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EMPLOYMENT TRIBUNALS

Claimant: **Mr A Simpson**

Respondent: **Provide CIC**

Heard at: **East London Hearing Centre**

On: **6, 7 June and 25, 26 September and in chambers on 27 and 30 September 2019**

Before: **Employment Judge Jones**

Members: Mr Burrows
Mrs Saund

Representation

Claimant: In person

Respondent: Ms N. Newbegin (Counsel)

JUDGMENT

1. The Claimant made protected public interest disclosures.

2. The Claimant was not subjected to any detriment done on the grounds that he made protected disclosures.

3. The claim is dismissed.

REASONS

1. The Claimant initially brought complaints of constructive unfair dismissal

and detriment following the making of public interest disclosures.

2. At a hearing held on 5 November 2018 and in a judgment sent to the parties on 12 December 2018, EJ O'Brien's judgment was that the claims of constructive unfair dismissal and protected public interest disclosure had been presented out of time. It was his judgment that the Tribunal had no jurisdiction to hear those claims as they were issued outside of the statutory time limits. That claim was dismissed.

3. The Claimant brought a second claim on 16 November 2018 alleging that he had been subject to post-employment detriments because he made public interest disclosure. The Claimant complained of two detriments arising out of 2 separate references issued by the Respondent after the termination of his employment.

4. At a preliminary hearing held on 10 April 2019 the specific allegations to be determined by the Tribunal were agreed between the parties. This included the 6 alleged public interest disclosures and two detriments the Claimant alleged that he suffered. Those are set out at page 149D and 149E of the hearing bundle. The issues will be set out below in detail in the '*Applying Law to facts'* section of this judgment.

Claimant's application to amend the claim

5. At the start of this hearing the Claimant made an application to amend his claim to add 2 further disclosures. They were the communications he had with the local CCG and the Care Quality Commission (CQC). He submitted that he now believed that it was because of him whistleblowing to those organisations in July 2018 together with his communication with the Parliamentary Ombudsman and the other disclosures already part of the claim; that he was subjected to the alleged detriment i.e. the wording of the references that the Respondent produced for him when requested.

6. The Claimant confirmed that his original claim to the Tribunal had been issued on 2 August and that there had been two preliminary hearings on 4 March and 10 April 2019 on this matter.

7. The Respondent resisted the application. it questioned whether the communication to Christine Craven at 345 would be considered a qualifying disclosure or even if it had ever been sent. Also, it was pointed out that it was not clear what part of 43(B) Employment Rights Act 1996 was being referred to, if any. More importantly, it was not clear when the Claimant had gone to the CCG. Counsel submitted that this was an 11th hour application which should have been particularised and that if it were to be granted today, there would need to be an adjournment so that the Respondent could properly address it.

8. The Respondent also referred to the principles set out in the case of *Selkent Bus Co v Moore* [1996] ICR 836 on amendments which the Tribunal considered. That case outlined the balance of injustice and hardship test which

a Tribunal must consider when dealing with an application to amend existing claims. Mummery J stated that the relevant circumstances to be considered by the tribunal in balancing the injustice and hardship of allowing the amendment as against refusing it includes; the nature of the amendment, the applicability of time limits and the timing and manner of the application.

9. After further discussion and due consideration of the Claimant's application the Tribunal gave its decision and reasons for that decision. Full reasons were given at the time. Those are reproduced below as the Claimant as a litigant-in-person may not have taken a full note of the Tribunal's decision on his application.

Decision on the Claimant's application

10. The Claimant seeks leave to amend his claim to add two further alleged protected disclosures which he alleges were set out in emails to Rachel Hearne of the CCG and to Christine Craven of the CQC.

11. These alleged protected disclosures were not referred in the Claimant's two ET1 claim forms.

12. The Claimant has had the benefit of three preliminary hearings in this matter, one in November 2018 when the original claim was struck out and then two on this claim when he had the benefit of a full discussion on his complaints.

13. The Tribunal took into account that the Claimant is a litigant in person.

14. However, he has been able to articulate his alleged public interest disclosures in these proceedings and a list of 6 was clearly set out in the note from the preliminary hearing conducted by REJ Taylor in April 2019.

15. The evidence shown to the Tribunal today shows that the Claimant discussed with the Respondent's solicitors on 8 April that he wanted to add these two alleged disclosures to his claim.

16. At the hearing before REJ Taylor the Claimant tried to add them to his case. After a full discussion, the Judge decided that the Claimant was bound to the allegations made in his ET1 and as set out in the draft list of issues for that hearing. The Claimant was not allowed to add the two alleged disclosures that are the subject of today's application. This means that he has already made an attempt to add them to his case and been unsuccessful in doing so.

17. The Respondent's Counsel's note of that hearing, which the Claimant did not challenge in the earlier discussion today; indicated that the Claimant discussed that he might issue a new claim to raise these matters. He did not do so and there was no application by him to REJ Taylor to reconsider her decision. He also did not appeal her decision.

18. Instead the Claimant has simply referred to the 2 alleged disclosures in his witness statement as though they are already part of his claim.

19. He was advised at the preliminary hearing that the matters forming those two potential disclosures were either out of time or not in the claim form and could not be considered as part of the complaint that the Tribunal has to adjudicate on.

20. We consider that the Claimant applied at the preliminary hearing on 10 April 2019 to amend his claim to add those two further alleged disclosures. REJ Taylor refused his application.

21. The Claimant's renewed application today was unclear and despite the Tribunal's efforts to gain clarity, the alleged disclosures remain unclear. The Claimant was unclear of what he said/information provided in the alleged disclosures and also unclear of the dates on which he allegedly disclosed to Ms Hearne and to Ms Craven.

22. It is also not clear what the disclosures were to them. Did he allege that the Respondent was putting health and safety of patients at risk or did he allege that it had failed in a legal obligation to which it is subject? Or did he make another allegation that did not fall within the ambit of section 43B(1) of the Employment Rights Act 1996 (see below)?

23. Right at the start of this case, in February 2019, the Tribunal wrote to the Claimant asking for a list of all the disclosures he wanted to rely on and for details of each one – including what was said, to whom, when, and why it is alleged to be a disclosure.

24. At the 4 March preliminary hearing with Judge Martin the Judge set out in an appendix, a list of the further information that the Claimant had to supply to the Tribunal, which included details of what the Claimant says are the protected disclosures.

25. In this Tribunal's judgment, the Claimant has had many opportunities to set out his case and has failed to include these two alleged disclosures until today.

26. The application is late and there is no reason why it could not have been made before the April preliminary hearing and why, after receiving minutes of REJ Taylor's hearing, the Claimant did not write to challenge the decision not to allow him to include these two additional alleged disclosures in his case.

27. Also, if the Tribunal granted the Claimant permission to add them to his claim at this stage in the proceedings, this would introduce quite different alleged disclosures into the case. These are alleged disclosures to outside agencies that are completely different in nature to that allegedly disclosed internally.

28. The Respondent has submitted that if leave was granted to add these two additional potential disclosures to the case an adjournment would be required to allow it to go away and get further evidence and/or witnesses to be able to respond to the question of what was known by the person who gave the references on the Claimant and whether the fact that these communications were

made (once it is decided what it was), was known to them. Such an adjournment would incur costs and further delay in a claim that is already old where the Claimant has had at least two earlier opportunities and since April 2019 to address this matter.

29. Having considered all those factors – it is this Tribunal's judgment that it would not be reasonable to allow the Claimant to amend his claim to add these two alleged disclosures. The prejudice to him would be that he would have to rely on the disclosures that are already part of the claim. That is lessened by the fact that he was clear today that he continues to rely on them as well.

30. The Tribunal's judgment was to refuse the Claimant's application for leave to amend his claim to add two more alleged protected disclosures.

31. The hearing proceeded with the case as set out in the list of issues.

32. The Tribunal noted that it is part of the Claimant's narrative that he sent emails and communications to Ms Hearne and to Ms Craven. That is part of the factual matrix of this case. We will hear about them in that context but we will not be asked to consider whether they are protected disclosures or whether any detriment suffered by the Claimant, if he had suffered any; was done on the grounds that he made those alleged protected disclosures.

Evidence

33. This matter was initially listed for 2 days on 6 and 7 June 2019. That time was insufficient to hear all the evidence. The matter resumed on 25 September 2019. The parties were in attendance on 25, 26 and 27 September. The Tribunal was in chambers on 27 and 30 September 2019.

34. In June the Claimant brought his projector into the hearing and showed the Tribunal how to retrieve a patient record in a database called SystmOne. The Tribunal also had an agreed bundle of documents.

35. The Claimant called Rachel Hearne from the Mid Essex CCG (Clinical Commissioning Group) to give evidence on his behalf but he had not prepared a witness statement for her, which meant that she attended without one. She gave live evidence to the hearing. The Tribunal heard from the Claimant, Ms Hearne and Ms R, in support of his case. We heard from Christopher Wright Head of IT & Data, Richard Atienza-Hawkes who at the time was Executive Head of HR and Operations Director, and Bridget Acketts, who was Head of Human Resources; on behalf of the Respondent. We therefore had witness statements from all witnesses, apart from Ms Hearne.

36. The Tribunal make the following findings of fact from the evidence given in this case. The Tribunal has not made a finding on every piece of evidence but instead, focussed on those facts that are relevant to the issues that we have to decide.

Findings of Fact

37. The Claimant initially worked for the Respondent as a SystmOne Community Trainer on a one-year fixed term contract which started on 4 February 2015. He was then appointed to the position of Systems trainer, Support and Development lead on 1 April 2016 and remained in this role until his resignation.

38. He worked at the Respondent's head office and also at GP surgeries and hospitals on the Respondent's behalf.

39. The Respondent provides a range of services for NHS and others based in different settings such as community hospitals, primary care settings and in the home.

40. It is likely that SystmOne was the NHS database system that the Respondent used it to keep clinical records for patients at the various services it managed. The Claimant's line manager was Carol Gerrard. Her manager was Christopher Wright who was a witness in this Tribunal hearing.

41. The Respondent had a Data Protection Policy which was ratified by the Finance and Risk board subcommittee in March 2017. We had the document in the bundle and noted that it stated that it would be monitored and reviewed every 2 years by the Respondent's Information Governance Manager or as and when significant changes make earlier review necessary. The copy of the Policy in the bundle is the one that applied to this period of the Claimant's employment. It stated that it would be reviewed in March 2019.

42. We find that the Policy stated that the Respondent had a legal obligation to comply with all appropriate legislation in respect of data, information and IT security. It also had a duty to comply with guidance issued by the Department of Health, the Information Commissioner, other advisory groups to the NHS and guidance from professional bodies.

43. Under the heading of '*Patient-Specific issues'* the Policy stated as follows: -

> *"Whilst any organisation may legitimately process data for the purposes of pursuing their legitimate interests, the (Data Protection) Act requires specific conditions be met before the processing of 'sensitive' data can take place. 'Sensitive' data includes details of physical or mental health or condition, racial or ethnic origin, religious beliefs and political opinions, offences committed and sexual life. Virtually all patient data collected in the organisation will make reference to at least one of the above data items, and hence the importance of ensuring these conditions have been met"*

44. The Policy confirmed that a breach of the Data Protection Policy requirements could result in a member of staff facing disciplinary action.

45. We also had the Respondent's Confidentiality Code of Conduct for Staff

in the bundle. This had been ratified by the Respondent's Quality and Safety committee on 27 July 2017 and was due to be reviewed on 27 July 2019. It stated that it had been produced to ensure that all staff members were aware of their legal duty to maintain confidentiality, to inform staff of the processes in place to protect personal information and to provide guidance on disclosure obligations.

46. It began with a statement that:

> *"All employees working for Provide are bound by a legal duty of confidence to protect personal information they may come into contact with during the course of their work. That is not just a requirement of their contractual responsibilities but also a requirement within the common law duty of confidence and the Data Protection Act 1998. It is also a requirement within the NHS Care Record Guarantee, produced to assure patients regarding the use of their information".*

47. The Code stated under the heading '*Scope'* at section 3: -

> *"The code is concerned with protecting personal information about patients, and staff's personal information. Personal information is data in any form (paper, electronic, tape, verbal, etc) from which a living individual could be identified; including name, age, address, and personal circumstances, as well as sensitive personal information like race, health, sexuality etc. This may include patient attendances at appointments, staff disciplinary records, information about agency staff or volunteers, though this list is not exhaustive"*

48. The Code confirmed that it also applied to information about deceased patients.

49. At section 5 headed '*Principles'* the Code stated that:

> *"A duty of confidence arises out of the common law duty of confidence, employment contracts and for registered health professionals, it is part of your professional obligations. Breaches of confidence and inappropriate use of records or computer systems are serious matters which could result in disciplinary proceedings, dismissal and possibly legal prosecution. So, make sure that you do not:*
>
> - *put personal information at risk of unauthorised access;*
> - *knowingly misuse any personal information or allow others to do so;*
> - *access records or information that you have no legitimate reason to look at, this includes records and information about your family, friends, neighbours and acquaintances as well as patients who are not under your care."*

50. In the Respondent's disciplinary Policy and procedure which was in the bundle, it stated under the heading *Procedure* at section 2.4 that *"if an employee resigns and formal proceedings are being considered or have started, the investigation may continue to an appropriate conclusion at management's discretion. HR advice should be taken on this and any subsequent reference requests relating to the employee should include that the employee left the organisation whilst an investigation was ongoing."*

51. On 15 February 2017 the Claimant sent an email to managers, Jackie Bolton and Lucie Holford with a copy to his line manager, Carol Gerrard. He stated that he felt that he had to report something that came up in the training that he had been giving to nursing and other staff the previous day. He was concerned. The Claimant believed that in the training he was told that some staff were recording observations when they had not yet seen the patient and that he was asked by a nurse how to change the time on the system that they record observations. Another issue was around recording within the National Early Warning Scale and yet another issue related to a nurse's request to be able to backdate the time at which falls assessments had been carried out. This concerned the Claimant as they were supposed to be carried out within 6 hours of a fall. The last issue mentioned in the email was about a nurse who may be dyslexic but had not informed the Respondent as her employer about it.

52. In the email the Claimant recorded what he had seen in respect of these issues and what he had been told by the respective members of staff. He reported his concerns.

53. Jackie Bolton replied on the following day. She confirmed that she recognised that the Claimant had significant clinical safety issues and that the Respondent may need to undertake an investigation into them. The Claimant agreed in evidence that she thanked him for raising his concern. Ms Bolton was one of the Respondent's Assistant Directors.

54. Libby Marsden who also received the email indicated that she was on her way to the ward and would take the opportunity to catch up with the Claimant on the issues raised.

55. After the issue of the provenance of the Falls Policy became an issue in the early part of this Tribunal hearing in June, the Respondent applied to the Tribunal for permission to insert a redacted copy of the minutes into the bundle. We accepted Mr Wright's evidence that the Respondent has had a Falls Policy in place since 2009 and that this and other policies are reviewed on a regular basis. We find that the policies are written as Word documents initially and sent to the Board for ratification. Part of the ratification process allows for amendments, additions and alterations to be made at Board level. Once ratified they are made into PDF documents and sent to all members of staff who need to attest to them. We find that each member of staff would get an alert or some form of notification that they have to read the Policy and it would keep alerting them to the Policy until they did so. PDF documents cannot be amended by members of staff. As the minutes contained commercially sensitive information it was not necessary for the deliberation of the issues in this case for us to see the whole minutes in order to deal with this point and the Tribunal agreed to the Respondent's

application to only put the redacted version in the bundle. In addition, the Tribunal did have sight of the unredacted version during the hearing. We can confirm that the Respondent's Quality and Safety Committee met on 28 September. This was a subset of the Board. The subcommittee minutes show that the Respondent's Falls Policy was ratified at that meeting.

56. In early October as part of his work with the Care Coordination Centre, the Claimant was reviewing processes with a view to identifying how improvements could be made. He noticed that there was a function within SystmOne which allowed staff to cancel an appointment for a patient, with another option to re-book it later. He believed that staff had been using this re-book later function when he believed they should not been doing so. The Claimant identified patient appointments stored on what he referred to as a 'list for re-booking' which he was concerned about as he believed that staff had not re-booked these appointments but had instead been clicking a button that kept patients on that list indefinitely. If that were true it would represent a significant failing either in the system or with the operators or both as patients would never get rebooked for their appointments and would not get the service to which they were entitled.

57. On 10 October the Claimant sent an email about this to Annie Ellis and Ellen Van Gemmert with copies to his line manager Carol Gerrard and two other managers. In the email he stated that he had pulled off a list from the system to attach to the email. In the emails the Claimant told the managers about the staff using the option of 're-book later' on the system when an appointment is cancelled and his concern that by doing so, those patients were likely to get missed and not seen.

58. The Claimant felt that a different way to address the cancellations would be for staff to create a waiting list rather than keep patients on a 're-book later' list. In his email he asked the Respondent to make sure that these patients were given new appointments and once that was done, that they were then removed from the list. He was clearly unhappy that staff were using the 're-book later' function as he thought that this meant that those patients would never be given new appointments and would therefore not receive a service.

59. On 18 October the Claimant wrote to Ms Ellis and Ms Van Gemmert again raising the same issue. He was clearly disappointed that, having raised the issue on 10 October, it did not look to him that anything had changed and in fact, he believed that it had got worse. The number of patients that he could see on the 're-book later' list had risen to just over 200 whereas when he wrote the 10 October email it was his position that he saw 196 patients on there. He believed that this was a list of people who were still waiting to be re-booked and he asked for this to be sorted out as a matter of urgency. He stated that he had spoken to Quality and Safety and they had advised him to 'Datix' this issue.

60. We find that the Datix system was an internal incident reporting system through which an employee could raise a complaint about an incident at work or involving work. The Claimant's Datix was raised on 18 October 2017. In it the Claimant explained the 're-book' functionality within SystmOne and stated that usually, this function is not used as there is a clear clinical risk attached which is

that the patient never gets re-booked and does not get the service. He stated that he had noticed that the number of patients on the list had risen as he looked at it that day.

61. The fact that the Claimant had put in the Datix was reported to Brigitte Beal, the Respondent's Assistant Director Clinical Practice & Quality Assurance. She took the Claimant's report seriously and asked him for further details such as whether he could advise her which staff/teams were using the particular functionality he referred to.

62. On the same day, Mr Wright, the Respondent's Head of IT and Data wrote to the Claimant to confirm that this was a risk which needed urgent attention. He asked the Claimant whether he could identify how to stop this happening and asked if there was any training that could be put in place to ensure that it did not happen again.

63. We find that the Respondent took the Claimant's concerns seriously acted on it. When the Claimant provided the names of the teams that were using this functionality, Ms Beal wrote to the team managers on the same day to ask them to raise it with their teams and to ensure that people on a rebook list are reviewed and moved on to an appropriate waiting list. She advised that clinicians as well as teams should be told not to use this functionality.

64. On 20 October Gerdalize du Toit stated in an email to Ms Beal that she considered that the issue had been overstated. Ms Du Toit was the Assistant Director Primary and Prevention Pathways. She considered that the patients the Claimant saw on the list had all been re-booked and were not lost in the system. She believed that the issue was that the wrong box had been ticked when staff were rebooking patients. Nevertheless, she confirmed that she was looking into the matter in detail but considered that the risk was very low that any harm had come to any of the Respondent's patients in the way the Claimant believed.

65. On 12 November 2017, Patient MRF had a fall on a ward run by the Respondent. She sustained serious injuries. The Claimant was extremely unhappy with the way in which the patient was cared for on the ward immediately after she fell. A serious incident investigation took place and a serious incident report and action plan was compiled by Jayne Overett. She spoke to the Claimant as part of her investigation. The Claimant confirmed to her his belief that the process in place at the time could not be relied upon for correctly recording patient observations and that this presented a risk to patients.

66. It was the Claimant's case that Ms Overett was leaned on by the Respondent to change her report. He relied on a text message which he believed came from her. We did not hear from Ms Overett. We had no independent evidence of where the text message came from or what exactly it meant as the words in it could be interpreted in more than one way.

67. The text message stated:

> *"Hopefully you will not see this in the morning. I have been asked to write the report on the clarification of the meeting and I was asked to set*

out that a layman could understand to exonerate Provide. I feel I am finding that hard to swallow. Not sure am I being an idiot?"

68. We were not sure what it meant or why, if it was sent by Ms Overett, she would raise with the Claimant if she was uncomfortable with the Respondent's request/instructions rather than take up issues with the Respondent itself. What did she feel that she was being asked to do? It was not clear to us that this text message was sent by Ms Overett to the Claimant. Ms Overett is recorded as stating to Mr Horne that she did not send the message and that she could not find such a message on her mobile phone. Ms Overett was adamant that the final version of the report that she signed off and uploaded was her own report that she was content with.

69. In her report Ms Overett recorded her conclusion that a member of staff on the ward had changed her previous statement after being asked by the senior nurse to do so. Ms Overett made sure that the member of staff had the Respondent's Freedom to Speak Up Policy and Procedure. If the Respondent had been trying to get her to write a report that left that out, they had failed as she included it.

70. The Claimant sent an email to Carole Gerrard in the early hours of the morning of 15 January. In the email he made allegations that the Respondent has committed medical negligence in relation to the '*incident'*, which we find is likely to be patient MRF's fall. The Claimant threatened to go to the police if the issue was not dealt with in the way he suggested. The email was headed '*Falls investigation'* but did not refer to patient MRF by name. The Claimant's explanation in the hearing was that he believed that the Respondent was trying to get Ms Overett to cover up the wrongdoing of staff in relation to the fall. The Claimant did not believe that the Respondent had a Falls Policy in place at the time but we have already found above that it did.

71. On 30 January the Claimant sent Ms Gerrard an email in which he submitted his resignation. The Claimant stated that he was not happy with the way things were done at the Respondent and that he had found another job. He gave the end date of his employment as 5 March and indicated that he was prepared to complete the hospital rollout before leaving. It is likely that that was the project he had been working on at the time.

72. On the evening of 30 January one of the Claimant's friends, Ms R, telephoned him. Ms R's parents are looked after by one of the services provided by the Respondent. She was very annoyed and upset at how she felt she had been treated on a call to the Respondent's Central Point of Access. She was the main carer for her elderly parents and she needed urgent help with her father, Mr K. The Claimant then telephoned the Central Point of Access on her behalf. His evidence was that he waited approximately 20 minutes before the call was answered. The person he spoke to told him that she was the only one there and became tearful and upset during their conversation. The Claimant's evidence was that at some point that night he checked Mr K's medical records.

73. The Claimant was upset at what had happened that evening. He felt that the service the Respondent provided had been lacking. The Claimant promised Ms R that he would raise this at work in the morning and he would get something done.

74. On his arrival at work the following morning the Claimant spoke to Mr Wright and Carole Gerrard. The Claimant was visibly angry and shaking while he spoke with them. The Claimant reported to them what had happened the night before. He raised the issue of the call handler working on her own. It is likely that although he did not expressly raise a concern about unsafe staffing levels; there was an inference of understaffing in him reporting back to managers that the call handler had been there on her own.

75. Mr Wright suggested that the Claimant write down a chronology of events while it was fresh in his mind. We find it likely that the Claimant was not asked to access the patient record to do so. Patient records are confidential and the Claimant was not a clinician so it is highly unlikely that he would have been specifically asked to go into the records to create a chronology of his involvement with the patient. A chronology would usually be timeline of events that the Claimant's knows about i.e. his involvement. The Claimant did not explain to the Tribunal why he would require clinical details in order to give a timeline of what happened on the previous evening.

76. The Claimant did access the patient's records to create his chronology. Once he did the chronology, the Claimant had a meeting with Jane Churchman, who was the Respondent's Customer Services Co-ordinator. The expectation was that after meeting him, Ms Churchman would then start the process of an official investigation into the incident that had occurred with the service provided to Mr K on the previous evening. At the end of their meeting Ms Churchman put a referral on the system so that Mr K would get the particular service that he needed. This led to a nurse being sent over to carry out an assessment. The Claimant was successful in getting something done for Mr K as he promised.

77. On 1 February the Claimant was advised that he would be meeting with Stephanie Dawe, the Respondent's Executive Clinical and Operations Director. The Claimant was advised that he would need to provide a chronology of what had happened with Mr K. That chronology was needed for the investigation by David Horne.

78. In that meeting the Claimant was also told that there had been a Datix filed against him. That Datix had been raised by another member of staff on 31 January. It complained that the Claimant as a non-clinical member of staff had accessed patient records multiple times since November 2017. As a result, the Claimant's access to the records was reduced. The Claimant requested a meeting with Mr Wright to ask why that had happened. The meeting took place on 5 February. Another meeting between the Claimant and Mr Wright happened on 6 February.

79. In the meetings the Claimant and Mr Wright discussed the Claimant accessing patient records over a period of 3 days in different units. We had two sets of minutes of the first meeting in the bundle. Mr Wright is recorded as

stating that he appreciated that the Claimant was doing good work but he was concerned at the number of times the Claimant had accessed the patient records. Although he was certain that it was not the Claimant's job to be accessing patient records, he stated that he wanted to take a pragmatic approach to the matter. The Claimant stated that he accessed the records to help the family and because he had been asked to put a chronology together.

80. After some reflection on the issue, Mr Wright asked to meet with the Claimant on the following day. The Claimant was adamant that he had been instructed by Ms Gerrard and Mr Wright to access the patient records. Mr Wright responded to the effect that even if he had, he had definitely not been asked to do so three times on three different occasions. He decided that the pragmatic approach would be to ask the Claimant to take the rest of his notice as gardening leave. The Claimant had already resigned and given his notice. Mr Wright confirmed that the Claimant's NHS.net email account would be suspended but transferred to a new employer intact. It would not be shut down or deleted. The period of gardening leave was to be between 7 February and 5 March.

81. Mr Wright provided the Claimant's first reference dated 7 February 2018. The Respondent's format for its reference did not change during the period covered by this case. The reference is in the form of boxes on a printed page. The first box asks for the last post held which was filled in as 'Technology Systems Lead'. The reason for leaving box is completed with the word "Resignation" and the dates of the Claimant's sickness absence is recorded. The box which asked about his conduct at work was completed to say that he did not have a current disciplinary warning on his file and that he was not currently under formal investigation. Next to the box which asked about 'Capability/Performance' the Respondent had completed it to state that '*The employee is not currently being assessed regarding their performance under the Provide Capability Policy'*. Next to the Safeguarding box – the answer was that *'There are not any recent/outstanding allegations made against this employee regarding safeguarding*'. Next to the parental leave box was marked the words 'N/A'. The reference stated that it was the Respondent's policy to provide a standard written reference for all its employees. It was signed by Chris Wright, Head of IT and Data. This reference was provided to Channel3 Group which we find is likely to be a recruitment agency.

82. In May 2018 David Horne was engaged by the Respondent to investigate 8 concerns raised by the Claimant under the Respondent's Freedom to Speak Up Policy. His report was in the bundle. Concerns 1 - 4 of the matters listed that were investigated relate to the management and running of Halstead ward where patient MRF had their fall and the issues which arose from it, issue 5 was the Claimant's concern that 200 patients who were allegedly assigned as 're-book later' may not have had their appointment rebooked and might therefore not have received timely care, and issue 6 was the Claimant's allegation that Ms Du Toit shouted at him when he raised a Datix on the same issue. We find it acceptable for the Respondent to seek to investigate all the issues raised in the Claimant's Freedom to Speak Up Policy at the same time.

83. We find that the Respondent took seriously the issue of the 200 patients who the Claimant alleged had not been rebooked, which was why it was included in this investigation.

84. One of the outcomes of this investigation was that the allegation that the member of staff on the ward where MRF fell was not competent was partially upheld as that person had not followed procedure. The report recorded that it was now an item to be taken forward in an action plan.

85. The allegation that the ward manager had ordered a member of staff to amend her witness statement was investigated. Mr Horne spoke to the Claimant about this issue. The conclusion was that the final version of the statement was her own work and she denied being bullied or coerced into changing her statement.

86. Mr Horne also investigated the problems identified by the Claimant with the re-book later function on SystmOne. Mr Horne spoke to the Claimant at length about this issue. Ms Ellen van Gammert gave her evidence to the investigation and confirmed that following the Claimant raising the concern in October she had worked with colleagues in knowledge management and quality and safety to conduct an audit relating to a significant sample of the 200 cases in question. The audit showed that the services that had chosen to utilise 're-book later' had local systems in place to ensure that the patient re-booking actually took place. The audit showed that there had been no delay and no clinical harm had come to any patients. This was confirmed by Carol Gerrard who stated that no clinical harm had been identified in any of the 're-book later' cases.

87. Mr Horne's report was published on 23 May. Two of the Claimant's concerns were either partially or fully upheld.

88. While this investigation was going on, the Respondent provided a second reference for the Claimant. This reference was in the same format as the one provided in February. It was provided by Carol Gerrard, his former line manager. His last post held was described in a different way. It was now called 'Systems Trainer, Support and Development Lead' and the reason for leaving was different to the last reference as it was now stated to be 'New Challenge'. The Claimant makes no complaint about those changes. This reference confirmed that there was nothing to mention in relation to safeguarding, disciplinary action or capability/performance. The reference was dated 30 July 2018.

89. The Claimant was sent a redacted copy of the investigation report. He was not satisfied with the outcome of Mr Horne's investigation. On 16 July he wrote to the NHS Mid-Essex Clinical Commissioning Group to complain. He attached both the redacted and original copies of Mr Horne's report to his email. He stated that he was in possession of evidence to support what he was saying including *'a copy of an appointments for re-booking showing over 200 patients potentially not seen due to a situation highlighted'.* He stated that he had given the Respondent every chance to address his concerns and be what he described as *'honest and open about their practices'* which he felt that they had not done and was why he had decided that he could not work for them any longer.

90. On 17 July Ms Hearne replied to the Claimant after having had a conversation with him. She stated that she was dealing with the matter with Viv Barker, the Respondent's Deputy Director of Nursing and Quality. In the email she recapped what the Claimant had told her and then advised him to contact the

Respondent to discuss his concerns and to allow the Freedom to Speak Up to continue. He was advised that there was likely to be an appeal. The Claimant had, at this point also been invited to meet with the Respondent's Director of Finance and the Deputy Director of Operations to discuss Mr Horne's findings. Ms Hearne urged him to go to those meetings. She advised him that the most appropriate avenue for further complaint if he was not happy with the outcome of the full internal process was to complain to the Care Quality Commission and she gave him details of how he could do so.

91. On 27 July Ms Hearne wrote to the Claimant by email again and stated that she remained concerned that the Claimant had disclosed to her that he had over 200 records relating to patient identifiable information that he was using as evidence. She asked him to consider giving this information to the Mid Essex CCG to hold as third party as he pursued the case, to ensure the integrity and safety of those records. She advised him to contact Viv Barker to progress this.

92. The Claimant responded to Ms Hearne on the same day to say that he did not have copies of 200 patient records but that he had a list of patients that were affected by the issue. He stated that it was held securely in his NHS email account. He offered to send it to her.

93. We find that the Claimant started work for another organisation within the NHS while he was on garden leave from the Respondent. He transferred the list to an NHS email account on 26 February when he started the new job. It was from that account that he sent the list to the CCG on Ms Hearne's request.

94. By 31 July the information that the Claimant believed contained evidence of the patient list for re-booking had been sent to the CCG. This was confirmed in correspondence between the Claimant and the CCG.

95. The Claimant issued his first ET1 claim against the Respondent on 2 August 2018. At the time, his complaints were of unfair dismissal and detriments following the making of protected disclosures. In his email to Viv Barker on 8 August he told her that he had now deleted the list from his computer. He stated that the list was still in his secure NHS email account as a saved email in the 'sent' folder having been sent to her. He confirmed that he wanted the list kept safe as he needed it for his Employment Tribunal claim to show that the issued he raised had not been dealt with correctly prior to him leaving the company. He stated that he considered that an email from the CCG stating that it had in its possession a list of the 200 or so patients that had been affected by this investigation would assist his tribunal claim.

96. Ms Hearne wrote to the Respondent on 3 September to formally inform them that she had been contacted by the Claimant who had made her aware that he had in his possession around 200 patient records from their system that he had downloaded as evidence of an incident that he was pursuing. She stated that following a discussion as the Caldicott Guardian for Mid Essex CCG with Viv Barnes she had asked the Claimant to transfer the data to Mid Essex CCG for safekeeping, whilst any ongoing investigations continued. She confirmed that she had asked the Claimant to delete all storage of the data. She confirmed that the transfer of the data had occurred and that it was in Mid Essex CCG's possession.

97. We find that Mr Wright first responded by conducting a fact-finding exercise from which he concluded that the Claimant had inappropriately accessed and copied patient records while he was employed. He confirmed in his evidence that it was standard practice to undertake a preliminary investigation for data breaches. Once he came to that conclusion, Mr Wright on behalf of the Respondent appointed Mr Hooper to investigate the Claimant's conduct in relation to the allegation that he had inappropriately accessed and copied records whilst working at the Respondent.

98. Mr Hooper was the Deputy Director, Integrated Pathway Hub. In a letter dated 5 September Mr Wright notified the Claimant that an investigation had been set up to investigate 3 concerns: one relating to accessing patient MRF's records, another related to copying patient records from SystmOne and the last concern was that he kept a copy of patient records in his personal possession and continued to hold them after his employment with the Respondent had ceased.

99. The Claimant was told that Mr Hooper would shortly be in contact to start the investigation. Mr Hooper was the Respondent's Deputy Director of Marketing, Business Development and PMO. In conducting his investigation Mr Hooper interviewed Carol Gerrard, Annie Ellis, Vicky Waldon, Phillip Richards, Rachel Hearne and David Horne. The Claimant had an email exchange with Mr Hooper but did not attend the interview with him.

100. At the end of his investigation, Mr Hooper produced two reports. One dealt with what happened and was more technical while the other addressed the Claimant's conduct. At the end he made recommendations and arrangements for shared learning. At the end of the report of the investigation into the Claimant's conduct he stated that there was sufficient evidence to support the allegations against the Claimant. He recommended that a panel should be convened to look at the evidence and decide on the three allegations.

101. On or around 20 September the Respondent reported an incident via the Data Security and Protection Toolkit. This was in relation to the Claimant's possession of the list of patient appointments for re-booking. Mr Wright confirmed that it was reported to the Information Commissioner's Office (ICO). We had a copy of the report in the bundle of documents. The report confirms that the Claimant downloaded the list or printed it from the Respondent's Electronic Patient Records on SystmOne when the Claimant was one of its employees. The list was of patient appointments from 16 February 2017 – 18 October 2017 and had been printed off or downloaded by the Claimant on 7 November 2017. The Respondent reported on the form that it had become aware of this through the local CCG and that the list had been given to the CCG by the Claimant as a former employee. The report stated that the list contained the details of 205 patients from various clinical services and contained patient names, DOB, clinical service name, clinician's name and date and time of appointment with service. The ICO was informed that the list had been confiscated from the Claimant when he presented it to the CCG and sent back to the Respondent.

102. The Respondent also contacted all the patients on the re-book later list as part of its Duty of Candour to let them know what had happened with their data. As part of his report, Mr Hooper confirmed that on 1 October, Mr Wright

wrote to the 205 patients on the list to inform them of the breach and the steps taken to address it. At the date of writing his report, 13 patients had responded and the Respondent had follow-up telephone calls with them. Mr Wright confirmed in his evidence that due to personal circumstances at least one individual affected by this incident was particularly distressed and worried and that several service users were very unhappy about what had happened.

103. On 10 December Mr Wright wrote to the Claimant to invite him to a disciplinary case review following the outcome of the investigation. The Claimant was told that as he was no longer one of the Respondent's employees, as an alternative to a disciplinary hearing, the Respondent would conduct a case review of Mr Hooper's investigation report and supporting information to determine an appropriate outcome. The case review was to follow the principles of the Respondent's Disciplinary Policy and Procedure. The case review was due to take place on Wednesday 19 December 2018. The Claimant was advised that as he was no longer employed by the Respondent he was not required to attend although he was welcome to do so and /or make written submissions to the panel. The Claimant was advised of his right to be accompanied.

104. He was advised that the case review would consider the following allegations: -

a. That between 21/12/17 and 31/1/18 he inappropriately accessed the patient record of MRF (a patient who was the focus of a Serious Incident Review) within the Halstead Community SystmOne Unit, on 3 separate occasions, without having a business need to do so

b. That he inappropriately copied patient records from SystymOne; and

c. That he kept these copies of patient records in his personal possession and continued to hold them after his employment with the Respondent ceased.

105. The Claimant was provided with a copy of Mr Hooper's investigation report and the supporting documents considered during the investigation.

106. The Claimant was advised that at the end of the case review the Respondent would decide whether the case was upheld. If upheld then the panel would determine whether it is appropriate that any future employment references would reflect the outcome of the case review. The panel would consist of Mr Richard Atienza-Hawkes, the Respondent's Executive Director and the Respondent's HR Business Partner.

107. On 12 December the Claimant wrote to Mr Hooper and Mr Wright to request that a copy of the email sent to the Respondent by the CCG should be included in the papers as he intended to add the CCG to the list of defendants at the Tribunal claim. He stated that he considered that the CCG had been working with the Respondent to cover up and shift blame over patient care.

108. When Mr Wright had a look at the emails between the Claimant and Viv Barker he was unclear about what had happened with the chain of possession of the list. He wrote an email to the Respondent's HR on 16 December in which he stated that the Respondent had understood that there had been a paper copy of the records which had been passed to the CCG but on reading the emails sent by the Claimant he now understood that the Claimant had kept the information in a secure NHS email account. He queried how that could be since the Claimant's email account had been marked as a '*leaver'* on his departure. His evidence was that as the Claimant's new employer was also an NHS organisation, it could mark the Claimant as a '*joiner'* on the system and this would allow him to retain access to the account but as the Claimant had not started his new job immediately, it was still unclear what had happened.

109. Although the Claimant stated in cross-examination in this Tribunal hearing that he thought that his Hotmail account was secure he did confirm that when working with the NHS he would not be allowed to use his Hotmail account to send secure messages relating to work.

110. We find that Mr Atienza-Hawkes went in to the disciplinary case review on 19 December without a clear understanding of the chain of possession of the patient re-booking list. The fact that the list had first been sent to the Claimant's Hotmail account before being sent on to the NHS account was not revealed to the Respondent until the case review meeting.

111. The Claimant attended on his own. In the hearing the Claimant denied that the re-book list was patient records. It was agreed that the information on the list was patient identifiable data.

112. It was in the case review meeting that the Claimant clarified that he had forwarded the patient re-booking list to his own personal email address which was a Hotmail account. It stayed there for about two weeks. Once he started at his new employer, which was also an NHS employer, he transferred the data into an NHS email account. This was the first that the Respondent knew that the data had been in his personal Hotmail account.

113. The Claimant told Mr Atienza-Hawkes that he sent the list of patients for re-booking electronically to his Hotmail email account as he was leaving the Respondent and because he did not want the Respondent to hide the evidence. He left the Respondent on 5 February by agreement with the Respondent (although he remained employed until 2 March 2018) and just before that, he sent what he believed to be the patient list for re-booking, as an attachment to an email, to his Hotmail account. The Claimant's evidence to the Tribunal was that this was sent securely. We find that an email that is being sent to an account that is not part of the NHS would need to have the word "[secure]" written in that way (i.e. with brackets around the word) in the *send* part of the email details in order to make it secure. If it is being sent to and from an NHS account then it would have built-in additional security. We had a copy in the bundle of the email that the Claimant sent to his Hotmail address attaching the list and we find that the word "[secure]" was not included in the address section. He sent the list to his personal Hotmail account on 15 January 2018.

114. We find that the only security that exists with a personal Hotmail account is the owner's password. If the account is linked to a phone or other mobile device, it is likely that someone would not need the password in order to access the account. All they would need to do is to open the account on the phone or mobile device. Hotmail does not offer the security that everyone agreed in the hearing that an NHS email account would have.

115. In the case review meeting and in the Tribunal hearing the Claimant was adamant that he had not looked at the list. However, we find it likely that he had looked at it as he intended to use the list as evidence in his Employment Tribunal case and would have needed to be sure that it had information on appointments, cancellations and an absence of the appointment being re-booked in order for it to be helpful evidence of his case. In addition, in cross-examination in the Tribunal hearing, the Claimant confirmed that the list contained the names, dates of birth, home addresses and telephone number of patients as well as the dates and times of appointments, the clinician/clinic each patient had been booked with and the service or department concerned. It would have also contained the details of the cancelled appointment. He was asked on two occasions during his cross examination whether the list contained all that information on patients and on both occasions, he confirmed that it did.

116. During the meeting they also discussed the Claimant's access to MRF's medical records which the Claimant had accessed many times. It was agreed that the Claimant had accessed the records to assist Ms Overett in her investigation but it was not clear why he needed to do so a further 3 occasions between 21 December and 31 January.

117. On 27 December, Mr Atienza-Hawkes wrote to the Claimant to let him know the outcome of the disciplinary case review. The panel concluded, in relation to the first allegation, that the Claimant had a legitimate business need to access the patient records of MRF between 21 December 2017 – 31 January 2018 as part of his assistance to Ms Overett in her investigation. This meant that allegation 1 was not upheld. In relation to allegation 2, the panel, who were now clear on the chain of possession of the list and what the list was; concluded that the Claimant had not taken copies of patient records and that any patient records he had in his possession were as result of the support he was giving to the Serious Incident investigation. The second allegation was not upheld.

118. In relation to allegation 3, the panel concluded after consideration of all the evidence that the Claimant had kept patient records in the form of patient identifiable data as an attachment to an email, which he had in his possession and which he held on to after his employment with the Respondent had ceased. The panel's decision was that allegation 3 was upheld.

119. Mr Atienza-Hawkes recorded in the outcome letter that the panel had considered the Claimant's mitigation which was that he had done this because he believed that the information contained in the list related to a matter he had raised under the Respondent's Freedom to Speak Up Policy. The panel considered that doing so amounted to a breach of the Respondent's policies and would have constituted misconduct under the disciplinary sanctions had the Claimant still been in employment. In that case, it would have warranted action

short of dismissal. As the Claimant was no longer an employee, the panel considered that it was appropriate that the fact that this allegation was upheld should be reflected in answer to any future reference requests that the Respondent received regarding his employment. The Claimant was advised of his right of appeal.

120. On 29 December the Claimant wrote to Mr Atienza-Hawkes to state that he was unhappy with his decision. He submitted his appeal on 4 January 2019. In that letter he stated that he believed that this was revenge for him putting in an Employment Tribunal claim against the Respondent. He stated that this had all happened because the Respondent did not do what it was set up to do which was care for patients instead of trying to cover things up and causing patients more distress. He considered that he was being victimised by the Respondent and by the CCG.

121. On 9 January the Respondent wrote to invite him to an appeal hearing on 14 February which would be chaired by the Respondent's Chief Executive, John Niland. The Claimant was asked to provide an explanation of his grounds of appeal. He was advised that at the appeal hearing he would be given the opportunity to present his reasons and evidence for appealing the decision. The Claimant was advised of his right to be accompanied to the hearing by a work colleague, a trade union representative or ex-colleague. He was also told that he could bring witnesses.

122. In the interim, on 7 February 2019, the Respondent completed another reference request for the Claimant from Evolution Recruitment Solutions. Bridgett Acketts, the Respondent's Head of HR, completed the reference form and all the information was the same as the previous reference apart from what was stated in the 'Conduct at work' section; which was as follows: -

> *"A panel upheld an allegation that AS kept copies of patient records in his personal possession and continued to hold them after his employment with Provide ceased. This decision is currently subject to an appeal process".*

123. Ms Acketts had not been involved in the Disciplinary Case Review process or in the investigation by Mr Hooper. She was aware that allegation 3 had been upheld after the process had completed. Mr Atienza-Hawkes came to the decision that the Claimant's act in keeping the information he had, had been a breach of the Respondent's Confidentiality Code of Conduct for Staff, its Data Protection Policy and the terms relating to confidentiality in his contract of employment. It would also have constituted misconduct under the disciplinary Policy had he still be in employment. It was on the basis of the decision of the Case Review panel that she completed the reference in the way set out above. It was not her decision. We find that she used the same wording that Mr Atienza-Hawkes used in the outcome letter.

124. The Respondent received the reference request from Evolution, an agency, regarding the Claimant on 30 January 2019. The appeal process was still ongoing but, she did not want to hold up the reference and so completed it using the wording in the outcome letter and made sure to indicate that it was still under review as part of the Claimant's appeal. The reference was sent on

30 January but due to Evolution having problems accessing the electronic copy, she sent them a hard copy by post on 7 February, which is the date on the copy we had in the hearing bundle.

125. The Claimant was invited to a disciplinary case review appeal meeting on Friday 14 February.

126. The Claimant attended the appeal hearing accompanied by Ms R. As she was neither a colleague, former colleague or a TU official, she was asked to remain in the breakout room where the Claimant could speak to her on breaks, if he wanted to.

127. Mr Atienza-Hawkes attended the appeal hearing and it was chaired by the Respondent's CEO, John Niland. Ms Acketts was also present. Mr Hooper attended the hearing. The Claimant's main ground of appeal as set out in the minutes was that the information he had sent to the CCG via his Hotmail account was not a list of patients and not patient identifiable data. He also appealed against the punishment which he said was too severe. He did not say that the punishment, which was the statement in his reference, was inaccurate. He simply stated that it was too severe. In the Tribunal hearing he agreed with Counsel that the statement in the reference was accurate.

128. During the discussion in the appeal hearing the Claimant stated that he had encrypted the email when he sent it to his Hotmail account. As we have found above this was unlikely to be true as the email of 15 February did not have the "[secure]" encryption on it.

129. In the appeal hearing the Claimant confirmed that when his NHS email closed on 5 February he forwarded the list of patient identifiable data to his personal Hotmail account. He also confirmed in the appeal hearing that he was unhappy with the reference the Respondent provided which was dated 7 February but that he got the job that Evolution had used the reference for. In evidence to the Tribunal he stated that it was likely that the agency kept the reference when they received it and did not pass it on to the new employer and that he only got the job because he asked some former colleagues to call and provide verbal references for him.

130. We find it likely that this was an assumption that he made and we had no evidence to support it. Having asked for the reference from the Respondent who was his most recent employer, it is highly likely that Evolution would have sent it to the prospective employer on his behalf. The Claimant had been employed by the Respondent for just over three years and he was in the process of applying for employment within another NHS body. In those circumstances, we find it likely that the prospective employer would have required a reference from his most recent employer.

131. We find it likely that the new employer weighed up all of the references it received on the Claimant, including the paper reference, before it decided to offer him employment. The Claimant was employed at that job for 4 months.

132. At the appeal hearing the panel was satisfied that the Claimant had kept patient records in the form of a patient list containing patient identifiable data by sending it to his personal email address and then transferring it to a secure nhs.net email account when he started with his new employer. The panel was also convinced that had the Claimant still been an employee, what he had done would have amounted to misconduct and that the appropriate sanction at the end of a process would have been action short of dismissal which we find was likely to have been a warning. As the Claimant was no longer employed, the panel confirmed the Disciplinary Case Review decision that, in response to reference requests from prospective employers, an amended reference would be provided to reflect the Disciplinary Case Review findings. The appeal panel agreed to change the wording to reflect what the Claimant believed to be a more accurate way of describing the data he kept in his possession was that it was 'patient identifiable data'.

133. There was a fundamental difference between the Claimant and the Respondent's understanding of what constituted 'patient records'. The minutes show that discussion on what was meant when the word 'records' is used took place at the appeal hearing as well as in this Tribunal hearing. The Respondent confirmed that it was not saying that the Claimant downloaded and kept complete patient records. The allegation that he inappropriately copied patient records was referred to in the initial invitation to Disciplinary Case Review letter but that allegation was not upheld. The Respondent began to use the phrase 'patient identifiable data' in the internal hearings, in the papers and in the Tribunal hearing. From his evidence we find that the Claimant seemed to think that unless he had complete paper or electronic copies of patient files then the term 'patient records' could not be used. That was the purpose of him bringing his computer to the hearing to demonstrate how to access case records.

134. The Tribunal considered that what the Respondent referred to was parts of patient records. It may not have been the complete record that was on SystmOne about each patient that he had accessed or was on the list but it was a record concerning each of the patients on it. In the appeal hearing Mr Atienza-Hawkes made it clear that the Respondent considered that the information in the list was patient identifiable data. As the Claimant confirmed, the information on the list was sufficient to be able to identify the patients to be able to re-book their appointments and included their names, dates of birth, home addresses and telephone numbers, the date and time of their cancelled appointments, the clinician/clinic that each patient had been booked with and the service or department concerned.

135. From the additional evidence we heard, Rachel Hearne from the CCG who was called to give evidence by the Claimant confirmed that the list was printed out by the CCG and that although it had not been read it was evident that it contained approximately 12 pages of patient identifiable data. She confirmed that even if the Claimant just had a list of patient names in his Hotmail account or in his possession, this would be of concern to her. She said that patients trust healthcare providers with their information and they trust that it is being held in a secure way. That did not include holding it in a Hotmail account. She also stated that when an employee leaves an organisation she would not expect them to take patient identifiable information with them. Her view in a professional capacity on behalf of the CCG was that whether it was a list of patients or parts of

patient records, it was all patient identifiable data that formed part of their care records and should have been kept confidential. It would not have to be the complete patient records to attract that confidentiality.

136. In a letter to the Claimant dated 19 February 2019 the appeal panel set out its decision on the appeal. In that letter the Respondent repeated its position that all data relating to a patient constituted a patient record and that it does not have to be the complete portfolio of notes kept by health professionals caring for a patient for it to be described as such. Also, the phrase 'kept a copy' does not require him to have kept a physical copy. Transferring data is keeping a copy.

137. In the appeal outcome letter, the Respondent stated that it was clear that the Claimant was passionate about patient care and the panel did not believe that what had happened showed any malicious intent on the Claimant's part. Nevertheless, he had breached the Respondent's Confidentiality Code of Conduct for Staff, its Data Protection and other policies as well as his contract of employment and that had to be addressed.

138. The letter confirmed the Respondent's decision to change the wording of the reference to 'patient identifiable data', which was done soon after the decision was reached. Ms Acketts wrote a new reference, also dated 7 February and sent it to the Claimants agency on 27 February. The new reference contained the same wording in all parts of the reference as the one provided at the end of January apart from the conduct at work section which now read as follows: -

> "*A panel upheld an allegation that AS kept a patient list containing patient identifiable data in his personal possession and continued to hold this after his employment with Provide ceased".*

139. We find it unlikely that Mr Atienza-Hawkes was aware that the Claimant had made protected disclosures since at the time, they were not referred to as such. He was however, aware that the Claimant had raised issues with the Respondent about various matters. He had not been involved in addressing them. Mr Atienza-Hawkes had surgery around the beginning of March 2018 and had been off in recovery for 3 months around the time the Claimant raised these issues. In June 2018 he was at work on a phased return but then off again until September. He was therefore not around for most of 2018. The Datix that the Claimant made was mentioned in his hearing but it is unlikely that he thought about it as a disclosure. He was clear in our hearing that his concerns were simply that the Claimant had been in possession of patient identifiable data and what needed to be done about that.

140. Ms Bridgett Acketts confirmed that she had been away from the Respondent on a career break between June 2017 and April 2018. She was not aware of the issues the Claimant raised until she returned to work. We find that Ms Acketts offered to write the Claimant's reference. On 27 February she wrote the amended reference and dated it 7 February so that it replaced the earlier one.

141. The Claimant worked for 4 months in his new employment before it was terminated. He was on garden leave from the Respondent and agreed to start working for his new employer during that notice period. The Claimant did not

seek permission from the Respondent to start the new job. His evidence was that he did not think to ask the Respondent to move the end date of his employment with it.

142. It was the Claimant's evidence that he had been led to believe that he was going to be made permanent in that job and that subsequently, the new employer changed its mind and terminated the contract. After making enquiries of his new employer he was told that budgetary constraints meant that they could no longer employ him. His contract was terminated. The Claimant did not accept this and assumes that this termination is linked to the concerns that he raised during his employment with the Respondent. There was no clear evidence that the Claimant relied on to show that there was any connection between the Respondent and the new employer or that the Respondent had any influence or control over his new employer.

Law

143. The Claimant complains that the reason for his detrimental treatment was that he made protected disclosures. The Respondent denied that this was the case and queried whether all his disclosures were qualifying and whether he had been subjected to a detriment.

144. In order for disclosures to be considered as protected in accordance with the Employment Rights Act 1996 (ERA) three requirements need to be satisfied. A '*qualifying disclosure'* needs to contain a disclosure of information, which is made in the public interest and is made by the worker in a manner which accords with the scheme set out in the ERA sections 43C-43H.

145. Whether or not the disclosure qualifies depends on the nature of the information being revealed. The worker making the disclosure must have a reasonable belief that it tends to show one of the following statutory categories of failure. It is not necessary for the information to be true. However, determining whether they are true can assist the tribunal in their assessment of whether the worker held a reasonable belief that the disclosure in question tended to show a relevant failure. (*Darnton v University of Surrey* [2003] IRLR 133).

146. The ERA sets out six categories to which the information must relate if the disclosure is to be one qualifying for protection. Out of those six there are three that could apply to the facts of this case. Those are: (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject; or (d) that the health or safety of any individual has been, is being or is likely to be endangered, 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. The Claimant confirmed at the Preliminary Hearing in April that he relied on (b).

147. The Tribunal considered the case of *Cavendish Munro Professional Risks Management Ltd v Geduld* [2010] ICR 325 where the EAT stressed the requirement that in order for the disclosure to fall within the statutory definition there must be disclosure of information. The court made a clear distinction between the provision of 'information' which would satisfy the test; and making an

'allegation' which would not be covered. A mere allegation against the employer or a simple expression of dissatisfaction would not be sufficient to warrant the protection of the ERA.

148. The disclosure must be made to the worker's employer or to another responsible person. A disclosure to the employer is always protected, whether the failure is of the employer himself or of some other person.

149. In the case of *Kilraine v Wandsworth* [2018] ICR 1850 the EAT stated that the information provided must have *"sufficient factual content and specificity such as is capable of tending to show one of the matters listed in subsection (1)"* above.

150. The Respondent's case was that it did not accept that the Claimant reasonably believed that the disclosures were in the public interest. It also disputed that disclosures 5 and 6 amounted to qualifying disclosures as the email of 15 January did not disclose information and the Respondent's clear evidence had been that the Claimant had not referred to staffing levels in the conversation with Mr Wright on 31 January.

151. The Claimant submitted that he suffered detriment as a direct consequence of making the protected disclosure. The alleged detriment was the contents of the references completed after the disciplinary case review had been held. The Respondent's main submission was that the Claimant had failed to prove that there was any link between any alleged disclosures and the references that he complained about. Also, that he could not go further and prove that the contents of the references had been written to his detriment '*on the grounds'* that he made the disclosures. The Claimant has to prove that he suffered a detriment and that the detriment had been done *'on the grounds'* that he had made disclosures in order to satisfy the test in section 47B of the Employment Rights Act 1996.

152. The Tribunal is aware that in considering whether the Claimant had been subject to a detriment on the ground that he made disclosures the Tribunal needs to analyse the mental processes (conscious or unconscious) of the Respondent (*London Borough of Harrow v Knight* [2003] IRLR 140). The Tribunal also considered the case of *Fecitt v NHS Manchester* [2012] ICR 372 in which the Court of Appeal stated that it is not necessary that the protected disclosure is the sole or principal reason for the treatment. Section 47B will be infringed if the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistleblower.

153. In the case of *Bolton School v Evans* [2007] ICR 641 the Court of Appeal upheld a finding that the reason for the act or omission complained of in that case was the teacher's misconduct in accessing the computer system to demonstrate weaknesses in the security of the system rather than his disclosure about the weaknesses in the security system. This was so even though his reasons for accessing the system was to demonstrate the force of his concerns about the security of the computer system. It was held that this was separate from the protected disclosure he made about weaknesses in the computer security system. The protected disclosure was the means by which the headmaster

found out about the misconduct but that did not affect the findings about why he disciplined the employee. The two things were related but different.

154. The Tribunal will also need to assess whether the Claimant suffered a detriment at all.

155. The Respondent submitted that the Claimant had not been subjected to a detriment. The references were fair and accurate and he secured the job that it had been obtained for. It was the Respondent's case that the Claimant had not suffered any loss.

156. In the case of *Bartholemew v London Borough of Hackney* [1999] IRLR 246 the Court of Appeal stated that the employer was not in breach of a duty of care owed to its former employee in providing a reference for a prospective employer which referred to something that was factually correct and where they did not include the whole of the employee's version of events. The Court stated that an employer is under a duty of care to provide a reference that is in substance true, accurate and fair. The reference must not give an unfair or misleading impression overall, even if its discrete components are factually correct. However, the duty of care owed by a former employer to a former employee does not mean that a reference must, in every case be full and comprehensive. The reference had not as a whole been unfair, in accurate or false and so the ex-employee's claim failed. This was confirmed in the judgment in the case of *Hincks v Sense Network Ltd* [2018] IRLR 614.

157. The Claimant's submissions were focussed on his assistance to Ms R's family and their dissatisfaction, as users of the service, with the quality of service they received from the Respondent. The Claimant considered that he had been punished for standing up for patient care and that the Respondent was seeking to cover up these issues.

158. He submitted that all his disclosures should be considered protected public interest disclosures and that he was only doing his civic duty in standing up for patient care.

Applying the law to the facts found above

159. The Tribunal will now work through the agreed list of issues on pages 149D – 149E of the bundle and agreed at the Case Management hearing in April, to reach its judgment in this case.

160. The first part of the list of issues beginning at paragraph 10 of the Case Management Summary, under the heading "*the issues to be determined*" all question whether the Claimant made protected public interest disclosures, with the actual alleged disclosures listed at paragraphs 12.1 – 12.6. Dealing with each in turn:

Issues

Issue 12.1 – An email sent by him to Lucinda Holford (Ward Matron) and Jackie Bolton (Assistant Director for Community Hospitals) on 15 February 2017, which the Claimant asserts highlighted potential risks to patients.

161. It is our judgment that the Claimant did send this email. In it he included information which we judge that he reasonably believed showed that the

Respondent, through its nurses, had failed or was likely to fail in its legal obligations to the patients it serves. In the email he referred to information which came from nurses who had attended the training session he had recently conducted. He stated that during the training, the nurses had asked whether it was possible to back-date observations on the system and that the question gave him cause for concern. He also stated that there had been a discussion in the training session on the National Early Warning Scale which also concerned him and what he believed was the Respondent's failure to have or follow a Falls policy.

162. It is this Tribunal's judgment that the Claimant had a reasonable belief that what he was being told in the training session were the practices which those nurses followed or intended to follow and if that was so, it would not have amounted to good care for the Respondent's patients. In our judgment that was the reason he raised these matters in this email. It is likely that at the time he sent this email he was raising these issues out of concern for members of the public. He was expressing concerned about the quality of the service provided to the recipients of the Respondent's services.

163. The Respondent took those concerns seriously and acted on them and thanked the Claimant for bringing them to its attention.

Issues 12.2: An email sent by him to Annie Ellis and Ellen Van Gemmert (Provide Care Coordination Centre Managers) on 10 October 2017 asserting the clinical risk of staff using part of the function of SystmOne which they had not been trained to use.

12.3 An email sent by him to Annie Ellis and Ellen Van Gemmert on 18 October 2017, repeating the concerns set out in the 10 October 2017 letter.

12.4 A Datix completed by the claimant on 18 October 2017 about the clinical risk of staff using part of the function of SystmOne which they had not been trained to use.

164. The Datix and these two emails all refer to the Claimant's belief at the time that he raised this issue that when patients had appointments cancelled, staff were not using the re-booking function on SystmOne properly and patients were not getting re-booked but were going on to a list which meant that they were unlikely to ever be seen. He considered that the result of the Respondent's staff using the re-book function was that patients were not being given a good service or the service to which they were entitled.

165. It was not immediately apparent to him that the patients were being re-booked. In the Datix and in the email sent on 18 October the Claimant provided additional information that he believed from looking at the 'list' on SystmOne that the list had grown since he last looked at it. It is likely that he considered that this was now an urgent matter and that is why he raised the Datix as well, having already sent an email that day.

166. It is our judgment that at the time he raised the Datix and sent the emails in October the Claimant believed that the Respondent were likely to be in breach

of its legal duty to NHS patients by not making it clear to staff that patients should be re-booked rather than stay on a re-book list or by allowing them to use the 'rebook later' function on SystmOne which the Claimant thought meant that they were unlikely to ever get re-booked on to fresh appointments with the relevant clinician.

167. It is also our judgment that the Respondent also took this issue seriously and conducted an investigation into the issues that the Claimant raised here. The Respondent also asked him for suggestions to ensure that it did not continue to happen. He had responses from several senior officers at the Respondent and action was taken.

Issue 12.5 An email sent by him to Carol Gerrard (Technology Systems and Support Manager and the claimant's line manager) on 15 January 2018 alleging a 'cover up'.

168. In this Tribunal's judgment this email did not provide information but instead, the Claimant made accusations and threats in it. In this email, the Claimant alleged that the Respondent was responsible for a cover-up. He did not refer to the patient by name. He did not give any information. Instead, in this email he threatened that unless it was dealt with to his satisfaction he would go to the Police. It is likely that this was about patient MRF but it was not clear from the email.

169. It is this Tribunal's judgment that this email does not satisfy the definition of a qualifying disclosure set out in section 43 of the Employment Rights Act or the principles in the case of *Cavendish Munro* because it simply makes accusations. It is this Tribunal's judgment that this was not a qualifying public interest disclosure.

12.6 A conversation with Carol Gerrard and Christopher Wright, Head of IT and Data, on 30 January 2018, during which the claimant asserts he raised issues about dangerous staffing levels within Central Point of Access and the Care Co-ordination Centre.

170. It is our judgment that in the conversation that the Claimant had with Carol Gerrard and Christopher Wright on 30 January he implied from the information that he gave to them that the Respondent's staffing levels on the previous evening had been inadequate. He complained that the call handler her been the only person receiving calls and that this was unacceptable. However, he did not allege any breach of a legal duty. We were not told that the Respondent had to have a certain number of staff members answering the telephones during the night and it may be that it was appropriate to only have one person at particular hours of the night when there is no or little demand. The Claimant did not allege a breach of legal duty in his conversation with Ms Gerrard and Mr Wright. He inferred that the service was inadequate, which is not the same thing.

171. The Claimant clearly did not believe that the service the Respondent provided to its service users that evening was a good service and his recollection was that he had to wait 20 minutes for his call to be answered. The Claimant did

not provide information tending to show that the Respondent had breached a legal duty to which it had been subject. It is our judgment that this was also not a qualifying public interest disclosure.

172. It is this Tribunal's judgment that 12,1, 12.2, 12.3 and 12.4 are qualifying disclosures as in them the Claimant provided information about a matter that he reasonably thought was a breach of the Respondent's legal duty. The Respondent, as an NHS provider is under a duty to ensure that patients are able to access NHS services. If patients' appointments are cancelled and they are not re-booked for fresh appointments or if the Respondent's staff use a function on SystmOne which means that they stay on a 'list for re-booking' but never get rebooked, there is a strong likelihood that the Respondent would have failed in its legal duty to them. The same is true in relation to the first disclosure. If patients' falls are not recorded or their observations are not properly documented or done at the appropriate time they are unlikely to get the service to which they are entitled on the NHS.

173. It is also our judgment that the Claimant made those disclosures in the public interest. At the time he wrote those emails and raised the Datix the Claimant was concerned about the service the Respondent was providing to the public and to ensure that it was the best possible service. He was engaged in training staff and these issues arose during the training he was giving or the work he was doing for the Respondent. At the end of the appeal hearing, in its decision letter dated 19 February 2019 the Respondent acknowledged that the Claimant's actions were motivated by his passion for patient care and in our judgment, that was an accurate assessment of the situation.

174. In our judgment, it is likely that the Claimant made protected public interest disclosures in relation to issues 12.1, 12.2, 12.3 and 12.4.

175. Issue 12.5 did not contain information and in Issue 12.6 he did not refer to a breach of a legal duty. It is our judgment that those allegations cannot be protected disclosures. They are not protected public interest disclosures.

176. Issue 13 in the list of issues at page 149E of the hearing bundle addresses the question of the alleged detriments which are the subject of this claim.

Issue 13 The alleged detrimental treatment is that in job references dated 7 February 2019 addressed to Ms Walker of Evolution Recruitment Solutions the Respondent included the following statements:

13.1 A panel upheld an allegation that AS kept copies of patient records in his personal possession and continued to hold them after his employment with Provide ceased. This decision is currently subject to an appeal process.

13.2 A panel upheld an allegation that AES kept a patient list containing patient identifiable data in his personal possession and continued to hold this after his employment with Provide ceased.

177. The wording of both references was taken from the decision made by Mr Atienza-Hawkes after the Disciplinary Case Review and later, the decision

made by John Niland after the appeal hearing. The wording of the references reflected the wording of the decisions of each of the panels.

178. It is our judgment that at the end of the Disciplinary Case Review Mr Atienza-Hawkes decided that the Claimant had not had not taken copies of patient records and that any patient records he had in his possession were as result of the support he was giving to the Serious Incident investigation. However, he had taken possession of a list of patient identifiable data/information which were part of patient records which he had sent by email to his Hotmail account. Mr Atienza-Hawkes was clear that the Claimant had kept the information in that account for two weeks before forwarding it to his NHS account and then to the CCG. It was accurate and fair to say that he had the list in his possession because having information in your Hotmail account is having it in your possession. This was not information that he was authorised to have in his possession. He was not required to have that data in his possession in order to perform the duties of his job.

179. Mr Atienza-Hawkes was clear that the Claimant had accessed patient records in order to help with the enquiry conducted by Ms Overett and the allegation relating to that matter was not upheld. Also, the allegation that he had copied paper records was also not upheld as the Claimant never had possession of paper records.

180. But in relation to allegation 3, the Claimant had been honest in the Disciplinary Case Review meeting that he had held the 'list for re-booking' in his Hotmail account for two weeks. He was not authorised to have that information. Holding it in his possession was a breach of the Respondent's Confidentiality Code of Conduct for staff and Data Protection Policies. It was also a breach of his contract of employment. That was Mr Atienza-Hawkes' decision and that was the wording that was put in the first reference.

181. The Respondent's contract of employment gives it the power and the duty, being an NHS employer to ensure that it records accurate information in references. Patient confidentiality is a serious and important matter. The Respondent took this seriously. This is demonstrated by the actions it took to report the matter of the Claimant's possession of the list to the Data Commissioner and to the patients, once it was fully aware of what the Claimant had done. Ms Hearne's evidence confirmed that the CCG also took this matter seriously.

182. In our judgment, it was appropriate for the Respondent to have recorded this in its reference. In the Claimant's contract of employment, the Respondent retained to continue with an investigation and to record information in any reference requests that relate to matters that arise after an employee has handed in their notice or while they are working their notice. This is exactly what happened in this case. The matter arose while the Claimant was working his notice. As the issue of confidentiality of records is a matter of concern to all NHS providers, it was not simply an internal matter for the Respondent. It was appropriate that the Respondent should record Mr Atienza-Hawkes' decision on the reference provided to Evolution on 7 February.

183. At the Claimant's appeal he was adamant that he had not had possession of patient records. The Respondent agreed that what he had in his possession for those two weeks could also be described as 'patient identifiable data' because it would have been possible to identify patients from the data. It was not the complete records or paper records but nevertheless it was part of their records which contained sufficient information for them to be identified. The Claimant should not have had the ''list for re-booking' in his possession at all and certainly not after he left the Respondent's employment. He did have that list in his Hotmail account after he left the Respondent's employment and before he started at his new NHS employer. The list contained as a minimum, the following information - patient's dates of birth, names, addresses, date of cancelled appointments, names of the clinician they were due to see or the relevant department. That information forms part of a patient record. Holding it in his Hotmail account was in breach of the Respondent's Confidentiality Code of Conduct for Staff and its Data Protection Policy and the Claimant's contract of employment.

184. The Respondent agreed to change the wording of the reference to say that he held 'patient identifiable data' in his personal possession and continued to hold it after his employment ceased. This was accurate.

185. It is our judgment that both references were accurate. It is this Tribunal's judgment that the Respondent's assessment that the data the Claimant held is patient identifiable data is correct and that there is no requirement for it to be all the patient's records kept on the system or for it to be a print-out of the records on the system for it to be called 'patient records' or 'patient identifiable data'. The information in the 'list for re-booking' was not paper records and was not the complete set of records but it did not need to be and it was never stated that he had a complete set of patient records. It is our judgment that the references provided accurate descriptions of the Claimant's actions.

Issue 13.3 if so was this done on the ground that the Claimant made one or more protected disclosures?

186. It is also our judgment that the Claimant has failed to prove that the wording of those references was linked to his disclosures. They are related to the disclosures as the disclosures were made about the same matter, which was the list of patients for re-booking. The Claimant believed that the list was evidence of what he claimed or referred to in 3 of his protected disclosures. Those 3 protected disclosures were based on what he thought was in the list or what he thought the list showed.

187. However, it is our judgment that if the Claimant had not made his disclosures and had simply taken possession of the patient 'list for re-booking' for some other reason and the Respondent had found out about it, the Respondent would have taken the same action against him as it did here and would have recorded its decision on any reference it provided for him.

188. It is our judgment that the Claimant has failed to show that the reference was connected to his disclosures and he has failed to prove the higher test,

which he would need to do in order to succeed; which is that the references were written in the way they were on the grounds that he had made public interest disclosures. It is our judgment that they were written in the way they were because they accurately reflect what the Claimant had done as found by the Disciplinary Case Review Panel and the Appeal panel. The earlier references made no mention of any issue with the Claimant's performance and these statements were only made after the Disciplinary Case Review and Appeal panel had issued their decisions. They were accurate statements. The Claimant confirmed that he held patient identifiable data in his possession in his Hotmail account for two weeks which included a period after his employment with the Respondent terminated. He was not allowed to have this information. He was in breach of the Respondent's Data Protection Policy and Confidentiality Code of Conduct for Staff. This was accurate and necessary information that the Respondent had to put in its reference and it did so. These statements were not inserted into his references on the grounds that he made the disclosures, even though it may be related to the disclosures as it relates to the same matter.

189. In the case of *Bolton* referred to above, the teacher concerned was not treated to his detriment because he made disclosures when he was disciplined for accessing the computer system in the school to demonstrate that his disclosure that the system's security was inadequate was true. It was appropriate for the school to separate the disclosure from the action of accessing the network. Even though the two were related as they both involved the security of the school computer system, one was not done on the grounds of the other and the teacher's employment tribunal claim failed.

190. That is also the case here. It is our judgment that the complaint that the references were written on the grounds of the disclosure fails.

Issue 13.4 The alleged detriments the Claimant relies on are that he was prevented from securing work employment with the job agency, Evolution Recruitment Solutions.

191. It is also our judgment that we did not have evidence that the references were detrimental to the Claimant. The references were provided in February and the Claimant was appointed to the post. He worked there for approximately 4 months. He was told that contrary to their initial belief, they would not be able to appoint him to the permanent post. He was told that this was due to budgetary constraints.

192. The Claimant has chosen to disbelieve this and prefers to believe that it has something to do with the Respondent. We had no evidence on which to base a conclusion that the Respondent caused his employment with the new company to be terminated.

193. It is likely that the agency did send the references across to the new company. The Claimant had been employed by the Respondent for approximately three years so it is unlikely that he would have been employed by the new employer if Evolution had not given the references over to the new employer. It is likely that they considered the references and decided to continue to employ him.

194. We had no evidence on which to base a conclusion that the fact the employment did not continue was in any way related to his protected disclosures or to the references that the Respondent provided on 7 and 27 February.

195. In this Tribunal's judgment, the Claimant made 4 public interest disclosures set out at 12.1, 12.2, 12.3 and 12.4 above while employed by the Respondent.

196. It is this Tribunal's judgment that the Claimant did not suffer a detriment done on the grounds that he made public interest disclosures.

197. It is this Tribunal's judgment that the Claimant was not prevented from securing work with Evolution by any action or failure to act by the Respondent. The Claimant began working for Evolution with another NHS provider during his notice period from the Respondent. The Claimant worked for 4 months at that provider and had been led to believe that there was a possibility of being given a contract of employment there. After 4 months he was told that due to budgetary constraints, he would not be offered employment after all. His engagement was terminated.

198. We did not have evidence of the Respondent having any connection with Evolution or with the NHS provider that the Claimant worked for during those 4 months. The Claimant has failed to prove that the Respondent had any influence over that provider or anyone at Evolution or that it would have done as alleged.

199. The Claimant has failed to prove that he was prevented from securing work with Evolution as he did work with Evolution for a period of 4 months after he left the Respondent. It was the Claimant's case that he has not worked since and that his career in the NHS is over because of the events of this case but we did not have evidence of his search for employment since his engagement terminated or how he came to that conclusion.

200. The Claimant's complaints fail and are dismissed.

Employment Judge Jones

4 December 2019