



# THE EMPLOYMENT TRIBUNALS

**Claimant:** Mr Justin Sanjay Chatterjee

**Respondent:** Newcastle upon Tyne Hospitals NHS Trust

**Heard at:** North Shields      **On:** 13, 16, 17, 18, 19, 20, 23 & 24 April 2017

**Before:** Employment Judge Pitt

**Members:** Mr S Hunter  
Mr L Brown

***Representation:***

**Claimant:** Ms Sophie Garner of Counsel

**Respondent:** Mr R Gibson, Solicitor

## REASONS

Both parties having requested written reasons, judgment having already been issued, these are as follows:-

- 1 The claimant was employed by the respondent as a Consultant Plastic Surgeon from 2 November 2015 until 2 November 2017. He brought a claim for detriment by reason of protected disclosures under section 47B of the Employment Rights Act 1996. His employment ended having tendered his resignation on 20 October 2017.
- 2 The Tribunal heard evidence from the claimant on his own behalf, Mr Welsh, a Consultant ENT Surgeon at the respondent, and Medical Director for the Trust and Joint Acting Chief Executive; Michael Clarke a Consultant Ophthalmologist and the Clinical Director of the Plastic Surgery, Dermatology and Ophthalmology Department; Joseph O'Donaghue a Consultant Plastic Surgeon; Peter Hodgkinson, Consultant Plastic Surgeon and Clinical Director; Joanne Taylor, Senior Sister at the respondents Trust; Homa Arshad, a Consultant in Trauma and Orthopaedics, who formerly worked for the respondent; P Fearon Consultant and Orthopaedic Surgeon at the respondent; A Sorial, Junior Doctor at the respondent; H Cain Consultant Breast surgeon at the respondent; S. Nicholson

Consultant surgeon at the respondent; S Varma. The Tribunal had before it bundles of documents which included the respondent's policies for managing whistle-blowing, the recruitment pack for the claimant's position, the Department of Health Maintaining High Professional Standards in the Modern NHS (HMHPS) and the Royal College of Surgeons Separating Emergency and Elective Surgery. In addition, numerous e-mails between various parties and witnesses in these proceedings and a report from Mr Lees who conducted the investigation into allegations raised against the claimant.

### The Facts

- 4.1 Many of the facts in this case are uncontroversial. The claimant was recruited to his role of Plastic Surgeon following an open recruitment exercise. At the interview there were two candidates for the role, the second candidate being a Mr Veeramani who was an internal candidate. It is clear from the evidence before the Tribunal there was a split decision as to who to appoint, however the claimant was the successful candidate. The Tribunal is satisfied from the evidence it heard and the report of Mr Lees and the recommendations from Julia Newton that the department to which the claimant was appointed was fractured and divisive. Further the Tribunal is satisfied that the appointment of the claimant over the internal candidate was a subject of speculation and the Tribunal is astonished that the details of the split decision appear to be an open secret in the department. In particular it is clear that the internal candidate was known to all staff and was familiar with local protocols and there appeared to be an expectation that he would be appointed. Further it seems there was a level of disappointment amongst some in the department that the external candidate, that is to say the claimant, was appointed. This is reinforced by the claimant's different style in relation to a number of issues including postoperative care and in particular wound management. To this end it is clear that the claimant came into a hostile environment.
- 4.2 The claimant, also has experience as a hand surgeon and wanted to take up private consultancy work within the same area. It took some time for this to be resolved despite the fact that many others were in fact carrying out this kind of work including Mr Hodgkinson himself and it was not until the claimant sought clarification from the BMA about his hours of working that he was able to actually resolve this issue.
- 4.3 In 2016 an issue arose in relation to the claimant's care of a patient in which Mr Hodgkinson intervened. In particular the claimant highlighted an e-mail from Mr Hodgkinson to the claimant which read, "*You may want to read this e-mail on Sunday night holding something alcoholic*" and went on. The reply was, "*Justin's clearly rattled I think we need to draw a line forget about make sure we give him a fair crack of the whip and see what happens*". It is worth noting and jumping forward to the investigation in 2017, in relation to this incident, Mr Lees concluded that Mr Chatterjee's diligence with this patient seems to be an example of good practice rather than a reason for criticism.
- 4.4 A number of issues were raised by the claimant, before the Tribunal, to evidence the behaviour towards him including his job planning. In addition, there was a

refusal to allow him to attend a wrist arthroscopy seminar and in particular in relation to this matter Mr Hodgkinson admits that he wrote across the application form "*He is a breast surgeon*".

- 4.5 During these events it is clear that the respondent Trust was under pressure to reduce waiting lists and that there were already issues with registrars being available to carry out work. This became clear to the claimant in January 2016 when he was the on-call surgeon and there was no one scheduled to cover the Registrar work; he reported this to Mr Clarke who asked the claimant to organise a locum. Following that Mr Hodgkinson contacted him and said he would attend because locums were expensive and that a Senior House Officer would attend later after that and the claimant notes this was not the only time this had happened to him and not having Registrar or Junior Doctor cover for his elective surgeries.
- 4.6 In February 2016 at an away-day a new rota was proposed. The proposal was put forward on behalf of Mr Hodgkinson, although not by him. There were concerns raised by a number of people as to the way forward with the new rota and at that time there seemed to be no agreement. The main thrust of the new rota was that Consultant Surgeons would carry out elective work at the same time as they were on call. The previous rota had been that when they were on call that was the only work they would carry out during that period of time.
- 4.7 On 14 July 2016 the claimant worked again without Registrar support. He was approached by one of the Nurses to ask whether that was ok, and he was unhappy. The claimant reported his concerns to Mr Hodgkinson and asked for a locum. He was told that locums were more hassle than they were worth and expensive. The claimant felt that that did not address his concerns of patient safety and was not very supportive.
- 4.8 During the claimant's tenure at the respondent several issues were raised in relation to his patient care. Although much of the case revolved around these issues, the Tribunal is not going to rehearse the details here. It is the respondent's case that it was because of these issues that the claimant was subject to an investigation. On 19 August Mr Clarke and the claimant had a meeting concerning the issues Mr Chatterjee had. In his witness statement Mr Clarke says, "*I felt like the claimant was struggling and that some of his colleagues were becoming reluctant to work with him. The purpose of my meeting was partly to hear his side of the story regarding the patient transfer from ITU but also to encourage him to seek help. I made a note because I considered it to be a significant conversation and I recognised there may be problems in the future*". He accepts that he sent the e-mail to Mr Hodgkinson saying he needed to draw a line under it and make sure the claimant got a fair crack of the whip. It is against this background of a fractured department that this case must be considered.
- 4.9 The claimant was one of the first consultant to be deployed under the new on-call system this was at the week beginning 14 November 2016. The claimant did not have the benefit of the registrar that week his support came from a senior house officer. It was his opinion that the new system would cause delays and

complications with the elective list and compromise patient safety. It was at this time the claimant undertook research and concluded that the new systems contradicted the guidance given by the RCS in “separating emergency and elective surgical care: recommendations for practice”

- 4.10 During a meeting on 15 November the claimant spoke to Mr O’Donoghue and advised him of his concerns. At that meeting the claimant informed Mr O’Donoghue of issues he had had the previous day whilst he was the on-call consultant. The claimant also informed Mr O’Donoghue of the RCS recommendations. The claimant sent these recommendations to Mr O’Donoghue the following day
- 4.11 The claimant made another complaint to Mr O’Donoghue in relation to the new rota on the 16<sup>th</sup> or 17<sup>th</sup> of November when he had cause to leave a patient during a consultation to attend emergency theatre.
- 4.12 On 17 November there was a consultant business meeting within the Department of plastic surgery. Prior to the meeting the claimant and Mr O’Donoghue spoke Mr O’Donoghue said that he would discuss the claimant’s concerns within the meeting and raise them with Mr Hodgkinson. During this meeting Mr O’Donoghue raised the RCS recommendations and gave information as to the claimant’s issues that week. It is clear to the tribunal that this was a fractious meeting which became heated with many people talking over each other. The conclusion of the discussion was that the trial period of six months was to continue
- 4.13 The tribunal has been referred to an email sent by Mr Hodgkinson dated 8 December, this relates to Sister Taylor’s concerns in relation to the claimant working practices she has complained about the manner in which the claimant deals with the recovery of patients which was contrary to the manner in which the sister usually worked. Further there are issues as to the claimant wanting to do his own dressings on patients. She told this tribunal that she and her staff found him unapproachable controlling and dismissive. In line with the email of 8 December Sister Taylor told the tribunal that she was advised to raise the issue with the clinical director.
- 4.14 As a breast screening unit staff meeting on 9 December the claimant asked for the issue of conflict between on call and elective clinics to be placed upon the agenda as he was not able to attend that meeting. The tribunal have seen minutes of the meeting suggest it was raised.
- 4.15 Matters came to a head on 13 December when there was an issue in relation to the claimant’s treatment of a patient on the ward where Sister Taylor was working; and during the course of the day a patient became unwell; attempts were made to contact the claimant for his instructions upon the way to proceed. Sister Taylor having taken advice, from another consultant, proceeded to remove a dressing contrary to previous instructions from the claimant. The sister received a complaint later that evening from one of her nurses to the effect that the claimant had shouted at her in front of a patient; Sister Taylor describes her member of staff as being extremely upset and in fact in tears. The claimant’s

account is at odds with this, but what is clear is there was a heated discussion between the claimant and this nurse. This is confirmed in the report into this incident prepared by Dr Lees.

- 4.16 The claimant was invited to a meeting with Mr Clarke and Mr Welsh on 17 December he was not informed the purpose of the meeting and was suspicious of the purpose of that meeting, believing that Mr Clarke was doing something against him. The claimant declined to attend the meeting.
- 14.17 The next contact he had from the respondents was an email indicating he was to be placed on restricted duties. In relation to these matters Mr Welsh told us that he had been informed that Mr Chatterjee was struggling and about the incident on 13 December, therefore, because the claimant had failed to attend the interview, he believed the correct course of the was to investigate the matter. Mr Welsh took the decision to place the claimant on restricted duties in that he was not to work on call or take on joint cases with other specialities. It was Mr Welsh's view that there was plenty of work the claimant to do. The claimant did meet with Mr Welsh on 22 December when he was he informed Mr Welsh that he believed Mr Hodgkinson was acting against him and that there was not going to be a fair and open investigation. The claimant was signed off sick at this time with a chest infection. What is clear is that the decision to restrict the claimant's duties was not properly thought through nor are there any minutes to show how it was concluded that this was a measure that was required. Throughout the remaining period of the claimant's employment with the respondents the claimant remained absent through ill health.
- 14.18 Although it was decided to investigate, no progress was made until March when Mr Lee was appointed, and the terms of reference set out; Mr Lee's describes his terms of reference as to look at the range of the claimant's clinical activities relations with staff clinical management of two patients and support received by him. He added two further matters, the circumstances surrounding his appointment and changes to the on-call rota.
- 14.19 During the investigation that followed the claimant remained on restricted duties, at no time was this restriction further reviewed as required under the respondent's policy; the claimant remained absent through ill health, no sickness policy was invoked; the claimant other than contact for the investigation was left to drift by the respondents. One of the issues raised by the claimant's list of witnesses, these names were supplied by the HR Department and the claimant from the commencement of the proceedings queried their relevance. Mr Lee conducted his investigation, which was extremely thorough, interviewing some 28 witnesses; he concluded that the claimant is a slow operator, however he is meticulous in his detail reluctant to delegate as a result of this this creates an impression that he trusts no one. Mr Lee's view was claimant was safe to operate.
- 14.20 The investigation report was sent to Dr Newton for a review on 24 July 2017 she did not produce her outcome until 2 October 2017 during this period the claimant says he lost trust and confidence in the trust and it is clear to the tribunal that he must have started looking for work elsewhere at this time because he

commenced new employment for his resignation to the respondent the claimant criticises the report however the outcome was that no action was to be taken against him.

### The issues

- 5.1 Did t you he claimant disclose information to Mr O'Donoghue on or about 15 and 16 November?
- 5.2 Did the claimant disclose information at the meeting on 17 November?
- 5.3 Did the claimant disclose information at a meeting of 9<sup>th</sup> December?
- 5.4 Was the information which he gave on those dates in relation to patient safety under the new rota?
- 5.5 Did he have a genuine belief that what he was saying was true.
- 5.6 Is it reasonable for the claimant to hold that view?
- 5.7 Did the claimant act in the public interest or for some other motive?
- 5.8 Was the claimant subjected to detriments?

The detriments were:-

- 6.1 At a meeting on 8 December 2016 did Mr Hodgkinson suggest to Ms Taylor that she should contact Mr Clarke to see how her concerns about the claimant's conduct towards her Nurses could be taken forward?
- 6.2 Did Mr Hodgkinson escalate the issue of the claimant having allegedly shouted at Hayley Nevin on 13 December to Mike Clark? Did he do so without making any attempt to verify Ms Nevin's account before so doing or speak to other people present?
- 6.3 Mr Hodgkinson presented the issue above as a matter of competence as well as a matter of communication, i.e. that he was out of his depth.
- 6.4 Mr Hodgkinson presented his concerns about the claimant to Mr Clarke as being of sufficient gravity to provide reasons to investigate the claimant and/or restrict his duties?
- 6.5 Mr Clarke escalated Mr Hodgkinson's concerns about the claimant to Mr Welsh which included an allegation of lack of competence.
- 6.6 Did Mr Hodgkinson and Mr Clarke fail to keep a record of what was reported by Mr Hodgkinson and how the decision had been reached to initiate an investigation and/or put in place restrictions?

- 6.7 An investigation was initiated, and restrictions placed on the claimant's practice.
- 6.8 Did Mr Hodgkinson and Mr Clarke devise the terms of reference for the investigation taking its scope beyond the matters that PH and SC had initially reported to Mr Clarke on 14 or 15 December 2016?
- 6.9 Did Mr Hodgkinson and Mr Clarke propose the initial list of witnesses to the case investigator in February 2017 excluding witnesses you, a which included Antony Sorial, who might have witnessed or had information about the claimant's interactions with Hayley Nevin on 13 December 2016?
- 7.1 Did Mr Hodgkinson and Mr Clarke withhold from Mr Lees the statement of Mr Sorial which they had in their possession from December 2016?
- 7.2 Did they fail to review the restrictions on the claimant's practice causing him to be deskilled?
- 7.3 The delay in progress and completion of the investigation.

#### Submissions

- 8.1 The panel are grateful to both Counsel on behalf of the claimant and the respondent's solicitor for providing us with comprehensive submissions referring to the events and also the law. It is not intended to repeat those submissions here in any detail save to say it is the claimant's case that having come into a fractured department the claimant raised an issue in relation to the new rota which was (the pet project of Mr Hodgkinson). Mr Hodgkinson seized upon the incident with a Nurse in order to remove the claimant from his department and therefore the claimant's case is that he did that because of his disclosures. The respondent's case is that this is simply not true, that the claimant in part objected to his restricted practice because it prevented him from carrying out his work in a private hospital.

#### The Law

The Tribunal had regard to the following statutory provisions:-

Employment Rights Act 1996 section 43B relates to disclosures qualifying for protection

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

- (a) that a criminal offence has been committed, is being committed or is likely to be committed,
- (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,

- (c) that a miscarriage of justice has occurred, is occurring or is likely to occur,
- (d) that the health or safety of any individual has been, is being or is likely to be endangered,
- (e) that the environment has been, is being or is likely to be damaged, or
- (f) that information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed.

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

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

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

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

Section 47B Employment Rights Act 1996; this section sets out an employee's right not to be subjected to detriments because of a protected disclosure. Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285; sets out the test in relation to detriment, that is to say whether the claimant subjectively considered himself been subject to a detriment, however tribunal must set that against all the circumstances of the case. In The case of Fecitt v NHS Manchester 2011 IRLR 64 Lord Justice Elias sets out the way in which a tribunal should approach such a case "tribunal's will need to look with a critical – indeed sceptical – eye whether the explanation given by the employer the advert is indeed the. The detrimental treatment of an innocent whistleblower necessarily provides a strong prim facie case that the action has been taken because of the protected disclosure cries out an explanation from the employer."

## **Discussion and Conclusions**

- 9.1 The claimant was appointed to a position within the respondent trust over an internal candidate. The Tribunal is satisfied from the evidence it heard and the report of T Lees and the recommendations of Julia Newton that the department was fractured and divisive. Further the Tribunal is satisfied that the appointment of the claimant over the internal candidate was the subject of speculation and the Tribunal is astonished that the details of the split decision appeared to be an open secret in the department. In particular it is clear that the internal candidate was known to all staff and was familiar with local protocols and there appeared to be an expectation he would be appointed, and a level of disappointment amongst some that the external candidate, the claimant was appointed. This is reinforced by the claimants differing style in relation a number of issues including to post-



operative care and in particular would management to this end it is clear the claimant came into a hostile environment.

- 9.2 Having observed the claimant during these proceedings he is a measured man who takes his time to think through issues and gave his evidence in a like manner. He is quietly spoken and although on occasion straying off point at no point was he hostile during robust cross examination. It is clear that although he has confidence in his abilities he does not like confrontation, this is evidenced by his seeking support from his professional body in relation to his job plan. A clear indication that he was suspicious of the motives of Welch and Clarke, was his reluctance to attend meetings without appropriate professional support.
- 9.2 A number of issues were raised by the claimant to evidence the behaviour towards him including the job planning to allow him to carry out private work and the refusal in relation to a wrist arthroscopy seminar because he is a breast surgeon. The fact that it was put into writing by Clarke in an email that the we need to draw a line under this etc. fair crack of the whip appears to the Tribunal to be an acknowledgment that the claimant had been unfairly treated up to this point It is against this background that the case must be considered.

### Issues

#### Did the claimant make qualifying disclosures?

- 10.1 Did the claimant disclose information to O'Donoghue on/about 15<sup>th</sup> 16<sup>th</sup> November?

The Tribunal is satisfied that the claimant had a discussion with Mr O'Donoghue about the new rota on 15<sup>th</sup> or 16<sup>th</sup> Nov. There is a conflict in the evidence between Mr O'Donoghue and the claimant as to what was actually said. In his witness statement at para 12. Mr O'Donoghue maintains that the claimant made no reference to health and safety, although not directly contradicted by his account to Mr Lees during the investigation, the two do not sit comfortably together. In order to resolve this conflict the Tribunal looked at all the surrounding circumstances. In this regard the Tribunal noted that at the meeting on 17<sup>th</sup> Dec Mr O'Donoghue referred to the RCS guidelines with respect to on-call emergency surgery and elective surgery being kept separate. The Tribunal concluded that the only reason he would refer to this was because the claimant had referred him to it, the only reason the claimant would refer to this document is to make a point on health and safety. The Tribunal is therefore satisfied that during this conversation the claimant disclosed information.

- 10.2 Did the claimant disclose information to the meeting on 17<sup>th</sup> November?

It is clear to the Tribunal that the Mr O'Donoghue indicated he would raise the claimants concerns about the rota issue at this meeting on behalf of the claimant. From the evidence we heard, and contrary to Mr Hodgkinson's account that the claimant never spoke, the Tribunal is satisfied that the claimant did speak to voice his concerns; he was not alone and one witness, stated that it got quite heated. The overwhelming evidence received was that the issue was raised by several people including the claimant, that is to say the issues raised was patient and safety. On this point the Tribunal noted that the claimant was one of only two people who had been on the rota; that it had been intended that consultants reduce their elective lists and that surgery to be undertaken was to be of

Registrar level. The team were under pressure to reduce the waiting list, indeed this was the reason the claimant was appointed, one of the reasons the rota was introduced was to avoid cancelling electives. Having noted the claimant's demeanour above the Tribunal concluded that the claimant was unlikely to confront the relevant person in charge of the waiting list, in order to reduce his elective list, unlike other consultants who had been employed for longer and may have had a more robust attitude. It was agreed by all that there were teething problems and the electives may not have been reduced to an appropriate level at this time and this was a real concern for the claimant. We are satisfied that the claimant amongst others raised patient safety at this meeting.

10.3 Did the claimant disclose information at a meeting of 9<sup>th</sup> Dec?

Looking at the agenda and minutes of the meeting on the 9<sup>th</sup> the issue here is that of consultants covering clinics when on call which was an agenda item added by the claimant. The Tribunal concluded that although the claimant had direct experience during his most recent on call when he left mid consultation which is undesirable, the patient's safety was not put at risk, although the Tribunal acknowledge it would may cause further distress. The Tribunal concluded that he felt it was an issue as it caused more distress at a time when patients were vulnerable. The Tribunal concluded that this was not information relating to patient.

10.4 Did the claimant have a genuine belief that what he was saying was true?

As already noted the claimant was a measured person who because of his training and as a new consultant it is not unreasonable for him to be heavily influenced by the RCS guidelines, in addition he had had experience of a registrar who was not suitably qualified to take over an elective surgery when the claimant was called to an emergency. In the end he was not required to go to the emergency. This clearly would raise concerns in his mind as to his patient's safety. The Tribunal concluded he believed that patient safety was a very real issue

10.5 Is it reasonable for the claimant to hold that view?

In considering this issue in an objective way the Tribunal had to balance the following factors the first point that the Tribunal note is the claimant own experience. whilst on the on rota. The Tribunal were referred to the RCS guidelines The Tribunal is aware that the rota has now been approved and is in operation on a permanent basis. However, it is also clear to the Tribunal that its operation is subtly different in that the elective lists are now lighter and reduced to registrar level. The Tribunal therefore concluded that in particular because of his direct experience and the evidence in the minutes of the meeting of 17<sup>th</sup> November in relation to Registrar level electives that it was reasonable for him to hold such a view.

10.4 Did the claimant act in the public interest or for some other motive?

It is asserted by Respondent that the claimant was concerned about the impact on his private practice and/or his hand surgery work. The former is clearly not correct as the job plan took account of the claimant's commitments to the on call rota then in place. Whilst the claimant's emergency surgery work on hands was reduced the Tribunal did not consider this to be the claimant's motivation as he

was still carrying out hand work in his private practice. There was no evidence whilst he would be expecting to do some hand work it would have some effect This was not the drive it was in the public interest.

Was the claimant subject to detriments?

Did the matters listed in the issues amount to a detriments?

- 12.1 At a meeting on 8 December 2016 did Mr Hodgkinson suggest to Ms Taylor that she should contact Mr Clarke to see how her concerns about the claimant's conduct towards her Nurses could be taken forward? Did Mr Hodgkinson escalate the issue of the claimant having allegedly shouted at Hayley Nevin on 13 December to Mike Clark? Did he do so without making any attempt to verify Ms Nevin's account before so doing or speak to other people present? The t is satisfied that these two may amount to a detriment and in this case did. It is clear evidence that Dr Hodgkinson had dislike for the claimant
- 12.2 Did Mr Hodgkinson present the issue above as a matter of competence as well as a matter of communication, i.e. that he was out of his depth. Clearly this was how the complaint was presented rather than a complaint nabout a specific incident. A complaint as to competence, in thief Tribunal'seection view will always be detrimental treatment to an employee.
- 12.4 Mr Hodgkinson presented his concerns about the claimant to Mr Clarke as being of sufficient gravity to provide reasons to investigate the claimant and/or restrict his duties? Again, the tribunal is satisfied that the concerns were presented in such a light.
- 12.5 Did Mr Clarke escalate Mr Hodgkinson's concerns about the claimant to Mr Welsh which included an allegation of lack of competence. These concerns were escalated and amount to a detriment, in that the investigation proved them to be false.
- 12.6 Did Mr Hodgkinson and Mr Clarke fail to keep a record of what was reported by Mr Hodgkinson and how the decision had been reached to initiate an investigation and/or put in place restrictions? There is an appalling lack of record keeping in this case; it leaves the claimant at a disadvantage in challenging the motive of the respondent's witnesses
- 12.7 An investigation was initiated, and restrictions placed on the claimant's practice. may be considered, and are considered to be detriments by this Tribunal
- 12.8 Did Mr Hodgkinson and Mr Clarke devise the terms of reference for the investigation taking its scope beyond the matters that PH and SC had initially reported to Mr Clarke on 14 or 15 December 2016? Did Mr Hodgkinson and Mr Clarke propose the initial list of witnesses to the case investigator in February 2017 excluding witnesses you, a which included Antony Sorial, who might have witnessed or had information about the claimant's interactions with Hayley Nevin on 13 December 2016? The Tribunal are satisfied that the terms of reference

were compiled by them; what is not clear is why they thought they should meddle in the investigation.

- 12.8 Did Mr Hodgkinson and Mr Clarke withhold from Mr Lees the statement of Mr Sorial which they had in their possession from December 2016? Did they fail to review the restrictions on the claimant's practice causing him to be deskilled? The Tribunal considered this and the failure to review the claimant's sickness absence is astonishing; clearly places the claimant at a detriment.
- 12.9 The delay in progress and completion of the investigation. The delay in the investigation is detrimental as until the investigation is complete the claimant cannot return to work. During this period, he is not working which may lead to him becoming deskilled.

Was the claimant subjected to those detriments because of the qualifying disclosure?

- 13.1 The crux of this case therefore is whether the respondent acted in the manner it did because of the claimant disclosures; that is to say why did Dr Hodgkinson act in the manner he did, as it was his 'rota' that was under attack and he was the one to raise the initial concerns. Was it simply because he disliked the claimant and seized the opportunity or because the claimant was interfering with the rota? Was it some of both? The Tribunal must consider whether the disclosure was more than a trivial element in the decision to initiate capability proceedings.
- 13.2 It is clear to the Tribunal that Dr Hodgkinson did not want the claimant in his department and the claimant had problems throughout his tenure in relation, for example, his job plan to allow for private practice, which was not unusual, his request to undertake a wrist arthroscopy, where it had been written across his application he is a breast surgeon. The Tribunal concluded that there was some antipathy towards the claimant from certain members of staff, this quite possibly came about because of Dr Hodgkinson's attitude.
- 13.3 In looking at the issue of causation the Tribunal must consider whether the claimant's disclosure had a material influence on the behaviour of Mr Hodgkinson or other members of the team
- 13.4 The Tribunal is satisfied that, Mr Hodgkinson's behaviour acted in the way he did because of the concerns his staff raised about the claimant which he was reluctant to raise because of the agreement to 'draw a line under it' earlier in the year. Having said that, he seized upon this last incident as an opportunity to ensure that the whole claimant's behaviour was brought to the attention of Messer's Clarke and Welch. The Tribunal concluded that he did this because of his ongoing concerns and antipathy towards the claimant, rather than because of the jeopardy to his new rota.
- 13.5 Turning to the remaining detriments, in order for the Tribunal to conclude that they were as a result of the disclosures there would have to be a measure of collusion between Messer's Hodgkinson, Clarke and Welch. The Tribunal reject such an argument. Rather the Tribunal concluded that the manner in which the

investigation was conducted, the failure to review the restrictions on duty, to apply a sickness absence policy, were at best a lack of training in the relevant policies and procedures and at worst total incompetence. The respondent would be well advised to ensure that its senior management team is fully conversant with any policies they may need to apply.

- 13.6 The Tribunal, although having some sympathy for the claimant in the manner in which he was dealt with, is forced to the conclusion that the treatment was not as a result of his disclosures. His claim is therefore dismissed

**EMPLOYMENT JUDGE PITT**

**JUDGMENT SIGNED BY EMPLOYMENT  
JUDGE ON  
18<sup>th</sup> September 2018**

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