Appeal No. UKEAT/0047/19/BA

# EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON, EC4A 1NL

At the Tribunal
On 23 September 2019

**Before**

**HIS HONOUR JUDGE AUERBACH**

**(SITTING ALONE)**

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MR JUSTIN SANJAY CHATTERJEE — APPELLANT

NEWCASTLE UPON TYNE HOSPITALS NHS TRUST — RESPONDENT

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Transcript of Proceedings

JUDGMENT

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## APPEARANCES

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| For the Appellant | MS SOPHIE GARNER<br>Irwin Mitchell LLP<br>Imperial House<br>31 Temple Street<br>Birmingham<br>B2 5DB |
| For the Respondent | MS SOPHIE BELGROVE<br>Samuel Phillips Law Firm<br>Gibb Chambers<br>52 Westgate Road<br>Newcastle upon Tyne<br>NE1 5XU |

**SUMMARY**

**VICTIMISATION DISCRIMINATION – Protected disclosure**

The Employment Tribunal found that the Claimant made protected disclosures in respect of the introduction of a new rota system, which he reasonably believed posed a danger to the health and safety of patients, and to be made in the public interest. Subsequent to this, concerns raised by colleagues about his alleged conduct were reffered to an investigation process, during which he was placed on restricted duties. The Claimant alleged that a number of matters to do with the instigation and handling of that process amounted to detrimental treatment by the colleague at whose instigation the new rota system had been introduced, as well as by others. The Tribunal found that he did make protected disclosures, but all of his claims of detrimental treatment because of the protected disclosures failed.

**Held**: the Tribunal had failed properly to analyse and engage with its own findings of fact, and evaluations of the Respondent's conduct, in various respects. That is having regard to the legal test of whether a detriment is on "grounds" of a protected disclosure, to the provisions of section 48(2) **Employment Rights Act 1996** on the burden of proof, and associated guidance in the authorities. A cross-appeal in respect of the Tribunal's conclusions that there were protected disclosures was dismissed.

**HIS HONOUR JUDGE AUERBACH**

## Introduction

1. I shall refer to the parties as they were before the Employment Tribunal ("the ET"), as Claimant and Respondent. This is the Claimant's appeal, although there is also a cross-appeal from the Respondent, in respect of the decision of the ET (Employment Judge Pitt, Mr Hunter and Mr Brown), arising from a hearing in April 2017. The Tribunal gave an oral decision, with written judgment following, in which it found that the Claimant made qualifying (and it is clear that the Tribunal also found, protected) disclosures on or about 15 or 16 November 2016 and 17 November 2016. However, it also found that he was not subjected to any detriments on the ground that he had made those disclosures. His claims under Section 47B of the **Employment Rights Act 1996** ("ERA") were therefore dismissed. Written Reasons were requested and in due course produced. A number of points of correction were then raised, leading to the Tribunal issuing a certificate of correction, and corrected Reasons. Those corrected Reasons plainly are the Tribunal's definitive written Reasons, and it is to these that I will refer.

2. The Claimant seeks to appeal against the Tribunal's dismissal of his claims that he was subject to one or more detriments on grounds of the protected disclosures. The Respondent's cross-appeal is pertinent only if that appeal succeeds, it being argued by the cross-appeal that the Tribunal erred in its findings that there were indeed protected disclosures.

3. The claim was begun while the Claimant was still employed by the Respondent, although by the time of the Tribunal's hearing he had resigned. It was confirmed to me that there was no claim of constructive unfair dismissal added at any point to his complaints.

## The Employment Tribunal's Decision

4. The Tribunal stated that the Claimant was employed by the Respondent as a Consultant Plastic Surgeon, having joined in November 2015. It heard evidence from the Claimant, and from a number of witnesses on behalf of the Respondent. Among them were: Mr Welch, a Consultant ENT Surgeon, Medical Director, and Joint Acting Chief Executive: Mr Clarke, also a Consultant and Clinical Director of the Plastic Surgery Dermatology and Ophthalmology Department; Mr O'Donoghue, another Consultant Plastic Surgeon; and Mr Hodgkinson, another Consultant Plastic Surgeon and Clinical Director. There were various other witnesses.

5. The Tribunal set out its findings of fact. It described how the Claimant was one of two candidates interviewed for the role that he got in 2015, the other being an internal candidate, Mr Veeramani. The appointment was a split decision, and there was an expectation in some quarters that the internal candidate would have been appointed, and disappointment that he was not. The Tribunal found, against this background, that the Claimant came into a hostile environment. The Tribunal went on to find that an issue arose during 2016 in relation to the Claimant's care of a particular patient, in which Mr Hodgkinson intervened. However, the Tribunal recorded that Mr Clarke sent Mr Hodgkinson an email in which he wrote that:

> **"….we need to draw a line, forget about Siva, make sure we give him a fair crack of the whip and see what happens."**

From later findings it is apparent this email was sent in August 2016.

6. The Tribunal went on to refer to a number of issues being raised by the Claimant about behaviour towards him that troubled him, including in relation to his job planning, Mr Hodgkinson opposing him attending a particular seminar, and so forth. The Tribunal also found that the Claimant had concerns about, in his view, not always having sufficient support to cover his elective surgeries.

7. At paragraph 4.6 the Tribunal found as follows:

> **"In February 2016 at an away-day a new rota was proposed. The proposal was put forward on behalf of Mr Hodgkinson, although not by him. There were concerns raised by a number of people as to the way forward with the new rota and at that time there seemed to be no agreement. The main thrust of the new rota was that Consultant Surgeons would carry out elective work at the same time as they were on call. The previous rota had been that when they were on call that was the only work they would carry out during that period of time."**

8. The Tribunal went on to record that the Claimant had some further ongoing concerns about lack of Registrar support, and that this gave rise to concerns on his part in relation to patient safety. The Tribunal went on to find that, during the Claimant's time, some issues were raised about his conduct of patient care. It recorded at paragraph 4.8:

> **"…. It is the respondent's case that it was because of these issues that the claimant was subject to an investigation…."**

In the same paragraph, however, it recorded its findings about the email sent by Mr Clarke to Mr Hodgkinson, to which I have already referred, indicating that a line needed to be drawn, and the Claimant needed to be given a fair crack of the whip.

9. On the subject of the new on-call system the Tribunal found as follows:

> **"4.9. The claimant was one of the first consultants to be deployed under the new on-call system this was at the week beginning 14 November 2016. The claimant did not have the benefit of the registrar that week his support came from a senior house officer. It was his opinion that the new system would cause delays and complications with the elective list and compromise patient safety. It was at this time the claimant undertook research and concluded that the new systems contradicted the guidance given by the RCS in "separating emergency and elective surgical care: recommendations for practice".**
>
> **4.10 During a meeting on 15 November the claimant spoke to Mr O'Donoghue and advised him of his concerns. At that meeting the claimant informed Mr O'Donoghue of issues he had had the previous day whilst he was the on-call consultant. The claimant also informed Mr O'Donoghue of the RCS recommendations. The claimant sent these recommendations to Mr O'Donoghue the following day.**
>
> **4.11 The claimant made another complaint to Mr O'Donoghue in relation to the new rota on the 16th or 17th of November when he had cause to leave a patient during a consultation to attend emergency theatre.**
>
> **4.12 On 17 November there was a consultant business meeting within the Department of plastic surgery. Prior to the meeting the claimant and Mr O'Donoghue spoke. Mr O'Donoghue said that he would discuss the claimant's concerns within the meeting and raise them with Mr Hodgkinson. During this meeting Mr O'Donoghue raised the RCS recommendations and gave information as to the claimant's issues that week. It is clear to the tribunal that this was a fractious meeting which became heated with many people talking over each other. The conclusion of the discussion was that the trial period of six months was to continue."**

10. The Tribunal then went on to refer to a meeting between Mr Hodgkinson and a Sister, Sister Taylor, in which she complained about certain working practices of the Claimant. This was on 8 December 2016. Following that Mr Hodgkinson sent her an email advising that she raise her concerns with the Clinical Director. The Tribunal went on to refer to a Breast Screening Unit staff meeting on 9 December at which the Claimant asked for the issue of conflict between on-call and elective clinics to be placed on the agenda. He did not attend that meeting, although the minutes suggested that the topic was raised.

11. The Tribunal then made a finding that:

> **"4.15. Matters came to a head on 13 December when there was an issue in relation to the claimant's treatment of a patient on the ward where Sister Taylor was working…."**

12. There had been a complaint from one of the nurses working under Sister Taylor. It is apparent from later on in the Tribunal's decision that this was a nurse called Ms Nevin, who, according to Sister Taylor, had been spoken to by the Claimant in a manner that left her extremely upset and in tears. The Tribunal recorded that the Claimant disputed that account, but that it was clear that there had been a heated discussion between them.

13. The Tribunal found that the Claimant was invited to a meeting with Mr Clarke and Mr Welch on 17 December, but not told the purpose, and so he declined to attend.

> **"4.17 The next contact he had from the respondent was an email indicating he was to be placed on restricted duties. In relation to these matters Mr Welch told us that he had been informed that Mr Chatterjee was struggling and about the incident on 13 December, therefore, because the claimant had failed to attend the interview, he believed the correct course of action was to investigate the matter. Mr Welch took the decision to place the claimant on restricted duties in that he was not to work on call or take on joint cases with other specialities. It was Mr Welch's view that there was plenty of work for the claimant to do. The claimant met with Mr Welch on 22 December when he informed Mr Welsh that he believed Mr Hodgkinson was acting against him and that there was not going to be a fair and open investigation. The claimant was signed off sick at this time with a chest infection. What is clear is that the decision to restrict the claimant's duties was not properly thought through nor are there any minutes to show how it was concluded that this was a measure that was required. Throughout the remaining period of the claimant's employment with the respondent the claimant remained absent through ill health."**

14. The Tribunal went on to find that no progress was made until March, when Mr Lees was appointed to conduct the investigation. During the investigation the Claimant remained on restricted duties and at no time was that restriction reviewed. Throughout the investigation he remained absent through ill-health. The Tribunal found that, other than contact for the purposes of the investigation, the Claimant was "left to drift" by the Respondent. An issue was also raised about the list of witnesses to be interviewed during the investigation. However, the Tribunal found that Mr Lees conducted an extremely thorough and meticulous investigation and report, concluding that the Claimant was safe to operate. The final report was seen by a Dr Newton in July, who produced her outcome in October 2017. However, the Claimant's case was that he had by then lost trust and confidence, and he resigned shortly thereafter.

15. In the next section of its Decision the Tribunal set out the issues in the following way

> **"5.1 Did the claimant disclose information to Mr O'Donoghue on or about 15 and 16 November?**
>
> **5.2. Did the claimant disclose information at the meeting on 17 November?**
>
> **5.3. Did the claimant disclose information at a meeting on 9th December?**
>
> **5.4. Was the information which he gave on those dates in relation to patient safety under the new rota?**
>
> **5.5. Did he have a genuine belief that what he was saying was true?**
>
> **5.6. Is it reasonable for the claimant to hold that view?**
>
> **5.7. Did the claimant act in the public interest or for some other motive?**
>
> **5.8. Was the claimant subjected to detriments?**
>
> **The alleged detriments were:-**
>
> **6.1. At a meeting on 8 December 2016 did Mr Hodgkinson suggest to Ms Taylor that she should contact Mr Clarke to see how her concerns about the claimant's conduct towards her Nurses could be taken forward?**
>
> **6.2. Did Mr Hodgkinson escalate the issue of the claimant having allegedly shouted at Hayley Nevin on 13 December to Mike Clark? Did he do so without making any attempt to verify Ms Nevin's account before so doing or speak to other people present?**
>
> **6.3. Mr Hodgkinson presented the issue above as a matter of competence as well as a matter of communication, i.e. that he was out of his depth.**
>
> **6.4. Mr Hodgkinson presented his concerns about the claimant to Mr Clarke as being of sufficient gravity to provide reasons to investigate the claimant and/or restrict his duties?**
>
> **6.5. Mr Clarke escalated Mr Hodgkinson's concerns about the claimant to Mr Welch which included an allegation of lack of competence.**

**6.6. Did Mr Hodgkinson and Mr Clarke fail to keep a record of what was reported by Mr Hodgkinson and how the decision had been reached to initiate an investigation and/or put in place restrictions?**

**6.7. An investigation was initiated, and restrictions placed on the claimant's practice.**

**6.8. Did Mr Hodgkinson and Mr Clarke devise the terms of reference for the investigation taking its scope beyond the matters that Mr Hodgkinson and Mr Clarke had initially reported to Mr Clarke on 14 or 15 December 2016?**

**6.9 Did Mr Hodgkinson and Mr Clarke propose the initial list of witnesses to the case investigator in February 2017 excluding witnesses, which included Antony Sorial, who might have witnessed or had information about the claimant's interactions with Hayley Nevin on 13 December 2016?**

**7.1. Did Mr Hodgkinson and Mr Clarke withhold from Mr Lees the statement of Mr Sorial which they had in their possession from December 2016?**

**7.2. Did they fail to review the restrictions on the claimant's practice causing him to be deskilled?**

**7.3. The delay in progress and completion of the investigation."**

16. In referring to the rival submissions the Tribunal said this, at paragraph 8.1:

> **"… it is the claimant's case that having come into a fractured department the claimant raised an issue in relation to the new rota which was the pet project of Mr Hodgkinson. Mr Hodgkinson seized upon the incident with a Nurse in order to remove the claimant from his department and therefore the claimant's case is that he did that because of his disclosures. The respondent's case is that this is simply not true, that the claimant in part objected to his restricted practice because it prevented him from carrying out his work in a private hospital."**

17. Under a Section headed "the Law" the Tribunal set out the full text of Section 43B of the **ERA** 1996. It also referred to Section 47B as creating the right not to be subjected to detriments because of a protected disclosure. It referred to **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] IRLR 285 on the concept of detriment, and cited from the speech of Elias LJ in **Fecitt & Ors v NHS Manchester** [2012] ICR 372, in particular from part of what he said at paragraph 51.

18. There was then a section headed, "Discussion and Conclusions". The Tribunal there repeated what it had said earlier about the Claimant having come into a fractured and divisive department and, having been appointed over the internal candidate, a hostile environment. It also found that the Claimant did not like confrontation and was suspicious of the motives of Mr

Welch and Mr Clarke and reluctant to attend meetings without appropriate professional support. It referred to a number of issues of unfair treatment having been raised, including in relation to job planning, permitting him to carry out private work, refusal to attend the wrist arthroscopy seminar and Mr Clarke having sent the "we need to draw a line under this" email, which the Tribunal took to be an acknowledgment that the Claimant had been unfairly treated up to that point. The Tribunal observed, at paragraph 9.3:

> **"It is against this background that the case must be considered."**

19. The Tribunal then turned to the issue of whether the Claimant made qualifying, and hence, as the communications were with his employer, protected disclosures. It said this:

> **"10.2. Did the claimant disclose information to the meeting on 17th November? It is clear to the Tribunal that Mr O'Donoghue indicated he would raise the claimants concerns about the rota issue at this meeting on behalf of the claimant. From the evidence we heard, and contrary to Mr Hodgkinson's account that the claimant never spoke, the Tribunal is satisfied that the claimant did speak to voice his concerns; he was not alone, and one witness stated that it got quite heated. The overwhelming evidence received was that the issue was raised by several people including the claimant, that is to say the issues raised was patient and safety. On this point the Tribunal noted that the claimant was one of only two people who had been on the rota; that it had been intended that consultants reduce their elective lists and that surgery to be undertaken was to be of Registrar level. The team were under pressure to reduce the waiting list; indeed, this was the reason the claimant was appointed, one of the reasons the rota was introduced was to avoid cancelling electives. Having noted the claimant's demeanour above the Tribunal concluded that the claimant was unlikely to confront the relevant person in charge of the waiting list, in order to reduce his elective list, unlike other consultants who had been employed for longer and may have had a more robust attitude. It was agreed by all that there were teething problems and the electives may not have been reduced to an appropriate level at this time and this was a real concern for the claimant. We are satisfied that the claimant amongst others raised patient safety at this meeting.**
>
> **10.3. Did the claimant disclose information at a meeting of 9th Dec?**
>
> **Looking at the agenda and minutes of the meeting of 9th December, an agenda item added by the claimant was the issue of consultants covering clinics when on call. The Tribunal concluded that although the claimant had direct experience during his most recent on call when he left mid consultation which is undesirable, patient safety was not put at risk, although the Tribunal acknowledge it would may cause further distress to a patient. Whilst the Tribunal concluded that the claimant felt it was an issue as it caused more distress at a time when patients were vulnerable. The Tribunal concluded that this was not information for the purposes of section 43B Employment Rights Act 1996.**
>
> **10.4 Did the claimant have a genuine belief that what he was saying was true?**
>
> **As already noted the claimant was a measured person who because of his training and as a new consultant within the Trust, the Tribunal concluded it is not unreasonable for him to be heavily influenced by the RCS guidelines. Further, he had had experience of a registrar who was not suitably qualified to take over an elective surgery when the claimant was called to an emergency. In the end he was not required to go to the emergency. This clearly would raise concerns in his mind as to his patient's safety. The Tribunal concluded he believed that patient safety was a very real issue.**
>
> **10.5. Is it reasonable for the claimant to hold that view?**

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

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

**It is asserted by the Respondent that the claimant was concerned about the impact on his private practice and/or his hand surgery work. The former is clearly not correct as the job plan took account of the claimant's commitments to the on call rota then in place. Whilst the claimant's emergency surgery work on hands was reduced the Tribunal did not consider this to be the claimant's motivation as he was still carrying out hand work in his private practice. There was no evidence whilst he would be expecting to do some=me hand work it would have some effect This was not the drive it was in the public interest."**

20. The Tribunal then turned to the question of whether the Claimant was subjected to one or more detriments, being those which it had identified in paragraphs 6.1 through to 7.3.

**"12.1. At a meeting on 8 December 2016 did Mr Hodgkinson suggest to Ms Taylor that she should contact Mr Clarke to see how her concerns about the claimant's conduct towards her Nurses could be taken forward? Did Mr Hodgkinson escalate the issue of the claimant having allegedly shouted at Hayley Nevin on 13 December to Mike Clark? Did he do so without making any attempt to verify Ms Nevin's account before so doing or speak to other people present? The tribunal is satisfied that these two may amount to a detriment and in this case did. It is clear evidence that Mr Hodgkinson had dislike for the claimant.**

**12.2. Did Mr Hodgkinson present the issue above as a matter of competence as well as a matter of communication, i.e. that he was out of his depth. The tribunal is satisfied that the complaint was presented in this way rather than a complaint about a specific incident. A complaint as to competence of an employee, may be detrimental treatment to an employee, and the Tribunal concluded that it was in this case.**

**There is no numbered paragraph 12.3**

**12.4. Did Mr Hodgkinson present his concerns about the claimant to Mr Clarke as being of sufficient gravity to provide reasons to investigate the claimant and/or restrict his duties? Again, the tribunal is satisfied that the concerns were presented in such a light.**

**12.5. Did Mr Clarke escalate Mr Hodgkinson's concerns about the claimant to Mr Welch which included an allegation of lack of competence. These concerns were escalated and amount to a detriment, in that the investigation proved them to be false.**

**12.6. Did Mr Hodgkinson and Mr Clarke fail to keep a record of what was reported by Mr Hodgkinson and how the decision had been reached to initiate an investigation and/or put in place restrictions? There is an appalling lack of record keeping in this case; in particular as to how the decision was made. The claimant is therefore at a disadvantage in challenging the motive of the respondent's witnesses.**

**12.7. An investigation was initiated, and restrictions placed on the claimant's practice. Such actions may be considered, and are considered to be detriments by this Tribunal.**

**12.8. Did Mr Hodgkinson and Mr Clarke devise the terms of reference for the investigation taking its scope beyond the matters that PH and SC had initially reported to Mr Clarke on 14 or 15 December 2016? Did Mr Hodgkinson and Mr Clarke propose the initial list of witnesses to the case investigator in February 2017 excluding witnesses, which included Antony Sorial, who might have witnessed or had information about the claimant's interactions with Hayley Nevin on 13 December 2016? The Tribunal are satisfied that the terms of reference were**

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

**12.9. Did Mr Hodgkinson and Mr Clarke withhold from Mr Lees the statement of Mr Sorial which they had in their possession from December 2016? Did they fail to review the restrictions on the claimant's practice causing him to be deskilled? The Tribunal considered this and the failure to review the claimant's sickness absence is astonishing clearly places the claimant at a detriment.**

**12.10 The delay in progress and completion of the investigation. The delay in the investigation is detrimental as until the investigation is complete the claimant cannot return to work. During this period, he is not working which may lead to him becoming deskilled."**

21. The Tribunal then, under the heading, "Was the Claimant subjected to those detriments because of the qualifying disclosure" said the following:

**"13.1. The crux of this case therefore is whether the respondent acted in the manner it did because of the claimant's disclosures; that is to say why did Dr Hodgkinson act in the manner he did, as it was it because his 'rota' that was under attack and the claimant was the one to raise initial concerns. Was it simply because he disliked the claimant and seized the opportunity or because the claimant was interfering with the rota? Was it some of both? The Tribunal must consider whether the disclosure was more than a trivial element in the decision to initiate capability proceedings.**

**13.2. It is clear to the Tribunal that Mr Hodgkinson did not want the claimant in his department and the claimant had problems throughout his tenure in relation to, for example, his job plan to allow for private practice, which was not unusual, his request to undertake a wrist arthroscopy, where it had been written across his application he is a breast surgeon. The Tribunal concluded that there was some antipathy towards the claimant from certain members of staff, this quite possibly came about because of Dr Hodgkinson's attitude.**

**13.3. In looking at the issue of causation the Tribunal must consider whether the claimant's disclosure had a material influence on the behaviour of Mr Hodgkinson or other members of the team**

**13.4. The Tribunal is satisfied that, Mr Hodgkinson's behaviour acted in the way he did because of the concerns his staff raised about the claimant which he was reluctant to raise because of the agreement to 'draw a line under it' earlier in the year. Having said that, he seized upon this last incident as an opportunity to ensure that the whole of the claimant's behaviour was brought to the attention of Messrs Clarke and Welch. The Tribunal concluded that he did this because of his ongoing concerns and antipathy towards the claimant, rather than because of the jeopardy to his new rota.**

**13.5. Turning to the remaining detriments, in order for the Tribunal to conclude that they were as a result of the disclosures there would have to be a measure of collusion between Messrs Hodkinson, Clarke and Welch. The Tribunal reject such an argument. Rather the Tribunal concluded that the manner in which the investigation was conducted, the failure to review the restrictions on duty, to apply a sickness absence policy, were at best a lack of training in the relevant policies and procedures and at worst total incompetence. The respondent would be well advised to ensure that its senior management team is fully conversant with any policies they may need to apply.**

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

## The Law

22. Section 43A **ERA** 1996 provides that a protected disclosure is a qualifying disclosure as defined by Section 43B, which is made by a worker in accordance with any of Sections 43C to 43H. There was no dispute in this case that if the Claimant made qualifying disclosures, then they were made to his employer and were protected disclosures. Section 43B reads as follows:

> **"(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, is being or is likely to be deliberately concealed.**
>
> **(2). For the purposes of subsection (1), it is immaterial whether the relevant failure occurred, occurs or would occur in the United Kingdom or elsewhere, and whether the law applying to it is that of the United Kingdom or of any other country or territory.**
>
> **(3). A disclosure of information is not a qualifying disclosure if the person making the disclosure commits an offence by making it.**
>
> **(4). A disclosure of information in respect of which a claim to legal professional privilege (or, in Scotland, to confidentiality as between client and professional legal adviser) could be maintained in legal proceedings is not a qualifying disclosure if it is made by a person to whom the information had been disclosed in the course of obtaining legal advice.**
>
> **(5). In this Part "the relevant failure", in relation to a qualifying disclosure, means the matter falling within paragraphs (a) to (f) of subjection (1)."**

23. Section 47B gives a worker the right not to be subject to any detriment by any act or any deliberate failure to act by his employer done on the ground that the worker has made a protected disclosure. It is one of a group of sections that provide protection, against detrimental treatment, to workers who have done a variety of things. They are all covered by the right to make a complaint conferred by Section 48, that the worker concerned has been subjected to a detriment in contravention of one or other of this group of sections.

24. Section 48(2) provides that on a complaint under certain subsections, including that concerned with detriment on the ground of having made a protected disclosure:

> **" …. it is for the employer to show the ground on which any act or deliberate failure to act was done."**

25. There are a number of authorities on the concept of a qualifying disclosure, but it is sufficient for the purposes of this appeal only to mention **Blackbay Ventures Ltd v Gahir** [2014] IRLR 416. There it was suggested that, in a case where there is a dispute about whether the complainant has done sufficient to make a qualifying disclosure, the ET should ask itself a series of discrete questions in respect of each claimed disclosure, in order to establish whether all the elements of the definition are satisfied. See **Gahir** at paragraph 98.

26. I was also referred to the following authorities. In **London Borough of Harrow v Knight** [2003] IRLR 140 the point was made that "on the ground of" is equivalent to the test of victimisation in the context of a discrimination claim, and therefore consideration of it requires an analysis of the mental processes, conscious or unconscious, which caused the individual concerned to have acted as they did. There is some reference to the Section 48(2) test in that decision, but ultimately in that case the EAT did not have to come to a firm analysis of it.

27. **Fecitt & Ors v NHS Manchester** [2012] ICR 372, was a decision of the Court of Appeal, Elias LJ giving the main speech, Davis and Mummery LJJ concurring. The Court held that the correct test, in relation to such a detriment claim, is whether the protected disclosure materially influenced, in the sense of being more than a trivial influence upon, the employer's treatment of the whistle-blower, as opposed to the test being the one that would apply in the unfair dismissal context, of whether the protected disclosure was the sole or principal reason for the dismissal. See in particular paragraph 45.

28. Further on, the Court of Appeal considered the question of whether such a claim must succeed if the treatment complained of was found to be "related to" the disclosure, or whether it was possible on appropriate facts for the Tribunal to distinguish, for example, between the fact of the disclosure and the manner in which it was made. The Court of Appeal accepted that in an appropriate case such a distinction should be drawn, although caution was required. This was the context and sense of its remarks at paragraph 51.

29. I was referred also to **Ibekwe v Sussex Partnership NHS Foundation Trust** UKEAT/0072/14. In particular, when considering the effect of these provisions, His Honour Judge Peter Clark said:

> **"21. I do not accept that a failure by the Respondent to show positively why no action was taken on the letter of 5 April before the form ET1 was lodged on 12 June means that the Section 47B complaint succeeds by default (*cf* the position under the ordinary discrimination legislation, considered by Elias LJ in Fecitt)." Ultimately it was a question of fact for the Employment Tribunal as to whether or not the, 'managerial failure' to deal with the Claimant's letter of 5 April was on the ground that she there made protected disclosure."**

30. **Serco Limited v Dahou** [2017] IRLR 81 was a case in which complaint was made pursuant to Section 148 **Trade Union and Labour Relations (Consolidation) Act 1992** ("TULRCA") of detrimental treatment said to be contrary to Section 146 of the **1992 Act**. This authority was cited to me because (although it refers to "sole or main purpose" rather than "ground") the language of Section 148(1) of the **1992 Act** is similar to that of Section 48(2) of the **1996 Act**. It provides that on a complaint under Section 146 "it shall be for the employer to show what was the sole or main purpose for which he acted or failed to act". In **Dahou** the EAT overturned a finding in favour of the complainant, because the ET had failed sufficiently to get to grips with the employer's case as to why it had treated him in the way that it had.

31. That decision, of Simler J as she then was, was upheld by the Court of Appeal [2017] IRLR 81. At 29 to 32 the Court (Laws LJ, Longmore and Richards LJJ concurring) said:

**29. It is plain that both the purpose of an employer's act or omission (sections 146 and 148) and the reason for dismissal of an employee (section 152) consist in the factors operating on the mind of the relevant decision-maker: see, for example, Baddeley [2014] EWCA Civ 658, per Underhill LJ at paragraphs 41 and 42. Both under section 146 (see Yewdall) and section 152 (see Kuzel), it is for the employee to raise a *prima facie* case. In the dismissal case it is perhaps more accurate to say that it is for the employee to show "only that there is an issue warranting investigation and capable of establishing the prohibited reason": Simler J (paragraph 52) referring to Maund [1984] ICR 143.**

**30. If the *prima facie* case is made out, then it is for the employer to show the purpose of his act or the reason for the dismissal, and therefore to prove what were the factors operating on the mind of the decision-maker. It follows, of course, that in such a case a critical element in the task of the Employment Tribunal consists in their reasoned assessment of the matters, certainly the central matters, advanced by the employer in proof of those factors.**

**31. In my judgment that was the approach which Simler J followed. She noted at paragraph 49 that at paragraph 17 the Employment Tribunal had observed in relation to Yewdall that "the EAT stated that the burden of proof" (section 146) operated in the same way as in the anti-discrimination legislation, such as section 63A of the Sex Discrimination Act 1975. The burden of proof only passes to the employer after the employee has established a *prima facie* or arguable case of unfavourable treatment which requires to be explained.**

**Simler J proceeded to observe at paragraph 50:**

> **"The first sentence appears to overstate paragraph 24 of Yewdall. The mechanism may be similar, but that does not mean that it operates in the same way, and nor is this what the Employment Appeal Tribunal said."**

32. I interpose that, in the passage in the EAT's decision in **Dahou**, which refers to the earlier EAT decision in **Yewdall v SSWP**, UKEAT/0071/05, Simler J went on to draw attention to the fact that, unlike the burden of proof provisions in the **Equality Act 2010** ("EqA"), under these provisions of the **ERA**, a shifting of the burden, and a failure by the employer then to persuade the Tribunal of its innocent explanation does not *automatically* lead to a finding in favour of the employee.

33. There was no disagreement before me today as to the salient propositions that can be extracted from this body of authority, and I would summarise them as follows. Firstly, it will not *necessarily* follow, from findings that a complainant has made a protected disclosure, and that they have been subjected to a detriment, alone, that these must by themselves lead to a shifting of the burden under Section 48(2). The Tribunal needs to be satisfied that there is a sufficient *prima facie* case, such that the conduct calls for an explanation.

34. Secondly, if the burden *does* shift in that way, it will fall to the employer to advance an explanation, but, if the Tribunal is not persuaded of its particular explanation, that does not mean that it must necessarily or automatically lose. If the Tribunal is not persuaded of the employer's explanation, that *may* lead the Tribunal to draw an inference against it, that the conduct was on the ground of the protected disclosure. But in a given case the Tribunal may still feel able to draw inferences, from *all* of the facts found, that there was an innocent explanation for the conduct (though not the one advanced by the employer), and that the protected disclosure was not a material influence on the conduct in the requisite sense.

35. It was common ground before me, correctly, that material influence is indeed (or one of the synonymous ways it is expressed in some authorities – it is all the same test), the test which the Tribunal should be applying. I add that it needs to be borne in mind that, where the claim is of unfair dismissal, under section 103A of the **1996 Act**, as the test there is "reason (or, if more than one, the principal reason)", there can be mixed reasons, but there cannot be more than one sole or principal reason. (A similar point applies in relation to the detriment test under Section 146 of the **1992 Act** considered in **Dahou** – referring to "sole or main purpose".) However, where the test in section 47B of the **1996 Act** applies, it is possible for the Tribunal to find that more than one matter was a material or contributing influence or ground. In such a case, therefore, where it is argued, or the Tribunal considers, even if it is not any party's positive case, that one or more of a number of different influences may be at work, it will potentially be open to it to find that more than one of them was a material or contributing influence.

**The Appeal – Grounds and Arguments**

36. I turn to the grounds, and the parties' arguments, in relation to the main appeal. I take the grounds of appeal and the arguments together, because the original grounds were somewhat discursive, with elements of repetition, and they were brought more into focus by Ms Garner's

written and oral submissions for the hearing of the appeal itself. In each case I have considered all the arguments, but will set out what seemed to me to be the main or most pertinent points.

*Claimant's Case*

37. I would summarise the headline basis for this appeal as follows.

38. Firstly, the Tribunal wrongly stated the underlying legal test of what it means for treatment to have been on the ground of the complainant having made a protected disclosure; or, alternatively, if it stated the test correctly, it did not apply it correctly. Secondly, the Tribunal failed properly to state and address how the burden of proof works in relation to such a claim, including by failing to cite specifically Section 48(2) of the **1996 Act**. Alternatively, it, in any event, took the wrong approach to the burden of proof, wrongly assuming either that the burden lay on the Claimant, or at best for him that the burden was neutral.

39. More specifically, the Tribunal failed, or failed sufficiently, to engage with the mental processes of the individuals said to be responsible for the detrimental treatment. There was an insufficient analysis of whether, in the requisite sense, the reasons for the detrimental treatment were the reasons put forward by the Respondent, the reasons put forward by the Claimant, or other reasons that emerged from the overall constellation of facts; and hence of whether among the reasons, those relied upon by the Claimant did play a material influencing part. There was insufficient analysis of this by reference to each of the detriments separately identified as having been asserted, of which there were some 12 in all. Rather, these were dealt with compendiously in two short paragraphs, 13.4 and 13.5 of the Tribunal's Decision.

40. The Tribunal had also failed to give sufficient attention to the implications of the fact that the reasons advanced by the Respondent were not found by it entirely to hold good. These

were briefly mentioned in paragraph 4.8, where it was said that it was because of patient care issues that the Claimant was subject to an investigation, but were not mentioned again in paragraphs 8.1 or 13.1.

41. The Tribunal had also not paid sufficient attention to the fact that there were two incidents in December which the Respondent was relying on, as having given rise to genuine performance concerns and, in turn, the investigation. The first was the one that led to Mr Hodgkinson emailing Sister Taylor encouraging her to take up her concerns with the Clinical Director, and the second was the one involving the complaint by Ms Nevin. The Tribunal had only specifically referred to the second of these (assuming that that was what it had in mind when it spoke of the last incident). The Tribunal had also not engaged with its own findings, in particular that Mr Hodgkinson and Mr Clarke between them had withheld from the investigation the statement of another colleague, Mr Sorial, that was favourable to the Claimant, and that they had omitted him from the list of witnesses who might be interviewed.

42. The Tribunal had found that Mr Hodgkinson may have "seized on" the complaints of Ms Taylor and Ms Nevin, but had not considered *why* he had chosen to seize on them, and to escalate matters into an investigation procedure, in the way that he had. The Tribunal had also misled itself by referring to the Claimant's actions having put the new rota "in jeopardy", because ultimately the new rota was adjusted to ensure that, on occasions when consultants were on call for emergencies, elective procedures were confined to those that could be carried out by Registrars or more junior doctors.

43. The real point, said Ms Garner, was that, by raising his concerns about the rota, and in particular by referring to RCS Guidance, the Claimant had embarrassed Mr Hodgkinson in relation to this new rota, which was Mr Hodgkinson's project. Also, said Ms Garner, the

Tribunal had failed to address the implications of its own findings in paragraph 12.6, that there was an appalling lack of recordkeeping, in paragraph 12.8 that the Tribunal was not clear why Mr Hodgkinson and Mr Clarke thought they should "meddle" in the investigation, and in paragraph 12.9, about the withholding of Mr Sorial's statement, and that the failure to review the restrictions on the Claimant's practice over the months of the investigation, causing him to be deskilled, and the failure to review his sickness absence, were "astonishing".

44. There was a further strand to the appeal, to the effect that the Tribunal had wrongly assumed that there was a legal requirement for a finding of collusion in respect of the allegations that involved Mr Clarke and Mr Welch, together with Mr Hodgkinson. However, in her submissions to me today Ms Garner, whilst not resiling from that proposition, did not particularly rely on it. Rather, she said, the point in relation to this observation in paragraph 13.5, which supported her main grounds of appeal, was that the Tribunal *had* found that Mr Hodgkinson, Mr Clarke and Mr Welch had been involved in mutual discussions and decisions; and so had not sufficiently explained why its observation about the need for collusion caused it to reject the complaints of detriment to which it was referring in that paragraph.

*Respondent's Case*

45. Ms Belgrove's main points were as follows.

46. Firstly, the Tribunal plainly understood the underlying legal test that they had to apply, referring in terms at paragraph 13.1 to the test of whether the disclosure was more than a trivial element in the decision to initiate capability proceedings, and again in paragraph 13.3 to whether it had a material influence on the behaviour of Mr Hodgkinson, and/or other members of the team. Further, the Tribunal had plainly applied that test, because in paragraphs 13.4

through to 13.6 it rejected any matters to do with the Claimant's concerns about the new rota as having had any influence on the treatment complained of. It said in terms in paragraph 13.6 that the treatment was not as a result of his disclosures.

47. On the question of the burden, whilst acknowledging that the Tribunal had not cited Section 48(2), Ms Belgrove submitted that it was nevertheless clear that it was aware of the appropriate approach to take, given its citation from paragraph 51 of **Fecitt** in its summary of the law, and its findings as to the positive reasons for the detriments, and to the effect that it was satisfied as to what these were.

48. As to the point about there having been two incidents in December, Ms Belgrove said they were all of a piece, because the general concern of the Sister was about the Claimant's interactions with nurses for whom she was responsible, and the complaint by Ms Nevin was a specific example of this, that was said to involve a particularly confrontational encounter, which brought this issue to a head.

49. Nothing of significance could be read into the Tribunal's reference to the question of whether Mr Hodgkinson had been motivated by the Claimant having put the rota in jeopardy, as that was simply a shorthand for the Claimant's acts of whistleblowing as found. Generally, submitted Ms Belgrove, the Tribunal's findings were sufficiently detailed and clear in its concluding section, which consisted not just of paragraphs 13.4 and 13.5 but began at paragraph 13.1, and needed to be read as a whole, and set against the background of the various earlier detailed findings of fact, on which it drew.

50. In particular, those findings set out clearly the factual background for the Tribunal's conclusions that the Claimant had come into a hostile environment and a fractured department, that there had been some concerns raised about performance issues, and friction between him and Mr Hodgkinson, from the outset, and dating from well before the time when he made the first of his protected disclosures. Further, the Tribunal reasonably grouped the multiple detriments into those that involved the role of Mr Hodgkinson in raising various matters that led to the investigation process getting under way, and then those that related to the unfolding of that process itself, once Mr Clarke and others became involved. Further, the Tribunal had made a clear finding as to why all of these detriments occurred, and that it was because of the background which owed nothing to his protected disclosures, and was an established feature of the situation before those disclosures were made.

51. The Tribunal was also entitled to refer to the fact that, insofar as Messrs Clarke and Welch were said to be implicated, that would have to have involved some collusion, and to conclude that there was no sufficient reason to conclude that there was such collusion, having regard to what it found to be the true explanation, which focused on the Claimant's relationship with Mr Hodgkinson.

**Discussion and Conclusions**

52. I start with the question of whether the Tribunal sufficiently stated the law in terms of the basic legal test to be applied by it. I agree with Ms Belgrove that the Tribunal correctly and fairly stated the test, as such, as being whether the disclosures were more than a trivial element, or had a material influence on the conduct complained of. Various phrases have been used in the authorities over the years, but they all mean the same thing, and the Tribunal clearly had the correct test in mind when it used these phrases.

53. However, what the Tribunal did not specifically remind itself of was that, in order to decide this question, consideration has to be given to the mental processes of the individual or individuals concerned. This is important particularly in a case where, as I have said, it is possible that there may have been a number of influences, and more than one material influence, on the mind of the individual or individuals concerned. The Tribunal did not say anything that *incorrectly* stated the law on this point, and therefore this omission is not necessarily fatal to the integrity of its decision; but it means that, in reviewing its decision, I have to decide whether I can be sufficiently confident that it had this aspect properly in mind, without having the reassurance of a clear statement that the Tribunal reminded itself of it.

54. Similarly, in relation to the burden of proof, in a decision on a section 47B claim, a Tribunal ought to refer to Section 48(2), or what it says; and indeed, without wishing to encouraging excessive or over-complicated citation of authority in this area, to show some awareness of the guidance that has emerged now from the authorities on how Section 48(2) may work in practice. Once again, there is, in this Decision, no *incorrect* statement of the law on this point, and so the failure of the Tribunal to direct itself about the burden is not necessarily fatal, so long as I can still discern that it did effectively consider and apply it correctly, in so far as it needed to do so.

55. In this case the Tribunal found that the Claimant had made protected disclosures, and had been subject to a large number of detriments over a period of time. Though they clearly all arose out of the same unfolding course of events, these various detriments were not, in their nature, all of a piece. Further, the Tribunal had found that the protected disclosures involved raising concerns and issues about the implications for patient safety of a new rota that had been introduced at the instigation of Mr Hodgkinson, and it had found that almost all of the

detriments were by way of conduct on the part of Mr Hodgkinson, and/or of Mr Hodgkinson together with others. Possibly the only detriment, although it is not entirely clear, that was found not to have involved Mr Hodgkinson at all, was the delay in progress and completion of the investigation.

56. The Tribunal had also made the findings, in paragraph 12.6, in which they spoke of an "appalling" lack of record keeping, in paragraph 12.8, that it was "not clear" why Mr Hodgkinson and Mr Clarke thought they should meddle in the investigation, a word that is, at best for the Respondent, ambiguous as to whether it has an entirely innocent connotation, and in paragraph 12.9, about the withholding from the investigation of the evidence of Mr Sorial, the failure to review the restrictions, and the failure to review the Claimant's sickness absence, the latter two of which the Tribunal described as "astonishing". Given all of those strong findings, had the Tribunal addressed the burden of proof in terms, in my judgment it would have been bound to conclude that a *prima facie* case was made out, which called for some answer.

57. Not all of Ms Garner's criticisms of the Tribunal's reasoning struck home. I saw force in Ms Belgrove's point that the two incidents involving the nurses were similar, the second incident being viewed as illustrative of the concerns raised by the first incident. I agree with Ms Belgrove that the reference to the rota being put in "jeopardy" was simply a shorthand for referring to the potential implications of the Claimant's whistleblowing, whatever precisely they might be.

58. The Tribunal was also entitled, as such, to consider whether some, or possibly even all, of the explanation for the detrimental treatment found was the hostile and difficult environment into which the Claimant came, and the various issues (unrelated to the protected disclosures)

over which he had clashed with Mr Hodgkinson, and the Tribunal's conclusion that Mr Hodgkinson was generally hostile or unsympathetic towards him for reasons that predated, and had nothing to do with, the protected disclosures.

59. However, I am persuaded by Ms Garner that there are a number of significant shortcomings in the Tribunal's reasoning. Firstly, it was the Respondent's case (as mentioned in paragraph 4.8) that Mr Hodgkinson's conduct, in particular in escalating (or encouraging the escalation of) the matters that were brought to his attention by Sister Taylor, and in relation to Nurse Nevin, into a formal process, was explained wholly and purely by his having had genuine concerns about the Claimant's performance or capability.

60. The Tribunal, however, did not, or certainly did not wholly, accept that case. In paragraph 13.1 it postulated the question whether (in contrast to the Claimant's case that Mr Hodgkinson had reacted to his protected disclosures) Mr Hodgkinson's conduct was explained by his "dislike" of the Claimant (which, in paragraph 12.1, it had found indeed existed), and in paragraph 13.4 appears to have concluded that the explanation was a mixture of his "ongoing concerns" (in response to issues raised by staff) and his "antipathy" towards the Claimant.

61. Having found that what it called "dislike" or "antipathy" (as I read it, the Tribunal regarded these two terms as synonymous) on the part of Mr Hodgkinson was part of the explanation for his conduct, which had not been any part of the Respondent's case, the Tribunal did not give any consideration to what, if any inference should be drawn from the fact that the Respondent had advanced a case before it that had not, or certainly not wholly, been accepted.

62. Secondly, and related to that, the Tribunal has not, in my judgment, sufficiently explained why it was satisfied that Mr Hodgkinson's conduct was wholly explained by "his ongoing concerns and antipathy towards the claimant, rather than because of the jeopardy to his new rota", that is, why, having regard in particular to that findings of "dislike" and "antipathy", it felt able to exclude the possibility that the Claimant's whistleblowing in relation to the rota had also at least had a material influence on his conduct.

63. In this regard, there is, so far as I can see, almost no express analysis in this Decision, for example, of the evidence given by Mr Hodgkinson or Mr Clarke or Mr Welch, whether in chief or under cross-examination, as to what was going through and influencing their respective minds. There is a reference in relation to Mr Welch, in paragraph 4.17, to what he told the Tribunal as to why he placed the Claimant on restricted duties, and what he said he believed about that, and there is a finding there that this was "not properly thought through". However, whilst that might, just, be sufficient to point to the Tribunal's conclusions about the thought processes of *Mr Welch*, it does not assist in relation to Mr Clarke or Mr Hodgkinson.

64. There is also no engagement by the Tribunal, in the concluding section, with its own earlier findings, in paragraphs 12.6, 12.8, and 12.9. The Tribunal uses strong language in these passages. The finding that the statement of Mr Sorial, and his name as a potential witness, were deliberately withheld, could also potentially be viewed as significant. The case advanced before me (as I understood it) was that the Tribunal was entitled to take the view that the behaviour discussed there was influenced by the animosity that had built up on the part of Mr Hodgkinson towards the Claimant. But I consider that the Tribunal needed to address the reasons for this conduct more fully, having regard for example, to its earlier finding that Mr Hodgkinson had been warned off, and told by Mr Clarke, indeed, to draw a line under matters,

but now seemed to have returned to them; and indeed its findings that Mr Clarke was involved, together with Mr Hodgkinson, in these very actions, despite the fact that it was Mr Clarke who had previously warned Mr Hodgkinson off.

65. It may be said that there is a significant difference between this case and **Dahou**, because in that case the ET had made a finding adverse to the employer without fully reflecting on the employer's explanations, whereas in this case the finding went in the employer's favour. I recognise that this Tribunal was in principle *potentially* entitled to make a finding that the whole explanation was not the one advanced by the Respondent, but a mixture of genuine performance concerns and animosity towards, or dislike of, the Claimant, but that, nevertheless, it was satisfied that the Claimant's disclosures in relation to the rota were not also among the things that materially influenced the conduct. However, if so, the Tribunal needed, in its reasons, to engage with those features of its findings that I have highlighted, and to set out a far more full account of the reasoning taking it to that conclusion, than it in fact did.

66. The Notice of Appeal as originally framed had included a *Meek*-compliance argument (**Meek v Birmingham District Council** [1987] IRLR 250), but, following remarks made by Simler J, as she then was, on the paper sift, Ms Garner did not seek to rely on a freestanding *Meek* ground. However, in any event the failures that I have described are failures by the Tribunal to take the proper legal approach that was necessary, in a case which presented itself with this particular multi-stranded evidential and factual matrix. This was an error of law, and therefore the appeal succeeds.

**The Cross-Appeal**

67. Ms Belgrove criticised the Tribunal's findings that there were protected disclosures, as defective, broadly in two respects. Firstly, the Tribunal had not properly identified which sub-limb of Section 43B(1) was being relied upon. It might be sub-limb (b) – failure to comply with a legal obligation, or (d) – health and safety being endangered, but the Tribunal had not said, in terms, which it was. Secondly, the Tribunal had not anywhere made specific findings of fact as to what information the Claimant actually communicated, in terms of what he actually said on the occasions when it found that he did make protected disclosures. These were essential building blocks of a proper finding that there were the elements of a protected disclosure present on each occasion, and without them it could not clearly be understood, for example, why the Tribunal considered that the Claimant had the requisite reasonable beliefs.

68. In reply Ms Garner drew my attention to the fact that the Claimant had provided further and better particulars of his claim in this regard. These appeared in my bundle. They included a specific account of what the Claimant said he had told Mr O'Donoghue in the telephone call on 15 November, to the effect that the new system was causing delays and complications with the start of the elective list, and compromising patient safety, including referring to a more than one specific example, of how he said such problems had arisen. Further, on either the 16th or 17th, having sent the RCS recommendations to Mr O'Donoghue, he spoke again, and gave him another example of how this had come about. They also asserted that he had spoken up at the meeting on 17 November, giving supporting information and answering queries about the incidents to which he referred. They also referred to his case as to his reasonable beliefs, drawing on the RCS recommendations, and referring to the explanation given there, of why separating emergency and elective cases had significant benefits for patients. All of this, I was told, was reflected in the Claimant's witness statement for the hearing.

69. Ms Belgrove submitted that it was not sufficient to rely on pleadings or, indeed, the Claimant's witness statement, because none of that was reflected in the Tribunal's findings in its actual decision. Indeed, she suggested the fact that Ms Garner had had to resort to this material rather made her point.

70. However, I do not agree. Firstly, in its decision the Tribunal, at paragraph 4.7, referred to the Claimant's concerns about patient safety. In paragraph 4.9 it referred to his opinion that the new system would cause delays and complications with the elective list and compromise patient safety, and that his research revealed that it contradicted RCS Guidance on, "separating emergency and elective surgical care". In paragraph 4.10 the Tribunal referred to the Claimant informing Mr O'Donoghue of issues he had had the previous day whilst he was the on-call consultant. It referred to in paragraph 4.11 to him telling Mr O'Donoghue he had had cause to leave a patient during a consultation to attend emergency theatre. In 4.12 Mr O'Donoghue was recorded as telling the Claimant he would raise his concerns at the meeting, and raise them with Mr Hodgkinson. In 5.1 the Tribunal posed the question in general terms but in 5.4 it referred to patient safety.

71. Then, in paragraph 10.1, the Tribunal again posed the question of whether there was a disclosure, and went on to identify that the issue was whether the Claimant had made a point in relation to health and safety. In 10.2 it referred to the fact that the Claimant was one of only two people who had been on the rota, and that it was satisfied that he was among those who raised patient safety at the meeting. Thereafter, in 10.4, it concluded that it was not unreasonable for him to be heavily influenced by the RCS Guidelines, and that the Tribunal accepted that he believed that patient safety was a very real issue. In 10.5 it referred to his own

A experience whilst on the on-call rota and to the issue having been addressed by ensuring that elective lists were now lighter, and reduced to Registrar level.

B 72. Drawing on all of that, firstly, there was no suggestion, either before the Tribunal nor as a postulated ground of appeal, that Mr O'Donoghue did not know about what the Claimant had raised, why he had raised it, and about the examples that he had given. Secondly, it really is perfectly clear, I think, from all of those passages, that it was understood by the Tribunal, and C by the Respondent, that the Claimant was raising concerns over what he saw as the implications for patient safety, and that it was his case that this fell within Section 43B(1)(d). One has to remember, I think, that this whole case has the context of a hospital setting, treatment of D patients, and in particular, treatment of patients requiring surgery or surgical care.

73. It is also clear that evidence was given to the Tribunal that the Claimant had spelled out E his concerns by reference to actual factual examples from his own experience. True it is that the Tribunal did not reproduce and set out what those examples were, to which he had referred, in its own written Reasons, and true it is that its summary of the issues does not frame in paragraph five the questions for its consideration in precisely the correct legal way. However, F one needs to bear in mind that the first audience for the Tribunal's decision was the parties, who were fully acquainted with the issues, and with the evidence that had been given reflecting those issues. I think it can be inferred that the Tribunal assumed that they would, therefore, G know the greater detail behind the matters to which it was referring in this regard. That was, as such, a fair assumption. Further, the real focus of what it had to decide, on the question of whether these were qualifying and protected disclosures, and which it did get to grips with, in H its Reasons, was whether the Claimant had genuine concerns and whether they were reasonably

held. I add that there was no challenge in this appeal to the Tribunal's conclusion (or how it was expressed) on the public interest limbs of the definition of a qualifying disclosure.

74. The Tribunal, it must be said, did sail perhaps a little close to the wind by not setting out more precisely the legal tests in this regard, in the statement of issues in paragraphs 5.1 to 5.8, and by not spelling out, for the benefit of *all* readers of its decision, in more detail, the factual evidence it had, of the examples that the Claimant had given in raising his concerns with Mr O'Donoghue, and in articulating his concerns at the 17 November meeting. I do not encourage the cutting of corners of that sort, relying on the assumption that the parties will know well enough what is being spoken about. However, in this case I do not consider that the failure to set out this aspect was fatal to the robustness of the Tribunal's findings and conclusions that there was a protected disclosure. Accordingly, the cross-appeal fails.