggested to him that if he did, his concerns would be addressed. By the time it was suggested by Ms Vickery that he should do so (apparently for the first time in the e-mail dated 27 March), the claimant said that by then he had already raised the issues with senior executives (rather than, as Mr Millar suggested because he had "access" to them) and this would have been to invite even more paperwork from the claimant. Further, a whistleblowing

policy is intended to encourage people to raise their concerns internally in the first instance without fear of reprisal, and not to operate as an excuse not to deal with such concerns unless they are made in terms of the policy (which in any event rightly does not state that a worker can only raise concerns that are work related).

275. Certainly, Mr Rosenblatt's responses were limited and his "tactic" of shutting the claimant down by refusing to open password protected documents was for him a convenient excuse not to have to respond or engage in correspondence with the claimant. Indeed we were of the view that Mr Rosenblatt, knowing the personality of the claimant, served simply to antagonise him and exacerbate the problem, and so this was entirely counterproductive and unnecessary. We noted in contrast that Ms Watts and Ms Vichery still did open the claimant's e-mails and replied, referring him again to Mr Rosenblatt, but using temperate and placatory language. The irony that it was Mr Rosenblatt who did not in fact act on the instructions of Ms Watts did not escape us. We accepted therefore that the lack of responses was a failure to act on the part of the respondent for the purposes of section 47B.

276. The second detriment was the instigation of disciplinary proceedings against the claimant, commencing with the suspension. The very manner in which the disciplinary process was commenced, with the claimant's line managers being less than frank about the reason for the meeting when they intended to suspend him, could be said to be a detriment. There is even a question about the appropriateness of suspending him given the misconduct alleged. Mr Edward argued that at least part of the reason for instigating the disciplinary process was because he had made protected disclosures, and certainly we accepted that these actions of the respondent could be said to amount to an act for the purposes of the section.

277. Mr Edward argued that there was a third detriment, namely that the making of protected disclosures, which if not the sole or main reason for dismissal, played some part in the decision to dismiss. He submitted therefore that to

that extent the employer's action should be categorised as detriments short of dismissal. We were not clear exactly what the distinction between the second and third detriments were, but we were in any event prepared to accept that the claimant did suffer detriments short of dismissal, in his concerns not being properly addressed, and in him being suspended and subjected to the disciplinary process.

Reason for detriment

278. Those actions/failures must have been "done on the ground that" the worker has made a protected disclosure. We accepted Mr Edward's submission that the onus of proof is on the respondent at this stage, and we understood that it was for that reason that Mr Edward did not put to the respondent's witnesses in cross examination that they had acted the way that they did because of the protected disclosures.

279. We noted that Mr Edward relied on the case of **Fecitt v NHS Manchester 2012 ICR 372 CA**, in which it was held that "on the ground that" meant "materially influenced" and that this is a looser test than the test of establish dismissal for making a protected disclosure. Mr Millar argued that the correct approach is not to ask "but for" the protected disclosures would he have suffered detriment, but rather whether this was the "real" or "core" reason. He did not refer to any authorities to support that proposition, but we did understand him to accept that the test is "materially influenced".

280. When it comes to the meaning of that phrase, in **Fecitt**, Elias LJ confirmed that s47B is infringed if "the protected disclosure materially (in the sense of more than trivially) influences" the employer's treatment of the whistleblower. In other words, it need not be the dominant reason, so long as the protected disclosures played a more than trivial part. Elias LJ recognised that this test is different from the test for establishing dismissal for making a protected disclosure, where if the making of the protected disclosure is a subsidiary reason the test will not be made out, whereas that will be sufficient for claims under section 47B.

281. In this case, we have concluded for the reasons that follow that the fact that the claimant was making protected disclosures at least partly influenced the respondent's decision to not respond to his enquiries and to instigate the disciplinary process.

282. The respondent's witnesses repeatedly stressed that he was not given details about how the concerns which he raised were being dealt with was because these were nothing to do with his job. We did not accept that was a valid excuse. However it was the failure of the respondent to deal appropriately with the claimant's protected disclosures that escalated the situation. These failures of the respondent were in circumstances where we have found that the disclosures were genuinely made and that the claimant was genuinely looking for answers to his concerns. That failure to respond, purportedly because he was raising concerns which had nothing to do with his work and therefore did not require an answer, was influenced by the fact that the claimant had made protected disclosures. It was the escalation of the complaints which the respondent had failed to respond to which led to the further dogged correspondence from the claimant which and in turn their decision not to respond to him and ultimately to the disciplinary process. We came to the view that the protected disclosures materially influenced (that is played a more than trivial part) in the decision of the respondent not to provide and appropriate response and then to instigate the disciplinary process in light of the claimant's reaction to those failures.

283. We conclude therefore that the claimant did suffer detriment on the ground that he had make protected disclosures.

Contributory fault

284. As discussed above, we recognise the real difficulties which the respondent had managing and dealing with the claimant, and indeed accept that he had essentially become unmanageable. It may well be that this was for reasons related to his disability, but that is beside the point in this case where we have

also found that the respondent did not know, or could not reasonably have been expected to know, that he was disabled.

285. We did however accept Mr Millar's submission that the claimant's behaviour contributed to his ultimate dismissal. Mr Millar argued that the claimant was wholly the author of his own misfortune, so that any compensation should be reduced by 100%.

286. In this case we have described the claimant as unmanageable. We have set out above actions which we would categorise as unreasonable. We conclude that to a significant extent that behaviour contributed to his dismissal, and therefore his actions were culpable or blameworthy. Certainly the situation was aggravated by the conduct of the claimant, even if he did not know that to be the case, or that he did not perceive his conduct to be inappropriate.

287. To give some examples, conduct which we conclude contributed to his culpability was his insistence on password protecting all correspondence; his frequent long detailed unfocussed letters which made it difficult for the respondent to respond to his complaints; his failure to give sufficient time to respond; his very literal interpretation of some correspondence; his failure on occasion to respond himself to correspondence; his repeated challenges to the grievance procedure; his failure to specify the reason for turning down the meeting on 26 April, and the inappropriate language he used in correspondence.

288. It was these actions, illustrations of the fact that the claimant had become unmanageable, that must be said to have at least contributed to the dismissal.

289. Having determined that the claimant's behaviour contributed to his dismissal, we came to consider to what extent it was just and equitable to reduce compensation. On the basis of this conduct, we took the view that the claimant must take a good deal of responsibility for his actions and that he was largely to blame for his ultimate dismissal. We therefore came to the conclusion that his actions had contributed to dismissal to the extent of 75%.

Termination of employment for other reasons

290. Further and in any event, we accepted Mr Millar's argument that, given our conclusion that the reason for the claimant's dismissal was that he had become unmanageable, the claimant would have subsequently been dismissed in any event.

291. Ironically Mr Rosenblatt, in answer to a question from Mr Millar if it were to be suggested to him that the claimant's dismissal was "stage managed to get him out", he said that was not true, because otherwise they would not have invested the time and resources into undertaking the investigation and conducting the disciplinary hearing. However, we find that this is exactly what the respondent did, having already decided that the only solution was to get rid of him, they engineered a situation which they believed would legitimise his subsequent dismissal. The trouble for the respondent is that their attempt to do that, and thereby not being upfront about the real reason why they dismissed the claimant, was not well-handled, and it was this that lead us to the view that the purported reasons for dismissal were a sham.

292. While we did not accept that the reasons given for dismissal were the real reasons, we do accept that the working relationship between the claimant and the respondent had broken down, largely because the respondent had lost respect for the claimant, such that the respondent could say for their part that mutual trust and confidence necessary to continue an employment relationship no longer existed. Had the respondent recognised that, then they would have taken a very different approach to the dismissal process and their reasons for the dismissal.

293. It seemed to us that an alternative approach should have been taken, which might at least have been to make it clear to the claimant (prior to his suspension) if he did not desist behaving the way that he was that his conduct likely to result in disciplinary action and possibly even dismissal. We considered that this was never actually make clear to him, and that time ought

to have been taken to ensure it was, not least in light of the illness from which he was clearly suffering.

294. Given the actions of the claimant, and given our conclusion that he had become unmanageable, and that the working relationship, from the respondent's point of view at least had broken down, we accept that it was only a matter of time before the claimant would have been dismissed. We came to the view, bearing in mind that an appropriate disciplinary procedure would require to have been undertaken, that the claimant would, in any event, have been dismissed within six months of the date of his dismissal.

Concluding remarks on remedies

295. We noted in the schedule of loss that the claimant seeks an uplift for the failure of the respondent to comply with the ACAS Code of Practice, although it we not clear to us which facts the claimant will rely on to support that submission, and this is not a matter on which we have yet heard submissions.

Conclusion on liability

296. We find that the claimant was unfairly dismissed in terms of section 94 ERA, but that his own conduct contributed to his dismissal, and that to the extent of 75%. We find that the claimant would have been dismissed in any event within six months.

297. We fined that the claimant suffered detriment on the ground that he made protected disclosures.

298. We find that his dismissal was not however because of having made protected disclosures and therefore the claim for automatic unfair dismissal for that reason is not well-founded and is dismissed.

299. The claimant's claims for disability discrimination are not well-founded and therefore are also dismissed.

300. A further final hearing will now be listed to consider the matter of remedy.

Employment Judge: M Robison
Date of Judgment: 16 November 2018
Entered in register: 19 November 2018
and copied to parties