Case No: 1600772/2016

EMPLOYMENT TRIBUNALS

Claimant: **Mrs J Climer-Jones**

Respondent: **Cardiff and Vale University Local Health Board**

Heard at: Cardiff

On: 23, 24, 25, 26, 27, 30 September 2019, 1, 2, 3, 4, 7, 8, 9, 11, 14, 15, 16, 21, 22, 23 October 2019

Before: Employment Judge Moore
Mrs L Bishop
Mr P Bradney

Representation
Claimant: In person / Mr Climer - Jones
Respondent: Mr G Powell, Counsel

RESERVED JUDGMENT

1. The unanimous decision of the Tribunal is:

2. The Claimant has been subjected to unlawful detriments on the grounds she had made protected disclosures, contrary to S47B Employment rights Act 1996.

3. The Claimant's claim for unfair dismissal contrary to S98 Employment Rights Act 1996 succeeds.

4. The Claimant's claim for unfair dismissal contrary to S103A of the Employment Rights Act 1996 succeeds.

REASONS

Background

1. This claim was presented on 17 October 2016. The Claimant was initially represented by M/s Slater and Gordon, then M/s Watson Burton LLP, who came off record on 15 August 2019.

2. A detailed history of the claim is set out in EJ Beard's Order, paragraph 3, dated 7 January 2019. In summary, there have been a number of preliminary hearings and orders for the Claimant to further particularise her claim and a number of hearings listed previously only to be postponed for a different reasons. In November 2018 EJ Beard permitted some amendments to the claim and ordered the parties to attend the hearing with an agreed document setting out the amended claim as it stood following the preliminary hearing on 13 & 14 November 2018 as had been permitted and announced at that hearing.

3. In accordance with that order a revised Schedule of Protected Disclosures and Detriments ("the schedule") had been produced by M/s Watson Burton LLP and served on the Respondent on 8 August 2019. This contained 4 separate protected disclosures and 12 detriments. No issues were raised in respect of that schedule with the Tribunal.

4. A separate preliminary hearing took place on 23, 24 January and 27, 28 February and 1 March 2019. One of the issues determined by EJ Beard was whether to grant an application for specific disclosure by the Claimant of the unredacted Independent Enquiry Report by Fiona Smith (& others) dated 18 May 2015 ("the Fiona Smith report"). The Respondent resisted the application on the grounds of relevance and Public Interest Immunity. EJ Beard, having had full sight of the unredacted report and all communications around the report, refused the application on the basis there was nothing of relevance in the disclosed documents which went beyond that already disclosed in the redacted report, other than a view of the general culture, which engaged directly with the Claimant's complaints or those whose conduct she complained about. The one exception noted by EJ Beard was where Ms O'Brien was referenced, but he went on to conclude the documents were hearsay. A further document was described as opinion based.

5. The Claimant brought claims of constructive unfair dismissal, automatic unfair dismissal contrary to Section 103A Employment Rights Act 1996 ("ERA"), and that she had been subjected to detriments contrary to S47B ERA.

6. There was a bundle prepared by the Respondent consisting of 2063 pages. The Claimant prepared an additional bundle, some of the contents were already in the Respondent's bundle but many documents were not. This ran to 128 pages.

Order of witnesses

7. The table below sets out the witnesses that gave evidence to the Tribunal during the hearing.

Witness	Date

Claimant	Friday 27th September 2019, Monday 30th September 2019, Tuesday 1 October 2019, Wednesday 2 October 2019, Thursday 3 October 2019
Aimee Lewis (Witness Order - Claimant)	Thursday 3 October 2019
Debra Callaghan (Claimant)	
Rose Davies (Claimant)	
Joanne Towers (Claimant)	
Jason Ball (Claimant)	
Mr Climer-Jones (Claimant)	Friday 4 October 2019
Julia Evans (Respondent)	
Loretta Reilly (Respondent)	
Lisa Waters (Respondent)	
Wendy Hopkins (Claimant)	Monday 7 October 2019
Loretta Reilly (Respondent – recalled)	
Sharon O'Brien (Respondent)	Monday 7 October 2019 into Tuesday 8 October 2019
Dr Al-Mudhaffar (Respondent)	Tuesday 8 October 2019
Natasha Whysall (Respondent)	Wednesday 9 October 2019
Muriel Andal (Respondent)	
Lisa Graham (Respondent)	
Mary Santos (Respondent)	
Tracey Skyrme (Respondent)	
Ceri Martin (Respondent)	Friday 11 October 2019
Ben Durham (Respondent)	
Louise Farrow (Respondent)	
Rhodri John (Respondent)	Friday 11 October 2019 and Monday 14 October 2019
Sheila Harrison (Respondent)	Monday 14 October 2019 and Tuesday 15 October 2019
Rachelle Griffiths (Respondent)	Tuesday 15 October 2019
Andrea Richards (Respondent)	
Nicola Evans (Respondent)	Tuesday 15 October 2019 and Wednesday 16 October 2019
Helen Richardson (Respondent)	Wednesday 16 October 2019
Kim Tovey (Respondent)	
Susan Thomas	21 October 2019

Issues arising during the hearing

8. A number of issues arose during the course of the hearing.

Unless Order 23 September 2019

9. By an order dated 10 September 2019 the parties were due to exchange witness statements on 17 September 2019. This was varied to 19 September 2019 with consent of the parties. The parties were ordered to attend the on the morning of 23 September 2019 and hand in copy statements. It was anticipated the first two days would be reading days and a "housekeeping" discussion would take place at 10am on Monday 23 September 2019.

10. On Monday 23 September 2019 the Tribunal were provided with bundles but no statements. The Claimant had not complied with the order to exchange witness statements and requested a further extension of time until Thursday 26 September 2019. The request was refused. Her reasons for not exchanging her statement were that having gone through the Respondent's bundle, which she had received on 18 September 2019, it was missing a significant number of crucial documents and she had to collate an additional bundle. An unless order was issued ordering the Claimant to exchange her witness statements with the Respondent on or before 4pm on Wednesday 25 September 2019 failing which her case would be struck out. The Tribunal used the remainder of Monday 23 September, Tuesday 24 September and Wednesday 25 September 2019 to read the documents in the bundle which extended to 2025 pages (later increased to 2063 pages with additional documents added during the course of the hearing). It was agreed to reconvene on Thursday 26 September 2019 at 10am to discuss when the parties would be ready to start.

<u>26 September 2019</u>

11. The Claimant had complied with the unless order and the hearing reconvened at 10am Thursday 26 September 2019. A number of preliminary matters were discussed with the parties. The Respondent was ready to start. The Tribunal decided to start the evidence on Friday 27 September 2019 with the Claimant going first. It was agreed that Mr Powell would produce a draft timetable for discussion with the Tribunal on Monday 30 September 2019. Mr Powell advised his estimate of cross examination of Claimant would take two days, possibly three with a view to finishing cross examination of the other witnesses for the Claimant on Wednesday 2 October 2019.

12. As the Claimant had not had time to review the Respondent's witness statements prior to starting her cross examination it was directed that the Claimant could deal with any supplementary evidence in chief she wished to give arising from the Respondent's statements after cross examination. Mr Powell would be given an opportunity to then revisit any further cross examination arising.

13. Mr Powell raised an issue as to whether a number of detriments in the schedule had been withdrawn. These were detriments 1, 2, 9, 10 and 12. This came as a surprise to the Claimant who understood the detriments were as contained in the schedule drafted by her previous representatives. The issue of what had been withdrawn had been examined and determined by EJ Beard on 13 and 14 November 2018. The Respondent had not raised any issue with the Tribunal regarding the schedule that had been served on them or that it contained detriments they believed had been withdrawn until 26 September 2019. Mr Powell confirmed the Respondent was ready and prepared to deal with all 12 detriments in the schedule.

14. It was confirmed that the Tribunal would be determining the claims as set out in the ET1 and the schedule.

<u>27 September 2019</u>

15. On Friday 27th September 2019 the Tribunal raised an issue with the Claimant regarding her protected disclosure said to have taken place on 9 September 2013 as we were unclear to whom the disclosure was said to have been made. There were documents in the bundle that suggested these were two separate incidents. The Claimant withdrew the second section of the protected disclosure as set out in the schedule at pages 37 – 39 of the bundle, agreeing it was more a state of affairs she was relaying rather than a specific protected disclosure. This was set out as follows:

"Nurse Tracey Skyrme had promised a bed to a relative of hers, but in doing so, was effectively attempting to "jump the queue".

16. The other disclosure said to have been made on 9 September 2013 (Claimant challenged the inappropriate allocation of 2 patients to 1 bed space) remained live and to be determined.

Timetabling – Claimant's cross examination

17. We set out how the Claimant's cross examination progressed as eventually, at 3pm on Wednesday 2 October 2019 the Tribunal imposed a limit on the Claimant's cross examination. Mr Powell's objection that this resulted in the Respondent's being unable to fully put their case was noted.

18. The Claimant's evidence, straight into cross examination, commenced at 11.24am on Friday 27 September 2019. Mr Powell commenced by taking the Claimant through the schedule and the history of the proceedings. After 20 minutes of these questions the Tribunal asked Mr Powell why the history of the proceedings in respect of what had been withdrawn and why and what amendments had been permitted were relevant given the preceding discussion clarifying what the issues were that were to be determined. Mr Powell wanted to take the Claimant through each disclosure and detriment to understand the Claimant's claims. This line of questioning continued until lunchtime. After lunch the Tribunal discussed this approach again with Mr Powell and advised that we found this line of questioning unhelpful as it appeared that the purpose of the questioning was to get the Claimant to resile from her pleaded claim and schedule which had been prepared by her representatives. Given she had very recently become a litigant in person, if this was the purpose, it would not be in accordance with the overriding objective to secure the Claimant resiling from her claims in this manner as this would not be in the interest of justice. The case had taken almost 3 years to reach a hearing and it needed to be started using the time allocated for cross examination. If the Respondent had remained unable to prepare or understand the claim from the schedule provided by M/s Watson Burton LLP the appropriate manner to have raised that was with the Tribunal prior to the hearing commencing. A version of the schedule was first provided on 5 October 2017.

19. Given the history of the number of attempts to reach a point at which the claim was particularised, we invited Mr Powell to set out what elements of the schedule were unclear rather than go through each section, as by 2pm he had only reached detriment 2. Mr Powell remained of the view it was necessary to continue to go through each detriment to understand; for example, the identity of the witnesses referred to in detriment 4 and when the Claimant asked for them to be interviewed. (We later identified that this was

dealt with in the Claimant's witness statement at paragraph 324). Also under detriment 4, in respect of the review the Claimant says should have been offered Mr Powell wanted to know who, within the Respondent should have offered the review.

20. The Tribunal informed Mr Powell that having made the above observations, it was a matter for the Respondent how they used their allocated time to cross examine the Claimant.

Monday 30 September

21. The timetable was revisited and Mr Powell indicated he would finish cross examination of the Claimant and all of the Claimant's witness potentially Tuesday (1st) or Wednesday (2nd) October 2019.

22. The first protected disclosure relied upon by the Claimant was 3 May 2013. The Respondent was calling four witnesses to give evidence on events prior to this from 2009 – 2011 when the Claimant worked at Llandough Hospital. The Respondent sought to rely upon this evidence as relevant to their case that Claimant was generally difficult rude and aggressive.

23. By the end of Monday 30 September 2019 Mr Powell had not commenced cross examination on her evidence in respect of the actual protected disclosures or detriments. This was discussed with Mr Powell a number of times and he was advised the Tribunal would find it helpful to focus on these issues.

Tuesday 1 October

24. The time estimate for the Claimant's cross examination was discussed again and Mr Powell advised he would finish that day with the Claimant with the other witnesses to be dealt with Wednesday.

25. At 1pm the Tribunal advised we were concerned about timings as Mr Powell had only just finished dealing with the first protected disclosure. This left a further three protected disclosures and all of the detriments. We reminded Mr Powell it was a matter for him how to use the time allocated. It was agreed at the end of Tuesday that the following day would be used to finish cross examination, deal with supplementary and re-examination and panel questions with C's witnesses to attend Thursday.

Wednesday 2 October

26. On Wednesday morning Mr Powell indicated he would finish cross examination by 1pm. At 1pm he had not finished and was asked how much longer he advised one hour and permission was given for this further time. After lunch at 3pm (having started at 2.10pm) the Tribunal advised Counsel he had ten minutes at which point he requested a further extension of time. The Claimant because very distressed and a break had to be taken.

27. After the break Mr Powell was informed he had ten minutes remaining as per previous discussions. Mr Powell objected and said this meant he was unable to put the Respondent's case.

28. The Tribunal were satisfied that the Respondent had had adequate time, discussed and agreed through timetabling as well as a number of extensions of time to put their case to the Claimant.

Thursday 3 October 2019

29. At close of the hearing the last matter discussed with the parties was the timetable for the following day. It was agreed that we would hear evidence in the following order:

- Mr Climer Jones – Claimant;
- Julia Evans;
- Loretta Reilly;
- Sharon O'Brien – Ms O'Brien had been scheduled to give evidence (using the timetable prepared by Mr Powell) on Tuesday 8 / Wednesday 9 October 2019. Mr Powell informed the Tribunal that he had learned that Ms O'Brien was on annual leave as of Tuesday 8 October 2019 and therefore needed to be called sooner. Ms O'Brien was a key witness. It was therefore agreed to change the running order so that she would hopefully be in a position to start the following day.

Friday 4 October 2019

30. The Claimant told the Tribunal that directly after the parties left the hearing the evening before, she was informed by Mr Powell that contrary to the discussion that had just taken place with the Tribunal about order of witnesses the following day, the Respondent was calling Lisa Waters first and this was "non negotiable". As a result, the Claimant and her husband had stayed up until 3am preparing their cross examination of Ms Waters, as they had not expected to have to be prepared to cross examine her today.

31. Mr Powell disputed he had told the Claimant it was "non negotiable" and explained he had been unaware when agreeing the running order that Ms Waters was also on leave from 6 – 13th October 2019 and considered Claimant should be ready to deal with all witnesses. He also reminded the Tribunal, quite reasonably that the Respondent was having to re-visit the expected running order due to the delay in starting the case as the Claimant had failed to comply with the order to exchange witness statements.

32. For the avoidance of any further doubt, the Tribunal informed both parties that we took the view it was not in accordance with the overriding objective to expect a litigant in person to be ready to cross examine any witness the Respondent should choose to call due to the number of witnesses, especially when the running order had only just been agreed with the Tribunal. Permission was needed from the Tribunal should the running order need to be changed and no party should seek to change an agreed running order without discussion with the Tribunal.

11 October 2019

Helen Richardson

33. The Tribunal enquired of the Respondent the reason we were not hearing from Ms Richardson as she appeared from the Respondent's evidence to be the decision maker in respect of the Claimant's suspension, which was on the alleged detriments. In doing so we observed it was a matter for the Respondent who they call as witnesses, but if there is a failure to call a witness at all, in the absence of an explanation an inference may be drawn from that failure.

34. The explanation was that the Respondent had always understood the Claimant's case to be against Ms O'Brien. In this regard we observed that the Claimant was not to know, possibly until witness statements were exchanged, that Ms Richardson had taken the decision to suspend given that the letter of suspension is signed by Ms O'Brien and the suspension had always been pleaded as a detriment. We also observed that the Claimant's unchallenged evidence was that she had a meeting arranged with Ms Richardson the same day as the suspension to discuss her concerns she was being punished for raising issues of patient safety.

35. The Respondent made some enquiries of Ms Richardson (who had left the Respondent in 2014/15) and she was called to give evidence on 16 October 2019. We deal below with her evidence.

Louise Farrow witness evidence – written reasons

36. On 11 October 2019 we decided that the Claimant should be permitted to ask a question of Ms Farrow to which Mr Powell had objected. Reasons were given at the hearing. Written reasons were requested and these are as follows.

37. The question was whether Ms Farrow had been named unredacted version of the Fiona Smith report. Mr Powell objected on the basis the question went beyond the ruling of EJ Beard and it was irrelevant and prejudicial. It was decided to send Ms Farrow out of the during this discussion as she had been sworn in and was under oath. The Respondent was of the view there was nothing in the unredacted report that informed of similar facts nor did it provide any material relevant to this occasion, nor was there any similar action. It did not identify or address the Claimant's identified situation. The Respondent were being ambushed.

38. The Claimant maintained it was relevant to her fourth protected disclosure (which was in summary that Ms Farrow had bullied and harassed the Claimant and a young nurse arising from her instruction to transfer a patient). At F32 of the Fiona Smith report it made findings that senior controllers exert pressure on staff to move patients when it was not in the best interest of the patients or safe to do so. Ms Farrow was a senior controller and the Claimant maintained this if Ms Farrow was named in the unredacted report it could corroborate her version of events.

39. The Tribunal adjourned to discuss whether to permit the question. We did not have sight of the unredacted report and had to decide whether to permit the question. The Claimant was not seeking disclosure of whole of the unredacted report but wanted to ask if Ms Farrow had been named as one of

the Senior Controllers who were said to have exerted pressure on staff at F32. We considered whether the answer to that question and any follow on evidence that may arise, either positive or affirmative was likely to be evidence that was relevant. In doing so, our starting point was Rule 41 of the Employment Tribunal Rules of Procedure. This provides that we are not bound by any rule of law relating to the admissibility of evidence in proceedings before the courts. In order for the Tribunal to decide whether evidence is relevant we would normally admit the said evidence and then determine what if any weight should be attached to it. In our view, it was potentially relevant if Ms Farrow had been identified in an independent report to have been reported by others as exerting pressure on staff to move patients in circumstances similar to the Claimant's fourth protected disclosure, this was potentially relevant as it may amount to collateral facts affecting her credibility or support the existence of a particular culture within the Respondent. We permitted the question and would then assess what weight if any to attach when reaching our decision.

40. After informing the parties of our decision, we permitted Ms Farrow to be released from her oath in order that Mr Powell could discuss this one issue with her. We also informed Mr Powell that we would permit, if requested further time to take instructions, call any further witnesses or admit further evidence so as to address any potential prejudice.

FINDINGS OF FACT

41. We found the following findings of fact on the balance of probabilities. We have only made findings in respect of evidence we considered to be relevant.

42. The Claimant was employed by the Respondent as a Band 5 Staff Nurse. She commenced employment on 30 November 2009 and latterly worked in the Accident and Emergency Unit at the University Hospital of Wales in Cardiff (locally known as the heath).

Claimant's employment at Llandough Hospital 2010 / 2011

43. The Tribunal heard evidence from a number of witnesses and also had sight of a number of documents in the bundle relating to a period of time prior to the first protected disclosure in 2013 surrounding events of the Claimant's time in employment at Llandough Hospital in 2010 and 2011. The Respondent intended to rely on and call witnesses on these events to demonstrate a pattern of behaviour by the Claimant, her general attitude and that the Claimant had a theme or a pattern of responding to events by raising grievances. The main witness for the Respondent about these events was Ms Julia Evans.

June 2010 meeting

44. In June 2010 a meeting took place between the Claimant and Sister Rachel Maiden and Sister Evangaline Belarmino. In 2010 the Claimant had been suffering from a frozen shoulder. She had taken some time off work and was receiving pain killing injections, but on returning to work felt she was unfairly being allocated certain heavy lifting duties. This led to the Claimant leaving a

note in the off-duty folder (which the Claimant had run past the nurse in charge before doing so), asking for 'fair play in nurse allocation between two areas.' The note gave the impression it was not written on behalf of the Claimant only, but on behalf of the Band 5 nurses on the unit.

45. As a consequence the Claimant was called to a meeting with Sister Maiden and Sister Belarmino. Notes of the meeting taken by Sister Maiden were in the bundle. They record that there were a number of issues discussed with the Claimant namely her letter, allocation, shifts, attitude and the Claimant's formal letter of complaint. The Claimant apologised for making it appear the letter was on behalf of all band 5 nurses as she had not sought permission to send a letter on behalf of everyone.

46. Concerns over the Claimant's attitude upsetting other staff members are also recorded in the notes and the Claimant is recorded as agreeing she had been upset due to her perceived an unfair allocation of shifts and apologised for any offence caused. The meeting notes go on to confirm that the Claimant informed Sister Maiden and Sister Belarmino that she had written a detailed formal letter of her issues which she wished to submit to Ms O'Brien, Lead Nurse. Sister Maiden stated she would be **"happy to take her letter but explained the procedure of what would happen and would she (the Claimant) be prepared for that."** The Claimant's evidence was that she found this to be a threat by Sister Maiden and that she was informed by Sister Maiden that if she was to complain about management or treatment she would be likely to be subject to a disciplinary investigation into her attitude and competency. As a result the Claimant decided not to submit her formal letter of complaint.

47. We accepted the Claimant's evidence on this point. It was corroborated by the Respondent's note to a degree (the reference to "would she be prepared for that") and we did not hear from Sister Rachel Maiden. The Claimant's recollection of being threatened with consequences for raising a grievance was corroborated by extract from the Claimant's diary that we had sight of in the bundle (page 509) that recorded that the Claimant had noted that the meeting as "quite intimidating" and she was informed that if she submitted a formal complaint she would be investigated for competency and attitude.

<u>Complaint by Sister Davies</u>

48. The next incident described by Ms J Evans was a complaint from a colleague, Sister Emma Davies. We did not have sight of the formal complaint although there was said to be a written complaint at the time, this was not before us. The Claimant's version of events between her and Sister Davies was that between June and October 2010 she recalls being asked by Sister Davies to hand over Sister Davies's patients towards the end of the Claimant's particularly busy shift. The Claimant considered this to be an unfair instruction. The Claimant did not know anything about Sister Davies's patients and was concerned about handing over patients to night staff as she would be held responsible if she omitted to hand over something important. The Claimant therefore informed Sister Davies that she did not agree to her request.

49. Ms J Evans' statement agreed Sister Davies complaint was that the Claimant had refused to hand over Sister Davies's patients to the night shift. We did

not hear any evidence on why the Claimant would have been asked to have handed over another nurse's patients at the end of the shift.

50. Ms J Evans, when giving evidence, confirmed that she had looked into that incident at the time and discussed the request with Sister Davies. Ms J Evans did not think that it had been an unsafe request by Sister Davies that the Claimant hand over Sister Davies's patients. No action was taken against the Claimant at the time.

51. Ms J Evans also agreed that that a lot but not all of the Claimant's concerns raised were about clinical incidents or patient safety.

Natasha Whysall incident

52. We were then taken to a further incident in November 2010 between the Claimant and another nurse Natasha Whysall in which there was a disagreement between the Claimant and Ms Whysall about whose patient should be moved. We heard evidence from Ms Whysall. It was clear to us from both witnesses that it was a disagreement about patient care and who should take priority, both believing their patients should take priority. This reportedly left Ms Whysall feeling upset and although it was not clear how this was escalated to Ms J Evans. Ms J Evans accepted that she was a personal friend of Ms Whysall outside of work.

Action Plan

53. On 24 November 2010 the Claimant was asked to attend a meeting with Julia Evans and Mr Ben Durham. The Claimant was told it was an informal meeting and we had sight of notes of this meeting which were taken by Mr Durham although the notes were not shared with the Claimant and were not seen by the Claimant until these proceedings. This was in common with a number of other notes retained on the Claimant, produced in the bundle, but not shared with the Claimant until these proceedings.

54. Ms J Evans had decided, with support from advice from HR that due to issues with the Claimant that an action plan would be the best way to try and informally resolve concerns that Ms J Evans had about the Claimant's behaviour and to that end an action plan was going to be put in place. In Ms J Evans' witness statement the incidents which led to the action plan were the incidents we have relayed above although she made reference to the Claimant's behaviour becoming increasingly erratic and instances of her behaving rudely. She said that there were many instances (with no detail) but the three instances above were the ones that led to the action plan. At the meeting the Claimant refused to accept the imposition of an action plan without having the opportunity to have her version of events investigated. Mr Durham's notes record that at times the Claimant's response and manner was considered to be disrespectful and in some ways aggressive.

Meeting 8 December 2010

55. The Claimant was then sent a letter by Ceri-Ann Hughes, HR inviting the Claimant to a further meeting on 8 December 2010 present at which would

be Lorretta Reilly, Directorate Manager and Julia Evans. The Claimant was informed she was entitled to be represented at the meeting by a representative (Trade Union, staff, organisation, friend or colleague). The Claimant's evidence was that the action plan given to her at that meeting was blank. At some point the Claimant was given the action plan as the version we saw had the Claimant's handwritten annotations.

56. The Claimant's evidence was that parts of the action plan were not appropriate as it contradicted certain obligations she had in respect of her professional code of conduct. The action plan stated on a number of entries (in summary) to respect the authority of the nurse in charge, learn to accept constructive criticism, follow the nurse in charge instructions without confrontation, develop understanding of nurse in charge role to delegate and allocate staff appropriately, to respect the nurse in charges' decisions, to be guided by the nurse in charge as appropriate placement of patients in the unit, improve negative attitude. At face value, in an environment where an employee would feel comfortable there would be no consequences in challenging management decisions, we find these were potentially reasonable requests. However in the context of the previous threat of disciplinary action (see paragraph 46), the repeated emphasis on accepting nurse in charge decisions and a later comment by J Evans (see paragraph 57), we accepted the Claimant's evidence that she believed this action plan to be an instruction to stop raising legitimate challenges.

57. There were a number of disputes between the parties about what subsequently happened at the meeting on 8 December 2010. The first matter in dispute was that the Claimant's case was that Ms Evans informed the Claimant "don't make enemies of us, we can make your life very difficult". Ms J Evans accepted under cross examination that she had said "don't make enemies of us", but disputed she had said the latter part of the comment about making the Claimant's life very difficult. She explained the context of that comment was that it felt like the Claimant was making life very difficult for the team. We have accepted the Claimant's account that Ms J Evans made the entire comment as it was subsequently quoted in a letter from the Respondent recording the meeting dated 22 December 2010 authored by Ceri-Ann Hughes. The letter stated as follows

"You also noted that during the meeting how Sister Julia Evans stated "don't make enemies of us [i.e. management], we can make your life very difficult." Sister Evans explained that this was her response to your comment that you had been put on the unit to make life difficult for management."

58. Ceri Ann Hughes had been at the meeting and does not say the Claimant was mistaken in her recollection, rather she seeks to explain what Ms J Evans had meant by what she had said.

59. The other matter in dispute between the parties about events or matters that were discussed at the meeting on 8 December 2010 was in respect of a coroner's report. On 20 October 2010 the Respondent had been written to by the coroner regarding an inquest about the death of a patient in October 2010. The coroner wrote to the Respondent, the letter being addressed to Chief Executive, asking for a written response to his report within 56 days of the date of the letter. The report relays concerns by the patient's family regarding the Claimant's conduct after the patient was readmitted to hospital.

The patient's family, the coroner's report notes, complained that they had asked the Claimant to help arrange attendance of a priest but was told by the Claimant "this was unnecessary as these young doctors don't know anything and this was not the day your brother will die" or words to that effect. The family then left the hospital, but were called within 2 hours and told that the patient had passed away without his family members being present and without the priest.

60. There was no evidence about what action the Respondent had taken in response to this letter prior to the first time it was raised with the Claimant at the meeting on 8 December 2010. The Claimant had a clear recollection of how this was raised at the meeting. She became very distressed when given the evidence relaying what was said to her at the meeting about the coroner's report. The Claimant had no knowledge that there had been a coroner's inquest until this meeting. The Claimant says that this was raised with her in a "gleeful" way by Ms J Evans who first informed the Claimant of the report in response to a question by the Claimant if there were any serious concerns with her nursing care. Ms Evans responded "well there is the coroner's case" in an excited tone and Ms Reilly subsequently informed the Claimant that there were omissions in the Claimant's nursing care that had resulted in the death of a patient. The Claimant described how she became extremely upset, felt immediately unwell and the Claimant took from that that there was a possibility of her being pursued for manslaughter. The Claimant describes how the HR representative Ceri-Ann Hughes started to look visibly uncomfortable and attempted to interject and protest that it was inappropriate to discuss the matter at the time as Ms Reilly and Ms Evans were not privy to the facts. The Claimant brought the meeting to an end as she was too unwell to continue.

61. When Ms Reilly and Ms Evans were asked about this in cross examination both denied that they had raised this issue at all with the Claimant. We were referred to a grievance that the Claimant subsequently wrote on 14 December 2010 in which she does not complain about these matters. However in a letter from the Claimant to Ceri-Ann Hughes on 19 January 2011 she does refer to this issue. In the Claimant's conclusion to the letter she brings this to Ms Hughes attention in which she describes in the Claimant's words **"the totally unacceptable manner in which the last meeting was brought to an end."** The Claimant says as follows **"the only word I can use to describe it is spiteful and is further evidence of senior managements bullying. I was as you recall reduced to tears and unable to continue. As a non-nurse you will not appreciate the magnitude of what Sister Evans said. For your nursing practice to be questioned in an open coroner's court is the worst of professional scenarios to find yourself involved. However as the letter has since been read to me I am now aware as was Sister Evans at the meeting that the complaint came from a relative which was expressed by the coroner my nursing care was not in question as Sister Evans will have been aware, so when I asked if there were any problems with my clinical practice the truthful answer would have been for her to say no".**

62. In light of this letter that was written a few weeks after the meeting and to which there was no rebuttal we prefer the Claimant's account of what happened at that meeting and we find that the coroner's inquest was raised in the manner suggested by the Claimant.

63. As neither Ms Reilly nor Ms J Evans accepted that they had raised this matter with the Claimant at the meeting at all, we did not have any evidence from

either individual about why it had been raised with the Claimant at that time. We note that on 13 December 2010 Ms O'Brien had a discussion with the Claimant to discuss the outcome of the coroner's report. The Claimant's version of events was very different to that of the family and this was relayed to Ms O'Brien. The Claimant gave an account of what she had said to the family agreeing that the doctor had said he was critically ill and he did not have long left and that she could not say what the best thing to do about going home would be. We find that to raise this with the Claimant at this meeting in the way that it was raised was not an appropriate way to raise the coroner's concerns with the Claimant

Meeting 17 January 2011

64. A further meeting took place between Ms Reilly, the Claimant and Ms J Evans on 17 January 2011. There were no notes of this meeting but there was a follow up letter from Ms Reilly in which she agreed to the Claimant's temporary transfer to the A&E unit at the University Hospital of Wales in Cardiff (known as "the Heath"). At the end of the letter Ms Reilly commented that she felt the Claimant had been rude and discourteous and at times aggressive towards Ms Reilly. The Claimant in response objected to these comments by Ms Reilly on the basis that she felt this could be interpreted as a form of warning. Mediation was offered to which Ms Reilly agreed to but Ms Julia Evans declined to take part and this did not take place.

Written complaint against the Claimant

65. We were also taken to a written complaint from a patient's wife part of which was against the Claimant on 18 January 2011, who complained the Claimant had an aggressive and demeaning manner and been rude and short tempered. No action was taken in respect of this complaint by the Respondent.

Conclusions – Llandough

66. In conclusion regarding the Claimant's period of employment at Llandough we find that there was an authoritarian management style and a clear message that if a member of staff raised issues they would be disciplined themselves or there would be unfavourable consequences as evidenced by the way on which the coroner's report was raised with the Claimant. Challenges to Nurses in Charge were viewed in a hostile manner. We reject that the evidence demonstrated that the Claimant behaved in the manner described at paragraph 43 above. We also find that the Respondent's concerns about the Claimant were not focussed on the way she raised issues rather that she raised the issues in the first place, in a culture where this was likely to lead to the above consequences.

67. We do not agree that the Respondent's evidence demonstrated that the Claimant raised issues that were not genuine or in a retaliatory manner. The issues raised by the Claimant (apart from her frozen shoulder) were all related to patient safety and concerns. None were for her own personal gain or motivation for her own circumstances.

2012- 2013

68. Following the Claimant's move to the Heath the Claimant had a period of maternity leave in 2012 and during this time there was an organisational change within the unit. The Claimant requested to be redeployed to critical care upon her return from maternity leave, however this was not pursued as the critical care unit were not able to accommodate the Claimant's work life balance request and as such she returned to the Assessment Unit under the management of Ben Durham who was the Unit Manager at that time.

Tracey Shanahan incident – April 2013

69. An incident arose between the Claimant and Sister Tracey Shanahan concerning a diabetic patient. There was a dispute between the two which was recorded in incident forms that they respectively completed on 7 April 2013. We did not hear evidence from Ms Shanahan but her incident form recorded that there had been no blood monitor documented or ketones recorded and when she discussed it with the Claimant she had become defensive agitated and rude. Ms Shanahan went on to say that she had spoken to the Claimant and explained that if things are not documented then it is assumed that they are not done and the Claimant told her not to be ridiculous and to check the monitor. The form recorded that Sister Shanahan required escalation to a senior nurse regarding the Claimant's attitude and ability to recognise a sick patient.

70. The Claimant's incident form recorded a similar version of events in respect of the patient but differed in regard to Sister Shanahan's behaviour, as did her witness statement. The incident form also dated 7 April 2013 recorded that the Claimant had requested two doctors to cannulate the patient as well as the nurse in charge. It goes on to say that the patient was eventually cannulated and stabilised and the Claimant acknowledged that she was unable to find her the original observations. Ms Shanahan is said to have announced in front of everyone that "if it was not written it was not done". The Claimant acknowledges that she was upset and that she went on to apologising for not noticing the HB (blood count). The Claimant alleges that Sister Shanahan proceeded to jump in and further humiliate the Claimant in front of colleagues. The Claimant's witness statement also describes behaviour of Ms Shanahan alleging that Sister Shanahan started to chant "if it's not written it's not done" whilst pointing at the Claimant and that this continued for some time in such a vocal manner that the entire major department was reduced to a hushed silence. The Claimant described being reduced to blubbing like a child in front of everyone but continued to try and assist the patient.

71. We heard evidence from Sharon O'Brien that she investigated the incident by speaking to both Sister Shanahan and the Claimant and reviewing incident forms we have referred to above. Ms O'Brien also described meeting senior nurse Jennie Palmer to consider the incident and agreeing that no conduct or capability action should be taken against the Claimant.

72. We had sight of an email discussing this incident from Ms O'Brien to Rhodri John, copied to Ceri-Ann Hughes and Jane Williams, both of HR and Jenny Palmer on 13 June 2013. This email heading was "Dignity at Work - Jude"

which refers to a later incident which we deal with below. The email reads as follows:

"Hi Rhodri, Following on from our meeting last week regarding Jude Evans in AU I have reviewed the incident forms and the patient's notes with Jennie Palmer surrounding a patient incident that she was involved in and we have both agreed that we need to let this incident go as far as capability or conduct issues. There was far too much going on that day with other patients and Jude is adamant that she recorded the patient's BM and she has documented this".

73. We find the timing of this email and the reference to the discussion taking place "last week" (the week before 13 June 2013) important. Also the fact that it was being discussed in the context of the dignity at work complaint that the Claimant went onto raise almost one month later. Furthermore, where it records they needed to "let go" of the incident this contradicted Ms O'Brien's witness statement that her and Jennie Palmer decided that the Claimant needed to be reminded it was not appropriate to speak to colleagues in an unprofessional manner when raising any concerns or questions regarding patient care. We noted that with two conflicting versions of events that the Sister Shanahan's version was accepted without question whereas the Claimant's version was dismissed and there was no investigation. The Claimant disputed that Ms O'Brien ever spoke to her about the incident. We find in view of the email of 13 June 2013 that Ms O'Brien did not discuss this incident with the Claimant.

74. We have taken some time to set out this incident as it was important in respect of what subsequently followed and the Claimant's actions about the incident with her and Ms Waters on the 3 May 2013.

Incident on 3 May 2013

75. On or around 23:00 hours on 2 May 2013 a patient which we will refer as Patient A was admitted to the EU department. He was recorded as being intoxicated and found outside of Tesco supermarket with a head injury. We had sight of some of this patient's notes in the original bundle, but an important section of the notes was missing and we therefore requested that the Respondent try and locate these notes. Some further notes were provided but the important part of the notes (the contemporaneous notes from the afternoon of 3 May 2013) could not be located. The notes record that the patient continued to be treated in the unit through the night and was recorded at various times as being very abusive, verbally threatening (00:30 hours) as of 3 May 4:00am the nursing notes record that he has also been very abusive, disruptive, making a lot of noise, being inappropriate to staff and patients around him, refusing to listen, highly intoxicated and security being called following him shouting, speaking inappropriate words and insulting staff on the ward. This was followed up by an entry by a different nurse at 6:00am that he continued to be aggressive verbally. At some point by 7:30am on 3 May 2013 the patient had left the ward against medical advice and the police and security were called. At 10:00am that day the nursing notes record that the police contacted the ward to enquire whether the patient was wearing a bandage and at some point after this the patient was brought back to the ward by the police and readmitted.

76. We had sight of a consultation note by Dr Munawar Al-Mudhaffar who was the Consultant in charge of the EU department that day. Dr Al-Mudhaffar notes record an entry at 17:30 (there was some question over whether that was the time he saw the patient or the time he wrote the notes) where he records that the patient had admitted to drinking. He went on to write up a plan for Patient A to be carried out by the nurses.

77. The Tribunal heard evidence from Joanne Towers who was the nurse responsible for Patient A during the afternoon for which time there were no nursing notes available. Ms Towers was called on behalf of the Claimant. Ms Towers was employed on the Assessment Unit team at the University Hospital Wales from 2010 to 2014 as a Band 5 Staff Nurse, she subsequently left her career as a nurse for personal reasons. We found Ms Towers to be a very credible and reliable witness. She gave clear evidence and had a good recollection of events of the afternoon in question of 3 May 2013. Ms Towers described the patient's behaviour and the impact it had on both the staff and other patients in the AU department. Ms Towers was working in the Clinical Decisions Unit ("CDU") Unit which was under the remit of the Accident and Emergency department, but usually used for patient's requiring observation pending discharge. Ms Towers described being under constant pressure to discharge patients to create bed spaces for A & E patients that needed to come into CDU and that the vast majority of CDU patients were elderly, vulnerable or intoxicated.

78. On that particular day Patient A was brought back to CDU by two policemen at approximately 2:00pm. Ms Towers was unable to give him any treatment as he informed her he did not consent and threatened to physically hurt her if she approached him. Ms Towers expressed her concerns to the A & E doctors whose advice was to "keep trying". Patient A went on to behave in a verbally abusive and threatening manner to Ms Towers and the other patients using extreme profane language and was physically threatening. A relative of one of the patients informed Ms Towers that the Patient A had threatened to murder his mother when she was asleep and when the relative left the unit. Ms Towers felt alone, isolated and vulnerable. She described that the security hospital team were called on numerous occasions and described at one point the patient being held down by 2 or 3 security guards. Ms Towers was unable to say which doctor she had spoken to in A & E and was also unable to say whether it was Dr Al-Mudhaffar. Dr Al-Mudhaffar came on shift either at 3:00pm or 5:00pm.

79. Ms Towers handed over the Patient A to the Claimant when she arrived for her night shift shortly before 7:00pm and distinctly recalls apologising to the Claimant for the outstanding tasks that she had not been able to complete due to the time taken up by Patient A. Ms Towers said that the Claimant was very calm and professional, but was shocked that she had been left on her own and that the other patients in CDU had been exposed to the behaviour of this patient without intervention from either a senior nurse or a doctor for such a protected period of time. Ms Towers said that she had called security during this period up to 10 times. We accepted Ms Towers evidence that at no time was she offered any support from the doctor who was aware of his violent behaviour or from the nurse in charge, she also requested to have a 'special' for the patient which involves a member of staff sitting with the patient at all times. Also declined was her request for him to be moved to a

different area where the nurse to patient ratio was higher. Due to the behaviour of the patient the plan that had been written up by Dr Al-Mudhaffar had not been able to be implemented.

80. After the Claimant had the handover from Ms Towers she proceeded immediately to the High Dependency Unit office to speak to the Consultant in charge, Dr Al-Mudhaffar. We accepted the Claimant's evidence that she believed the patient had not been reviewed by the Consultant since his arrival and was unaware that Dr Al-Mudhaffar had written up the plan for the patient. The Claimant went to see Dr Al-Mudhaffar on the basis of what she had been informed at the handover by Ms Towers.

81. There was a dispute about what happened next in the High Dependency Unit office. The Claimant's evidence was that when she arrived there were at least two doctors including Dr Al-Mudhaffar sitting together chatting and possibly another junior doctor also as well as about four staff nurses. The Claimant waited for the conversation to end, but then interrupted as she was anxious that a plan be put in place before the patient had woken up (the patient having been asleep when the Claimant took the handover from Ms Towers). The Claimant accepted that she conveyed dismay to the Consultant at his leaving a young nurse alone for 6 hours with a violent patient but denied that she was rude to the Consultant. This account differed from a witness that we heard from who was present during this discussion, Natasha Whysall, and also from Dr Al-Mudhaffar's witness evidence. Dr Al-Mudhaffar described the Claimant coming into the office and talking to him in a loud and aggressive manner. He went on to say that she was restless and unhappy and was very aggressive, rude and unreasonable and kept repeating very loudly "your patient". He also described being embarrassed and intimidated by the Claimant's behaviour which he considered to be completely inappropriate, particularly given the clinical environment. Natasha Whysall was also present during this discussion and gave evidence to the Tribunal, describing the Claimant as confrontational and very rude to the Consultant as well as being angry and flustered when she came into the office and shouting very loudly.

82. We have also taken into account the near as contemporaneous witness statements given by Ms Whysall, the Claimant and Dr Al-Mudhaffar given the time of events that have passed since this incident and the Employment Tribunal hearing. These were in provided during the course of a later disciplinary investigation conducted by Mr Rhodri John, HR Officer and also a Dignity at Work investigation.

83. There was reference to Dr Al-Mudhaffar making a statement on 8 May 2013 (see paragraph 120 below) but this statement was missing from the bundle.

84. In a statement dated 22 October 2013, Dr Al-Mudhaffar gave a statement to Andrea Richards in which he described the Claimant as very rude and agitated and also that he felt intimidated by her manner. He also said that her approach was unprofessional, she was rude, aggressive and kept on repeating "your patient" in a loud voice with her body language and facial expression also aggressive in nature and describes being embarrassed and intimidated. He also commented that he felt Sister Waters could have been "a bit more discreet in taking the Claimant away from the area". Dr Al-Mudhaffar was interviewed again on 25 April 2014 as part of a disciplinary

investigation by Rhodri John. Dr Al-Mudhaffar essentially said the same thing, that the Claimant was very rude, seemed agitated and he felt intimidated. He goes on to describe her being shaking being so angry and that he found her to be aggressive.

85. Ms Whysall's statement to Andrea Richards was dated 4 December 2013. She stated that at the time the Claimant entered the room to talk to the Consultant she used words to the effect that she was not willing to put herself in a potentially difficult situation with an aggressive patient and that the A & E doctor would have to come and see the patient. Ms Whysall describes the Claimant as being abrupt and rude to the Consultant and appeared to be agitated from the moment she arrived in the office with mannerism and body language being confrontational. Natasha Whysall was interviewed on the 24 April 2014 by Mr Rhodri and reiterated that the Claimant had told the Consultant she was not willing to put herself at risk with a patient who had been aggressive and went on to describe the Claimant as seeming flustered, agitated, was not behaving professionally, being quite confrontational and quite defensive, balshy, abrupt and loud. She did not describe the Claimant as aggressive towards the Consultant in her interview with Mr John but said that she was quite aggressive to Ms Waters which we will deal with below.

86. In terms of this particular incident we find that the Claimant would have approached the Consultant in an agitated manner and in the manner described by Natasha Whysall and Dr Al-Mudhaffar.

87. After the Claimant's intervention the Patient A was discharged shortly later.

Incident with Ms Waters

88. During the exchange between the Claimant and Dr Al-Mudhaffar Sister Waters entered the HDU office, again there was a dispute about what happened next. It is common ground that Ms Waters challenged the Claimant about her confronting Dr Al-Mudhaffar and asked her to leave the office so that it could be discussed. They both left the office and then there was an incident in the corridor captured on CCTV footage. The Tribunal saw the CCTV footage a number of times throughout the hearing and we make the following findings of fact based on the CCTV footage and the witness statements from the Claimant and Ms Waters who were the only people interviewed at the time. It was very clear to the Tribunal from the CCTV footage that Ms Waters takes hold of the Claimant's arm near her elbow and then pulls the Claimant's arm, pulling the Claimant towards another side room off the corridor away from the HDU office. We were able to see clearly from the CCTV footage that it was a pull by Ms Waters as we could see the Claimant attempt to pull her arm back and Ms Waters immediately pull the Claimant's arm towards her. We also observed Ms Waters pushed the Claimant in the back also in a manner of trying to usher her or ensure that she was removed from the corridor into the side room. This was obvious to us particularly given the Claimant's stance in leaning back at this moment in time as if she was trying to resist where she was being directed by Ms Waters actions. They then went into a side room where there was a heated discussion between them.

89. After the first pull to the arm, the Claimant told Ms Waters not to touch her. Ms Waters' witness statement accepted that she put her hand on the back of the Claimant's shoulder with the intention of comforting her and that the Claimant immediately started to claim that she had assaulted her. This differed from Ms Waters account at the time described in an email to Ms O'Brien on 7 May 2013 in which she acknowledged that she had touched the Claimant's arm in a 'come hither' gesture. Notwithstanding Ms Waters various descriptions of how she touched the Claimant it was obvious to us that the contact with the Claimant was more than a hand on the back of a shoulder or a 'come hither' touch on the arm from the CCTV footage.

90. We also observed on CCTV footage that there was a member of staff (Julie White) in the corridor at the time of the incident between the Claimant and Ms Waters and 3 members of the public. None of these individuals were interviewed by Andrea Richards in the subsequent Dignity at Work investigation (see below). We saw from the CCTV footage that the Claimant and Ms Waters both left the office and there was a few seconds of further conversation at which point we observed one of the members of the public turning pointedly to look towards the Claimant and Ms Waters which indicated to us that there continued to be quite a heated discussion between the two of them. The Claimant then returned to the ward to attend to the patient and as outlined above Patient A was subsequently discharged within the hour.

91. The Claimant was extremely upset by the incident and immediately phoned the Site Manager, Richard Jones. A meeting followed between Richard Jones, the Claimant and Ms Waters at which point Lisa Waters said in her witness statement that the Claimant was so angry she was frothing at the mouth when she was talking and behaved in an extremely aggressive manner towards her. (We did not hear evidence from Richard Jones although he had provided a witness statement he was not available to attend the Tribunal to give evidence. The Claimant also confirmed that she did not have any questions for Mr Jones.)

92. Mr Jones' statement describes that the Claimant had approached him on 3 May 2013 and seemed distressed and told Mr Jones she had contacted the police regarding an alleged assault on her by Ms Waters. He goes on to say that he was informed by the Claimant she was so upset by the incident she could not complete the shift and would be leaving the hospital premises. Mr Jones admitted that he informed her that leaving in the middle of the shift could be considered as an unauthorised absence and might be treated as a disciplinary offence.

93. The Claimant had not immediately contacted the police following the incident with Ms Waters but when she returned home after discussing what had happened with her husband. The Claimant explained her reasons for doing so in that she felt following what she considered to be a verbal assault by Ms Shanahan the month previously when no action had been taken that she could not continue to accept bullying behaviour in the workplace with nothing being done about it. The Claimant contacted the 101 police service and explained the situation to the call handler and was informed that from what she had described it constituted an assault, but it was unlikely to result in an arrest. The Claimant advised the 101 service it was not a serious assault but did result in her being concerned for her safety and had caused her to be very

upset but she did not wish for Ms Waters to be arrested. After a discussion about internal processes to deal with complaints the call handler informed the Claimant she should go down this line. The Claimant asked the call handler to ask if the police officer attached to the A & E unit could liaise with Sister Waters manager about the incident and that was agreed as far as the Claimant was concerned.

94. On 7 May 2013 Ms Waters emailed Ms O'Brien about the incident, she outlined her version of events and described the Claimant as aggressive both in the office with Dr Al-Mudhaffar after Ms Waters' intervention and in the psychiatric room where Ms Waters claimed that she asked if she could speak to the Claimant and made the 'come hither' gesture by touching her left arm in the corridor. When Ms O'Brien was asked in cross examination about this email Ms O'Brien told the Tribunal that Ms Waters had also come to her office to speak to her about the incident at which point she was in possession of the CCTV footage. Ms O'Brien did not keep a note of the discussion with Ms Waters.

95. At some point although it was unclear when, Ms Waters asked Ms Whysall to prepare a statement about what had happened. Ms Whysall did not do this.

Evidence of Ms Lewis

96. We pause here to deal with the evidence we heard from Ms Lewis who had been called to the Tribunal to give evidence under a Witness Order applied for by the Claimant.

97. Ms Lewis attended Tribunal on Thursday 3 October 2019 under the Witness Order and was asked questions by the Claimant and then cross examined by Counsel for the Respondent. We found Ms Lewis to be a credible witness, but extremely nervous about having to appear in the Employment Tribunal to give evidence.

98. Ms Lewis's evidence was as follows. She had experienced two events with Sister Waters involving her uniform. Ms Lewis described an incident in the corridor with Ms Waters which she placed in 2014 before her daughter was born. A new uniform had been issued and they were instructed to wash the uniform numerous times due to concerns about allergies. Despite following these instructions the uniform caused an allergic reaction which led her to have a very sore neck. Ms Lewis's mum had altered her uniform so it would not rub by tucking in the collar.

99. Ms Lewis was wearing her altered uniform and whilst returning from the toilet Sister Waters came down the corridor, stepped in front of Ms Lewis and caught hold of her uniform where it had been altered and said to her words to the effect "what have you done with your top?" Ms Lewis was asked to demonstrate how Sister Waters had touched her uniform and in doing so she demonstrated lifting her top up and down in a minor flapping motion. Ms Lewis described herself as being taken off guard but brushed it off. She then went on to describe a second incident which took place in the sluice where Sister Waters came into the sluice and said to her words to the effect of "your top, your top again". On this occasion she did not touch Ms Lewis.

100. Ms Lewis told Sister Waters that she had spoken to Mr Durham which she described to the Tribunal as a lie as she had not. She explained she lied as she felt that she had to say that she had spoken to Mr Durham to make Sister Walters think everything was OK. After this Ms Lewis went to Ben Durham and told him she had been pulled up twice on it, she could not wear the new top as it made her neck red raw. Mr Durham said that he would email Sister Waters about it. Ms Lewis does not know if he ever did and it was never mentioned again.

101. Sister Waters had been asked about this in cross examination and she denied touching Ms Lewis and said that she had spoken to her at the nurses' station. We preferred the account of Ms Lewis in relation to where this incident took place and also her version of events as it was corroborated by Mr Durham to the extent he agreed Ms Lewis had told him that Ms Waters had pointed or touched her collar.

102. In cross examination of Ms Lewis, she confirmed that contrary to the Claimant's evidence (that Ms Lewis informed her that Ms Waters had grabbed and shook her uniform vigorously) this what not what she had told the Claimant. We accepted her evidence. We find that Ms Waters did take hold of Ms Lewis's collar on one occasion and shake it, but not in an aggressive or vigorous way. Nonetheless it caught Ms Lewis off guard and it was uninvited physical contact from Ms Waters. She was sufficiently affected by the incident so as to be untruthful when she was challenged the second time.

103. Ms Lewis also agreed under cross examination that the Claimant's version of what Ms Lewis had told her was not an accurate description as she was already in the sluice and she was not reduced to tears or shook or grabbed and she had not told the Claimant that this was the case. Mr Powell asked about the Claimant's behaviour as to whether or not Ms Lewis had observed if the Claimant was hot-headed or aggressive and if she had ever found her that way at work. The Claimant had not been asked about this at the evidence in chief stage and the Tribunal intervened as to whether it this was an appropriate question. After hearing from Mr Powell we permitted the question. Ms Lewis said that the Claimant and her were friends and they worked together well. She said they worked in a stressful environment and that she had never seen the Claimant get hot-headed or aggressive or rude.

<u>Protected Disclosure 1</u>

104. This had been dated 3 May 2013 in the schedule. This was the date of the incident between the Claimant and Ms Waters.

105. The schedule set out the disclosure as follows:

"Violence and aggression form completed and submitted by the Claimant in respect of bullying. The complaint was raised against a Senior Staff Nurse, Lisa Waters (a Band 7 sister in the Accident and Emergency Department) and an assault that was carried out by a Senior Staff Nurse Lisa Waters on the Claimant".

106. The ET1 set out that this disclosure had been relayed verbally to Mr Jones, site manager and within the violence and aggression form and dignity at work complaint (letter dated 22 May 2013). The S43B sections relied upon were that a criminal offence had been committed or was likely to have been committed (assault by Ms Waters on the Claimant) and health and safety of the Claimant, staff generally and patients was, had been or was likely to be in danger. The breach of legal obligation was permitted by the amendment. The disclosures were said to have been made to her employer and the police.

107. On 22 May 2013 the Claimant sent the violence and aggression form (which was an incident report form) and accompanying letter to Ms O'Brien. It was a pro forma form that had sections for completion. The Claimant had ticked "Physical" in a list of possible types of assaults (the others being verbal, sexual, racial and weapon involved). She named Ms Waters in a separate box which we could not read the title of, but it is likely this asked for the identity of the perpetrator. It stated that she had reported the incident to the police and gave the name of a PC and a crime number. The Claimant had stated as follows in the information box:

"After addressing my concerns pertaining to an aggressive patient in the Assessment Unit North (trolley 12) to the responsible Consultant in the HDU office, the Consultant acknowledged my concerns by advising me that he would come and review the patient in 10 minutes at which point I turned to leave. As I was about to leave I was startled to hear my name shouted behind me! I was confronted by Ms Lisa Waters, who demanded to know if there was a problem. Not content with my answer that the problem had now been resolved, in front of two Consultants and four to five junior nurses she went on to announce that she did not like my attitude which she found to be aggressive. The Consultant had not shown any signs of irritation regarding my attitude however, neither did he express any concern regarding my behaviour verbally. Ms Waters tone continued to be both cold and inappropriate. She then proceeded to request I join her in the link corridor, although at this point I was extremely annoyed at her obvious attempt to humiliate me. Feeling that little would be gained by pursuing the conversation further, and actually concerned for her behaviour which I felt had now deteriorated, I advised her to address her concerns via an incident form. At this point she attempted to direct me to the corridor side by holding my arm. I clearly advised her that I did not want her to touch me. Ignoring my wishes she put her arm firmly around my shoulder and attempted to direct me where she wanted me to go. Her attitude remained bullying and I promptly removed myself from her presence. Upon arriving to the unit I paged the Site Manager Richard."

108. In the covering letter of 22 May 2013 the Claimant acknowledge it might be construed that her decision to involve the police in this incident to be somewhat extreme and that it was not a decision she took lightly. She described the reason for involving the police was (in summary) that nothing had been done about her incident form she had submitted concerning the incident with Ms Shanahan which she considered to be a verbal assault. The Claimant goes on to say as follows:

"With regard to this latest incident, there are other issues surrounding it that I also feel need to be addressed. Firstly is what was being discussed with the Consultant. The day staff nurse had been working in the CDU area on her own since midday when the ANP finished her shift. She had a patient who had been swearing profanities at staff, patients and relatives alike since his arrival, consequently none of the most basic medical requests had been performed, observations and vena puncture for example. Visiting relatives were expressing concerns and eager to take patients home rather than leave them in their current positions in the CDU, as they were concerned for their safety. When I discussed this with the Consultant, he did not convey in any way any displeasure or irritation with my behaviour, in fact he seemed very sympathetic of my concerns and assured me of a prompt review. I find it hard to believe a Consultant of his stature would

allow Band 5, or any other member of staff to publicly ridicule him without some form of reprimand. It only became apparent that he felt my attitude was aggressive when Ms Waters, who I had already informed of my intention to pursue this matter further, questioned him and other junior nurses present . I do not think, and I am sure you would agree it is not appropriate for someone at a crux of an incident, to prime a witness secondly I am also concerned that despite describing herself as being in charge of both the Accident and Emergency department and the Assessment Unit, she was totally unaware of this very aggressive individual in CDU. Within half an hour of raising my concerns with the Consultant, the patient in question was escorted from the premises. In view of all of the above and what I consider to be complacency on behalf of the Trust in dealing with issues pertaining to bullying and harassment within the workplace I felt I had no alternative but to address my concerns with a body independent of the Trust."

109. Following the sending of this letter the Claimant was absent from work for a short period. Ms O'Brien was aware of the incident on 3 May 2013 from the email from Ms Waters. She had also been informed by the Hospital Police Liaison Officer that following a conversation with the Claimant the local police had closed the case and told the Claimant that this was an internal matter within the Respondent Trust. This corroborates what the Claimant had said to a degree about her conversation with the police. Therefore Ms O'Brien knew at that stage the police were not pursuing the matter. Ms O'Brien asked the Claimant to write a statement of events which she duly did on 22 May 2013 (see above). Ms O'Brien said she did not recall receiving the violence and aggression form. The form had been attached to the Claimant's letter dated 22 May 2013 which Ms O'Brien agrees she received and was directly referenced as being attached in the first sentence. Further, Ms O'Brien refers to the form in her subsequent letter dated 19 June 2013. We find that Ms O'Brien must have received the form.

110. Ms O'Brien took no steps to investigate what had happened with Patient A. She did not speak to Nurse Towers. Ms O'Brien told the Tribunal that the Respondent has a zero-tolerance policy of violence against staff and where incidents are reported they are investigated and the patient is written to by the violence and aggression team. We saw no evidence that this had happened in the case of Patient A.

Emails between Sharon O'Brien and Rhodri John 13 – 27 June 2013

13 June 2013

111. Ms O'Brien was asked in cross examination why, on 13 June 2013, her and Jennie Palmer were looking at the incident between the Claimant and Tracey Shanahan from April 2013 in the context of the Dignity at Work investigation (as referenced in the email subject matter – see paragraph 72 above). Ms O'Brien explained the reason was that the Claimant had brought up the incident in her letter of 22 May 2013. However the wording of the email suggests that this was not the reason. The wording suggests that they were looking again at the incident to see if the Claimant could be disciplined for either conduct or capability. The reason we make this finding is where it says in the email about them 'having to let the incident' go directly in connection with capability or conduct and gives reasons for doing so to Mr John.

112. Above in the context of the Tracey Shanahan incident we have already set out part of the email between Sharon O'Brien and Rhodri John on 13 June 2013. The email goes on to deal with the Claimant's allegation in respect of

Lisa Waters and in view of the importance we attach to this email we set out the remaining content of the email word for word. The second paragraph of the email goes on to say as follows:

"With regard to the other incident about her conduct with the Sister in EU, Lisa Waters, I have spoken to Lisa and informed her that this will commence as a Dignity at Work issue. Lisa was more than happy as she was going to put in a complaint about Jude anyway.

Can you send me the next steps that I need to do (sic) undertake this to start this process, I also remember Jane mentioning a flow chart so that we know where we are going with this as I don't just want to get to a stage where Jude and Lisa sit across a table from each (sic), the plan is for us to intervene before that and state that I need this now investigated through the disciplinary process.

I am more than happy to get going on this once I hear back from you."

113. The subject of this email was "**Dignity at Work – Jude**", therefore, it was obvious to us that the email concerned and was in response to the Dignity at Work complaint the Claimant had raised on 22 May 2013 namely her first alleged protected disclosure.

114. There were a number of troubling aspects about this email. The first we have already dealt with – was it evidenced an abandoned attempt in by Ms O'Brien and Ms Palmer to see if the incident from April 2013 could result in conduct or capability proceedings against the Claimant (see paragraph 73 above). The second troubling aspect of the email is the reference Ms O'Brien makes to the incident with Ms Waters where she refers to the Claimant's conduct (our emphasis) with the Sister in EU. At this stage in the investigation the Claimant had made a complaint that Ms Waters had assaulted her whereas Ms Water's allegation was she had been spoken to in an undignified manner which if viewed without pre judgement must have appeared a less serious matter. We take into account that Ms Waters had raised an issue about the Claimant's behaviour in her email to Ms O'Brien on 7 May 2013, but no one had spoken to the Claimant about this by this stage whereas Ms O'Brien has clearly had conversations with Ms Waters. The reference to Ms O'Brien "needing" this to be investigated through the disciplinary process was direct evidence that the decision to discipline the Claimant had already been taken. Ms O'Brien had reached this conclusion prior to any investigation into the Claimant's complaint against Ms Waters.

115. The last paragraph of the email also shows that Ms O'Brien was of the view, and was instructing HR that the process was not permitted to get to a stage where the Claimant and Lisa would sit across a table from each other. This directly contradicted the recommended outcome of the Respondent's Dignity at Work policy. This provided at Section 9.2 that mediation is available at any point during the process and should be used as a **first resort** (our emphasis) and considered as an option to be returned to at any time during the process. Section 10 sets out the first stage as being the "Informal Phase" with Step 1 described as follows:

"Step 1 – Individual discussions / raise concerns

In some instances members of staff may be unaware of or insensitive to the impact of their actions and behaviour in others. Wherever practicably possible the member of staff responsible for the behaviour causing offence should be made aware that their

behaviour is unwelcome and unwanted. Making the member of staff aware of the impact of their behaviour can be undertaken in a number of ways:

- **A face to face discussion**
- **In writing**
- **Through a third party on behalf of the recipient – this will usually be through the line manger…"**

116. The purpose of this stage is to ensure both parties are given the opportunity to express their feelings and hopefully agree an amicable way forward. It states mediation **should** (our emphasis) be offered at this stage of the process. Step 2 is then set out as Mediation and a whole section is set out at section 11 describing the mediation process. This duplicates the reference to mediation in step 1 (step 1 appearing to focus on raising the concern and having an informal discussion). If mediation is unsuccessful then it will be necessary to move to the formal phase. No-one spoke to the Claimant to ask her if she wanted to adopt Step 1 or Step 2. The formal phase was presented to her as a fait accompli.

117. Ms O'Brien was asked about this email in cross examination. She was asked why she had informed Mr John that she did not want the Claimant and Sister Waters to sit across a table from each other and also why she referred to this being investigated through the disciplinary process given that a Dignity at Work investigation had been instigated. We found Ms O'Brien's evidence in reply to be vague and unhelpful. Ms O'Brien was unable to explain why she had made this comment. She referred to "lots of conversations" and a meeting that had taken place between her and HR where there had been a general discussion regarding the process which she referred to as a "decision tree". This was to decide whether or not the Claimant's complaint should go down the disciplinary procedure or Dignity at Work procedure. When she was asked why, given the Claimant had complained of an assault, there was a discussion about a disciplinary procedure, Ms O'Brien said it was aimed at both (the Claimant and Sister Waters) and that she had come out of the meeting with the next steps being Dignity at Work or disciplinary where both were investigated, namely Lisa Waters and the Claimant and the email was just a follow up.

118. Taking all of this evidence into account, we find that Ms O'Brien instructed Mr John to bypass Steps 1 and 2 of the Respondents' Dignity at Work policy and effectively turn the complaint into a covert disciplinary investigation into the Claimant's conduct, directly due to the Claimant's complaint against Ms Waters. In the email of 13 June 2013, Ms O'Brien states that she 'needs' this to be investigated through the disciplinary process. She goes on to emphasise that she is 'more than happy' to get going on this when she heard back from Mr John.

119. This was corroborated by the evidence of Ms Andrea Richards who told the Tribunal that she was instructed to start the process in respect of the Dignity at Work investigation at the formal phase (Section 10.2 of the Respondents Dignity at Work policy being Step 3.) We find that Andrea Richards received this instruction as a result of the emailed instructions from Ms O'Brien to Mr John on 13 June 2013.

<u>Email 18 June 2013</u>

120. A further material email was between Mr John and Ms O'Brien dated 18 June 2013. It was an exchange from Mr John and Ms O'Brien copying in Ceri-Ann Hughes and Jane Williams in HR. This time the subject of the heading was **"Dignity at Work investigation JEJ.**" As this is an important email we quote from it as follows (we are not quoting the entire contents of the email just the relevant parts that we consider to be relevant):

"Sharon,

I have outlined below the background/my advice with regards to this case.

Incident 3 May 2013

Statements received: Dr Munawar Al-Mudhaffar (8 May 2013)[1]
Jude Evans – Jones (22 May 2013)
Lisa Walters (7 May 2013)
Initial meeting with HR and Sharon O'Brien: 6 June 2013

Jude has made a complaint against Lisa Waters which we are managing under the Dignity at Work policy.
I understand that Lisa has not yet made a complaint against Jude.
The Doctor involved on the shift (Dr Munawar Al-Mudhaffar) has also provided a statement – but this is concerned with Jude's unprofessional attitude towards himself and Lisa.
When we met with Jane Williams, we were looking at the investigation taking place with Jude being both the victim and the perpetrator.
We need to ascertain whether the Doctor wishes to make a complaint..
My view is we can still proceed with the investigation process in respect of Jude's complaint against Lisa and you can speak to the Doctor upon his return to see whether he will be making a complaint against Jude.
……. There could also be others to interview too, namely Richard Jones..Natasha Whysall and Julie White[2].
If Jude states she does not want to pursue her complaint down this route – we advise her that we have to take the issue seriously given the police involvement and our duty of care towards her – we still investigate."

121. Mr John must have viewed the CCTV footage by this stage as he had identified Julie White as a potential witness. Mr John goes on to sum up the allegations that he had summarised from the statements gathered so far although he insisted under cross examination that he had not drafted these allegations and they had been drafted by someone else.

<u>Meeting on 20 June 2013</u>

122. The Claimant was called to a meeting on 20 June 2013 by Ms Palmer and Mr Durham. She was accompanied by Jason Ball. The Claimant was informed that Ms O'Brien had decided that her complaints would be formally investigated using the Dignity at Work policy. The Claimant protested at the move to the formal stage and stated that she felt it would be more appropriate to take Sister Waters aside and 'advise her firmly that her behaviour was unacceptable and she should desist from manhandling staff'. This was ignored. The decision to proceed to a formal investigation was confirmed in a letter dated 19 June 2013 (it must have been written prior to the meeting)

[1] This statement was not in the bundle nor was it referred to anywhere else including in Dr Al Mudhaffar's witness statement

[2] Julie White was the nurse present in the corridor on the CCTV footage. There was no evidence she was ever interviewed.

from Ms O'Brien. Both the Claimant and Ms Waters received letters confirming that a Dignity at Work investigation was going to be conducted in line 10.2 Formal phase of the NHS Wales Dignity at Work policy into the Claimant's letter of complaint of 22 May 2013. It goes on to state that the investigation is being conducted due to the seriousness of the issues given the Claimant's decision to involve the Police with regards to the incident in question. This corroborates Mr John's email advice the day before (18 June 2013) in which he advises if the Claimant did not want to pursue a formally complaint they would still investigate. This was despite Ms O'Brien being aware by this point that the police were not taking any further action.

123. The letter sets out the summary of the Claimant's allegations (that Mr John's email said he had drafted) as follows; firstly that Sister Lisa Waters had humiliated the Claimant and secondly that she had put her arm firmly around her shoulder and attempted to direct her elsewhere despite requests she did not touch the Claimant.

124. Andrea Richards was appointed to conduct the Dignity at Work Investigation.

Email 24 June 2013

125. Ms O'Brien emailed to Mr John on 24 June 2013, forwarding the email from Ms Waters dated 7 May 2013. Ms O'Brien goes on to say in the email as follows:

"I presume that this really is classed as Lisa making a complaint against Jude's behaviour? Lisa is concerned that this will turn on its head as we are only allowing Jude to be the instigator of the Dignity at Work? What do you think? Should we amend the letters to reflect both parties and would this mean they would receive two separate letters as the instigator and recipient. Hope this makes sense, Sharon".

126. Mr John replied on 25 June 2013. He advises Ms O'Brien that in terms of the investigation even though the Claimant was the instigator if, following the investigation process it was considered that it was the Claimant's behaviour at fault then this would be addressed appropriately. He references being unable to speak to the doctor (which was a reference to Dr Al-Mudhaffar) as he was on special leave. Ms O'Brien replies the same day stating as follows:

"Thanks Rhodri, I know it has all become a bit confusing. Lisa did not want to make an initial complaint but in considering that we have to be by the book with all, (sic) it was not fair to either to not raise the issue of emails Lisa sent. Lisa also feels that she does not just want it to be Jude making instigating the Dignity at Work as she feels that she also feels that she was spoken to in an undignified manner by Jude. No letters have been sent yet and Jude has not been approached. I am on annual leave next week and have asked Jenny to meet with Jude, I will ask Jenny and Ben to withhold meeting with Jude until we have made a decision."

127. Mr John replies on 27 June 2013. He informs Ms O'Brien that they were not preventing Ms Waters from making a complaint however the view was that they proceed with the allegations from the Claimant and during the investigation process Ms Waters would have an opportunity to give her version of events/discuss the way she was spoken to and this will also need to be addressed as part of the investigation report. He reiterates that Ms Waters concerns will not go unaddressed.

128. For reasons that were unclear, Ms Richards did not commence the Dignity at Work investigation until 10 September 2013. We therefore deal with other events relevant to protected disclosure 2, 3 and 4, and detriment 1, before returning to the Dignity at Work investigation below at paragraph 183.

Incident on 2 September 2013 (relevant to Detriment 1)

129. On 2 September 2013 Tracey Skyrme, who was a Senior Sister/Team Leader in EU, emailed Ms O'Brien from her Hotmail account (which was not a work email account), a complaint she had received from her ex-sister-in-law who we will call JF. The email contained an attached letter which was undated, but related to events on Thursday 1 August 2013 involving and her partner (the patient) who we will call DB and the Claimant. We do not know when JF first emailed Ms Skyrme as we did not see the originating email from JF to Ms Skyrme.

130. We heard evidence from Ms Skyrme and she was asked in cross examination how it came about that JF approached Ms Skyrme with the complaint. Ms Skyrme told the Tribunal that JF had contacted her on the telephone at home. She was also asked why upon receiving the contact Ms Skyrme did not refer JF to the Respondent's normal complaints procedure rather than asking her to send her a personal email which she then forwarded on directly to Sharon O'Brien. It was the Claimant's case that Ms O'Brien had instructed the senior staff to gather any complaints about the Claimant and send them to her, due to the Claimant's alleged protected disclosure against Ms Waters in May 2013, with the Senior Sister, in particular, closing rank around Ms Waters and colluding to highlight any issue relating to the Claimant.

131. Ms Skyrme explained that when she spoke to JF on the phone she told her about the complaints route and offered her the contact complaints email. JF said she did not want to make a formal complaint, but wanted to inform the Claimant's Line Manager of what had happened. When Ms Skyrme was asked who the Claimant's Line Manager was, she told the Tribunal it was Mr Durham. She was then asked therefore why she had sent the complaint to Sharon O'Brien and not Mr Durham. Ms Skyrme's explanation was that she worked in A&E so submitted it to Sharon O'Brien. We did not find this to be a satisfactory explanation and contradicted what Ms Skyrme had said about JF wanting the Claimant's line manager to be informed.

132. The email from the relative stated that the patient DB had been advised by Ms Skyrme at approximately 4.30pm the day after his admittance that he would be moving to a ward shortly as a bed had been allocated. Ms Skyrme denied that she had informed the JF or DB that a bed had been allocated and therefore there was some discrepancy between the complaint letter written by JF and Ms Skyrme's evidence. The letter went on to make a complaint about the Claimant. The letter stated that the Claimant's attitude and treatment of herself and her partner could only be described as rude, insensitive and unprofessional and having enquired as to the current situation with regards to a move to a ward, the Claimant informed JF that there was no bed and "what was she on about". Having relayed the earlier conversation with Ms Skyrme in which JF claimed that Ms Skyrme had told her a bed had

been allocated (which Ms Skyrme denied), the Claimant had replied "well they're not here now" and "he was lucky to have a bed at all".

133. The letter also went on to describe allegedly appalling treatment by the Claimant of an "elderly gentleman" in the next cubicle in which he was informed by the Claimant at 11.00pm that evening he would be discharged immediately which caused the elderly gentleman some concern as he was shocked and disorientated and lived at home alone. JF described the Claimant went on to harass and bully this individual about being able to get him home in what can only be described as an abhorrent and cruel manner. It is unclear when the letter from JF was written but it was sent to Tracey Skyrme who forwarded it onto to Ms O'Brien on 14 September 2013 who subsequently forwarded it onto Ceri-Ann Hughes, copied into Ben Durham and someone else called Cath Heath on 17 September 2013.

134. The Claimant's evidence on this incident was as follows: She was informed that on 1 August 2013 a patient's partner (JF) had been rude and confrontational since her arrival and had made it clear she was a sister or sister-in-law of a senior sister in the A&E department, Sister Tracey Skyrme. JF also made it known she had been told by Ms Skyrme that a monitored bed had been secured for her partner/husband DB on the cardiology or coronary care ward. The Claimant was summoned by JF who was confrontational and accusatory from the outset and informed the Claimant she was a close relative of Sister Skyrme and had been promised a monitored bed. The Claimant informed JF that she had not been informed that a bed was available and also that she had confirmed this by the Assessment Unit nurse in charge. The Claimant tried to contact the Site Manager on duty to check if a bed was available, but one was not and this message was relayed to the relative. In relation to the "elderly gentleman" referred to in JF's complaint, the Claimant was anxious to prioritise his discharge before it got too dark and recalls him being in his mid-eighties. The doctor had decided despite the late hour that he needed to be discharged as he was medically fit and that the elderly gentleman did not really want to go and put up a good fight. The Claimant made a request to the doctor whether he could stay until the morning, but did not insist as she did not feel he was an unsafe discharge. She remembered him well as she had a "soft spot" for him, but this was not a reason to justify taking a trolley when there was a full A&E department. The Claimant was eventually able to contact his daughter who was able to come in and collect him and thanked her profusely for his care.

135. In making findings of fact about this incident we have considered the evidence from the Claimant, Ms Skyrme and the email and the letter from JF. Ms Skyrme herself did not agree with some of JF's account and this casts doubt on the reliability of the description of events by JF. We do not find that Ms Skyrme acted in a way to "jump the queue" for DB. Nonetheless for whatever reason, JF was under the impression they were getting a bed so by the time the Claimant started her shift at 7.00pm and they did not have the bed, JF and her partner were probably frustrated and the Claimant was the bearer of the news there was still no bed. This was not of the Claimant's making. The Claimant did not have the authority to make a decision about a bed for DB, these are matters that are dealt with elsewhere within the hospital. We also find the Claimant was likely, in light of her character, about which we make findings below (see paragraph 431), to have been fairly direct

with JF and her partner about the bed situation. In relation to the treatment of the elderly gentleman we note there is no evidence of any complaint from the gentleman or his daughter about the discharge and we also note that it would not equally have been the Claimant's decision to have sent the elderly gentleman home at the time that he was discharged and she specifically does not have that authority to make the decision on the discharge. We preferred the Claimant's account of her interaction with the patient and that she had not treated this patient in the manner described by JF.

136. The Respondent was entitled to treat the letter from JF as a complaint and to have investigated it through the appropriate channels, notwithstanding the manner of receipt. We were not convinced by Ms Skyrme's explanation for the reason it was sent to Ms O'Brien instead of Mr Durham as it contradicted what she had told the Tribunal about why JF had wanted to send the complaint directly to Ms Skyrme. Instead Ms Skyrme did not send the letter to the Claimant's line manager, Mr Durham but straight to Ms O'Brien who Mr Durham reported to. There was also no explanation for the delay between the incident itself and the sending of the email by JF. The Claimant later cited this complaint as one of the examples of a deliberate decision to gather complaints about her as punishment for raising patient safety issues.

Second alleged Protected Interest Disclosure – 9 September 2013

137. This was set out in the schedule as follows:

"The Claimant challenged the inappropriate allocation of 2 patients to 1 bed space. The transfer had not been sanctioned by the NIC of the assessment unit"

138. This incident also involved Ms Skyrme. This was said to be a verbal disclosure, there is not an incident form in respect of this incident. The Claimant was on duty on the south side of the Assessment Unit when she describes an A&E Staff Nurse arriving with a porter, a trolley with a patient on it and an elderly man, with dementia, in a wheelchair who was the patient's husband. It transpired during handover that they were both being admitted as the wife was the husband's carer and it was unsafe for him to be home alone and therefore a decision was taken to admit the husband also. Whilst the Claimant was not challenging the decision to admit the husband, she objected to (and described herself as "astounded") at the follow on decision to allocate two unwell patients to one trolley space. The Claimant was of the view that this was clinically unsafe and totally unacceptable.

139. Ms Skyrme gave evidence as to the reasons for this decision. She was the Senior EU Sister on the shift that evening. The decision was taken to admit the husband as a social admission by the EU nurse in charge as a temporary measure until a care package could be arranged for him while his wife was in hospital. The hospital was full that night and there was no bed that could be sourced for the husband. Ms Skyrme told the Tribunal there followed an altercation with the Claimant which she describes as a verbal onslaught.

140. It was important to make findings on the words the Claimant used as relied upon by the Claimant as a protected disclosure. The Claimant says approached Ms Skyrme to "relay her concerns". She did not describe the

words used. The Claimant alleges Ms Skyrme replied, "it is nothing to do with me I'm not in charge" and shrugged and walked away. This was denied by Ms Skyrme and we accepted Ms Skyrme did not make this comment. Ms Skyrme's evidence was that the Claimant was shouting at her about the couple being transferred and her voice was raised and that she repeatedly said it was "not on" that two patients were in one bed area. Ms Skyrme says she explained to the Claimant they had managed the situation in EU and queried why it could not continue to be managed in the same way in AU (the Claimant's case was that EU had a higher nurse to patient ratio than the AU so this argument held no force). In response Ms Skyrme says that the Claimant said she would "not put up with it and she was not having it". She goes on to say that the Claimant said she was going to complain about the situation. Ms Skyrme explained that Anna Sussex, the nurse in charge, had known about the patients and arranged for them to be allocated to MAU. The Claimant complained to the Site Practitioner, Dale Collins about the couple being allocated to the same bed space in MAU.

141. We also had a written statement from Ms Skyrme in the bundle which Ms Skyrme says she wrote and reported at the time of the incident to Ms O'Brien on the morning or the day after so it was fresh in her mind and she had not been asked to write it, she did so of her own volition and without direction or instruction in case the incident escalated. We find this an unexplained position to have taken. This was the second document Ms Skyrme had forwarded to Ms O'Brien regarding the Claimant.

142. In Ms Skyrme's written statement she notes she was "set upon" by the Claimant in a "verbal onslaught". She records that the Claimant said it was "scandalous and we should not be putting up with this". According to Ms Skyrme's statement the husband of the patient was not demanding and did not need nursing care.

143. Ms Skyrme was asked by the Tribunal how long the patient's husband been in the wheelchair at the time he was admitted to the Claimant's area at 1.00 or 2.00am, but Ms Skyrme was unaware. She agreed that he would have been more comfortable on a trolley but told the Tribunal that no care package could be resourced till the morning. The plan was that the elderly patient with dementia would spend the night in wheelchair.

144. We heard evidence from Ms O'Brien about how equipment was allocated per trolley unit i.e. the monitoring equipment. Ms O'Brien agreed there was generally one set of equipment per bed space but said that there was other equipment available that could be brought in in an emergency.

145. Eventually the Claimant was able to secure an additional trolley for the husband so he did not have to spend the night sitting in a wheelchair.

Protected Interest Disclosure 3 – 12 September 2013 (page 621 of the bundle)

146. This is described in the schedule as:

"Incident form submitted by the Claimant regarding her own inability to administer drugs due to understaffing and having to prioritise the transfer of patients to ensure that there was no breach of patient case standards".

Incident forms

147. There were two different incident forms in use at the Respondent at the relevant time. These were: "Incident Record Form" and "Violence and Aggression Form."

148. The Claimant completed an incident record form on 12 September 2013 and left it in Mr Durham's post box outside of his office. The form states as follows under the box titled "Description of Incident":

"Unable to give a patient Optuplex prior to the transfer to the ward despite being prescribed at approximately 19.30 hours. Consequently Optuplex not administered until about 12.30 – 1.30am reasons are at my end as follows
X 5 transfers four of which came up at 19.00 at handover
x 1 patient with blood sugars 40mm DKA required commencement of insulin infusion prior to transfer
Young lady (Porphyria), learning disabilities, distressed +++ that her Haemarginate had not been given, (should be given within an hour of her arrival) this required organising as it is administered through portacat and we needed to secure the connectors from paeds. Vitamin K administered (late) but prior to transfer ward requested to administer asap."

149. The Claimant also recorded that she had not had a second break and that 6 patients and 1 nurse was not sufficient in this area.

150. Mr Durham's witness statement said that the first time he had seen the form was upon disclosure when he had been asked to comment on it and he had no recollection of receiving the form at the time. He referenced the fact that the front page of the form was not signed by anybody other than the Claimant. He also commented that the second page is not available but this was unsurprising as none of the incident forms (apart from one from 2014) we saw had the second page available.

151. Mr Durham also could not recall receiving another incident form completed by the Claimant in January 2014 but Ms Lisa Graham confirmed the form had been left in Mr Durham's office.

152. We were taken to a section in Whistleblowing Investigation Report by Nicola Hughes regarding another incident form Mr Durham had been sent concerning a patient who had absconded from the EU and was seen walking down the A48 [which is a busy dual carriageway near the Heath] with the police having to be called. Mr Durham is recorded as remembering seeing the incident form but nothing else which the report records as surprising given the Chief Executive had emailed him requesting what action had been taken.

153. In cross examination Mr Durham agreed that it was common practice for staff to photocopy the front page of the incident form before handing them in which may explain why the Claimant had only retained the top page she had provided during disclosure. The Respondent should have had the second page of the form as it contained action or details for which the management should have followed up on investigating the incident. The Claimant said that she had photocopied the form and given it to Mr Durham or placed it in his

post box and asked how he could have missed it. In response he said that he would work through incident forms and he had a deputy at the time but he was under a great deal of pressure and was becoming over-burdened and swamped with his workload. He agreed that if he received it he should have dealt with it, but it was not possible that he had not done so.

154. As we were taken to a number of examples of Mr Durham not recalling incident forms, where there was supporting evidence he had been given them, we find that the Claimant's evidence regarding the submission of the incident form to be more reliable than Mr Durham's evidence and that the form was indeed provided to Mr Durham.

Protected Disclosure 4 – 15 September 2013

155. This was set out in the schedule as follows:

"The Claimant made a protected disclosure to Senior Nurse Farrow regarding how she was speaking to a young nurse on duty at the nurses' station. There were two witness statements which supported the Claimant's account. Louise Farrow was insisting that a young nurse who had just completed a 12-hour shift move a patient. She then turned her attention to the Claimant who, not knowing the patient, suggested that it was more appropriate for Nurse Farrow move the patient. The Claimant accused Nurse Farrow of demonstrating bullying and threatening behaviour during this altercation with the Claimant and the young nurse."

156. On 15 September 2013 the Claimant was about to start a night shift on the south side of the unit and was in receipt of a handover from a day shift colleague. A discussion followed between a Senior Controller, Louise Farrow and a Staff Nurse called Stacey Wallace. We heard evidence from Ms Farrow and had sight of a written statement from Stacey Wallace that had been taken at the time of the incident or shortly afterwards. This was another statement taken and retained by the Respondent, but never shared with the Claimant until disclosure in these proceedings. Ms Farrow's role was one of Senior Controller and she was responsible for managing the flow and constraints on the ward and had an umbrella operational view over the Emergency and Assessment Units.

157. We pause here to say something about the role of Senior Controller that was identified in the Independent Inquiry Report by Fiona Smith and others dated 18 May 2015. When Ms Farrow came to give her evidence the first question that she was asked by the Claimant's husband in cross examination was whether she had been named in the unredacted version of the report.

158. Following an objection from Mr Powell about this question, the Tribunal permitted this question. Our reasons, as requested by the Respondent are set out above in paragraphs 36-40.

159. Ms Farrow told the Tribunal that until that day 11 October 2019), she had never been informed that she had been named in the unredacted version of the Report. The specific section that dealt with Senior Controllers was at page 21. This stated as follows:

"Overall Finding (OF)

OF7. We found that there is a high probability that at times of surge in activity; targets are prioritised instead of patient-focused care.

Supported findings
F28 We found that there are unreasonable levels of scrutiny over staff's management of the waiting patients and that there is pressure exerted to see patients out of clinical need order.
F29 We found that there is at times significant pressure exerted on staff by managers to move patients in order to offload ambulance patients.
F31 We found that there is a risk that junior, less experienced or temporary staff may not be able to resist the pressure [to move patients inappropriately]
F32 We found that Senior Controllers exert pressure on staff to move patients when it was not in the best interest of the patients or safe to do so."

160. Ms Farrow had been named in the redacted version as one of those Senior Controllers and we were subsequently provided with an extract of the unredacted version which stated as follows:

P194 "Staff felt that it was possible to negotiate with some of the Senior Controllers, however one specific Senior Controller [name blank] was consistently described as a particularly difficult individual, *"some Controllers are worse than others e.g. [blank] and Louise Farrow are more reasonable but will still walk all over the quieter nurse in charge"*.

161. When Ms Farrow returned to continue with her evidence she told the Tribunal that the Respondent had never informed her that she had been named in the report nor had there been any follow up on the concerns that had been raised by the staff related to Ms Farrow.

162. We found the background of this Report to be of some relevance when deciding upon the different version of events of what happened on 12 September 2013. It corroborated the Claimant's version of events to a degree that the enquiry found evidence that senior controllers had exerted pressure on staff to move patients when it was not in their best interests and that other staff had complained whilst Ms Farrow was more reasonable she would "walk all over the quieter nurse in charge".

163. On 15 September 2013 the Claimant had just started her shift and was awaiting a handover of patients form the day shift nurse. Ms Farrow was instructing Ms Wallace to transfer a patient from the AU to a ward. Ms Wallace had explained she was in the middle of a handover and thereafter that nurse would be taking the patient. Ms Farrow asked that a Health Care Worker move the patient but was informed by Ms Wallace that this was not possible as there was a clinical need for the patient to be transferred with a Staff Nurse as he required oxygen having had cancer of the throat and jaw and was desaturating off the oxygen.

164. Ms Farrow then instructed the Claimant to take the patient for the handover, to which the Claimant refused, informing Ms Farrow that she was also waiting for her handover and did not know the patient in question. She explained that if she took the handover the day shift nurse would not be free to leave until 20.15 which the Claimant observed was not fair after a 12-hour shift and that she would not be repaid and suggested Ms Farrow take the patient. Ms Farrow was embarrassed and shocked about the way she had been spoken to by the Claimant and thought the way she had addressed her was completely inappropriate. She accepts telling the Claimant she should not speak to [her] like that and wanted to discuss the

matter with her in a more private setting. The Claimant specifically recalls Ms Farrow stating to her "you want to be careful who you're speaking to girlie! I'll speak to you in the office". Ms Farrow denies using the word "girlie" but accepts she may have said something along those lines.

165. Subsequently the Claimant was asked to go to the office with Ms Farrow and two other members of staff called Mary Santos and Mr Potter. Ms Farrow and the Claimant agreed that the Claimant accused Ms Farrow of bullying or behaving in a bullying, threatening way towards her and Ms Wallace. Ms Farrow's statement (written the following day) says the Claimant said as follows:

"You are nothing more than a bully! How dare you come over here threatening the staff and bullying them to move patients? You A&E Managers are all the same..Telling me to 'watch who I am speaking to!" and "…stop bullying all the staff in the assessment unit!"

166. Ms Wallace's statement was dated 2 October 2013. It is not clear who asked Ms Wallace to make this statement but Ms Wallace's statement corroborates the Claimant's version of events about the first exchange insofar as she says that midway through her handover she was asked by Ms Farrow if there was anyone to transfer a patient and she had explained to Ms Farrow that she had handed over the patient and was handing over to the night staff and there was effectively a plan in place to transfer the patient once she had finished. She also confirms that Ms Farrow asked the Claimant to take the patient to the ward and she was told she could not do so as she was waiting for her own handover. Ms Wallace says that it appeared that Louise (Ms Farrow) was not very happy with this reasoning. Ms Wallace also described that the Claimant had been sat by her while she was doing her handover and had asked what the matter was trying to assist Ms Farrow with what she was enquiring about as the Claimant could see that Ms Wallace was in the middle of a handover. Ms Wallace corroborates that Ms Farrow asked the Claimant to take the transfer but she refused and asked why she could not take the patient herself. Ms Wallace's statement does not corroborate Ms Farrow's allegation that the Claimant leant in her chair, pointed at Ms Farrow and said in a raised voice "why don't you take the patient". She does not comment that the way that the Claimant spoke to Ms Farrow was in any way inappropriate.

167. Turning to the events in the office Ms Farrow alleged that the Claimant became very aggressive and was shouting and also she goes on to say as the meeting progressed the Claimant got more and more angry, she was speaking in a venomous tone and her body language was threatening, leaning forward in her chair and pointing at her. Eventually Ms Farrow said she could not carry on with the meeting as she was so disgusted and she would be reporting this behaviour. Subsequently Ms Farrow submitted an email of complaint to Sharon O'Brien about the incident which we return to below.

168. The Respondent called Mary Santos as a witness. She also had been asked to write a witness statement about the incident at the time. Ms Santos was unable to remember how the request to make a statement arose and who had made the request from her. She does recall passing the statement to Ben Durham at the time. Ms Santos says in her contemporaneous statement the Claimant had stated her argument in a raised voice but she was not

shouting and Ms Farrow was trying to speak. She describes that Ms Farrow asked the Claimant to give her a chance to talk as mostly the Claimant dominated the talking continually to state her point. She also corroborates that the Claimant made an accusation that Ms Farrow was bullying Ms Wallace and Ms Santos records **"this made me ask her how does she know that Ms Wallace felt bullied?"** Ms Santos goes on to say **"she also made comments that her main responsibility was to her 6 patients only and that patients outside the ambulance were not her responsibility…. Ms Farrow explained she was trying to do her job and that the Claimant should give her some respect."** Ms Santos goes on to describe it as an **"ugly exchange".** The word "exchange" indicated to us there was an argument between the Claimant and Ms Farrow.

169. Mr Potter also appears to have given a statement after the incident. It is not signed and we do not know who requested this statement or what happened to the statement, but he does describe the Claimant as becoming aggressive in the way she spoke and would not allow Ms Farrow to speak. It goes on to describe her again as defensive and aggressive.

170. The Claimant accepted that her behaviour in the office on that occasion was unacceptable.

171. Ms Farrow emailed Ms O'Brien on 16 September 2013 to complain about the Claimant's behaviour.

172. Ms Farrow was subsequently asked to type her witness statement of the events in Ms O'Brien's office with Ms O'Brien and Ms Reilly present.

Detriment 1 – 27 September 2013

173. The schedule sets out the detriment as follows:

> "The Claimant is summoned to a meeting with Sharon O'Brien in which she is accused of being rude to Senior Nurse Skyrme and being insubordinate to Senior Staff Nurse Louise Farrow. In this meeting, Sharon O'Brien likened Nursing to the army, and that nurses have to do as they are told whether "they like it or not"."

174. The background to this meeting is as follows. The Claimant was telephoned by Ms O'Brien at home on or around 25 September 2013 and asked to attend a meeting. The Claimant refused unless beforehand she was advised of what the purpose of the meeting was for. The Claimant's reason was she was becoming increasingly aware she was being subjected to special treatment and felt concerned that she may be ambushed. Ms O'Brien sent the Claimant a letter on 26 September 2013 setting out her four areas of concern which would be the subject of the discussion at the meeting. The first and second concerned the complaint from Ms Skyrme's relative namely that the Claimant had been rude, unprofessional and insensitive towards JF and DB and also that they had alleged witnessing her behaving in an unacceptable manner to the elderly patient about the discharge. The third allegation was that she had behaved inappropriately towards other nursing colleagues regarding the two patients in one bay which was the Claimant's second alleged protected disclosure on 9 September 2013. The fourth allegation was that the Claimant had inappropriately involved herself with the conversation about a patient transfer between Louise Farrow and Stacey Wallace which resulted in her

allegedly being insubordinate and displaying aggressive and intimidating behaviour.

175. By this point in time there must have been a background investigation into the Claimant's behaviour. Tracey Skyrme had forwarded the email from her relative to Sharon O'Brien who in turn forwarded it to Rhodri John on 17 September 2013. Ms Farrow had also written an email and someone had asked Stacey Wallace, Mr Potter and Mary Santos to provide written statements although we do not know on whose instructions those statements were taken, when and how they were provided and to whom. Ms Farrow wrote her witness statement in Ms O'Brien's office with Ms O'Brien present as well as Ms Reilly. Based on the retention of records to this date, we find there was an awareness amongst senior staff that a record had to be kept of any interaction with the Claimant where she was deemed to be challenging senior nurse decisions and / or behaving in an insubordinate / rude manner.

176. There was no evidence of any fact checking with regards the elderly gentleman or that he or a relative had been contacted to corroborate the email from JF.

177. In Ms O'Brien's witness statement at paragraph 23 she refers to sending the complaint on from Tracey Skyrme to Rhodri John as part of his disciplinary investigation. She was asked about this in cross examination as far as the Claimant had been aware at this point in time she was not and had not been subject to any disciplinary investigation. Ms O'Brien confirmed in re-examination that the reference to there being a disciplinary investigation in her witness statement had been a mistake on her part. She told the Tribunal it might have been 'going down that road' or words to that effect but she was trying to give the Claimant the opportunity to come and see her for fact finding, looking to find out what had gone on. A disciplinary process was not pursued against the Claimant. Ms O'Brien said that after her meeting with the Claimant on 27 September 2013 she discussed with the Clinical Board and felt that the issues had been addressed.

178. In relation to the alleged 'army' comment, Ms O'Brien's statement did not deal with this despite it being pleaded as a detriment. She was asked about it in cross examination. At the meeting on 27 September 2013 Ms O'Brien recalls having the discussion about the army. The Claimant's evidence was that Sharon O'Brien likened nursing to the army and explained to the Claimant that "we might not like something but we have to do as we are told like in the army." Unbeknown to Ms O'Brien the Claimant had actually been in the army as a nurse in her late teens and early twenties. The Claimant says that she pointed out to Ms O'Brien that a Commanding Officer in the army takes ultimate responsibility for conduct whereas a Lead Nurse is not accountable for responsible for the actions the Claimant might take and that in nursing if she fails to question decisions which would compromise a patient and the patient comes to harm she could be subject to professional disciplinary proceedings by the NMC. The further point was made that in the army if someone is given an instruction or an order they can cite that as a reason for behaving in a certain way whereas in nursing the Claimant believed that she could not excuse omissions in her care because the nurse in charge had told her to do something in a certain way.

179. Ms O'Brien agreed that at the meeting in conversation with the Claimant, the Claimant said that she had been in the army and that Ms O'Brien agreed she had tried to explain nursing was a bit like the army. The nurse in charge has to be the hierarchy of decision making in clinical areas including where patients are placed and if there was no leadership there would be anarchy. Ms O'Brien agreed that she had said it was very similar to being in the army, there are pressures, it is a pressured environment and there has to be senior people that make decisions.

180. We have very carefully considered whether we find Ms O'Brien likened nursing to being in the army and informed the Claimant that nurses have to "do as they are told whether they like it or not" and find that the comment was made. Ms O'Brien did not directly accept under cross examination that she had made the comment that nurses must do as they are told whether they like it or not but she was the one who had initiated the analogy between the army and nursing and accepted she had said it was similar to being in the army. We accepted that the Claimant went away from that meeting understanding that she had been instructed that she must follow instructions whether she accepted them or not.

181. Following this meeting the Tribunal heard evidence of another incident involving the Claimant on 3 December 2013 which was brought to Ms O'Brien's attention via an email from Mary Santos. Nothing happened in respect of this incident insofar as the Claimant was not even aware that the email had been sent or a complaint had been made by Mary Santos regarding the events until these Tribunal proceedings and it being referred to in Ms O'Brien's witness statement. It was relied upon by the Respondent to show further evidence of the Claimant's general bad behaviour and character. Ms O'Brien appeared to have acknowledged Ms Santos' email stating she would request statements from the Consultant and medical staff involved but Ms O'Brien was unable to remember what if any action was taken and it was agreed that no formal action was taken against the Claimant.

Meeting with Helen Richardson

182. At some time towards the end of 2013 the exact date being unknown, the Claimant telephoned the secretary of Helen Richardson who was the new Interim Clinical Board Nurse replacing the previous holder Ms Bevan. The Claimant requested a meeting with Ms Richardson to discuss her concerns that she was being punished for raising concerns, this followed the meeting on 27 September 2013 with Ms O'Brien and a Dignity at Work investigation meeting with Ms Richards on 10 September 2013. The Claimant advised the secretary that she requested the strictest confidentiality due to her concerns of the reaction of the AU/EU Management Team should they find out Claimant was "going above their heads" and the secretary assured the Claimant that none of the Management Team would be made aware. The appointment was arranged for 22 January 2014.

Dignity at Work Investigation

183. The Dignity at Work investigation which had been initiated in June 2013 by Ms O'Brien. This overlapped events around this time and it is convenient to

deal with it now, in terms of chronological events, as the investigation took place between September 2013 – February 2014.

184. Ms Richards met with Ms O'Brien and was provided with copies of the Claimant's letter dated 22 May 2013, the Violence and Aggression form and Ms Water's email dated 7 May 2013. She told the Tribunal she was familiar with the Dignity at Work policy. This specifically cites unwanted or inappropriate physical contact ranging from touching to serious assault as an example of unacceptable/inappropriate behaviour in the workplace. It also provides at 4.8 that one of the principles and values is recognition of the fact that it is the impact of the action / behaviour on the recipient that determines whether that individual fees bullied or harassed.

185. Ms Richards evidence was that she was given a verbal remit of the investigation by Ceri-Ann Hughes of HR, who we note had had dealings with the Claimant at Llandough hospital. We did not hear witness evidence from Ms Hughes who was involved fairly extensively in this case. Ms Hughes had been copied into the email from Sharon O'Brien and Rhodri John dated 13 June 2013.

186. We do not find that Ms Richards inappropriately colluded with anyone else to turn this into a covert disciplinary investigation into the Claimant's conduct. However we do find that Ms Richards mindset was been influenced by the remit that she was given from HR by Ceri-Ann Hughes with the end result being that the focus was on the Claimant's behaviour and not Ms Waters. Given the content of the email dated 13 June 2013 and our findings in respect of that email we find that Ms Richards remit was influenced to the extent that the perception of the Claimant and her conduct and behaviour was more of a focus than it should have been given the allegation made by the Claimant against Ms Waters and the CCTV footage which on any viewing supported the Claimant's complaint.

187. Ms Richards did not start her investigation or at least begin interviewing the witnesses until 10 September 2013 when she interviewed the Claimant. She subsequently interviewed Ms Waters on 9 October 2013, Dr Al-Mudhaffar on 22 October 2013 and Staff Nurse Natasha Whysall on 4 December 2013. We had no explanation for the delay in conducting these investigations. The Respondents' Dignity at Work policy states that the Step 3 formal investigation should be completed within 28 days wherever possible. On 23 October 2013 and 28 November 2013 Ms Richards chased the Claimant regarding the statement she had taken from her at the investigation meeting on 10 September 2013 asking for her to review the statement and return to her as soon as possible to enable her to complete the report. This may explain the delay in Ms Richards publishing the report although it should be noted that she did not meet with Natasha Whysall until December 2013.

188. Ms Richards viewed the CCTV footage but it transpired during her cross examination and through viewing the CCTV footage at the hearing with the Employment Tribunal that the version she had viewed had not shown the other persons present in the corridor when the incident took place between the Claimant and Ms Waters namely nurse Julie White and the members of the public. The explanation provided by Ms Richards is that she viewed the

CCTV footage on a lap top screen and the CCTV footage that we observed in the Tribunal was viewed on a normal monitor. This must have been a very small lap top monitor as on the footage we saw the Claimant and Ms Waters are quite a way into the background. This reflected the lack of proper investigation into this matter. Mr John was aware that Julie White was present during the incident in the corridor as he identifies her as a potential witness right at the beginning of the investigation (see paragraph 120).

189. The Claimant suggested to Ms Richards that Ben Durham had information of similar behaviour by Ms Waters involving a previous incident with Aimee Lewis. The Claimant's statement did not specifically name Ms Lewis but stated that Ben Durham had relevant information. Ms Richards decided that she would not follow this up with Mr Durham as she did not feel it to be relevant as Mr Durham was not there at the time of the incident. Mr Durham told the Tribunal that he had been aware of an incident with Ms Lewis and Ms Waters. He recalled that Ms Lewis had come to him and reported that Ms Waters had pointed or touched her collar and that he reassured her that Ms Waters should have come to him as her line manager if she had a problem with her uniform.

190. Ms Richards did not undertake any investigations into the behaviour of Patient A and the events leading up to the incident between the Claimant and Ms Waters as she did not consider it to be relevant. We had sight of Ms Richard's report in the bundle. It was undated but Ms Richard's evidence was she completed it on 27 February 2014. By 13 March 2014 Ms O'Brien has a copy and she refers to it in a letter to the Claimant dated the same day. The Claimant had seen it by May 2014 as she asked for a review. The report, in our view, arrived at some very surprising, questionable and unreasonable conclusions. It did not take into account as mitigating circumstances any of the events that led to the incident between the Claimant and Ms Waters. The section under mitigation states that it was apparent that the Claimant did not feel she was at fault in any way and on that basis there are no mitigating circumstances offered. Given that this was investigation into Ms Waters conduct this supported the finding we have made that Ms Richards' mindset was against the Claimant from her remit from HR - why the Claimant should be regarded as needing to offer mitigating circumstances when it was supposed to be an investigation into Ms Waters' behaviour.

191. In section 5 (Investigation Findings) Ms Richards states that CCTV footage of the incident supports the fact that LW did not pull or put her arms around the Claimant. This was not our conclusion on viewing the CCTV footage and was not a plausible conclusion to have reached on viewing the CCTV footage. Even if Ms Richards did not see an arm pull, it must have been evident there was a number of times where Ms Waters touched the Claimant and not in a 'come hither' gesture.

192. We have found above that the Claimant's behaviour in the office towards the Consultant was inappropriate and as described by Dr Al-Mudhaffar and Ms Whysall. It was a highly charged incident, and the emotion of the moment and the events leading up to her speaking to Dr Al-Mudhaffar may have caused her to cross the boundaries of appropriate behaviour towards her colleagues. The final conclusions of Ms Richards report concluded that there was no evidence to support that the Claimant had been subject to bullying

and harassment and went further recommending the Claimant's allegations could have been malicious.

193. It went on to conclude that there were concerns about the Claimant's behaviour within the workplace and towards colleagues and that the evidence supported the fact that it was the Claimant's behaviour that was inappropriate as behaviour witnessed by the staff and in the earshot of patients. The Claimant was referred to as having no insight into her behaviour and the effect it has on other colleagues.

194. Ms Richards further concluded that the Claimant's decision to involve the police could be considered malicious as there was sufficient supporting evidence from witnesses to confirm that it was the Claimant and not Ms Waters who acted inappropriately on the shift in question. In light of the findings Ms Richards stated it was for management to decide on whether the matter is best dealt with under the disciplinary policy. This was the result Ms O'Brien had said she 'needed' in her email to HR on 13 June 2013.

Detriment 2 – Incident on the 10 January 2014

195. This is set out as follows in the schedule:

"The Claimant is accused of being rude and unprofessional, shouting at a Senior Nurse, being rude and abusive and undermining staff."

196. On 10 January 2014 the Claimant was working in the Clinical Decisions Unit in the north side of the Assessment Unit. The Claimant should have had a Health Care Assistant ("HCA") working with her on that occasion, but the HCA had phoned in sick and therefore the Claimant was working alone. At approximately 1.00am a patient was transferred from the A&E Department by Staff Nurse Annie Mubarak. It was common ground that this patient required *"specialing"*. This means that he should have been supervised on a one to one basis by a member of staff due to risks of falling out of bed. The Claimant maintains the reason that he had been transferred was that he was about to breach the 4-hour A&E target and therefore this was the reason he was being transferred to the Assessment Unit. This was corroborated by Ms Casey. [3]The Claimant also maintained that whilst he was in the EU with Annie Mubarak he was only one of two patients and therefore she could have closely supervised him and assured his personal safety but the breach of the target was prioritised over his safety. The Claimant immediately reached the conclusion that there was no way she would be able to special this patient, having no HCA and also having other patients to look after. The Claimant approached the nurse in charge Muriel Andal who was managing both the north and south sides and the lounge area of the AU.

197. Ms Andal gave witness evidence to the Tribunal. She agreed that it had been identified that the patient needed specialing (one to one care). Ms Andal had tried to make arrangements with Ms Ceri Martin who was the nurse in charge of A&E to ensure that there was someone to sit with the patient, but there was nobody available. Ms Andal had also written a handwritten letter outlining her recollection of events which is dated 12 January 2014. In that letter Ms

[3] See paragraph 275 J

Andal describes that a decision had been taken between her and Ms Martin was that as there was only one HCA on the north side no-one could stay with the patient most of the time, but they felt it was a visible area and they would 'see how it goes' when the patient was transferred. When the patient arrived Ms Andal says that she instructed someone to move him to trolley 1 which she had identified as the visible area and she agreed that the patient was agitated at that time. Ms Andal complained that when she tried to talk to the Claimant about the patient the Claimant shouted and was 'so rude' to her in front of doctor, nurse, patient and nurses' station. She describes the Claimant as saying (in summary) that she was not putting her pin (NMC) at risk if the patient falls because no-one is specialing the patient and [Ms Andal] was nurse in charge so it would be her responsibility. Ms Andal complained the Claimant did not give her the chance to discuss that her and Ms Martin already had a plan for that patient.

198. After making a number of suggestions that were not agreed, the Claimant decided to go and speak to Sister Martin herself. She approached Ms Martin and asked when the special would be arriving. She was informed it would not be until 7.00am later that morning.

199. Ms Martin wrote an email to Sharon O'Brien on 12 January 2014 about the incident. In this email she described having a dispute with the Claimant. Ms Martin describes that she put a patient in CDU that required watching as he wanted to get out of bed and that she had kept him in the EU as long as she could but they needed to offload ambulances. Ms Martin relayed that she had spoken to the Site Manager and asked for an HCA but no-one was available and asked if one of the HCA's on the south side could watch him until he fell asleep. It was agreed that this would be the case. She described the Claimant as becoming quite abusive and extremely argumentative towards her, questioning the decision that had been made in front of other staff and patients stating they did not look busy, she was having to do her job for her and didn't understand the decision to move the patient as the EU nursing to patient ratio was much less than in the CDU area. She concluded by saying she needed this addressing as she [the Claimant] is very difficult to work with if she does not agree with decisions.

200. We were also taken to the patient notes that the Claimant had completed on the night in question and photocopied and given to Ben Durham. In the notes the Claimant records at 1.25am as follows:

> "**Patient brought over from A&E to trolley bay 6. Patient needed specialing over in A&E by the Staff Nurse ration 1:4 compared to our 1:6. Site Practitioner stated there was no pool nurses available until the morning, in the interim the patient had been attempting to climb out of bed and his trolley space has been changed to a more visible space. Nurse in charge of AU did not want to utilise a nursing auxiliary from the south side as this would leave them short although there are no patients of risk falling however I had to engage rather aggressively with both nurse in charge in AU and A&E and Site Practitioner before it was eventually agreed that an NA from south side should special this vulnerable gentleman. I have suggested to share the responsibility of care that we rotate the nursing auxiliaries hourly so that patients on the south side are not further disadvantaged. This has been a very frustrating process.**

201. The Claimant then also wrote a note directly to Ben Durham as follows:

"Ben this is an entry into my patient notes regarding the lengths I had to go to to secure a special for him. It is not my job to organise staff! I expect the nurses in charge there's enough of them to ensure the patient's safety not to just dump them on a Band 5 and hope she shuts up. I do expect some kind of acknowledgment please".

202. The Claimant recorded that no specialing forms had been completed, the patient smelled of urine and had not been washed. In a subsequent investigation Rhodri John established that no risk assessment had been completed for this particular patient in respect of his risk of falling.

203. Following this incident as noted above both Muriel Andal and Ms Martin complained to Sharon O'Brien about the Claimant's behaviour on that night. There was no evidence that Ben Durham acknowledged what the Claimant had brought to his attention regarding the patient on the 10/11 January 2014. There was no investigation as to why the risk assessments had not been completed for this patient.

<u>14 January 2014 – Ms Wiggins</u>

204. On 14 January 2014 a further incident arose between the Claimant and some of her colleagues. The Claimant was working on the south side with HCA Ms Wiggins. The HCA role is generally is to support the nurse with assisting the patients with washing, eating and toileting amongst other things. The Claimant's evidence was that Ms Wiggins effectively disappeared for the vast majority of her shift either on cigarette breaks, having breaks in the kitchen or helping someone else but not assisting the Claimant. It also transpired, and this was not in dispute from the later witness statements from Mr O'Connor, that when he took his break he asked Ms Wiggins to cover his break without informing the Claimant. Eventually the Claimant went to see Ben Durham and expressed her frustration with the situation with Ms Wiggins, Mr Durham agreed in cross examination that he remembered the Claimant coming to his office and telling him about the problems she was having with Ms Wiggins and that he subsequently informed Rachelle Griffiths who was the nurse in charge or Lisa Graham to come and assist the Claimant with the problem that was happening. They did not do so. When the Claimant located Ms Wiggins the Claimant remonstrated with Ms Wiggins and told her that she considered that she was neglecting her patients. The Claimant describes her conversation with Ms Wiggins as not being rude, but that Ms Wiggins was upset by the conversation.

205. A significant number of witness statements were taken following this incident by Rhodri John in a later disciplinary investigation. We return to these statements below.

206. We heard evidence from Lisa Graham (formerly Lisa Ward) and the Deputy Sister on the same shift. Ms Graham described coming back from a break and being told by one of the Staff Nurses to 'go and sort those two out by the kitchen', referring to Ms Wiggins and the Claimant. Ms Graham said they were both speaking in raised voices and agreed that the Claimant was saying something about Ms Wiggins being missing all day. Ms Graham thought it was inappropriate for them to be having a discussion where they could be heard and asked them to go into the office. In her witness statement to the Tribunal Ms Graham goes on to describe Ms Wiggins being in tears and at

this point the Claimant ”ranting” and being forceful in what she was saying and would not let others speak.

207. Ms Graham gave a witness statements to Rhodri John on 5 March 2014 and we had sight of a witness statement that she had reviewed and signed having made some annotations. In that statement made Ms Graham also mentions raised voices between the Claimant and Ms Wiggins and them being asked to go into the office. Ms Graham referred to the Claimant raising her voice, being intimidating, angry and shouting, but she did not say in the statement at the time that the Claimant was “ranting”. She went on to say that she liked the Claimant, she could be a bit eccentric, colourful character, clinically sound, at times could be opinionated, she corroborated that the Claimant had written an incident form following the incident and left it on Ben Durham’s desk. She reported that there were no further issues between the Claimant and Ms Wiggins for the remainder of the shift (Ms Wiggins was moved to the north side for the remainder of that shift). After Ms Wiggins was sent to work on the south side the Claimant remained alone caring for her patients.

14 January 2014 – Mr O’Connor

208. Staff Nurse Mr O’Connor was working in the lounge area of the AU. Unlike the Claimant he had an allocated HCA. He had requisitioned Ms Wiggins to also assist him both with his patients and with a patient that needed specialing. This, along with the breaks taken by Ms Wiggins had left the Claimant on her own for most of the shift. Then, at lunchtime, Mr O’Connor asked Ms Wiggins to cover his lunch break without informing the Claimant. The Claimant subsequently asked to speak to him about what she referred to as him continually “poaching” her HCA to which he put his hand up to her face (to indicate she should stop talking) and walked away. We accepted the Claimant’s evidence on this as it was corroborated by the contemporaneous incident form and Mr O’Connor’s witness statement.

209. There was no record of any complaint by Ms Wiggins or Mr O’Connor regarding the Claimant’s behaviour that day. When Mr O’Connor was later interviewed by Mr John he significantly downplayed the alleged ‘altercation’. He was interviewed twice, on 25 February 2014 and 24 April 2014.

Mr O’Connor - Witness statement 25 February 2014

210. Mr O’Connor told Mr John they had been short staffed and a member of staff had called in sick. He then described the discussion between him and the Claimant. We set out his statements as follows:

“When I got back from break, I walked past the Nurses station in the south side Assessment Unit and Jude said something like, ‘Can I have a word with you;.

RJ: When did this happen?

DOC: A few minutes after my break

RJ: How did Jude sound when she said that?

DOC: Fine, yeah she was fine. She didn't say it softly, just the way she normally speaks, her voice wasn't raised, just firm. She asked me to come to the communications hub behind the south side Assessment unit. She explained that she wasn't happy with the way the shift went and that I didn't ask her before taking Ms Wiggins into the lounge to cover before I took a break, I can't remember much what was said to be honest."

211. Mr O'Connor agreed he should have checked with the Claimant before asking Ms Wiggins to cover his break. He later added he was going to write a statement but decided not to as "**It wasn't a big deal, there were no raised voices".** He later states **"I just want to say I haven't got an issue with Jude or with what happened".**

212. Mr O'Connor told Mr John that he was called to the office by Ben Durham. He thinks Ms O'Brien was present but was not sure. He reports telling Ben Durham that Jude had asked to speak to him and she wasn't happy with the way the shift went. Mr John asks why [Ben Durham asked to speak to him] when he'd said there were no issues and Mr O'Connor said he didn't know.

Mr O'Connor - Witness statement 24 April 2014

213. Mr John met Mr O'Connor again. He was told that other members of staff have given different versions of events to his and he was being given an opportunity to expand on what happened on that shift.

214. Mr O'Connor agreed he may have taken offence at what the Claimant had said but confirmed she did not shout at him. He mentioned several times how busy it had been and that the unit was short staffed. He accepted again he had not asked the Claimant's permission about Ms Wiggins working in the lounge and that was probably the reason she was not happy. He described her as annoyed when they spoke and could tell the situation was going to escalate so he **"cut her dead and stopped the conversation".** He later confirms he spoke to Ms O'Brien but does not say when, and does not mention speaking to her twice or attending a formal or informal investigation meeting.

215. Ms Graham also reported at the time in her statement to Mr John that a Ms Clutterbuck told a colleague of Ms Graham that the Claimant had allegedly called Mr O'Connor a bastard on the day in question. Ms Clutterbuck was not working on 14 January 2014 and Ms Graham could not remember how she was told or the circumstances around it, she thinks someone told her. This was at best second-hand hearsay from someone who had not even been present on the day to a colleague of Ms Graham but it appeared in Ms Graham's witness statement and in the Respondent's submissions. Mr O'Connor's witness statement made no suggestion that he had been called this by the Claimant.

216. Ms Graham was asked by Mr John that if a Band 5 or 6 nurse needed to go on a break and needed someone to cover them are they permitted to ask an HCA. This was in reference to Mr O'Connor requesting Ms Wiggins to cover him while he went on a break. Ms Graham told Mr John that they were not permitted to do that and they should ask a qualified member of staff and liaise amongst themselves.

217. We also heard evidence from Rachelle Griffiths who was the nurse in charge on the day in question. Ms Griffiths had only been present towards the end

of the discussion in the office with Lisa Graham. Ms Griffiths describes later in the shift being approached by Mr O'Connor who told Ms Griffiths that the Claimant had shouted at him and behaved inappropriately in front of patients and that he had been very upset by the way he had been spoken to and wanted something done about it. Ms Griffiths spoke to Mr Durham for advice and was told he would deal with the situation. Ms Griffiths described the Claimant as a good nurse from a clinical perspective, but as having unpredictable behaviour and that she felt the need to be cautious. She said that although she did not witness the Claimant frequently shouting at others, she felt her behaviour towards other members of staff was often intimidating, particularly at handovers.

218. The witness statements taken by Mr John showed that that Mr O'Connor had asked Ms Wiggins to cover his break without discussing that with the Claimant beforehand. Mr O'Connor must have known that he was in the wrong as having asked Ms Wiggins to cover his break without informing the Claimant beforehand or speaking to anyone in charge about that particular decision.

219. We find that he did complain to Rachelle Griffiths and later with Sharon O'Brien that the Claimant had been rude and aggressive towards him (see below) at the time but as later events will show in our view, he did not pursue this any further and did not wish to pursue it any further.

220. After the incident the Claimant filled in an incident form and gave it to Mr Durham. The Claimant says that after handing it to Mr Durham she left his office and heard him telephone Sharon O'Brien, she openly admits putting her ear to the door after she closed the door to his office. The Claimant describes hearing Mr Durham calling first of all Mr Parsons in the Directorate Office and then asking for Sharon and after a few seconds silence heard Mr Durham say, presumably to Ms O'Brien, "she's put another one in". The Claimant took that as referring to the Claimant having put another incident form in. Mr Durham agreed in cross examination that he had telephoned Ms O'Brien but he did not recall whether he said, "she's put another one in". We accept the Claimant's account as Mr Durham could not recall (he did not deny) he had said "she's put another one in" whereas the Claimant's was clear. We also do not think the Claimant would fabricate behaviour where she has admitted listening at the door of her previous line manager. This seemed to us to be implausible behaviour.

221. Ms O'Brien came straight down to the unit. Ms O'Brien described in cross examination that on the way towards Ben Durham's office she spoke to Mr O'Connor and Mr O'Connor informed her of what had happened between him and the Claimant.

222. We take some care to set out the evidence that Ms O'Brien gave surrounding the decision to include an allegation about the Claimant's behaviour towards Mr O'Connor and Ms Wiggins, as this was one of the reasons she was subsequently suspended under an allegation of gross misconduct. Mr O'Connor did not make a formal complaint in writing to anyone about the incident on 14 January 2014 and neither did Ms Wiggins. The decision to suspend the Claimant was taken on 22 January 2014.

223. Ms O'Brien was asked about the decision to suspend the Claimant in respect of allegation 3 (see below). Mr O'Connor had spoken to Ms O'Brien and told her he was upset. Ms O'Brien's witness statement at paragraph 31 describes going to the unit after receiving the telephone call from Mr Durham to speak to the Claimant and Mr O'Connor. Having found Mr O'Connor, Ms O'Brien relays that he informed her that the Claimant had been rude and aggressive towards him, shouted at him in the middle of the AU lounge. Ms O'Brien was asked where this conversation took place and she described it as being on the way to walking to Ben Durham's office. Ms O'Brien was asked whether this formed the basis of the allegations for the Claimant's suspension on 22 January 2014 and she confirmed that she based it on what Mr O'Connor had said at the time. Ms O'Brien was asked if the decision to suspend was on the basis of that conversation only, given there was no follow up complaint from Mr O'Connor and Ms Wiggins. Ms O'Brien then told the Tribunal she had held another meeting with Mr O'Connor on the day of the incident after she had spoken to the Claimant. This was not in Ms O'Brien's witness statement and there were no notes of that second meeting. There was no mention of it until Ms O'Brien gave her answer to the question whilst giving evidence. We do not accept that Ms O'Brien conducted a further investigation meeting with Mr O'Connor. There was no evidence to corroborate a second meeting. It was not mentioned by Mr O'Connor or in any of the investigation documents. Her decision to suspend the Claimant (in respect of allegation 3) was based solely on the conversation with Mr O'Connor on the way to Mr Durham's office.

224. Returning now to Ms O'Brien coming down to Mr Durham's office on 14 January 2014, the Claimant also entered the office and there was a discussion about what had happened between the three of them. Ms O'Brien informed the Claimant that two other members of staff had made similar complaints about her behaviour over the weekend referring to the complaints from Ceri Martin and Muriel Andal. Ms O'Brien describes the Claimant as almost hysterical, screaming and crying at the meeting in the office with her and Mr Durham (paragraph 34). The Claimant describes the meeting as threatening and intimidating and agrees that she was reduced to tears and following this meeting the Claimant was permitted to go home.

225. Ms O'Brien made some handwritten notes after the meeting. These were not shared as part of any subsequent investigation first being seen by the Claimant in disclosure. Ms O'Brien does not record the Claimant anywhere in these notes as being "almost hysterical, screaming and crying', as she described in her witness statement. The picture painted of the Claimant in Ms O'Brien's witness statement was very different to her notes made at the time. We set out the relevant parts of the contemporaneous note as follows – after the Claimant was asked about what had happened with Mr O'Connor:

"She informed me that she did not shout but told him as it was. ..she later informed me that she loses patience with staff who aren't capable of doing their job and patient safety comes first."

226. Ms O'Brien records saying several times that it was not the issue of raising concerns it was the way the Claimant was raising them. Ms O'Brien's note confirms that she would deal with the Claimant's concerns [about poor nursing care] separately.

227. We find that the difference between the contemporaneous note and Ms O'Brien's subsequent description of the Claimant's behaviour in her witness statement reflected a pattern in the Respondent's witness statements to exaggerate the Claimant's behaviour to create an impression of her character.

228. On the Claimant's return home she telephoned Helen Richardson and spoke to Helen Richardson's secretary to confirm that her meeting was still scheduled for the Wednesday 22 January and was confirmed that it was.

Disciplinary procedure

229. The Respondent's disciplinary procedure provided that suspension may be considered appropriate where keeping the employee in the workplace after the incident / misconduct may compound the offence, interfere or prejudice the investigation or jeopardise the safety or well-being of patients and employees.

230. 10.3 of the Respondent's disciplinary procedure provides if the decision to suspend is taken by the manager (in consultation with a senior HR adviser or, where not available another manager of equivalent seniority) the employee should be told of this decision immediately. Where possible the employee should be given the opportunity to be accompanied at the meeting when they are informed of their suspension if they wish.

231. At 10.6 of the Respondent's disciplinary procedure it states that the manager must ensure that the period of suspension is kept to a minimum and that the investigation takes place as swiftly as possible. The manager should review fortnightly the period of suspension, and any that continues beyond four months should be reported, together with information on the expected completion of the investigation to the board of the UHB. Regular reports should be made to the board detailing current suspensions and their duration. Information identifying individual members of staff should not, however, be presented in the open board meeting.

Detriment 3 – suspension

232. The schedule sets out detriment 3 as follows:

> "The Claimant is suspended pending an investigation into gross misconduct and gross insubordination."

233. Ms O'Brien's witness statement stated that the decision to suspend the Claimant had been taken by Ms Helen Richardson. Ms O'Brien denied having any involvement in that decision under cross examination repeating she did not have the authority. She also stated she had no involvement in drafting the suspension letter other than signing it. Mr John's evidence was that the suspension was a joint decision between Ms Richardson and Ms O'Brien.

234. The issue of who had taken the decision was of significance, being pleaded as a detriment as well as the timing of the suspension coinciding with the

confidential private meeting the Claimant had asked to have with Ms Richardson it being arranged for the very same day she was suspended. The Claimant's purpose of requesting that meeting was to discuss her concerns that she was being victimised for raising concerns regarding patient safety. The reason she had requested the meeting was reiterated repeatedly by the Claimant in subsequent correspondence so the Respondent was on notice of the significance and importance attached to this meeting by the Claimant.

235. The Respondent decided to call Ms Richardson and she attended the hearing to give evidence on 16 October 2019. Prior to that the Respondent produced an email from Ms Richardson dated 15 October 2019 in which she stated she did not have any recollection of this particular case, but agreed it would have been her decision to suspend as Clinical Board Nurse, taking into consideration all the information available and that suspension would have been a neutral act on consideration of risk to patients, staff or effectiveness of the investigation. Ms Richardson's oral evidence was no different. Ms Richardson could not recall anything about the decision to suspend the Claimant or the meeting the Claimant says was arranged with Ms Richardson on 22 January 2014, despite having been taken to emails by Mr Powell. Ms Richardson confirmed she had no recollection of any matters relating to the Claimant.

236. On 22 January 2014 the Claimant arrived at work and was escorted to Ms O'Brien's office by Mr Durham. She was informed by Ms O'Brien that she was suspended regarding concerns she had been rude and abusive to colleagues and there would be an investigation into conduct and professional behaviour. Ms O'Brien was aware of the meeting that had been due to take place with Ms Richardson despite the assurances of confidentiality given to the Claimant. The Claimant was not permitted to attend that meeting. It was never rearranged or followed up by Ms Richardson.

237. The suspension letter was dated 23 January 2014. This set out three allegations as follows:

"1. Whilst working a night shift on 10th of January 2014 you were rude and unprofessional towards a senior nursing colleague and shouted at them in front of another nurse and a patient.
2. Whilst working a night shift on 10 January 2014 you were rude and abusive towards a senior colleague whilst undermining her authority.
3. That whilst working on a shift on 14th of January 2014 you were rude and unprofessional towards other nursing colleagues which resulted in you displaying aggressive and intimidating behaviour towards them."

238. The letter went on to inform the Claimant that if the allegations were substantiated they would constitute gross misconduct under the following disciplinary rules:

"**9. Gross insubordination-including wilful refusal to carry out a reasonable instruction or behaviour or other display of attitude which seriously undermines managements authority.**

12. Unacceptable behaviour-towards staff, patients, visitors or public in the course of work or on UHB premises.
19. Failure to meet required standards-gross failure to meet required standards of performance behaviour"

239. The letter was signed by Sharon O'Brien and copied to Jennie Palmer and Ben Durham.

240. Taking all of this into account we find it was a joint decision between Ms Richardson's decision to suspend following input from HR and Sharon O'Brien. This input was motivated by Ms O'Brien's need to have the Claimant disciplined as a result of her first disclosure and also to prevent her from submitting any further incident forms.

241. Mr John was appointed as the investigating officer. On 28 January 2014 he emailed Ms O'Brien to request any initial statements that had been taken. Ms O'Brien replied the same day to advise that she had two initial brief statements (Muriel Andal and Ceri Martin's), but she did not have one from Mr O'Connor and asked if Mr John wanted her to get one or she was he happy to interview him without reviewing an initial statement. Ms O'Brien did not tell Mr John that she had already interviewed Mr O'Connor after the incident as she told the Tribunal (see paragraph 223 above). This is another reason why we did not accept Ms O'Brien's evidence that she had a second meeting with Mr O'Connor on 14 January 2014.

242. After hearing from all of the witnesses it remained unexplained to the Tribunal why the decision was taken to include the third allegation against the Claimant in her suspension letter. We take into account that Ms O'Brien says she spoke to Mr O'Connor on the way to Mr Durham's office and he told her he was unhappy about the way the Claimant had spoken to him. However in contrast with allegations one and two, which related to Muriel Andal and Ceri Martin there were no formal or informal complaints that have been received from either Ms Wiggins or Mr O'Connor. Mr John chased statements from Mr O'Connor and Ms Wiggins but these were never received. Mr John evidently decided to interview those individuals in any event to obtain their statements. Mr John also gathered a copy of the patient records in relation to the incident on 10 January 2014.

243. Mr John also told the Tribunal that he established that no risk assessment had been completed for the patient that required specialing on the night of 10 January 2014. This was a breach of the Respondent's procedure in place to risk assess patients at risk of falling. No one apart from the Claimant was ever subject to any investigation or disciplinary proceedings arising from events that night.

244. Mr John subsequently interviewed what struck the tribunal as an excessive number of witnesses in relation to these allegations, in two time frames. These included staff that were not even in the vicinity (being on the north side of AU) during the events on 14 January 2014. We take the opportunity to set the first set of witnesses interviewed by Mr John, as well as any relevant facts from their statements not already dealt with above, as follows;

a. 13 February 2014 Ms Martin;

b. 18 February 2014 Ms Andal;

c. 25 February 2014 Mr O'Connor;

d. 25 February 2014 Ms O'Brien;

e. 3 March 2014 Mr Potter;

f. 4 March 2014 Ms Wiggins;

g. 5 March 2014 Ms Lisa Ward (Graham);

h. 5 March 2014 Mr Bolanos;

i. 10 March 2014 Ms Taylor (Site Nurse Practitioner);

j. 11 March 2014 Ms Mubarak (had transferred the patient needing specialing on 10 January 2014);

k. 11 March 2014 Ms Kirk (HCA - witness to discussion between Claimant and Ms Wiggins);

l. 12 March 2014 Ms Cyrus. Ms Cyrus was witness to the conversation between the Claimant and Ms Andal on 10 January 2014. Ms Cyrus confirmed as follows. The Claimant was angry and she could see that Muriel was about to burst into tears and had gone red. The Claimant was raising her voice very loudly. Muriel later told Ms Cyrus that the Claimant had asked Muriel who was going to sit with the patient and that she [the Claimant] was not responsible to which she was informed by Ms Andal that she was responsible and that patient had been allocated to the Claimant. This contradicted the account of Ms Andal that it had been agreed the patient would be placed in a visible area to be observed by all. Mr John asked Ms Cyrus who was meant to be looking after the patient and Ms Cyrus confirmed it was the Claimant. Ms Cyrus told Mr John that Ms Andal had told her that the Claimant told her she had no right to accept the patient because they were not fully staffed. Ms Cyrus expressed the view that the Claimant was really challenging Ms Andal and not in a nice way. She was of the view that they had to ‘work it out if there isn't enough cover.’ Ms Cyrus was asked about the Claimant and she said that she liked her as a person she stands up for what she believes in but perhaps doesn't do it in the right way. She speaks her mind. There have been a few instances when Ms Cyrus did not think she acted appropriately and disrespected colleagues. Ms Cyrus also witnessed the incident on 14 January 2014 with Ms Wiggins. She described the Claimant was raising her voice at Ms Wiggins but that was all she was able to say;

m. 4 April 2014 Rachelle Griffiths;

n. 10 April 2014 Jason Ball;

o. 10 April 2014 the Claimant;

p. 11 April 2014 Lisa Waters;

q. 24 April 2014 Mr O'Connor (2nd interview).

245. As of 25 February 2014 Mr John was in possession of information that should have led him to conclude there was no case to answer in respect of the third allegation against the Claimant about events on 14 January 2014. Mr O'Connor's description of the events did not warrant continuation of the allegation involving him. What had been gathered in relation to Ms Wiggins should have informed Mr John that a case that the Claimant had been rude and unprofessional to Ms Wiggins and Mr O'Connor, as well as aggressive and intimidating, was on very shaky ground. Although the Claimant had clearly remonstrated with Ms Wiggins there were significant mitigating circumstances that Mr John must have been aware of in relation to Ms Wiggins that at least required investigation into her whereabouts and conduct on that shift.

Detriment 4 - Interaction with Dignity at Work Investigation and addition of two further allegations of misconduct against the Claimant on 13 March 2014

246. At this point in terms of the chronology it is necessary to revisit the Dignity at Work investigation into the incident between the Claimant and Lisa Waters in May 2013. As referred to in paragraph 190 above, Ms Richardson completed her report as of 27 February 2014. The Dignity at Work policy provided that there should be an appropriate de-brief for both parties on the outcome of the investigation with a feedback discussion as soon as reasonably practicable. If this could not be achieved within 7 days both parties should have been kept informed of progress

247. Turning now to the decision taken to follow the recommendations of Ms Richards that the Claimant be investigated for making false allegations against Ms Waters. Ms O'Brien's witness statement stated that she had been asked to attend a meeting with Ceri Ann Hughes and another member of the senior HR team (who she believed to be Jane Williams) to discuss the outcome of the dignity at work investigation and at that meeting Ms O'Brien said it was suggested by HR that based on recommendations in the investigation report that the further two allegations should be added to the three existing allegations. A further meeting then took place involving Ms Richardson regarding the next steps. Ms Richardson could not remember anything about this decision either. Ms N Evans said in her email to Ms Richardson dated 9 June 2014 that Ms O'Brien had taken the decision on the outcome [to add the allegations]. Based on this internal, contemporaneous email, we find that the decision to add the two allegations was that of Ms O'Brien. In terms of when the decision was taken we were unable to identify an actual date other than it had been taken between 27 February 2014 (when the report was sent) and 13 March 2014 as this was when the letter was sent to the Claimant informing her of the additional allegations.

248. On 13 March 2014 Ms O'Brien wrote to the Claimant reiterating the current three allegations that had been made against the Claimant on 22 January 2014. The letter went onto to address the outcome of the dignity at work investigation. Ms O'Brien stated she had tried to meet with her on three

occasions to discuss the outcome of the dignity at work investigation but the Claimant had not wished to meet with her to discuss this in person and requested a letter to be sent in the post. There was no evidence of three requests to meet the Claimant. Ms O'Brien had telephoned the Claimant at home and asked her to attend a meeting with herself and Loretta Reilly which she had declined and asked Ms O'Brien to write to her. A copy of the dignity at work report was not sent to the Claimant. There was no feedback in the report other than as follows:

..the findings of this investigation were twofold: firstly that there was no evidence to support your claims of bullying and harassment. Secondly, that it was in fact your behaviour that was inappropriate on the shift in question and that this behaviour was witnessed by other staff and was within earshot of patients. The Dignity at Work Investigating Officer concluded their report by suggesting that your claims of bullying and harassment and the involvement in the police in this matter, may have been false/ malicious in nature."

249. The Claimant was informed that Ms O'Brien was adding these issues as further allegations to the ongoing disciplinary investigation undertaken by Rhodri John and set out to further allegations as follows:

"**4. On 3 May 2013, your behaviour towards two of your colleagues was rude, disrespectful and inappropriate was witnessed by the staff, as well as within earshot of patients.**

5. As a result of the above incident, you made a false/malicious allegation against one of your colleagues, stating that this colleague had bullied and harassed you on the shift of third of May 2013, resulting in the reporting the matter to the police. The dignity at work investigation into this matter however established that it was your behaviour and attitude that was inappropriate and not that of your colleague."

250. The Claimant was not told of the right to request a review of the outcome as per the policy. She had been provided with a copy of the policy which contained that right but had overlooked it and it was not brought to her attention as there was no proper outcome de-brief to the Claimant as per the policy, rather a focus on adding further allegations. Mr John was instructed to widen his investigation into these additional allegations and began to speak to witnesses who were present on 3 May 2013.

<u>Events between April 2014 – October 2014 Grievance against Sharon O'Brien, Dignity at Work Review and reframing allegations</u>

251. The Claimant submitted a letter to the Human Resources Department dated 17 April 2014, emailed to Mr John on 18 April 2014. The Respondent says they did not initially understand or believe this to be a formal grievance as one of the reasons relied upon to explain the subsequent delay in dealing with that letter. We return to this below. The subject matter was *"Re: Concerns regarding exponential increase in complaints against myself from Accident and Emergency staff since my Public Disclosure to the Police of a Criminal Act…commonly referred to as victimisation."*

252. We do not find, as we were invited to do so, that the letter was a commentary on the disciplinary investigation. The letter did contain some commentary on the disciplinary investigation, but the plain purpose of the letter was for the Claimant to set out allegations against Ms O'Brien directly

linking an increase in complaints against the Claimant having made a protected disclosure. In summary the letter raised the following concerns:

- Who had made the decision to change the complaints against the Claimant (referring to the additional allegations that had been added in Ms O'Brien's letter dated 13 March 2014).
- That she had been subjected 10 complaints in eight months following her complaint of 3 May 2013 which she described a number of times as a public disclosure.
- Why Ms O'Brien was being emailed complaints directly which she suggested was in conflict with the usual procedure that incident forms were completed and / or complaints were dealt with by her line manager Mr Durham.
- Nothing had been done about the Claimant's complaint that she submitted by the incident form on 14 January 2014. There had been no investigation neither was there any in subsequent investigation into the conduct of Ms Wiggins on 14 January 2014 or conduct of Mr O'Connor.
- It had become apparent that what had changed in respect of her treatment was that Ms O'Brien had become aware of the meeting that the Claimant had arranged with Ms Richardson on 22 January 2014.

253. On 18 April 2014 the Claimant also raised concerns about the outcome of Ms Richard's report in a nine page document written by the Claimant titled "Concerns pertaining to the dignity at work investigation report, conducted by Andrea Richards" and expressed the view that these should be addressed before commencing any investigation into the allegations that flowed from report. This was not a formal request for a review under the Dignity at Work policy as the Claimant was not aware of the process at that stage, but it was obvious form the content that the Claimant was challenging the outcome of Ms Richard's report. The Claimant reiterated that she felt she had been victimised by Sharon O'Brien and some of her management team as a direct result of making a public disclosure. She requested the name of the HR director. Mr John replied to the Claimant's on 23 April 2014 and advised the Claimant that her victimisation document (grievance letter dated 17 April 2014) would need to be provided to Ms O'Brien to respond to and sought the Claimant's consent to share her letter dated 17 April 2014 with Ms O'Brien, to which the Claimant refused (by email dated 28 April 2014) and raised concerns as to why it was being dealt with in such an informal manner.

254. In an email dated 28 April 2014 Mr John advises he has passed the Claimant's letter dated 17 April 2014 and 18 April 2014 to Ms Evans for review.

255. Thereafter followed a series of emails between the Claimant and Ms Evans regarding the different procedures that would be used to investigate the Claimant's concerns.

<u>Dignity at Work Review</u>

256. At some point after submitting her nine-page challenge to Ms Richard's report, the Claimant had read the Dignity at Work policy and realised had identified the right to request a review. On 9 May 2014 the

Claimant sent a letter to Tracey Myhill formally requesting a review of Andrea Richards' dignity at work investigation report. Ms Myhill replied on 9 June 2014 confirming that Nicola Evans had been instructed to respond to her directly to explain the arrangements. (References hereafter to Ms Evans are to Ms Nicola Evans). Ms Evans emailed her manager, Kim Tovey on 9 June 2014 about who should conduct the review. Ms Richardson was copied in and replied and queried if someone in HR could be that person. This was later confirmed to be Mrs Gillian Edwards. Ms Evans informed the Claimant of this on 24 June 2014 and also that in light of the review the allegations (4) and (5) added by Ms O'Brien's letter dated 13 March 2014 were placed on hold until the review was concluded.

257. On 24 June 2014 the Claimant emailed Ms Evans as follows:

"I have made a serious complaint about a senior manager and I would like to know if this, and her conduct is being investigated…

…I would like a confirmation, either a yes or a no, if my complaints against Ms O'Brien are being investigated separately. If not why not.."

258. On 26 June 2014 we had sight of an email chain between HR (Ms Evans, Mr John, Mr Jones) and Ms O'Brien and Ms Richardson from Judith Harrhy. Ms Harrhy was Mr John's HR coach. This was not in the main bundle but in the Claimant's additional bundle. The subject was "Reframed allegations JEJ URGENT". We set out that email:

"Hl Helen

Further to the email trail below.

We felt that it would help to clarify the allegations, as there are 3 allegations and it wasn't totally clear which referred to whom. Sharon has agreed a new form of words but we are still stuck regarding whose name they should go out in as the Disciplining Officer. I can pp a letter once we have confirmed this. Ideally the letter should go out asap.

Also we should be reviewing her suspension periodically to ensure that it is still appropriate and advising her as such. The investigation so far has found evidence to support the allegations, but also a degree of mitigation. Whereas I would say it is inappropriate for her to return to her place of work, I am asking for your opinion whether she could now work elsewhere, or whether you feel her continued suspension is needed."

259. There was no evidence that Ms Richardson reviewed the Claimant's suspension as suggested by Ms Harrhy and contrary to the Respondent's suspension policy.

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260. Ms O'Brien then spoke to Mr John and sent him an amended letter reframing the allegations. This showed that Ms O'Brien was still playing a central part in the disciplinary investigation despite the Claimant having raised a written complaint against Ms O'Brien in April 2014. Mr John then emailed Ms Harrhy, copying in Ms Evans on 7 July 2014 with the reframed allegations. The changes were to add the reference to AU and EU (allegation 1 being described as a senior nursing professional - Muriel Andal and allegation 2 a senior colleague from EU Ceri Martin) so as to identify the individuals to each allegation.

261. Ms Evans emailed the Claimant on 30 June 2014 asking her to confirm she was content for Gillian Edwards to undertake the Dignity at Work review. The Claimant sent a letter dated 25 June 2014, by email on 30 June 2014, repeating concerns that she had been victimised by Ms O'Brien. By this point, the correspondence was becoming very confusing as to which procedure was being used to investigate which complaint. There were the disciplinary investigations into the Claimant being conducted by Rhodri John and the Dignity at Work review, proposed to be conducted by Ms Edwards. The Claimant was also repeatedly asking for an investigation into what she alleged was victimisation by Ms O'Brien. Ms Evans was unable to open the attached letter of 25 June 2014 and the Claimant sent a further copy. Nothing then happened until Mr John emailed the Claimant on 25 July 2014 asking to meet as part of the disciplinary. Ms Evans did not follow up the letter of 25 June 2014 and appears to have been waiting for the Claimant to authorise Ms Edwards to undertake the review.

262. On 31 August 2014 the Claimant repeated a request for her letter of 17 April 2014 to be treated as a formal grievance against Ms O'Brien and her A&E management team. In a detailed letter she also requested an investigation under the Whistleblowing Policy into the conduct of Muriel Andal and Ceri Martin relating to the incident on 10 January 2014 and the prolonged exposure of vulnerable patients to a violent patient arising from the incident on the 3 May 2013.

263. On 12 September 2014 Ms Evans wrote to the Claimant and acknowledged that whilst the Claimant wished her letter of 17 April 2014 to be treated as a grievance, it could not be so, as the letter formed part of the Dignity at Work review, so it could not be considered as under the grievance policy as well. This was a surprising conclusion as the Respondent's dignity at work policy provided that the review would only look at process and would not be a re-investigation. The review could only review procedures in respect of Ms Richards' conclusions rather than the new allegations raised by the Claimant that in essence Ms O'Brien was co-ordinating or encouraging complaints against the Claimant due to her having made protected disclosures in 2013.

264. We did not accept the reasons put forward by the Respondent as to why the Claimant's letter of 17 April 2014 had not been understood to be a grievance against Ms O'Brien until much later. In the letter, whilst the Claimant did not use the word grievance, she had clearly set out that she believed she was being victimised for having made a public disclosure, by Ms O'Brien. This was not taken seriously at all by the Respondent. Initially Mr John said it would be passed to the disciplining officer who at that time was Ms O'Brien herself. [4]

265. On 18 August 2014 Ms Evans wrote to the Claimant formally setting out the Respondent denied that the Claimant had made a protected disclosure citing the reason that the Claimant's concern did not meet the criteria for such a disclosure and it did not appear that her complaint had been raised in good faith. Ms Evans goes on to confirm that no action will be taken

[4] As stated by Ms Dodwell in her email dated 30 October 2014

against the Claimant for raising concerns and that the allegations have been identified as a result of her alleged conduct and not on the basis of her raising concerns.

266. Also in Ms Evan's letter of 12 September 2014 she informed the Claimant that it was a confidential process and Ms O'Brien has not been contacted to comment on any information gathered as part of this investigation or to comment on whether the issues the Claimant raised were nursing issues or not. Ms Evans confirmed that the Respondent would conduct a formal investigation under the Respondent's "Raising Concerns (Whistleblowing)" Policy and that a person will be appointed in due course.

267. Ms Evan's reassurances regarding there being a confidential process and that Ms O'Brien had not been contacted were not borne out by an email we saw in the Claimant's additional bundle dated 25 September 2014. Ms O'Brien had emailed Mr John and Ms Evans on 24 September 2014 to ask for an update on the Claimant's disciplinary. In response to Kim Tovey she later stated:

"I did manage to catch up with Helen yesterday to discuss and I am aware of Jude's additional letters (all of which have been raised before and addressed with meetings previously with her and Ben). This is a frequent pattern of behaviour with Jude in that the same concerns are raised on each occasion in the past when she is spoken to about her behaviour..

I understand there is a plan but Helen was fully supportive yesterday of urgently progressing ahead with the disciplinary".

268. We found this email to be highly relevant. Firstly it showed that contrary to Ms Evan's assurances Ms O'Brien had been shown the Claimant's letters. Secondly, that those complaints were dismissed by Ms O'Brien as a "pattern of behaviour" by the Claimant when she is spoken to about her behaviour. She referred to a "plan". What is without doubt is that Ms Richardson was fully supportive of pressing on with a disciplinary, even before Mr John had finished his investigation and despite having been told by Judith Harrhy on 7 July 2014 that although there was evidence to support the allegations there was a degree of mitigation. This emailed demonstrated that the Respondent , via Ms O'Brien and Ms Richardson, was intent on disciplining the Claimant regardless of the outcome of Mr John's investigation.

269. Up until this point the Claimant had been accompanied most of her meetings with management or HR by Mr Jason Ball. Mr Ball was at the time employed on the AU as a Band 6 staff nurse. Mr Ball worked with the Claimant for the entirety of her employment AU. Mr Ball was initially a work colleague and later became friends with the Claimant. On 3 October 2014 Mr John wrote to the Claimant to advise that Mr Ball was no longer permitted to act as her workplace companion. as he was a witness into the incident on 10 January 2014. Mr John says that he had been informed by the Claimant that his statement would be crucial to the investigation. The Claimant challenged this and decision in an email dated 7 October 2014 and asserted that this was a deliberate decision taken to isolate her. The Claimant telephoned Ms Evans to discuss this issue and was informed that Mr Ball could not be a witness and her companion. It was eventually agreed

that as the third investigation meeting was to discuss the third allegation Mr Ball could accompany the Claimant.

270. There was nothing in the Respondent's disciplinary procedure that supported this position taken by Mr John.

271. As of October 2014 no progression had been made into the Dignity at Work review promised by Ms Myhill in June 2014. This was partly due to a delay in the Claimant confirming she was content to proceed (Ms Evans had asked for confirmation in June 2014 and the Claimant had understood she had given consent but confirmed this again on 31 August 2014) and partly due to Gillian Edwards who had originally been appointed was no longer able to pick up the case. The Claimant was informed on 10 October 2014 that Ms Karen Elcock was appointed in her place and asked if she was a nurse – confirming by 15 October 2014 that she consented to Ms Elcock conducting the review.

<u>Disciplinary Investigation continued – April – November 2014</u>

272. The Claimant continued to raise concerns with Mr John that he was not suitably qualified to be the investigating officer as he was a HR professional rather than having a nursing background. The Claimant consistently and repeatedly made the point to the Respondent in numerous emails and meetings that she believed the matters under investigation were nursing issues relating to patient care and safety and therefore Mr John was not placed to make any proper assessment of the situations. This was consistently rebuffed by the Respondent who refused to accept nursing issues were relevant. The Respondent's focus was always on the Claimant's behaviour. No account or investigation was ever undertaken into any of the patient safety issues the Claimant had raised, which in turn to allegations the Claimant was rude and aggressive by senior members of staff in either May 2013, September 2013 or January 2014.

273. In June 2014 Mr John asked if he could be allocated a nurse adviser to seek guidance from certain aspects of at the investigation and a Clare Wade was appointed to the role in October 2014. Mr John told the Tribunal Ms Wade had secured patients notes but other than this we do not know how much if any involvement she had.

274. Mr John met with the Claimant on three separate occasions in the course of his disciplinary investigation the last of which was 21 October 2014. This had not taken the recommended 28 days in the Respondent's disciplinary procedure. The Respondent sought to partly blame the Claimant for the delay. Mr John's witness statement set out details of the delays between April – October 2014 citing the Claimant's unavailability and refusal to meet until certain matters had been clarified. There was a delay between end of April 2014 and 23 June 2014 whilst Mr John awaited Ms Evans review of the impact of the dignity at work investigation on the disciplinary investigation. The Claimant was then on leave in July and some subsequent misunderstandings in relation to dates arranged on both sides.

275. Continuing with the list above witnesses who Mr John interviewed these were as follows:

a. 24 April 2014 Natasha Whysall;

b. 25 April 2014 Dr Al-Mudhaffar;

c. 13 April 2014 Mr Potter;

d. 2 September 2014 Claimant;

e. 23 September 2014 Ms Kirk (2nd interview - incident on 10 January 2014);

f. 6 October 2014 Ms Hicks site nurse practitioner;

g. 15 October 2014 Ms Martin (2nd interview- clarifies Ms Martin's understanding of meaning of word "abusive" as follows - comments from the Claimant 'you don't know how busy we are, yea right you look busy, was rude in way she was talking and she was shouting');

h. 20 October 2014 Mr Potter (corroborates Ms Wiggins "kept going for cigarette breaks" and she was at fault. Mr John was also following up a comment from Mr Potter's earlier statement in which he had stated the Claimant had disappeared for four hours, Mr Potter confirmed he had got confused between events on 10 and 14 January and he did not think the Claimant had so disappeared);

i. 20 October 2014 Josephine Wood (not a witness to the incident on 14 January 2014 but was told what happened by Ms Wiggins);

j. 20 October 2014 Ms Casey (Ms Casey informed Mr John that she had not witnessed the incident on 10th of January 2014 but had been told by Ms Andal she was upset about the way the Claimant had spoken to her. Ms Casey confirms that the patient in question was about to breach (in reference to the 4-hour A&E target) and needed to come AU. Ms Casey also her states that the Claimant had informed her they were not adequately staffed and Ms Casey said in her opinion the Claimant was right and that she could see whether Claimant was coming from to only have one HCA between 15 patients and there would have been pressure on the Claimant);

k. 21 October 2014 the Claimant;

l. 22 October 2014 Ms Mubarak (the nurse who transferred the patient on instruction of Ms Martin on 10 January 2014). Ms Mubarak confirms she was instructed to hand over to the Claimant. Ms Mubarak stated that the Claimant walked off without Ms Mubarak having the opportunity to introduce the patient and she did not seem happy. She was pressed by Mr John whether the Claimant had refused to take the handover of the patient and Ms Mubarak confirmed that was not the case. Mr John asked about the risk assessment forms whether they were completed and Ms Mubarak said she didn't know;

m. 22 October 2014 Ms Howard. Ms Howard was on duty on 14 January 2014 but she was not working on the South side of the unit with the Claimant and

Ms Wiggins she was working on the North side. She informed Mr John that she had just heard talk through the unit about something that happened;

n. 22 October 2014 Ms Andal;

o. 22 October 2014 Mr Allen (HCA) on duty on 14 January 2014 confirmed he was not in the vicinity and didn't see anything;

p. 22 October 2014 Ms Clutterbuck. Informed Mr John that she was informed a few days after the incident between the Claimant and Mr O'Connor that Mr O'Connor informed her that the Claimant had called him a bastard. Ms Clutterbuck also informed Mr John she had been on the brunt of the Claimant on many occasions and could "kick-off easily", and recalled an occasion where the Claimant got really angry about a discussion regarding work life balance and 'kicked off' and was told to calm down by Ms Clutterbuck and that everyone was wary of the Claimant Ms Clutterbuck is a staff nurse band six.

q. 23 October 2014 – Ms Parker told Mr John that she had heard about an incident between the Claimant and Ms Wiggins but did not witness or hear anything apparat from passing the Claimant and Mr O'Connor and there appearing to be a disagreement, but no raised voices or anything to cause alarm. Mr John progressed nonetheless to take an entire statement of opinion and hearsay about the Claimant and what Ms Parker had heard from other people. Ms Parker described the Claimant as a very professional and liked things done in certain way. She told Mr John it was a busy shift. Ms Parker and Mr O'Connor are friends and Ms Parker reported that Mr O'Connor said he was fine when she asked him if he was okay;

r. 24 October 2014 Ms O'Shea was the site nurse practitioner on 10 January 2014. She was unable to call any incident whatsoever;

s. 7 November 2014 Ms Holyfield, HCA on duty on 10 January 2014. Ms Holyfield was unable to recall an incident whatsoever.

Whistleblowing Investigation

276. On 15th of October 2014 Ms Evans confirmed that Nicola Hughes, Chronic Disease Manager, had been appointed to investigate the Claimant's whistleblowing concerns. This was confirmed in a letter of 17 October 2014.

Detriments 5, 6, 7 and 8

277. These are set out in the schedule as follows:

5 – "Early October 2014 – The Respondent's investigation concludes that there is insufficient evidence to pursue the complaint against the Claimant (10 January 2014) but the Respondent withholds this information from the Claimant".

6 – 20 February 2015 – "The Respondent concludes the disciplinary investigation despite the findings of the disciplinary investigation (as confirmed in a letter

dated 20 February 2015) that there was insufficient evidence to support any of the allegations made against her".

7 – 20 February 2015 – "The Respondent withholds the findings of the disciplinary investigation from the Claimant".

278. At some point in October 2014, Ms Richardson left the Respondent's employment and was replaced by Ms Candy Dodwell. The Claimant had complained to Ms Evans in September 2014 about the time the investigation was taking and how long she had been suspended for. This, rather than the Respondent pro actively reviewing her suspension fortnightly, prompted Ms Evans to raise the suspension with Ms O'Brien.

279. Ms Evans emailed Ms O'Brien on 9 October 2014 regarding reviewing the Claimant's suspension. Ms O'Brien was still responsible for reviewing this decision even though the Claimant had raised a grievance against Ms O'Brien for victimising her for making a public disclosure. Ms Evans' witness statement says she discussed the Claimant's suspension with Ms Dodwell after the Claimant challenged the delay earlier in September 2014 and it was agreed the suspension would be lifted. Ms Evans was asked why that decision was taken given the Claimant was still facing allegations of gross misconduct. She told the Tribunal that there was no reason from the information gathered why the Claimant could not return even though it was still considered gross misconduct at that time. She was asked what had changed in between her suspension and it being lifted and she told the Tribunal that it was the information gathered against allegations and whether the Claimant was a threat to staff or patient safety.

RCN Letter of concern – 15 October 2014

280. On15th October 2014 Ms Tina Donnelly, Director of RCN Wales wrote to the Respondent raising concerns of bullying and harassment, poor practices of care causing patient harm, targets being prioritised over patient focus and staffing levels being poor and inadequate. We did not have sight of this letter and what we have set out here was later quoted in the Fiona Smith report.

281. We were taken to some material emails that took place after the decision to lift the suspension but before it was implemented. In the Claimant's additional bundle. These were as follows.

30 October 2014 emails between Ms Evans and Ms Dodwell

282. 10.04am Ms Evans to Ms Dodwell:

"Subject: JCJ

Hi Candy

Thanks for calling me back.

Here is the letter. This is linked to some of the EU stuff.

Cheers
Nic"

283. We did not have the attached letter. Ms Evans was unable to confirm which letter she was referring to in the email. We find it was the Claimant's complaint against Ms O'Brien dated 17 April 2014 because of what Ms Dodwell says in her reply. She asks back directly if Sharon [O'Brien] is aware of the allegations. This must be in reference to the Claimant's allegations against Ms O'Brien in her letter dated 17 April 2014.

284. Ms Dodwell replied at 13.27, copying in Helen Richardson. We set out the email in full:

"Nicola

Is Sharon aware of the allegations and that she will no longer be discipline (sic) officer – I think these conversations needs to be had prior to any letter going out to JCJ.

If this is linked to the 'other' EU stuff we need to be very clear about how this is all managed before we send this letter to CJC, so it does not compromise any thing or anyone in relation to how we move forward.

C/x"

285. At 13.59 Ms Evans replied :

"Hi Candy

Sharon is aware of this case and I have discussed JCJ returning to work. We haven't discussed her not being the DO as only in the last week or so has JCJ formally raised her Dignity at Work. I can speak to Sharon about you being the DO.

We don't have anything to confirm this is linked to the other EU stuff just that it is similar. It won't compromise any actions we may or may take (sic) as we have been clear, via Ruth Walker, that we will continue with the local/ current issues we are aware of. Does this help?

Cheers
Nic"

286. Ms Evans was asked about the references to "other EU stuff" in cross examination.[5] She told the Tribunal that she did not know what the content of the "other EU stuff" was, only that concerns had been raised. She was then asked if this was the case, how she was able to conclude the Claimant's letter was similar. At this point Ms Evans accepted she knew it [the other EU stuff] was related to bullying and harassment and that Ms O'Brien was involved. Ms Evans firstly told the Tribunal that they had been asked to see if there were any cases that needed to be linked into the independent enquiry as it was important they were dealt with under that process and that the RCN had raised concerns but did not understand the Claimant's complaint to be part of it. She later then told the Tribunal that there had been no instruction that any similar case be put forward. Ms Evans said she was aware that the RCN had contacted the Respondent to raise concerns about EU but did not know if this was collective grievance or a request for an independent review. She had not been involved in the investigation and had not seen the subsequent Fiona Smith report. She was unaware that the Fiona Smith had been published on the Respondent's intranet and had not read it.

[5] 16th October 2019 @ 11.25am and again at 11.45am

287. We did not accept Ms Evan's explanation as to how she had reached a conclusion that the Claimant's complaint against Sharon O'Brien dated 17 April 2014 was not similar to the RCN and UNISON collective grievances of bullying and harassment, even without us seeing those collective grievances, the subject was not in dispute – it was bullying and harassment involving Ms O'Brien. We also did not accept as plausible that, Ms Evans, in her role as Deputy HR Director for the area in which the RCN had raised a formal complaint was unaware of the content of that complaint. Ms Evans was asked why she had concluded and advised it was not linked. We reject the explanation for failing to make a connection was that the RCN had not identified the Claimant as part of the process. In the first email Ms Evans says it is linked, then when questioned by Ms Dodwell, who makes it clear it would have to be "carefully managed" so as not to "compromise anything or anyone", Ms Evans makes an about turn and says it is not linked, just similar.

288. Ms Evans was asked about Ms Dodwell's use of the words "if this is linked the other EU stuff" and what she may have meant by this. It should be noted that we did not hear evidence from Ms Dodwell, the explanation given was that she was unwell. Ms Evans told the Tribunal that she meant if it became an independent review it needed to be managed under that process and they needed to be careful how they progressed the Claimant's case – as part of the independent review or could it be progressed separately. Up until this point we had understood that the Independent Enquiry had not been commissioned, however it was clear from Ms Evans evidence that there was an awareness of some form of independent review was coming.

289. At 17.40 a further email from Ms Evans to Ms Dodwell copied to Ms Richardson:

"Hi Candy

Can we have a chat about this tomorrow, even if by phone, as I have to get a letter out to her tomorrow so she is aware we have reviewed her suspension and she is returning.

I note the points you make which are legitimate and I agree with them. We just need to consider how we do this, as I am not in a position to confirm the dignity at work stuff yet, as I don't have all the details. We may have grounds to say that Sharon is a witness but I need to discuss this with you. I can also have a discussion with Sharon but conscious of the bigger picture."

290. Ms Evans told the Tribunal that the reference to the bigger picture was the number of policies running at the same time. The reference to having grounds to say Sharon O'Brien was a witness was that she may be a witness to the disciplinary so should not be the disciplinary officer. Again we did not accept this explanation. It was not plausible. They had already decided Ms O'Brien could not be the disciplining officer so why would there need to be a discussion about her being a witness. She also was not a witness to any of the allegations. We find that the reference to having grounds to say Ms O'Brien was a witness was to exclude her in some way

from an investigation. We find the reference to the "bigger picture" was a reference to the other complaints against Ms O'Brien.

Suspension lifted – 31 October 2014

291. On 31 October 2014 Ms Evans wrote to the Claimant lifting the suspension and advising that Candy Dodwell had been appointed as the disciplining officer in light of the Claimant's dignity at work complaint (grievance) raised in relation to Ms O'Brien. Ms Evans informed the Claimant in the letter that consideration was being given to an appropriate place for her to work until a decision has been made in respect of the ongoing disciplinary investigation and that Ms Evans would be in touch in due course to discuss her return to work in more detail.

292. We were taken to a further email exchange in the Claimant's additional bundle dated 4 November 2014.

293. This was an email from Ms Evans to Ms Dodwell copied to Ms Tovey. She starts by advising she wanted to discuss the whistleblowing case that Nicky Hughes is conducting into issues in EU. This is a reference to the Claimant's Whistleblowing complaint. She goes on to say:

"I am aware that we haven't informed Sharon O'Brien that Nicky Hughes will be conducting an investigation into a whistleblowing complaint and we should do but with the other stuff in the background it was a case of timing. "

294. We find that in light of these emails the Respondent (Ms Dodwell and Ms Evans) was fully aware of the potential impact the Claimant's allegations against Ms O'Brien, that arose directly from having made the first protected disclosure, could have had on the other issues that had been raised by the RCN and Unison. This resulted in Ms Dodwell directing that the management of the Claimant's case should not compromise the other complaints against Ms O'Brien. We find that this amounted to collusion between Ms Dodwell and Ms Evans to withhold and "de-link" the Claimant's complaint against Ms O'Brien with the other complaints against Ms O'Brien of bullying and harassment.

Fiona Smith Report

295. This is an appropriate point at which to deal with the evidence concerning the Independent Enquiry Report by Fiona Smith, Debbie Lymn and Professor Fiona Patterson published on 18 May 2015. The introduction to the report set out the background and timings. Ms Donnelly's letter was referenced. A collective grievance had been submitted on 13 November 2014 by RCN and UNISON under the dignity at work and whistleblowing policies. The Claimant was aware of the collective grievance although she was not a member of either union. The Claimant's unchallenged evidence was that the grievances were against Sharon O'Brien[6]. In a letter dated 18 December 2014 the Chief Executive Officer of the Respondent confirmed the independence of the enquiry panel, clarified the terms of reference

[6] 2 October 2019 @ 12.44pm

ensured the scope of enquiry would include all[7] current members of staff, past members of staff and any other emergency service employee who wished to be interviewed and that the findings would be shared. The panel was commissioned in late December 2014 and commenced on site on 7 January 2015. The collective grievances were withdrawn as a result of the Respondent commissioning the enquiry.

296. When Ms Kim Tovey gave evidence it transpired she had been instructed, as part of the enquiry, to pass on details of all different cases in operation from HR to the enquiry itself by way of a list. She was asked if the Claimant's name was on this list and her evidence was that if the Claimant's case was live it would have been. This was the first time this had ever been disclosed to the Claimant. The Respondent had not included reference to her details being on a list in their SAR response nor had it been disclosed as part of disclosure. The list was an excel spreadsheet provided monthly. It was subsequently produced to the Tribunal and added to the bundle.[8] The title of the spreadsheet was "Emergency Medicine from April 2013 (revised 12 January 2015)". There were different sections for capability, change, complaint, dignity at work, disciplinary, grievance, sickness, recruitment and whistleblowing cases. The Claimant had entries under dignity at work, disciplinary, sickness and whistleblowing. She did not appear in the grievance section, despite the Respondent being aware (even on their own case) that she had brought a grievance against Ms O'Brien. The spreadsheet was last updated by "NE" on 12 January 2015.

Entry under dignity at work

297. The Claimant was listed in three separate entries, her original complaint against Lisa Waters, the review by Karen Elcock and her complaint against Sharon O'Brien. Against this entry it is recorded as "on hold" under the What stage column and stated as follows under outcome:

"9-1-15 Need Candy to confirm appropriate Investigating Officer and to inform SOB of the investigation. Need to inform JCJ of the update asap as this is a potential risk due to the delays with her complaint and appropriate action."

Entry under disciplinary

298. This detailed three separate allegations for inappropriate, abusive or rude behaviour towards Deputy Sisters (Muriel and Ceri). Under outcome it records as follows:

"9-1-15 interim report provided to CD on 10 November 2014, chased on 18 November 2014 and 23 December 2014. Meeting with CD arranged for 13 January 2015. NE sought legal advice to assess risks of any decisions."

Entry under sickness

299. This recorded that the outcome was awaiting a decision from Candy Dodwell about the disciplinary investigation.

[7] This contradicted what Ms Evans told Ms Dodwell in her email dated 30.10.14 that Ruth Walker had directed that local / current issues would be continued with

[8] Pages 2064-2071

Entry under Whistleblowing

300. The date received is recorded as September 2014 and the details were related to patients' dignity / staff and patient safety and deceased patients. It was recorded that it was ongoing and that Ms Evans would chase up when Ms Hughes was likely to complete the investigation.

301. We find that this cannot have been the same spreadsheet provided to the enquiry. It looked far more like an internal record. It seems highly improbable that the Respondent would be referring to taking legal advice and highlighting risk to the Fiona Smith enquiry. Also the informal language used as well as abbreviations instead of full names.

302. We do not find that the Respondent has deliberately misled the Tribunal in providing what was plainly the incorrect document. Ms Tovey first mentioned the document in cross examination. It was then produced the following day and we can understand that the wrong document may have been sourced in the circumstances. However this does not explain the omission of the spreadsheet in disclosure, the SAR and why it was only mentioned by Ms Tovey at this stage of the proceedings.

303. The Claimant was not aware that the enquiry was ongoing at the time. She was not a member of the RCN or UNISON nor was she in work. The enquiry used mixed methods to gather evidence including one to one meetings, focus groups, staff survey, review of documents and observational visits.

304. There was no evidence that the Claimant was informed of this enquiry or sent any information which would have enabled her to take part. The Claimant has copied in Adam Cairns, the Chief Executive to some of her email correspondence in the Autumn of 2014. There was an awareness at the highest level that the Claimant was making allegations she had been subjected to bullying as a result of making protected disclosures.

305. We had no doubt that if the Claimant had been aware of the Independent Enquiry she would have requested to participate. Even though the enquiry report confirmed that they did not include individual personal complaints relating to their own circumstances they gathered evidence from individuals to reach their overall conclusions.

306. The report contained findings over 18 pages. We set out the relevant findings (in summary) as follows:

- OF1: The enquiry found evidence that the provision of care was being compromised due to the prevailing organisational culture with the EU and / or AU. There was an authoritarian command and control management approach. Under "How employees are treated" the enquiry found that staff did not feel cared for or respected by the ES Management Team. They recommended that senior managers must be prepared to take allegations seriously and fully investigate in a prompt way regardless where the allegation comes from.
- The enquiry found there was no evidence a patient had yet been harmed due to patient care arrangements but went on to find there was an ongoing

significant risk of harm to patients. Patients in AU/ AU lounge spent long times not being monitored and were an unquantified risk.

- Shifts were regularly short staffed in EU/AU and there were insufficient staff to care for patients needs.
- There was no systemic process of analysis of incidents and risk or learning from incidents.
- The enquiry found the prevailing organisational culture had resulted in harm to employees, with staff at all levels experiencing emotional distress on a regular basis and forego caring for themselves to ensure patient care is not compromised.
- At times of a surge in activity there was a high probability targets were prioritised instead of patient focused care.
- There was clear evidence of a culture of bullying, harassment and inappropriate behaviour and treatment which pervaded all levels of staff in the ES. The behaviours were described as endemic.
- HR was found not to be ensuring cases were managed to conclusion promptly. There was a lack of systemic and skilled involvement of ES by HR and there was a belief by managers they should not retain written evidence/ files notes of informal discussions with staff.
- There was a risk that the 4-hour A&E target was being manipulated.

<u>November 2014 – request for a brief on the Claimant by the COO</u>

307. The Claimant was still awaiting instructions on where and when she would be returning to work.

308. A further email exchange took place between HR and Candy Dodwell on 7 November 2014. This exchange commenced with an email from Daniel Jones to Rhodri John subject matter JCJ (Claimant). Mr Jones informed Mr John that on submitting the suspension report for the PPD committee, he had received feedback that Alice wanted to have a brief on the JCJ case. We learned that the reference to Alice was Alice Casey, the Chief Operating Officer of the Respondent at that time. Mr Jones advised his understanding was that Ms Casey wanted details of where Mr John “was at” and what has happened to date/likely completion date if possible. Mr John sent this email onto Ms Evans and asked to have a chat with her about it.

309. Ms Evans then forwarded the chain onto Ms Tovey and Ms Dodwell copying in Mr Hywel Daniel and Mr John. She informed them that she was making them aware Alice was asking for information about this case. Ms Evans commented that it would be good to review the case early next week possible and to confirm where she [the Claimant] can return to work since the letter confirming she could return was sent to her last Friday. This was the letter sent to the Claimant regarding lifting her suspension on 31st of October 2014. The email goes on to say that Ms Evans had spoken to Ms O'Brien who confirmed that the Claimant was extremely knowledgeable and has high care standards and discusses where she could possibly return with and support. Ms Evans also states that in addition they needed to make a decision about whether they could pursue the disciplinary investigation case. She refers to Mr John having done a brief summary report which she could talk them through as the investigating officer and asked that this could be done as a matter of urgency. She refers to Alice asking for a brief and therefore if they were in position to say the Claimant

was back at work and the decision had been made then this would be positive.

310. There was no further information as to the "brief" that Ms Casey had requested. We asked the Respondent to check they had complied with their disclosure requirements regarding this "brief" but the Respondent was unable to locate any further documents. Ms Evans was asked why Ms Casey was asking for a brief on the Claimant in cross examination. Her explanation was that it would have been related to the Claimant's suspension and she said she could not understand why Ms Casey's request for a brief on the Claimant would be connected to the "other EU stuff". We did not accept this explanation. At the time Ms Casey had been asking for the brief the Claimant's suspension had already been lifted so this was not in our view a plausible explanation. We find that Ms Casey was asking for a brief on the Claimant due to the potential link between her complaints and the Fiona Smith enquiry.

Summary report – Mr John

311. Upon the instruction of Ms Evans, Mr John had prepared a summary report of his investigations. This was not in accordance with the Respondent's disciplinary procedure and there was no process for a summary report dealt with in that procedure. Mr John explained that the reason he was asked to prepare such a report was due to the timescales and evidence that have been gathered up to that point, the status of the investigation needed to be reviewed to obtain a view from the recently appointed disciplinary officer Candy Dodwell on the merits of the case. The summary report was submitted to Candy Dodwell on 10 November 2014.

312. Overall Mr John's summary report presented a reasonably balanced summary of the witness statements gathered in relation to the three allegations arising from the incidents on the 10th and 14th of January 2014. Mr John highlighted inconsistencies between Muriel Andal and Ceri Martin's statements and referenced a number of witnesses who discussed the pressure that the allocation of the patient who required specialing must have put the Claimant under. Mr John summarised the Claimant's behaviour towards Ms Andal and Ms Martin which was described by a number of witnesses as loud, shouting, angry, rude, quite aggressive, a bit intimidating. He also highlighted that the conversation with Ms Andal probably lasted no more than a few seconds and with Ms Martin no more than a few minutes. Mr John also told the Tribunal he also presented Ms Dodwell a file containing all of the witness statements, patient notes and the Claimant's incident forms and gave a verbal presentation in which he advised that the risk assessment forms for the patient had not been completed.

313. On 13 November 2014 Ms Evans emailed Ms Dodwell copying in Ms Tovey regarding the Claimant. This was the first email of a series of emails from Ms Evans chasing Ms Dodwell for a decision about where and when the Claimant would return following her suspension from duty. Ms Evans informs Ms Dodwell that they needed to prioritise her return to work as it remained a "significant risk to the organisation" and the case itself,

highlighting the Claimant was placed on suspension 10 months ago and it needed to urgently be resolved. Ms Evans goes on to say, **"…in light of the other issues within the EU, we really need to get a return to work plan sorted for her before the end of this week".**

314. By 18 November 2014 the Claimant was chasing Mr John for their next investigation meeting. As far as the Claimant was aware at this point the disciplinary investigation was ongoing even though the suspension has been lifted. Mr John did not reply to the Claimant but sent on her email to Ms Evans. That same day Ms Evans emails Ms Dodwell again copies in Ms Tovey and Mr Hywel Daniels and she states as follows

"Hi Candy

I appreciate you are very busy and I'm very sorry to I have to chase you. I just wondered when we are going to be in position to confirm a return to work placement and date the JCJ. We need a position very soon is currently we, as a UHB, are vulnerable.

There is also a need to make a decision, as soon as possible, on her disciplinary investigation case. As you will see from the attached email, JCJ has emailed Rhodri again today, seeking a date for a further meeting to discuss the ongoing disciplinary investigation that he is conducting. At the last meeting, Hywel, Rhodri and I met to discuss whether the allegations should be reframed or whether consideration should be given to concluding the investigation and making a decision as to whether it is likely not go to a hearing. As I discussed with you on Friday, there is a possibility that this case should be concluded and JCJ is managed and a different route e.g. with training etc.

If this is the case, then there is no point calling her in and reframing the allegations if the case is not likely to be pursued. We do need to respond to J CJ so would be helpful to have another meeting this week to discuss the way forward."

315. It ended by asking when Ms Dodwell would be available to meet.

<u>Reframing allegations</u>

316. There were two separate discussions regarding reframing the allegations. The first was in June 2014 (see paragraph 260 above).

317. The second reference to reformulating the allegations had arisen as Mr John later informed Ms Evans that there needed to be clarity around whether the word ‘abusive’ in allegation 2 in light of the evidence gathered (in respect of a second statement from Ms Martin where she was asked to explain what she had meant by abusive). She recommended that this be discussed with Candy Dodwell but accepted this never actually happened.

318. It was around this time that the Claimant was informed that the Respondent were considering reformulating the complaints against her as she queried this with Ms Evans on 20 November 2014. There had been a long telephone call between the Claimant and Ms Evans on 19 November 2014. The Claimant asked Ms Evans to put in writing that they were reformulating the complaints and tell her what the new complaints were and chased her again for the provisions that been made for her return to work including date of commencement and location.

319. On 19th of November 2014 Ms Evans had received a recommendation from Mr Hywel Daniel (Head of Workforce and OD) that they ‘get the Claimant in by the end of that week to resolve her return from suspension’. He goes on

to say that the delays in the case pose a real risk in terms of any future process (Tribunal). Ms Evans in her reply to Mr Daniel copying in Ms Dodwell asks again for some time to discuss the Claimant's case and advises that the Claimant had informed her she was not fit to return to work with the investigation hanging over her ability to perform and make a decisions as a qualified nurse. It should be borne in mind that the Claimant was still accused of five allegations said to have amounted to gross misconduct this point (albeit 4 and 5 were on hold). Ms Evans again refers to the details of the dignity at work complaint the Claimant wanted to raise against Sharon O'Brien and that this would mean Sharon would need to be informed of this Ms Evans goes on to repeat the link between the Claimant's complaint against Ms O'Brien and the other grievances where she says, **"in light of the other stuff, timing will be crucial."**

320. Ms Evans was also asked in cross examination what she meant by reference to the "other stuff" and at first she said that it was the various procedures the Claimant was pursuing namely the dignity at work, whistleblowing and disciplinary issues and there were "lots of bits and pieces". She did acknowledge that this also was a reference to the independent enquiry by Fiona Smith. See also references to "other stuff" in paragraph 293.

321. Ms Evans chased Ms Dodwell on 24 November 2014. It is evident from this email that Ms Evans was being placed in a very difficult position by a lack of response from Ms Dodwell. Ms Evans advised that she was being put in a very difficult situation as she was unable to respond to the Claimant about her return to work as she had no update. She reiterated she had sent a number of emails about this to date as it was now three weeks since the Claimant was informed the suspension been revoked. Ms Evans again highlights the risk to the Respondent in terms of further claims and that the Claimant thought she was not supporting her and not progressing the case.

322. Ms Evans must have received some instruction as on 25 November 2014 as she wrote to the Claimant apologising for not replying to have various emails, acknowledged there had been some delay in confirming her return to work arrangements and assured the Claimant that she would not be financially affected or expected to explain her absence during this period as she was awaiting information from the Respondent.

<u>Meeting 4 December 2014 between Candy Dodwell, Nicola Evans and Claimant</u>

323. A meeting was subsequently arranged between the Claimant and Candy Dodwell to discuss her return to work. There were no notes taken of this meeting. At this meeting the Claimant was still under the disciplinary investigation. The Claimant confirmed she could not return to work and practice as a nurse whilst under gross misconduct allegations and she was signed off sick from 5 December 2014. It was therefore plain that the disciplinary investigation needed to be concluded as soon as possible to facilitate the Claimant returning to work (depending of course on the outcome).

324. Mr John emailed Ms Dodwell on 23 December 2014 having been contacted by the Claimant asking when their next meeting would be under the

disciplinary investigation. He stated that he understood a decision had not yet been taken on the disciplinary investigation.

325. The Claimant chased Ms Evans and Ms Dodwell on 8 December 2014 and 6 January 2015 (copying in the Chief Executive Adam Cairns) for an update on the disciplinary investigation in particular the reframed allegations. The same day the Claimant contacted Adam Cairns directly in a lengthy email summarising her situation to date. She then chased Ms Dodwell again on 9 January 2015 by email and telephoned her on 19 January 2015. A further chasing letter was sent to Ms Dodwell on 28 January 2015.

Decision to drop the disciplinary investigation – January 2015

326. On 16 January 2015 Ms Kim Tovey, Head of Workforce and Organisational development, emailed Ms Evans and referred to a meeting that had taken place between them and Mr John and Ms Dodwell in early January 2015. The outcomes agreed were set out as follow:

"Drop the discipline case for reasons discussed (Nic can you insert please)
JCJ would do it again but discussion would need to be the message might be right however the method would need modification
Structured development for JCJ regarding Core Dimension 1 – Communication including Emotional intelligence, MBTI – perception
Return to work offering mediation."

327. Therefore, by 16 January 2015 there had been a decision to drop the disciplinary case against the Claimant in respect of allegations 1 - 3. The Respondent's reasons for dropping the allegations were (presented in Ms Evans witness statement) as follows; there was evidence to support the three allegations but in light of the delay in the process Ms Dodwell's decision was to discontinue the process and support the Claimant in returning to work. The Respondent denied that the reason was because there was insufficient evidence to pursue the allegations.

328. The reason we find the decision was only in relation to allegations 1 – 3 was due to a later email from Ms Evans dated 27 February 2014. We also return to this below at paragraph 353.

329. On 26 January 2015 Mr John emailed Ms Tovey and Ms Evans notes of the patient who required specialing on 10 January 2014. He highlighted that the EU risk of falls screening tool had not been completed and there were issues around communication between EU and AU that needed to be picked up following the investigation as well as the timely completion of forms. No action was ever taken against anyone other than the Claimant in respect of these shortfalls and no-one followed up Mr John's recommendations.

330. Ms Tovey forwarded another chasing email from the Claimant addressed to Adam Cairns to Ms Evans and asked for a discussion. In response, on 30 January 2015 there was another significant email between Ms Evans and Ms Tovey, copied to 3 other persons with HR. Ms Evans set out a chronology and history of the Claimant's case thus far. It is a lengthy document so we set out the relevant parts as follows:

- **"…it was considered that on reviewing suspension, that the issues were not as serious as initially thought…**
- **I refute the points made by Jude that I or Rhodri have been incompetent, dishonest or lacking in integrity.**
- **The allegations were regarding Jude's behaviour and conduct. While the instance that led to the allegations may have been related to nursing issues the allegations were not about her performance as a nurse but instead related to how she had spoken to and behaved towards other staff including staff senior to her.**
- **As they are allegations until the matter is thoroughly investigated it is not possible to determine whether she did act inappropriately or not. That is what the process should identify. Some of the points she identifies would form part of her defence/statement in response the allegations put before her.**
- **Rhodri and I did not refuse to address any nursing issues she identified. She did raise some issues in the letter she sent in about victimisation above-which related to her D@W complaints which was due to be picked up through the D@W review process. If these should have been picked up by whistleblowing at the time they weren't there was an oversight rather than a deliberate attempt to refuse to address any issues.[9]**
- **Jude has in the same email confirmed she feels she has been victimised since raising the original issues against Lisa Waters which were investigated under the D@W policy and she claims were public disclosure (whistleblowing). We have informed her that it was not considered an incident that would be considered under the whistleblowing policy. See my letter of 14th of August 2014 whereby towards the end of the page I confirmed there is no evidence that this is a whistleblowing incident. Since then, having attended the legal session with Blake Morgan solicitors on 11 December 2014, a concern that the fact that she reported the incident of assault and battery to the police-the police are not considered as prescribed persons to report a disclosure to.**
- **I did not deny what Jude is saying about the whistleblowing - to be honest we weren't sure ourselves until the training session whether it met the criteria or not.**
- **As you are aware Rhodri and I have raised issues about the investigation in several emails to Candy and decision has yet been confirmed to Jude. There is little point in us reframing allegations and asking her to respond to the final allegation if the case is being withdrawn. As we are not in a position to confirm the outcome we have been unable to respond hence her comments that we have not responded**

331. It is clear that although a decision had been taken in early January 2015 to drop the disciplinary against the Claimant, Ms Evans still has not had the go ahead from Ms Dodwell to confirm as such as of 30 January 2015.

332. Ms Evans emailed Ms Tovey separately also on 30 January 2015 to remind her they had not yet informed the Claimant in writing as to how they would be taking forward her allegations against Sharon (O'Brien) (first raised on 17 April 2014) and that it needed to happen as a matter of urgency.

333. Also on 30 January 2015 Ms Evans forwarded Ms Tovey Ms Hughes's draft whistleblowing report and asked her to discuss this with Ms Dodwell as a matter of urgency. Ms Dodwell is also referenced as being sent the report by Ms Evans.

334. Also on 30 January 2015 the Claimant emailed Nicola Hughes in response to a statement that she had provided to the Claimant (taken whilst investigating the whistleblowing complaint) to inform her that she did not feel it truly reflected the meeting or the seriousness of her concerns. She informed Ms Hughes she would therefore take her concerns to the Health Inspectorate Wales. The same day Claimant chased Ms Elcock for

[9] The Respondent's Dignity at Work review does not provide for a re-investigation.

response to her dignity at work review which had been commissioned on 9 June 2014.

Whistleblowing Report by Nicola Hughes

335. On 22 January 2015 Nicola Hughes sent her draft report to Ms Dodwell and Ms Evans. She commented in the covering email she was "happy to change anything you wish and look into anything further if you wish." She goes on to describe some of the comments as "quite disheartening". We do not know if the report we saw in the bundle was the first draft or a final version. The version we saw was dated 19 January 2015. The allegations investigated were as follows:

- failure of both deputy sister Ceri Martin and Muriel Andal to safeguard patient safety (10 January 2014 incident);
- prolonged exposure of vulnerable patients to a violent patient (3 May 2013 incident);
- transfer of two deceased patients through public through fare;
- gentleman absconding from the EU seen walking down the A48 and the police had to be called.

336. Ms Hughes had interviewed the Claimant, Jason Ball, Rhodri John, Ben Durham, Jenny Palmer and John Baldwin as part of her investigation. Ms Palmer was referred to throughout as the senior nurse and Mr Durham as the assessment unit manager.

337. Ms Hughes commented about the incident between the Claimant and Ms Waters on 3 May 2013. Ms Hughes had been unable to locate an incident form regarding the incident or any CCTV footage. There was no explanation as to why this was the case given the Claimant had completed the violence and aggression form and sent a copy to HR on 22 May 2013 and there was CCTV footage in possession of the Respondent. Mrs Hughes also appeared to be unaware that Mr John had been investigating the Claimant about this incident. She records that she had been unable to ascertain whether a formal investigation was performed.

338. This is our view demonstrated a complete lack of even a basic overview or handover from the Respondent (HR) to Ms Hughes to have enabled her to conduct a proper investigation. We had no explanation for this state of affairs. Ms Hughes was not passed key documents that would have enabled her to investigate the issues. Even when this was highlighted in the report no one subsequently provided the documents or CCTV footage.

339. The Claimant had been able to show Ms Hughes some video footage that she had herself. In consequence of viewing the footage Ms Hughes commented that it was clear that the nurse with her (Ms Waters) did place her hand on her and you could see the Claimant move her arm away. The Claimant accepted when talking to Ms Hughes that the video clip showed the touching was not violent but at the time following the incident she was shaken and distressed.

Conclusions of the report

340. Ms Hughes report relayed that the statements of the three staff she had spoken to talked about a culture of fear and bullying and harassment and one member of staff had described the unit as a “hellhole”. In relation to the alleged failure by Ceri Martin and Muriel Andal to safeguard patient safety, Ms Hughes finds that the staffing levels on that the night in question were reduced with there being no health care support worker available. She concluded that it would be difficult to question the clinical decision to move the gentleman without been present at the time and with the knowledge of the whole picture of the Department the patients need.

341. In relation to the allegation that Ms Andal had refused to assist in the patient care Ms Hughes notes that the patient noted corroborate the Claimant’s statement and frustration that she felt in trying to gain a special for the patient. She concluded that it was clear that the nurse in charge was responsible for ensuring staffing levels were appropriate and moving staff around the unit as they see fit to manage patient safety. She goes on to say is not clear why such support was not gained on that night and this will be addressed through another HR policy. This was in relation to Ms Andal’s conduct. There was no evidence that Ms Andal was ever subjected to any further investigation following events of that night.

342. Ms Hughes acknowledged that Mr Durham had highlighted tension between AU and the EU staff and that he believed that junior staff should and would be able to question senior staff but that was not apparent in the statements from junior staff who talked of a culture of fear, bullying and harassment.

343. Ms Hughes also concluded that it was clear from statements the Claimant may not tell deal with other members of staff in a tactful way but it was felt that her actions were undertaken in the best interests of patients.

344. Ms Hughes concluded by saying that there are other possible issues to be investigated as follows (we have not set out all of these just the ones we regard relevant to the issues in this case). These are very similar to some of the conclusions reached by the Fiona Smith report:

- Failure of Human Resources to act when information has been given to them regarding shortcomings in patient care
- Complaints are used as a weapon (statement of Jason Ball)
- There is no confidence that incident forms are managed
- There is very little support and staff are not allowed to question
- Staff feel intimidated
- If you put your head above the parapet-your life is made a living hell-statement of John Baldwin.

<u>Detriments 6 and 7 - Letter dated 20 February 2015</u>

345. At this time the Claimant still had not been informed of the decision to drop the allegations 1 – 3 against her but there does appear to have been a plan to try and meet with the Claimant. In light of the Claimant's allegations against Ms Evans (made in her email to Adam Cairns on 6 January 2015 that Ms Evans had been dishonest) it was decided that a new HR individual, Ms Rees, should be allocated to the Claimant's case to attend a meeting. In anticipation of the meeting yet to be arranged Ms Evans had drafted an

outcome letter on 20th of February 2015 and emailed it to Ms Tovey, Ms Dodwell, Ms Rees and Mr John. The covering email described the letter as a "rough draft" and would need "tweaking". This letter only came to light following a subject access request made by the Claimant in 2016 as it was never sent. Ms Evans' evidence was that it was intended to be an 'aide memoire' for Candy Dodwell and Kim Tovey with gaps to be filled in depending on the discussions which took place at the meeting. It is written in the future tense indicating it was intended to be sent after the meeting. We set out the relevant parts of that letter as follows:

"the purpose of the meeting with you was to discuss the recent developments in respect of your pending disciplinary. On further consideration of the merits of the case, having reviewed the information collected by the Investigating Officer and in accordance with our duty and obligation to act proportionately, fairly and justly towards our employees, we have taken a decision to discontinue the disciplinary process against you with immediate effect. This relates to the following allegations:

(section left intentionally blank)[10]

It is recognised the disciplinary investigation process has been delayed due to a number of reasons which we acknowledge is not satisfactory. However, it is important that we support you in returning to work as quickly as practically possible having considered any up to date medical opinion.

While I explained that there was insufficient evidence to pursue this case further, it was identified that the work needed to be undertaken with the team in the assessment and emergency unit. In addition, we also needed to support you with a training development plan in light of some of the issues identified during the investigation process."

346. The section where it was intended to confirm the allegations which were being discontinued was left blank. This showed that Ms Evans was not aware whether all of the allegations were being dropped or just allegations 1 – 3 otherwise she is likely to have included them within the body of the letter.

347. The paragraph referencing insufficient evidence was not left blank or highlighted as an area which may require revision unlike other sections of the letter. There were other sections of the latter where it was clear that it would need to be revised following the meeting. This is one of the reasons why we did not accept that this element of the letter was intended to be draft.

348. We did not accept the Respondent's explanation that the reason the disciplinary investigation was dropped was as set out in paragraph 327 above. We find that the reasons the decision was taken to drop the disciplinary investigation was because there was insufficient evidence to progress the case further. Firstly, this was plausible as being the only sensible conclusion that could have been reached in light of the evidence gathered by Mr John's investigation. Of more significance is that this explanation simply does not correlate with the contemporaneous written evidence at that time. Ms Evans set out in a number of different communications that there was insufficient evidence. It was not just in the draft letter dated 20 February 2015. It appeared later in her email to Ms Rees dated 13 July 2015 and also in a script she prepared for Ms Harrison

[10] Our annotation this wording was not in the letter but we have inserted it to explain the format

ahead of a meeting in June 2015. Ms Evans referred to the allegations not being as serious as first thought in her email dated 30 January 2015. The Respondent acted unreasonably in maintaining in the light of these documents that the reason the investigation was to be dropped was not due to insufficient evidence and we do not accept Ms Evan's evidence in this regard.

349. Despite a decision being made on 16 January 2015 and this letter being drafted on 20 February 2015 no arrangements were made to meet with the Claimant until 16 March 2015 when Ms Dodwell wrote to her inviting her to a meeting on 31 March 2015. That letter only cited allegations 1 – 3. We find from this and any evidence to the contrary that Ms Dodwell only intended to discuss the first three allegations with the Claimant.

350. The Claimant had still not been informed of the decision taken in early January 2015 to drop the disciplinary allegations against her. During January 2015 the Fiona Smith enquiry was actively ongoing within the Respondent with the panel on site as of 7 January 2015. As we found above the Claimant was not informed of the enquiry nor was she given the chance to participate. It was the Claimant's case that she was kept out of the hospital as it would not have been in the Respondent's interests for her to return whilst the report was ongoing. We accepted the Claimant's evidence. The situation had shifted. Since reaching the decision on 16 January 2015 to drop the allegations against the Claimant, the Respondent had received two reports which in the main, supported the Claimant (Whistleblowing and dignity at work review). The Whistleblowing report was of significant timing given the comments that were made regarding bullying and harassment. We had no explanation from the Respondent as to why this decision was not communicated to the Claimant. We draw an inference from the findings of fact that the reason it was not communicated was to keep the Claimant out of the workplace during the enquiry.

<u>Dignity at Work review</u>

351. Ms Elcock had met with the Claimant, Ms O'Brien, Ceri Anne Hughes and Ms Richards as part of her review in November 2014. She subsequently sent her review to Ms Evans and Ms Tovey. It was unclear when but they were in receipt of it as of 27 February 2015 as there were email discussions regarding it. They did not pass the review onto the Claimant despite numerous requests to do so, until 28 July 2015 and even then only sections were released with the recommendations being withheld.

352. Ms Elcock found in summary that:

- The Respondent had not followed their Dignity at Work policy (4.10) which stated mediation should be used as a first resort of dealing with any dignity at work issues and an option to return to mediation at any stage of the process. It remained unclear why mediation had not been offered, and no evidence had been found to justify the deviation of the policy. (We found that the reason mediation was not offered was that Ms O'Brien instructed the HR department to ensure the informal stage was bypassed and it would end with a disciplinary against the Claimant).

- Ms Elcock highlighted that the policy stated there should be recognition of the fact it is the impact of the action / behaviour on the recipient that determines whether that individual feels bullied or harassed. She goes on the quote a definition of assault which describes violence means any unlawful touching (and acknowledged there was some debate over whether touching must also be hostile).

353. Ms Evans and Ms Tovey discussed the review in an email dated 27 February 2015. Ms Evans highlighted that allegations 4 and 5 remained as an outcome for determination. She stated as follows:

"Due to the timeline it may be a consideration that allegation 4 (the other 3 relate to the current disciplinary investigation that we have been discussing separately and these two allegations were placed on hold while the D@W review was underway) it may be suggested that this is also dropped and picked up as part of the training and development plan we have suggested. This would then give us good evidence of notifying her that her behaviour is an issue and what we have tried to do about it. Should she return to work and a further incident happen in the future there would be hard evidence that this has been discussed with her and a development plan put in place to make the necessary changes. This is not currently in place which makes it difficult to address formally if she has not been made aware formally that this behaviour is not acceptable and must change.

Allegation 5 refers to the false and malicious allegation yet all parties confirm that a "touching" took place which according to the definition could constitute assault so I am not sure if this can then be taken forward formally and may also need to be re-considered. Please can you consider my response and speak to Candy on this."

Ms Evans advised Ms Tovey they needed to be clear in the letter about what allegations were being dropped. Despite this advice, the letter that was sent to the Claimant on 16 March 2015 inviting her to a meeting to discuss the next steps of the disciplinary procedure only mentioned allegations 1 – 3. We did not hear any evidence from Ms Tovey as to whether those discussions took place or not with Ms Dodwell and but we infer from the fact that they were omitted that there was still an intention to pursue allegations 4 and 5 despite the findings of the review.

354. A meeting was subsequently arranged between the Claimant, Ms Dodwell, Ms Tovey on 31 March 2015 but the Claimant did not receive the letter of 16 March 2015 and it did not go ahead. Ms Tovey emailed the Claimant on 2 April 2015 having spoken to her on 31 March 2015 requesting dates to rearrange the meeting. Sometime before June 2015, Ms Dodwell then stepped down as Interim Clinical Board Nurse and was replaced by Mrs Sheila Harrison. A further meeting was not then arranged until 27 June 2015. As of 22 June 2015 the Claimant still had not been provided with a copy of Ms Elcock's dignity at work review. Ms Tovey refused to provide the Claimant with a copy – citing in an email dated 24 June 2015 that it was not normal process to share the report nor did the Dignity at Work Policy state a copy would be shared and further, there was concern expressed about data protection in that the review identified other employees.

355. We found this to be obstructive and unmeritorious explanation. The review was akin to an appeal and in our view akin to refusing to share the outcome of an appeal to an employee. The original dignity at work report had been shared with the Claimant and that referred to Ms Waters without redaction or similar concerns regarding data protection issues. The Claimant had been promised a copy by Ms Elcock and reasonably wanted to know the

outcome especially given the potential impact it had on allegations 4 and 5 which she still faced and were of very serious nature.

Meeting on 26 June 2015 between Claimant, Sheila Harrison and Collette Rees.

356. Prior to the meeting Ms Evans had prepared a script and draft letter (which was the same letter as the draft of 20 February 2015). [11] The script also makes reference to there being insufficient evidence to pursue the case further and it is clear that is only allegations 1 – 3 that were being dropped. This was sent to Ms Harrison and Ms Rees by email on 26 June 2015. Ms Harrison admitted in cross examination she did not read the script or the letter. There was an expectation by Ms Evans that Ms Harrison and Ms Rees would follow what had been agreed, as set out in the script and draft letter. This did not happen.

357. What actually happened at the meeting on 26 June 2015 was not in accordance to the draft script and letter.

358. There were no notes taken of the 26 June 2015 meeting. A letter was sent by Ms Harrison on 10 July 2015 summarising what had been discussed. This letter quoted allegations 1 – 3 that had originally been put to the Claimant in January 2014. It was silent on the allegations 4 and 5 that had been added by Sharon O'Brien following the Andrea Richards' report. Ms Evans had advised dropping allegation 4 and expressed concern about allegation 5, in her email to Ms Tovey of 27 February 2015.

359. The Claimant was informed that the decision had been taken to discontinue the disciplinary proceedings with immediate effect. However when the Claimant queried whether this meant she had not acted inappropriately, Ms Rees confirmed that as the disciplinary process had not been completed she felt it would be inappropriate to confirm this. This was not what the Respondent's disciplinary procedure provided for. The choices were; no case to answer, proceed to a disciplinary hearing or proceed through an alternative route e.g. capability. None of these avenues were open to the Claimant. This left the Claimant reasonably feeling that the allegations would always be in the background. The Claimant was presented with two choices; to accept she was satisfied that the Respondent would not continue with the disciplinary process and she would "move forward" from the process, with all correspondence relating to this disciplinary hearing being removed from her personal file and disregarded or that she wished for the disciplinary investigation to continue to be concluded so she had closure on the outcome. Ms Harrison noted given the timeframes it would be difficult to conclude fully.

360. Prior to this meeting, Ms Harrison told the Tribunal that she had not read any of the reports that were available. This included Mr John's summary report into the disciplinary investigation, Nicola Hughes' Whistleblowing report or the Dignity at work report and review and the script prepared by Ms Evans. Her explanation was that Ms Tovey was going to lead the meeting but was unwell. Whilst this may have been an explanation (albeit not a satisfactory one) for not having read any of the documentation prior to the first meeting, Mrs Harrison further admitted in cross examination that

[11] Page 940 and 661

she never at any stage when dealing with the Claimant read any of the reports. We found this to be a surprising position to have taken. Had she read Mr John's summary report, with annexed 37 witness statements, incident forms, patients notes and noted the failure to risk assess the patient on 10 January 2014, she would have been on notice that it would have been very difficult to see what further investigation could actually take place (other than the Claimant be asked again about the incident on 14 January 2014. This was our finding also corroborated by HR advice to Ms Harrison at the time – see below).

361. In relation to the Dignity At work review Ms Harrison maintained (it would seem on advice from HR) that the Claimant was not permitted to see the review and she was directed to make a request to the Information Governance Team who dealt with subject access requests.

362. In relation to the Claimant's grievance against Ms O'Brien which had not progressed in any form, it was agreed Ms Harrison would ensure the correct process was in place.

363. In relation to the Whistleblowing report by Nicola Hughes, the Claimant had still not been provided with a copy and confirmed she believed she had done all she could as a qualified nurse to raise the concerns with the Respondent and agreed the issue was closed.

364. The Claimant did not therefore know at that stage that Ms Elcock had decided that the Respondent had failed to follow the dignity at work policy and that both Ms Elcock and Ms Hughes suggested that the Claimant had at the least recognised that Ms Waters had touched the Claimant's arm and the Claimant pulling her arm back..

365. Finally, Ms Harrison discussed the Claimant now being in half pay and confirmed that due to the numerous delays in process, she would ensure the Claimant was not in any detriment and full pay would be reinstated. Ms Harrison did state that this arrangement could not continue indefinitely. A further meeting was arranged for 16 July 2015.

366. Following Ms Evans' receiving the draft outcome letter detailing the discussions of the meeting on 26 June 2015 she emailed Ms Rees and Ms Harrison as follows (13 July 2015):

"I would still strongly recommend that we do not continue with the disciplinary investigation process on the basis that you have informed her of the outcome e.g. it is not being progressed, all details will be removed from her file and no further action will be taken. This is also on the basis that there was insufficient evidence to proceed, there is a 8-month gap between the case being halted and when she was informed of the outcome. Due to the time lapse, it has to be dropped and the outcome has already been decided. Even if there was anything found I am sure you could not rely on this or could action this with so much of a time delay."

367. Ms Rees replied on 14 July 2015 that the letter had now gone to the Claimant and her advice to Ms Harrison had been to give the two options as was stated in the letter, as she felt this was fair and of natural justice to the Claimant.

368. Ms Harrison was asked about this decision in cross examination. She agreed she had seen the email from Ms Evans in which she stated there was insufficient evidence. She agreed that dropping the disciplinary case against the Claimant by way of discontinuation due to delay was different to dropping it to due to insufficient evidence. She was asked why she had not told the Claimant, on receipt of the email from Ms Evans that there was insufficient evidence. She told the Tribunal she had not seen Mr John's report so did not know there was insufficient evidence but this does did not deal why she did not tell the Claimant there was insufficient evidence after seeing the email from Ms Evans apart from stating she had wanted to bring a very protracted process to an end. When pressed Ms Harrison said "there is no reason I can give why I did not share this email" [with the Claimant]. She accepted with hindsight that she should have indicated it [the email] was here. Ms Harrison also had no knowledge that there had been discussions about the allegations no longer deemed to be gross misconduct (see above reference to email from Ms Evans dated 30 January 2015 at paragraph 330). Ms Harrison also accepted that she had not read the script prepared by Ms Evans which also referred to there being insufficient evidence. She was not briefed when she took over from Ms Dodwell. The Claimant became visibly distressed when Ms Harrison admitted she had not read any of the reports and she asked how in this case Ms Harrison could have hoped to resolve the issues. Ms Harrison conceded that perhaps this had been an error on her part.

369. Ms Williams (HR) emailed Ms Rees on 16 July 2015 (we only had part of this email) as it would appear she had also learned that the investigation for the Claimant may be reinstated. She asked for a discussion about how and who takes this forward as there were **"so many issues including the recommendation previously not to continue with the investigation".** Therefore, Ms Rees has now received two warnings from HR colleagues about the path they were taking in reinstating the disciplinary investigation.

<u>Meeting 16 July 2015</u>

370. The Claimant raised a query over the status of allegations 4 and 5 as Ms Harrison's letter dated 10 July 2015 had not mentioned these and advised she would not be in a position to make a decision on the options presented to her until she received the dignity at work review by Ms Elcock, still not released to the Claimant at that stage.

371. In relation to the Claimant's grievance against Ms O'Brien, and in contrast to the Claimant's position when she had submitted a complaint against Lisa Waters, the Respondent offered the Claimant mediation with Ms O'Brien.

372. The Claimant was finally provided with a copy of Ms Elcock's review on 28 July 2015.

<u>Meeting 30 July 2015 – Ruth Walker, Ms Harrison, Collette Rees, Claimant and Mr Climer-Jones</u>

373. A meeting took place for which we saw a script but no notes. In the script written for Ms Walker she was noted in the script to state as follows regarding Ms Hughes Whistleblowing report: "I have read through the recommendations and they will form part of the great work that is being done in EM". This proved not to be the case. There was no evidence that anyone followed up Ms Hughes reports or her recommendations by anyone within the Respondent. Ms Harrison admitted she never even read the report.

374. The script also suggested that allegations 4 and 5 would be included in the option to reinstate the disciplinary investigation proposed by Ms Harrison.

375. Ms Harrison wrote to the Claimant on 14 August 2015 and asked her to write to confirm that she was requesting the investigation against her to be reinstated.

Events between August 2015 – January 2016

376. Between this period the parties were engaged in without prejudice discussions which resulted in internal processes being put on hold.

Meeting on 25 February 2016

377. The open discussions between the parties recommenced on the above date. The Claimant was informed she would be placed on half pay from 24 March 2016. The Respondent proposed a review of Ms Elcock's Review of the Dignity at Work review, despite Ms Elcock's review being the final stage in the Respondent's Dignity at Work Policy. The terms of the review were drafted by Ms Rees. The aims were to review whether the two additional allegations (allegations 4 and 5) were fair and objective, whether the process should have been dealt with differently, whether Ms Richards' report had been conducted in a transparent manner and whether Ms Elcock's review was coherent in accordance with the Respondent's policy.

378. The Respondent's reasons for constructing this review remained without explanation from the Respondent. If allegations 4 and 5 needed to be reviewed we were unclear why this would not be done as part of an ordinary disciplinary investigation rather than open a new review, outside of procedure. Mr John had already conducted part of the investigation into allegations 4 and 5, and this was now almost three years after the original incident had taken place. Instead, Ms Harrison decided that the disciplinary procedure would be put on hold, pending the outcome of the Dignity at Work further review. For these reasons we find that the Claimant's objections to this proposal to be entirely reasonable. The Respondent did not accept the outcome of Ms Elcock's review nor did they find it palatable. Instead of abiding by the findings they sought to conduct a further review which based on how long previous investigations could have taken many months. In the absence of an explanation by the Respondent for creating this review outside process we find the purpose of it was to create further delay and keep the Claimant under threat of disciplinary allegations.

379. As Ms Harrison made a number of comments regarding the Claimant's behaviour at the various meetings we make some findings in this regard. By this point, the Claimant had been under the threat of disciplinary proceedings for gross misconduct that if upheld would potentially jeopardise her professional career. There had been repeated changes in persons allocated to her complaints, from HR to management. She was signed off sick with anxiety and stress and had been instructed that her chosen companion was not permitted to accompany her at one stage of the proceedings. She now faced a review of the review. We accept that the Claimant may have been bad tempered and rude at these meetings. There were mitigating circumstances. The Respondent had not taken any steps to ensure the Claimant was well enough to be attending these meetings.

380. The Claimant's evidence, which we accepted, was that at this point she was close to a mental and physical break down and felt like she was losing her mind. Her trust was gone and she became paranoid and questioned everyone's motivation.

381. The Claimant was also criticised by Ms Harrison for making disparaging and critical remarks about Ms Rees and Ms Harrison's handling of her case. This related specifically to the proposed further review of the dignity at work review which the Claimant described as a barely veiled attempt at a "second bite of the apple" to secure a more palatable outcome for Ms O'Brien. We do not agree that this was detrimental to the Claimant's credibility or assisted the Respondent's case in respect of her character as we find the Claimant was not unreasonable in expressing a level of dismay at the proposal.

382. Ms Harrison also asserted in her witness statement that the Claimant said at the meeting she hoped they (her and Ms Rees) dropped dead. The Claimant challenged Ms Harrison about this in cross examination. She put to her that the Claimant had said to Ms Harrison that she believed they were hoping that she [the Claimant] dropped dead. The Claimant's description of the context of the comment was corroborated by Ms Harrison's own letter dated 18 March 2016[12]. Mrs Harrison wrote as follows:

"You also stated that you know that we were hoping that you would "drop dead"..

383. Ms Harrison's witness statement made a very serious allegation against the Claimant that was plainly wrong, by her own account and her own hand. The Claimant never said to Ms Harrison she hoped she dropped dead, she was talking about herself. This should have indicated to the Respondent how unwell the Claimant was at this point in time.

384. It was evident from the correspondence around this time that the Claimant was becoming increasingly frustrated and unwell. She subsequently wrote a very long letter to Adam Cairns on 28 February 2016 which resulted in Mr Cairns confirming in a letter dated 18 March 2016 that he had asked Ms Susan Thomas being asked to meet with the Claimant to discuss her concerns. Mrs Susan Thomas was the newly appointed Head of Workforce & Organisational development for the Medicine Clinical Board.

[12] Page 1100

385. Ms Harrison confirmed that the Claimant's grievance would now move forward but subsequently put all outstanding matters on hold pending her meeting with Mrs Thomas.

386. Mrs Thomas was involved in translating a number of the recommendations from the Fiona Smith report into action plans. She told the Tribunal that she was unaware of any disciplinary action against any of the individuals named in the unredacted report. Mrs Thomas was asked about the Fiona Smith report recommendations relating to HR and if she was involved in implementing these. Mrs Thomas told the Tribunal she was tasked to ensure robustness around HR policies, clarity of responsibility and a closer look at ER cases and that one of the HR advisors involved in the Claimant's case received an action plan around her development.

387. Mrs Thomas told the Tribunal she had read the conclusions of the reports by Mr John and Ms Hughes regarding the Claimant. She did not read these in depth. She was not told about the advice from Ms Evans in February 2015 that allegations 4 should be dropped and that there was doubt as to whether allegation 5 should be taken forward. She was also not aware of Ms Evans email to Ms Rees dated 13 July 2015 in which she strongly recommended they did not continue with the disciplinary investigation.

388. Mrs Thomas accepted that she was aware there had been a handover from Ms Evans to Ms Rees that gave advice about how the case could be taken forward but then Ms Rees and Ms Harrison met the Claimant and took a different route. She only became aware of this after the Claimant's resignation. However given that she had read the conclusions of Mrs Hughes we had no explanation as to why she endorsed the reinstatement of the disciplinary hearing which should have caused her to question whether allegations 4 and 5 should be maintained.

Subject Access Request

389. On 10 March 2016 the Claimant made a subject access request ("SAR") to the Respondent. The Claimant requested all documentation held by the Respondent relating to herself and listed 21 bullet points of the information she expected to receive. This included emails between Ms Farrow and Ms Skyrme and Ms O'Brien, witness statements written about the Claimant, the complaints by Muriel Andal and Ceri Martin and other documents that would have been relevant to Mr John's disciplinary investigation. She also requested emails between HR and the summary report of Mr John. It was a comprehensive list and most of the documents were present in the bundle before us.

390. On 20 April 2016 a file was released to the Claimant of approximately 500 pages. The Claimant was asked to meet a Ms Morgan, Corporate Governance Senior Information Communication Manager, in the concourse of the Heath to collect the information which was handed to her in paper format. The Claimant was immediately shocked at how little information there appeared and tried to protest but Ms Morgan refused to discuss this with the Claimant citing the concourse was not an appropriate place for a discussion.

391. The Claimant was devastated at what she perceived to be a breach of the Respondent's obligations to release her personal data under the SAR. She described, and we accepted her evidence, how she was now at her lowest ebb, felt absolutely defeated and was in a very dark place, feeling her son and husband would be better off without her being a burden to everyone around her.

392. Mr Climer-Jones gave evidence to the Tribunal. Most of his witness statement was hearsay, in that he relayed to the Tribunal what he had been told by the Claimant about the events in question. He gave some evidence about the Claimant's state of mind around the time she received the SAR response. Looking for Mr John's report, which was not there, in amongst the papers made the Claimant more unwell. She did not check everything initially as she was looking for Mr John's report in particular. She was so upset at the failure to include the report that she did not look further at the documents and it remained in their front room for about 6 weeks. Mr Climer-Jones described by this point the Claimant as very depressed, upset, paranoid and distrusting of the Respondent. He had also experienced a period of ill health due to the stress the Claimant was under.

393. Mr Climer-Jones' description of the Claimant as paranoid was relied upon by the Respondent in their submissions that the Claimant's protected disclosures were not made in good faith / reasonable belief. We reject this. Mr Climer-Jones was frank under cross examination about the Claimant's state of mind as of Spring 2016 and did not suggest that this was her state of mind at the time the disclosures were made.

394. One of the key documents she was expecting was Mr John's summary report. The explanation given for not providing a copy was that the Claimant had already been provided with a copy. The Claimant immediately appealed and asked for evidence as to when Mr John's summary report had been given to her. The Respondent maintained this explanation and insisted that a copy had been handed to the Claimant by Mr John. The Claimant emailed Mr John directly and asked him to re-send a copy or provide proof of when he gave it he had handed her a copy. Mr John did not reply, nor did he deal with this in his evidence. We find that Mr John never provided the Claimant with a copy of the report. There was no evidence to support this assertion at the time of the Claimants' SAR or after, on the contrary the Claimant had made repeated requests for the report even before the SAR and there was no evidence that it had been given to her.

395. The Claimant also asked Ms Morgan if the Respondent has sought permission from the third parties (the Respondent relied on the exemption under the Data Protection Act that provides they did not have to release personal data relating to the Claimant if it would mean disclosing information about another individual who can be identified from that data) and they had concluded it was not reasonable to disclose without consent. It was unclear if consent had been sought.

396. The Respondent sent a holding email on 9 May 2016 and a further email on 12 May 2016 in which they advised they would not be providing any further information.

Meeting with Mrs Thomas on 21 April 2016

397. Prior to the meeting on 19 April 2016, the Claimant emailed Mrs Thomas and requested there be allocated time at the end of the meeting to reflect and agree on the minutes alternatively she noted there was nothing in disciplinary policy preventing taping meetings.

398. Ms Thomas replied to advise that recording was not permitted.

399. Mrs Thomas was accompanied by Ms H Palmer, HR as a note taker and the Claimant was accompanied by Mr Jason Ball. Upon their arrival, the Claimant was already present and there was an immediate stand-off between the parties as the Claimant was recording the meeting and so informed Mrs Thomas. We saw Ms Palmer's notes. Ms Palmer noted that the Claimant talked over Mrs Thomas and alleged that Mrs Thomas was not competent enough to have what she said recorded. The notes did not record what Mrs Thomas subsequently included in her witness statements as follows:

- the Claimant was agitated and pacing the room;
- the Claimant was aggressive;
- the rudest behaviour ever encountered in a 25-year career;
- the Claimant was incredibly aggressive and unprofessional throughout;
- the Claimant waved her recording device in Mrs Thomas' face

400. Whilst we find that the Claimant was likely to be upset and agitated at this meeting (we take into particular account her health at that time), we do not find she behaved in the manner described by Mrs Thomas in her witness statement to this Tribunal. This was not recorded in the Respondent's notes taken at the time. Had such behaviour been exhibited we find it likely that it would have been so recorded in the notes. Whilst Mrs Thomas's later letter refers to the Claimant being very rude it did not refer to any of the above behaviours.

401. Mrs Thomas confirmed they did not wish for the meeting to be recorded. The discussion became heated with both parties raising their voices to try and be heard. It was brought to an end by Mrs Thomas.

Detriments 8, 9 and 10

402. These were set out in the schedule as follows:

Detriment 8 – 10 May 2016 – a letter is received by the Claimant from Susan Thomas regarding the meeting of 21 April 2016 and confirming the allegations against the Claimant are to be re-pursued, prompting a further investigation.

Detriment 9 – 7 June 2016 – The Claimant is advised that the enhancements for her temporary injury allowance will not be reinstated and were in fact paid in error.

Detriment 10 – 9 June 2016 – The Claimant was advised that Clive Mason has been appointed to investigate the grievance that she raised in April 2014

regarding Sharon O'Brien. Failure to properly investigate the grievance or follow the Respondent's grievance procedure in doing so amounts to a detriment which she was subjected to on the grounds that she had made a number of protected disclosures.

403. Mrs Thomas wrote a detailed letter to the Claimant on 10 May 2016. The Respondent's decisions in respect of detriments 8, 9 and 10 were all conveyed in this letter.

404. Mrs Thomas advised that as the Claimant had refused to agree to the proposed review of Ms Elcock's review, they considered the matter closed. This meant that the Claimant's challenge to Ms Richard's report was closed down apart from the disciplinary investigation that would be considering allegations of gross misconduct against the Claimant.

Detriment 8

405. In relation to the 5 disciplinary allegations, Mrs Thomas confirmed she supported Ms Harrison and Ms Rees' decision to progress with the disciplinary procedure and had appointed a Mrs J Tottle as investigating officer. All 5 allegations against the Claimant were reinstated, including the word 'abusive' in allegation 2. Mrs Harrison was to be appointed as the Claimant's direct line manager during the outstanding processes.

Detriment 9 - Enhancement and sick pay

406. Also in the letter dated 10 May 2016, Mrs Thomas advised that the Claimant had been paid full sick pay from 5 December 2014 to 25 March 2016. In January 2015, Agenda for Change guidelines changed so that staff should not receive enhancements whilst on sick leave except where there had been an accepted injury at work, Mrs Thomas advised that payroll had made an error that the Claimant was entitled to an enhancement and she had continued to be paid it. Therefore, they would seek repayment of the overpayment. Moving forward the Claimant would receive 50% salary with no enhancement.

Detriment 10

407. In relation to detriment 10 – Mrs Thomas advised that the grievance against Ms O'Brien would progress with a Mr Clive Morgan being appointed to hear the grievance. This was later confirmed in a letter from Mr Morgan dated 9 June 2016. Whilst previously there had been assurances the grievance would be dealt with it had not been. This was the first occasion the Respondent actually named an appointed investigating officer. We therefore find this was the relevant date that the Respondent did an act inconsistent with their previous failure to progress the grievance.

Inappropriate behaviour to work colleagues

408. Mrs Thomas informed the Claimant that she had received several recent complaints from payroll and HR staff about inappropriate behaviour (rudeness and aggression). Mr Connolly of payroll had complained about a telephone call with the Claimant on 19 June 2016 where she was rude and

sarcastic. He informed Ms Rees that due to rudeness he would not provide her with information about her pay. Ms Rees counselled Mr Connolly that the Claimant was entitled to this information and assured him his concerns would be addressed. We do not know who the other complaints were from.

409. A further meeting was arranged with Ms Harrison on 20 June 2016. The Claimant received a letter from Mrs Tottle dated 14 June 2016 confirming again the 5 allegations and that she was re starting the investigation, advising she would be reviewing the investigation thus far (it being noted as incomplete) then decide process.

Discovery of Nicola Evans' draft letter dated 20 February

410. On 18 June 2016 the Claimant, having received no reply from Mr John to her email of 12 June 2016 requesting the summary investigation report, decided with her husband to look through the envelope with the SAR documents provided by the Respondent in April.

411. Mr Climer-Jones discovered the letter from Ms Dodwell, drafted by Ms Evans (see paragraph 345 above) dated 20 February 2015. The letter led the Claimant to conclude that HR and Senior Nurse management knew as early as February 2015 that there was insufficient evidence to continue the allegations against her and they recognised that further work needed to be done within the team in AU and EU.

Detriment 11 – 20 June 2016 – the Claimant was constructively dismissed.

412. The Claimant's ET1 set out this discovery to be the "last straw". The Claimant drafted a detailed and lengthy letter of resignation between 18 – 20 June 2016. In the 14-page letter the Claimant sets out the following heads she relied upon:

- Meeting of 21 April 2016 and further accusations;
- Dignity at Work Review (further review proposed by Ms Rees and Ms Harrison, not Ms Elcock's review);
- Dignity at Work Report by Ms Elcock;
- Grievance against Ms O'Brien (delay);
- Outstanding disciplinary allegations;
- Allegations against Mr Durham;
- Concerns regarding Ms Harrison and Ms Rees;
- Sickness and absence;
- Enhancement (removal and demand for repayment);
- Injury allowance application;
- Holiday Pay;
- Addressed accusations of inappropriate behaviour by Mrs Thomas;
- Conclusion - the Claimant sets out that the Respondent had been aware for 16 months that there has been insufficient evidence regarding the allegations yet had pursued her mercilessly going so far as to commence another investigation. The Claimant described it as a witch hunt.

413. The final paragraph states:

"As a result of all of the above, I am tendering my resignation on the grounds of constructive dismissal with immediate effect, due to my ongoing victimisation for raising concerns relating to patient care and my assault which has still not been investigated, which again occurred in the process of raising concerns. The letter that was sent to me by Ms Thomas on May 10th confirmed to me that the UHB has no intention of resolving any of these matters in a way that is either honest or compatible with your own policies. I reiterate my accusation that the Human Resources Department for Medicine is rotten to it's core, from the bottom to the very top."

414. We accept, on the basis of this paragraph, that the discovery of Ms Evan's draft letter in the SAR documents two days before was the last straw, as it confirmed to the Claimant that the Respondent was intent on pursuing her to a disciplinary even though they had known for 16 months there was insufficient evidence.

415. The Claimant then attended a meeting with Ms Harrison and Ms Rees on 20 June 2016 where she read the letter verbatim and then left. She was described in Ms Harrisons' witness statement to the Tribunal as 'as furious, aggressive, slamming her hands on the table, pointing her finger, shouting and unconsciously spitting as she spoke'. Some of this behaviour was recorded in a note taken by Ms Rees, the 'speaking aggressively, slamming the table and shouting. The Claimant was likely to have been angry and loud.

416. The letter of resignation was emailed to Mr Cairns the same day and acknowledged by Ms Harrison in her letter dated 20 June 2016.

Detriment 12 (and 9)[13]

417. This is set out in the schedule as follows:

"The Respondent wrote to the Claimant advising her that she owed £7000 which they claim was an overpayment of her temporary injury allowance but they have no further explanation. The letter also confirmed that, contrary to the Claimant's records, that she was not entitled to any payment in lieu of accrued but unused annual leave (the Claimant believes that she has an entitlement to a sum in respect of that entitlement)."

418. During the hearing we were provided with some further documents relevant to this issue namely a copy of the Amendment of National Terms and Conditions of Service (Agenda for Change) from 1 January 2015. These provided as follows:

Pay During Sickness Absence

With effect from 1 January 2015 pay during periods of sickness absence will be paid at basic salary levels and will no longer include any allowances or payments linked to working patterns or additional work commitments.

419. It was common ground that in normal circumstances this term, agreed by collective agreement, would have applied to the Claimant. An exception would have been if the Claimant had successfully applied for an Industrial

[13] The findings are relevant to both detriments so set out together, out of chronological order, for ease of reference

Injury Allowance, whereby if there is an accepted injury at work, the employee is still entitled to enhancements whilst off sick.

420. It was the Claimant's case however that this did not apply to her as she had been promised by Ms Harrison that she should not be at a financial detriment in her letter dated 10 July 2015 (see paragraph 365 above). Ms Harrison had qualified that statement to the extent she said in her letter that the full pay arrangements could not continue indefinitely.

421. We had sight of a letter from Mr Durham to the Claimant dated 16 July 2015 (Mr Durham continued to manage the Claimant's sickness absence at this point). In that letter he stated:

"I explained to Jude that since we last spoke on 9 June 2015, I have been instructed by the Medical Clinical Board Nurse to reinstate your full sickness pay with enhancement and the Annual leave that was used for delaying you going into ½ pay will also be reinstated, an instruction to payroll was sent on 9 July 2015"

422. The instruction to include enhancements that Mr Durham cites was given by Ms Harrison was therefore given 6.5 months after the change to the collective agreement that enhancements should no longer be paid, which was the Respondent's explanation for seeking the overpayment.

423. This agreement was reiterated in a letter from Ms Harrison on 19 January 2016 in which she advised full pay would continue until further notice. She did state that it is important to inform the Claimant that discussions in relation to future sick leave will be discussed during the meeting (due to take place on 17 February 2016). This did not qualify or reserve any right to reclaim enhancements Ms Harrison had authorised payroll to pay the Claimant.

424. At the meeting on 25 February 2016 the Claimant was given four weeks' notice that she would be placed on half sick pay. Ms Harrison explained that the Claimant had received in excess of the usual NHS sick pay (six months full pay) acknowledging in this regard they had gone outside the usual policy. In her letter dated 18 March 2016 there was no mention of an overpayment of enhancements

425. The Claimant then queried whether her half pay would include enhancements as it had so thus far. It was only at this stage that Mrs Thomas, in her letter dated 10 May 2016, advised it would not and furthermore, that enhancements paid to date had been paid in error. Mrs Thomas advised she had contacted Mrs Dodwell and Ms Evans to confirm if they had agreed to include enhancements but they confirmed they had not. She contacted Ms Dodwell as the Claimant referred to Ms Dodwell having made the agreement. However, as seen by the letter from Mr Durham in July 2015, he records that it there had been such an agreement by the Clinical Board Nurse, which at the time was Mrs Harrison (Acting from June 2015).

426. The Claimant had informed Ms Thomas that Ms Dodwell and Ms Harrison had agreed she would not be at a financial detriment. There cannot have been a proper investigation into these matters otherwise the letter from Mr Durham would have confirmed the position. The Respondent has retained

records on the Claimant dating back to 2010 and we had no reason to conclude the letter from Mr Durham was not as easily accessible.

427. We find there had plainly been such an agreement based on the letter from Mr Durham who specifically tells the Claimant her full pay would include enhancements on instruction of Mrs Harrison.

428. The reason given by the Respondent for withdrawing the enhancements was there had been a payroll error and that there had been no such agreement contradicted what the Claimant was told in writing by Mr Durham on 16 July 2015. The payment was only brought to Mrs Thomas' attention by the Claimant herself when she queried if going to half pay also meant it would affect her enhancements.

429. On 20 June 2016 Ms Harrison wrote to the Claimant addressing outstanding issues in respect of her salary, Injury Allowance claim and overpayment of enhancements and salary. The Claimant had made an application for Injury Allowance on the basis her absence from work since December 2014 was an industrial injury. M Harrison informed the Claimant she had been overpaid to the sum of £7,937.27 (gross), £4683.40 (net) for enhancements on sick pay between December 2014 and March 2016 (when her pay was reduced to 50%). The Claimant was owed £2749.80 gross accrued holiday pay. Ms Harrison explained that if the Claimant's application for Injury Allowance succeeded she would not have to repay the enhancements and would be due £2370.33 holiday pay. If it was not successful, she would still owe the Respondent money. Therefore, no accrued holiday pay was paid to the Claimant.

430. On 11 September 2016 the Claimant was informed her Industrial Injury claim had not been successful.

Findings in respect of Claimant's character

431. Having considered all of the evidence and various incidents we were taken to, it is appropriate to set out our findings about the Claimant's character and the reasons for making such findings. The Claimant has been referred to consistently and in a large number of the Respondent's witness statements as aggressive, rude, unprofessional, discourteous, intimidating. She is described by a number of different witnesses as ranting, frothing at the mouth, foaming, spitting in rage. She was alleged to have told Mrs Harrison and Ms Rees she hoped they would die when she had not done so at all. We have noted that many of the descriptions of the Claimant as rude and aggressive have come from management or nurses senior to the Claimant. We have also found that some of the Respondent's witness statements exaggerated the Claimant's behaviour when compared to notes that had been made at the time.

432. In contrast witnesses that generally worked with the Claimant on a peer level have described the Claimant in somewhat different terms, in particular we noted that the statements taken by Rhodri John from Mr O'Connor and Jason Ball, Amy Lewis' evidence under cross examination and that of Ms Towers and Mrs Davies. The Claimant is described variously as assertive tough

standing up for what she believes in and unafraid to challenge management (Mr Bolanas, Ms Casey) and at the same time as going about challenging management in the wrong way.

433. Mr Durham, the Claimant's line manager, told the Tribunal in his dealings with the Claimant she had always put the patient at the forefront. He also said that the Claimant was a very diligent and caring nurse and if she was raising concerns it would have been because she believed they needed to be raised.

434. We find that there were occasions when the Claimant has been rude, confrontational and assertive. The Claimant was passionate about patient care and safety and if she believed that an instruction was endangering patient safety and the Claimant's own professional standards she was not afraid to stand up to management and challenge the decisions. She did not always go about this in a polite way. She was not subservient and did not accept all instructions that were given without challenge. There were no issues whatsoever in respect of her nursing care on the contrary even Ms O'Brien praised her nursing abilities. In the duration of this claim we were taken to three complaints from patients or relative (the 2011 complaint letter, complaint from JF and the coroner complaint).

435. The Claimant herself recognised that if she felt people were not behaving appropriately or pulling their weight that she was more than willing to confront them about that and take issue with the individual concerned. The most telling example being the exchange with Mr O'Connor.

Evidence from the Claimant's witnesses

436. In addition to our findings above where we deal with evidence from the Claimant's witnesses we have found to be relevant to the issues in this case, we should also record evidence and the weight we attach to it from other witnesses called by the Claimant namely Mrs Rosemary Davies and Ms Wendy Hopkins.

437. Mrs Davies was formerly a Band 7 Team leader employed by the Respondent and worked in the EU department. She resigned in November 2015. She worked regularly with the Claimant and found her to be professional and hard working at all times, would raise concerns correctly and ask for help appropriately. She found the Claimant to be even tempered calm and an excellent patient advocate. The majority of Ms Davies witness statement was about her own employment and issues and she had cut and pasted her detailed and lengthy letter of resignation to Ms O'Brien into her witness statement. Except to corroborate a general culture within the Respondent which was also found by the Fiona Smith report there was no evidence directly relevant to the issues in the Claimant's case.

438. Ms Hopkins had not provided a witness statement. She had been the lead nurse responsible for ED prior to Ms O'Brien but had changed roles to a Consultant Nurse. She resigned in 2016 after becoming very unwell and was diagnosed with chronic PTSD. As with Ms Davies, the majority of Ms Hopkins

evidence was in relation to her own experiences. She corroborated the general culture and background as found by the Fiona Smith report.

The Law

439. The Respondent provided written legal propositions and closing submissions, as well as a bundle of authorities. We do not set out all of the authorities to which we were referred; these can be found in the Respondent's legal propositions.

440. The Claimant also made written closing submissions.

441. The parties also had the opportunity to submit written representations following the Supreme Court decision in **Royal Mail Group v Jhuti [2019] UKSC 55.**

Protected disclosures

442. The first protected disclosure relied upon predated 25 June 2013 and fell to be determined prior to the amendments made by S17 and S18 of the Enterprise and Regulatory Reform Act 2013. S17 inserted the public interest requirement and S18 removed good faith from the qualifying aspect of the disclosure and inserted it a new subsection (6A) into remedies in Section 49.

443. Therefore, in order to be a qualifying disclosure the first disclosure relied upon needed to have been made in good faith.

Pre June 2013 definition:

S43B Disclosures qualifying for protection

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

(sets out the same sub sections a – f as below)

……

S43C Disclosure to employer or other responsible person

(1) A qualifying disclosure is made in accordance with this section if the worker makes a disclosure in good faith-

(a) To his employer…

……..

Existing S43B definition:

43B Disclosures qualifying for protection

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

(a) that a criminal offence has been committed, is being committed or is likely to be committed,

(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,

(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,

(d) that the health or safety of any individual has been, is being or is likely to be endangered,

(e) that the environment has been, is being or is likely to be damaged, or

(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed.

444. In determining whether there has been a protected disclosure, a cumulative approach may be taken whereby more than one communication can be read together to amount to a qualifying disclosure, when taken separately would not each amount to a disclosure **(Norbrook Laboratories v Dhaw [2014] ICR 540).**

445. In **Kilraine v Wandsworth London Borough Council [2018] ICR 1850**, the Court of Appeal held that the concept of information in S43B (1) was capable of covering statements which might also be allegations. In order for a statement to be a qualifying disclosure it had to have sufficient factual content and specifity such as is capable of tending to show one of the matters listed in subsection (1) and this was a question of fact for the Tribunal. The disclosure should be assessed in the light of the context in which it is made.

446. Where the disclosure is said to be a breach of a legal obligation (S43B (1) (b)), if the legal obligation is obvious then it need not necessarily be identified **(Bolton School v Evans [2006] IRLR 500** (EAT upheld by CA)) and **Blackbay Ventures Ltd v Gahir [2014] ICR 747))**. If it is not obvious, the source of the legal obligation should be identified by the Tribunal and how the employer failed to comply with it. The identification of the obligation does not have to be detailed or precise but it must be more than a belief that certain actions are wrong **(Eiger Securities LLP v Korshunova [2017] ICR 561).**

<u>Reasonable belief and public interest</u>

447. In **Chesterton Global Ltd (t/a Chestertons) v Nurmohamed [2018] IRLR 837),** the following approach when considering reasonable belief was set out (per Lord Justice Underhill:

"26. The issue in this appeal turns on the meaning, and the proper application to the facts, of the phrase "in the public interest". But before I get to that question I would like to make four points about the nature of the exercise required by section 43B (1) .
27. First, and at the risk of stating the obvious, the words added by the 2013 Act fit into the structure of section 43B as expounded in Babula (see para. 8 above). The tribunal thus has to ask (a) whether the worker believed, at the time that he was making it, that the disclosure was in the public interest and (b) whether, if so, that belief was reasonable.

28. Second, and hardly moving much further from the obvious, element (b) in that exercise requires the tribunal to recognise, as in the case of any other reasonableness review, that there may be more than one reasonable view as to whether a particular disclosure was in the public interest; and that is perhaps particularly so given that that question is of its nature so broad-textured. The parties in their oral submissions referred both to the "range of reasonable responses" approach applied in considering whether a dismissal is unfair under Part X of the 1996 Act and to "the Wednesbury approach" employed in (some) public law cases. Of course we are in essentially the same territory, but I do not believe that resort to tests formulated in different contexts is helpful. All that matters is that the Tribunal should be careful not to substitute its own view of whether the disclosure was in the public interest for that of the worker. That does not mean that it is illegitimate for the tribunal to form its own view on that question, as part of its thinking – that is indeed often difficult to avoid – but only that that view is not as such determinative.

29. Third, the necessary belief is simply that the disclosure is in the public interest. The particular reasons why the worker believes that to be so are not of the essence. That means that a disclosure does not cease to qualify simply because the worker seeks, as not uncommonly happens, to justify it after the event by reference to specific matters which the tribunal finds were not in his head at the time he made it. Of course, if he cannot give credible reasons for why he thought at the time that the disclosure was in the public interest, that may cast doubt on whether he really thought so at all; but the significance is evidential not substantive. Likewise, in principle a tribunal might find that the particular reasons why the worker believed the disclosure to be in the public interest did not reasonably justify his belief, but nevertheless find it to have been reasonable for different reasons which he had not articulated to himself at the time: all that matters is that his (subjective) belief was (objectively) reasonable. [4]

30. Fourth, while the worker must have a genuine (and reasonable) belief that the disclosure is in the public interest, that does not have to be his or her predominant motive in making it: otherwise, as pointed out at para. 17 above, the new sections 49 (6A) and 103 (6A) would have no role. I am inclined to think that the belief does not in fact have to form any part of the worker's motivation – the phrase " <u>in</u> the belief" is not the same as "motivated by the belief"; but it is hard to see that the point will arise in practice, since where a worker believes that a disclosure is in the public interest it would be odd if that did not form at least some part of their motivation in making it. "

448. Public interest is not defined in ERA. The question is whether in the worker reasonably believed the disclosure was in the public interest, not whether objectively it can be seen as such. **<u>Chesterton</u>** also discussed the issue of public interest (paragraphs 34 and 37) - this was a case where the disclosure was in relation to a breach of the employee's own contract).

<u>Motive and good faith</u>

449. In respect of the first disclosure relied upon, as falling before 25 June 2013, the question of whether it was made in good faith needs to be addressed in the context of whether it qualified as a disclosure. For disclosures 2 – 4 the question is relevant to remedy.

450. The Respondent cited **Street v Derbyshire Unemployed Workers' Centre [2005] ICR 97** in respect of good faith and in particular as the appropriate

authority for their submission that the Claimant did not make the first protected disclosure in good faith. **Street** provides that a Tribunal should only find that a disclosure was not made in good faith when they are of the view that the dominant or predominant purpose of making it was for some ulterior motive unrelated to the statutory objectives.

Detriment claim

451. Under S47B ERA 1996 the employee has the right not to be subjected to any detriment by any act, or deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.

452. A detriment will exist if by reason of the act or acts complained of a reasonable worker would or might take the view that he had been disadvantaged in the circumstances in which he thereafter had to work. An unjustified sense of grievance cannot amount to a detriment but it is not necessary to demonstrate some physical or economic consequence **(Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11).**

Causation

453. If the employee establishes that they made protected disclosures and there were detriments , S48(2) ERA 1996 provides it is for the employer to show the ground on which any act or deliberate failure to act was done, only by showing that the making of the protected disclosure played no part whatsoever in the relevant acts or omissions. The standard of the burden of proof required is if the protected disclosure materially influences (in the sense of more than a trivial influence) the employer's treatment of a whistle-blower **(Fecitt v NHS Manchester [2012] ICR 372).**

454. An employer will not be liable if they can show the reason for the act or failure to act was not the protected act but one or more features properly severable from it **(Martin v Devonshires Solicitors [2011] ICR 352, Panayiotou v Kernaghan [2014] IRLR 500).**

Time Limits – Detriments

455. S48(3) ERA 1996 provides that the Tribunal shall not consider a complaint unless it is presented before the end of three months beginning with the date of the act or failure to act to which the complaint relates, or where that act or failure is part of a series of similar acts or failures, the last of them. If the claim is presented out of time the test is one of reasonable practibility.

456. S48(4) provides that where an act extends over a period, the "date of the act" means the last day of that period and a deliberate failure to act shall be treated as done when it was decided on.

457. Time will start to run from the date of the act or failure to act, not the date on which the employee becomes aware **(McKinney v Newham London BC [2015] ICR 495).** In **Tait v Redcar and Cleveland Borough Council [2008] All ER**, disciplinary action was found to be capable of being classified as 'an act extending over a period'. There was also a finding that although there was

no doubt that there had been an initial 'act' of suspension, the state of affairs thereafter in which the employee remained suspended pending the outcome of the disciplinary proceedings could quite naturally be described not simply as a consequence of that act but as a continuation of it.

458. It is important not to confuse the act with the effects of the detriment if they continue to be felt. Furthermore, the meaning of "series of similar acts" in S48(3) (a) differs to the meaning of an act extending over a period of time in S48(4) (a). We note the following guidance in **Arthur v London Eastern Railway Ltd [2007] ICR 193** (per Mummery LJ):

"29. Parliament considered it necessary to make exceptions to the general rule where an act (or failure) in the short three-month period is not an isolated incident or a discrete act. Unlike a dismissal, which occurs at a specific moment of time, discrimination or other forms of detrimental treatment can spread over a period, sometimes a long period. A vulnerable employee may, for understandable reasons, put up with less favourable treatment or detriment for a long time before making a complaint to a tribunal. It is not always reasonable to expect an employee to take his employer to a tribunal at the first opportunity. So an act extending over a period may be treated as a single continuing act and the particular act occurring in the three-month period may be treated as the last day on which the continuing act occurred. There are instances in the authorities on discrimination law of a continuing act in the form of the application over a period of a discriminatory rule, practice scheme or policy. Behind the appearance of isolated, discrete acts the reality may be a common or connecting factor, the continuing application of which to the employee subjects him to ongoing or repeated acts of discrimination or detriment. If, for example, an employer victimised an employee for making a protected disclosure by directing the pay office to deduct £10 from his weekly pay from then on, the employee's right to complain to the tribunal would not be limited to the deductions made from his pay in the three months preceding the presentation of his application. The instruction to deduct would extend over the period during which it was in force and the last deduction in the three months would be treated as the date of the act complained of.

30. The provision in section 48(3) regarding complaint of an act which is part of a series of similar acts is also aimed at allowing employees to complain about acts (or failures) occurring outside the three-month period. There must be an act (or failure) within the three-month period, but the complaint is not confined to that act (or failure.) The last act (or failure) within the three-month period may be treated as part of a series of similar acts (or failures) occurring outside the period. If it is, a complaint about the whole series of similar acts (or failures) will be treated as in time.

31. The provision can therefore cover a case where, as here, the complainant alleges a number of acts of detriment, some inside the three-month period and some outside it. The acts occurring in the three-month period may not be isolated one-off acts, but connected to earlier acts or failures outside the period. It may not be possible to characterise it as a case of an act extending over a period within section 48(4) by reference, for example, to a connecting rule, practice, scheme or policy but there may be some link between them which makes it just and reasonable for them to be treated as in time and for the complainant to be able to rely on them. Section 48(3) is designed to cover such a case. There must be some relevant connection between the acts in the three-month period and

those outside it. The necessary connections were correctly identified by Judge Reid QC as (a) being part of a "series" and (b) being acts which are "similar" to one another.
32. The provisions for acts extending over a period and for acts which are part of a series of similar acts are important to both sides because they affect the jurisdiction of the tribunal and they could also affect the amount of compensation that can be awarded.

And at paragraph 35:

35. In order to determine whether the acts are part of a series some evidence is needed to determine what link, if any, there is between the acts in the three-month period and the acts outside the three-month period. We know that they are alleged to have been committed against Mr Arthur. That by itself would hardly make them part of a series or similar. It is necessary to look at all the circumstances surrounding the acts. Were they all committed by fellow employees? If not, what connection, if any, was there between the alleged perpetrators? Were their actions organised or concerted in some way? It would also be relevant to inquire why they did what is alleged. I do not find "motive" a helpful departure from the legislative language according to which the determining factor is whether the act was done "on the ground" that the employee had made a protected disclosure. Depending on the facts I would not rule out the possibility of a series of apparently disparate acts being shown to be part of a series or to be similar to one another in a relevant way by reason of them all being on the ground of a protected disclosure.

S103A Unfair Dismissal

459. An employee has the right not to be unfairly dismissed if the reason (or if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.

460. There is a different causation test to the detriment claim as the disclosure must be the primary motivation rather than a material influence.

461. In S103A constructive dismissal claims the question to be determined is whether the principal reason for the fundamental breach in contract was the protected disclosure.

462. We found the summary of Judge Eady QC of assistance when considering a S103A claim in a constructive dismissal case **(Salisbury NHS Foundation Trust v Wyeth UKEAT/0061/15):**

"***[26]*** *Moreover, when asking what was the reason or principal reason for a dismissal, that is a "reason why" question, which is not the same as a "but for" test, see as put by HHJ Peter Clark in the case of* Arriva London South Ltd v Nicolaou *(2011) UKEAT/0293/11/RN, [2012] ICR 510 "28 The reason why question must not be confused with the 'but for' test . . . . In short, whereas the but for test may be appropriate in 'criterion' cases . . . it is the reason why question which prevails in circumstances where the employer's mental processes (conscious or subconscious) are in issue. The latter question arises in the present case."*

[27] *It can, furthermore, be the case that an employer may dismiss an employee in response to a protected disclosure but still (see* Martin v Devonshires Solicitors *(2010) UKEAT/0086/10, [2011] EqLR 108, [2011] ICR 352 EAT, at para 22) say that the reason for the dismissal "*was not the complaint [the protected disclosure] as such but some feature of it which can properly be treated as separable*".* Martin v Devonshires *was a case involving a protected act for victimisation purposes, but the reasoning can be read across to a protected disclosure claim. The classic example of this distinction might be a dismissal that apparently takes place in relation to the making of a protected disclosure but where it is not, in fact, that disclosure that is the reason for the dismissal but the manner in which it was made.*

[28] *A subsequent division of the EAT, in* Woodhouse v West North West Homes (Leeds) Ltd *(2013) UKEAT/0007/12, [2013] IRLR 773, [2013] EqLR 796 per HHJ Hand QC, warned that ETs should not be too quick to see cases as fitting within the* Martin v Devonshires *template; that would generally be the exception rather than the rule, and it was right that appellate courts remain mindful that the assessment will be for the ET as the first-instance tribunal (as acknowledged in* Martin*).*

[29] *Returning to the case-law on protected disclosures, it has been further recognised that there can be a distinction between the protected disclosure and the way in which the Respondent responds to it, see per Carnwath LJ, sitting in the EAT in* Price v Surrey County Council and Governing Body of Wood Street School *[2011] UKEAT/0450/10/SM:*

"52 This approach in our view reflects a misconception of the statutory scheme. It is about the protection of 'whistle-blowers'. The purpose is to ensure that employees do not suffer simply because they have had the courage to speak up about problems affecting their workplace. Thus it is the 'making' of the protected disclosure which is the focus of attention, and which must be the principal reason for the dismissal, or for the other detrimental action or inaction In this case, by contrast, Mrs Price's forced resignation came about, not because of the making of her complaint as such, but because of the inadequacy in one important respect of the authorities' response to it."

[30] *Where an ET has to identify whether a protected disclosure was the reason or principal reason in constructive dismissal case, it will be important to ensure that the correct focus is maintained. As was held in* Berriman v Delabole State Ltd *[1985] IRLR 305, [1985] ICR 546 CA ". . . It is the employers' reasons for their conduct not the employee's reaction to that conduct which is important . . .". (p 551B)*

[31] *In such a case, the ET will have identified the fundamental breaches of contract that caused the employee to resign in circumstances in which she was entitled to claim to have been constructively dismissed. Where no reason capable of being fair for s 98 purposes has been established by the employer, that constructive dismissal will be unfair. Where, however, the reason remains in issue because there is a dispute as to whether it was such as to render the dismissal automatically unfair, the ET then has to ask what was the reason why the Respondent behaved in the way that gave rise to the fundamental breaches of contract? The Claimant's perception, although relevant to the issue why she left her employment (her acceptance of the repudiatory breach), does not answer that question.*

463. Although not a case concerning constructive dismissal, in **Royal Mail Group Ltd v Jhuti 2019 UKSC 55, SC,** the Supreme Court held that if a person in the hierarchy of responsibility above the employee determines that she (or he) should be dismissed for a reason but hides it behind an invented reason which the decision-maker adopts, the reason for the dismissal is the hidden reason rather than the invented reason.

S98 ERA 1996 claim

464. The relevant law is contained in Section 95 (1) c) ERA 1996 which sets out circumstances in which the Claimant will be dismissed if the employee terminates the contract.

465. Following **Western Excavating (ECC) v Sharp [1978] IRLR 27**, the employee must establish:

- that there was a fundamental breach of contract by the employer;
- that the employer's breach caused the Claimant to resign;
- the employee must not delay too long before resigning or he will have affirmed the breach and lose the right to be discharged from the contract.

466. In **Malik & Mahmud v Bank of Credit & Commerce International SA [1997] 3 W.L.R 95** the implied term of mutual trust and confidence was held to be as follows:

"The employer shall not without reasonable and proper cause conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."

Discussions and Conclusions

467. **Conclusions on Protected Disclosure 1**

Date	Qualifying disclosure - section	Summary
3 May 2013	S43B (1) (a)	Criminal offence
	S43B (1) (b)	Failure to comply with any legal obligation
	S43 (1) (d)	Health and safety

468. The first protected disclosure relied upon was prior to 25 June 2013 and accordingly fell to be determined under the law prior to the amendments made by the Enterprise and Regulatory Reform Act 2013 (see above at paragraph 442).

Did the Claimant make a disclosure of information?

469. There were three forms of communication that made up this disclosure which may be taken cumulatively; the verbal disclosure to the site manager Richard Jones on 3 May 2013, and the subsequent violence and aggression form and accompanying letter dated 22 May 2013. All three were set out in the Claimant's ET1 in paragraphs 7 – 9 and the sub sections of S43B were set

out in paragraph 10. S43B (1) (a) was the criminal offence namely the alleged assault on the Claimant by Lisa Waters. S34B (1) (b) was described as the health and safety of the Claimant, staff generally and patients. S43B (1) (d), breach of legal obligation category was added by way of amendment. Our findings of fact as to what was conveyed to Mr Jones and on the violence and aggression form and accompanying letter as set out above in paragraphs 106-108.

Section 43 B (1) (a) – criminal offence

470. This was said to be an assault on the Claimant by Ms Waters.

471. Mr Jones' witness statement did not set out the exact words used by the Claimant. However his words relay that the Claimant informed him she had contacted the police regarding an alleged assault on her by Ms Waters.

472. This is what the Claimant said in her violence and aggression incident form specifically:

"… At this point she attempted to direct me to the corridor side by holding my arm. I clearly advised her that I did not want her to touch me. Ignoring my wishes she put her arm firmly around my shoulder and attempted to direct me where she wanted me to go."

473. The Claimant, in this passage provided information about what had happened specifically in relation to the alleged assault. She describes where they were, what was said and by whom, how Ms Waters acted, relaying that she attempted to direct the Claimant by holding her arm, then putting her arm clearly around her shoulder and again attempting to direct the Claimant where she [Ms Waters] wanted to go. The Claimant relays that she told Ms Waters she did not want her to touch her and yet she touched her again by putting her arm firmly around her shoulder.

474. The Claimant does not directly say in the form that this was an alleged assault or a criminal offence. The Respondent submitted that the form provided no allegation or information of an assault. We do not agree with this contention for the following reasons.

475. The Claimant clearly relayed information and an allegation about unwanted touching on the form. The Claimant gives information about how she was touched after she informed Ms Waters she did not want to be touched. She used the Respondent's own prescribed conduit for disclosing the information to her employer on their violence and aggression form. The Claimant did not use the "ordinary" incident form. The very choice of form also, in our view denoted that a disclosure of a criminal assault was being made. The key word being in the title of the form, "violence and aggression". Furthermore the Claimant ticked the box 'physical' describing the type of incident that had taken place and that she had reported it to the police. She conveyed specific information detailing the date, time, location description of events, who was involved and that it had been reported to the police, on a form clearly designed and denoted by the Respondent to be used in cases of violence and aggression.

476. It would be in our view difficult to see how all of the above information would not have amounted to sufficient factual content amounting to a disclosure of information and an allegation that a criminal offence had occurred. We find the Claimant had made a disclosure of information to her employer that tended to show a criminal offence had been or was likely to have been committed.

S34B (1) (b) – health and safety

477. There are two reasons why we consider that the information provided by the Claimant was a disclosure of information that the Claimant reasonably believed tended to show that the health and safety of any individual had been, was being or was likely to have been endangered.

478. Firstly is in relation to the health and safety of the Claimant. For the same reasons as we have set out above under the criminal offence discussion, we are of the view that the information disclosed that the health and safety of the Claimant had been endangered as she had been subjected to unwanted touching by Ms Waters. The manner of the unwanted touching was sufficient in our view for the Claimant to have reasonably perceived her health and safety in danger. Further, where the Claimant had stated that the Respondent was complacent about dealing with issues pertaining to bullying and harassment, in our judgment it must follow that if an employee discloses information that their employer is complacent about dealing with issues of bullying and harassment that this could tend to show that the health and safety of their employees has been, is being or is likely to be endangered.

479. Secondly is in relation to the health and safety of others. In the covering letter of 22 May 2013 the Claimant relays information about the aggressive patient (see paragraph 108 above). The Claimant describes how Ms Towers had been working alone with the patient who had been swearing profanities at staff, patients and relatives. She described how as a consequence none of the patient's basic medical requests had been performed and how visiting relatives were concerned for their relative's safety. The Claimant disclosed information to her employer that showed she perceived that the health and safety of the nurse, the patient and other patients and their relatives was endangered.

S43B (1) (d) Failure to comply with legal obligation

480. We have considered whether the disclosure of information we have considered above also was a disclosure of information in respect of S43B (1) (b). Was it information that the Claimant reasonably believed tended to show that a person had failed, is failing or is likely to fail to comply with any legal obligation to which he is subject?

481. No legal obligation has been specifically identified in the Claimant's ET1. It was not pleaded in the amendment. Neither party addressed this issue in their submissions in relation to protected disclosure one. In our view, this may well have been that the legal obligation was obvious as the legal obligation on an employer to protect their employees from being assaulted at work and / or protect patients from harm **(Bolton School v Evans)**. If we are wrong (that the source of the legal obligation was obvious) then the Claimant,

in any event, identified the source of the legal obligation (**Blackbay** and **Eiger Securities**) for the following reasons.

482. In the Claimant's letter of 22 May 2013 she explained she had contacted the police about the alleged assault by Ms Waters as nothing had been done about her earlier report of what she considered to be a verbal assault by Ms Shanahan. She goes on to say:

"In view of all of the above and what I consider to be complacency on behalf of the Trust in dealing with issues pertaining to bullying and harassment within the workplace I felt I had no alternative but to address my concerns with a body independent of the Trust."

483. This in our view set out the source of the legal obligation that the Claimant believed the Respondent was subject to – an obligation to deal with issues of bullying and harassment – and how they had failed to comply with it – complacency thus requiring report of an assault at work to the police. We therefore concluded that the Claimant had made a disclosure of information that she reasonably believed tended to show the Respondent had failed and was failing to comply with a legal obligation to protect employees and patients from harm.

Were the disclosures made in good faith and in the public interest?

484. The Respondent submitted that the disclosures were not made in good faith and that the Claimant had no real or objective belief in such matters. The Claimant made the disclosures with an ulterior motive, namely in response to allegations made about her that she was rude and aggressive towards Dr Al-Mudhaffar and aggressive and shouted at Ms Water.

485. Dealing firstly with the alleged ulterior motive. We reject this contention. At the time the Claimant made the disclosures (on the night of 3 May to Mr Jones and then on 22 May 2013) the Claimant was not aware that allegations had been made about her by Dr Mudhaffar or Ms Waters. Indeed, Dr Mudhaffar did not at any time instigate allegations. Once an investigation was initiated he certainly informed Mr John about the Claimant's behaviour towards him but it is incorrect to say he made allegations against the Claimant. It therefore cannot be the case that the Claimant's disclosures were retaliatory in respect of Dr Mudhaffar.

486. Ms Waters had emailed Ms O'Brien on 7 May 2013 but the Claimant was not aware of this.

487. This was not a case whereby the Claimant only made a disclosure after she became aware that she was facing disciplinary action. The Claimant was unaware that she would be the individual to face action about the events on the night of 3 May 2013 until she was informed by Ms O'Brien in March 2014. We have taken into account her actions on the night in question. There was no inertia by the Claimant in making the disclosures. They came immediately. She immediately paged the site manager. She informed the police. We do not think it is plausible that the Claimant took these steps out of an ulterior motive, in anticipation that that allegations would be made against her. What is a far more plausible explanation is that the Claimant reasonably believed

that she had been assaulted by Ms Waters and that the situation with Patient A was endangering the health and safety of staff and other patients and Patient A himself. We are even more persuaded that the Claimant reasonably believed both of these things to be true given our findings of fact set out at paragraphs 79, 80 and 88-93 above. We found that Patient A was behaving in a manner where any reasonable person would perceive that health and safety was being endangered. We have also found that the Claimant was subjected to being pulled by the arm and then pushed by Ms Waters on the night in question.

488. The disclosures made by the Claimant were essentially made up of two parts, firstly what she said about Ms Waters conduct towards to the Claimant and secondly, the information relayed about the behaviour of Patient A on 2 and 3 May 2013 towards staff and patients. The Respondent did not contend that the disclosures were not in the public interest; their submissions focused on motive and lack of objective belief amounting to the disclosure not being made in good faith.

489. Nonetheless we set out conclusions in this regard. If, as we have found, the Claimant reasonably believed she had been subjected to an assault by a Senior Sister in charge of the EU department, at a time she was reporting her concerns about Patient A, we find that she must have also reasonably believed the disclosure of this information was in the public interest. Also, that in disclosing information about Patient A (hat Ms Towers had been left alone, none of the basis medical interventions had been able to be performed on Patient A due to his behaviour and relatives being concerned for the safety of the patients) the Claimant had a reasonable belief this information would be in the public interest. The Claimant refers to complacency within the Trust regarding bullying and harassment and that Ms Waters was unaware of Patient A's behaviour despite being in charge of the whole of the EU and AU department.

490. Taking all of the above into account, we find that the disclosures were made in good faith and the Claimant had a reasonable belief the disclosures tended to show the three grounds relied upon.

Conclusions - Protected Disclosure 2

Date	Qualifying disclosure – section	Summary
9 September 2013	S43B (1) (b)	Failure to comply with a legal obligation
	S43 (1) (d)	Health and safety

Did the Claimant make a disclosure of information?

491. This was the disclosure that the Claimant had challenged an inappropriate allocation of 2 patients to 1 bed space. Our findings of fact are set out at paragraphs 138-148 above. This disclosure occurred after 25 June 2013 and fell to be determined in accordance with S43B ERA 1996.

492. The Respondent submitted this was not a disclosure of information and the Claimant had made observations/ and or behaved inappropriately because she disagreed with the decision.

493. It was common ground that the Claimant had vocally expressed her disagreement with the decision to allocate two patients to one bed area. The Claimant relayed her concerns in very strong terms about this allocation to Ms Skyrme. Ms Skyrme told the Tribunal that the Claimant had said the decision was scandalous and should not be put up with. The Claimant complained to the site practitioner.

494. We have considered the information disclosed by the Claimant in the context of the surrounding findings of fact. We acknowledge we did not have evidence of the exact words used to Ms Skyrme only that the Claimant "relayed her concerns". We have looked at the facts which were not in dispute of the surrounding circumstances. An elderly patient with dementia was to spend the remainder of the night in a wheelchair in the same bed space as his wife who was on a trolley and the Claimant was to be the nurse responsible for their care. The risk of that patient falling was obvious to the Tribunal as was the risk of allocating two patients to one bed space. It is not for the Tribunal to comment on the decision taken by the Respondent on the night in question. There is no doubt the hospital was under significant pressure and a judgment call was made, given there was no other bed available. What is for us to determine was whether, in disclosing the Claimant's concerns regarding this decision, the Claimant had a reasonable belief that her concerns tended to show both a failure to comply with a legal obligation and a risk of health and safety. We have concluded that she did make such a disclosure of information. She relayed information which left Ms Skyrme in no doubt as to what her concerns were and why. She reported matters to the site practitioner, the most senior manager on site.

495. In respect of the legal obligation this again had not been addressed in the schedule. We considered whether the source of the legal obligation the Claimant believed was being breached was obvious and we decided that it must have been. A hospital is legally obliged to protect the safety of its patients. The patient had been admitted. He had dementia and the plan was for him to spend the night in a wheelchair. It was already the early hours of the morning at the time he was brought to CDU. It was reasonable for the Claimant to have believed that this plan for this patient would be in breach of a legal obligation to look after patients. We also find, for the same reasons that the Claimant reasonably believed that the health and safety of this patient was likely to be endangered if he had to spend the night in a wheelchair. The Claimant was responsible for the patient, he was placed under her care.

496. The disclosure the Claimant made (to Ms Skyrme, who was the Senior Sister in charge that night) was in the reasonable belief of the Claimant made in the public interest. The Claimant described the decision as "scandalous". It was not a disclosure made in respect of her own contract or breach thereof. Having regard to the guidance in paragraphs 34 (approved as appropriate factors in paragraph 37 in **Chesterton**), in our view the disclosure was reasonably believed to be in the public interest by the Claimant, denoted by the description of the decision as scandalous as well as a matter of common sense. The public would be interested to know that an elderly patient with

dementia had to spend the night in a wheelchair as there were no beds available in the major A&E department in Cardiff.

Conclusions - Protected Disclosure 3

Date	Qualifying disclosure – section	Summary
12 September 2013	S43B (1) (b)	Failure to comply with any legal obligation
	S43 (1) (d)	Health and safety

Did the Claimant make a disclosure of information?

497. This was asserted to be the incident form that was provided to Mr Durham on 12 September 2013. On the form, the Claimant provided information that a patient who had been prescribed a drug at 19.30 hours did not have it administered it until about 12.30 – 1.30am due to staffing pressures the Claimant was under. She effectively self-reported being unable to administer the drug due to the pressure she was under. In our view this was a disclosure of information. It conveyed facts and reasons why it had happened.

498. The information disclosed by the Claimant described the reasons she gave at the time for being unable to administer the drug. These were that 5 patients had been transferred, 4 at 19.00 (thirty minutes before the drug should have been administered). She had a patient with learning disabilities who had also not been administered a drug that required the Claimant to organise and a patient requiring insulin infusion. The Claimant reported she had been unable to take her second break and that 6 patients to 1 nurse were insufficient.

Did the Claimant reasonably believe that the information tended to show that the health and safety of an individual had been, was being or was likely to have been endangered/ and / or that a person had failed to comply with a legal obligation?

499. The Respondent submitted that the disclosure was not in the public interest and the Claimant did not have a reasonable belief in it being in the public interest. Further that it did not disclose a failure to comply with a legal obligation or that the health and safety of an individual had been endangered. The reason the Claimant provided the information / completed the incident form was to provide an explanation and an excuse, personal to her why she did not administer the drug to the patient timeously.

500. We do not accept the Respondent's submission as to the reason the Claimant provided the form. By this we assume the Respondent submits the Claimant was at fault for being unable to administer the drug and the reasons relayed on the incident form were either untrue or not the reason(s) the Claimant was unable to administer the drug. Firstly there was no evidence from the Respondent to support the contention that the reason the Claimant had been unable to administer the drug were for reasons personal to the Claimant. We preferred the Claimant's contemporaneous account as to the reasons she had been unable to administer the drug which were as summarised above at paragraph 148. Secondly, we find it implausible to suggest the reason the Claimant self-reported herself was to provide an excuse for her inability to administer the drug. This simply does not accord with the detailed reasons

she provided at the time. It was clear to us from the detail on the form that the Claimant reasonably believed the reason she was providing the form was to highlight how under staffed she had been and the consequences of that (the inability to administer the drug to the patient) and not for some underlying false motive.

501. As regards to the legal obligation, again we were not directed to what the legal obligation was, but again, we find it must be obvious that the Respondent, and the Claimant were subject to a legal obligation to ensure that patients within their care have drugs administered to them that have been prescribed. We did not have any evidence as to what the consequences might have been for the patient in having Octaplex 5 hours late but that was not the question requiring determination. The issue was whether the Claimant reasonably believed that the information tended to show a breach of a legal obligation and we find that she did.

Public interest

502. Both subjectively (from the Claimant's reasonable belief) and objectively, information that a nurse working in an EU department was under pressure of work to the extent she was unable to administer drugs prescribed until 5 – 6 hours later, must in our view be in the public interest. The information was not in relation to a breach of the Claimant's own contract of employment or of a personal nature with no wider public interest implications.

Conclusions on Protected Disclosure 4

Date	Qualifying disclosure – section	Summary
15 September 2013	S43B (1) (b)	Failure to comply with any legal obligation
	S43 (1) (d)	Health and safety

Did the Claimant make a disclosure of information?

503. We have to determine is whether or not the words used by the Claimant on that occasion amounted to disclosure of information. The protected disclosure was said to be about how Ms Farrow was speaking to Ms Wallace and that the Claimant accused Ms Farrow of demonstrating bullying and threatening behaviour. This must have been in relation to the comments made by the Claimant in the office, rather than during the initial exchange with Ms Farrow. We had limited evidence from the Claimant about what words were used. We found that the words used were that the Claimant accused Ms Farrow of threatening the staff [in AU] and bullying them to move patients.

504. We find that the words used by the Claimant to Ms Farrow were allegations rather than a disclosure of information. The Claimant did not disclose information or convey facts. She did not use words that could have suggested link between Ms Farrow's behaviour and an inappropriate or potentially dangerous transfer of the patient. She expressed an opinion and allegations in what she accepted was a heated exchange and inappropriate behaviour

on her part. We have reminded ourselves of the guidance in **Kilraine** that a disclosure of information can cover statements which might also be characterized as allegations and also that not every statement involving an allegation would constitute "information". In our judgment, the words used by the Claimant did not have sufficient factual content and specificity to be capable of tending to show a breach of S43B (1) (b) or (1) (d).

505. As we have decided there was not a disclosure of information, we do not need to deal with whether we considered that the Claimant reasonably believed that the information tended to show that the health and safety of an individual had been, was being or was likely to have been endangered/ and / or that a person had failed to comply with a legal obligation.

Conclusions – Detriment 1

27 September 2013	The Claimant is summoned to a meeting with Sharon O'Brien in which she is accused of being rude to Senior Nurse Skyrme and being insubordinate to Senior Staff Nurse Louise Farrow. In this meeting, Sharon O'Brien likened Nursing to the army, and that nurses have to do as they are told whether "they like it nor not".

506. This detriment was related to protected disclosures 2 and 4. We have found that disclosure 4 did not amount to a protected disclosure.

507. The term detriment is not defined under S47 B ERA 1996. A detriment may exist if a reasonable worker would or might take the view that the action of an employer was in all the circumstances to his detriment. A detriment will put an employee under a disadvantage.

508. This detriment is made up of two elements.

509. Firstly the Claimant was summonsed to a meeting and secondly that the Claimant was informed that nurses have to do as they are told whether they like it or not.

510. Dealing with the first element of the alleged detriment. We have considered whether the Claimant being required to attend the meeting with Ms O'Brien on 27 September 2013 could amount to a detriment. We have concluded that this could not amount to a detriment. Ms O'Brien had received an external complaint and two internal complaints regarding the Claimant's behaviour. Notwithstanding the vehicle for its passage to Ms O'Brien there was no suggestion that the complaint letter from JF was manufactured. There had been email complaints from Ms Skyrme and Ms Farrow. It was legitimate and reasonable for Ms O'Brien to have requested the Claimant to attend a meeting to discuss these matters. The Claimant was not subjected to any outcome in terms of any formal or informal disciplinary action as a result of those complaints at that respective time. The Claimant has not demonstrated any disadvantage out of the act of summonsing her to a meeting.

511. Turning now to the second element of the alleged detriment. The Respondent disputed that the Claimant had been told by Ms O'Brien that nurses have to do as they are told whether they like it or not. Our findings of fact in this regard are at paragraph 180 above. We found that Ms O'Brien did make comments to this effect and that the Claimant went away from the meeting with the understanding that she was not permitted to challenge decisions being made as akin to being in the army.

512. We have looked at it from the viewpoint of the Claimant being a nurse with professional obligations. The instruction given by Ms O'Brien did amount to a detriment as the Claimant understood that contrary to her nursing professional standards, she had to "follow orders" and not question decisions on the nurses in charge. This was a disadvantage as the Claimant was being instructed to follow instructions she may not agree with and may have put her in breach of her professional obligations as a nurse.

513. In respect of causation we had to consider whether the detriment was done on the ground the Claimant made a protected disclosure. One of the reasons the Claimant was subjected to the detriment was the second protected disclosure in respect of her challenge to Tracey Skyrme concerning the inappropriate allocation of two patients to one bed space. This was one of the reasons the Claimant was required to attend the meeting. The detriment – that the Claimant must do as she is told – arose from a disclosure the Claimant had made where she was challenging a decision of the nurse in charge.

514. The detriment occurred on 27 September 2013. The detriment was an act rather than a failure to act. The claim was presented significantly outside of the three months beginning with the date of the act. We therefore return to the time point below in our conclusions under paragraph 633 .

Conclusions - Detriment 2

10 January 2014	The Claimant is accused of being rude and unprofessional, shouting at a Senior Nurse, being rude and abusive and undermining staff.

515. This is said to have occurred in 10 January 2014. Our findings of fact in relation to this incident are set out at paragraphs 196-203 above. This was the night where the patient who required specialing was transferred to the care of the Claimant without anyone to special him. The detriment is described as being accused of being rude and unprofessional, shouting at a Senior Nurse, being rude and abusive and undermining senior staff. These are the allegations that led to detriment 3 (suspension). The detriment is one of being accused.

516. There was some discussion that the Claimant had sought to change the allegation as advanced on the basis that Ms O'Brien was the accuser and not Ms Andal and Ms Martin. This was not our understanding of the detriment and we accept the Respondent's position that it is as put in the schedule. The only persons who accused the Claimant of the conduct on 10 January 2014 are Ms Andal and Ms Martin.

517. We have considered whether being accused, or being subject to an accusation could amount to a detriment. We have concluded that being accused could in theory amount to a detriment and put someone to a disadvantage especially if the outcome of the accusations leads to disciplinary proceedings as it did in this case.

518. The next question is whether the detriment (being accused) was done on the ground the Claimant had made a protected disclosure. We reject this. There was no evidence to link the accusations by Ms Andal and Ms Martin and the protected disclosures. There had been exchanges of views between the Claimant and Ms Andal and Ms Martin which they perceived to be aggressive and rude. We found above that the Claimant had cause to be concerned about the allocation of a patient to her responsibility with no person allocated to special him. This does not change that there was nothing to suggest Ms Andal and Ms Martin accused the Claimant of the behaviour on the grounds she had made the disclosures. There was no evidence they even knew about her protected disclosures and none to suggest they had been influenced by them to make the complaint by reason the Claimant had made protected disclosures.

Conclusions - Detriment 3

22 January 2014	The Claimant is suspended pending an investigation in respect of gross misconduct and gross insubordination

519. This is the suspension of the Claimant on 22 January 2014 pending an investigation in respect of gross misconduct and gross insubordination.

520. Our findings of fact in respect of the decision to suspend the Claimant are set out at paragraphs 232 - 240 above.

521. Dealing with the question of whether suspension was a detriment. There was no suggestion, sensibly, that suspension could not amount to a detriment. The Claimant was unable to work, would lose skill and experience. This is especially so in a professional role such as nursing where periods away from work could affect ability to practice.

Was the suspension done on the ground that the Claimant had made a protected disclosure.

522. The Respondent submitted that the suspension was because of the allegations of the Claimant's poor behaviours on 10 and 14 January 2014 (including that she had sworn) at Mr O'Connor and on basis of concern she would repeat her behaviour or compound the offence. We reject the submission that there was an allegation at that stage the Claimant had sworn at Mr O'Connor. This came later (via Ms Clutterbuck in her statement to Mr John) and could not have formed part of the reasons for suspension.

523. We acknowledge there were allegations against the Claimant. There was an incident on 10 January 2014 that led to Ms Andal and Ms Martin making written complaints. There was a verbal complaint from Mr O'Connor on 14 January 2014 and Ms Wiggins was upset on 14 January 2014 after a discussion with the Claimant.

524. In deciding whether the Respondent's reason was the reason for the suspension, we regard the following as material to this discussion.

525. The Claimant had pre-arranged a confidential meeting with Ms Richardson that same day to discuss her concerns she was being victimised for complaining about patient safety. This was unchallenged evidence and Ms Richardson was not able to assist the Tribunal in any regard as to why the meeting did not go ahead. Ms O'Brien was aware of the meeting despite the assurances the Claimant had received of confidentiality. The Respondent did not take the Claimant's concerns seriously nor did they respect her request for confidentiality. The meeting was completely disregarded. It was never rearranged or followed up. The Respondent did not provide an explanation for the coincidence in timing or why the meeting did not go ahead, nor why the Claimant's request for confidentiality was not maintained and the person whom she had feared finding out had been informed. We therefore draw an inference that one of the grounds for suspending the Claimant was to prevent the meeting arranged to talk about the Claimant's concerns she was being victimised, from taking place. The concerns had arisen from having made the protected disclosures.

526. We accepted the Claimant's evidence that after she gave the incident form (on 14 January 2014) to Mr Durham he immediately contacted Ms O'Brien stating "she's put another one in" or words to that effect. Her previous incident form we found to have amounted to protected disclosure 3. In turn, Ms O'Brien immediately came down to investigate and remonstrate with the Claimant. No-one else was spoken to, Ms Wiggins faced no such investigation neither did Mr O'Connor. Ms O'Brien based her decision to include allegation 3 on a conversation in passing Mr O'Connor on the way to Mr Durham's office. The Claimant was immediately assumed to have been in the wrong and at fault as she was perceived to be a troublemaker, filling in incident forms.

527. The Respondent treated the Claimant differently to the other employees involved and we had no explanation why. There was no preliminary investigation to establish the Claimant's version of events of what had happened and why and whether there were any legitimate reasons as to why the Claimant may have challenged the decisions of Ms Andal and Ms Martin. Ms Hughes later found that the failure by Ms Andal to not manage support for patient safety would be addressed through other HR policies (though they never were).

528. The Claimant had legitimate and valid grounds for objecting to the patient being allocated to her responsibility. There was ample preliminary evidence that this was the case and should have been obvious even on a cursory review of the information available at the time. This included the patient notes, and the complaint letters from Ms Andal and Ms Martin. Ms Andal's letter of

complaint referenced the Claimant stating she was not referencing her pin (NMC) if the patient should fall and said she could not refuse to have the patient from A&E.

529. Nobody reviewed the patient notes the Claimant had completed regarding the incident on 10 January 2014 in which she describes the lengths she had had to go to secure a special for the patient. There was no investigation into any of the other staff conduct on the night in question and it was later established that someone failed to complete the patients' risk assessment. Mr Durham had received a direct request from the Claimant to acknowledge her comments on the notes but never responded. Instead the Claimant was suspended and accused of gross insubordination for challenging the decision to move the Patient into her care without a special.

530. Even if the Claimant was rude and aggressive, on Mr John's investigation the exchange with Ms Andal lasted no more than a few seconds and Ms Martin no more than a few minutes. Although this would not excuse such behaviour, the context of the situation was relevant.

531. In relation to the incident on 14 January 2014 there was no complaint forthcoming from Mr O'Connor or Ms Wiggins at the time of suspension. At best, Mr O'Connor made a passing comment to Ms O'Brien and Ms Griffiths that the Claimant had been rude. There was no complaint, no witness statement even taken from Mr O'Connor yet the Claimant was suspended on allegations of gross misconduct and gross insubordination for allegedly being rude unprofessional and displaying aggressive and intimidating behaviour towards him and Ms Wiggins. In relation to Ms Wiggins, Mr Durham knew and had already asked Ms Griffiths to intervene and address concerns that Ms Wiggins was missing and not supporting the Claimant on the shift in question yet the Claimant faced extremely serious allegation for remonstrating with Ms Wiggins in respect of her behaviour.

532. We find that the reasons put forward by the Respondent for the Claimant's suspension do not justify why suspension was decided upon. There was no suggestion of any issue in respect of patient safety or the Claimant's clinical ability. She had challenged two senior nurses on what was an unreasonable placement of a patient in the Claimant's case where the consequences of the Claimant if he fell would have also been extremely serious.

533. Lastly, we made findings that since the Claimant made her first protected disclosure there was an intention to discipline the Claimant by Ms O'Brien regardless of the outcome of the Dignity at Work investigation. The events on 10 and 14 January 2014 gave her that opportunity.

534. In these circumstances we find that the Claimant was suspended to thwart her meeting with Ms Richardson and subject her to disciplinary proceedings. The protected disclosures were the direct reason for doing so.

535. In respect of detriment 3 we therefore find for the Claimant.

Conclusions - Detriment 4 – 13 March 2014

536. This was made up of a number of elements. We therefore set the detriment out in full and denote sub paragraphs:

4 (a)	The Claimant is accused of two further acts of misconduct: That on 3 May 2013 her behaviour was rude and disrespectful and inappropriate; and That the Claimant had made false or malicious allegations of bullying and harassment. The Claimant is informed that a Dignity at Work investigation has established that it was her behaviour and attitude that was inappropriate and not that of the colleagues that she accused in her incident form submitted on 3 May 2013.
4 (b)	None of the witnesses the Claimant asked to be interviewed in conjunction with this investigation were approached by the Respondent.
4 (c)	The Claimant was not offered a review (in the first instance).
4 (d)	Despite the hospital policy stating clearly that the review should take no longer than twenty-eight days it took in fact four months to be completed and eight months for the Claimant to receive it.

537. We take each one in turn as follows:

4 (a)

538. The Claimant was accused of two further acts of misconduct (relating to the incident on 3 May 2013) in the letter from Ms O'Brien dated 13 March 2014. These were directly related to the events on 3 May 2013. The allegations are set out at paragraph 249 above.

539. Being subjected to disciplinary allegations, in particular the extremely serious allegations made against the Claimant that she had made a false and malicious complaint, amounted to a detriment.

540. Was the addition of the further allegations on the grounds the Claimant had made protected disclosures?

541. In our view the direct causal link and evidence of material influence was very clearly established in the email exchanges we have set out at paragraphs 112, 120 and 267 above for the following reasons:

542. Ms O'Brien had already tried (unsuccessfully) to establish a disciplinary case against the Claimant from the Tracey Shanahan incident but had to 'let it go' as they had recognised it would not get off the ground.

543. In her email dated 13 June 2013, (subject matter being the investigation into the Claimant's protected disclosure of 22 May 2013 (Dignity at work – Jude)), Ms O'Brien discusses a plan to obviate the mediation stage of the Dignity at Work policy by intervening and implementing a disciplinary process. There is a direct rejection of the Respondent's own process which provides for mediation. In our judgment this was cogent and direct evidence of the link between disciplining the Claimant and her first protected disclosure. It

showed that notwithstanding the Respondent appearing to offer the Claimant a Dignity at Work investigation the plan was always to discipline the Claimant. We found that there was a direct instruction from Ms O'Brien to Mr John to turn the Claimant's dignity at work complaint into a covert disciplinary investigation into the Claimant.

544. In the email dated 18 June 2013 (again the subject matter being the Claimant's Dignity at Work – which emanated from her protected disclosure) Mr John describes the investigation taking place with the Claimant being the *victim and the perpetrator.* Mr John's email in our view clearly sets out that the Respondent intended to pursue a formal investigation regardless of the Claimant's wishes – contrary to the Dignity at Work policy which provided that informal stage and mediation to be the first steps. In particular, the Respondent (Ms O'Brien) was aware at that stage the police were not taking any formal action.

545. Ms White had been identified as a potential witness -but was never interviewed. We do not know why. Given the lengths Mr John went to investigate the Claimant in 2014, we draw an inference that this was an indication of a very different level of investigation into the Claimant's misdemeanours to Ms Waters.

546. Ms O'Brien's emails of 24 June 2013 and 25 June 2013 all focus on concerns for Ms Waters and how the incident had affected her. By this point she had seen the CCTV which clearly showed Ms Waters pulling the Claimant's arm and pushing her. We had no explanation as to why the Respondent failed to take seriously the CCTV footage and how anyone could have arrived at a conclusion that the Claimant's complaint against Ms Waters of assault was malicious let alone then charge the Claimant with an allegation as such. Ms Hughes, Ms Elcock and Ms Evans all later acknowledged that Ms Waters had touched the Claimant in one way or another. Ms Elcock quotes a definition of assault.

547. Ms O'Brien and Ms Richardson's determination to discipline the Claimant was also evidenced later in the email dated 24 September 2014. As we observed at paragraph 267, even before the disciplinary investigation had concluded Ms O'Brien is recorded as stating that Ms Richardson was fully supportive of pressing ahead with a disciplinary. The reference to a plan was in our judgment a reference to the Respondent's plan, in which HR were complicit to discipline the Claimant for having raised the first protected disclosure.

4 (b)

548. This was in reference to the Claimant's request for Ben Durham to be interviewed as she maintained he would corroborate there had been another complaint about Ms Water's behaviour as well as Ms Towers who had looked after Patient A on 3 May 2013.

549. In our judgment a failure to conduct a fair and balanced investigation by failing to interview witnesses suggested by the Claimant amounts to a detriment especially where it was being suggested that the witness could corroborate that Ms Waters had behaved in a similar manner previously.

Was the failure on the grounds the Claimant had made protected disclosures?

550. We do not find that Ms Richards failed to interview the witnesses on the grounds the Claimant had made protected disclosures. The reason given by Ms Richards was that she did not believe their evidence to be of any relevance as they had not witnessed the events in question on 3 May 2013. We accepted that this was the reason and it was genuine but in our view misguided belief. The failure to consider the events that led up to the incident demonstrated a substandard investigation and led to the incident being viewed in a lacuna.

551. In the ordinary course of a fair investigation surrounding events should be taken into consideration especially where there were two differing accounts of an incident and the investigating officer needs to assess all of the factors in reaching a conclusion as to whose version of events should be preferred.

552. However this was not even the case in this situation as Ms Richards had the CCTV footage which plainly showed the Claimant being pulled by the arm and then pushed. We would comment that had Ms Richards properly viewed the footage she would not have needed corroboration type evidence from Ms Lewis as the CCTV footage was plain to see.

553. We therefore do not find that the failure to interview the witnesses was on the grounds of the Claimant having made a protected disclosure. It is a relevant factor in the constructive dismissal and we return to this below at paragraph 652.

4 (c)

554. This was concerning the Claimant not being offered a review (in the first instance) of Ms Richards' dignity at work investigation. The Respondent's Dignity at Work policy did not specifically state that the Respondent should *offer* a review. It *provides* for a review. The onus is on the individual to formally request a review in writing within 7 days of the confirmation of the outcome. The problem the Claimant had was that she never received either a copy of the outcome or proper feedback or a debrief contrary to the policy. At no time did Ms Richards meet with the Claimant to provide feedback. Instead the limited feedback was from Ms O'Brien in her letter dated 13 March 2014 which relayed Ms Richards conclusions in a few sentences with no rationale or basis for her conclusion that it had been the Claimant at fault.

555. It was open to the Claimant to have requested the review within 7 days of Ms O'Brien's letter. She had a copy of the policy. It is arguable the onus was on the Claimant to trigger the request and the policy did not contain any obligation on the Respondent to draw the Claimant's attention to the right to request a review. However, in our view this would be analogous to failing to offer the right to an appeal against a grievance outcome. The Respondent failed to follow their own policy in respect of the feedback / de-brief of the outcome to the Claimant and therefore it is unfair to criticise the Claimant for then failing to request a review. This was acknowledged by Nicola Evans in her email dated 27 February 2015 where she describes this as an "oversight but an issue she will raise" as well as acknowledging the delay and that the Claimant had not been written to, to explain the delays.

556. As Ms O'Brien was tasked with providing the feedback / de-brief on the outcome of the Dignity at Work report it must follow that the oversight in failing to offer a review was Ms O'Brien's. The consequences of the failure to offer a review were that the Claimant was not given the opportunity to challenge the outcome which had led to two further disciplinary allegations being made against the Claimant, one of which was of an extremely serious nature (the false / malicious allegation).

557. We have considered whether the failure to offer a review (until Tracey Myhill agreed to in June 2014 after the Claimant had to raise it formally) amounted to a detriment. The remit of the review, according to policy, was not a re-investigation but to consider the grounds on which the individual was unhappy either the application of the policy / procedure, the process that has been followed.

558. As we have found above, the Dignity at Work policy was not followed as the informal phase was completely bypassed – mediation was not offered. Therefore, a formal review could have (and Ms Elcock subsequently did) identify that the application of the policy / procedure and the process had not been followed. We made findings above as to why mediation was not offered contrary to the policy. Ms O'Brien instructed HR that mediation was not an acceptable outcome and it needed to be pursued through the disciplinary investigation. In failing to offer a review, the Claimant lost the chance to show that the procedure had not been followed correctly and faced two further serious allegations.

559. There is a further factor in the failure to offer a review. The Claimant had consistently raised that the Respondent's Dignity at Work policy provided that unwanted or inappropriate physical contact ranging from touching to serious assault was listed as an example of unacceptable / inappropriate behaviour in the workplace. Anyone that had seen the CCTV footage of 3 May 2013 could see at the very least that Ms Waters had pulled the Claimant's arm and pushed her. Ms Richards report fails to consider the touching and how that amounted to unwanted physical contact in accordance with the policy. Ms Richards conclusions were at odds with the definitions within the policy both in respect of principles (assessing the impact on the recipient) and the definition of inappropriate physical contact. A review should have (and subsequently did) identify this failure to follow the policy.

560. We therefore conclude that the failure to offer a review of the Dignity at Work report by Ms Richards amounted to a detriment.

<u>Was the failure to offer a review on the grounds of the protected disclosures?</u>

561. We did not have any direct evidence from Ms O'Brien as to why a review was not offered in her letter to the Claimant dated 13 March 2014. This was the only communication that could be regarded as the feedback / debrief provided for by the policy. Ms O'Brien had blocked the informal stage of the Dignity at Work procedure by instructing Mr John to ensure the Claimant's complaint against Ms Waters (which we found to be a protected disclosure) be investigated through the disciplinary procedure. She specifically informed Mr John that it should not reach a stage whether the Claimant and Ms Waters

sit down across a table *(I don't just want to get to a stage where Jude and Lisa sit across a table from each (sic), the plan is for us to intervene before that and state that I need this now investigated through the disciplinary process.)* This must have been in reference to the mediation stage and there is an express instruction this must not happen. The word "need" in respect of there being an investigation in our view demonstrated how strongly Ms O'Brien believed this was necessary. The motivation was in our judgment clearly that the Claimant had raised the protected disclosure that she had been assaulted by Ms Waters.

562. For these reasons, and our reasoning set out above that Ms O'Brien instructed HR to bypass the informal stage of the Dignity at Work policy and discipline the Claimant, we therefore conclude that the failure to offer the review was on the grounds the Claimant had made protected disclosure 1. That decision had been taken as of 13 March 2014.

4 (d)

563. The review was requested by the Claimant on 18 April 2014. Ms Elcock's report was produced in February 2015 but it was not released to the Claimant and then only in part to the Claimant in July 2015.

564. The review should have been completed within 28 days. The Respondent accepted there had been a delay and submitted that in part this was down to the Claimant. There was a period between June and August 2014 where there was confusion between Ms Evans and the Claimant about whether the Claimant had consented. However even setting aside this period such a significant delay would have amounted to a detriment as the Claimant was disadvantaged as a result. If there had not been this delay, and the review had taken place within the specified policy timescales, it would have been completed by the end of May 2014. Although it is difficult to speculate on what would have happened with no delay (and also taking into account our finding that the Respondent refused to accept Ms Elcock's findings in any event), allegations 4 and 5 were on hold pending the review. The Respondent had determined that the disciplinary investigation in respect of these allegations could not be progressed until the review had taken place.

565. We have gone on to consider whether the delay arose because of the protected disclosures. There were a number of factors as set out in paragraph 271 above. We have already found that the initial failure to offer a review by Ms O'Brien was due to the protected disclosure. However once the review was formally requested and agreed, we do not conclude that the delay was on the grounds of the protected disclosures. The delay was due to a number of factors namely the confusion between Ms Evans and the Claimant about consent, and then the substitution of the manager to investigate. The delay was unsatisfactory even taking into account any delay by the Claimant to confirm her consent but the reason was not the protected disclosures themselves.

Conclusions – Detriments 5, 6 and 7

5	Early October 2014	The Respondent's investigation concludes

		that there is insufficient evidence to pursue the complaint against the Claimant (10 January 2014) but the Respondent withholds this information from the Claimant.
6	20 February 2015	The Respondent continues the disciplinary investigation despite the findings of the disciplinary investigation (as confirmed in a letter dated 20 February that there was insufficient evidence to support any of the allegations made against her.
7	20 February 2015	The Respondent withholds the findings of the disciplinary investigation from the Claimant.

566. As these are largely similar we deal with these detriments together.

Conclusions - Detriment 5

567. Mr John's summary investigation report was completed and submitted to Ms Dodwell on 10 November 2014, not early October 2014 as set out in the schedule. Mr John's report did not expressly conclude there was insufficient evidence or contain any such specific statement as such. His report did not reach any conclusions. We found above at paragraph 312 it presented a balanced view of all of the evidence and the significant mitigating circumstances for the incidents on 10 January 2014. We observe that any sensible reading of the summary of the evidence for the events on 14 January 2014 should have led to the reader concluding there was insufficient evidence. But that was not how the detriment was put. Accordingly, detriment 5 must fail as factually, it did not happen.

Conclusions – detriment 6 and 7

568. Detriment 6 was continuing the disciplinary investigation despite there being insufficient evidence (referring to Ms Evan's draft letter of 20 February 2015). There were 5 disciplinary investigations against the Claimant at the time, although allegations 4 and 5 were on hold. Detriment 7 was the withholding of the findings of the disciplinary investigation.

569. Continuation of disciplinary proceedings and withholding findings that might exonerate an employee, where an employer knows there is insufficient evidence would in our judgment amount to a detriment. It must be a detriment to continue to pursue serious allegations of gross misconduct if the employer knows there is insufficient evidence. This would be against the principles of natural justice and fairness particularly where the allegations affected the Claimant's health preventing her from returning to work in her professional capacity. There would be disadvantage in facing allegations where the evidence is known to be insufficient. We found that the Respondent had concluded by the time this letter was drafted that there was insufficient evidence against the Claimant.

Did the Respondent continue the disciplinary investigation and withhold the findings of the disciplinary investigation on the grounds she had made the protected disclosure(s)?

570. We have considered the following background context.

571. The Claimant's suspension was lifted on 31 October 2014. The decision was taken to lift the Claimant's suspension even though the Respondent maintained she still faced allegations of gross misconduct. This does not sit comfortably with the earlier decision to justify the suspension where she was said to be a potential risk to staff, patients or the effectiveness of the investigation. The Respondent was content for the Claimant to return to work, albeit in a different area even though nothing had outwardly changed since the decision to suspend apart from Mr Johns' investigation had proceeded (although not concluded as this did not happen until 10 November 2014).

572. The suspension was lifted was by this point as there was a general acknowledgement and recognition that the allegations were not as serious as first considered. This also was widely known and referenced in a number of communications. Firstly as early as 7 July 2014 Judith Harrhy informs Ms Richardson, Ms Evans and Mr John that they had found evidence to support the allegations but with a degree of mitigation (yet the Respondent never disclosed this to the Claimant or lessened the charge). Secondly, Ms Evans later stated that the issues were not as serious as initially thought at the time suspension was reviewed (see email dated 30 January 2015). This was of course compounded on receipt of Mr John's summary report on 10 November 2014 and shortly after Ms Evans emailed there was "little point" reframing the allegations if they were not likely to be pursued.

573. We did not hear evidence from Ms Dodwell. We were informed the reason she was not called was that due to her health. We acknowledge that we have made a number of findings of fact and drawn inferences in respect of Ms Dodwell's involvement and decision making. We have done so based on the documents available to us, the surrounding circumstances at the time in the absence of hearing from Ms Dodwell. In our judgment there was a significant gap in the Respondent's evidence as to events between October 2014 – to June 2015. Ms Evans witness statement gave limited evidence about events after 16 January 2015 to her drafting the letter of 20 February and there being a meeting arranged for 31 March 2015. There was no explanation, other than Ms Dodwell stepping down and Ms Harrison being appointed for the delay in

facilitating the Claimant returning to work or progressing the disciplinary investigation.

574. We had to consider what then changed – why was the Claimant not brought back into the workplace as had been agreed?

575. By this stage there was already a clear awareness of the potential effect of the Claimant's grievance against Ms O'Brien and the receipt of the RCN letter of concern in October 2014. We found above that Ms Evans and Ms Dodwell colluded to "de-link" the two complaints. The email exchange on 30 October 2014 was in our judgment a significant exchange which caused us to reach this conclusion. Nonetheless the decision had been taken to lift the Claimant's suspension and manage it "locally", we find because of the risks to the Respondent that had been highlighted by Ms Evans and Mr Daniel.

576. There was a further delay in facilitating the Claimant's return to work throughout November 2014 where Ms Dodwell is not engaging or seen to be replying to Ms Evans despite her repeated requests for urgent responses for a decision on the Claimant's return to work. We did not have an explanation from Ms Dodwell for this situation. The Claimant's case was that it was deliberate to "keep her away from the hospital". We have therefore considered the evidence before us to determine the reasons for this delay and concluded the receipt of the collective grievances from RCN and Unison on behalf of their members against Ms O'Brien for bullying and harassment changed the situation. Although we never saw the collective grievances we heard evidence that they related to bullying and harassment by Ms O'Brien. These were similar allegations as had been made by the Claimant against Ms O'Brien. It is plausible that the Respondent did not want a similar grievance / complaint against Ms O'Brien coming to the attention of the enquiry at that point in time especially given the underlying allegations of assault and victimisation allegations the Claimant had made. The Fiona Smith Enquiry terms were also being agreed between 13 November and 4 December 2014. We have concluded on the basis of the evidence before us and the lack of explanation from the Respondent witnesses, this was the reason for the change in position from lifting the suspension so as to effectively block the Claimant's agreed return to work.

577. On 4 December 2014 there was a meeting between the Claimant, Ms Dodwell and Ms Evans. The Claimant advised she would go off sick as she felt unable to return to practice as a nurse with the allegations hanging over her. The Respondent knew that the Claimant's position was that she could not return until the disciplinary investigation was progressed (depending of course on the outcome of the investigation). Provided the Respondent genuinely wanted a fair outcome, it was in everyone's interests that the investigation was concluded as soon as possible.

578. This did not happen. Despite the Claimant chasing Mr John, Ms Evans, Ms Dodwell and Mr Cairns between December 2014 and January 2015, no progress is made with the investigation itself. By 16 January 2015 there had been a decision to drop the disciplinary case against the Claimant, but this never came about and was still live at the time she resigned, 17 months later.

Just a few days later, on 22 January 2015 Ms Hughes' whistleblowing report was published (to HR and Ms Dodwell).

579. Ms Hughes report to some extent corroborated the Claimant's complaints about a culture of bullying and the failings to secure a special for the patient on 10 January 2014 and Ms Hughes observed some quite disheartening comments. Nothing happens with this report. There is no evidence this was shared with the Fiona Smith enquiry which was looking at similar issues despite Mr Cairn's commitment it would include all staff.

580. Ms Elcock's review was also published (on 27 February 2015) which concluded that the Respondent had not followed their Dignity at Work policy and offered mediation and she had found no valid reason to justify deviation from the policy.

581. The Respondent was well aware that the Claimant alleged her treatment was linked to whistleblowing. Ms Evans admitted in her email dated 30 January 2015 that she had written a letter to the Claimant denying her issues with Lisa Waters would be a whistleblowing incident even though she said she was not sure until she attended a later training session. Ms Evans thus openly admitted to refuting the Claimant had made a protected disclosure despite not knowing if this was actually the case which in our view demonstrated the Respondent was more concerned with rebuttal than listening to concerns.

582. We found that the Respondent had concluded there was insufficient evidence by 20 February 2015 (and reiterated by 27 February 2015) and decided to continue with the disciplinary investigations motivated by a desire to keep the Claimant from the workplace. Although a meeting had been arranged for 31 March 2015 it did not go ahead. We saw no reason why the Claimant could not simply have been written to and told that of the decision that had been reached as of 16 January, if that decision remained live. As far as the Claimant was concerned the disciplinary case was continuing. The decision reached on 16 January 2015 never materialised as far as the Claimant was concerned.

583. The Respondent submitted that the Claimant had not challenged the evidence of Ms Evans and Ms Tovey that there was evidence of inappropriate behaviour but those matters would be addressed by training support and mediation.

584. The problem with this submission is that the draft letter of 20 February 2015 does not say there was evidence of inappropriate behaviour. Ms Evans had also informed Ms Tovey in her email dated 30 January 2015 that until the allegations were investigated thoroughly it was not possible to determine if the Claimant acted inappropriately or not.

585. Ms Tovey was also challenged about the inclusion of the words "insufficient evidence" in this letter and her explanation was that it was a draft. The Claimant also questioned Ms Evans regarding her explanation about the letter dated 20 February 2015. Ms Evans had sought to explain that the reference to insufficient evidence in that letter was intended as an aide memoire with gaps to be filled. It was put to Ms Evans that whilst there were

sections in the letter with gaps or blanks to be later filled in (after the meeting), the section referencing insufficient evidence was not presented in such a way.

586. We go back and remind ourselves that we must determine whether, these detriments were on the grounds the Claimant had made the protected disclosures. We are firmly of the view they were. We are aware we must not adopt a "but for" analysis, the test is one of material influence. We have concluded that the decision to continue with disciplinary investigation and withhold the finding there was insufficient evidence form the Claimant was materially influenced by all of the protected disclosures. This is because the Respondent faced an independent enquiry and collective grievances against the same senior nurse whom the Claimant alleged had manufactured a disciplinary procedure against her for having made protected disclosures.

587. The disciplinary investigation was never dropped and remained live (albeit on hold for period of time) as of the date the Claimant resigned. We find that the continuation of the disciplinary investigation was an act extending over a period of time in accordance with Section 48 (4) (a) ERA 1996, to be distinguished from a one-off act with an ongoing detriment that continued to be felt. The Claimant remained under threat of the allegations, which she had been informed were potentially gross misconduct until the day she resigned. They had at that stage been actively reinstated by Ms Thomas and earlier by Ms Harrison. They were perpetuated and reiterated by the Respondent until she resigned.

588. Following the departure of Ms Dodwell around May / June 2015, Ms Harrison took over as the manager dealing with the Claimant's various complaints. Ms Evans also handed over to a new HR advisor Ms Rees. They were both sent a script and draft letter which was essentially a repeat of what had been agreed in February regarding dropping the disciplinary case against the Claimant.

589. We found Ms Harrison's admission that she did not read any of the reports on the Claimant at any time in her dealings with the Claimant to be in itself a very serious omission. Ms Harrison was a senior nurse charged with resolving matters that had been ongoing for over two years by the Chief Executive. The Respondent had conducted three separate investigations and one review by this point – Mr John's disciplinary investigation, Ms Richards Dignity at Work and Ms Elcock's review and Ms Hughes whistleblowing report. Whilst we acknowledge that there was evidence that the Claimant may have raised issues in an unsatisfactory way by this time there was in our view substantial and significant evidence that she had done so in the context of raising patient safety in situations where she believed patients were at risk and that she had been subjected to physical arm pulling and pushing by a senior sister. Yet Ms Harrison did not see it necessary to read any of these reports but at the same time presided over a decision to reinstate the disciplinary allegations against the Claimant.

590. There was a marked difference in advising the Claimant the allegations were discontinued due to delay as opposed to being dropped due to insufficient

evidence. If the Respondent had been open about the reasons (and we find they were not as it would have impacted on the Fiona Smith enquiry), then the Claimant would not have felt the need to continue and clear her name. Even when Ms Rees and Ms Harrison were told in no uncertain terms by Ms Evans and Ms Williams what an error this was, they still proceeded. We reject the reason given for this decision, namely that it was fairness and of natural justice to the Claimant. What would have been fair would be to have told the Claimant the real reason the disciplinary allegations were being dropped – that there was insufficient evidence. The distress this caused to the Claimant was significant both at the time of discovering the letter of 20 February 2015 in June 2016 and on hearing Ms Harrison's admission she had not read any of the reports.

Conclusions – Detriment 8, 9 and 10

8	10 May 2016	A letter is received by the Claimant from Susan Thomas regarding the meeting of 21 April 2016 and confirming that the allegations against the Claimant are to be re-pursued prompting a further investigation
9	7 June 2016	The Claimant is advised that the enhancements for her temporary injury allowance will not be reinstated and were in fact paid in error
10	9 June 2016	The Claimant was advised that Clive Mason has been appointed to investigate the grievance that she raised in April 2014 regarding Sharon O'Brien. Failure to properly investigate the grievance or follow the Respondent's grievance procedure in doing so amounts to a detriment which she was subjected to on the grounds that she had made a number of protected disclosures.
12[14]	30 June 2016	The Respondent wrote to the Claimant advising her that she owed £7,000 which they claim was an overpayment of her temporary injury allowance but they have no further explanation. The letter also confirmed that, contrary to the Claimant's own records, that she was not entitled to any payment in lieu of accrued but unused annual leave (the Claimant believes that she has an entitlement to a sum in respect of that entitlement).

591. As we have observed in paragraph 403 above, all three decisions were conveyed in Ms Thomas' letter dated 10 May 2016.

Detriment 8

592. Firstly, considering whether the decision to re-pursue the allegations and start a new investigation amounted to a detriment.

[14] We deal with detriment 12 out of sequence as it relates to the same issues as detriment 9

593. The Respondent submitted that there was no breach of contract in these matters. In particular that completion of the investigation did not necessarily mean that the Claimant would face a disciplinary hearing.

594. We have therefore considered whether being subjected to disciplinary investigations could amount to a detriment. Although the suspension had been lifted, the effect of the allegations was such that the Claimant felt incapable (in reference to health) to practice as a nurse until the outcome of the investigations. Whilst there may not have been any eventual disciplinary hearing or actual findings, we conclude that being subjected to serious disciplinary allegations amounted to a detriment.

595. The decision to re-pursue the allegations and appoint a new investigating officer arose emanated from the meeting between the Claimant and Ms Harrison and Ms Rees on 26 June 2015. Our findings of fact are at paragraphs 356-365 above. It is therefore necessary to consider how and why Ms Harrison and Ms Rees and then Mrs Thomas, arrived at this decision when determining if it was on the grounds of the protected disclosures.

596. The Respondent submits that this came about as the Claimant failed to indicate which option she wanted to proceed with. This was in relation to the two options set out in Ms Harrison's letter dated 10 July 2015, following the meeting on 26 June 2015, that the Claimant accept a discontinuation (rather than no case to answer) or the investigation to continue so the Claimant had closure. The problem with this is that in Ms Harrison's letter dated 10 July 2015 she only addressed allegations 1 – 3 and therefore the Claimant did not know the status of allegations 4 and 5, which as she raised made it impossible for her to make a decision. The Claimant wanted to see Ms Elcock's report before she made a decision, which was not an unreasonable position to have taken in the circumstances as this was supposed to consider the events around allegations 4 and 5. The Respondent via Ms Harrison was still, at that stage refusing to release that report to her. After it was eventually released, Ms Harrison confirmed that should the Claimant choose to continue with the disciplinary investigation it would also include allegations 4 and 5.

597. There were a number of potential explanations for the decision taken to reinstate the disciplinary allegations against the Claimant against all of the advice of HR and the evidence collated to date showing on any sensible reading that the case against the Claimant for gross misconduct was questionable for allegations 1 & 2 and without merit for allegations 3, 4 and 5.

598. The first explanation was that Ms Rees and Ms Harrison had a genuine misguided belief that reinstating the disciplinary was for reasons of natural justice and fairness to the Claimant. Such a belief, if it existed, with respect to both individuals, at best amounted to shortcomings in their management of the situation and was contrary to the advice they had been given by Ms Evans and the decision taken by Ms Dodwell in February 2015 as evidenced in the email from Ms Tovey (see above). As we observed above, it would have been reasonable and of natural justice to have informed the Claimant there was insufficient evidence rather than reinstate what must have been a hopeless disciplinary investigation.

599. The Respondent submits that the continuation came about as the Respondent was not able to agree with the Claimant at a meeting an alternative approach to addressing the issues. We reject this submission. The continuation came about as the Respondent withheld from the Claimant the conclusion there was insufficient evidence, despite Ms Harrison and Ms Rees being aware that this was the conclusion that had been reached by Ms Dodwell , Ms Evans and Ms Tovey. The question was why? Ms Harrison could not give an answer to that specific question.

600. We have to carefully consider what was the motivation for Ms Harrison, Ms Rees and followed through by Mrs Thomas for re-instigating the disciplinary allegations. They were all aware that experienced HR professionals involved in the case throughout and Ms Dodwell had concluded there was insufficient evidence and furthermore that a further investigation was inevitably futile. Even Ms Harrison recognised this in her letter where she acknowledges that given the time lapsed it would be difficult to conclude fully. The logical thing to have done was tell the Claimant there was insufficient evidence, in accordance with the Respondent's disciplinary procedure that there was no case to answer.

601. The Claimant was in effect faced with two options both with equally undesirable and futile outcomes. By July 2015 she had been suspended for 16 months. Mr John's investigation was exhaustive and it is very difficult to see what more could have been done to investigate matters than had already occurred. The Respondent submitted that the investigation was incomplete in relation to allegation 3. It is correct that despite three investigation meetings with the Claimant Mr John had not yet discussed allegation 3. However we found that very early in the investigation it should have been obvious to Mr John there was no case no answer and no complaint had even been received from Mr O'Connor or Ms Wiggins.

602. Although Ms Thomas had not been informed directly about the advice from Ms Evans to drop the allegations, she had read both Mr John's report and Ms Hughes report which should have, in our judgment, at the very least cast considerable doubt as to why the allegations were being re-pursued. She did not conduct a reasonable and sufficiently detailed decision-making process before agreeing that the allegations should be pursued but simply supported Ms Harrison's earlier decision.

603. We also remind ourselves of our conclusions as to why the Claimant faced disciplinary allegations in the first place – due to her having made protected disclosures.

604. In the absence of any satisfactory explanation for this decision and against the background of the Claimant's history and reputation, we have concluded that the reason the investigations were re-pursued was that Ms Harrison and Ms Rees withheld from the Claimant that there was insufficient evidence and that they allowed themselves to be caught up with the systemic and bureaucratic prejudice against the Claimant on the basis of her reputation as a troublemaker, which stemmed from her disclosures. Ms Thomas's decision was tainted in the same way. The Respondent has failed to prove the Claimant was not subjected to the detriment on the grounds she had made the protected disclosures.

Conclusions - Detriments 9 and 12

605. Detriment 9 was a reneging on an agreement to pay enhancements whilst off sick. This led to a financial loss for the Claimant as enhancements were stopped from 10 May 2016.

606. The relevant date was not 7 June 2016 as set out in the schedule. As we found in paragraph 403 above the Claimant was informed of this decision in the letter from Ms Thomas dated 10 May 2016. Furthermore, the enhancements that detriments 9 and 12 relate to were not a temporary injury allowances but enhancements to sick pay. Ms Thomas informed the Claimant that she had been overpaid these enhancements since January 2015 and recovery would be discussed at the next meeting. Ms Thomas referred to having contacted Ms Dodwell and Ms Evans to confirm whether they had made an arrangement to continue the enhancement indefinitely and reported they did not recall any such agreement.

607. However, as we saw from Mr Durham's letter to the Claimant dated 16 July 2015, the Claimant had been expressly informed that the Medical Clinical Board Nurse had instructed Mr Durham to reinstate full sickness pay with enhancement. At this time the Medical Clinical Board Nurse was Ms Harrison. There was an express agreement authorised by Ms Harrison and conveyed in writing that the Claimant would receive the enhancement, six months after the change to the collective terms under Agenda for Change. There was no pay roll error as Mr Durham confirmed at the time that an express instruction to payroll had been sent on 9 July 2015 to reinstate full sick pay with enhancement.

608. We did not hear any evidence as to whether the overpayment was actually pursued. If the overpayment was deducted from the Claimant's final salary we would find this to be a detriment, it amounting to a financial detriment and also a breach of contract. Even if it was not, the threat to recover an enhancement that had been expressly agreed would amount to an anticipatory breach of contract. The Claimant had relied upon and received in good faith an express agreement by Ms Harrison to pay her enhancements on her sick pay and the Respondent resiled, in breach of contract from that agreed term, advising that they did not recognise any such agreement and intended to pursue her for overpayment. This in turn must amount to a detriment.

609. Detriment 12 is made up of two parts; firstly informing the Claimant that she owed £7937.27 (not the £7000 quoted in the schedule) and secondly, in reliance of the overpayment, withholding accrued holiday pay from the Claimant. We do not know when the actual decision was taken to withhold holiday pay by Ms Thomas, but it was conveyed in the letter dated 30 June 2016. Ms Harrison's witness statement did not address this issue at all. Ms Harrison said that she had no involvement with the Claimant after 20 June 2016 which was incorrect as she wrote the letter dated 30 June 2016 in which she advised the holiday pay would be withheld. In the absence of any other evidence we find this was the relevant date for detriment 12.

610. We equally find that informing the Claimant she owed £7937.27 amounted to a detriment for the same reasons set out above.

611. We find that withholding the holiday pay to offset the overpayment was also a detriment which caused the Claimant financial detriment. The Respondent was not entitled to offset the overpayment as in doing so they were in breach of contract.

Was the failure to reinstate the enhancements, informing the Claimant they had been paid in error and withholding holiday pay on the grounds the Claimant had made protected disclosures?

612. We looked to the Respondent to show the reason for the treatment in respect of the position they took on the overpayment and then withholding the holiday pay in reliance on their position. The reasons given in explanation by Ms Thomas in her letter was that there had been a payroll error and no such agreement had been reached with Ms Dodwell and Ms Evans. Whilst no agreement had been reached with Ms Dodwell and Ms Evans, an agreement had been made with Ms Harrison and conveyed in Mr Durham's letter dated 16 July 2015. There was no explanation as to why the letter from Mr Durham was not taken into account. It must have been in the Respondent's possession it was their letter. There was reference to a payroll instruction in July 2015, and no evidence of an earlier payroll error as suggested by Ms Thomas.

613. In the absence of a satisfactory explanation from the Respondent for subjecting the Claimant to this detriment, we draw an inference that the reason was materially influenced by the Claimant having made the protected disclosures. We base this on our findings that the Claimant was perceived as an individual who was a troublemaker who raised grievances and issues to deflect her own behaviour. Assumptions were made by Ms Thomas that the Claimant was simply not being truthful about this agreement which was, as borne out by the documents, wholly an incorrect position to have been taken. Because of this perception there was no proper investigation into whether there had been any such agreement, there cannot have been otherwise Mr Durham's letter would have shown otherwise. This was also reflected in Ms Evan's failure to properly consider the reports before her regarding the Claimant.

Conclusions – Detriment 10

614. This detriment is put as a failure to address the Claimant's grievance and / or follow the Respondent's grievance procedure. The relevant date asserted in the schedule is 9 June 2016 as the date Clive Mason was appointed to hear the grievance. We presume this date was asserted on the basis that it was the date the Respondent did an act (of appointing someone to hear the grievance) which was inconsistent with their previous alleged failure to act.

615. A failure to address the grievance or follow a grievance procedure could, in our judgment amount to a detriment. There were consequences to the failure to allow the Claimant to raise a grievance for over two years, forcing the process through the Dignity at Work review. The significant consequence was

that the Dignity at Work review did not provide for a re-investigation only a review of process and therefore the Claimant's grievance could never have been properly addressed through this channel.

616. We must consider what was the date of the act or failure to act relied upon and also whether the findings of fact have established if and when a deliberate failure to address the Claimant's grievance took place. If not, we must go on to consider the date the period expired within which the Respondent might reasonably have been expected to do the failed act **(Blackbay).**

617. The Respondent submitted that Ms Evans did not consider that the Claimant had submitted a grievance in April 2014, did not provide details when requested, did not decline mediation until 25 February 2016, matters were on hold for without prejudice discussions between August 2015 – 25 February 2016 and failed to provide details of her grievance in February 2016.

618. The Respondent failed to address the Claimant's grievance and this amounted to a failure to act that extended over a period of time and also a detriment. We conclude this for the following reasons.

619. The Claimant's letter dated 17 April 2014 was clearly a grievance which raised new and separate matters to those being investigated as part of the disciplinary investigation. Where an employee raises allegations that there are ulterior motives for a disciplinary investigation, these should be investigated properly, whether under a separate grievance or as part of the disciplinary investigation. Neither avenue was implemented by the Respondent.

620. Mr John initially advised the Claimant's concerns would be considered by the disciplinary officer which at that time was Ms O'Brien, the person against whom the grievance had been raised. He then advised he needed to share the Claimant's grievance with Ms O'Brien and when the Claimant refused permission he passed it to Ms Evans. This was not a reasonable response to the Claimant's grievance. There was no investigation other than a proposal to share the grievance with the alleged perpetrator. Whilst we acknowledge that a usual grievance investigation would require details of the allegations to be shared with the alleged perpetrator to enable them to have the opportunity to address and answer the allegations, it is not, in this Tribunal's experience, usual practice to simply copy the full complaint to the perpetrator especially where the allegations involve bullying and harassment.

621. The Claimant repeated her requests to have the matter treated as a grievance, or investigated separately on 24, 25 June 2014 and in a letter of 31 August 2014.

622. Ms Evans was certainly aware by 12 September 2014 that the Claimant was requesting this, as she acknowledged it in her letter of that date. Ms Evans said it had to be considered as part of the Dignity at Work review, but as the Respondent's procedure provided, and this was reiterated many times by the Respondent, the review was not to be a re-investigation but a review of process. This was evidenced by the review itself which made no findings on the matters raised by the Claimant in her grievance other than finding the

Respondent's dignity at work policy had not been followed. Ms Elcock did not investigate any of the Claimant's other concerns.

623. Ms Dodwell and Ms Evans discussed the allegations in the Claimant's grievance in their email exchanges on 30 October 2014 and colluded to "de-link" the Claimant's grievances from the other complaints against Ms O'Brien.

624. Ms Evans admitted in her email to Ms Tovey of 30 January 2015 that they had not dealt with the Claimant's allegations against Ms O'Brien and needed to do so as a matter of urgency.

625. Ms Harrison apologised in her letter dated 10 July 2015 for the delay in dealing with the Claimant's grievance and promised to ensure the correct process would now take place, indicating it had not done so to date.

626. We accepted that there was an understanding that the grievance was put on hold during without prejudice discussions and therefore this period should be discounted when considering there has been a failure to address the grievance. We also for the same reasons reject that the Claimant should be accountable for a failure to communicate her decision to decline mediation between July 2015 and February 2016.

627. On 18 March 2016 Ms Harrison confirmed they would progress the Claimant's grievance. We reject that the Claimant contributed to any delay by failing to provide a copy of the grievance she had submitted. The Claimant was informed in Ms Thomas' letter of 10 May 2016 that Mr Morgan had been appointed to hear her grievance. This was the first time that any formal arrangements were confirmed. We find that the 10 May 2016 was the date on which time began to run in respect of detriment 10 as this was the date the Respondent did an act inconsistent with the failure to act – they appointed someone to address the grievance after failing to do so since 17 April 2014.

628. We have concluded that the reason the Respondent failed to address the Claimant's grievance was for the same reasons they withheld the outcome of the disciplinary investigation – to protect Ms O'Brien from any further grievances. This was in our view direct causal link as shown by the email exchanges between Ms Dodwell and Ms Evans. This was the root cause of the failure to address the grievance and there was no change in this causation it merely extended over a period of time until Ms Thomas finally confirmed that a grievance officer had been appointed on 10 May 2016.

Detriment 11

629. This is advanced as the Claimant was constructively dismissed.

630. S47B (2) ERA 1996 provides that the right not to be subjected to a detriment does not apply where the worker is an employee and the detriment in question amounts to a dismissal.

631. We did not hear any submissions from either party[15] that the dismissal was in consequence of the detriments (per Underhill LJ, para 78 **Osipov** and

[15] The Respondent's submissions addressed Osipov but in the context of vicarious liability

acknowledged as not yet finally resolved by Lord Wilson in **Royal Mail Group and Jhuti**). The dismissal element of the claim was advanced in the ET1 as contrary to S103A of ERA 1996.

632. For these reasons detriment 11, as advanced is not well founded and is dismissed.

Time limits – detriments

633. Given the number of detriments we set out the relevant date in reference to our findings of fact in respect of each one in the following table. We are only including those detriments found to be on the grounds of having made a protected disclosure:

Detriment	Date of act or failure to act	S48(3) or S48 (4)
1 (army comment)	25.9.13	S48 (3) - act
3	31.10.14	S48(4) – (suspension) – an act extending over a period namely 22.1.14 to date suspension lifted 31.10.14
4a	20.6.1	S48(4) (accused of two further acts of misconduct) – an act extending over a period of time the last day of which it could have continued was the date the Claimant resigned.
4c	13.3.14	S48 (3) (failure to offer a review) decision taken by Ms O'Brien by 13.3.14
6	20.6.16	S48 (4) (continuation of the disciplinary investigation) – an act extending over a period the last date of which was the date the Claimant resigned namely 20.6.17
7	20.6.16	S48(4) (withholding the findings of the disciplinary investigation) – an act extending over a period the last date of which was the date the Claimant resigned namely 20.6.17
8	20.6.16	S48(4) (reinstating the disciplinary allegations) – an act extending over a period the last day of which was the date the Claimant resigned as the allegations remained live as of the date of dismissal)
9	10.5.16	S48(3) – (decision to renege on an agreement to pay the Claimant enhancements) – an act
10	10.5.16	S48(3) a failure to progress the Claimant's grievance - on 10.5.17 the Respondent did something inconsistent with that failure namely

		appointed a manager to hear the grievance
12	30.6.16	S48 (3) – an act – namely the date by which the Respondent had decided to withhold holiday pay to offset an overpayment in breach of contract

634. In respect of detriments 1,3, 4c we find that these were a series of similar acts, all perpetrated by Ms O'Brien, on the grounds of the Claimant having made protected disclosures. We also conclude they were intrinsically bound up with detriments 4a, 6, 7 and 8 namely the Respondent's motivation to keep the Claimant away from the hospital during the Fiona Smith enquiry, which were acts extending over periods, the last of which were in time (20 June 2016).

635. Further, in respect of detriment 9 we find that this detriment was one of a series of similar acts connected to detriment 12 which was presented in time. The decision conveyed to the Claimant on 10 May 2016 to renege on the decision to pay the Claimant enhancements had a direct link to the subsequent decision to then withhold accrued holiday pay on 30 June 2016 as it was decided there had been an overpayment.

636. If we are wrong about the continuation of the disciplinary investigation and withholding of the findings being an act extending over a period of time, we would extend time under S48 (3) (b) ERA 1996 in respect of detriments 6 and 7. The Claimant only discovered Ms Evans draft letter dated 20 February 2015 letter on 18 June 2016. Until this she was not aware that the Respondent had concluded as of February 2015 that there was insufficient evidence and it would not have been reasonably practicable to have presented a complaint about an act she had no knowledge of.

<u>S98 ERA claim – constructive unfair dismissal</u>

637. There is a separate claim for constructive dismissal based on an alleged breach of the implied term of mutual trust and confidence. The Claimant succeeds in her claim of constructive dismissal.

638. We have set out above our conclusions on each detriment which were also relied upon as breaches of contract.

639. In respect of detriments 1 (army comment), 3, 4a, 4c, 6, 7, 8, 9 and 10, we found they were on the grounds of the Claimant having made protected disclosure(s). For the same reasons we find the same detriments amounted to breaches of the implied term of mutual trust and confidence.

640. In respect of some of the detriments (2, 4b, 4d and 5) we did not conclude that they were on the grounds the Claimant had made a protected disclosure. Detriments 1 (summonsed to a meeting) and 5 were not found to be detriments at all. Nonetheless, this does not mean that the events described

as detriments were not separate or cumulative breaches of the implied term of mutual trust and confidence.

641. In addition, there was other conduct not pleaded as detriments that amounted to cumulative conduct that breached the implied term of mutual trust and confidence. In addition to the detriment findings, we also set out below our reasons why we have concluded there was a breach of contract entitling the Claimant to treat herself as dismissed. There is a degree of overlap.

642. The Claimant had her arm pulled and was pushed by Ms Waters on 3 May 2013. Apart from Ms Hughes no-one in the Respondent has ever acknowledged this despite there being clear evidence on CCTV plain on any sensible viewing. The Claimant submitted that this absolute continued denial in the face of the clearest of CCTV evidence amounted to gas lighting and impacted significantly on her health. We agree that the Respondent (apart from Ms Hughes) categorically refused to acknowledge what had happened to the Claimant on 3 May 2013. The Claimant's subsequent disclosure triggered a systemic catalogue of bullying and pursuit of the Claimant in the form of a covert disciplinary investigation that was maintained up to the date she resigned despite the Respondent being aware early on there was insufficient evidence and evidence the Claimant had been inappropriately pulled and pushed by Ms Waters. This was motivated by a desire to discipline the Claimant regardless of the outcome of any disciplinary investigation. There was a plan in place to discipline the Claimant and disapply the Respondent's own Dignity at Work policy. There was collusion between the senior management team and HR to ensure the Claimant was disciplined and punished for having raised the allegation against Ms Waters.

643. No action was ever taken against Ms Waters in respect of her conduct towards the Claimant on 3 May 2013.

644. The Claimant was exposed to an unsafe working environment on 3 May 2013 by the failures in addressing the behaviours of Patient A and whilst she may have not gone about addressing her concerns in a polite way, she raised legitimate concerns for the safety of the patient, staff and other patients and relatives on the ward.

645. The Claimant was threatened with disciplinary action by Mr Jones if she went home despite being visibly distressed about events between her and Ms Waters.

646. The Respondent (Ms O'Brien by instruction to Mr John) deliberately and with intent colluded to disapply their Dignity at Work Policy so as to refuse to allow the Claimant to invoke the first informal stage of mediation.

647. The Respondent attributed a much higher value to the complaint from Ms Waters against the Claimant, with Ms O'Brien urging and encouraging HR to treat Ms Waters complaint as far more serious than the Claimant's. This was unfair and unreasonable.

648. On 9 September 2013 the Claimant was unreasonably instructed to be responsible for two patients in one trolley bay, one of whom was an elderly

patient with dementia whom the management had determined would spend the night in a wheelchair.

649. The Respondent (Mr Durham) failed to act on incident forms submitted by the Claimant which recorded serious issues in relation to being short staffed and inability to care for patients and administer medication.

650. There was an ongoing practice of undertaking background investigations into the Claimant's behaviour, in particular when she had challenged senior nurses. Numerous colleagues were instructed to provide written witness statements which were retained on the Claimant's file but the Claimant was never given the opportunity to challenge these accounts or put forward her own version of events. In many cases, the Claimant saw witness statements taken as early as 2013 for the first time in disclosure in these proceedings. All of this painted a picture of the Respondent collating and retaining a dossier on the Claimant without any proper investigation or checking facts. For example the allegations received from JF.

651. The Claimant had requested a confidential meeting with Helen Richardson to discuss her concern she was being singled out for raising issues of patient safety. The meeting was arranged and she was assured of confidentiality which was breached. Ms O'Brien was aware of the meeting and it never took place as the Claimant was suspended. It was never rearranged or followed up by Ms Richardson which in our judgment showed there was no intention on Ms Richardson's part of taking the Claimant's concerns seriously or being prepared to address the concerns.

652. The Dignity at Work investigation conducted by Ms Richards was inadequate and took far in excess of a reasonable timeframe. She failed to interview relevant witnesses and reached what can only be described as an extremely surprising conclusion that there was no evidence to support the Claimant's complaint against Ms Waters and that there were grounds to conclude her complaints were malicious. Ms Richards failed to consider the extreme pressures of the events on 3 May 2013 and the conduct of Patient A and completely disregarded it as possible mitigation for the Claimant's behaviour.

653. On 10 January 2014 the Claimant was unreasonably instructed to look after a patient who should have received one to one care (specialing) and who in breach of the Respondent's own procedures had not been risk assessed for falls. Ms Hughes later acknowledged that the nurse in charge should have been responsible for ensuring staffing levels were safe and this should be addressed through other HR policies. The Claimant is the only individual to face disciplinary investigation arising from the events of this night, as she was alleged to have been rude to senior staff when challenging this decision.

654. The Claimant was the only individual to face a disciplinary investigation arising from events on 14 January 2014, despite Ms Wiggins "disappearing" and Mr O'Connor wrongly requisitioning Ms Wiggins to cover his break without informing or agreeing this with the Claimant or senior nurse. Mr O'Connor's version of events was accepted without question and the Claimant was immediately admonished by Ms O'Brien and the blame laid firmly at her door. The events on this day were one of the reasons the Claimant was later suspended even though there was never any complaint

by Mr O'Connor or Ms Wiggins apart from at best a verbal complaint conveyed in passing Ms O'Brien in a corridor.

655. In respect of the suspension and ensuing disciplinary procedure, a reasonable employer would be expected to:

    a. Inform the employee what the allegations are so that that they know what they are said to have done wrong;
    b. Complete the investigation in a timely manner.

656. We have considered allegations 1 – 3 that were put to the Claimant and we are of the view that it would have been very difficult for the Claimant to have understood what she was supposed to have said, to whom, why what she said was aggressive, rude, abusive, intimidating, unprofessional and how she had undermined authority.

657. The Respondent failed to provide a satisfactory explanation as to why the Claimant was suspended (we found that it on the grounds of her protected disclosures). They also breached their own policy by failing to review the suspension. The Claimant's professional capacity as a nurse was affected the longer she was absent from work.

658. Mr John's investigation into the events of 10 and 14 January 2014 were wholly disproportionate to the extent we concluded it was intended to try and secure as many wrong doings by the Claimant as possible rather than investigate the three allegations. By 25 February 2014 Mr John should have concluded and reported back that there were no grounds whatsoever to substantiate allegation 3, yet still they were pursued.

659. The Respondent (Ms O'Brien) failed to follow the Dignity at Work policy as she did not de-brief the Claimant or have a feedback discussion with the Claimant. There was no follow up in writing other than a brief paragraph in a letter the purpose of which was to add further disciplinary allegations against the Claimant. The Claimant was not told in that letter about the right to request a review.

660. There was a wholescale failure to address the Claimant's grievance against Ms O'Brien. The Respondent's (Ms Evans) failure to treat it as such prejudiced the Claimant as her enforced route instead of the grievance procedure was a review of the Dignity at Work report which could not have addressed the issues being raised in the grievance as the Respondent's policy does not allow a review of the investigation so any factual errors or erroneous conclusions could not be corrected. Only the procedure could be reviewed.

661. The Respondent (Mr John's) disciplinary investigation refused to address any of the mitigating circumstances surrounding events on 10 and 14 January 2014 and initially at least focussed solely on the Claimant's behaviour and reactions to events and decisions being imposed on her by the senior nurses, despite the risks that entailed for the Claimant's professional nursing obligations and patient care.

662. The Respondent focused on denying that there had been "valid" protected disclosures rather than treating the Claimant's disclosures seriously and addressing them through their own whistleblowing procedures, despite Ms Evans later admitting she was unsure if this was even the correct position to have taken.

663. Ms Evans informed the Claimant that there was a confidential process and that Ms O'Brien had not been contacted whereas Ms O'Brien had been shown the Claimant's letters as evidenced in her email dated 24 September 2014. Ms O'Brien dismissed all of the Claimant's complaints as a frequent pattern of behaviour. Ms O'Brien and Ms Richardson had decided to press ahead with the disciplinary even though the investigation had not even been completed.

664. The Respondent (Mr John) barred the Claimant from being accompanied by the one person who was willing to be her workplace companion at meetings. The reasons given by Mr John were without merit. Mr Ball was a minor witness to the first two allegations and one of many. There was no legitimate reason we could see why this would mean he could not accompany the Claimant. This was not provided for in the Respondent's disciplinary procedure.

665. The Dignity at Work review should have taken 28 days but it took almost twelve months and then the Respondent unreasonably refused to release a copy to the Claimant. The Respondent (Ms Rees and Ms Harrison) refused to act on the review (which was that process had not been followed as the Claimant had not been offered mediation). Instead they sought to impose a further review, out of process.

666. The Claimant was unreasonably kept away from the workplace after her suspension was lifted by the delay in Ms Dodwell making a decision about where she could return to work and then later to ensure she was kept away from the workplace due to the Fiona Smith enquiry.

667. The Respondent did not take steps to ensure the Claimant could participate in the enquiry contrary to the agreed methodology.

668. The Respondent knew the allegations needed to be reframed but failed to do so and in particular retained the word abusive despite Mr John and Ms Evans highlighting concerns over this wording.

669. Ms O'Brien continued to play a central role in the Claimant's disciplinary despite the grievance against her.

670. There was a systemic failure to properly address and progress the various procedures and policies in a timely manner. Ms Hughes' Whistleblowing report demonstrated that no-one had ensured she had access to the relevant material – she even had not been provided with a copy of the CCTV footage or any of the patient notes from 10 January 2014, neither had she been informed that Mr John had already conducted an extensive investigation into the events on that night. Ms Hughes' recommendations were not acted upon.

671. Ms Harrison fundamentally let the Claimant down in failing to read any of the reports or the script prepared by Ms Evans. She had been assigned by the Chief Executive to get a proper handle on the situation. In our judgment it was not possible to have done this without reading any of the background information. Had Ms Harrison properly informed herself, and listened to the advice from Ms Evans and Ms Harrhy, it is likely that the decision to reinstate the disciplinary allegations against the Claimant would not have happened. Ms Harrison accepted as much in her evidence. This had long reaching and serious consequences for the Claimant. Ms Harrison was influenced by the systemic and engrained reputation of the Claimant as a troublemaker and this led to a dismissive attitude regarding the Claimant's complaints.

672. Ms Walker did not, as promised at her meeting with the Claimant follow up Ms Hughes recommendations. No actions were taken.

673. Despite the Claimant having been signed off sick for over one year for stress and depression, the Claimant's behaviour at meetings was subject to extreme criticism by the Respondent. No steps were taken to check she was well enough to attend meetings until Ms Harrison instructed Occupational health in 2016.

674. Ms Harrison gave assurances in March 2016 that the Claimant's grievance would move forward but nothing still happened until Mr Mason was appointed and even then he did not contact the Claimant until June 2016. The Respondent had also apparently lost the Claimant's original grievance letter.

675. The Respondent (HR) did not inform Ms Thomas that there was insufficient evidence or that there had been a view expressed by Ms Evans that allegation 4 should be dropped and whether allegation 5 should even be taken forward. Ms Thomas also did not properly consider the background documents reading only the conclusions of Mr John's and Ms Hughes' report.

676. The Respondent failed to fully comply with the Claimant's subject access request in refusing to release a copy of Mr John's report on the basis she had already been provided a copy, whereas there was no evidence he had done so and he was unable to produce any such evidence.

677. The Respondent tended to exaggerate the Claimant's behaviour in follow up letters which was not supported by the minutes and failed to take into account the Claimant's mental health.

678. This was in our judgment a course of conduct by the Respondent in a manner likely to destroy or serious damage the relationship of confidence and trust with the Claimant and amounted to a repudiatory breach going to the root of the contract.

679. The Claimant resigned in response to this breach of contract and did not affirm the breach. The Respondent submitted that the reason the Claimant resigned was not in response to the breaches but as she was not prepared to return to work or have the issues addressed by Ms Thomas. This submission relied on two comments made by the Claimant. Firstly in a disciplinaty investigation meeting with Mr John on 25 September 2014 ("I don't want to retirn to this place, this has gone on for too long") and secondly

in February 2016 when she is said to have made it clear she would not return to work. We do not accept this submission. In relation to the comment in September 2014 the notes are not signed by the Claimant. Further, even if the Claimant did make this comment a one-off comment made in the context of expressing frustration about how long the process Is taking this does not in our judgment override the Claimant's subsequent engagement in all procedures in her attempts to resolves matters. It was the Claimant who was pushing the Respondent to resolve the disciplinary investigation in December 2014 / January 2015 and she was met with a wall of silence. In relation to the February 2016 comments we were unable to establish the source of these comments other than the Claimant expressed a view that Ms O'Brien could be moved to facilitate a return to work, but there was no refusal that we could ascertain to return to work at that stage.

680. The weight of evidence surrounding the resignation leads us to conclude it is inherently plausible that the Claimant resigned for the reasons she set out in her letter of 20 June 2016, having discovered the insufficient evidence letter two days earlier and this was the 'last straw'.

681. The effective date of termination was 20 June 2016. The ACAS period of early conciliation ran from 22 June 2016 (Day A) to 22 July 2016 (Day B) The ET1 was presented on 17 October 2016 which means the S98 and S103A claims were presented in time.

Dismissal under S103A ERA 1996

682. Having found the Claimant was constructively dismissed we now turn to examine the reason for the dismissal.

683. The test to be determined is if the reason or if more than one the principal reason for the dismissal is that the employee made the protected disclosure.

684. In cases of constructive dismissal we must consider whether the reason or principal reason for the fundamental breach(es) of contract that resulted in the resignation was the protected disclosure(s). We must ask what was the reason why the Respondent behaved in the way that gave rise to the fundamental breaches of contract? **(Salisbury NHS Foundation Trust v Wyeth)**.

685. We remind ourselves that there is a different test in respect of causation for detriments ('material influence' – **Fecitt**) to unfair dismissal under S103A (reason or principal reason).

686. The Claimant's case was brought on the basis of a fundamental breach of the implied term of mutual trust and confidence and relied upon the Respondent's cumulative conduct, with the 'last straw' being the discovery of the draft letter written by Ms Evans in February 2015, confirming the Respondent had been aware there had been insufficient evidence against her in respect of the disciplinary investigation for 16 months. Our findings in respect of the breaches relied upon by the Claimant in considering herself as constructively dismissed are set out in paragraphs 412-414 above. It was evident from the correspondence and timing of the resignation that the discovery of that letter was a major factor in the Claimant's decision.

687. Where the Claimant has made multiple disclosures we should consider whether cumulatively the disclosures amounted to the principal reason for dismissal.

688. The decision to subject the Claimant to the disciplinary investigation came in two stages. The first three allegations arose out of events on 10 and 14 January 2014. In our detriment conclusions we found that the Respondent's decision to suspend the Claimant was directly caused by her having made protected disclosures 1, 2 and 3. In respect of allegations 4 and 5 we also found that there was a direct causal link between having made protected disclosure 1.

689. The disciplinary investigation resulted in the Claimant being suspended in January 2014 and never returning to work. Whilst the suspension was ostensibly lifted this was a false lifting. There was no intention on the part of the Respondent to enable the Claimant to return to work. It was a chicken and egg situation. The Respondent failed to progress the disciplinary investigation, as they sought to delay the Claimant's return to work during the Fiona Smith enquiry. They knew, collectively, as early as January 2015 that there was insufficient evidence for allegations 1 – 3 and serious doubts surrounding allegations 4 – 5. When the Claimant discovered this in June 2016 it was the last straw. We find that the protected disclosures were the principal reason for the Respondent's breach of the implied term of mutual trust and confidence for their conduct in respect of the disciplinary investigation, from the suspension, withholding of the investigation findings and the reinstatement of the allegations in June 2016.

690. For these reasons the Claimant's claim for automatic unfair dismissal pursuant to S103A ERA 1996 succeeds.

691. The Respondent submitted that the Claimant became aware of the 20 February 2015 letter when she reviewed the SAR documents on 20 April 2016. We found that the Claimant discovered this letter on 18 June 2016 (see paragraph 410 above). We have no hesitation that the discovery of this letter was indeed the "last straw" for the Claimant. She quite reasonably concluded that the Respondent, including both HR and Senior Nurses management team had known for at least 16 months there was insufficient evidence against her yet were still pursuing all 5 allegations and had recently reinstated the disciplinary investigation. The letter also acknowledged that work needed to be done within the teams in AU and EU. We therefore reject the submission she was aware in April 2016 and that she waited too long thereby waiving the breach.

692. For these reasons the Claimant's claims are well founded and they succeed.

The claim will now be listed for a remedy hearing.

Employment Judge Moore

Date: 21 January 2020

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

.....22 January 2020.....

.....
FOR EMPLOYMENT TRIBUNALS