EMPLOYMENT TRIBUNALS

Claimant	**Respondent**
Mr M Coxwell	**Glenside Manor Healthcare Services Ltd**

Heard at: Southampton **On: 29 January 2020**

Before: Employment Judge Rayner

Appearances
For the Claimant: Mr Coxwell (in Person)
For the Respondent: Mr G Self (Counsel)

JUDGMENT

1. The Claimant was automatically and unfairly dismissed contrary to the provisions of the Employment Rights Act section 103A. The principal reason for his dismissal was that he had made public interest disclosures within the meaning of section 43B of the Employment Rights Act 1996 in that he disclosed information in emails dated

    a. 1 November 2018, about failing heating and lack of an adequately qualified maintenance team;
    b. 2 November 2018 about broken hoists.

2. The Claimant was wrongfully dismissed by the Respondent.

3. The Claimant contributed to his own dismissal by blameworthy conduct in that he sent an ultimatum to his employer in his email of 2 November 2018 and the compensation awarded in respect of unfair dismissal is therefore reduced by 20%.

4. The Respondent failed to comply with the ACAS code of conduct applicable in this case to a conduct dismissal, within the meaning of section 207A TULCRA 1992 and the Claimants' award in respect of unfair dismissal is therefore subject to a 25% uplift.

5. The Respondent will pay to the Claimant the total sum of **£ 46,882.69** calculated as follows:

Basic award	£787.50	
20% reduction for		**£787.50**

contributory fault, 25% uplift for ACAS failure		
Compensation for loss of earnings for period up to end August 2018	£31831.77	
Less proportion of earned income of £750.00	£31081.77	
Additional loss of use of company car of £5602.74	£31081.77 + £5602.74 = £36,684.51	
Less 20 % for contributory fault; followed by 25% uplift for ACAS failure	£36,684.51	**£36,684.51**
Damage for wrongful dismissal		**£9410.68**
Total award		**£46882.69**

REASONS

6. Oral reasons were provided at the end of hearing. A request for written reasons was made following the hearing and those reasons are provided as set out below.

The Hearing and the Issues

7. The Claimant in this case had applied for interim relief which had been refused, and we were provided with a copy of the judgment of that hearing.

8. There had been 3 case management hearings, on 1 March 2019 before EJ Salter; on 9 August 2019 before EJ Oliver and on 16 December 2019 before EJ Livesey.

9. As a result of the case management hearings and orders, the issues in the case had been agreed between the parties.

10. At the start of this hearing there was some discussion about the scope of the Claimants claim. The Claimant who was a litigant in person before us but who has had the benefit of legal advice and assistance at an earlier stage in the litigation, referred to disclosures that he said he had made to the Clinical Commissioning Group and Wiltshire NHS amongst others. It was clear throughout the hearing that these disclosures were important to him. However, these disclosures did not now form any part of his claim before us.

11. Following explanations about the progress of the case and the process of agreeing the issues which the ET must determine in this case from Mr Self, who has represented the Respondents throughout, and discussion with the Claimant , the Claimant confirmed that he had withdrawn his claim in respect of the alleged disclosures to the CCG and to WNHS and that his amended claim was correct.

12. This was reflected in the case management orders and from the papers in respect of the interim relief hearing.

13. The issues for us to decide then, were limited, by agreement, to findings in respect of the 5 groups of emails set out in the case management order of Employment Judge Oliver of 9 August 2019. Those disclosures were described as follows:

    a. email 23 June 2018 about a medical error;
    b. email 17 October 2018 about poor standards of cleaning;
    c. email of 18 October 2018 about levels of qualified and appropriate staff;
    d. email of 1 November 2018 about failing heating and lack of an adequately qualified maintenance team;
    e. email of 2 November 2018 about broken hoists.

14. The emails are relied on individually and collectively.

15. The question we must consider and answer is whether any information was disclosed in any or all of those emails which, in the Claimant's reasonable belief, tended to show that either

    a. a person has failed to comply with a legal obligation to which he was subject with reference to the Health and Safety At Work Act 2008 or
    b. that the health and safety of any individual has been; is being or was likely to be endangered.

16. If so, did the Claimant reasonably believe that the disclosure was made in the public interest? The Claimant relied upon the disclosures highlighting serious risks to health and safety of vulnerable patients.

17. If the Claimant did make any disclosures of information which are protected disclosures was the making of any proven protected disclosure the reason or the principal reason for the dismissal?

18. The Claimant also brings a claim of wrongful dismissal. The Claimant was dismissed without notice but was paid one month's pay in lieu of notice. The Claimant says that he was contractually entitled to 3 months' notice. There is a dispute about the terms of the contract of employment which was in force at termination, because there had been discussion about variation of some terms of the Claimants contract, and agreement to make variations to his contract, following his successful completion of his probationary period in March 2018.

19. We have heard oral evidence under oath from the Claimant; from his witness Jackie Harris and from his witness Yvette Healy. We have also been provided with a witness statement from Heidi Hand on his behalf, who was unable to attend to give evidence.

20. We have heard no live evidence from the Respondent at all, we have been provided with a witness statement signed by Dr F, which was produced for the purposes of an earlier hearing in respect of interim relief.

21. There is no dispute that the person responsible for the line management of the Claimant, and the person who decided to dismiss him was Dr Gerhard

Florshutz. (Dr F.) However, we have heard no live evidence from him at this hearing.

22. We were not told why Dr F did not attend.

23. Whilst it is for the Claimant to prove on balance of probabilities what the principal reason for his dismissal was, we noted that the Respondent may face some difficulty in asserting an alternative cause, in the absence of any live evidence, if there is evidence supporting the cause relied upon by the Claimant. We would need to consider whether any alternative cause is plainly evident on the face of the documents, or any explanation in the witness statement of Dr F is plainly supported by such documentation for example.

Findings of fact

24. The Claimant started working with Glenside on 31 October 2017 as operations director. His employment ended on 6 November 2018 when he was dismissed.

25. The Claimant alleges that he was automatically unfairly dismissed contrary to section 103A ERA 1996, as a result of having made protected disclosures to his employer. He relies upon the 5 sets of emails, the first of which was sent in June 2018 the remainder of which he sent in October and November 2018.

26. The Claimant was employed by the Respondent for less than a year and therefore does not have the right to bring a claim for ordinary unfair dismissal. In addition, he has the burden of showing on the balance of probabilities that the reason for his dismissal is one which leads to a finding of automatic unfair dismissal in the context of a public interest disclosure claim, within the meaning of sections 103A and 43B ERA 1996.

27. The Claimant must prove that the reason for his dismissal was that he had made the disclosures he relies upon. In this case, where it is suggested that there may have been mixed motives or causes for the dismissal, the Claimant must prove that those disclosures were the reason or the principal reason for his dismissal.

28. The Claimant was employed by the Respondent as its operations director. The Respondent is a private health care provider with a number of facilities across the country, of which Glenside is one.

29. Glenside is a private hospital dealing in part with the rehabilitation of those requiring neuro rehabilitation and those who have had brain injuries following a traumatic event and require ongoing therapy to assist with a range of functions. Much of the work we were told about involved individual therapy sessions with physiotherapists. Many of the patients were unable to get in and out of bed unaided and required the use of hoists for this, as well as to enable them to take part in the physical therapy. Other patients, either with dementia or with brain injuries may have difficulty in communicating, or in understanding some communication.

30. The facilities comprise a hospital and also residential units.

31. The majority of patients admitted to Glenside are publicly funded from NHS England or other CGCs from around the country. The company contracted with national health providers to take patients from the NHS and provide them with care. The company was paid a sum for each patient, and therefore the business depended upon any vacant beds being filled quickly in order to generate profit.

32. In order to be able to receive patients with the most acute needs from NHS England, the unit had specialist status which required staffing by specified levels of health care professionals. This included allied healthcare professionals or AHP with physiotherapists; speech-language therapists; occupational therapists and required a psychologist at professional band 7.

33. Dr F had, we are told, previously run a successful business, Raphael, and had bought the share capital of the Respondents . This was sometime prior to the Claimant being employed.

34. The Respondent suggested and the Claimant did not disagree that Dr F had an authoritarian and dictatorial approach to matters. The Claimant accepted that Dr F was mainly interested in the Claimants experience of dealing with and his links with the suppliers of potential customers. The Claimant accepted that it was this area of work that Dr F wanted him to focus on.

Findings of fact

35. Initially during his early employment, the Claimant met regularly with Dr F at Glenside. However, as his employment progressed they met less often.

36. The Claimant agreed in cross examination that Dr F was of the view that the Claimants main work focus should be to use his expertise and connections to get patients into the beds. He agreed that Dr F saw this as the primary purpose of his role and also agreed that Dr F, as director and shareholder and his line manager and boss, was entitled to require him to focus on this aspect of his job.

37. The Claimant was instructed to focus on patient occupancy numbers and was, in reality, given little opportunity to manage Glenside. Dr F took over responsibilities for recruitment; purchasing and site maintenance and actively discouraged the Claimant becoming involved in these matters.

38. Throughout his employment the Claimant raised numerous concerns about the performance of the maintenance team, and as time went on about other teams.

39. He was particularly concerned that the maintenance team did not appear to be doing a good job and did not speak sufficient English in order for instructions to be given when plant equipment for things such as heating needed repairing. This was a concern, because the Claimant considered that things like heating needed immediate action, given the vulnerabilities of many of the patients who were resident at the hospital.

40. As his employment continued he was also increasingly concerned about the way staff were recruited both to maintenance roles and to front line care roles. He was unhappy that existing staff were replaced with overseas staff, who had little English and were not able to understand the patients, and whom the

patients, many of whom had serious brain injuries, could not understand. He was concerned that people turned up at the hospital saying that Dr F had given them a job, without paper work showing the right to work in the UK, or showing that they had been DBS checked.

Emails of 23 June at p B28

41. In June 2018 Dr F cancelled a contract with NES to provide cover staff on a 24 hour basis with junior doctors and instead recruited a Dr Dana. When Dr dana was first appointed, she was initially shadowing the NES doctor who was working on site, but by 23 June 2018 she was left to work alone. A serious incident then took place as a result of her clinical treatment of a patient. This incident is described by Steve Baldeo, Glenside clinical lead, in an email to Koko Naing and was copied into Dr F and the Claimant on 23 June 2018.

42. At 14.42pm on the same day the Claimant emailed to Dr F stating that there was no choice but to relieve Dr Dana of her post. He states that *This is such a critical medical error. It leaves us massively vulnerable. We need to resume contract with NES.*

43. Dr F knew what the issue was. He knew that Dr D had put a patient's life at risk. This email informed him that there was further risk, because without her working as the Doctor, they did not have cover. This would have been obvious to Dr F who knew that Dr D was the only cover, having taken the decision to recruit her to replace the services previously purchased from NES.

44. We find that this is a disclosure of information by the Claimant and that the Claimant reasonably believed that his email, in conjunction with other matters communicated and known by Dr F tended to show the health and safety of patients may be endangered. He believed and was communicating to the Respondent that the continued employment of Dr Dana, and the lack of proper supervision by qualified doctors, posed a serious risk by leaving them massively vulnerable.

45. However, if we are wrong about this, and in any event, we find that the email exchange in June 2018 had no effect whatsoever on the Respondent's later decision to dismiss the Claimant in November 2018.

46. We find that following this event, the Claimant did renew the contract with NES, but that this was subsequently cancelled by Dr F. Instead, the medical staff were used on a spot basis or contract by contract basis.

47. The next set of events relied on by the Claimant concern the cleaning of the staff accommodation.

48. The Claimant was concerned about the lack of record-keeping of those who were on site and told us that he was concerned that people would turn up with a suitcase and say they have been offered a job and accommodation by Dr F.

49. The email at page B 60 refers to an issue in respect of cleaning. It arises from the staff members rooms not being cleaned properly.

50. The Claimant forwarded an email to Dr F with a complaint about the lack of cleaning and says *if you cannot organise this let me know and we can handle it. The whole accommodation situation is a joke.*

51. The Claimant suggests that this is a reference to staff turning up on site, those staff being staff about whom the Claimant had no knowledge and in respect of whom there was no paperwork. We do not agree. This exchange, which culminated in Dr F responding to the Claimant to *leave your hands off this and concern yourself with your tasks* is not a disclosure of information about staff not being qualified or having proper clearance. It is information flagging up a difficulty with cleaning of staff accommodation. The Claimant is dissatisfied with the system for cleaning, but there is no suggestion of any other concern and no other information in this email exchange.

52. Could the Claimant reasonably have believed that this email exchange tended to show a breach of a legal obligation or risk to anybody's health and safety? We find that he could not have done and did not do so.

53. The emails of 18 October 2018 are alleged to be about qualified staff at the hospital . B63 is about qualified staff and expresses concerns that the hospital does not have the required levels of staffing of AHP to retain their specialist status, to manage current levels of rehabilitation or to be reassured that the facility would be able to continue to take admissions.

54. In evidence the Claimant said that the consequence would be that the Glenside may lose custom and clients. Mr Coxwell stated that the consequence of not recruiting further staff would be that the unit would not be able to meet the required specification and therefore would not be able to take on additional patients with high level of need. He did not any point suggest that the consequence would be a risk to existing patient safety or a breach of regulations but rather that he was concerned about a potential economic impact for the unit of not addressing the staffing issues at that point.

55. The concern raised is over whether or not Glenside *will be able to continue to deliver the service, because they do not have the right staff levels*. The Claimant suggests that Dr F provided figures which were an attempt to hoodwink the commissioner. He says this in his WS at para 22(f), but he does not say this in his email and it cannot be inferred from the correspondence .

56. This is a disclosure of information, but the email does not refer to health and safety concerns or to legal obligations being breached, and that cannot be inferred from the context. It is about whether or not Glenside can continue to be a specialist unit, and retain its status as such. Whilst it raises concerns about the future viability of the unit, no reference is made to patients or to any concerns about risks to their health and safety or that of anyone else.

57. Whilst the Claimant may have had concerns that staffing levels and in particular that the recruitment and retention of qualified staff would impact on patient safety, this email exchange does not in any sense refer to such a concern and we find that the Claimant cannot have reasonably believed that this email

exchange tended to show a failure to comply with a legal obligation or that the health and safety of any individual was or might be endangered.

58. On his own evidence this was not the focus of his concern. We find this despite the fact that there are references to expected standards of staffing. The email exchange is about the possibility of providing services in the future and the fact that it will not be possible to do so because the unit does not have the required staffing levels at present.

59. We find for this reason that this was not a protected disclosure.

60. By October 2018 the Claimant became increasingly concerned about the way that Glenside was operating.

61. One such issue of concern was Pembroke lodge heating.

62. As a result of Dr F having made significant changes to the staff who were responsible for maintaining and servicing the heating systems, there was an issue when boilers broke down. The Claimant says that the staff who were on site and responsible for dealing with on-site issues could not speak English well enough, making it difficult for him to communicate concerns to them and that despite raising the matter with Dr F, Dr F failed to take any steps to get it sorted out. The Claimants concern, he told us, was that patients were being affected.

63. On 29 October 2018 Sandra Jones, an inspector at CCG, wrote in an email to inform the Claimant and others that they had received a whistleblowing concern about Pembroke Lodge.

64. She stated that there was a need to ensure that people will not be cold while the weather temperatures are low.

65. The Claimant wrote back saying that he was not aware of the issues, and asked Steve to investigate.

66. At 20.42pm on 29 October, Steve B emailed the Claimant, to explain what the problem was and noting the steps would be taken to ensure that patients would all be warm enough during cold weather.

67. On 1 Nov 2018 Sandra Jones, who had been copied into the email from Steve B, wrote again, stating that they continued to receive whistleblowing concerns and setting out the CCQC registration regulations.

68. The Claimant then wrote by email to Dr F at 15.27 on 1 November 2018, attaching the chain of emails, and saying that the site service was unacceptable on multiple counts and that he had no choice but to step in and get a qualified contractor to come in and solve the situation. He also states, *Please don't try telling me it is the first you have heard of it.* As set out below this was to pre-empt an expected reply.

69. Dr F responded, on the 1 November 2018 at 21.17 referring to an earlier email, which was a response in respect of another issue which had been raised at the same time, and concerned the question of hoists, which we consider below.

70. There is no response that we have seen from Dr F to the serious concern about heating for patients by email or otherwise at that time, and this is not something which he had addressed in the witness statement which we have been given on his behalf.

71. Turning to the issue of hoists. At 11.10am on 1 November 2018, Steve B had emailed a general email for information referring to the fact that all three hoists were broken in the hospital but that the physio team had agreed to do sessions in the SU room. One hoist was being shared between the Homes and the hospital.

72. At 11.34 the Claimant sent an email to Dr F saying *this situation has been going on for weeks hoist issues we need to order at least 2 hoists now regardless of any that can be repaired I can do this today, regards Mark*.

73. We also heard evidence which we accept from Yvette Healy. Her statement and her evidence was not challenged by the Respondent.

74. At para 5.1 of her witness statement she explains that from the beginning of her employment Glenside had not had enough working hoists and the ones they did have were faulty.

75. She had asked Mark (the Claimant) to order more hoists and had asked for an update in her one-to-one meetings with him. She had raised with him her concerns about the impact that the lack of hoists had on patients and had been told by Mark that he had informed Dr F about it as he was also receiving complaints.

76. Ms Healy states in her witness statement *I also know he spoke with Gerhardt (Dr F)as Gerhardt was present in some of our managers meetings and Mark would ask him direct. One patient's family actually rented their own equipment because we couldn't order it for them. Gerhardt had agreed to reimburse them but later denied having any knowledge of it. One of the staff members also bought a hoist with their own money and then had to be reimbursed by the finance director*.

77. We find that the absence of working hoists for vulnerable patients, was so obviously a health and safety risk to both the patients who need to be assisted in and out of bed, and who relied upon the hoists to ensure that they received physiotherapy, and received it safely, but also to staff who are working with them which, that it should not have needed to be spelt out to Dr F.

78. The reply from Dr F by email on 1 November 2018 12.57 is that this is the first that he hears about it, and says he will source from *our suppliers ASAP*.

79. The Claimants evidence, and that of Yvette Healy was that he had told Dr F about the Hoists previously, and we find as fact that he had done so. Dr F did already know about issues with the hoists when he received the Claimants email, and would have known or ought to have realised the health and safety implications.

80. Dr Fs response, that this was the first he had heard about the hoists, was not true. He knew there had been a problem with hoists for some time but had taken no steps to remedy the situation, and then claimed ignorance of the issue.

81. In the absence of any explanation for the inconsistency, we find that this is an example of the unreliability of Dr GF as a witness of truth.

82. We find that the email was a disclosure of information which in context referred to the fact that the health and safety of patients was being or would be endangered, which was so obvious, and had been raised so many times, that Dr F would have known of it and did, in fact know of it.

83. More importantly, when the Claimant wrote the email, he reasonably believed that the information he was communicating tended to show that a person had failed to comply with a legal obligation and/or that the health and safety of an individual, whether patient or staff member, had been or would be endangered.

84. These were disclosures of information in the public interest and were qualifying disclosures within 43B.

85. To put this in its proper order, the emails about the hoists came first, and then, after sending those emails, the Claimant sent further emails to Dr F about the heating, and made his comment *please don't try to tell me that this is the first you have heard about it*.

86. So, at this point, Dr F had said that he would order some hoists. At 15.27, he then received a further email about a different problem from the Claimant , this time about the heating.

87. This was the email in which the Claimant raised the problem about the heating at the homes and the need to get a contractor in to deal with the problem.

88. The Claimant sent the series of emails to Dr F, and thus was disclosing information about a problem at the home, in relation to the heating. We find that the Claimant reasonably believed that the information which he was disclosing tended to show a failure to comply with a legal obligation and that the health and safety of patients had been was being or was likely to be endangered, and that the information he was disclosing was in the public interest.

89. In addition, the combination of the emails about hoists and the lack of them, and the heating and the lack of it, and the difficulty with fixing the problems, combine to disclose information about a combined concern about health and safety risks to patients at Glenside. This chain of emails was made in the public interest and was a public interest disclosure.

90. It was in the email sent at 15.27, in the course of an email raising this second serious problem, that the Claimant who was clearly and understandably exasperated at this point, wrote to Dr F, don't say that *this is the first you have heard about it*.

91. In response to this email that Dr F replied at 21.17 on 1 November 2018 to the Claimant *do not overstep your mark and remember who your employer is*.

92. Dr F says in his email that he had already arranged for an annual service of the hoists to take place in November and that he would try to bring that forward. He signs, kind regards.

93. During that day there had been two issues which the Claimant had raised with Dr GF, and in both cases he has sent an email chain about the issues, firstly with the hoists and secondly about the heating. The email chains in both cases set out serious concerns.

94. The Claimant remained concerned and frustrated and later that evening at 23.23 he wrote in a further email to Dr F, *gerhard we have no hoists, I am so frustrated by this ridiculous set up!* We have seen no reply to this email.

95. However, 8 minutes later, the Claimant sent a further email to Dr GF saying *I give in I can't do my job anymore because you won't allow me. It's ridiculous and I am so passionate about Glenside. You really need to wake up I am trying to help you.*

96. The third email that the Claimant sent that night was sent at just after midnight on the morning of 2 November 2018. The Claimant was clearly worrying about Glenside, and was up in the middle of the night sending emails to his boss about how he wanted to manage the issues.

97. He says, *re Pembroke Lodge*, *I am prepared to give you an ultimatum. Give me 100% control operationally and financially of Glenside for 12 months and I will prove to you and Glenside will thrive and be the best investment you have ever made. You need to trust me Gerhard but I know I can do it better without your input. You are paying me the same as priory/…….I am good at my job but cannot do it if you are so restrictive.*

98. He forwarded this email to a colleague, and then at 00.31 told Koko Naing that he was having a *neck on the line* moment.

Finds of fact in respect of the Dismissal

99. The following morning at 8.52, Dr F replied to the Claimant stating *you do not give me an ultimatum. If you do not like to work under my instruction as your director and employer I suggest that you consider your position.*

100. That email does not say that he, Dr F has lost confidence in the Claimant and does not suggest that at this point Dr F was thinking about dismissing the Claimant. In fact, it places the onus on the Claimant. He can consider his position if he does not like the way that Dr F runs the business.

101. We have heard in evidence from the Claimant that Dr F was a man who said what he thought. We have seen his emails, and find that, had he been thinking about sacking the Claimant, that it is highly likely that he would have either said so, or taken some action at that point. He did not do so.

102. The next thing to happen is that at 9.59 am the Claimant sent a further email, attaching a concern from a residents partner, about broken hoists. He states that staff have whistle blown to CQC and refers to the email which is set out below his own. We find that this is a disclosure of information and satisfies

the remainder of the test for a PID, both on its own, and in combination with the previous correspondence sent by the Claimant and others.

103. We see no response to that email, but note it was sent on same day that the CQG inspection took place. This is one of the emails which is relied upon by the Claimant.

104.

The Respondents evidence on the reason for the dismissal

105. The Claimant performance

106. The first indication that Dr GF had of any issue of confidence in the Claimant is in the dismissal letter which was written in advance of the meeting of 6 November and handed to him at that point.

107. In that letter Dr Gf states *I am writing to confirm that as discussed with you in our meeting of todays date and following the carious issues arising from the recent CQC and CC inspections the company has decided to terminate your employment without notice.*

108. This is not called gross misconduct but the lack of notice suggests this.

109. Dr F did not give evidence to us, and the only explanation of the letter and the thinking behind it is in the witness statement provided on behalf of Dr F dated 25 November 2018 and produced for an interim relief hearing before Judge Jones.

110. In that statement he sets out the reason for dismissal at paragraphs 23-30. He refers to disappointing CQC inspections; and says that *they gave me considerable doubt as to whether or not C was the right person to be in charge of Glenside*.

111. The Claimants evidence about the first and earlier CQC investigation (we cannot find a date for it) was that even though there had been an improvement *Gf was so upset that we had not got up to the standard required that he hired Lester Aldridge solicitors to challenge the outcome because he thought that it was a bad investigation.*

112. This was not challenged and we accept this. The Claimant persuaded Dr F not to pursue the investigation.

113. At that point, we accept the evidence of the Claimant that there was an improvement in service and we find that Dr F was not at that point blaming the Claimant, and in fact did not believe that the Claimants performance was poor. In fact Dr F was supporting the Claimant.

114. The Claimants probationary period had been confirmed in March 2018. From what we have been told about Dr F we find that If there had been issues about his performance this would have been raised then and at other times.

115. In August 2018 contract negotiations were taking place, and a final contract proposal set out that the Claimant would receive a new contract and

receive a pay increase and a bonus. This was in fact put into place and both pay and bonus were backdated to March 2018.

116. We find that this would not have happened had there in reality been any concerns about the Claimants performance. On basis of what R has suggested is the personality of Dr F , we conclude that had he had any real issues with the Claimant at any stage he would have said so at the time, and if they were serious he would have dismissed the Claimant.

117. In the light of Cs evidence which is sworn and has been cross examined and our findings in respect of the contract, bonus and pay rise, we find that the statement in Dr Fs witness statement that Dr F had concerns about whether the Claimant was the right person the job because of poor C QC inspections was untrue and that Dr F knew it was untrue.

118. Whilst Dr F may by November have had concerns about whether the Claimant was the right person for the job his concern was, we find, nothing to do with his performance.

119. We also reject the suggestion in his witness statement that the Claimant did not tell Dr F about issues at the Respondents premises. The evidence of C, which we accept and that of his two witnesses is that the Claimant frequently told Dr F at meetings and otherwise of issues and problems at the site. We have made findings above that Dr F knew of problems with hoists and with heating and with staffing and with cleaning and other matters because the Claimant told him so. We find that the evidence of Dr F is unreliable in this respect and we reject it.

120. We also find that although Dr F suggests in his statement that the Claimant was tasked with managing the business the reality, which was his preferred way of operating, was that he took more and more control of contracts, staffing, maintenance, and other matters upon himself, and that he did not allow the Claimant to run the operation at all, despite the Claimant requesting that he be given more leeway and control on many occasions. Dr F knew this was the case and his witness statement is untruthful and unreliable in this respect.

121. We find that he did cancel the contract with NES; he did hire staff without telling the Claimant or others at Glenside, and that he managed the facilities from refurbishment through to heating and the servicing of equipment and replacement of equipment and purchase of equipment remotely and without input from the Claimant.

122. When the Claimant sought to do his job, he was told to focus on getting the patients in.

123. We conclude that what is set out in the WS is not reliable or realistic reflection of what was happening, or what Dr F thought at the time.

124. Dr F may have been annoyed by the tone of the emails sent, and in his WS he does make reference to this. We have not heard him cross examined on

this and having made conclusions that other aspects of his witness evidence are unreliable we place no weight on this aspect of his evidence.

125. In this case the Respondent asserts that the decision made by Dr F was not made for the principal reason of the Claimant having made protected disclosures but was principally made because of the tone and language of the Claimants emails to him.

126. we have therefore carefully considered what is written in the statement provided on behalf of Dr F and what is set out in the witness statements. We have looked at these in the context of the chronology of events and against the background of the Claimants protected disclosures.

127. We have also considered the evidence that we have from the Claimant about the approach Dr F took to his staff; we have taken into account the Respondents propositions put to the Claimant about Dr F in cross examination and in submissions and we have taken into account the Claimant's own evidence about what was said to him at the meeting he attended with Dr F at which he was handed a letter of dismissal.

128. Firstly, we conclude that Dr F was not particularly concerned about the manner in which the Claimant wrote to him. The Respondent counsel suggested in cross examination to the Claimant that Dr F frequently reminded the Claimant not to interfere in areas of the business that were not his concern and simply to focus on getting the patients into the beds.

129. From all the evidence we have heard we conclude that whilst Dr F was a man spoke his mind that he was not somebody who would dismiss a valued and useful employee simply because of the tone of an email.

130. We accept that the Claimant's emails sent on 2 November 2018 at 4 minutes past midnight was forceful but it was not in itself rude or impolite. The immediate response from Dr F does not in any way suggest that Dr F was considering that he needed to terminate the Claimant's employment. It says *you do not give me an ultimatum. If you do not like to work under my instructions as your director and employer I suggest you consider your position*. He is telling the claimant, that the Claimant can leave if he does not like the job.

131. This email does not suggests that Dr F considered that the relationship has broken down.

132. We have therefore considered what happened next. In his witness statement written for the purposes of the interim relief hearing, at paragraph 27 Dr F states *I am not used to nor do I appreciate being given an ultimatum such as this and I certainly had no intention of turning over control of R2 to an individual in respect of whom I already had a number of concerns. I make this position clear to the Claimant in my response to him. I also at that point had made my mind up that I could no longer have any confidence in the Claimant to run R2 as required and that I would need to dismiss him at the earliest opportunity as I considered that his continued employment with putting my investment at risk.*

133. Mr F does not say why the claimant being employed was putting his business at risk. We have seen no evidence at all that suggests that this was a real concern, or that it would have been a justified concern. The only risk we

can see, from the point of view of DR F, is that the claimant was raising concerns that DR F was running his business in an unsafe way, potentially risking the heath and safety of patients.

134. Since we have heard no live evidence from Dr F and he has not been cross examined on whether or not this is a truthful and honest statement about his views at that point, we have had to look at the evidence in the documents, and from the live witnesses we have heard from.

135. There is no evidence before the tribunal that Dr F had raised concerns about the Claimant previously at any point.

136. In paragraph 25 of the same statement for example Dr F suggests that the Claimant had a tendency not to inform him of issues that had arisen at R2s premises. We do not accept this. On the contrary we find that the Claimant did regularly tell Dr F about concerns that he had but that Dr F took very little notice of him.

137. Dr F also says that the Claimant failed to inform him of matters impacting on the viability of R2 instead copying him into emails regarding more minor matters such as whether or not a room and staff accommodation been cleaned. We find again that this is not correct. In fact there is only evidence of one email of this type being sent to Dr F and many others where the Claimant does inform him of matters impacting the viability of the respondent. Again, we conclude that Dr F is not a reliable witness.

138. Dr F accepts in paragraph 26 that the situation with the Claimant came to a head at the beginning of November 2018 and makes reference to an email from the CTC regarding the heating.

139. Against this background the Respondent suggests that at the beginning of November he had decided that he would need to dismiss the Claimant because the Claimant was putting his investment at risk.

140. We have no live evidence before us which has been subject to cross-examination that the Respondent had ever had any such thoughts, and up until the email exchange which followed upon the information from the CTC there is no evidence that Dr F had any particular concerns about the Claimant other than that he tended to raise matters of wider concern and that Dr F did not wish him to do that.

141. On 5 November 2018 there was unannounced inspection of the 2nd Respondent by the Wiltshire CCG and NHS England. The Claimant tells us and we accept that he tried to contact Dr F to tell him about inspection but that Dr F did not answer any of his calls. In paragraph 28 of the statement Dr F comments that he expected the Claimant to contact him to confirm the outcome of the visit.

142. The Respondent suggests that he sought to review the Claimant's contract to see what notice was required and arranged for the letter to be drafted regarding summary dismissal.

143. He then called the claimant to a meeting on the 6 November 2019 at which after some initial exchanges, he handed the claimant the letter of dismissal, and terminated the claimants employment.

144. We have been referred to that letter and to a note made of the meeting of the 6 November 2018, from Ruth Lambert for the respondent. This note which was subsequently, but does not say when it was written.

145. In the note Dr F is recorded as commenting that he had thought the Claimant would call him to give feedback after the inspection on Friday, 2 November. It is also recorded that the Claimant thought that Dr F would have contacted him as they had tried to contact him during the day on Friday but had not succeeded as Dr F had not answered his calls. Dr F responded that he was out of the office and unobtainable.

146. We conclude from this firstly that the Claimant's evidence that he had tried to contact Dr F on 2 November is true and secondly that Dr F would have known that the Claimant had tried to contact him but had ignored the calls.

147. We also find that the only matter referred to which is noted by Ruth Lambert is in respect of the inspection and that there is no reference whatsoever to any other reason for terminating the Claimant's employment. The letter itself simply states *I am writing to confirm that as discussed with you during our meeting of todays date and following various issues arising from recent CTC and QC inspections the company has decided to terminate your employment without notice.*

148. At this point the CTC had not reported back and we find that it was highly probable that the only matters that Dr F could have been referring to were the concerns the Claimant had raised with Dr F in his emails which we have found to be protected disclosures. There is no suggestion either in the meeting notes, or in the letter that the Claimant's manner of addressing the Respondent in earlier emails is the cause of his dismissal and no suggestion that there is any other failure on behalf of the Claimant which leads to his dismissal.

149. Dr F suggests that the lack of contact added to his belief that the relationship had broken down irretrievably. We find that if he thought the relationship had broken down, it was not because of a lack of contact, but rather because the claimant had made contact and had told him about the problems in the hospital. He had made protected disclosures.

The Claimants Contract Of Employment

150. When the Claimant initially started work he was issued with a contract of employment which had been designed for a Nurse. This contract was subsequently replaced and it is not suggested that the nursing contract was one which continued to apply to the Claimant at termination.

151. We heard evidence from Jackie Harris who was employed from February 2018 at Raphael as the HR manager. Her key priorities were the recruitment and employer relations at both Glenside and Raphael.

152. In her witness statement Ms Harris states that she was told by Mr Coxwell in March 2018 that he did not have a proper contract in place. She says that it took her until September 2018 to get a new contract in place and agreed for him because Dr F was deliberating over the bonus and did not appear to see the importance of Mr Coxwell having contract.

153. She also states that she was instructed to issue a new contract to Mr Coxwell and that the new contract included changes on salary and notice period and bonus. We are referred to this contract at B39 in the bundle.

154. In this contract the remuneration with effect from 1 March 2018 is £90,000 per annum payable monthly in arrears. There is also a provision for a bonus and the section at 6(b) states

in addition to your annual salary with effect from 1 March 2018 you will receive a bonus. Your bonus will be paid to you monthly one month in arrears. The bonus will be based on an expectation of at least 4 admissions per month to be paid as follows….

there is then a reference to a bonus of £500 for admissions of 5 to 8 patients and £1000.00 pounds for admission of 9 or more patients. It is stated that this is agreed for the period 1 March 2018 until 1 November 2018 and which point it will be reviewed.

155. At paragraph 13 the notice of termination of employment to be given by the employer is to be one month for employment of less than 6 months and 3 months for employment of more than 6 months.

156. We accept the Claimants oral evidence that when he started work, the contract which he was initially given was one which he told us was designed for a nurse, with his name crossed out. He told us that he subsequently negotiated and agreed a contract which had a 3 month notice clause. He did not know if it had been agreed by Dr F after he , Mr Coxwell had accepted it.

157. We were referred to an unsigned contract dated 30 October 2017 purporting to be between Raphael Medical Centre Ltd and Mr Coxwell. Both Ms Harris and Mr Coxwell denied before us that this contract had ever been issued to the Claimant.

158. The Respondent suggests that both the Claimant and Ms Harris had stated in their evidence that this was the contract issued at the start of employment. We find that there is a certain amount of confusion about which document is being referred to in the bundle but that Mr Coxwell is very clear that this was not a contract which was issued to him. We accept his evidence and conclude that any confusion by Ms Harris is genuine confusion caused by the inclusion in the bundle of a contract which was not in fact ever issued.

159. In any event it is accepted by the parties and we find as fact that there was a recognised need for a new set of terms and conditions and that there was further negotiation over the contract terms.

160. The Claimant had a six-month probation period which he passed satisfactorily at the end of March 2018. At this point there were some discussions about the Claimant's salary; about bonus and about pension.

161. A contract with re-drafted and terms and conditions was provided to the Claimant sometime between March and May 2018. The Claimant did not agree with those terms and conditions at that time and there was then further

discussion. One particular issue was in respect of the notice period. Mr Coxwell wanted a three month notice period.

162. Ms Harris, HR manager, who gave evidence for the Claimant and who was employed as HR manager until the dismissal on 19 November 2018 told us that it took her until September 2018 to get a new contract for the Claimant in place. This was because Dr F was deliberating over the bonus. She told us and we accept that she was eventually instructed to issue the new contract which she did in or around September 2018.

163. The Contract at B39 of the bundle is the contract which we find was drafted and referred to in the letter of 13 September 2018 and is the one agreed by each of the parties separately and which was in force in respect of the Claimant's employment at the time of his dismissal. This contract includes an entitlement to 3 months' notice.

164. The Claimant told us and we accept that he had seen this draft and agreed it. He remembered that it had 3 months' notice period in it not the 28 day period of the earlier draft. His evidence was that he had agreed it and that he was waiting for Dr F to agree it.

165. Ms Harris told us that she discussed the contract with Dr F and that he had agreed to it. We accept her evidence. At that point both parties to the contract agreed to the terms and Ms Harris treated it as the agreed contract terms, agreed by both parties. At that point the contract was not signed and we accept that the contract was not in fact ever signed. However, we find that it was the contract that the parties accepted and operated in respect of pay and bonus from then on.

166. We find this in particular because the backdating of the Claimants pay only took place in August 2018 once the final agreement was made. Whilst we were told that an earlier agreement in respect of backdating the pay increase to the end of March 2018 has been agreed in principle, we note that it was not actioned at that point. It was not actioned until 3 months later coinciding with the timing of the agreement of the 3rd draft of the contract.

167. It was not suggested by the Respondent that Ms Harris had not been instructed to issue the contract to Mr Coxwell but rather that this contract had remained unsigned and required the agreement of Dr F.

Conclusions on the Contract of employment

168. Whilst the contracts were not signed, we find that there was verbal agreement of both parties to the new terms and conditions and the fact that the parties acted on the new terms and that the Claimant was paid in accordance with it indicate that the last draft was the binding contract.

The Legal Principles and Provisions

169. The Public Interest Disclosure Act 1998 inserted new provisions into the Employment Rights Act 1996 in order to protect individuals who made certain disclosures of information in the public interest. The provisions give protection to employees who make a protected disclosure and who are subject to a detriment or dismissed.

170. Section 47 B(1) provides that a worker has 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 .

171. A protected disclosure is a qualifying disclosure made by worker in accordance with any of subsections 43C (1) (a) – (b) of Employment Rights Act 1996.

172. Section 43B(1) of the Employment Rights Act 1996 defines a qualifying disclosure as *a disclosure of information which in the reasonable belief the worker making disclosure is made in the public interest and tends to show* one or more of the statutory matters in section matters set out in section 43B (1) (a) – (f).

173. These include at (b) *a belief that a person has failed is failing or is likely to fail to comply with any legal obligation to which he is subject* and at (d) *that the health or safety of any individual has been; is being or is likely to be endangered.*

174. In the case of ***Okwu v Rise Community Action*** UKEAT 0082 1900 the EAT confirmed that the question which the ET has to determine is whether there was a disclosure of information, which *in the reasonable belief of the Claimant* was made in the public interest and tended to show one of the things listed in section 43B.

175. Section 103A ERA provides that an employee who is dismissed shall be regarded for the purposes of the act as unfairly dismissed if the reason or if more than one of the principal reasons for the dismissal is that the employee made a protected disclosure.

176. In relation to dismissal, section 103A ERA 1996 provides that an employee who is dismissed shall be regarded for the purpose of this part as unfairly dismissed if the reason for the dismissal, or if there is more than one reason, the principal reason for the dismissal is that the employee made a protected disclosure.

177. The question which we must ask therefore is, whether the making of any proven protected disclosure was the principal reason for the dismissal?

178. Since the Claimant lacked the requisite service to bring an ordinary unfair dismissal claim, the burden is on him to prove the reason for the dismissal under s.103A on the balance of probabilities; it is a greater burden

than the requirements to merely prove a prima facie case if he had a two-year service under ***Kuzel-v-Roche*** [2008] IRLR 530; ***Ross-v-Eddie Stobart*** [2013] UKEAT/0068/13/RN. This means that he must prove on the balance of probabilities, that the reason or if more than one, the principal reason for his dismissal was the protected disclosures.

179. We remind ourselves that when considering what causes an individual to make a decision, in this case a decision to dismiss, that we can draw inferences from our findings of primary fact, but that the Claimant still retains the burden of proof.

180. In order to determine the claim under 103A ERA 1996, we first, we had to determine whether there had been disclosures of 'information' or facts, which we remind ourselves was not necessarily the same thing as a simple or bare allegation (see the cases of ***Geduld-v-Cavendish-Munro*** [2010] ICR 325 in light of the caution urged by the Court of Appeal in ***Kilraine-v-Wandsworth BC*** [2018] EWCA Civ 1346).

181. We remind ourselves that an allegation could contain 'information' and that the terms are not mutually exclusive, but words that were too general and devoid of factual content capable of tending to show one of the factors listed in section 43B (1) would not generally be found to have amounted to 'information' under the section 43B(1).

182. The question for us is whether the words used in the emails, in context, had sufficient factual content and specificity to have tended to one or more of the matters contained within s. 43B (1)(b) or (f). Words that would otherwise have fallen short, could have been boosted by context or surrounding communications. The issue requires an objective analysis by us, and evaluative judgment by us in light of all the circumstances.

183. Next, we considered whether the alleged disclosures indicated which obligation was in the Claimant's mind when the disclosure was made such that the Respondent was given a broad indication of what was in issue (***Western Union-v-Anastasiou*** UKEAT/0135/13/LA).

184. We also had to consider whether the Claimant had a reasonable belief that the information that he had disclosed had tended to show that the matters within s. 43B (1)(b) or (d) had been or were likely to have been covered at the time that any disclosure was made. To that extent, we had to assess the objective reasonableness of the Claimant's belief at the time that he held it (***Babula-v-Waltham Forest College*** [2007] IRLR 3412 and ***Korashi-v-Abertawe University Local Health Board*** [2012] IRLR 4). 'Likely', in the context of its use in the sub-section, implied a higher threshold than the existence of a mere possibility or risk. We remind ourselves that the test was not met simply because a risk could have materialised (as in ***Kraus-v-Penna*** [2004] IRLR 260 EAT). Further, the belief in that context had to have been a belief about the information, not a doubt or an uncertainty (see Kraus above).

The category of 'breach of a legal obligation' under s. 43B (1)(b) is a broad category and has been held to include tortious and/or statutory duties such as defamation (***Ibrahim-v-HCA*** UKEAT/0105/18).

185. Next, we had to consider whether the disclosures had been 'in the public interest.' In other words, whether the Claimant had held a reasonable belief that the disclosures had been made for that purpose. As to the assessment of that belief, we had to consider the objective reasonableness of the Claimant's belief at the time that he possessed it (see ***Babula*** and ***Korashi*** above). That test required us to consider his personal circumstances and ask the question; was it reasonable for him to have believed that the disclosures were made in the public interest when they were made.

186. We remind ourselves that when considering whether or not the disclosure was made in the public interest, we must consider whether or not the disclosure is one that, in the reasonable belief of the worker in question, is made in the public interest. (***Chesterton Global (t/a Chestertons) v NurMohamed*** [2017] EWCA civ 979. Where there are mixed interests it will be for the ET to rule as a matter of fact as to whether there was sufficient public interest to qualify under the legislation.

187. We were referred by Respondent counsel Mr Self to ***Panayiotou v Chief Constable of Hampshire Police and anor*** [2014] IRLR 500 EAT The argument in that case was whether or not the reason or principal reason for the Claimants dismissal had been that he had made disclosures and whether the tribunal was entitled to find that whilst disclosures had been made it was not the disclosures themselves but the manner in which they were made which had led to the dismissal of the employee. We accept that under S.103A ERA, the employer can act lawfully if it relies only on the non-protected aspects of a whistleblower's conduct, even where that conduct is closely connected with the protected disclosures themselves.

188. If we find that information disclosed is a qualifying protected disclosure we must still consider whether or not we find that the Respondent relied on something separate to the disclosures themselves when deciding to dismiss . We must consider whether or not it was the tone of the emails as submitted by Mr self which was the principal reason for the dismissal rather than the content of information in those emails .

189. If we decide that it was then we must determine whether or not the tone of the emails is a separate factor from the content of those emails . If we find both that the tone of the emails is a separate factor to the content of them and that it was only the tone of the emails and in no sense the content of the emails that was the principal reason or cause of the dismissal then our conclusion must be that the dismissal was not caused by the protected disclosures

190. Whilst we accept the principle that there can be a distinction between the making of disclosures themselves as a reason for dismissal and a matter related to the making of those disclosures as a reason for dismissal, we have also borne in mind the need to look with care at arguments that say the dismissal was because of acts related to the disclosure rather than because of the disclosure itself. (per Buxton LJ ***Bolton School v Evans*** 2006 EW CA Civ 1653 207 IRLR 140, referred to at paragraph 50 of ***Panayiotou*** above.)

Wrongful dismissal

191. The Claimant asserts that he was wrongfully dismissed in that he was paid the incorrect contractual notice.

192. The dispute between the parties is whether he was entitled to one or three months notice. We have seen a set of terms and conditions of employment which contain a three month notice clause which the Claimant says he had agreed to.

193. The question for us, is what were the terms of the contract, and if there was any change ot any agreed terms, was any variation effective?

194. A contract of employment is a legally binding agreement. Once it is made, both parties are bound by its terms and neither can alter those terms without the agreement of the other. Nevertheless, over the course of an employment relationship, an employee's terms and conditions are likely to change considerably. New working methods may be introduced, perhaps to accommodate technological change; or the employer may wish to alter the structure of the workforce and/or the tasks that the employees perform, introduce new pay systems, or even move the business to another area. Employees may also want to make changes, as her, to pay, a bonus scheme or to a notice period.

195. Most changes take place by mutual consent however at common law a contract can only be changed by mutual consent and unilaterally imposed changes will not be contractually binding unless the other party agrees to them.

196. This means that the terms in individual employment contracts can be changed validly by the employer and employee agreeing a change, or the employee accepting a change by conduct, e.g. by carrying on working under the changed contract without protest. This means that a change notified to an employee, and accepted by them, will in be binding.

197. Where a variation is to the advantage of a Claimant employee, express agreement may not be required. If an employee knows of the variation and continues to work, it may be implied that he accepts the variation. This is in contrast to cases where the variation is adverse to the employees interests.

198. Therefore we must determine whether or not the contract was varied and whether or not the new terms and conditions were accepted by the Claimant, and enforceable by him against the Respondent.

199. The remedy of an employee who has been wrongfully dismissed is an action for damages. The normal measure of damages is the amount the employee would have earned under the contract for the period until the employer could lawfully have terminated it, less the amount he or she could reasonably be expected to earn in other employment. The dismissed employee, like any innocent party following a breach of contract by the other party, must take reasonable steps to minimise his or her loss

Conclusions.

200. Applying the legal tests to the facts found, we conclude as follows.

201. The emails sent by the Claimant on 17 October 2018 about poor standards of cleaning and on 18 October 2018 about levels of qualified and appropriate staff did not amount to protected disclosures. They were not the disclosure of information which tended to show a breach of a legal obligation or the endangerment of the health and safety of an individual, and we find that the Claimant did not believe that they did.

202. We conclude that the emails dated 23 June 2018 about a medical error was a public interest disclosure, but that it did not form any part of the reason for the claimants dismissal.

203. We conclude that the emails sent on 1 November 2018 about failing heating and lack of an adequately qualified maintenance team and the emails of 2 November 2018 about broken hoists and the information sent with them were disclosures of information and in the context, disclosures of information which did have the statutory effect, and which the Claimant reasonably believed had the statutory effect, and which were in Claimant did make in the public interest. These were Protected disclosures. We find that Mr C had a reasonable belief that the information disclosed did tend to show a failure to comply with legal obligation or that the health and safety of an individual had been is being or is likely to be endangered.

204. These are in the public interest and are protected disclosures.

205. We have then considered whether or not the disclosures had any causative effect on Dr F's R decision to dismiss the claimant and if so, whether they were the principle reason for the Claimant dismissal.

206. We conclude that up until at least September 2018 Dr F considered that the Claimant's work for Glenside was not only satisfactory but worthy of a pay rise and the implementation of a bonus scheme. The Claimant had passed his probationary period and there is no evidence of any concerns about the quality of the Claimant's work ever being raised by Dr F with the Claimant.

207. The only issues that Dr F ever raised were that the Claimant should not engage or involve himself in matters beyond the task of sourcing potential patients and gaining contract in respect of those contracts so that the beds were occupied. The pay rise and the bonus scheme indicate an employer more than satisfied with the work being done by the Claimant. This was as late as September 2018.

208. Before us Mr Self counsel for R argued that firstly we should accept evidence from Dr F that the reason for the dismissal was the tone and the manner of the discourse over the 1 and 2 of November. He submits that it disclosed that the Claimant was not prepared to work under Dr F's directions undertaking the tasks he was required to do and this he submits was the principal reason for the dismissal. He submits that to the extent that any of the matters raised by the Claimant where protected disclosures that they are covered by the Dicta from Panayiotou in that it was the unacceptable manner that the disclosures were made which were the operating feature on Dr F's mind, and not the fact of the disclosures themselves.

209. We have set out above our findings of fact in respect of the events after the emails were sent, and what was said to the claimant at the meeting of 6 November and in the dismissal letter.

210. We have also been referred to the witness statement at paragraph 32 in which Dr F states the reason for the claimant's dismissal were *my concerns in relation to his ability to manage R2 bearing in mind the contents of CQC's reports; his failure to inform me of matters that should have been brought to my attention and most importantly his direct challenge to my authority in respect of his ultimatum to me. I was unaware of and could not therefore have been influenced by any public interest disclosure that the claimant suggests may have been made*.

211. We have already rejected his suggestion that the claimant's ability to manage the business or his failure to inform him of matters that should been brought attention were either true or believed by Dr F.

212. We find that what is said in the statement, written sometime later was not said at the time, in the meeting or in set out in the letter, and we have rejected much of it as unsupported on the evidence. In so far as there is a reference to the challenge to his authority, and the ultimatum, we conclude that if this is about tone and content of the email, it was not in fact the real reason for the dismissal.

213. Regarding the assertion about disclosures not being influential, we have understood Dr F to be referring there to the public interest disclosures that the claimant says he made subsequently but which are not subject of this tribunal

as set out at the beginning of this judgement and not the emails with which we are concerned.

214. We have no basis for accepting the untested evidence of Dr F in relation to this part of his evidence in respect of his reason for dismissing the claimant and we reject it.

215. In contrast looking at the sequence of events and the point at which Dr F decided to terminate the claimant's employment, based on the facts we have found, we conclude on the balance of probabilities that the principal cause or reason the claimant's dismissal was that he had raised serious concerns with his employer about breaches of legal obligations and patient's health and safety being endangered.

216. We find that his decision that he needed to dismiss the Claimant at the earliest opportunity was not because of the rudeness of the emails or the tone of them or the ultimatum, but because of the information which the Claimant was sending him and the Claimants obvious concern about the seriousness of the issues.

217. The dismissal letter itself confirms that the issues with the CQC and the CGC were in his mind, and the issues are we find, those issues which the Claimant had made protected disclosures to DR F about.

218. We find that Dr F did not have a truthful belief that the issues were the fault of the Claimant, and conclude that the only explanation is that he decided to dismiss the Claimant because he had sent the emails containing the information.

219. The fact that the Claimant had sent emails setting out his concerns and reminding Dr F that he did indeed know about the particular problems at the home was we find on balance of probabilities the principle reason for his decision to dismiss the Claimant.

220. We find that when he went into the meeting with the Claimant on 6 November 2018 , he had decided that he would not employee the Claimant any further because of the contents of the emails sent, which we have found to be protected disclosures.

221. We conclude that the tone of the claimant's emails and manner of addressing Dr F formed no part of his thinking or reasoning at the time, and that it was the content and timing of the emails themselves which caused the Respondent to dismiss. We therefore conclude that the Claimant was automatically and unfairly dismissed.

222. In respect of the contract of employment, Dr F accepts in his witness evidence that former contracts had operated without being signed by both parties. We find that in this case that the new terms and conditions of employment, which included the longer notice period, and the variation in pay

took effect because they were accepted by the Claimant and because they were put into effect by the Respondent

223. We find that neither party expected that the contract would need to be signed in order for it to be binding and applying the legal principles. We have no evidence from Dr F in respect of the change in the Claimants pay and there is nothing in the evidence to suggest other than that the parties accepted the contract.

224. We conclude applying the legal principles set out above that there had been a variation of the claimant's contract which he had accepted and which implemented a pay rise backdated bonus and a 3-month notice period.

225. On this basis the claimant was entitled to 3 months' notice and as there was no suggestion that there was any gross misconduct, the claimant was entitled to be paid for the full notice period. We find that he was wrongfully dismissed.

226. We also conclude from the evidence that the process of dismissal breached the ACAS procedures. In reality there was no proper procedure followed at all.

_____

Employment Judge Rayner

Date: 9 April 2020

……..