Case Number: 3352856/2017
3307549/2018

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Morwenna Haslam	**v**	**BMI Healthcare Limited**

Heard at: Watford **On**: 27 March – 11 April 2019
30 April and 1 & 2 May 2019 (in chambers)

Before: Employment Judge Bedeau
Members: Mr I Bone
Mrs I Sood

Appearances

For the Claimant: Ms V von Wachter, Counsel
For the Respondent: Ms K Newton, Counsel

RESERVED JUDGMENT

1. The claim of unfair dismissal is well-founded.

2. The direct sex discrimination claim is not well-founded and is dismissed.

3. The claim of discrimination arising in consequence of disability is not well-founded and is dismissed.

4. The claim of harassment related to disability is not well-founded and is dismissed.

5. The claim of harassment related to sex is struck out as it was presented out of time.

6. The public interest disclosure detriment claim is not well-founded and is dismissed.

7. The public interest disclosure unfair dismissal claim is not well-founded and is dismissed.

8. The claims of victimisation, section 27(2)(a) Equality Act 2010, are not well-founded and are dismissed.

9. The wrongful dismissal claim has been proved.

10. The claim of failure to make reasonable adjustments is dismissed upon withdrawal.

11. The remedy hearing is listed on 4 and 5 November 2019, if not settled earlier.

REASONS

1. By claim forms presented to the tribunal on 21 December 2017 and 1 June 2018, the claimant made claims of: unfair dismissal; sex discrimination; disability discrimination; public interest disclosure; detriment and dismissal; breach of contract, and further claims of sex and disability discrimination.

2. In the responses presented to the tribunal on 1 December 2017 and on 8 July 2018, all of the claims are denied.

3. At the preliminary hearing held on 25 June 2018 before Employment Judge George, the claims and issues were to be amended following further particulars to be served by the claimant on or before 9 July 2018. The parties were ordered to agree a revised list of issues by 6 August 2018 and the case was set down for final hearing over 15 days.

4. On or around 29 August 2018, the parties agreed a consolidated list of the claims and issues which we now set out below.

The consolidated list of issues

"Case No: 3352857/2017

Unfair dismissal

1. What was the reason for the claimant's dismissal and was it a potentially fair reason within the meaning of a s 98(4) of the Employment Rights Act 1996 ("ERA")? The respondent will say that the claimant was dismissed by reason of her conduct, or for some other substantial reason, both of which are potentially fair reasons.

2. Did the respondent have a genuine belief:

    a) in a set of facts amounting to misconduct? And/or

    b) that there had been a break down in the trust and confidence between the claimant and respondent.

3. Was this belief based on reasonable grounds?

4. Did the respondent carry out a reasonable investigation?

5. Did dismissal fall within the range of reasonable responses? The claimant will say it did not as:

   a) the following reasons, either alone or taken together could not constitute gross misconduct:

      i. alleged sexual impropriety with a partner

      ii alleged poor leadership; and

      iii alleged unavailability.

6. Was the dismissal procedurally fair? The claimant will say it was not and relies on the following alleged particulars (all of which are disputed by the respondent):

   a) That she was suspended for no good reason and for an unconscionably long period – over 1 year.

   b) That she was subject to humiliating and degrading questioning about her private life, sexual practices and undergarments as part of a purported objective investigation;

   c) Her legitimate grievances about the length of her suspension were ignored;

   d) That she was given very limited access to documents and material that would have helped her defend her cause;

   e) That she was dismissed for matters that were evidenced by irrelevant factors, gossip, hearsay and malice on the part of the witnesses interviewed, many of whom had witnessed nothing other than what they had been told by others who, in many cases had also not personally witnessed the events complained of;

   f) That the respondent failed to take into account any evidence which supported the claimant's position preferring to believe:

      i. Alleged unsubstantiated and unparticularised accounts of many individuals whose credibility must have been suspect by reason of them being performance managed by the claimant at the time; and
      ii. Dr Dabbagh who the claimant alleges had his ego insulted when she rebuffed his sexual advances;

   g) That the appeal process was a sham and did not comply with its own stated aims; and

h) That the procedure was patently unfair and unnecessarily protracted. In this regard the claimant says she was never warned that she could be dismissed summarily.

Wrongful dismissal

7. Is the claimant entitled to be paid for a period of notice? If so, for what period?

Disability Discrimination

Disability

8. Is the claimant disabled within the meaning of section 6 of the Equality Act 2010 ("EQA")? The condition the claimant relies upon a neurogenic bladder.

Section 15 Discrimination for a reason arising from a disability

9. If the claimant was disabled, was she treated unfavourably because of something arising in consequences of the claimant's disability? The claimant says that:

   a) as a consequence of her disability she was required to buy painkillers; and

   b) one of the respondent's purported reasons for dismissal was the claimant's activity in buying painkillers.

10. If so, was the treatment a proportionate means of achieving a legitimate aim?

11. If not, did the respondent know, or could it reasonably have been expected to know, that the claimant had the disability? Was the Occupation Health report of 20 January 2017 sufficient to fix the respondent with knowledge?

12. Withdrawn.

13. Withdrawn.

14. Withdrawn.

15. Withdrawn.

Sex Discrimination

Direct sex discrimination

16. The claimant alleges that she was:

    a) suspended for a year for alleged improper behaviour with another member of staff;

    b) subjected to prolonged and intrusive questioning concerning alleged improper behaviour with another male member of staff; and

    c) dismissed for improper behaviour with another male member of staff.

17. In respect of each of the acts at paragraph 16:

    a) did the respondent treat the claimant less favourably than the comparator relied upon by the claimant, namely the male member of staff with whom she was in a relationship, Mr Patel. The claimant says that no corresponding action was taken in respect of the male member of staff;

    b) If so, was the reason or reasons for that less favourable treatment because of the claimant's sex?

Victimisation

18. Did the claimant make complaints of sex discrimination against the managers dealing with the disciplinary process?

19. If so, did those complaints amount to protected acts pursuant to section 27 (2) and (3) EQA?

20. If the claimant did any protected acts was she subjected to the following detriments because she had done any protected acts?

    a) a lengthy and oppressive disciplinary process;

    b) the dismissal;

Harassment

21. Did the respondent:

    a) insist that the claimant disclose details of her personal relationship;

    b) accuse the claimant of improper behaviour, details of which amounted to nothing more than affectionate gestures;

    c) ask for explanations with respect to dirty underwear "found in a desk drawer";

d) challenge the need for the claimant to source analgesia. The claimant alleges that this analgesia was required in order to deal with the pain caused by neurogenic bladder;

22. If so, did the acts at:

a) paragraphs 21 a-c amount to unwanted conducted related to the claimant's sex?

b) Paragraphs 21 c-d amount to unwanted conduct related to the claimant's disability?

23. If so, did the conduct at paragraph 21 a-d have the purpose or effect of creating a degrading, humiliating and intimidating environment for the claimant taking into account:

a) the claimant's perception;

b) the other circumstances of the case; and

c) whether it was reasonable for the conduct to have that effect.

Statutory Defence

24. If the acts complained of amount to discrimination, did the respondent take all reasonable steps to prevent discrimination from occurring in the workplace within the meaning of s 109 (4) by:

a) having in place an Equality and Diversity policy and a Bulling and Harassment policy;

b) Reviewing and updating the policies at paragraph 24a every three years or sooner if legislative changes require;

c) Engaging in networking with other organisations in its sector to share learning ideas and benchmarking itself against others in areas including equality and diversity;

d) Taking practical steps to implement the policies at paragraph 24a;

e) Requiring staff to successfully complete a mandatory Equality, Diversity and Human Rights training module on a biennial basis;

f) Making available to staff, resources and training courses covering a wide range of subjects such as discrimination and harassment, including an Investigation Skills Courts and a selection of e-workbooks;

g) Providing managers with an 'HOD's 101' induction on the commencement or employment during which the policies at paragraph 24a are referred to;

h) Providing Heads of Department with on-site training which covers the policies at paragraph 24a; and

i) Carrying out an annual staff survey which has a section dedicated by bulling and harassment at work.

Time limits

25. Were any of the claimant's claims presented outside the relevant time limit? The respondent alleges that:

a) the claimant's direct sex discrimination claims are out of time insofar as they relate to events which occurred prior to 1 September 2017; and

b) the claimant's harassment claims are out of time insofar as they concern events that occurred prior to 1 September 2017.

26. Would it be just and equitable to extend the time limit?

Detriment/dismissal for making a protected disclosure

27. The claimant alleges that she made qualifying disclosures in accordance with section 43B of ERA by:

a) making an assertion that the health and safety of employees was being compromised by overwork and poor management (section 43B (d) ERA is relied on); and

b) asserting that the respondent was failing in its legal obligation and risking a miscarriage of justice insofar as the disciplinary procedure that it was following was oppressive and discriminatory (section 3B (b) and (c) ERA is relied on)

28. Do all or any of the above disclosures qualify as 'protected disclosures'? In particular:

a) did the claimant disclose information (as opposed to making mere allegations?)

b) If so, can the claimant show that when she made the alleged disclosures she had a reasonable belief that:

i. each disclosure was in the public interest?; and

ii. in respect of the disclosure at paragraph 27a this disclosure tended to show that the health or safety of any individual was being endangered;

iii. In respect of the disclosure at paragraph 27b, this disclosure tended to show that the respondent was failing in its legal obligations. The claimant does not set out what legal obligation she considers the respondent was failing to comply with;

iv. In respect of the disclosure at 27b, this disclosure tended to show that the respondent was risking a miscarriage of justice.

29. Was the claimant exposed to a protracted, oppressive and invasive disciplinary process which caused her distress and anxiety?

30. If so, was this because the claimant had made the disclosure at paragraph 22.1?

31. If the claimant proves that one or more of the above alleged disclosures is a protected disclosure can she show that the reason or principle reason for her dismissal was because she made the protected disclosures at paragraph 27a and/or b. The respondent contends that the claimant was dismissed for conduct/some other substantial reason unrelated to any alleged protected disclosures.

Statutory defence

32. If the acts complained of amount to detrimental treatment, did the respondent take all reasonable steps to prevent the detrimental treatment from occurring in the workplace within the meaning of s.47B(1D) ERA by:

a) Having in place a Public Interest Disclosure (Whistleblowing) Policy:-

i encouraging individuals to raise concerns;

ii detailing the different channels through which concerns can be raised and the steps that will be taken once a concern has been reported;

iii making it clear that no one will be prejudiced for raising a matter under the policy;

iv which all employees, agency staff, contractors and consultants are required to comply with; and

v which is reviewed every three years or sooner if legislative changes require.

b) Monitoring and assessing compliance with Public Interest Disclosure (whistleblowing) policy; and

c) Taking practical steps to implement the Public interest Disclosure (whistleblowing) policy.

Remedy

Remedy in respect of unfair dismissal

33. If the claimant's dismissal was procedurally unfair, should there be a "Polkey" reduction in the compensation awarded and if so, by how much?

34. If the claimant is awarded compensation what should the basic and compensatory awards be and should any reductions be made in accordance with sections 122(2), 123(4) and/or 123(6) of ERA?

35. If the claimant was unfairly dismissed, the respondent follow the ACAS Code? If not, what (if any) uplift should be made to the claimant's compensation?

Remedy in respect of protected disclosures

36. If the claimant was subject to any detriment for having made a protected disclosure what compensation is she entitled to and should any reductions be made if the claimant has failed to mitigate her losses or was found to have contributed to the acts complained of.

37. If the claimant was automatically unfairly dismissed what should the basic and compensatory awards be and should any reductions be made in accordance with sections 122(2), 123(4) and/or 123(6) of ERA?

Remedy in respect of claims under the Equality Act 2010

38. What remedy is the claimant entitled to in respect of any contravention of the EQA as?

    a) compensation;

    b) in respect of injury to feelings

39. Has the claimant failed to mitigate her losses and/or did she contribute to her dismissal or treatment? If so, should any reductions be made to the sums awarded and if so, how much?

40. Did any unlawful discriminatory conduct by the respondent cause the claimant personal injury? The respondent is seeking further particulars of this aspect of the claimant's claim.

Case No: 3307549/2018

Victimisation pursuant to section 27(2)(a) of the Equality Act 2010

41. Does the issuing of the Employment Tribunal proceedings in claim number 3352856/2017 by the claimant in respect of the matters set out in paragraphs 1c – 1d of the claimant's particulars of claim, constitute a protected act?

42. If so, did the respondent 'poison the relationship' between the claimant and The Imaging Centre?

    a) Who is alleged to have 'poisoned the relationship?

    b) Is the respondent liable for the acts of any such individual?

    c) Did their acts lead to the relationship being 'poisoned'?

    d) Did they subject the claimant to a detriment because she had brought tribunal proceedings?

43. If the acts complained of amount to victimisation, did the respondent take all reasonable steps to prevent victimisation in the workplace within the meaning of s 109(4) EQA? The respondent relies on the steps set out at paragraph 24a - i

<u>Detriment for making a protected disclosure</u>

44. The claimant alleges that she made a protected disclosure;

    a) What is the disclosure the claimant relies on as a qualifying disclosure?

    b) Does that disclosure show that the respondent had breached the statutory protection available to a person who has been prejudiced for bringing Employment Tribunal proceedings under EQA and ERA?

    c) Does the issuing of proceedings in respect of the matters set out in paragraphs 1(iii) – 1(vii) of the claimant's particulars of claim, constitute a qualifying disclosure within the meaning of section 43B(1)(b) of ERA?

45. Does the qualifying disclosure relied upon by the claimant, if any, constitute a protected disclosure?

46. If so, did the respondent 'poison the relationship' between the claimant and The Imaging Centre.

    a) Who is alleged to have 'poisoned the relationship'?

    b) Is the respondent liable for the acts of any such individual?

    c) Did their acts lead to the relationship being 'poisoned'?

    d) Did they subject the claimant to a detriment because she had made the qualifying disclosure at paragraph ?? above?

47. If the acts complained of amount to a detriment for making a protected disclosure, did the respondent take all reasonable steps to prevent detrimental treatment in the workplace within the meaning of s 47B(1D) ERA 1996? The respondent relies on the steps set out at paragraph ?? - ?? above.

Remedy

48. If the claimant is successful in her claim(s), what is the appropriate remedy?

    a) has the respondent 'impugned the claimant's repudiation'?

    b) has the respondent caused the claimant any loss or damage?

    c) Has the claimant attempted to mitigate her loss?

49. During the course of the hearing Ms von Wachter withdrew the section 20 Quality Act claim with failure to make reasonable adjustments. (Paragraphs 12 – 15 inclusive). Further, also paragraph 20 c and d and paragraph 25a (108 – 116) of the bundle.

50. The claimant suffers from a neurogenic bladder which the respondent received in writing dated 6 March 2019, that the claimant's condition qualifies as a disability under the Equality Act. That remained the issue of knowledge of the claimant's disability."

The Evidence

55. The tribunal heard evidence from the claimant who called Dr Vipul Patel, a Consultant Radiologist. The witness statement by Mrs Fawzia Imtiaz-Crosbie, Consultant Breast Surgeon. Her evidence was accepted by the respondent. She was therefore, not called as a witness.

56. On behalf of the respondent, evidence was given by Mr Nick Rothwell, former Regional Director; Ms Caron Hitchen, Human Resources Consultant; Dr Kevin Lotzof, Consultant Radiologist; Jason Rosenblatt, Head of HR Operations; Adrian Brady, former Executive Director of Kings Oak and Cavell Hospital; Christina Zimber, Head of Capital & Indirect Pure Procurement; Andrew Jeavons-Fellows, Executive Director Hendon Hospital and Stephanie Grainger, Human Resources Business Partner.

57. In addition to the oral evidence, the parties produced five lever arch bundles of documents comprising in excess of 1,790 pages. References will be made to the documents as numbered in the joint bundle.

58. During the course of the hearing Ms von Wachter withdrew the section 20 Equality Act 2010 claim of failure to make reasonable adjustments,

paragraphs 12 – 15 inclusive. Further, paragraphs 20c, 20d and paragraph 25a. (pages 108 – 116 of the bundle)

Findings of fact

59. The respondent is the largest independent provider of acute healthcare services in the United Kingdom with 59 hospitals and clinics located in this country.

60. The claimant commenced employment with the respondent on 22 May 2015 as a Diagnostic Imaging and Cardiology Manager at the respondent's Kings Oak and Cavell hospitals which are two separate hospitals located a mile apart in Enfield, Middlesex.

61. She managed about 30 staff across both hospitals.

62. She suffers from a neurogenic bladder which the respondent had knowledge of on 6 March 2019. Her condition qualifies as a physical disability under section 6 Equality Act 2010. What is in issue is whether the respondent had actual or constructive knowledge of the impact of her disability on normal day-to-day activities?

63. In her job description, it stated that the purpose of her role was:

> "62.1 to provide leadership and strategic direction, develop and manage service delivery within your area of responsibility with a high degree of professionalism, ensuring effective deployment, utilisation and control of all resources while providing a high quality, responsive, patient focused services.
>
> 62.2 as a member of the Senior Management Team, to contribute to the strategic operational and business development of the hospital".

64. One of her core responsibilities was to:

> "encourage and maintain an open and participative culture, fostering a supportive environment for staff and consultants ensuring excellent communication and motivation".

65. One of her key responsibilities was:

> "64.1 to provide leadership and direction to a multi-disciplinary team. To manage and operate the operational team by promoting an open learning environment, encouraging acceptance to change, initiating and promoting innovation through empowerment.
>
> 64.2 To set high personal and professional objectives in line with BMI's Code of Conduct.
>
> 64.3 recruit and retain a motivated team to ensure these standards are reinforced at every level" (132-135)

66. The respondent has policies on whistleblowing, discipline, and bullying and harassment.

67. In relation to whistleblowing, it is the respondent's case that it encourages all individuals to raise any concerns they may have about the conduct of others in the business or the way in which the business is run. Paragraph 5.3 states the following:

> "any matter raised under this procedure will be investigated thoroughly, promptly and confidentially, and the outcome of the investigation reported back to the individual who raised the issue".

68. Paragraph 6.5 states:

> "on conclusion of any investigation and assuming the concern was not raised anonymously, the individual who raised the matter will be told the outcome of the investigation and what action has been/will be taken. If no action is to be taken, the reason for this will be explained". (158-164)

69. The respondent also has an equality and diversity policy. In paragraph 6.4 of it, under disciplinary actions, it provides:

> "all allegations of discrimination will be investigated in accordance with the Disciplinary Policy. Behaviour or action which goes against the essence or letter of the Equality, Diversity and Human Rights Policy will normally result in disciplinary action which may lead to dismissal.
>
> Managers must take particular care to deal effectively with all allegations of discrimination, victimisation, bullying or harassment. It should not be assumed that such allegations arise out of over-sensitivity. Failure to undertake the responsibility of dealing appropriately with allegations of discrimination may be regarded as a disciplinary offence.
>
> All members of staff can use the grievance procedure, (or appeals procedure in relation to disciplinary matters) if they feel that they have been discriminated against" (165-192)

70. In the respondent's disciplinary policy, it states in paragraph 3.1.3, that employees should be informed promptly of the complaint against them and provide them with an opportunity to state their case before decisions are reached. Paragraph 3.1.6 states:

> "employees are not usually dismissed for a first offence, unless it is gross misconduct"

71. Paragraph 3.1.9 states:

> "issues are dealt with thoroughly, promptly and in a consistent manner"

72. Paragraph 3.1.10 states:

> "Where there is a serious breach or allegation of a serious breach of conduct of Professional Conduct the company reserves the right to report the matter to the professional body or any other relevant regulatory or registration body"

73. In the respondent's non-exhaustive list of examples of gross misconduct, it states:

> "off duty staff at social events on company premises or externally on company business whose actions are inappropriate as a result of alcohol or drugs"

74. In paragraph 4.2.9 it covers:

> "an act of discrimination, victimisation, bullying or harassment"

75. The policy states that misconduct is a very serious breach of the company's rules and would normally result in summary dismissal without notice or prior to first or final written warning.

76. In relation to dismissal, it states that disciplinary issues will progress to dismissal only as a last resort in the following circumstances:

> "6.4.1 A final written warning has already been issued, but no/insufficient improvement in behaviour is evident within the time scale set in the final warning, or a further misconduct has occurred. This is known as a procedural dismissal, ie the stages of the procedure (warnings) have been issued.
>
> 6.4.2 The matter is so serious as to be considered as gross misconduct, this is known as summary dismissal as previous warnings have not been issued and the whole procedure is summarised into one action – dismissal.
>
> 6.4.3 A dismissal can only be authorised by the Executive Direct/Corporate Director or nominated Head of Department"

77. The policy also allows for the issuing of a first written warning which is the normal sanction for a first offence, and a final written warning where the matter is of such a serious nature that it would be inappropriate to use a first written warning, or a first written warning has already been issued but no improvement or sufficient improvement in behaviour is evident in the timescale set.

78. In relation to suspension from employment, the policy states:

> "7.2 suspension should be considered only in the following circumstances:
>
> 7.2.1 when the allegations are considered to be so serious that they constitute gross misconduct, which could result in summary dismissal, or
>
> 7.2.2 it is believed that the employee's presence at work may hinder the investigation; or
>
> 7.2.3 it would be inappropriate for the individual to remain on the premises"

79. The policy also states that the suspension should last for as short a period as possible to allow the investigation to be carried out and would not normally continue beyond 14 days.

80. In relation to the formal disciplinary process, policy states that before commencing any formal action, the managers should always consider what informal action may be appropriate, for example, counselling or coaching.

81. In relation to the investigation, this should be conducted by a manager, chosen based on their neutrality to the incident, competence or technical know-how, relevant to the offence, paragraph 10.1.

82. In paragraph 11.4, it states the following:

> "What happens if further evidence of misconduct is found after the invitation to the disciplinary hearing has been sent out?
>
> A disciplinary hearing should not consider any allegations other than those set out in the invitation to the disciplinary hearing.
>
> If new allegations of misconduct occur or become known after the invitation to the disciplinary hearing has been issued, the letter inviting the employee to the hearing should be re-issued, and should be accompanied by any new supporting evidence. This may mean that the date of the original hearing has to be postponed in order to give the employee at least 48 hours during which to consider the new evidence."

83. In relation to the disciplinary hearing:

> "The hearing must be held at a time and place that make it reasonable for the employee to attend. The employee may suggest an alternative date within five working days of the original date if they, or their representative are unable to attend at the proposed time – this five day time limit may be extended by mutual agreement. Sufficient time (at least 48 hours) should have elapsed from the date of the letter outlining the reasons for the hearing, for the employee to have considered their response."

84. The policy further states:

> "12.3.4 the employee, if unaccompanied, should be reminded of her rights to be represented at the hearing;
>
> 12.3.5 the case against the employee should be presented first, including any witness statements;
>
> 12.3.6 the employee should be allowed to raise questions and query with the witness statements;
>
> 12.3.7 the manager should be allowed to ask questions of the employee and query witness statements.

12.3.8 both parties throughout the hearing will ask questions for clarity;

12.3.9 adjournment (with a further investigation of new evidence come to light as a result of the hearing);

12.3.10 advise the employee how and when they will be informed of the outcome of the hearing.

In relation to the appeal, the employee has five working days in receipt of the disciplinary decision to launch an appeal because the letter should set out, in broad terms, the reason(s) for the appeal (eg because the penalty is unfair, or too severe, the issue was not dealt with correctly or new evidence has come to light) and should be addressed to the person specified with a written notification of disciplinary action."

85. The policy addresses the issue of an employee raising a grievance relating to disciplinary action. Paragraph 11.3 states:

"q: what if the employee raises a grievance relating to the disciplinary action?

Depending on the nature of the grievance, the manager should consider suspending the disciplinary procedure for a short time while the grievance is dealt with.

Depending on the nature of the grievance, it may be necessary to bring in another manager to continue to deal with the disciplinary case." (193 – 206)

86. In the bullying and harassment policy, it sets out the principles to be followed. Bullying and harassment is not determined by the intention of the person who caused offence, but by the effect it has on the recipient "It is up to that person to decide if they are being bullied or harassed because they find the behaviour unacceptable".

87. The policy also set out the ways in which it can manifest itself:

- "Persistent incidents;
- Single serious incident;
- Unwanted physical contact;
- Verbal abuse, such as anonymous answerphone messages, offensive language or innuendo, telling offensive jokes, name calling or spreading malicious rumours.
- Written abuse such as letters, text messages, e-mails or graffiti, anything posted on social media sites or displaying of offensive pictures or posters;
- Explicit behaviour such as mimicking the effect of a disability, threats;
- Covert behaviour such as social isolation or non-co-operation; 'cold shouldering' or team 'ganging up' on an individual, implicit threats or pressure for sexual favours;
- Incidents associated with work such as stalking" (paragraph 6.3)

88. In relation to bullying behaviour, it may include:

- "Sadistic or aggressive behaviour over time;
- Exclusion from meetings;
- Humiliation and ridiculing;
- Criticism in public that is designed to humiliate;

- Persistent, unwanted criticism in private;
- Treating colleagues as children, rather than adults;
- Undermining staff by replacing their areas of responsibility unreasonably or without justification;
- Withholding information to deliberately affect a colleague's performance;
- Constantly changing work deadlines or guidelines" (paragraph 7.2) (207-223)

89. When the claimant took over the management of the Diagnostic Imaging and Cardiology Department, we find that she inherited a culture of poor performance, especially amongst the administration team at Kings Oak hospital. She was appraised of those issues by Ms Jane Wakefield, Director of Clinical Services, her line manager at the time. This was corroborated by Ms Wakefield during her interview with Ms Caron Hitchen as part of the disciplinary investigation into the claimant's conduct.

90. When the claimant commenced employment, she was briefed by Ms Wakefield on Ms Karen Ellwood, Team Supervisor, who had performance issues. Ms Wakefield had told the claimant that she should make her own decisions with regard to Ms Ellwood, who made errors in the course of her work which affected her performance. (1035)

91. On 10 September 2015, the claimant met Ms Ellwood to discuss issues in relation to her performance. Ms Ellwood said to her that she had been carrying out her role since December 2014 but had not gone through an official route of having to apply for the position and had not received any formal training for the role. It was noted that concerns were raised by three members of staff in their exit interviews who said that they had not felt supported by Ms Ellwood. In relation to her working hours, 1pm – 8pm, she was asked by the claimant if she could be more flexible and work earlier during the day and possibly work two evenings a week as the claimant would welcome her support during the day and to spend some time at Cavell hospital where she, Ms Ellwood, was not keen to work. The claimant also told her that she was not allowed to use the exercise bike in cardio room as she was not insured. Ms Ellwood agreed to undertake training for team leadership; work on the tone of her e-mails; change her working times; work during the day and work only two evenings each week. She also agreed to work one day at Cavell hospital and to undertake team training with everyone to avoid any member of staff feeling singled out. Finally, she agreed not to use the exercise bike. The notes were signed by her. (226-228)

Christmas party December 2015

92. At the claimant's initiative she organised the department's Christmas party, which was held off site on 6 December 2015, at the Banqueting Suite, Forty Hall, Enfield, and was paid for by members of staff. The venue was shared with other companies as the room was very large. She invited the Executive Management Team to the party. Also at the party was Dr Patel, as well as some medical staff. The claimant's group took up several

tables. What happened at the party we shall address later in this judgment.

93. In March 2016, Ms Zunaira Raza, Deputy Manager, who was line managed by the claimant, expressed her concern that she was having to do most of the claimant's work and felt disrespected in her role as her deputy.

94. In an e-mail from the claimant to Mr Philip Eke, Executive Director, she apologised for the "unpredictability of the recent past, it has been and I am sure it isn't over yet, but it has been a very trying time for a while now for a variety of reasons. I admit that I have been distracted by personal issues and have taken the last two weeks, as advised by Jane (Wakefield) to take stock and sort multiple things out. I appreciate your support and realise that being out of the department is not good, it was my reluctance to take the leave in the first place" (241-247)

95. She was in an unhappy marriage and was in the process of getting divorced. She met with Mr Eke and Ms Wakefield on 31 March 2016 to discuss a variety of matters, including the department management and her personal circumstances impacting on her ability to lead and manage her department. During the meeting it was highlighted that her relationship with her staff had deteriorated, in particular, her relationship with senior staff. The claimant recognised this and instigated weekly meetings with her senior team. She was prepared to meet with Ms Raza and another member of staff by the name of Christina, to start rebuilding relationships with them as concerns were raised about apparent favouritism on how work was allocated. This was a reference to the claimant's perceived personal relationship with Dr Patel, Consultant Radiologist.

96. It was not recorded that issues were raised about the claimant's dress and behaviour during the Christmas party in December 2015. (252-253)

97. Although Ms Wakefield had e-mailed Mr Eke on 22 March 2016 referring to the possibility of losing Ms Raza and Christina unless she, that is Ms Wakefield, and Mr Eke, address the issue of the claimant going around Chase Farm with Dr Patel, and getting others to cover her work, the matter was not raised during the meeting on 31 March. (245)

<u>BMI Manage</u>

98. The respondent's human resources outsourced advisers are BMI Manage. Should a manager decide to invoke the performance management procedure against a member of staff, they would need to contact BMI Manage for advice and assistance. BMI would record that the formal performance management process had started in respect of the employee.

99. On 4 May 2016, Ms Patricia Turner, took over the role of Clinical Director, and contacted BMI Manage on 20 May 2016, to raise a concern about the claimant's behaviour. She witnessed that the claimant appeared to be reluctant to use another office and remained in an office believed to be

dedicated for Ms Turner's use. The claimant also appeared disinterested in discussing the team and had been absent for the previous 3 days. As Ms Turner was new to her role, she did not want to take any formal action at that stage but preferred to monitor the claimant and to consider possible next steps. She was advised by BMI Manage that they were unable to provide personal advice but if she felt that there was capability or conduct issues, she should refer to the respondent's policies. (258-259)

100. Dr Kevin Lotzof, Consultant Radiologist, who works for the respondent but on a self-employed basis, raised concerns with the claimant about payment of his fees. He alleged that his concerns were not taken seriously by her resulting in his fees being incorrect for extended periods of time.

101. His other concern was that he was due to undertake a fibroid embolisation procedure on a patient and believed that the claimant spoke to the patient who said then said that she did not want to be seen by him.

102. His other concern was that on 9 June 2016, he had spoken to someone in the administration team and said to that person:

> "I had a good mind not to do this anymore."

103. That information, he believed, was relayed to the claimant who instructed her team not to allocate NHS work to him. He complained to her by e-mail on 20 June 2016, stating that, in fact, he was willing to engage in NHS work. He also complained to Mr Philip Eke, Executive Director, who later resolved the matter. (260-263)

104. It was clear to this tribunal that there were issues between the claimant and Dr Lotzof which adversely affected their professional relationship and, as will become apparent later, continued after the claimant's dismissal.

105. On 20 June 2016, another Consultant Radiologist, Dr Zaid Dabbagh, complained to Mr Eke about the claimant, alleging inappropriate decisions, poor management, confused instructions, inadequate fees, favouritism towards a new consultant, creating an atmosphere of disharmony and dissatisfaction and unhappiness among radiologists and other staff. He stated that eight radiologists approached him to urge him to act against the claimant's bad management before things got out of control. He also referred to the absence of the claimant from her workplace, not turning up to meetings and not having the courtesy to apologise. He was willing to discuss these issues at a meeting with Mr Eke and wanted appropriate explanations, answers and actions in relation to the concerns he raised. (265)

106. It was not clear to us whether the joint meeting that was requested was held around that time.

107. The following day, Ms Turner consulted with BMI Manage about the concerns raised by one of the consultants and it was agreed that she should meet with the claimant to discuss them. (267-268)

108. She met informally with the claimant on 27 June 2016, and discussed a number of issues. First, several members of staff had voiced concerns about her behaviour, citing her treatment of a 91-year old patient. Second, staff complained about her lack of presence and leadership during the recent Care Quality Commission's inspection. They felt anxious because of the inspection and expected the claimant to be there but did not know where she was. Third, her time keeping had become a problem. She would turn up late with the excuse that it was the traffic, notwithstanding that other members of staff had travelled from the same direction and got to work early. The fourth issue was taking unpaid leave when the department was not covered. Fifth, consultants were complaining that she was making unilateral decisions. Sixth, they had lost trust in her and raised their concerns regarding pay and salary and nothing had been done by her to address them. The seventh, was her not adhering to the respondent's uniform policy. The eighth being she was not doing any clinical work. The final matter was that she had continued to work at Kings Oak hospital despite being instructed to transfer files on 9 May 2016 to one of the two diagnostic imaging officers at Cavell and Kings Oak hospitals.

109. From the notes taken there was an action plan to improve the claimant's performance. She was required to undertake training and development to develop her skills as a leader in order to understand the role of the Diagnostic and Imaging Manager. She had to make a personal commitment to manage her time better and to be a role model to staff. She was also required to schedule one-to-one meetings with her staff in her diary to understand their needs; plan to gain the consultants' confidence and move documents from the office.

110. Ms Turner undertook to speak to those who made complaints and to defend the claimant by giving a balanced view; feedback to Dr Dabbagh; to find out how the respondent could support the claimant with the fee-split work, and meet with the claimant at the end of July 2016, to assess her progress. (277-281)

111. It would appear that BMI Manage chased Ms Turner for updates for the next steps in relation to managing the claimant's performance. (270-273)

112. There were still ongoing concerns about the claimant's performance as on 8 August 2016, Mr Eke contacted BMI Manage to raise capability concerns about her. It is recorded that the issues raised would move from the informal stage to the formal stage and that Mr Eke would be speaking with Ms Turner on 12 August 2016. (306-307)

113. Having agreed to invoke the formal procedure, no action was taken to meet with the claimant formally until she was suspended on 18 October

2016. BMI Manage attempted, unsuccessfully, to speak with Mr Eke to discuss progress. (308-309)

114. On 19 September 2016, the claimant contacted BMI Manage seeking advice and assistance in relation to invoking the formal capability procedure on four of her staff, namely Ms Ellwood; Ms Sally Brown, Administrator; Ms Jothi Cecil, Administrator; and Ms Sadika Naidu, Administrator. After clarifying the purpose of the call, BMI Manage then rang the claimant back and engaged in a detailed conversation with her. Both conversations were recorded and later transcribed.

115. The conversation with BMI Manage ended abruptly but they opened case reports on the four individuals. For three of them, no detail is recorded, but for Ms Ellwood, BMI Manage advised the claimant how best to proceed against her. (310a – 311g)

116. After her discussion with BMI Manage, it appears that she did not communicate with the four individuals in writing to arrange formal or informal meetings with them. She told the tribunal in her oral evidence, that she did write to them and handed them letters which should be on the respondent's computerised system. No such letters were produced during the hearing. Further, we know that in her very detailed witness statement, comprising of 461 paragraphs over 147 pages, made no reference to having typed and handed to the four members of staff, letters in relation to any potential performance management.

117. During 2016, the respondent decided to implement an electronic timesheet system called Kronos to assist in the allocation of fees.

<u>Alleged public interest disclosure on 19 September 2016</u>

118. An important aspect of the claimant's case against the respondent is that on 19 September 2016, she made a public interest disclosure. She e-mailed to the respondent's formal whistleblowing portal, the following:

> "As a head of department in discussion with other heads of department who feel the pressures being placed on us are too many and too heavy. The introduction of Kronos with insufficient training for HOD's (Heads of Departments) has created a rift between HOD and staff in our department. Morale is very low. , Recognition for the workloads on HOD's is not evidence from either DOCS and ED (Director of Clinical Services, Executive Director). Too much responsibility which should sit with ED level is being passed on to HOD's and then when processes are not being completed due to clinical/operational issues, eg RCA's/incident investigations / complaints/HR issues with staff/rostering etc, the 'blame' is laid at the HOD's feet. There is a 'blame' culture and minimal support for HOD's **in evidence.** The EMT are reactive on a daily basis and historical politics etc are not taken into account when holding HOD's to account for actions of the present. When grievances have been raised previously (I have raised one myself) I have been instructed to 'let it go' as there is 'no point'. There are no lessons learned and there's a culture to 'drop' things when directed at EMT. There are processes, for example – budget setting, is not set in conjunction with the HOD's and yet the HOD's are expected to achieve

and explain their finances despite not being any part of their budget/finance setting process. Therefore, I wish to raise a concern that this is not a healthy environment in which to work as part of the management team as 'blame' is directed in one direction and the culture is 'reactive' not 'pro-active' as a team. We are held to account for things we have no control over and reasoning is not listened to." (312)

Group complaint – 20 September 2016

119. On 20 September 2016, Ms Ellwood wrote to Mr Eke on behalf of her colleagues, complaining about the claimant's conduct and performance. It was signed by seven members of her team including herself. She wrote:

"Phillip,
We write to you in the hope that the current situation in Imaging can be resolved.

To describe the Diagnostic Imaging Department across both sites as a department that lacks leadership, a department that is falling apart, filled with staff that are unhappy and feel unsupported will be putting it lightly.

This is a general letter written by a few people however backed by almost 100% of the department. Yes there are few, when asked to stand up and be counted will sadly hide away however the majority of us, those who's signatures are signed below feel now more than ever we need to be heard. If things continue the way they have been over the past 12 months, soon there will be no staff left and Imaging will become even more of a shambles that it already is.

Many of have worked here for well over 5-14 years, and this is by far the lowest the moral has ever been across both sites.

The last thing we want is for this to be a personal attack on our current manager, but then again it has to be as we feel her personal life is having an effect on her professionalism and in turn affecting the service we provide. This is not us trying to bring you gossip or hearsay; this is us simply stating what we have seen, what we have been through and how we feel.

Having a relation with a colleague happens throughout many work places, at some it is frowned up and others it is not. We are not saying we do not approve of our manager having a relationship with one of the Radiologists, frankly it is not our business but when it affects us and hinders us from providing a service to patients that is of high standard, then it needs to be brought to light.

The general feeling across the department is that we are not supported, that we do not have a leader willing to lead. The best thing that has happened for us this year is appointing Zunaira Raza as Deputy Manager, however there is only so much she can do and ultimately when she has to go to our manager for the final say or for help, nothing gets done.

She plays us against each other, she lies not only about her whereabouts but about things that she has said, jobs that she has given to us to do, meetings that we have had with her she denies like they never happened. She does not stand by what she says and is quick to pass the blame on to others, as long as she does not end up being the one in the wrong. But we all talk, we all vent, we all confide in each other and inevitably the lies she tells come out.

The way in which she speaks to some of us is not professional, she is unapproachable and condescending, she is dismissive, she arranges meetings and never turns up, she replies via email (only when it suits her) rather than adopting face to face communication when it is a better alternative, she doesn't bother to speak to you personally about situations and when you really need a manager, she is nowhere to be found.

Day after day we find her telling one site she is at the other and vice versa, when we call for her, she is not there. Not too long ago she told the team over at Cavell that she will be at KOH until the evening, only for one of our admin team to then see her at the Robin Hood Pub along The Ridgeway with VP.

Our team constantly walks in on them, recently one of our clinical team members walked in on her sitting on his lap, another saw them kissing through the glass and one of our radiologists saw her with her hands running up and down his neck and chest. All of this was during work hours and it puts us all in an uncomfortable situation.

As stated earlier, their personal relationship should not concern us as they are two consenting adults, but we feel it is now intruding on our working life. There are 4 members of the admin team who would much rather not work a Saturday at KOH Imaging because VP is there, he is rude and nasty and if it was any other consultant we feel she would look further into it. However, as it is him, we feel it will be over looked; we have not approached her directly about this as we are worried that she will then pass it on to him and the backlash from him will be worse than it already is. He is late for sessions, he sometimes doesn't show up, he leaves patients in consulting rooms with needles and a wire still in them and disappears with her and this is not fair on our patients.

Patients care is meant to be the most important thing to us when they are at our hospital and this is not the case recently. We feel that VP also gets special treatment when it comes to being on call and the reporting. He is not on the on call rota, he gets the entire breast MRI workload unless the consultant asks specifically for another radiologist and on many occasions he has taken the breast work from other consultants even when it specifies them. This is being overlooked as well and again we feel this due to their personal relationship.

We appreciate that she is going through her own personal drama at home, discretion is not her strong point and neither is leadership. Staff motivation is at an all time low which is affecting staff retention; unless these issues are addressed the Imaging Department will be unable to operate whatsoever.

Staff shortages across the clinical and clerical team has meant that we all have to pull together and do longer hours, we get no thanks, we get our pay messed up and yes, maybe during the first month that was a problem with the KRONOS system, but it no longer is. We call payroll and they laugh when they hear that MC is our manager, they have no issue in informing us that she is the reason the hours have been messed up and when you question her about it, she lies, she tells you she will look into it and she doesn't.

Our manager is the biggest hindrance to our department, she delegates all of her roles to other members of the team, which leaves us wonder what exactly MC do, what is it that keeps her so busy?

> This is only a very brief description of how we feel, it has got to a point now where none us are happy here and feel we have to speak up about what is happening in the department.
>
> Again, to be very clear, this is not an attack on the relationship between our manager, Morwenna Corbett and the radiologist Dr Vipul Patel, we are simply informing you that the Imaging Department at Kings Oak and Cavell Hospitals is in a desperate state and needs support.
>
> We would like to request a meeting with you as soon as possible, and we assume that this is kept private and confidential until something is done.
>
> Kind Regards,
>
> From all the staff members signed below" (313 – 315)

120. The signatories were Ms Karen Elwood, Ms Maria Staikos; Ms Emma Hopkins; Ms Sasha Keating; Ms Sally Brown; Ms Samia Ramdani; Ms Estelle Griffiths; and Ms Sadika Naidu.

121. Mr Eke replied to Ms Ellwood on 27 September 2016, thanking her for the letter, reassuring her that he was taking the issues raised seriously and that he would be investigating the matters raised. He stated that for him to conduct an investigation he required statements and he set in bullet points, what should be included in them. (329a)

122. On 21 September 2016, Dr Dabbagh made a further complaint to Mr Eke about the claimant and her alleged poor management style. He stated that the morale amongst staff was the lowest he had ever witnessed in his many years' service and had been approached by many staff complaining about the claimant, some stating that they were considering resigning. He alleged that she had created an atmosphere of dissatisfaction, disharmony, inefficiency, gossip and chaos. She took things personally and sometimes in a vindictive way. He further alleged there were other negative things to say about her style, ability, personality and behaviour but could not mention them all in one e-mail. He ended his e-mail by writing:

> "Let me know if you want me to provide any further information or examples. I am happy to meet up with you and Patricia or Professor Downs to discuss further." (316)

123. It is clear to us that the e-mail sent by Dr Dabbagh was in response to a request from Mr Eke for information about the claimant. On 26 September 2016, he wrote again to Mr Eke on behalf of himself and seven other doctors giving examples of the claimant's behaviour as the manager of the Diagnostic and Imaging Department. (322-323)

124. On 29 September 2016, Mr Rothwell met with the claimant at Cavell hospital to discuss her alleged public interest disclosure. During the

meeting he discussed the concerns raised about her management style. She responded by giving her account of events.

125. We agree with Mr Rothwell's summary of the meeting as set out in paragraphs 10 and 11 of his witness statement. He stated that at the meeting they discussed concerns primarily about the hospitals' leadership. He recalled that some issues were about Mr Eke but the majority of what the claimant said were with reference to Ms Patricia Turner, Director of Clinical Services. She felt that Ms Turner acted in an aggressive and unacceptable manner and mainly towards her. Mr Rothwell understood that the claimant asserted as part of her evidence, that he was aggressive during the meeting, but he denied it entirely. He listened carefully to what she had to say, even allowing the meeting to overrun by one hour, to make certain he understood the basis of her concerns. He asked her to gather and send him further information, specifically regarding Ms Turner, for him to consider.

126. In paragraph 11 of his statement, he stated that in the claimant's e-mail and during their conversation, it was not his impression that she was raising health and safety concerns with him. Any of the matters raised related to Ms Turner's behaviour and operational matters, such as the budget setting process, which, whilst not ideal, was not a health and safety issue.

127. Having read the alleged public interest disclosure and having listened to the claimant's evidence, as well as the evidence given by the respondent's witnesses, we are satisfied that the claimant's e-mail does not disclose health and safety issues.

128. On 5 October 2016, she e-mailed Mr Rothwell apologising for not being in a position to send him further information regarding her concerns, specifically with reference to Ms Turner, but she was endeavouring to put together relevant information by the end of the week.

129. Mr Rothwell, on the same day, e-mailed her in response stating the following:

> "Thank you for your e-mail. I fully understand with regard to CQC and the focus required for that given the inspection next week. I was going to write to you tonight so your e-mail is good timing.
>
> I have reflected following our conversation and given the nature of what you have told me, I think if you want to take this forward, then raising a formal grievance is the most appropriate way to start the process. Can you therefore let me know if this is what you would like to do. If so, it will be important to detail all your concerns at the same time so they can be investigated fully.
>
> If you feel there is anything stopping you from using the grievance process then please let me know and I will look at alternative solutions." (374)

130. We are of the view that this was a reasonable and constructive response from Mr Rothwell and the claimant heeded his advice and lodged a formal grievance on the same day with Mr Eke. In it she raised concerns about Ms Turner's management style (374a)

131. Mr Eke left his employment with the respondent on 14 October 2016 and was replaced by Mr Adrian Brady.

Care Quality Commission inspection

132. On 11 October 2016, Kings Oak hospital was inspected by the Care Quality Commission "CQC" which regulates some health care providers. The inspection was carried out over a few days and the outcome was that Out-patients and Diagnostic Imaging were rated "good" overall. It was noted that staff were committed to delivering good care, although some felt unsupported by senior management. Not all staff were positive about their local leadership. The inspectors also noted that they heard several accounts of staff being treated unprofessionally and some wanted to leave. The comments noted by the inspectors did not distinguish between Out-patients and Diagnostic Imaging (R1).

133. There were responses to Mr Eke's request for statements from the individuals named in the complaint. These came from Ms Emma Hopkins (331); Ms Karen Ellwood (332); Ms Zunaira Raza (369-370); Ms Sarah Hodgson (368); Ms Maria Staikos (337-340); and from Ms Sally Brown (341-343).

134. They seemed to corroborate what was in the group complaint.

135. In relation to the claimant's grievance, she was written to by Ms Paula Friend, Executive Director, on 14 October 2016 and invited to a grievance meeting, scheduled to take place on Monday 17 October at Kings Oak hospital. She was asked to confirm her attendance at the meeting and was advised of her right to be accompanied. A copy of the grievance was enclosed. The letter also made reference to any specific adjustments required at the hearing as a result of a disability, should be discussed with Ms Friend (383).

136. The claimant e-mailed Mr Adrian Brady, who copied in Ms Karen Jones, to inform him that she had collapsed at work on Friday 14 October and was not well enough to attend work on that day. Mr Brady then conveyed to Ms Friend on 17 October, that the claimant would not be at the hospital and to cancel the meeting (383a).

137. The claimant was also due to be suspended 14 October 2016, but that decision was not taken because of her illness. She informed the hospital that she would be on sick leave from 17– 21 October 2016 following which she would be on annual leave for a week.

138. Mr Brady who was due to conduct the investigation into the matters raised in the group complaint and in the statements, decided to place his investigation on hold until the claimant return to work.

139. The claimant attended work on 18 October 2016 and e-mailed Mr Brady at 08:56 on the morning asking whether he would be prepared to meet with her that day and whether he would be either at Kings Oak or Cavell hospital. (388)

140. We find that the reason for the claimant's request was to discuss her stress and other issues as Mr Brady, as the new Executive Director.

141. At 09:01am 18 October 2016, Mr Brady e-mailed Ms Stephanie Grainger and Mick Rothwell informing them that the claimant had returned to work that day and he was due to see her in the afternoon. (387)

142. At 10:50am on 18 October, MS Grainger e-mailed Mr Brady stating that she had drafted the suspension letter and invitation to an investigation meeting to be sent to the claimant. She advised him on the issues to be discussed with the claimant and the reason for suspending her on full pay, namely gross misconduct. She further stated that she had a discussion with Greg at BMI Manage in that morning. (386-387, 392a – 392i)

<u>The claimant's suspension on 18 October 2018</u>

143. The claimant met with Mr Brady at 3pm on 18 October 2016 but had not been notified by him as to the purpose of the meeting. He informed her of the allegations against her and that she was being suspended while an investigation was carried out. He said that her suspension would be on full pay and was not an indication that she was guilty of the allegations. He said that there would be an investigation meeting with her at which she had the right to be accompanied. It was a brief meeting.

144. Later that day Mr Brady wrote to her confirming her suspension and stated that the investigation would look into serious misconduct, namely:

    a. "Alleged inappropriate behaviour with a consultant whilst at work;

    b. That you are allegedly not supporting your staff and some consultants"

145. It further stated that her e-mail account had been suspended and she would no longer have access to the respondent's computer network. She was forbidden from communicating with any employees, contractors or customers unless authorised to do so. Enclosed was a copy of the disciplinary policy. He then wrote:

> "If you know of any documents, witnesses or information that you think will be relevant to the investigation, please let me know as soon as possible. If you need access to the workplace or computer network for this purpose, please contact me so that we can arrange this under supervision". (393-394)

146. The 18 October was the claimant's birthday and on that day she was informed that her work colleague and friend had collapsed and died in the respondent's car park. It was by all accounts an emotional time for her.

The claimant's grievance investigation

147. On 21 October 2016, she met with Ms Friend, Executive Director, to discuss her grievance against Ms Turner. Ms Nicola Hudson was in attendance and took notes.

148. The claimant was written to by Ms Friend on 2 December 2016, who asked for more information and an accurate timeline of events, correspondence with Ms Turner and notes of meetings referred to during her discussion with Ms Friend. She stated that upon receipt of the information, she would be in a position to interview work colleagues, Ms Turner and then consider her findings. She attached notes of their meeting as well as copies of their e-mail correspondence. (466)

149. A grievance hearing was held on 6 January 2017 at which the claimant attended in the company of Ms Dorken. A notetaker was also in attendance. During the meeting the claimant said that she would send photographic evidence of he allegedly bruised arm to Ms Friend. She claimed her arm was bruised by Ms Turner when she held it. She was asked by Ms Friend whether the date and time would be on the photographic evidence to which the claimant replied 'Yes'. The claimant then gave an account of Ms Turner's management style. (512-515)

150. After the meeting Ms Friend interviewed potential witnesses to the various events: on 24 January 2017 (571-597); and on 30 January 2017, Mr Eke. (614-615)

151. The claimant did not send the photographic evidence as she had promised.

152. After conducting her investigation, Ms Friend wrote to the claimant on 16 February 2017, setting out her outcome. She concluded that there was no evidence that Ms Turner had treated the claimant differently compared with the claimant's work colleagues. There was also no evidence that Ms Turner behaved in an inappropriate way as Director of Clinical Services. The claimant was informed of her right of appeal. (637-639).

Investigation meeting with Mr Brady

153. On 2 November 2016, the claimant was invited by Mr Brady to an investigation meeting to take place on Friday 4 November. He stated that he was investigating the following allegations:

> "1 Inappropriate behaviour with a consultant whilst at work;

2 That staff feel intimidated by you".

154. He advised that possible outcomes could be no further action or the commencement of disciplinary proceedings. She had the right to be accompanied and repeated that should she require any adjustments because of a disability, he should be informed.

155. He removed the allegation that the claimant was not supporting her staff and some consultants and substituted "that staff felt intimidated by her".

156. The investigation meeting went ahead as scheduled. In attendance was Mr Brady, the claimant, Diane Dorken, the claimant's companion and Niki Bridge. The claimant raised the issue of the change in the allegations.

157. During his evidence, Mr Brady acknowledged that the allegation of intimidation by the claimant of her staff did not stand as the correct allegations were in the 18 October letter.

158. From the amended notes, the claimant was asked about her relationship with Dr Patel, with reference to the allegation of inappropriate behaviour with a consultant. She replied that her personal life was not up for discussion and denied, contrary to what the staff had stated, sitting on Dr Patel's lap. She also denied she jumped up when she saw a member of staff open the door to the room in which she and Dr Patel were in. She said that she had turned to see who was standing by the door. It was put to her that, on another occasion, she was witnessed, through a glass door, kissing Dr Patel and running her hands up and down his neck and chest during working hours but refuted the allegation.

159. It was put that she was witnessed being in the Robin Hood public house with Dr Patel around lunchtime for over an hour and was asked what the purpose of the meeting was. She replied that she took her lunch break for a full hour and the purpose of the meeting was to discuss work insurance. Mr Brady said that she had informed staff at Kings Oak that she was at Cavell hospital and not in the public house and that no member of staff was able to contact her by phone. She replied that if her staff needed her, they could have called her. They could also call her outside working hours.

160. Mr Brady next put to her that at the December 2015 Christmas party she and Dr Patel were observed by staff rubbing each other under the table and dancing intimately. When asked whether that was appropriate behaviour in public, she responded by saying that she was unsure how the matter could be a work issue. He replied that it was a work function held outside work premises. She said that she had arranged the event which was a private party for staff outside of working hours, held off site. Her actions could not, therefore, be questioned. She said there were people in a drunken state and that their statements could not be relied on. She admitted that she danced with Dr Patel and that they picked up each other's napkins off the floor. Dr Patel was close to her and at one point

another doctor was becoming over-friendly towards her. She denied that her behaviour was inappropriate.

161. It was further put to her that the office she used, which was later occupied by Ms Turner, had some dirty underwear which was found in a drawer. She was asked if she knew anything about it, meaning "knickers"? She denied any knowledge of the underwear. The following was the dialogue between them:

> "D: About the underwear – do you know anything about that?
> M: I presume this means knickers?
> M: No I don't know – you will need to ask that person"
> D- Are there more than just you have access to this office?
> M – No – supposed to be my own office.
> D- we have access to office via keys and keysafe.
> M – then agreed that actually upon reflection, many people can access the office and in fact her deputy Zanira Raza used the office frequently whilst doing admin tasks."
> M – two questions – (1) if that's in a drawer in my office, why are people going through my drawers as I wouldn't walk into your office and do it? So why do they feel that they can or should need to go through drawers in my office? (2) how do they know they are mine?
> A – exactly my question
> M – what timings? I was in that office months ago, like May (again, why is this being brought up so many months later if this is a question to be answered, why was it not asked at the time? Also, I have bad periods so on the list to have a hysterectomy; I can go through 2-3 pairs a day through accidents. I keep them in an envelope, not open, in the drawer. On occasion I have had to change underwear.
> A- Based on this, they may have been yours?
> M – they may have but I don't have recollection. To me this is a monthly thing.
> M – can you clarify there are no more questions about the behaviour with consultants?
> A – yes they are now based on staff/consultant dissatisfaction."

162. At that point the claimant became upset and the meeting was adjourned for a short time after which the questioning continued. She asked if she could still attend an occupation health appointment to which Mr Brady agreed (413-425)

163. Notes were taken of the meeting which were sent to the claimant who amended them. Mr Brady agreed with her amendments.

164. Mr Brady also agreed that she should be afforded site access to her files and e-mails and that he would meet with her on 11 November 2016 between 11am and 5pm, to enable her to do so. He subsequently became ill with tonsillitis and the meeting had to be cancelled as he was off sick from 4 November, returning to work on 21 November 2016. He met with other members of staff to continue with his investigation and notes were taken of his meetings with them. (429-435)

165. The claimant, on 22 November 2016, wrote to Mr Brady complaining about the length of the delay in dealing with her grievance. She stated that according to the policy, suspension would not normally continue beyond

14 days which, by that date, she had been suspended for over a month. She also raised concerns about the nature of some of the questions asked by him during the investigation meeting. She wrote:

> "I felt somewhat harassed and humiliated by some of the lines of questioning and do not believe that if this was reversed and it was a male in my position, that the allegation surrounding personal relationships would have been given credence in the first place and certainly as nothing as base as underwear would have been discussed in a formal meeting and recorded in minutes. It left me feeling violated and hugely embarrassed. I attribute the inclusion of such questions, however, irrelevant to my professional role within BMI as sexually discriminatory and wrong"

166. She asked how much longer the investigation was likely to last. (427-428)

167. Mr Brady replied on 23 November 2016 to arrange a meeting with her on 1 December and advised that she should have access to her belongings and access to the respondent's systems, including her e-mail account. She wrote to him on 28 November, again expressing concern about the delay in accessing her e-mails and property. She asked whether someone else could accompany her as the questioning by him, she asserted, amounted to sexual harassment. These matters were addressed by Mr Brady in his e-mail dated 29 November, when he explained that given the sensitivity surrounding her suspension, there was no one else who could accompany her while she accessed the documents she wanted. He stated that the questions he asked were referable to the allegations and was sorry to hear she had been upset by them. He referred her to the Employee Assist if she needed support.

168. There then followed further e-mail correspondence between the two over the claimant's attendance at the respondent's premises to access e-mails and documents. Mr Brady stated that Ms Grainger would attend to provide a female presence should the claimant not want him to be there. He queried one of her requests for access to patient systems as it was not clear to him why such access was necessary. (460-462)

169. The claimant informed Mr Brady that she was too unwell to attend the meeting, and this should be scheduled for a later date.

<u>The claimant's second grievance dated 28 November 2016</u>

170. She lodged a further grievance on 28 November 2016, her second, in which she complained about Mr Brady's treatment of her during the investigatory meeting. She also complained about Mr Eke as he invited staff to write statements regarding her personal life outside of work for Mr Brady and Mr Rothwell to investigate. Mr Eke had also failed to take seriously Ms Turner's alleged physical assault on her by telling her "not to make a fuss" and to "compose herself". In relation to her grievance against Mr Rothwell, Regional Director, he appeared not to have been willing to listen to her grievances. (448-453)

171. On 30 November 2016, she requested that the disciplinary process be suspended pending the outcome of her grievance. (456)

172. Mr Brady, however, continued with his investigation and met with more staff of the Imaging Department. Notes were taken at the meetings with them. (467-475).

173. On 9 December 2016, the file in relation to his investigation was reviewed and it was decided that it be suspended until the outcome of the claimant's second grievance was known. This decision was made following discussions between Mr Brady, Ms Grainger and BMI Manage.

174. The claimant had access to documents and her e-mail account on 15 December 2016. (478a – 478c).

175. She was informed by Mr Brady in his letter dated 3 February 2017, that his investigation had been put on hold pending the outcome of her second grievance. She was also informed that as Ms Turner had left her employment and he would be her temporary replacement and her line manager. The claimant objected to this in light of her second grievance. She also questioned why the investigation was referred to as a "disciplinary investigation". (622-623, 630)

<u>The claimant's second grievance investigation</u>

176. Ms Sharon Stewart, Group Director of Clinical Governance, was appointed to hear the second grievance. On 20 December 2016, Mr Brady met with Ms Stewart as part of her investigation. Notes were taken of the meeting. (479-485)

177. In her letter dated 13 January 2017, sent to the claimant, Ms Stewart set out her outcome. All of the allegations were not upheld save for the complaint in relation the allegations having changed between the suspension letter and invitation to the investigation meeting. She recommended that all letters should be checked to ensure the content is correct and sufficient information is included in them. Allegation 5, namely that the claimant did not trust the evidence in the form of statements received from consultants, was partially upheld. The part that was upheld was that the claimant believed that the grievance in relation to the eight consultant radiologists, referred to ten individual statements from them and that was not the case.

178. In relation to being humiliated and sexually harassed, some of the questions put to her by Mr Brady, particularly in relation to the underwear, was not upheld. Ms Stewart found that the questions put to the claimant were as a result of the content of the statements from the staff members and consultants and were appropriate. She stated that she had discussed the matter with Mr Brady and was confident that he never intended to make the claimant feel humiliated, sexually harassed or sick regarding the questions he put to her. She recommended that in future, managers

conducting formal meetings, review their questions and questioning styles (428-434)

179. Mr Brady was also informed by Ms Stewart of the outcome of her investigation in her letter to him dated 11 January 2017. (521-525)

180. On 16 January 2017, the claimant notified the respondent of her intention to appeal Ms Stewart's grievance outcome and submitted on 19 January, her detailed grounds of appeal. Her letter was sent to Ms Liz Sharp, National Director, Clinical Services, at the respondent's head office, Paris Gardens, Southwark. (444 – 451)

181. The appeal was heard on 3 March 2017. In attendance were: Ms Sharp; the claimant; Diane Dorken, her work colleague; and Ms Jean Ponton, note taker.

182. Having heard the claimant's appeal Ms Sharp issued her outcome letter dated 13 March 2017. The claimant's appeal in respect of the alleged unacceptable time scale, investigation and her ongoing suspension, were not upheld. The alleged unacceptable behaviour at the interview on 4 November 2016 by Mr Brady was upheld. In her letter Ms Sharp wrote the following:

> "During the appeal hearing you were able to confirm your personal feelings and responses to the specific line of questioning which Adrian Brady undertook relating to very personal issues linked to the allegations that had been made by staff and consultants. The questions asked around dirty underwear in a drawer and the reasons for them being there were of an intimate nature and your responses relating to your menstrual cycle were embarrassing when shared with someone you had known for a very short period of time. I do not agree that this specific line of questioning does not appear to be linked to the allegations made.
>
> I have reviewed the minutes of the meeting, along with the statement submitted by Diane Dorken, that you shared with me as evidence to support your appeal and agree that this line of questioning was inappropriate. The other questions that you were asked were all as a result of the content of the statements from the staff members and consultants and therefore appropriate for Adrian, as the investigator, to ask you.
>
> My recommendation to Adrian Brady is to send you a letter of apology for the upset caused due to personal questions of an intimate nature that left you feeling humiliated, highly embarrassed and extremely upset".

183. In relation to the large number of inaccuracies in the minutes, it was not upheld. In respect of the apparent number of statements received from the consultants, this was partially upheld, and Ms Sharp agreed with Ms Stewart's outcome in relation to this issue.

184. As regards lack of communication between Mr Brady, human resources and the claimant, this was partially upheld as Ms Sharp found that there were gaps in communicating responses in a timely manner. There were, however, occasions when the claimant had not responded within a

reasonable timescale and had not provided the information requested which caused ongoing delay.

185. In relation to the unacceptable delay in granting the claimant access to her e-mails and files, this was not upheld.

186. The way the claimant was prevented from grieving for her work colleague was partially upheld. Ms Karen Jones had died on the same day the claimant was suspended which the claimant found deeply distressing as she was instructed to have no contact with hospital staff or consultants during her suspension. Mr Brady allowed her to communicate with Ms Dorken.

187. The allegation that Mr Rothwell was aware that the claimant had made a whistleblowing complaint, as he asked her "It's Morwenna isn't it?", was not upheld. Likewise, his alleged attitude as being distant and hostile during his meeting with the claimant, was also not upheld. The allegation that she was suspended because she was seen as a trouble-maker and raised concerns about the senior management team, was also not upheld.

188. It was not upheld the allegation that the claimant believed that it was inappropriate for Mr Rothwell to be involved in hearing her whistleblowing concerns as he had earlier been involved in the process.

189. As regards Mr Eke having issues which resulted in the claimant's suspension continuing for over a year unchecked and unmanaged, this was upheld. Ms Sharp wrote in her outcome letter the following:

> "I confirm that I have now been able to speak to Philip Eke regarding the management of the issues that you believe you have resulted in your suspension. Philip was very clear that a discussion was held with Jayne Wakefield and yourself relating to your behaviour with a consultant at a Christmas party and the need for you to wear more modest clothing at work. This was closed and the file note made. You thought there was a file note made for your personal file but there is nothing recorded on file. These two specific issues were formally closed. I therefore do uphold your grievance on this point."

190. The allegation that Mr Eke failed to take seriously and inform the police of Ms Turner's alleged physical assault on the claimant, was a matter dealt with by Ms Friend as part of the grievance investigation. (708-713)

191. Following on from Ms Sharp's recommendations, on 23 March 2017, Mr Brady wrote to the claimant to apologise for his behaviour. He stated the following:

> "Dear Morwenna,
> Please accept this letter as my apology. It was never my intention to cause you any upset or embarrassment.
> Kind Regards" (741)

Disability

192. The issue of disability, in the claimant's pre-employment health questionnaire completed 28 May 2015, in relation to the question whether she considered herself as having a disability, she replied "Yes". She gave details of her neurogenic bladder condition following a back injury and that she would to pass water twice a day at work via catheterisation (680-681).

193. In the occupational health report prepared by BMI Healthcare, dated 17 March 2016, the claimant's fitness to work was assessed. At the time she was going through a personal crisis, leaving her feeling under pressure and extremely stressed. In the report by Ms Allyson McDonnell, Specialist Practitioner in Occupational Health, she was of the opinion that the claimant was unfit for work caused by her current feelings of being under pressure due a personal crisis. (1262a – 1262b)

194. A further report was prepared on 20 January 2017 by Ms McDonnell during the claimant's suspension. In responding to the questions in the referral, in relation to whether the claimant came under the Equality Act, Ms McDonnell wrote:

> "Morwenna has a long-term underlying health condition that affects her daily living. As such she is covered under the Equality Act 2010. The condition becomes more difficult to manage when she is under stress, and I feel that this is being the cause of her failing to attend meetings in the past. Morwenna is able to attend meetings, but must be given sufficient time – at least one week' notice, to prepare herself". (1689-1690)

195. It follows from this that from 20 January 2017, the respondent had knowledge of the claimant's disability, her neurogenic bladder.

The claimant's appeal against the first grievance outcome

196. On 23 2017, the claimant appealed Ms Friend's outcome. (658)

197. Ms Connie Stocker, Executive Director, Somerfield hospital, heard the appeal on 16 March 2017. In attendance were the claimant and Ms Roslynn Clay, notetaker. During the meeting, the claimant was questioned about the photographic evidence. She replied saying that it was sent to Ms Friend. She was asked whether she had reported the incident on Sentinel or to the police. She said she did have a conversation with the Executive Director who advised her to deal with it, to compose herself and go back to work. She did not report the matter on Sentinel, nor did she report it to the police.

198. Having heard the claimant, Ms Stocker gave her summary. She was satisfied that the investigation and outcome of her grievance had been conducted correctly. She was not satisfied with the outcome around the alleged assault incident or that it was properly explored or referenced to.

She would question two witnesses in relation to the assault and would investigate the evidence. The meeting was adjourned to be reconvened on 29 March 2017. (720-722)

199. On 29 March 2017, Ms Stocker wrote to the claimant setting out her outcome to the grievance appeal which was not upheld. She found:

> "That the original investigation was of breadth and depth to be sufficiently robust to enable this finding to be reached. I am also satisfied that the correct process was followed.
>
> When we met on 26 March 2017, I explained that there was only one area I wished to further review myself and this concerned the alleged assault on your person by Patricia Turner on 29 September 2016. In previous notes I referred to, dated 6 January 2017, it is documented that there were two potential witnesses to this alleged incident. One of these left the business before the investigation so I was unable to speak with them. However, I did speak to the other named person who has confirmed that they did not witness this. I am therefore unable to uphold this aspect of your appeal against the original decision" (781-782)

<u>The claimant's third grievance</u>

200. On 20 February 2017, the claimant raised her third grievance which was against Mr Adrian Brady and was sent to Ms Grainger. She wrote:

> "I am writing to inform you that I have taken advice and wish to raise a grievance against Adrian Brady and therefore BMI under the Equalities Act 2010 for sexual discrimination in all four forms:
>
> - Direct
> - Indirect
> - Harassment
> - Victimisation
>
> This is in relation to the reasons given for my suspension, events that have occurred during my suspension in relation to Adrian's investigation into the allegations against me". (646)

201. It was heard by Ms Nicola Evans, Executive Director, Goring hospital, on 20 March 2017. Notes were taken. The claimant went through the investigation meeting with Mr Brady held on 4 November 2016 and said that she felt like a prostitute having to speak to him about underwear for about 25 minutes. She was upset but Mr Brady kept on probing her. She was asked by Ms Evans what was her desired outcome, to which she replied that she wanted Mr Brady to be removed from anything to do with the investigation going forward. She complained that he had mis-managed the situation and his behaviour was unacceptable and believed that he had had sexually harassed her on 4 November 2016. (733-737).

202. In Ms Evans' outcome letter dated 2 May 2017, the direct discrimination, indirect discrimination and victimisation allegations were not substantiated.

The change of line manager referred to in the letter dated 3 February 2017, was also not upheld. The harassment allegation was subject of the grievance appeal conducted by Ms Stewart.

203. In relation to the way in which the investigation had been conducted was partially upheld. Ms Evans found that "the timelines and processes within multiple cases which they are currently in motion to be often confusing." This was due to multiple processes ongoing at the same time with several people involved. It was clear to her, however, that the initial allegations did change. In the letters dated 18 October 2016 to 2 November 2016, the allegations did change. This was confusing and the reason for it was unclear from any of the documents she had seen as part of her investigation. It was noted that this aspect of the claimant's grievance was upheld by Sharon Stewart in her letter dated 10 January 2017.

204. In relation to the suspension of the disciplinary investigation, Ms Evans concluded that:

> "Having reviewed the evidence available, the process followed in relation to the suspension was neither clear nor transparent. Despite numerous questions via e-mails from you, it took from 9 November 2016 to 13 January 2017 via e-mail and 3 February by letter, to confirm the suspension of the disciplinary investigation in writing. During my investigation it is evident that assumptions have been made by all involved in communication with you had been informed of the decision to suspend the disciplinary investigation."

205. The claimant's challenge to the decision to suspend her and the grounds for her suspension, were not upheld. Ms Evans recommended that Mr Brady and Ms Grainger should have no further involvement in the claimant's disciplinary investigation. The disciplinary investigation should be completed and the decision in relation to the outcome should be communicated to the claimant as soon as reasonably possible. (826-829)

206. On 3 May 2017, the claimant appealed Ms Evans' outcome. (830-832).

207. A grievance appeal was held on 24 May 2017, conducted by Mr Marcus Taylor, Regional Director for London & South East Region. The claimant attended and notes were taken of the meeting. (849-853)

208. The outcome was sent to the claimant by letter dated 5 June 2017, dismissing her appeal. (857-860)

<u>Investigation into alleged sexual harassment</u>

209. Ms Theresa Starling, Executive Director, investigated alleged sexual harassment and inappropriate questioning of the claimant by Mr Brady and the inadequacy of his apology. She interviewed him on 21 April 2017. Her terms of reference were:

    a. to establish the reasons for Mr Brady's line of questioning;

b. to clarify the purpose of his investigation meeting with the claimant;

c. to identify what specific incident his line of questioning related to;

d. to get an understanding of why he thought his line of questioning was appropriate; and

e. to discuss the level of his apology sent to the claimant and establish if he was provided with any specific feedback prior to submitting his apology.

210. Ms Starling considered the disciplinary policy and the respondent's behaviour framework for Band 4 level managers. In relation to the allegation of sexual harassment and inappropriate questioning of the claimant, there was no case to answer for disciplinary proceedings having regard to the framework. She stated that different members of staff gave signed statements detailing the claimant's inappropriate behaviour. However, better judgment should have been exercised by Mr Brady as a senior manager before using descriptive allegations.

211. Ms Starling found that some of the questions and terms used which caused offence were unnecessary. Having interviewed Mr Brady, there was no evidence to suggest that he intended to harass the claimant, although his line of questioning could have been managed more sensitively.

212. In relation to the letter of apology, there was no case to answer. Ms Starling stated that it was reasonable to expect that a senior manager should be able to construct an appropriate letter of apology providing the reasons for the apology to the claimant. The letter was inadequate, it was very brief but in mitigation it had been checked by a more senior member of staff and should have included the reasons for the apology.

213. In paragraph 9 of Ms Starling's report, under conclusions/findings as to whether there appeared to be a case to answer, she wrote:

> "There is not a case for formal disciplinary action, but action should be taken in relation to training and performance to improve the approach of AB (Adrian Brady) to this type of situation. It is reasonable to expect that such a senior manager should have been able to make a sound judgment around what line of questioning is appropriate in these circumstances. Such a senior manager could reasonably be expected to know that some of the questions he asked could cause significant offence. However, there is no indication that there was any intention to sexually harass this member of staff; the questioning used indicated inexperience and not any intention to cause offence. AB believed that he was quoting the words used by other staff and that would not be a problem. This indicates lack of experience in managing a situation of this type and not malice. The same applies to the matter of the letter of apology; the letter of apology was not adequate and it could be reasonably expected that such a senior manager should be able to write an appropriate response. Further

> training should be facilitated to improve performance in this area. However, in mitigation AB told me that it had been checked by HO staff before being issued".

214. Ms Starling recommended feedback and coaching to improve performance going forward for Mr Brady. (853a-853e)

The claimant's fourth grievance

215. The fourth grievance was sent on 15 June 2017 and that concerned the claimant's deputy, Ms Zunaira Raza as having been referred to by the respondent as "Acting Imaging Manager" during the period of the claimant's suspension and that another member of staff, allegedly with no management experience, had been made up to "Acting Deputy Imaging Manager". The claimant had been contacted by an external recruitment agency asking whether she was still employed by the respondent and why was there an Acting Imaging Manager and a Deputy, and if she was still in post. (885-886)

216. Meetings were scheduled to discuss her grievance, but the claimant was unable to attend on the dates in question, 28 July 2017; 30 August 2017; 7 September 2017; and 11 October 2017.

217. Mr Andrew Jeavons-Fellows, Executive Director, Hendon hospital, investigated the grievance on behalf of the respondent in correspondence. He sent the claimant the outcome in writing on 30 November 2017 which was not upheld as he found that the term "Acting" was a standard term throughout the respondent's business to signify when a member of staff takes on more staff on an interim basis. On one occasion, in error, the Digital Marketing team had described the claimant's deputy as Imaging Manager in marketing material for a charity event and apologised for the error. (1403 – 1404)

Alleged public interest disclosure – miscarriage of justice

218. On 24 March 2017, the claimant raised a further alleged public interest disclosure, asserting miscarriage of justice. On 15 June 2017, she provided more details. She stated that there had been many failures on the part of the respondent to comply with timescales and policies regarding its processes. She referred to points in her grievances having been upheld but no action taken against the individuals. The grievance and appeal process, she claimed, left many questions unanswered. She further alleged that the whole process was nothing more than "a paper exercise" because employees are encouraged to use the respondent's procedures but in reality, there was no real tangible action or consequences. She referred to having taken legal advice. She continued:

> "I am raising this concern as I believe that any process against me will be handled in the same way, based on incomplete evidence, questions not being answered from BMI and no form of equality and transparency existing."

(881-882)

219. Mr Jason Rosenblatt, Head of HR Operations, e-mailed the claimant on 26 March 2017, stating that having read her public interest disclosure, he was of the view that it did not fall under the "principles" of a whistleblowing complaint and suggested that she raise the issues as part of the formal process she was currently engaged in. (747)

220. On 23 March 2017, she was informed by Ms Grainger that Mr Brady would no longer to continue to manage her and that she should communicate with Ms Sue Jones who was already her contact for sickness and absences. (749-750)

221. Ms Catherine Vickery, General Counsel, Company Secretary, e-mailed the claimant on 21 June 2017 regarding her miscarriage of justice disclosure. She stated that the disclosure raised concerns about the grievance and appeal processes. Although her disclosure letter of 15 June 2017 provided some detail, it did not provide sufficient detail for Ms Vickery to take matters further at that stage. She asked the claimant to provide clarification on which points of her grievance were upheld and what questions she considered had been left unanswered through the grievance and appeal processes. Ms Vickery was also unclear about the claimant's expectation that the matter be investigated confidentially. Once the claimant provided the further information requested, further consideration would be given. (888)

222. In considering the documentary evidence, we find that although the claimant was asked Ms Vickery to provide further details, she failed to do so.

<u>Investigation into the suspension allegations</u>

223. Ms Caron Hitchen, an independent Human Resources Consultant, was instructed by the respondent's legal advisers in or around June 2017, to conduct the investigation into the claimant's conduct in place of Mr Adrian Brady. She was aware that the initial allegations against the claimant were (i) inappropriate behaviour with a consultant whilst at work, and (ii) staff felt intimidated by her. She was briefed by Mr Rosenblatt and was informed that Ms Hanna Quttaineh, Human Resources Business Partner, would be her contact. Both Ms Hitchen and Mr Rosenblatt agreed that she, Ms Hitchen, would not rely on Mr Brady's investigation because she felt that the investigation should be carried out from her perspective. She was aware that the claimant had lodged a grievance against Mr Brady although she did not know the details of it but was of the view that relying on his investigation could compromise the perceived fairness of her investigation. She did take into account the initial statements made by some members of staff to Mr Eke. Her explanation being that these were contemporaneous documents.

224. After having had a discussion with Ms Quttaineh about witnesses, Ms Hitchen wrote to Ms Quttaineh setting out what she believed should be the allegations to be investigated. These were:

    a. inappropriate behaviour with a colleague whilst at work;

    b. favourable treatment of a colleague in relation to allocation of paid work and On-call duties;

    c. being misleading about her whereabouts, unavailable and not contactable whilst on duty; and

    d. intimidating behaviour towards staff.

225. Ms Hitchen had the group complaint letter and the official statements from those who raised concerns initially about the claimant's conduct. We summarise their accounts. Ms Sally Brown, Imaging Administrator, stated that the claimant was not available as senior manager when required; was not where she said she would be; when messages were left at either Kings Oak or Cavell hospital where she said she would be, they would go answered and she could not be located; a member of staff reported that they had opened a door that was closed and was visibly taken aback by what they saw involving Dr Patel and the claimant. She wrote that Dr Dabbagh had said to her that he had seen the claimant rubbing her hands up and down Dr Patel's chest. Another member of staff, Ms Sarah Hodgson, came to her visibly upset because she had walked into Dr Patel's office and saw the claimant sitting on his lap. Ms Brown also stated that Dr Patel would often leave patients waiting. There were significant issues with processing payments and additional hours which came under the claimant's management. Ms Brown claimed that the Imaging Department could not continue as it was at the end of a long road. (341-343)

226. Dr Dabbagh sent an e-mail to Mr Brady on 2 December 2016, to confirm that he had witnessed an incident in which the claimant had run her hands up and down the neck and chest of Dr Patel. (464)

227. Ms Zunaira Raza, Deputy Imaging Manager, wrote that at the December 2015 Christmas party, she and her team had seen the claimant and Dr Patel rubbing each other under the dinner table and dancing very intimately as well as leaving the party together. On 5 January 2016, she found a card and gift expressing Dr Patel's love for the claimant. The claimant, however, had told the department that rumours about a relationship with Dr Patel were false and very hurtful. Ms Raza stated that on one occasion she found dirty underwear in the office drawer at Kings Oak hospital which she suspected belonged to the claimant. On several occasions she was left to run the department on her own at a time when she was unsure of the processes as she was new in the role. She suffered from anxiety and stress due to lack of support and guidance from the claimant. When the claimant was either absent or late, these dates

would coincide with Dr Patel's clinics being cancelled. This was from November 2015 to April 2016.

228. On 4 December 2015, she suspected that the claimant and Dr Patel had sneaked off together during the afternoon. The claimant was then spotted in a public house with Dr Patel during working hours when she had told staff at Kings Oak that she was going to Cavell. On 1 July 2016, she was seen by the front of house reception at 10pm, very dressed up. She then went to the Kings Oak building and disappeared around the corner. Dr Patel's car was waiting for her. Ms Raza believed that the claimant had come in earlier and had appeared later to clock out of the BMI system. She had lied to her and at times was seen with Dr Patel acting inappropriately. She would come into work with love bites on her neck and would discuss her private life quite openly. Her behaviour was unprofessional. Ms Raza asserted that Ms Ellwood had been targeted by the claimant as the claimant believed that she was spreading rumours about her. On 9 September 2016, she told the claimant that she was considering whether she wanted to continue to work for the respondent as the environment within the department was full of negativity and low morale, as well as an underlying lack of respect. (434-435)

229. Ms Ellwood wrote that her issues about pay continued from May 2015 and remained unresolved in September 2016. The claimant would not listen and would lie to 'save her skin' and would not be where she said she would be. She would say to Ms Ellwood that she would be leaving to go to Enfield, the local town, to get some Panadol pain killer tablets, or petrol for her car. She would avoid meetings or would not turn up. She would fail to properly address issues, such as patient queries, setting up procedures and arranging for radiologists' fees to be paid correctly. Dr Patel was removed from the On-call rota as staff were told in November 2015 that MRI breast scans carried out at Cavell hospital would be vetted by him. The claimant had not supported her and brought the department to a "sorry state". (332)

230. Ms Emma Hopkins, Imaging Administrator, wrote that the claimant had told her that she was a contracted member of staff but that was not the case as she was asked for timesheets by another manager and had been incorrectly paid on an hourly basis. When this was raised with the claimant, she responded by saying that it was Mr Eke's fault. Ms Hopkins also stated that she did not know where the claimant was and would not be where she said she would be. (331)

231. Ms Sarah Hodgson, Healthcare Assistant, sent an e-mail on 4 October 2016, confirming that at the end of August, she had been assisting Dr Patel and went to return patients' notes to him in his office. On opening the door, she saw the claimant sitting on his lap. When the claimant saw her, she quickly jumped off his lap. Ms Hodgson felt extremely embarrassed and awkward as it made her working relationship with Dr Patel uncomfortable. (368)

232. After reading the statements, Ms Hitchen interviewed Ms Natalie Blythe, Lead Clinical Cardiac Physiologist (1025-1027); Ms Maria Staikos, Radiographer (1015-1016); Ms Samia Ramdani, Radiographer; (1017-1019); Ms Sally Brown, Imaging Administrator (993-995); Ms Sadika Naidu, Imaging Administrator; (1011-1014), Mr Dabbagh (1022–1024); Estelle Griffiths (1008 – 1010). Ms Raza (1004 – 1007). Ms Hopkins (983-985), Ms Hodgson (997-999). Ms Ellwood (987-989). These interviews covered the period from 14 to 18 July 2017.

233. After conducting her interviews, Ms Hitchen wrote to the claimant on 17 July 2017, inviting her to an investigation meeting on 28 July 2017. She repeated the four allegations under investigation. This was the first time the claimant became aware that she was the subject of an investigation in relation to four allegations. Up until that point, she was aware from the suspension letter sent to her by Mr Brady dated 18 October 2016, that there were two allegations under investigation, namely her alleged inappropriate behaviour with a consultant whilst at work and not supporting her staff and some consultants.

234. The four allegations were the ones she discussed with Ms Quttaineh, HR Business Partner, at the commencement of her investigation. (912-913) The claimant was advised of her right to be accompanied by either a work colleague or a trade union representative. She was informed of possible outcomes, namely a decision that no further action be taken, or invoking disciplinary proceedings.

235. The meeting went ahead on 28 July 2018. The claimant attended with Ms Diane Dorkin as her companion. She claimant repeated her concerns that Ms Lomas Makeda, Ms Wakefield's PA, should not be taking notes of the meeting as Ms Wakefield was going to be interviewed by Ms Hitchen as part of the investigation.

236. In relation to Mr Brady's investigation, Ms Hitchen said that she kept only the statements obtained by him as part of his investigation.

237. In respect of the allegation made by those interviewed, of being in her office with Dr Patel and locking the door, she said that she only locked her door to get changed. She denied sitting on Dr Patel's lap with her arm over his shoulder. She could not recall Dr Patel coming in from the rain and her drying him with wet papers. She was unaware that Dr Patel was allocating work himself and denied instructing staff to allocate work to him.

238. She denied that she was unavailable to her staff and said that she had raised with management the problems she had in contacting her staff due to the weak phone signal at Cavell hospital. She did not recall being unavailable in relation to the patient who had suffered a cardiac arrest. She insisted she was always available to her staff.

239. She said that she would go into town as often as twice a week to buy pain killer tablets, sanitary towels and other items during her lunch breaks. She

admitted saying that she rang in to say that she was stuck in traffic but was at a train station. On that day she was engaged in divorce proceedings. Ms Hitchen put to the claimant that she seemed to be saying that she was stuck in traffic whilst on the train. The claimant asserted that staff concerns about her being unapproachable were because of jealousy because she was in a relationship with Dr Patel.

240. In relation to Ms Karen Ellwood, she said that Ms Ellwood had performance issues and was about to taken down the disciplinary route.

241. Although the claimant said to Ms Hitchen that she thought Mr Brady's investigation had been completed, Ms Hitchen's response was that it had not, and it was her decision to add two further allegations. (974-981)

242. After her meeting with the claimant, Ms Hitchen spoke to Ms Wakefield on 1 August 2017, who said that one day the claimant came into the office with her neck covered in love bits. On another day, she admitted to her that on the day when the Imaging Department was fully stretched, she was at the nearby Robin Hood public house with Dr Patel. Ms Wakefield was aware that Ms Ellwood was making errors and there were performance issues. She stated that Ms Sarah Hodgson was not easy to manage and described the claimant as "difficult to manage as she was a slippery character and was manipulative". (1032 – 1036).

243. Following on from her interview with Ms Wakefield, Ms Hitchen enquired into the performance issues raised by the claimant concerning Ms Ellwood; Ms Sally Brown; Ms Jodie Cecil; and Ms Sadika Naidu. From the information obtained, she noticed that the claimant had logged performance concerns with BMI Manage in respect of them on 19 September 2016, but the matter did not progress as BMI Manage were unable to speak to her prior to her suspension.

244. In her witness statement, paragraph 90, Ms Hitchen considered whether to interview Dr Patel as part of her investigation. She decided that it was not necessary as he was likely to give an account consistent with the account given by the claimant. She wrote in her report:

> "In effect, I treated the matter as though I had spoken with Dr Patel and his account had supported everything Morwenna was telling me."

245. In relation to the four allegations, as regards "inappropriate behaviour with a colleague whilst at work (relating to a personal relationship with Dr Patel)", Ms Hitchen concluded that there was a wealth of coherent and consistent evidence that showed the claimant and Dr Patel engaged in inappropriate behaviour in the work place. She was satisfied that the evidence she had collected showed that there had been:

> "i. Private meetings between Morwenna and Dr Patel in a locked office, with the result that Morwenna was not available to her colleagues";

> "ii. Physical contact between Morwenna and Dr Patel which had included her sitting on Dr Patel's lap and standing behind him with her hands on his shoulders"
>
> "iii Flirtatious behaviour, by which I was referring to them being overly tactile with one another and engagement in behaviour which could have some sexual reference, for example, the incident with the lollipop which Sadika had told me about"; and
>
> "iv Intimate dancing and close physical contact at the dinner table at the work Christmas party in 2015 which was particularly inappropriate for Morwenna to have engaged in, given her position as a manager".

246. As regards "favourable treatment of a colleague in relation to allocation of paid work and on-call duties", Ms Hitchen was not satisfied that there was evidence in support of this allegation.

247. In relation to "being misleading about whereabouts, unavailability and not contactable whilst on duty", Ms Hitchen concluded that there was evidence in support of this allegation. The claimant had acknowledged that her staff encountered problems contacting her but described them as a communication issue which the management team encountered. Ms Hitchen was satisfied that the evidence she had collated showed that the claimant was frequently not available to her team. On one occasion she was in the Robin Hood public house with Dr Patel for over an hour. When the matter was raised by Ms Wakefield with her, her response was that she had been instructed by Ms Wakefield to take her relationship with Dr Patel off site. The problems with the phone signal at Cavell hospital, did not absolve the claimant from her responsibilities and obligations to her team. Ms Hitchen's view was that the claimant's duty was to support her staff. She was a senior manager and knew that there were issues with the phone signal. She should have made arrangements to ensure that she could be contacted. In addition, she had not raised concerns about the phone signal when off site during working hours or when travelling between sites. Ms Hitchen felt that the evidence in relation to this allegation was compelling.

248. As regards "intimidating behaviour towards staff", she concluded from the evidence and was satisfied that the claimant's treatment of Ms Ellwood was bullying and intimidating in nature and that this was the perception of Ms Ellwood rather than those had witnessed it.

249. Having regard to her findings and conclusions, Ms Hitchen recommended three out of the four allegations proceed to a disciplinary hearing as there was a case to answer. (947 – 1069)

250. She told the tribunal that the claimant did not mention anything about a bladder condition during the investigation meeting which lasted for over one and a half hours.

251. Her report was sent to BMI Manage on 29 August 2017.

252. After considering Ms Hitchen's investigation report and evidence before us, we find she did not interview Dr Patel and Dr Fawzia Imtiaz-Crosbie, Consultant Breast Surgeon, who featured in the account given by Ms Sally Brown who stated that on one occasion, Dr Imtiaz-Crosbie walked in to a room and jumped back when she saw the claimant and Dr Patel together. Ms Brown did not see what she believed Dr Imtiaz Crosbie saw. (994)

253. Had Ms Hitchen interviewed Dr Imtiaz-Crosbie what she would have said is in her witness statement before us:

> "I have never left a room because of seeing any inappropriate behaviour between the claimant and Dr Patel", paragraph 9.
>
> "It is absolutely normal for people to close their office doors all the time. When I am consulting with a patient or discussing one of my patients I would not do so with the door open", paragraph 11.

254. She also stated that the radiology department was on the ground floor of the same building and is a communication "black hole", paragraph 14.

255. We make the following evidential observations: (i) Ms Hitchen was asked by a member of the tribunal, "It was Dr Imtiaz-Crosbie who saw something as alleged by Sally Brown. She had first-hand evidence". Ms Hitchen replied, "I could have interviewed her".

256. (ii) From the various accounts given, there was the absence of dates when the alleged events occurred which would have enabled the claimant to obtain documentary evidence as to where she was at the time and what she was doing.

257. (iii) In evidence Ms Hitchen accepted that perhaps she should have spent more time focussing on the times and places of the events. She accepted that she did not check the respondent's time recording system. This is relevant as one of the witnesses, Ms Raza's account, who stated that the claimant came to work, on a particular occasion, at 10pm to clock out. A check of the respondent's records may have supported or questioned that account.

258. (iv) Ms Hitchen did not look at the physical locations where these alleged incidents took place, for example, whether the doors to the rooms were lockable, that is, whether they automatically lock once closed? She also did not ask any of the witnesses to give their accounts on how they knew the doors were locked.

259. (v) She accepted in evidence that she did not ask the claimant for a list of people the claimant wanted her to interview.

260. (vi) She failed to interview Dr Patel whose evidence could have opened up new lines of inquiry, for example, he told the tribunal that it was physically impossible for the claimant to sit on his lap in his office and that Ms Raza was manipulative and was motivated by jealousy.

261. (vii) She did not put to the claimant matters which subsequently formed part of her report and conclusions, such as, the allegations in relation to the claimant and Dr Patel's conduct during the December 2015 Christmas party, or that the claimant attended work with love bites on her neck. Had the latter been put to the claimant by Ms Hitchen, she would have explained that the marks on her neck were the result of her former partner trying to strangle her and that she wore a splint on one of her wrists following the assault.

262. (viii) Had Ms Hitchen enquired, she would have discovered that during the grievance process, it was accepted that the issues in relation to the claimant's dress and behaviour at the Christmas party had been formally closed by the respondent. Ms Hitchen accepted in evidence that if she was made aware of this finding, she would have changed her approach and closed that aspect of her investigation.

263. Ms Hitchen admitted in evidence that not all of the allegations made by the witnesses, namely Ms Hopkins, Ms Brown, Ms Raza, and Ms Naidu, were put to the claimant even though they were included in her report. For example, Ms Raza referred to the claimant and Dr Patel rubbing each other under a table during the Christmas party but that was not put to the claimant. (952 – 953)

<u>The disciplinary hearing</u>

264. On 28 August 2017, the Head of Human Resources Operations wrote to the claimant inviting her to a disciplinary hearing scheduled to take place on 5 September 2017, the purpose was to consider the following allegations:

1. "Inappropriate behaviour with a colleague whilst at work.

   This behaviour is associated with a personal romantic relationship with Dr V Patel, radiologist within the department. Examples include:

   - Private meetings between LMH and VP in locked office;
   - Close physical contact including sitting on VP's lap in the office and standing behind with hands on his shoulders;
   - Flirtatious behaviour with VP in the work place including patient areas;
   - As the departmental manager at the department's Christmas party 2015, LMH was seen dancing very intimately with VP and having close physical contact such as rubbing each other under the dinner table.

2. Favourable treatment of a colleague in relation to allocation of paid work and on call duties.;

3. Being misleading about her whereabouts, unavailable and not contactable whilst on duty;

4. Intimidating behaviour towards staff, specifically targeted at Karen Ellwood."

265. Despite Ms Hitchen's finding that there was no evidence in relation to the allegation of "favourable treatment of a colleague in relation to an allocation of paid work and on call duties", it was still one of the allegations the claimant faced at the disciplinary hearing.

266. The claimant was informed that if she intended to call any witnesses, she must provide their names and that she was responsible for arranging their attendance. She was warned that one possible outcome may be her dismissal. She was advised of her rights to be accompanied by either a trade union representative or a work colleague. She was also advised that if she required any reasonable adjustments at the hearing, she should inform the head of human resources operations. (1072 – 1073)

267. On 30 August 2017, the claimant lodged two further grievances, numbers 5 and 6. The fifth grievance was an allegation of the respondent's failure to follow proper procedure in relation to its policy, following protected disclosures made by the claimant on 19 September 2016 and 24 March 2017. She asserted that the respondent failed to undertake investigations into the allegations raised by her and had breached its duty of care. (1076)

268. The sixth grievance was with reference to holding a disciplinary hearing based on insufficiently detailed and malicious statements from staff from both hospitals. (1078 – 1079)

269. Mr Jason Rosenblatt, head of HR operations, e-mailed the claimant the following day stating that the grievances would be considered as part of the disciplinary process. (1080)

270. In the claimant's e-mail to Ms Quttaineh, dated 30 August 2017, she raised a number of queries: she was having difficulty accessing Ms Hichen's report; she asked why the allegation in relation to favourable treatment had been included when she had been exonerated by Ms Hitchen; and that she would like to call a list of individuals to give evidence including Dr Imtiaz-Crosbie and asked for permission to contact them. (1081 – 12082).

271. We find that the claimant was experiencing problems receiving and accessing documents. Once received they were forwarded to her lawyer. Accordingly, the hearing was rescheduled to take place on 13 September 2017.

272. The claimant wanted to question the witnesses who gave statements, but Mr Rosenblatt took the view that this would become confrontational.

Instead, he invited her to provide him with a list of questions which he would then put to the relevant witnesses. He wrote that the purpose of the meeting was to consider the facts outlined in Ms Hitchen's report and that he was prepared to accept any documents on the day of the hearing. (1108)

273. The hearing went ahead on 13 September. The claimant was accompanied by Ms Dorkin. Mr Rosenblatt conducted the hearing. Ms Lomas was the notetaker. He outlined the four allegations but stated that the second allegation, namely favourable treatment of a colleague in relation to allocation of paid work and on-call duties, was not going to be considered. He said, for the first time, that the allegations amounted to gross misconduct, a possible outcome being dismissal.

274. At the outset he said that the case would be taken as read by all parties and he would start with the claimant presenting her mitigation against the allegations, followed the questions.

275. We pause at this stage to refer to the respondent's disciplinary policy. This states, at paragraphs 12.3.5 and 12.3.6, the following:

> "A case against the employee shall be presented first, including any witness statements;" and the employee,
>
> "12.3.6 should be allowed to raise questions and query witness statements" (204)

276. The claimant considered the statement made by Mr Rosenblatt to proceed to mitigation, as the respondent having pre-judged the case.

277. We make this further observation, that mitigation normally occurs after there is a finding of guilt.

278. The claimant was also concerned that Mr Rosenblatt had decided to consider her two grievances as part of the disciplinary process.

279. After some prevarication, the claimant admitted that she began a relationship with Dr Patel in April 2016, but her personal life did not affect her professional behaviour. She denied the allegations put to her and promised to send Mr Rosenblatt further evidence and questions for the witnesses the following Friday. (1128 – 1137)

280. Although she had documents in her possession during the hearing, she did not provide copies to him.

281. In her e-mail dated 18 December 2017, she attached the questions Mr Rosenblatt should put to the witnesses she named. (1180 – 1186)

282. On 15 September 2017, she e-mailed her statement to him in response to the four allegations. (1139 – 1150)

283. She continued to send further information to him and on 20 September, she informed him that she would be on sick leave and was due to undergo surgery.

284. Having received the claimant's list of questions, Mr Rosenblatt met with staff members at Kings Oak and Cavell hospitals on 27 September 2018 and put her questions to them. He recorded their responses. He was of the view that their responses were largely consistent with their earlier statements given to Ms Hitchen. He was, however, not able to speak to all the witnesses the claimant had named as some were either not available, such as Ms Natalie Blyth, who was on maternity leave, or did not respond to his request.

285. He spoke to Ms Ellwood, Ms Hopkins, Ms Hodgson, Ms Brown, Ms Naidu, Ms Raza and Ms Field. He considered whether he should speak to Dr Patel before concluding the initial investigation but decided not to for the same reasons as given by Ms Hitchen. (1248 – 1254)

The claimant's dismissal

286. In an email dated 29 September 2017, he informed the claimant that he had decided to dismiss her effective on that day and that she would be referred to her professional body. His full reasons would follow. (1276)

287. In his letter dated 6 October 2017, he set out, in detail, his outcome in respect of each allegation. He stated that the claimant's grievance in respect of the delay in dealing with the allegations, following her suspension, was due to her actions in raising "multiple grievances" together with appealing the outcomes which contributed to the delays experienced.

288. In respect of the allegations, he wrote the following:

> "Allegation 1
>
> **Inappropriate behaviour with a colleague whilst at work**
>
> From the investigation report, it stated that there were numerous and consistent accounts of inappropriate behaviours whilst at work and also whilst representing your role of departmental manager at the Christmas party in 2015. This behaviour is associated with a personal romantic relationship with Dr Patel, Radiologist within the department. Examples include:
>
> - Private meetings with Dr Patel in a locked office;
> - Close physical contact including sitting on Dr Patel's lap in the office and standing behind him with hands on his shoulders;
> - Flirtatious behaviour with Dr Patel in the workplace including patient areas;

- At the Christmas do in 2015 you were seen dancing very intimately with Dr Patel and having close physical contact such as rubbing each other under the dinner table.

In response to this allegation you said that you have never acted inappropriately with a colleague and that this was one person's word against another. Furthermore, you denied being inappropriate at the Christmas party. You denied the above allegations and you refused to initially answer the question if you and Dr Patel were in a relationship.

Findings

Due to the number of statements received and numerous accounts of certain situations which are broadly similar in content, it is reasonable to believe that these events did in fact occur and are true.

Furthermore, it is noted that your line manager at the time, Jayne Wakefield had spoken to you on more than one occasion regarding your behaviour with Dr Patel in the workplace.

Therefore, I believe that you were aware of your behaviour and how it maybe impacting on others in the workplace.

It is noted that you deny these allegations in their entirety and that you continually deny acting inappropriately at any time.

Consequently, on the balance of probabilities I am upholding this allegation as I believe the staff have no reason not to tell the truth about this matter and consistently.

Allegation 2

Favourable treatment of a colleague in relation to allocation of paid work and on-call duties

As already stated this allegation was not considered as part of this disciplinary process.

Allegation 3

Being misleading about your whereabouts

From the investigation report it states that there was compelling consistency of evidence from witnesses accounting to you being expected on one site, being told by staff that you were at another site and not being located at either.

There are other examples of you being elsewhere such at the Robin Hood Pub, train station and town and not being available to your team and manager.

There are also numerous and frequent accounts of you not being contactable by phone to your manager or team members.

In response to this allegation you stated that you were contactable that had you not been contactable, colleagues should have tried harder to reach you. It was confirmed

by you and your colleague that at times it was difficult to speak with someone over both hospital sites. You believe that you were available to your staff however due to lack of a phone signal across both sites that hindered you being contactable.

You refuted that you were not available for a cardiac arrest situation.

You also believed that you were being single[d] out.

Findings

Due to the number of statements received in relation to this allegation I have to agree with the findings of the investigation that your lack being contactable was purely due to a lack of a mobile phone signal at both hospital sites and in any event alternative arrangements for contact such as desk phone and pagers could and should have been made.

It is noted that you deny these allegations in their entirety and that you continually deny not being contactable.

Consequently, on the balance of probability I am upholding this allegation as I believe the staff would have no reason not to tell the truth about this matter and your lack of insight in relation to you not being contactable and its impact on the teams which are responsible for is evident.

Allegation 4

Intimidating behaviour towards staff

From the investigation report, it was stated that you consistently demonstrated intimidating behaviour towards Karen Ellwood, Office Manager.

The report states and in your own words your "robust" management was evident in particular with Ms Ellwood.

From your statement of case, you claim that you were performance managing Ms Ellwood however could not provide any documentation to support this and the evidence from the investigation report stated that you only opened up a formal case with BMI Manage on 19 September 2016, therefore it is probable that the behaviours which you demonstrated would have been perceived as bullying and intimidating.

As part of your case you stated that you were performance managing a number of staff which also happened to be the members of staff (other than the consultant) that made the initial complaint against you.

Unfortunately, like Ms Ellwood, you were unable to provide any documentation around this nor were there any formal cases logged with BMI Manage.

You were of the opinion that it was due to your strong and robust management and our intention to performance management certain staff was the reason that these staff members got together and made up these allegations against you.

Findings

On the balance of probabilities, together with the lack of evidence provided by you this allegation is upheld on the basis that you [did] not provide any evidence to support your case that you were managing either informally or formally members of your team and as such your management and communication styles is a cause of concern.

Conclusion

Having reviewed all the of the information compiled by the investigation and the information which you have also submitted, together with the additional information submitted by the witnesses as part of your questioning I have made the decision to summarily dismiss you on the grounds of gross misconduct.

In coming to my decision, I considered all of the available options and considered the appropriateness and impact that a written warning would have.

Throughout the hearing it was clear to me that you appear to have very little insight in to the impact in which you had on your colleagues and I am of the opinion that you went to great length to deceive your colleagues as to your whereabouts which is strongly evidence throughout the investigation report.

During the hearing, I asked if you were in a relationship with Dr Patel and whilst at first you declined to answer this question you did admit to being in a relationship with him now. However, you were at pains to clarify that you were not in a relationship with him at the times stated within the investigation report.

In considering this point I find this unbelievable that you only started having a relationship with Dr Patel following your suspension and I take it that you have tried to mislead a formal process in their thought process.

Furthermore, having spoken to witnesses directly, it was clear that you only started having a relationship with Dr Patel following your suspension and I take it that you have tried to mislead a formal process in their thought process.

Furthermore, having spoken to witnesses directly it was clear to see that they were both afraid of the prospect of your returning to the hospital based on how you treated them previously. It was made very clear to me that should you return that staff would resign.

It is because of the above that I believe that it would not be fair and reasonable to issue you with a sanction of anything less than dismissal.

As part of this decision and as you have been dismissed on the ground of gross misconduct, I would like to make you aware that a "fitness to practice" referral will be made to your professional body informing them of this decision.

You have the right to appeal this decision and should be made in writing within 14 days from the date of this letter. Your appeal should be addressed via email to Christine Zimber, Head of Indirect and Capital Procurement ……" (1293-1299)

289. In cross-examination Mr Rosenblatt acknowledged being made aware of Ms Sharp's outcome in respect of the Christmas party matter having been closed. It was considered by him because he had taken into account what Ms Jayne Wakefield had said to Ms Hitchen. Although he denied that the

Christmas party incident was not reopened, he made express reference to it and he considered it as part of the allegation of inappropriate behaviour with colleague whilst at work. He cited the Christmas party as an example of one of the inappropriate behaviours. We, therefore, consider that the Christmas party incident was a material factor in the decision to dismiss the claimant.

290. Our concerns about the inadequacy of Ms Hitchen's investigation equally apply to Mr Rosenblatt's conduct of the disciplinary proceedings. He failed to interview witnesses who might be supportive of the claimant's account of events, such as Drs Patel and Imtiaz-Crosbie.

291. He did not seek to question more closely the dates and times when the alleged incidents took place and adopted what Ms Hitchen found and concluded.

292. The claimant was allowed to call witnesses relevant to her case as stated in the invitation to the disciplinary hearing, however, Mr Rosenblatt resiled from that and only invited her to provide a list the questions he would then to them. There was no opportunity afforded to the claimant to ask supplementary questions following on from the answers given. As she was not present, she could not challenge the accuracy of what Mr Rosenblatt recorded. He was in total control of that process.

293. During the course of his evidence, he accepted that more effort should have been made to pinpoint exact dates and times of the alleged events. He accepted that in relation to some of the alleged incidents, not even approximate times had been identified by the witnesses or by Ms Hitchen.

294. He also took into account views allegedly expressed by some members of staff that they were not in support of the claimant's return to work, but she did not have the opportunity to challenge their views yet this was one of the reasons why the decision was taken to terminate her employment.

<u>The appeal</u>

295. On 20 October 2017, the claimant sent her appeal against her dismissal to Ms Christina Zimber, Head of Indirect & Capital Procurement. She set out a history of her treatment; the delay in dealing with the disciplinary allegations; not addressing properly her protected interest disclosures; the paucity of the evidence in support of the allegations; and that she had been referred to her professional body, Health and Care Professions Council, in respect of her fitness to practice. It was a very lengthy and detailed document. (1329 – 1349)

296. The referral to her professional body was made on 10 October 2017, by Mr Andrew Jeavons-Fellows, Executive Director, following from her dismissal. (1304 – 1314)

297. The Council then wrote to the claimant on 13 October 2017, informing her that a concern had been raised about her fitness to practice and that the matter would be investigated. (1320 – 1321)

298. On 23 October 2017, Ms Zimber wrote to the claimant and invited her to structure her grounds of appeal under certain sub-headings which claimant declined. The claimant also expressed her concern that Ms Zimber stated that "the purpose of the appeal was not re-hear the facts of the case which have already been considered, but rather to look at the thought process behind the decision made". (1348 – 1351)

299. The appeal hearing was on 5 November 2017. At the start, Ms Zimber stated that the purpose of it was not to rehear the case but to consider the following:

> "Was the disciplinary policy followed?
> Was the decision made, fair and reasonable?
> Was the decision made within the band of reasonable responses?
> To deal with any grievances"
>
> "The case will be taken as read by all parties therefore we shortly start the process by you presenting your mitigation against the decision which will be followed by questioning".

300. This approach seemed to have mirrored the approach taken by Mr Rosenblatt during the disciplinary hearing. The claimant said that she had asked for her solicitor to be present, but this was declined. Instead, she asked for Ms Dorkin to attend but she was ill. She then requested a change of venue to one more convenient and this was also rejected. She, therefore, did not have anyone to accompany her at the hearing.

301. She outlined her case as set out in her grounds of appeal. (1446 – 1460)

302. In Ms Zimber's outcome letter dated 13 December 2017, sent to the claimant, she decided to uphold Mr Rosenblatt's decision and wrote the following:

> "……In coming to my decision, I have read your appeal and considered our conversation as part of the appeal.
>
> As you were made aware, one of the areas I wanted to explore with you was where you felt policies have not been followed. Unfortunately, other than a significant time being taken to conclude this case you were unable to provide me with any evidence to show where the policies were not adhered to.
>
> It is noted that this case has taken some time to conclude and in part I do accept that this may be down to the company's processes, it is also noted that the process has been elongated due to you raising numerous grievances and appeals which has prevented this process moving forward.
>
> Having reviewed the timeline I would suggest that you had it within your power to conclude this matter at a much earlier stage.

Notwithstanding this point, in considering the delays I considered whether you were put at any detriment as a result of the delays and have concluded that you have not.

Finally on this point, it is further noted that the investigation was conducted independently and thoroughly by an experienced HR consultant, Caron Hitchin.

Considering whether the decision to dismiss you was fair and reasonable and within a band of reasonable responses, the allegations put to you clearly fall within the band of gross misconduct and as such you were informed that an outcome following your disciplinary hearing may result in your dismissal.

I believe that the decision made to dismiss you fall within the band of reasonable response and as such was fair and reasonable in accordance with the allegations made against you.

Contained within the hearing you appear to direct much of your attention to Jason Rosenblatt, Head of Human Resources where you suggest that he acted inappropriately and was aggressive towards you.

The notes of the meeting do not support any allegation that "other" conversations were held.

Having reviewed the notes of the disciplinary hearing and having spoken to Mr Rosenblatt about this matter I can find no evidence to support this claim via the notes nor through conversation with Mr Rosenblatt.

You suggested within the appeal that you were minded to raise a grievance against Mr Rosenblatt however you did not wish to "poke the bear". Whilst I did not explore this with you in any great detail as to what this meant it is noted that you were aware of the grievance procedures and not been restrained in raising grievances in the past therefore I do not see why this would be any different now.

Having read the notes and outcome letter of the disciplinary hearing and reflect on the appeal it would appear that you were unstructured and were unable to provide evidence and examples to the most basic of questions.

From the appeal you appeared intent in repeating the hearing and made a number of unsubstantiated statements without providing any actual evidence.

From reading the disciplinary notes and outcome letter and as already referenced above it is unfortunate that you were unable to provide any substantial supporting evidence neither at either the disciplinary hearing nor at the appeal, but rather you chose to make unsubstantiated statements and regularly went off the point when asked questions and I had to continually bring you back to the question being asked.

During the appeal hearing no evidence was presented by you showed BMI had not followed the disciplinary policy, nor how the decisions were not fair and reasonable and within the band of reasonable responses.

I noted that you disputed all allegations during the hearing, however, the appeal hearing was not to rehear the case but to concentrate on process and fairness both of which in my opinion have been adhered to.

> From my review and the appeal hearing I believe the correct decision was made in each of three allegations stated within the disciplinary outcome letter.
>
> Within the meeting there were a couple of points I noted and confirmed I would review;
>
> - Confirm with Mr Rosenblatt that the evidence submitted about BMI Manage was reviewed.
> - Speak to Mr Rosenblatt with reference to the allegation that "other" conversations were held at the disciplinary hearing.
>
> Having reviewed the above points I can confirm that all the information was reviewed and Mr Rosenblatt is unaware of what "other conversation" were held within a formal meeting. As already stated, I have reviewed in some depth the notes of the hearing where again there is no evidence to support "other conversations" were had.
>
> In conclusion and having reviewed the above, the above points even if proven would not have had an impact on the decision BMI made in your dismissal.
>
> This appeal represents the final stage of the disciplinary process and whilst I appreciate that my decision will be disappointing to you, you have no further rights of appeal." (1469 – 1471)

303. The claimant's fifth and sixth grievances were dealt with by Mr Rosenblatt as part of the disciplinary hearing. It was apparent to him that they were related to the disciplinary process. The investigation into the claimant's behaviour began in November 2016 and was important to Mr Rosenblatt that the process be concluded without any further delay.

304. Grievances five and six, having regard to Mr Rosenblatt's outcome in relation to the disciplinary hearing, were not upheld. The claimant did not appeal.

Claimant's grievance against Dr Zaid Dabbagh

305. In an e-mail dated 13 September 2017, sent to Mr Jeavons-Fellows, the claimant attached her grievance dated 30 August 2017, against Dr Dabbagh, in which she alleged inappropriate sexual behaviour. She stated that he either sexually harassed her, bullied her or tried to imply that he "could help" her with the other consultants in return for sexual favours. He had inappropriately touched her thigh twice and left buttock and reported it to Mr Eke and Ms Turner. Ms Turner's alleged response was to say, "leave it". The claimant explained that she had kept it quiet because she had no other choice as Dr Dabbagh was in a position of power as a consultant. She turned down his sexual advances and touching. She invited Mr Jeavons-Fellows to investigate her allegations. (1119 – 1121)

306. The grievance was investigated by Mr Rosenblatt who informed the claimant on 12 October 2017, in writing, that it would be on the papers because her employment had come to an end. He asked her a series of questions about the allegations, including why she had not raised her

concerns formally given that her view was that Dr Dabbagh had been a risk to patients and to staff for some time.

307. On 18 October 2017, she responded stating that she needed more time to answer the questions.

308. Mr Rosenblatt met with Dr Dabbagh on 19 October 2017 and put to him several questions. Dr Dabbagh denied having ever engaged in any inappropriate behaviour with the claimant or even suggesting that he could further her career in exchange for sexual favours. He could not explain why the claimant had made the allegations and surmised that it may be that she had seen the statement he made about her during the disciplinary process. (1322 – 1323)

309. On 26 October 2017, the claimant provided answers to the questions put to her by Mr Rosenblatt and wanted a full investigation; for Dr Dabbagh's practising privileges to be suspended; and an apology "for all the consultants behaviour towards her". (1356 – 1359)

310. Having considered the evidence, Mr Rosenblatt decided that claimant's grievance should not be upheld. It was noted that her grievance letter against Dr Dabbagh dated 30 August 2017, was the day after the investigation report was sent to her. He was not persuaded by her explanation for the delay as once she had been suspended, she no longer feared retribution because she was in a position to speak up. Although she stated that Dr Dabbagh had sexually harassed her in the presence of Dr Patel, Dr Patel had remained silent on the matter and had not raised concerns nor contacted the General Medical Council as he would be required to do under the professional code of conduct. Despite the claimant's concerns about patients' safety, she did not formally report Mr Dabbagh for two years which Mr Rosenblatt found very difficult to accept given the code of conduct to which she was bound by.

311. Although that the claimant said that the matter had been reported to the Police, when Mr Rosenblatt requested details of the crime reference number, she stated that she had not been provided with one but expected to get one at a forthcoming interview. (1381)

312. On 6 October 2017, she e-mailed the police the alleged sexual harassment by Dr Dabbagh. (1290 – 1291)

313. On 5 November 2017, he wrote to her to inform her of his decision not to uphold her grievance. (1382)

314. The detailed outcome was sent on 10 November 2017. (1397 – 1399)

315. Mr Rosenblatt said in evidence that he was not aware of the claimant's disabled condition until she issued her claim form before the Employment Tribunal. We find that there was no evidence to show that he was aware prior to the presentation of the claim form.

316. The claimant appealed Mr Rosenblatt's decision on 28 December 2017. (1477a – 1477b)

317. The appeal hearing was held on 31 January 2018 and heard by Ms Sarah Ellis, Head of Group Audit, who, having heard the claimant's account, dismissed her appeal. (1501g – 1501l) (1501r – 1501u)

The grievance in relation to "Acting Manager"

318. The appeal against the grievance outcome in respect of the use of the description "Acting Manager", was heard by Ms Claire Armstrong, Executive Director, Clementine Churchill Hospital, who dismissed the appeal on 25 January 2018. (1501m – 1501n)

Meeting with Dr Patel

319. On 7 December 2017, Dr Patel had an informal meeting with Mr Jeavons-Fellows and Professor E Downs, Chair of the Hospital Medical Advisory Committee, and was told that it had come to the attention of management that he had voiced to others his opinions regarding the claimant's dismissal and such conduct was "unprofessional and inappropriate". According to Dr Patel, the claimant's dismissal had come as a complete shock to him and to the claimant, as did the result of her appeal. He said that he had only voiced his opinion when asked directly by staff members. During the meeting he agreed that in the interests of improving the morale in the Imaging Department, he would be willing to "reset" his relationships with staff in the department. He felt, however, that he had been singled out by staff, but was willing to re-establish good relations with them.

320. On 21 December 2017, Mr Jeavons-Fellows e-mailed Dr Patel, in which he wrote:

> "….It was proven that inappropriate behaviour had occurred between yourself and the then Imaging Manager, Ms Morwenna Haslam. During the previous 12 months there have been comments made by yourself, related to the suspension of the Imaging Manager, which in turn created tensions between the staff and yourself .
>
> It was reiterated the need for confidentiality and that all exchanges between yourself and the BMI staff working in the Imaging Department must always be of a professional nature. Any discussions relating to your personal life should not be initiated, by either party. You rightly raised your own personal concerns that some staff sought to ask prying or leading questions and I agreed that I would address this matter with the relevant staff group.
>
> As part of this meeting, I reminded you of the standards and behaviour expected of you and all persons engaged in BMI activities which you acknowledge …." (705f)

321. Dr Patel responded on 27 December 2017, by e-mail to Mr Jeavons-Fellows objecting to the finding that he had behaved inappropriately. He wrote:

> "…. I would just like to point out my surprise that it is apparently proven that I behaved inappropriately when I have never even been interviewed at all to give any opinion or reply to any false accusations that may have involved me. Anyway, I hope we can all move forward together" (705g)

322. During Dr Patel's evidence before us, he referred to an incident on a Thursday, in around June 2016, which he allegedly witnessed involving Dr Dabbagh and the claimant. He said that Dr Dabbagh had touched the claimant inappropriately in his reporting room while she was standing on a chair. Dr Dabbagh approached her and with his left hand, touched her buttock and thigh. At the time he, Dr Patel, was 12 feet away and had a clear view of the incident. He said that he was furious but in cross-examination acknowledged that he did not speak to Dr Dabbagh about it, nor did he report it to the General Medical Council. He said that the claimant was strong enough to deal with the matter in her own way.

323. We noted that the claimant did not raise this specific incident during the interview in relation to her grievance against Dr Dabbagh and allegations of sexual impropriety against him were raised at the time of the disciplinary proceedings. Given her view was that Dr Dabbagh's behaviour posed a risk to patients' safety, she did not report the alleged reporting room incident at the time, nor did Dr Patel.

324. We also bear in mind that, as part of the Dr Dabbagh grievance, the claimant asserted that she discussed his sexual conduct with Ms Jayne Wakefield but when Ms Wakefield was questioned by Mr Rosenblatt about conversations the claimant had with her about Dr Dabbagh's behaviour, she did not support the claimant's account. In the claimant's exchanges with Ms Wakefield, there was no reference or indication of this allegation having been raised by her.

325. Having considered the evidence, on balance, we find the reporting room incident did not take place.

<u>The Imaging Centre</u>

326. In May 2018, the claimant secured for herself a new position with The Imaging Centre "TIC" and informed its human resources manager of her previous employment with the respondent prior to the commencement of her employment on Wednesday 2 May 2018.

327. Mr Jeavons-Fellows knew of Mr Anthony Kleanthous, Chairman of Barnet Football Club through business discussions. Mr Kleanthous set up TIC, as a business.

328. TIC which provides diagnostic imaging services to athletes, private and NHS patients, first opened in early 2018.

329. Dr Lotsof also practised at TIC. On or around 10 May 2018, when he was told by Mr Rick Bartlett, Chief Operating Officer for TIC, that he had taken on the claimant as a new manager, his response was that he could not work with her. Although he knew that the claimant at the time had issued tribunal proceedings against the respondent, he did not know the specific claims brought. His comments to Mr Bartlett were based on his personal experiences of working with the claimant, particularly the issues she had allegedly created for him and in acting in the way she did. He spoke to Mr Kleanthous as he, Dr Lotsof, had received information from another doctor to the effect that the claimant had engaged in diverting work away from him to other consultants within TIC. He told Mr Kleanthous that although it was for him to hire and fire whoever he wanted, he could not work with the claimant and that if she was to stay, he would leave. At that point he mentioned that the claimant had been dismissed by the respondent and had a claim against it before the Employment Tribunal but did not provide any details as he did not know what they were. As we found earlier in this judgment, Dr Lotsof did not have a good relationship with the claimant.

330. On Friday 11 May 2018, the claimant had an informal meeting with Mr Bartlett who said that he "heard some things" and "done some digging" and wanted to know whether there was anything else she wanted to tell him about her departure from the respondent. She replied that she had told him the truth, namely that she was unfairly dismissed and gave him the reasons.

331. Some time during the evening of 11 May 2018, Mr Jeavons-Fellows received a call from Mr Kleanthous who asked whether he, Mr Jeavons-Fellows, knew of the claimant, who replied, "Yes". He was then asked whether the claimant had been dismissed by the respondent. He again replied "Yes" and asked Mr Kleanthous if he wanted anything more formal from him by way of a written reference. Mr Kleanthous said he did not and ended the call. Mr Jeavons-Fellows had no further discussions with Mr Kleanthous regarding the claimant since that call.

332. We referred to the grounds of resistance, paragraph 5, in which the respondent stated the following:

> "The respondent has not been formally contacted by any prospective employers seeking a reference in respect of the claimant at any time since the claimant's dismissal on 29 September 2017. Had any such request been received, it would have been dealt in accordance with the respondent's normal processes and a standard factual reference would have been provided. The respondent's standard factual reference confirms a former employee's date of employment and job title only. No mention is made of disciplinary taken or sanction supplied" (89)

333. In evidence, Mr Jeavons-Fellows said that he was not aware that the above is the respondent's policy, that, if asked, not to state a former

employee had been dismissed. He acknowledged that giving the reply to Mr Kleanthous he breached the policy. He said that at the time he was not aware that the claimant had issued Employment Tribunal proceedings against the respondent. We find that there was no evidence adduced to challenge his statement.

334. In answer to an e-mail sent by the claimant's solicitor to Mr Bartlett, he responded on 15 May 2018. Although his e-mail is headed "Without prejudice", this has been disclosed in the bundle of documents. He wrote:

> "….. During several interviews Ms Haslam did not inform either our Recruitment Agency, myself or our Chairman of her dismissal from BMI. In fact when directly asked about the conclusion of her previous employment she specifically and deliberately lied about her situation.
>
> She commenced here on Wednesday 3 May subject to references but we almost immediately discovered her duplicity when on Friday 11 May in the afternoon, our Chairman spoke with our radiologist, he then followed up with BMI who stated in fact that she had been dismissed. I can confirm that no other allegations were either made or discussed with BMI. A board meeting was held on that Friday evening and it was decided that we could not employ someone who had blatantly lied about her situation. This is a very sensitive position that demands full trust and integrity and Ms Haslam was deemed unsuitable on both counts.
>
> Under the circumstances we could not employ Ms Haslam so no contract was offered and she was asked to leave.
>
> Our intention was to quietly part company so neither party could suffer any further reputational damage but please note that should you wish to pursue this matter then we will vigorously defend our position including and not limited to reference to BMI". (1501aa)

335. The above are the tribunal's material findings of fact.

Submissions

336. The tribunal heard submissions from Ms von Wachter, counsel on behalf of the claimant and from Ms Newton, counsel on behalf of the respondent. They provided detailed written submissions and spoke to those. In addition, we have been provided with a small bundle of authorities which we have considered. We do not propose to repeat their submissions herein having regard to rule 62(5) employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, as amended.

The law

337. As regards unfair dismissal, section 98(1) Employment Rights Act 1996 "ERA", provides that in determining whether the dismissal of an employee is fair or unfair, it is for the employer to show what was the reason or the principal reason for dismissing the employee. Dismissal for conduct is a potentially fair reason, s.98(2)(b).

338. The test to be applied is the one set out in the case of BHS v Burchell [1978] IRLR 379, which is:

(i) Did the employer genuinely believe in the employee as on act which points towards guilt this is particularly so guilt;

(ii) Was such a belief held on reasonable grounds;

(iii) At the stage at which it formed that belief on those grounds, had the employer carried out as much investigation as was reasonable in all the circumstances of the case?

339. In A v B [2003] IRLR 405, the EAT held that the gravity of the charges and the potential effect on the employee will be relevant when considering what is expected of a reasonable investigation. In its view, an investigation leading to a warning need not be so rigorous as one likely to lead to dismissal. In that case the fact that the employee, if dismissed, would never again be able to work in his chosen field, was by no means as irrelevant as the tribunal appeared to think. Serious criminal allegations must always be carefully investigated, and the investigator should put as much focus on evidence that may point towards innocence as on that which points towards guilt. This is particularly so where the employee has been suspended and cannot communicate with witnesses.

340. A similar view was taken in the case of Salford Royal NHS Foundation Trust v Roldan [2010] ICR 1457, a judgment of the Court of Appeal, where the concern was that the claimant, who was a nurse, faced the prospect of being deported following dismissal. The emphasis being on the need to conduct a careful investigation.

341. Whether the dismissal is fair or unfair having regard to the reason shown by the employer, the tribunal must have regard to the provisions of s.98(4) which provides:

> "Where the employer has fulfilled the requirements of subsection (1), and the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) -
>
> (a) depends on whether in the circumstances (including the size and administrative resources of the employees undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
>
> (b) shall be determined in accordance with equity and the substantial merits of the case."

342. In applying section 98(4) ERA 1996, the function of the tribunal

> "Is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the

> dismissal is fair: if the dismissal fell outside the band it is unfair.", Iceland Frozen Foods v Jones [1982] IRLR 439.

343. In judging the reasonableness of the employer's conduct, the tribunal must not substitute its decision in place of the employer, Iceland Frozen Foods, or "slip into substitution mindset", London Ambulance Service NHS Trust v Small [2009] EWCA Civ 220.

344. In the case of Thames Water Utilities Ltd v Newbound [2015] EWCA Civ 776, the Court of Appeal held that a tribunal can decide, having regard to section 98(4) ERA 1996, whether the dismissal was within the range of reasonable responses.

345. The range of reasonable responses test applies also to the investigation, Sainsbury's Supermarket Ltd v Hitt [2002] IRLR 23, a judgment of the Court of Appeal.

346. The range of reasonable responses test also applies to the substantive decision to dismiss as well as procedural matters, Shreshtha v Genesis Housing Association Ltd [2015] IRLR 399.

347. The is no requirement that an employee must be shown copies of witness statements obtained by the employer about his or her conduct. There will be a failure of natural justice if the essence of the case is contained in statements which have not been disclosed to the employee, and where he or she has not otherwise been informed of the nature of the case against them, Hussain v Elonex [1999] IRLR 420, Court of Appeal.

348. The ACAS Code of Practice 1: Discipline and Grievance Procedures (2015) provides that:

> "It would normally be appropriate to provide copies of any written evidence, which may include any witness statements, with the notification.", paragraph 12.

349. Even though the initial stage of the disciplinary process is defective and unfair in some way, it does not matter whether an internal appeal is technically a rehearing or review, the question is whether the disciplinary process as a whole is fair, Taylor v OCS Group Ltd [2006] IRLR 613, Court of Appeal.

350. Reference in section 98(4) to "having regard to equity and substantial merits of the case", entertains the concept that employees who behave in much the same way, should receive the same punishment, Post Office v Fennell [1981] IRLR 221, Court of Appeal. However, this is qualified by the requirement that in relation to inconsistent or disparate treatment, the comparison must be in "truly parallel" circumstances. Employment Tribunals must scrutinise arguments based on disparity of treatment with particular care as there will not be many cases which are truly or sufficient

similar, Hadjioannou v Coral casinos Ltd [1981] IRLR 352, a judgment of the Employment Appeal Tribunal.

351. Under section 13, Equality Act 2010, "EqA", direct discrimination is defined:

> "(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."

352. Section 23, provides for a comparison by reference to circumstances in a direct discrimination complaint:

> "There must be no material difference between the circumstances relating to each case."

354. Section 136 EqA is the burden of proof provision. It provides:

> "(1) This section applies to any proceedings relating to a contravention of this Act.
>
> (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provisions concerned, the court must hold that the contravention occurred."
>
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision."

355. In the Supreme Court case of Hewage v Grampian Health Board [2012] ICR 1054, it was held that the tribunal is entitled, under the shifting burden of proof, to draw an inference of prima facie race and sex discrimination and then go on to uphold the claims on the basis that the employer had failed to provide a non-discriminatory explanation. When considering whether a prima facie case of discrimination has been established, a tribunal must assume there is no adequate explanation for the treatment in question. While the statutory burden of proof provisions has an important role to play where there is room for doubt as to the facts, they do not apply where the tribunal is in a position to make positive findings on the evidence one way or the other.

356. In Madarassy v Nomura International plc [2007IRLR 246, CA, the Court of Appeal approved the dicta in Igen Ltd v Wong [2005] IRLR 258. In Madarassy, the claimant alleged sex discrimination, victimisation and unfair dismissal. She was employed as a senior banker. Two months after passing her probationary period she informed the respondent that she was pregnant. During the redundancy exercise in the following year, she did not score highly in the selection process and was dismissed. She made 33 separate allegations. The employment tribunal dismissed all except one on the failure to carry out a pregnancy risk assessment. The EAT allowed her appeal but only in relation to two grounds. The issue before the Court of Appeal was the burden of proof applied by the employment tribunal.

357. The Court held that the burden of proof does not shift to the employer simply on the claimant establishing a difference in status, for example, sex

and a difference in treatment. Those bare facts only indicated a possibility of discrimination. They are not, without more, enough material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.

358. The Court then went on to give a helpful guide, "Could conclude" [now "could decide"] must mean that any reasonable tribunal could properly conclude from all the evidence before it. This will include evidence adduced by the claimant in support of the allegations of sex discrimination, such as evidence of a difference in status, a difference in treatment and the reason for the differential treatment. It would also include evidence adduced by the respondent in testing the complaint subject only to the statutory absence of an adequate explanation at this stage. The tribunal would need to consider all the evidence relevant to the discrimination complaint, such as evidence as to whether the acts complained of occurred at all; evidence as to the actual comparators relied on by the claimant to prove less favourable treatment; evidence as to whether the comparisons being made by the claimant is like with like, and available evidence of the reasons for the differential treatment.

359. The Court went on to hold that although the burden of proof involved a two-stage analysis of the evidence, it does not expressly or impliedly prevent the tribunal at the first stage from the hearing, accepting or drawing inferences from evidence adduced by the respondent disputing and rebutting the claimant's evidence of discrimination. The respondent may adduce in evidence at the first stage to show that the acts which are alleged to be discriminatory never happened; or that, if they did, they were not less favourable treatment of the claimant; or that the comparators chosen by the claimant or the situations with which comparisons are made are not truly like the claimant or the situation of the claimant; or that, even if there has been less favourable treatment of the claimant, it was not because of a protected characteristic, such as, age, race, disability, sex, religion or belief, sexual orientation or pregnancy. Such evidence from the respondent could, if accepted by the tribunal, be relevant as showing that, contrary to the claimant's allegations of discrimination, there is nothing in the evidence from which the tribunal could properly infer a prima facie case of discrimination.

360. Once the claimant establishes a prima facie case of discrimination, the burden shifts to the respondent to show, on the balance of probabilities, that its treatment of the claimant was not because of the protected characteristic, for example, either race, sex, religion or belief, sexual orientation, pregnancy or gender reassignment.

361. The employer's reason for the treatment of the claimant does not need to be laudable or reasonable in order to be non-discriminatory. In the case of B-v-A [2007] IRLR 576, the EAT held that a solicitor who dismissed his assistant with whom he was having a relationship upon discovering her apparent infidelity, did not discriminate on the ground of sex. The tribunal's finding that the reason for dismissal was his jealous reaction to the

claimant's apparent infidelity could not lead to the legal conclusion that the dismissal occurred because she was a woman.

362. The tribunal could pass the first stage of the burden of proof and go straight to the reason for the treatment. If, from the evidence, it is patently clear that the reason for the treatment is non-discriminatory, it may not be necessary to consider whether the claimant has established a prima facie case, particularly where he or she relies on a hypothetical comparator. This approach may apply in a case where the employer had repeatedly warned the claimant about drinking and dismissed him for doing so. It would be difficult for the claimant to assert that his dismissal was because of his protected characteristic, such as race, age or sex. This was approved by Lord Nicholls in Shamoon-v-Chief Constable of the Royal Ulster Constabulary [2003] ICR 337, judgment of the House of Lords

363. The claimant has to prove that the act occurred and, if so, did it amount to less favourable treatment because of the protected characteristic? Ayodele v Citilink Ltd [2017] EWCA Civ 1913.

364. Unreasonable conduct does not amount to discrimination, Bahl v Law Society [2004] IRLR 799.

365. Under section 123 EqA, a complaint must be presented within three months;

> "starting with the date of the act to which the complaint relates" (a), "or such other period as the employment tribunal thinks just and equitable," (b) and "conduct extending over a period is to be treated as done at the end of the period," (3)(a).

366. Whether the same or different individuals were involved in the alleged discriminatory treatment is a relevant factor but not a decisive one in determining whether the conduct extended over a period, Jackson LJ, Aziz v FDA [2010] EWCA Civ 304.

367. In the case of Robertson v Bexley Community Centre 2003 IRLR 434, the Court of Appeal held that the exercise of the tribunal's just and equitable discretion is the exception rather than the rule. The tribunal can take into account section 33 Limitation Act 1980, such factors as: the length of and reason for the delay; the extent to which the cogency of the evidence is likely to be affected by the delay; the extent to which the party sued has cooperated with any requests for information; the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action; and the steps taken by the claimant to obtain appropriate advice once he or she knew of the possibility of taking action, Department of Constitutional Affairs v Jones [2008] IRLR 128, Court of Appeal.

368. We have also taken into account the following cases: Land Registry v Grant [2011] EWCA Civ 769, [2011] ICR 1390; and Cordell v Foreign and Commonwealth Office [2012] ICR 280

369. Harassment is defined in section 26 EqA as;

"26 Harassment

(1) A person (A) harasses another (B) if-

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of-

(i) violating B's dignity, or
(ii) creating and intimidating, hostile, degrading, humiliating or offensive environment for B"

370. In deciding whether the conduct has the particular effect, regard must be had to the perception of B; other circumstances of the case; and whether it is reasonable for the conduct to have that effect, section 26(4).

371. In this regard guidance has been given by Underhill P, as he then was, in case of Richmond Pharmacology v Dhaliwal [2009] ICR 724, set out the approach to adopt when considering a harassment claim although it was with reference to section 3A(1) Race Relations Act 1976. The EAT held that the claimant had to show that:

(1) the respondent had engaged in unwanted conduct;

(2) the conduct had the purpose or effect of violating his or her dignity or of creating an adverse environment;

(3) the conduct was on one of the prohibited grounds;

(4) a respondent might be liable on the basis that the effect of his conduct had produced the proscribed consequences even if that was not his purpose, however, the respondent should not be held liable merely because his conduct had the effect of producing a proscribed consequence, unless it was also reasonable, adopting an objective test, for that consequence to have occurred; and

(5) it was for the tribunal to make a factual assessment, having regard to all the relevant circumstances, including the context of the conduct in question, as to whether it was reasonable for the claimant to have felt that their dignity had been violated, or an adverse environment created.

372. Whether the conduct relates to disability "will require consideration of the mental processes of the putative harasser", Underhill LJ, GMB v Henderson [2016] EWCA Civ 1049..

373. An unjustified sense of grievance cannot amount to detriment, Barclays Bank v Kapur and Others (No 2) [1995] IRLR 87, CA.

374. In relation to public interest disclosure, we have considered sections 103A and 47B Employment Rights Act 1996 on dismissal and detriment.

375. Section 47B(1), Employment Rights Act 1996 provides,

> "A worker has the right not to be subjected to any detriment by any, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure."

376. A protected disclosure means a qualifying disclosure as defined under section 43B made by a worker in accordance with sections 43C to 43H, ERA 1996, section 43A.

377. Section 43B defines what is a qualifying disclosure. It provides,

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

378. What is a detriment under section 47B is not defined in the legislation. In this regard the judgments of their Lordships in the case of Shamoon-v-Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285, will apply. It is whether or not the worker was put at a particular disadvantage having made a protected disclosure? The disadvantage could be either physical, such as being instructed to engage in degrading work; or denying them benefits such as a company car, medical cover or membership of a sports or social club; or being denied the opportunity of promotion. It may also be psychological, financial or not being offered employment, amongst other things.

379. The qualifying disclosure must be a disclosure of information, that is conveying facts, Cavendish Munro Professional Risks Management Ltd v Geduld [2010] IRLR 38, a judgment of the Employment Appeal tribunal.

380. A reasonable belief is assessed objectively taking into account the particular characteristics of the worker in determining whether it was reasonable for him/her to hold that belief, Korashi v Abertwe Bro Morgannwg University Local Health Board [2012] IRLR 4, EAT.

381. In the case of Fecitt and Others and Public Concern at Work-v-NHS Manchester [2011] EWCA Civ 1190, the Court of Appeal held that the causal link between the protected disclosure and suffering a detriment under section 47B, is whether the protected disclosure "materially influenced", in the sense of being more than a trivial influence, the employer's treatment of the whistleblower.

382. In a breach of a legal obligation case, the tribunal should identify the source of the legal obligation and how the employer failed to comply with it. Actions could be considered wrong because they were immoral, undesirable or in breach of guidance without being a breach of a legal obligation, Eiger Securities LLP v Korshunova [2017] IRLR 115, EAT.

383. Section 103A ERA provides that, "An employee who is dismissed shall be regarded for the purposes of the Part as unfairly dismissed if the reason or principal reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure." It is for the employer to prove the reason for the dismissal. Where the employee lacks the relevant qualifying period of service the burden will be on the employee to prove the reason for the dismissal was by reason of making a protected disclosure, Kuzel v Roche Products Ltd [2008] ICR 799.

384. A claim under section 47B must be presented within three months beginning with the date of the act of the failure to act, section 48(3).

385. This time is extended under section 207B where there has been conciliation before the presentation of the claim, section 48(4A).

386. Section 48(4) provides,

> "For the purposes of subsection 3 ---
>
> (a) where an act extends over a period, the "date of the act" means the last day of that period, and
>
> (b) a deliberate failure to act shall be treated as done when it was decided on."

387. In the case of Arthur v London Eastern Railway Ltd [2006] EWCA Civ 1358, the Court of Appeal held, Mummery LJ giving the leading judgment, that,

> "Section 48(3) is designed to cover a case which cannot be characterised as an act extending over a period by reference to a connecting rule, practice, scheme or policy, but where there is some link between the acts which makes it just and reasonable for them to be treated as in time and for the claimant to rely on them. In order for the acts in the three-month period and those outside to be connected, they must be part of a "series" and acts which are "similar" to one another."

388. If a detriment claim is well-founded the tribunal can make a declaration to that effect and award compensation, section 49(1) Employment Rights Act 1996. The claimant is under a duty to mitigate, section 49(4) and the tribunal can consider whether the claimant either caused or contributed to the act complained of, section 49(5). Compensation is assessed on the same basis as a discrimination claim and can include an injury to feelings award, Virgo Fidelis Senior School v Boyle [200] IRLR 268.

389. We have taken into account the statutory defences in sections 109(4) Equality Act and 47B(1D) ERA, the "taking of all reasonable steps".

390. In relation to wrongful dismissal, Lord Jauncey held in the case of Neary and Neary v Dean of Westminster [1999] IRLR 289,

> "Conduct amounting to gross misconduct justifying summary dismissal must so undermine the trust and confidence which is inherent in the particular contract of employment that the employer should no longer be required to retain the employee in his employment. Whether particular misconduct justifies summary dismissal is a question of fact. The character of the institutional employer, the role played by the employee in that institution and the degree of trust required of the employee vis-a-vis the employer must all be considered in determining the extent of the duty of trust and the seriousness of any breach thereof. It could not be accepted that when financial wrongdoing is alleged nothing short of deliberate dishonesty or deceit will to gross misconduct."

391. We have also taken into account the cases of: Sneddon v Carr-Gomm Scotland Ltd [2012] IRLR 820; Henderson v Granville Lourds [1982] IRLR 494; Crawford and another Suffolk Mental Health Partnership NHS Trust [20I2] 402; and Boyd v Renfrewshire Council [2008] SCLR 578, Court of Session.

Conclusions

392. As stated earlier, Ms von Wachter, on behalf of the claimant, withdrew the s.20 Equality Act 2010 claim of failure to make reasonable adjustments. She also withdrew the victimisation claim based on the claimant's reliance on paragraphs 20(c) and (d) and under time limits, paragraph 25(a).

Unfair dismissal

393. In relation to the question, what was the reason or reason for the claimant's dismissal, Mr Rosenblatt found that the claimant had engaged in inappropriate behaviour with a colleague whilst at work; was misleading as to her whereabouts; and had intimidated Ms Ellwood. In addition, he

had taken into account the views expressed by the witnesses, namely by some members of her team, to the effect that they were afraid of the prospect of her returning to work in the department because of how they had been treated be her. This relates to a breakdown in trust and confidence between the claimant and the respondent. We conclude that these reasons fall within the description of conduct.

394. In answering the question, did the respondent hold a genuine belief based on reasonable grounds in the claimant's guilt, we refer to the investigation conducted by Ms Hitchen, Mr Rosenblatt and Ms Zimber.

395. We have already referred to deficiencies in their investigations, which impacted on whether the respondent's belief in the claimant's guilt was based on reasonable grounds? We have concluded that although the decision makers' beliefs were genuine, they were not based on reasonable grounds as the investigation was seriously flawed.

396. The allegation that she was dismissed in relation to alleged irrelevant factors, we have taken her concerns here into account in our criticism of the investigation, disciplinary and appeal hearings. Likewise, the submission that the respondent considered evidence which supported its case and not in support of her position, A v B and Roldan. She is a medical professional and is subject to the standards as set down by the Health & Care Professions Council. An adverse finding by the respondent bore the risk of the claimant being considered not fit to practise, affecting her earnings and professional development.

397. Bearing in mind our concerns in relation to the serious procedural errors, when taken together, they rendered the claimant's dismissal substantively unfair.

398. As regards the range of reasonable responses, this the tribunal is unable to address as the respondent's investigation was seriously flawed. In any event we must be careful not to engage in the "substitution mindset" approach. We, however, have come to the conclusion that the claimant's unfair dismissal claim is well-founded.

399. The claimant submitted she was suspended for no good reason and for an unconscionably long period, over a year. We find that there were reasons for her suspension, namely the concerns raised by some members of staff in the Imaging Department. The length of her suspension was materially influenced by the number of grievances she lodged at different times and her request that the disciplinary procedure to be put on hold until the outcome of her grievances.

400. In relation to her grievance about the length of her suspension being ignored, this was not the case. They were addressed during her grievance investigation and an explanation given. We find that she was, to a large extent, responsible for delaying the disciplinary proceedings.

401. She also asserted that she was subjected to humiliating and degrading questioning about her private life, sexual practices and under garments as part of a purported objective investigation by Mr Brady. The respondent did find that Mr Brady's questioning of the claimant was inappropriate, and he was instructed to apologise. His apology was inadequate, and it was recommended that he be given coaching.

402. She was given access to documents in December 2016. Further documents were given to her in preparation for her disciplinary hearing.

403. Contrary to her assertion, she was warned about the possibility of dismissal in the invitation letter to the disciplinary hearing and, therefore, knew that one possible outcome may be her dismissal.

Wrongful Dismissal

404. In the e-mail sent by Mr Rosenblatt to the claimant dated 29 September 2017, he informed her that her employment would be terminated immediately. We, therefore, find that the effective date of termination was 29 September 2017.

405. The respondent has procedures to address absences and lateness but in the claimant's case, they never got beyond raising issues with her informally. All aspects of the Christmas party were closed prior to the disciplinary hearing. Likewise, in relation to her dress and her line managers did not take any disciplinary action against her prior to the group complaint.

406. The three allegations found against her were in relation to issues which, under the respondent's own procedures, would have been dealt with by the application of warnings, as set out in the respondent's disciplinary policy, that is by a first written warning, final written warning, with dismissal as a last resort.

407. In relation to Ms Ellwood, it was found that the claimant had intimidated her, but it was clear from the evidence before us, that she had performance issues and that the claimant had in mind invoking the performance management process.

408. In relation to the respondent relying on one of its reasons for dismissing the claimant, namely loss of trust and confidence, the claimant was not given the opportunity to challenge the accounts given to Mr Rosenblatt by some of the staff in relation to being fearful of her return to work.

409. Having regard to the above, and applying Neary, we have concluded that the claimant had not breached her contract of employment with the respondent, in a fundamental way, entitling the respondent to terminate without notice. She was, therefore, entitled to be given notice pay. This claim has been proved.

Discrimination arising in consequence of disability

410. There is no dispute that the claimant was at all materials times, a disabled person, suffering from a neurogenic bladder.

411. Her case is that, because of her disability, she was required to buy painkillers and one of the respondent's purported reasons for dismissing her was having to buy them.

412. Having regard to our findings of fact, there was no evidence before us that the respondent, as part of its reasons, dismissed the claimant because she was buying painkillers. The claimant had not established that she was discriminated for a reason arising in consequence of her disability. This claim is not well-founded and is dismissed.

Direct sex discrimination

413. The claimant claimed that she was suspended for a year for alleged improper behaviour with another member of staff; had been subjected to long and intrusive questioning concerning alleged improper behaviour with another member of staff; and dismissed for improper behaviour with another male member of staff. She relied on Dr Patel as an actual comparator.

414. We agree with Ms Newton's submissions on the point that with regard to the case of Shamon v Chief Constable of the Royal Ulster Constabulary, the comparator must be in the same position, in all material respects, as the claimant, save only that he or she is not a member of the protected class. In Dr Patel's case, he is a Consultant Radiologist with practising privileges. Not an employee of the respondent and eight people in the Imaging Department did not lodge a group complaint about him. We have concluded that he is not an appropriate comparator. As the claimant did not rely on a hypothetical comparator, this claim is not well-founded and is dismissed.

415. She applied, during the hearing, for Mr Adrian Brady to be another actual comparator and having heard submissions on the point, the tribunal refused the application to amend, applying Selkent. This is dealt with below.

Victimisation

416. The claimant asserted that she made protected acts in her grievances dated 28 November 2016 and 20 February 2017, regarding Mr Brady's conduct towards her and the conduct of other managers. She claimed that the detriment suffered was a lengthy and oppressive disciplinary process, resulting in her dismissal.

417. The respondent accepted that the claimant made allegations against Mr Brady on 20 February 2017, that he had discriminated against her because of her sex and that he was the only manager she lodged a sex discrimination grievance against.

418. We repeat that the lengthy disciplinary process was due, in part, to the claimant's request that her grievances be dealt with before disciplinary proceedings. Although lengthy, it was not oppressive as the respondent had to deal with many grievances. The disciplinary proceedings commenced prior to the incident involving Mr Brady's inappropriate questioning of her.

419. There was no evidence upon which we found as fact that the protected acts significantly influenced the delay in the disciplinary process. Furthermore, there was no evidence that Mr Rosenblatt had, in his mind, the two grievances the claimant relied upon as protected acts when he decided to dismiss her. Accordingly, this claim is not well-founded and is dismissed.

Harassment related to sex

420. It was submitted that the claimant was required to disclose details of her personal relationship with Dr Patel; that she was accused of improper behaviour which amounted really to nothing more than affectionate gestures; and was asked to explain the dirty underwear in her desk drawer.

421. We accept that enquiries were made in relation to the claimant's personal relationship with Dr Patel as concerns were raised by members of staff. She was only asked about her relationship in respect of her activities at work because she was required to behave in a professional manner as the manager of the Imaging Department while at work and to engage in work related duties and functions.

422. We do not conclude that these two aspects of the claimant's harassment related to sex claim violated her dignity or created an intimidating, hostile and degrading, humiliating or offensive environment for her as the respondent had a duty to explore the relationship as it affected the efficient workings of the department and the questions were not intrusive.

423. In relation to having to explain the dirty underwear found in her desk drawer, the respondent, having conducted the appeal in respect of the grievance outcome against Mr Brady, concluded that Mr Brady had engaged in inappropriate behaviour in his questioning of the claimant and recommended that he should apologise to her. We concur with that finding that the questioning was intrusive.

424. Although we accept that it was not the purpose of Mr Brady to create intimidating, hostile, degrading, humiliating or offensive environment nor to

violate the claimant's dignity, his questioning did have effect of violating her dignity and was humiliating.

425. In coming to this conclusion, we have taken into account the claimant's perception which was supported by Ms Stark on appeal as well as the circumstances of the case. It was reasonable, in our view, for the conduct to have that effect on her. Accordingly, subject to the issue of time limits, this aspect of the claimant's harassment related to sex claim appears to be well-founded, however, we have considered the issue of time limits which we address below.

Harassment related to disability

426. The claimant asserted that she was challenged by the respondent in relation to her need to source analgesic tablets. It was alleged that the tablets were required in order to deal with the pain caused by her neurogenic bladder.

427. We find that the respondent did not challenge the claimant's need for analgesic medication. Indeed, she stated that she would visit the local town to get her medication as well as other items, and this was on a regular basis. There was no suggestion that on each occasion she was challenged as to why she needed to her medication. The issue of medication was discussed with the claimant in addition to a number of matters as they were raised by some of her staff.

428. We do not accept, nor do we find, that the respondent had engaged in unwanted conduct related to the claimant's disability in respect of her medication. Accordingly, this claim is not well-founded and is dismissed.

429. Ms Newton submitted that the statutory defence in section 109(4) Equality Act 2010 should apply. The respondent has in place an equality and diversity policy and bullying and harassment policy which we have made reference to in the judgment. The policies are reviewed and updated every three years and we acknowledge that the versions do change every three years. We were told that the respondent network with other organisations in the sector to share learning ideas and benchmark itself against other areas, including equality and diversity. We accept that it does liaise with other organisations in equality and diversity.

430. In relation to the claim that it takes practical steps to implement its policies, here we do express our concerns. Mr Brady told the tribunal in evidence that he only did an online module in either April or May 2016 on equality management. He was not familiar with the respondent's bullying and harassment policy. He was also not familiar with the term protected characteristics. His apology to the claimant as instructed, was cursory and showed no understanding of the potential impact of harassment on staff member.

431. Section 109(4) requires the tribunal to look at the reasonable steps taken by the respondent to prevent Mr Brady from behaving the way he did in his meeting with the claimant.

432. Although Mr Rosenblatt has set out in paragraphs 8 and 9 of his witness statement the various policies and training given to managers and staff, Mr Brady did not demonstrate to us during the course of his evidence, that apart from the initial online module, the details of which were not disclosed to the tribunal, he had an understanding of equality and diversity issues. On the face of it, therefore, the statutory defence does not apply.

433. We stated earlier that we have considered the issue of time limits. Although we have found that the harassment related to sex regarding Mr Brady's questioning of the claimant concerning underwear found in a desk drawer, can be considered as a valid claim, it is subject to the issue of time limits. The incident in question occurred on 4 November 2016. The claimant grieved against her treatment and there was an eventual appeal outcome on 13 March 2017. Mr Brady was required to apologise to her. She did not refer to the inadequacy of the apology as part of her claims against the respondent in these proceedings.

434. We conclude that time began to run from the appeal outcome sent to the claimant on 13 March 2017. She presented her first claim form on 21 December 2017, nine months after being told of the grievance appeal outcome. Her second claim form was presented on 1 June 2018. ACAS was notified on 30 November 2017 and a certificate was issued on 7 December 2017.

435. We did not receive evidence from the claimant or anyone else, arguing that it was just and equitable to extend time. The act on 4 November 2016 was a single act and by 13 March 2017, she was aware of the appeal outcome in respect of it. By 21 December 2017, this claim of harassment related to sex was considerably out of time.

436. Accordingly, we have come to the conclusion that the tribunal has no jurisdiction to determine this aspect of the harassment claim and to award compensation as it was presented out of time. It is, therefore, struck out.

<u>Pubic interest detriment and dismissal</u>

437. The claimant's case is that she made a qualifying disclosure by asserting the health and safety of employees as having been compromised by overwork and poor management. We have already made our findings of fact that this was not a qualifying disclosure because she did not raise health and safety issues.

438. Her other qualifying disclosure was in respect of alleged miscarriage of justice with regard to the disciplinary process. She asserted that it was oppressive and discriminatory.

439. We find that the disclosure of alleged miscarriage of justice was in relation to the claimant's own treatment as she saw it, not a disclosure made in the public interest as it was personal to her and was her attempt to influence the outcome of the disciplinary proceedings. There was nothing asserted to suggest that her case had wider public interest concerns.

440. In any event, even if the health and safety and the assertion of miscarriage of justice, were qualifying and protected disclosures, we would conclude that neither together, nor separately, did they significantly influenced the disciplinary process by it being protracted, oppressive and invasive. For the reasons already given, the delay was in part due to the claimant's grievances and her request that they be dealt with prior to disciplinary proceedings.

441. Further, even if they were protected disclosures, there was no evidence that Mr Rosenblatt was significantly influenced by them either together or separately. Accordingly, these claims are not well-founded and are dismissed.

442. Having regard to our conclusions, it is purely academic considering the statutory defence in section 47(B)(1D) ERA 1996.

Victimisation, Section 27(2)(a) Equality Act 2010

443. This claim relates to the allegation that the respondent had "poisoned" the relationship between the claimant and The Imaging Centre.

444. Dr Lotsof was neither the respondent's employee, nor the respondent's agent. The respondent did not authorise him to be its agent. He gave reasons why he behaved in the way he did, in that, he could not work with the claimant and had told The Imaging Centre that if she was to continue in her employment, it was likely that he would leave.

445. Mr Jeavons-Fellows said that when he asked, he replied to Mr Kleanthous that the respondent had employed the claimant and when asked whether she was dismissed he replied "Yes". At the time he was not aware that the claimant had brought the first claim before the tribunal.

446. The respondent is not responsible for Dr Lotsof's acts or omissions. As Mr Jeavons-Fellows was not aware of tribunal proceedings at the time he spoke to Mr Kleanthous, there was no causal connection between the issuing of proceedings and what he said to Mr Kleanthous. Accordingly, this claim is not well-founded and is dismissed.

Detriment making a public interest disclosure

447. It was submitted by Ms von Wachter, that the issuing of proceedings before this tribunal, setting out the claims constitutes a qualifying disclosure within the meaning of section 43(B)(1)(b) ERA. We have come to a conclusion that the mere act of presenting a claim before an

Employment Tribunal may be a qualifying disclosure under that provision, but not a protected disclosure. The purpose of the public interest disclosure provisions is to protect a worker from the consequences of raising qualifying disclosures. The Employment Rights Act 1996 provides that the disclosures should be made initially to the employer and if not possible, then to the interested parties or prescribed persons as set out in sections 43C to 43H. Further, the claimant has not explained under what section her disclosure to the tribunal became a protected disclosure. She was also no longer an employee when she presented her claims. Accordingly, this claim has no merit. It is not well-founded and is dismissed.

448. Save for unfair dismissal, all of the claimant's claims are dismissed.

449. We did not hear detailed submissions in relation to contribution as this would depend, to a large extent, upon our findings. Should this issue be relevant it can be raised at the remedy hearing.

Claimant's application to amend

450. On the final day of the hearing and before the hearing evidence from the respondent's last witness, Ms von Wachter, on behalf of the claimant, made an application to amend the agreed list of issues in paragraphs 16 and 17, by adding to the direct sex discrimination claim another actual comparator, Mr Adrian Brady, Executive Director. The wording should be "Did the respondent treat the claimant less favourably than the comparators relied upon by the claimant, namely Mr Adrian Brady, Executive Director and the male member of staff with whom she was in a relationship, Dr Patel. No corresponding action was taken in respect of either comparator?"

451. We bear in mind that this case was heard on 25 June 2018 at a Preliminary Hearing conducted by Employment Judge George, and orders were given including disclosure of documents by a list and the request for copy documents, as well disclosure of the bundle of documents by 24 September 2018. Ms von Wachter said that disclosure of documents had been on separate occasions and on 8 March 2019, the respondent disclosed documents relevant to an investigation conducted by Ms Starling into the claimant's grievance against Mr Adrian Brady. Ms von Wachter submitted that it had not become apparent until Mr Brady's evidence on Monday, when he had said that the outcome of the investigation was that he was required to undertake a coaching discussion with his line manager, that it was in stark contrast with the way in which the claimant had been treated, as set out in paragraph 16 of the agreed list of issues. It was not until Ms von Wachter was preparing her submissions the previous night and following questions put to her the previous day in relation to the appropriateness of the Consultant Radiologist as comparator, led her to reflect on the case as pleaded in paragraphs 16 and 17, and as a consequence, she made the application before the final witness' evidence.

452. She stated that the respondent should not be prejudiced by the application as the delay was her fault as she did not fully appreciate the significance at the time of Mr Brady's evidence on Monday. She said that at the time of the pleadings, the claimant had no knowledge of how Mr Brady had been treated.

453. The amendment, if granted by the tribunal, would put the claimant's case in a slightly better position, in that, she would be able to rely on an employee of the respondent as opposed to a consultant. Nevertheless, it was still the claimant's case that she would also rely on Dr Patel as an appropriate comparator.

454. Ms Newton, on behalf of the respondent, submitted that the respondent had prepared its case based on matters pleaded and, on the claimant's, named comparators. It was never the claimant's case that she was going to rely on an employee of the respondent as a comparator in relation to the direct sex discrimination claim. The application was made very late in the day and the claimant had more than enough time to make the amendment. Ms Newton took the tribunal to the outcome of Ms Starling's report dated 2 June 2017, in which she recommended in paragraph 12,

> "I recommend that there is not a case for formal disciplinary action but training, feedback and coaching is required to improve performance going forward for AB."

455. Ms Newton submitted that the recommendation should have alerted the claimant and her legal advisers when they received the documents on 8 March 2019, that no formal disciplinary action had been taken against Mr Brady, therefore, when the claimant heard Mr Brady's evidence on the Monday that should not have come as a surprise to her.

456. The respondent, submitted Ms Newton, would be prejudiced because it would be unable to call, so late in the case, relevant evidence to respond to the amendment, for example, the treatment of other employees because of the change in the orientation of the case. If the application was granted, it would be based on comparators being a consultant and another being an employee, a significant change in the claimant's case. Further, consideration would need to be given as to whether to call Ms Starling and her motivation behind the recommendation, whether there was evidence to show that the treatment of staff in similar circumstances can be distinguished based on gender or whether gender was completely irrelevant. In order to do so, the respondent would require an adjournment if the application was granted and that would bring into play the issue of cost.

457. As the application took Ms Newton by surprise, she told the tribunal that she did not have the judgment in the well-known case of Selkent Bus Company v Moore [1996] ICR 836. She, however, submitted that the claimant had not provided a good reason for the delay. The delay being from 8 March 2019 when the documents were disclosed. In relation to the balance of prejudice, the claimant had a number of claims against the

respondent. If the application was refused, she could still proceed with her other claims. Whereas in the respondent's case, it was likely to result in an adjournment with additional costs as further evidence would need to be gathered.

458. We considered the application and concluded that the submissions made by Ms Newton, we would adopt. Counsel's error does not trump what we are required to consider as set out in the Selkent case. The proposed amendment was significant as the comparator and the facts to be relied on were to change, though not a new claim. What was the reason for the delay? Ms von Wachter admitted that it was the failure to have regard to the evidence provided by the respondent in March 2019 and in the oral evidence of Mr Brady that he was not the subject of disciplinary proceedings. In our view that did not provide a good and sufficient reason for the delay. We do take into account the length of the delay and the opportunities which were available to the claimant to make a timeous application to amend. Firstly, the disclosure of Ms Starling's report and her recommendation, in early March 2019. Secondly, that Mr Brady's evidence was given earlier in the hearing.

459. As regards relative prejudice, the claimant could still rely on her other Equality Act claims. Her sexual harassment claim concerned her treatment by Mr Brady. Further, it was still Ms von Wachter's contention that Dr Patel was an appropriate comparator in relation to the direct sex discrimination claim.

460. On the other hand, there was the real prospect of an adjournment if the application was granted as the respondent would need time to obtain the relevant evidence. Memories may have faded by the time the case is re-listed. The prejudice the respondent was likely to suffer if the application was granted outweighed the prejudice likely to be suffered by the claimant if it was refused. For all these reasons, the application was refused.

461. The case is listed for remedy hearing on 4 and 5 November 2019.

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Employment Judge Bedeau

Date: ……2/8/2019……..

Sent to the parties on: .....2.8.2019.....

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For the Tribunal Office