mf

EMPLOYMENT TRIBUNALS

Claimant: **Mr S Althaf**

Respondent: **Southend University Hospital NHS Foundation Trust**

Heard at: **East London Hearing Centre**

On: **14-17 May, 21-24 May, 5-7 June, 25-28 June & in chambers on 3 July, 5 July and 29 July 2019**

Before: **Employment Judge Ross**
Members: **Ms L Conwell-Tillotson**
Mr L O'Callaghan

Representation

Claimant: In person

Respondent: Ms C McCann (Counsel)

JUDGMENT

The Claimant having withdrawn his complaints against NHS England and the General Medical Council in these proceedings, the unanimous judgment of the Employment Tribunal is that:-

(1) The complaints against the Respondent Trust of unfair dismissal (section 98 Employment Rights Act 1996), automatic unfair dismissal (section 103A Employment Rights Act 1996), wrongful dismissal, public interest disclosure detriment (section 47B Employment Rights Act 1996), victimisation (sections 27 and 39 Equality Act 2010), disability discrimination (sections 20 to 21 and 39 Equality Act 2010), breach of contract, and unlawful deduction from wages, are dismissed.

(2) The Claim is dismissed.

REASONS

Complaints and Issues

1. A short chronology of the history of these Claims explains the complaints and issues before the Tribunal at this hearing:

   1.1. By a first Claim presented on 5 May 2017, after a period of Early Conciliation between 23 February and 6 April 2017, the Claimant presented detriment complaints under section 47 Employment Rights Act 1996 and complaints under Equality Act 2010, being race discrimination, victimisation, and disability discrimination. The Respondents were listed as the Respondent Trust, NHS England and the General Medical Council. The complaints against NHS England and the GMC were subsequently withdrawn in August 2017.

   1.2. At a Preliminary Hearing on 25 August 2017, before Regional Employment Judge Taylor, all complaints in this first Claim were withdrawn except the complaints of victimisation and the detriment complaints under section 47B ERA 1996.

   1.3. The Grounds of the first Claim were amended, then re-amended on 30 August 2017. At this time, the Claimant was represented by solicitors, who drafted the re-amendment.

   1.4. An agreed list of issues was produced, which was agreed whilst the Claimant was represented by the same solicitors.

   1.5. By a second Claim presented on 9 March 2018, after a period of Early Conciliation between 24 January and 9 February 2018, the Claimant presented complaints of unfair dismissal, victimisation, breach of contract, and complaints of detriment for making public interest disclosures.

   1.6. By Further and Better Particulars dated 16 April 2018, the Claimant sought to expand the second Claim by adding complaints.

   1.7. At a Preliminary Hearing on 12 July 2018, Employment Judge Ross determined the complaints included in the second Claim and refused the application to amend. The heads of complaint within the second Claim are listed at paragraphs 11-12 of the Summary (p.348-9).

   1.8. At a Preliminary Hearing on 27 July 2018, before Employment Judge Prichard, a list of issues was agreed in respect of the second Claim 3200438/2018.

2. The two lists of issues are annexed to this set of Reasons.

Procedural matters at the hearing

3. At the outset of the hearing, the Tribunal asked the Claimant whether he required any reasonable adjustments. The Claimant wished to use electronic copies of documents on his computer in part because of his musculo-skeletal impairment; and he did this throughout the hearing. Secondly, when asked whether adjustments were needed because of a mental impairment, the Claimant explained that, because he was representing himself, he was slow; he asked whether there was an opportunity to record proceedings. It was explained to the parties that recording the proceedings was not permitted and the reasons explained. To assist the Claimant, the Tribunal proposed that, on each day of hearing, it would adjourn for approximately 10 minutes each morning and each afternoon. In the event, the precise length of the breaks varied on whether any particular issue needed determination during the break. The exception was when the Tribunal sat through the afternoon of 26 June 2019.

4. On the first morning of the hearing, the Claimant confirmed that he had withdrawn his complaints against the General Medical Council ("GMC") in this Tribunal, but wished to pursue them in the Manchester Employment Tribunal. In correspondence, the GMC had requested dismissal. In the circumstances, where the Claim against the GMC had not been dismissed in the East London Tribunal and the Claimant wanted to continue these complaints in the Manchester Employment Tribunal, in the interests of justice, the Tribunal did not dismiss the complaints against the GMC.

5. It is important to emphasise that the Claimant had a full opportunity to put forward his case at this hearing and in submissions. This is particularly so when the following are taken into account: the procedural history including four Preliminary Hearings (including that on 12 July 2018, shortly before an earlier listed final hearing was due to commence, at which Employment Judge Ross allowed amendments and postponed the final hearing); the Claimant was represented by solicitors for part of the period after issue of the Claims (who were involved in the construction and agreement of the lists of issues); the number of applications made by the Claimant and determined within this hearing; and the degree of documentary and oral evidence taken. We found that the Claimant is an intelligent and articulate person, who was able to make oral submissions at the close of the case for about two hours.

6. Over the course of a 15 day hearing, there were a number of procedural matters which arose. It is unnecessary to list them all. The following is a brief summary, which provides an indication as to the progress of the hearing. Often, these matters involved an application (or applications) made on little or no notice by the Claimant.

7. In the course of the first day of evidence (15 May 2019), in cross-examination, the Claimant made repeated allegations that the Respondent had failed to disclose documents to him. This was time-consuming in itself, and the hearing time (at that point) had been reduced to 11 days due to lack of judicial resources.

8. In an attempt to address the repeated allegations of this nature, in an attempt to save time and further the overriding objective of justice, the Tribunal investigated with the Claimant what documents were alleged not to have been disclosed.

9. The Claimant stated that there was an outstanding disclosure application. This surprised the Tribunal, because Employment Judge Ross had perused the file prior to the commencement of the hearing and had not noticed any such application outstanding. Indeed, the Claimant's statement that an application was outstanding appeared to be contradicted by the Preliminary Hearing ("PH") Summary and Judgment for costs, with Reasons, made at the Preliminary Hearing in January 2019 by Employment Judge Prichard. In short, Employment Judge Prichard had found that the PH had been unnecessary and the Claimant's conduct unreasonable.

10. On enquiring of the Claimant when the alleged application was made, the Claimant referred to a short passage in his response to the Respondent's strike out application. This was not, as a matter of fact, an application for Specific Disclosure and nor did it state that it was any form of application.

11. In fairness to the Claimant, as a litigant in person, the Tribunal asked whether he wished to make an application for Specific Disclosure, or whether he was content to cross-examine and make submissions about the alleged non-disclosure. The Claimant wished to make a Specific Disclosure application. He was allowed an opportunity to do so the following morning.

12. At the commencement of the next day of the hearing, 16 May 2019, the Claimant made an oral application for Specific Disclosure. It is important to record that the Claimant was not restricted by the Tribunal in any way as to the length of this application; any limitation to it was imposed by himself. He stated that he could not break down categories into specific documents.

13. The Respondent, who made no complaint about having no written application nor notice of the scope of the application, responded to the application partly by reliance on two pieces of correspondence and partly by Counsel submitting why no order should be made, with reference to the issues in the two Agreed Lists of Issues.

14. The first letter from the Respondent's solicitor to the Claimant dated 24 August 2018 was a response to over 20 requests for Specific Disclosure raised in a series of emails from the Claimant in July 2018. This letter contained a table responding to each request ("the table"). The table was compiled in order to comply with the direction of Employment Judge Prichard at the PH on 27 July 2018, that the disclosure on the amendments permitted to the Claims should take place and that the Claimant should then identify outstanding documents relevant to the new complaints (permitted by amendment by Employment Judge Ross at the first PH in July 2018). The second letter dated 12 September 2018 also included responses to specific disclosure requests.

15. This application for specific disclosure was refused for reasons given on the morning of 17 May 2019, save that no determination was made about the request for Document Retention Policy or procedures, because the Respondent was happy to disclose these documents if it had them. In the event, on 22 May 2019, we were informed that copies of two such documents were emailed to the Claimant by the Respondent and that he was asked to indicate which if any parts he considered should be included in the Bundle. Up-to-date versions of the relevant documents on this issue were found over the break in the hearing from 24 May to 5 June 2019 and added to the

Bundle on 5 June 2019 (see the “Access Control Policy” for the period 2013 to 2015, p.2884.19ff) Over the course of the hearing, the Claimant did not put to any Respondent witness that this Policy was breached and the Claimant only mentioned it in passing, without any context.

16. Subsequently, the Claimant applied to make an amendment to his Claim during his evidence. By consent, the date of the alleged protected disclosure recorded at 1(e) on the First List of Issues was amended to 13 November 2014 (from 16 October 2014). We heard no explanation from the Claimant for this apparent error in dates.

17. The Tribunal agreed that if necessary, the Claimant could use his laptop to locate documents.

18. During his cross-examination, the Claimant repeatedly complained that documents disclosed were not in the Bundle and that they were relevant. He was informed at an early stage by the Tribunal that such documents should be shown the Respondent and could be added to the bundle, to the extent that they were relevant. Documents produced by the Claimant were added to the bundle during his cross-examination; in many instances, the Respondent did not oppose the documents that he sought to add and he did not need to make an application to add these further documents, but the Respondent made no concession as to the relevance of those documents, if any. Counsel wished to put on record that the Respondent complained of this piecemeal approach when the Respondent had understood that the Bundle had been agreed with his former advisers and where the Claimant had produced his own Bundle, which he had been directed to do by Employment Judge Prichard at a Preliminary Hearing on 15 January 2019.

19. As an example of how the Claimant was allowed every opportunity to put his case, he was allowed to add several pages to the bundle on 21 May 2019 (within pp 3716-3753). He had contended that the Respondent had kept these out of the bundle, despite the unchallenged fact that the Respondent had in fact agreed the contents of the bundle with the Claimant’s previous solicitors. At the same time, the Respondent was permitted to add an analysis of the hours worked, relevant to the breach of contract complaint.

20. During cross-examination on 23 May 2019, the Claimant stated that he also wished to adduce complete transcripts of certain meetings. It was pointed out by Counsel that he had been directed by Employment Judge Prichard to produce and serve transcripts or part of transcripts relied upon by 24 August 2018 (see p.348.5-348.6). The Tribunal explained to the Claimant that he could apply to adduce this further evidence, but pointed out that he would need to provide a copy of any transcript relied upon to the Respondent first. It was explained that such application would need to address his failure to comply with the order and, unless agreed, the Respondent’s opposition. A further transcript was eventually produced by the Claimant.

21. Cross-examination of the Claimant extended over several days, which was inevitable given the number of complaints in the Claim, the number of relevant documents, the number of alleged perpetrators, and the length of the history covered by the allegations (about four years). The Claimant only once asked for a break; and his was immediately provided (at 15:07 to 15:20 on 23 May 2019); and on the return of

the parties, the Claimant was asked if he was fit to carry on and invited to apply to adjourn to the next morning. He chose to continue on the basis that he would seek a break if he needed one. Cross-examination ended at 15:47 on the same afternoon, and no further evidence was taken that day.

22. The Tribunal took into account the fact that the Claimant was a litigant in person. For example, at 15:58 on Friday 24 May 2019, about 1 hour and 8 minutes into the cross-examination of Mr. Rothnie, when the Claimant explained that he was having trouble finding the page references, the Tribunal adjourned the hearing to 5 June 2019. Moreover, at this point, the Tribunal proposed to the Claimant that he made a list of page numbers, and a list of questions, in order to provide a structure for him to use in cross-examination. It was pointed out that this would assist him and save time. We considered that this would further the overriding objective. This suggestion was repeated to the Claimant on other occasions during the hearing.

23. Unfortunately, the experience of the Tribunal was that the Claimant did not help himself. Contrary to the proposals made to him, it was apparent from the questioning of Mr. Rothnie on 5 June 2019 that the Claimant did not write out a list of questions or page references. As a result, there were a number of delays whilst he sought to find page references (when cross examining each of the Respondent's witnesses), and he frequently asked the Respondent's Counsel for assistance with page references. Moreover, it appeared to us that, for each of the Respondent's witnesses, the Claimant had not prepared questions, but was formulating them as he went along. Moreover, the length of cross-examination of the Respondent's witnesses was added to by the Claimant raising entirely new allegations (such as that he had been excluded because he was about to lead the Clinical Specialists in Emergency Medicine in some form of industrial action; and that the photograph purporting to show him asleep had been procured as part of a scheme to have him excluded).

24. Although we fully understood the lack of experience of the Claimant, as a lay person bringing a claim in the Tribunal, the difficulties caused by this unstructured approach were obvious to the Tribunal: it led to the Claimant making a series of statements without reaching any question; where a question was finally put, it was difficult to follow the premises to it (or the witness could not agree the premises); the boundary between putting a question and making a submission was lost; and it used up a large amount of time.

25. For example, prior to the start of the hearing on 5 June, the Claimant was asked how much longer the cross-examination of Mr. Rothnie would be; he said that he was aiming to finish by the end of the day, and the Tribunal informed him that he should aim to finish by then.

26. Prior to lunch on 5 June (around 1140) the Tribunal again suggested that the Claimant write out some questions or page references. We explained he may wish to focus on specific issues, noting four that Mr. Rothnie dealt with in his evidence.

27. In terms of timing, the net result was that, despite the above, on the afternoon of 5 June, the Claimant explained that he would need until lunch on 6 June 2019 in cross-examination. If this was permitted, this would mean that Mr. Rothnie would have been

in cross-examination for almost 2 days; and the Tribunal could well have questions for the witness, in addition to any re-examination.

28. The Tribunal considered that the additional time sought was disproportionate given the following: the time that was left to hear and determine the case; the number of Respondent witnesses and the time that each was likely to take (having taken estimates of the length of cross-examination for each from the Claimant); the issues covered by Mr. Rothnie; the fact that the Claimant could make submissions about documents and their meaning; and the amount of time that the parties would require for submissions; and the time that the Tribunal would require for deliberation. Moreover, the Claimant had been informed at an early stage on the morning of 5 June 2019 that there was a risk that the Tribunal would have to direct that the cross-examination was to end, even if questions remained that the Claimant wanted to ask, if he did not use the time available on 5 June prudently. We directed that the Claimant should complete his cross-examination by the mid-point of the morning session of 6 June, being about 11:15 (given the 09:45 start). We explained to the parties that we did not rule out an application for more time to cross-examine Mr. Rothnie.

29. On 6 June 2019, the Claimant provided a further transcript of the meeting of 16 December 2015 and arrived with an audio file from that meeting that he requested that the Tribunal hear. The transcript was not complete; it contained typed up extracts of the meeting, which were noted by time. The Claimant had attended this meeting with his BMA representative, Ms. Saha; Mr. Rothnie and Ms. Bridge were present for the Respondent. The Claimant had made a surreptitious recording of the meeting; he claimed that this happened by accident when the device that he was using to record the meeting picked up (from outside the room) the private discussion of Mr. Rothnie and Ms. Bridge when they were in private. The Tribunal found that to be an implausible explanation for a covert recording.

30. The Claimant applied to play the audio file, consisting of about 5 minutes when he was out of the room. He claimed it showed a conspiracy to cover up the importance of a photo that had been taken of him asleep on duty, taken in a public area; and a conspiracy to delay or amend the disciplinary process, which by this stage, Mr. Rothnie had denied in his testimony.

31. At first, the Tribunal understood from the application that the transcript that he produced was incomplete; the Respondent understood him to be saying that the Tribunal needed to listen to more than 5 minutes because the detail was not in the transcript. Having refused the application on that basis, largely because Employment Judge Prichard had directed that the Claimant produce transcripts of the parts of the meetings relied on, the Claimant then stated that the transcripts were in fact complete extracts of the relevant parts. The Tribunal proposed that, if he wished the Tribunal to reconsider its decision, he needed to ask the Respondent if they agreed that the transcript was complete and accurate.

32. At 11:32, the Claimant applied for an extension of time to continue to cross-examine Mr. Rothnie. This was opposed by the Respondent. The Tribunal allowed further time for cross-examination to 11:45. Mr. Rothnie had been cross-examined for 7 hours 20 minutes up to this point.

33. At 13:45, the Claimant applied for the Tribunal to reconsider its decision on the application to hear the audio file. For reasons given at the time, this application was granted, the decision was reversed, and the Tribunal and the parties listened to the audio file of the meeting of 16.12.15. Two short extracts were played (up to 45.54, as shown at p.154.4; and from 1.19.54 to 1.21.23).

34. Mr. Rothnie was then re-called for further cross-examination, which was necessary in fairness to him and the Respondent's case. His cross-examination then concluded.

35. In respect of Dr. Howard, the Claimant cross-examined for far longer than he had estimated at the outset of the hearing when time-tabling had been attempted. Given he is a litigant in person, the Tribunal allowed an extended time for cross-examination. For reasons explained at the time (particularly the need to complete the evidence and submissions in the time available, leaving some time for Tribunal's consideration) and having previously warned the Claimant of this likely step, the Tribunal directed that the cross-examination should finish at 1300 on 25 June 2019. At this point, the Claimant was invited to apply for more time if required, but the Claimant opted to stop there. Subsequently, after the Tribunal had asked its questions, the Claimant raised an issue that he should have put to Dr. Howard in cross-examination. As a result, the Tribunal permitted further cross-examination of Dr. Howard.

36. On 26 June 2019, after the bulk of the Respondent's evidence had been heard, the Claimant attended the Tribunal with further documents. He wished to adduce these documents in evidence and rely on them in submissions. The application was opposed (save in respect of one screenshot, being his mobile phone account, which we added to the Claimant bundle). We refused the opposed part of the application for reasons given at the time, which included that there was no reason why the documents could not have been adduced earlier, Dr. Howard had concluded her evidence, and that they were not likely to be relevant to the issues in the case. It is relevant to point out that Dr. Howard had been under affirmation, due to breaks in the hearing and the need to interpose Dr. Willis, from 6 June 2019 to 25 June 2019.

37. In respect of final submissions, the Tribunal explained on the second morning of the hearing that submissions could be oral or written. The Tribunal directed the Respondent to provide a copy of any written submissions on the Monday of the last week of the hearing. This was based upon the Claimant being unrepresented, and in order to help the Claimant. In the event, the hearing was increased by four days, making the date for provision of written submissions 24 June 2019. The Claimant knew this, because Counsel confirmed this with the Tribunal during the course of the hearing.

38. On 7 June 2019, after the lunch adjournment, as a housekeeping matter, the issue of submissions, and how long they would take, was raised again by the Tribunal, because we had become concerned to ensure that the case should conclude within the time allotted to it (which had been extended by 1 day), or at least, that evidence and submissions would be complete. The Tribunal directed that the Claimant had two hours to make his oral submissions. He was advised to prepare his submissions in advance and it was explained to him that he could put submissions in writing if required.

39. The Respondent provided its written submissions (102 pages) to the Claimant around 9pm on 24 June 2019.

40. The parties were due to make submissions on 28 June 2019, at the commencement of the final day of the hearing. The Claimant knew that the Tribunal intended to hear submissions on the final day, and that, due to lack of time, the Respondent had decided not to call its last witness, Ms. Furley. Counsel made short submissions of about 15 minutes to accompany her written submissions on behalf of the Respondent.

41. The Claimant requested that he be given time to make written submissions; he asked for one week, stating that he wanted to codify them and needed time to do so. The application was opposed. The Tribunal took time for consideration. For reasons given at the time, the Tribunal decided that it would further the overriding objective to proceed to hear his oral submissions that day, to use the time available, and to start our deliberations whilst matters were fresh in our minds. It is important to record that the Claimant did not apply on grounds that a disability prevented him from preparing submissions in advance, although he did state that his mind was racing. We took this into account, and balanced it against the earlier guidance from the Tribunal about how submissions are given, the need to prepare, and that submissions could be put in writing. In addition, we took into account that we had sought to ensure, so far as possible, that the parties were on an equal footing by requiring the Respondent to provide its written submissions well before closing its case. As part of our decision, we allowed the Claimant to send authorities to the Tribunal if he sought to do so by 10am on 2 July 2019.

42. The Claimant proceeded to make oral submissions for about 2 hours.

43. Early on 2 July 2019, the Claimant emailed to the Tribunal a Skeleton Argument and a selection of cases. His covering email stated:

> *"As directed by the Judge, please find enclosed my submissions regarding relevant case law."*

44. As Dr. Althaf knew, the Tribunal had refused his application to delay closing the case so that he could put in written submissions.

45. Nevertheless, the Tribunal did take into account the Claimant's Skeleton Argument because it merely contained a summary of the authorities upon which he relied; there was no written submission linking the evidence in this case to any of those authorities, and inviting a conclusion. We decided that it would further the overriding objective for the Employment Tribunal to take into account the cases referred to. We did not consider that it would be unfair to the Respondent to take into account these case summaries; Counsel had made submissions on the law and provided several authorities and the Claimant had been permitted to provide the case-law that he relied upon after the final day of the hearing. So far as relevant, we took into account the caselaw provided by the Claimant. It is pertinent to point out that the facts within those cases were different to those found in this case.

The Evidence

Documentary evidence

46. There was a large bundle of documents prepared by the Respondent, running to some 8 lever arch files.

47. There was a Claimant bundle of documents in one file, plus another two files of documents exhibited to the statement of Dr. Plews (who had been medically retired with a chronic and enduring condition, and did not give oral evidence).

48. The Claimant was given the opportunity to provide oral evidence in examination-in-chief, in addition to his witness statement that exceeded 50 pages in length plus a Disability Impact Statement (which was over 80 pages including exhibits). He declined this opportunity, stating that he would adduce any necessary evidence during cross-examination and because it was already documented; he wanted to avoid any confusion for the Employment Tribunal.

49. The Tribunal sought clarity as to the purpose of the tables at the end of the Claimant's witness statement. He stated that they were there because it was "*tailing off*" and he agreed that including them was intended to incorporate all the "Evidence" referred to in the witness statement, partly as a "belt and braces" exercise.

50. Although the Claimant was an intelligent and articulate witness, we found him to be an unreliable witness in many areas of evidence, and not credible in some other areas. We found that this was mainly because he was unable to accept any documentary or oral evidence which did not accord with his perception of events. For example, in cross-examination of Ms. Bridge, he put to her that the email dated 16 December 2016 from the GMC (C186) told him to take a sick note to the forthcoming appraisal meeting; but this document states no such thing.

51. The Tribunal were unable to understand why, despite his perception of events, the Claimant could not accept the contents of documents or the obvious inferences to be drawn from them.

52. Further, the Claimant demonstrated that he would not, or could not, follow a structure of rules or directions, such as case management orders. This included requiring his witness statement to be filed; this had not been prepared when Employment Judge Ross heard a telephone Preliminary Hearing in July 2018, despite the fact that the hearing was due to begin shortly afterwards. His lack of action in respect of preparation of the final written submissions, until after our deliberations had started, despite warnings and advice as to when closing submissions would take place, is a further example. A further example was that, despite generous time being permitted for cross-examination of Dr. Howard, and despite extension, he still sought further time. Our experience tended to corroborate the grievance outcome in this respect. In that decision, Ms. Furley explained (p.1806):

> "*You appear to demonstrate a behaviour that persistently exhibits a desire not to follow policy, practice or procedure. You seem to lack self-awareness or the ability to work within current structures or practices….you seem to portray a*

behaviour that if your opinions or proposals are not accepted and enacted that this is somehow a personal detrimental action against you."

53. We formed the view that the Claimant considered his own view of or belief in what was or was not relevant, or necessary, was more important than the Tribunal's view. We found that his conduct at this hearing corroborated the Respondent's evidence in certain respects. We found it likely that during his employment he considered his opinions or beliefs were entitled to more weight than the decisions of his managers or others. For example, the Claimant dismissed the Statutory/Mandatory training on I-Learn (the online training portal used by the Respondent) as not necessary for him to complete. Given that the modules were, from what we heard and saw, not complex for qualified Clinical Specialist grade doctors and could be completed in a fairly short time, we found that there was no good reason why the Claimant did not accept the need to complete them.

54. In order to demonstrate some features of his evidence which showed its unreliability or lack of credibility, we noted the following.

54.1 The Claimant's failure to accept objective factual evidence meant that we found his evidence on such points incredible. Examples are found within this decision. In other parts of his evidence, he was unable to recall matters where factual issues were raised with him that he found difficult to explain.

54.2 The Claimant made entirely new allegations, not mentioned in his witness statement. When this was pointed out to him, he vehemently denied this. We found that this was all further damage to his credibility. For example: as explained above, in cross-examination of Mr. Rothnie; in closing submissions when he alleged the disclosure in the First List of Issues at 1(l) was something quite different to that recorded in the agreed list (contending it was about urinary retention and failures in performance). When this was pointed out by the Tribunal, he refused to accept this was correct, which the Tribunal found inexplicable, not credible, and only damaged its view of his credibility.

54.3 The Claimant's failure or inability to give a direct answer to a question requiring a simple answer, such as to confirm the contents of a document or whether he had seen or received a document.

54.4 The Claimant's failure to answer questions, but to answer a different question that he anticipated might to be put or that he wished to answer.

54.5 Answers to questions where the Claimant realised that they were about facts or documents that presented difficulties for his case led him to attempt to divert the Tribunal away from the subject, down some other evidential route - or "rabbit-hole" (to use Counsel's expression).

54.6 The Claimant had a tendency to change his evidence, which we found was when he realised that the first answer on the point was not credible. For example, on 21 May 2019, in cross examination, he stated that the

GMC had told him that there was no need to complete the appraisal documents for the Respondent; when asked where this was stated, he said he would have to look; and, a few questions later, said that the GMC had not told him that he did not have to do this.

54.7 The Claimant tended to a re-interpretation of questions or comments made by Respondent.

55. The Tribunal found that the Respondent's witnesses were honest and gave reliable evidence, which was generally corroborated by documentary evidence or other oral evidence. We found that they were measured in their approach to giving evidence. It was clear to the Tribunal that patient health and safety was of the utmost importance to them. We found that Dr. Howard and Dr. Willis were very impressive witnesses, in part due to their grasp of the facts, despite certain events being some years before.

56. Overall, where there was any conflict of fact, the Tribunal preferred the evidence of the Respondent's witnesses.

Findings of Fact

Contractual terms

57. From 21 October 2013, the Claimant was employed by the Respondent as a Clinical Specialist in the Emergency Department. Dr. Howard decided that the Respondent should employ him despite the fact that he was subject to GMC Conditions of Practice.

58. By a conditional offer letter of 20 September 2013 (p349), the Claimant was offered this role for an initial period of 3 months with a view to extension to a permanent post following satisfactory completion of a probationary period (p.349).

59. This offer was conditional; but the letter stated that if confirmed, the terms would be subject to the "*Terms and Conditions of Service of Hospital Medical and Dental Staff and Doctors in Public Health Medicine and the Community Health Service (England and Wales)*" ("TCS"). We accepted Ms. Bridge's explanation that this was not the intention.

60. By a further offer letter of 4 November 2013 (p355), the Claimant was offered the role on the terms set out in that letter, which also excluded entitlement to sick pay: see clause 9.

61. We find that it was a term of this offer that the Claimant had to be registered with the GMC.

62. The offer letter contained an "Acceptance of Contractual Terms and Conditions of Employment" clause, which stated that "*This offer, and acceptance of it, shall together constitute a contract between the parties*.". There is provision for a signature. Although no copy signed by the Claimant was in the Bundle, in the course of the Specific Disclosure application on 16 May 2019, the Claimant admitted that he had

signed this offer and never disputed this in evidence. We found that all the main terms of the Claimant's contract were contained in this offer letter. We found that the TCS were not incorporated within this contract.

63. The Claimant's case was that he was not employed only on the terms in that November 2014 offer letter, but also on the basis of contractually binding promises or assurances made to him in conversations by Dr. Howard and Dr. Willis, including at interview, and/or by telephone. His case was that he only took the post because of these statements.

64. We accepted the evidence of Dr. Howard and Dr. Willis that no such statements or promises were made to him. We find that Dr. Howard stated to the Claimant that the Clinical Specialist Contract was being revised, not that it incorporated the TCS or the Associate Specialist terms and conditions.

65. Neither Dr Howard nor Dr. Willis stated that the revised contract would have retrospective effect; we find that this is inherently unlikely and not credible. No such statement would have been made by these clinicians without Human Resources advice, nor without understanding the consequences in financial terms. The Claimant liaised with the British Medical Association ("BMA") but did not ask the BMA to demand retrospective effect, and the BMA never made such a demand of management.

66. The Claimant knew that he was receiving a "*local contract*" and must have seen this offer, or a summary of it, in advance on or about 12 September 2013 (evidenced by email exchange with a BMA representative, Dr. Naylor, p.492, who described it as a "*basic*", "*non-standard contract*" which did not involve membership of the NHS Pension Scheme). It is notable that the Claimant recognised that he was being offered a "Clinical Specialist contract", not an Associate Specialist contract: see his email, at 16:11 on 11 September 2013.

67. Furthermore, from the emails at pp 492-493, we find that the Claimant must have known that the contract being offered and that he entered into did not incorporate the TCS. It did not include entitlement to the NHS Pension Scheme, nor did it provide for Sick Pay. Moreover, Dr. Howard explained to him on 13 September 2013 that the "CS Contract" was being re-written to include sick pay allowance, study leave, lieu days, bank holidays and other things; there would have been no need for her to explain this if he was simply being offered the job on the TCS.

68. Moreover, the Claimant's case was inherently inconsistent in that, if the TCS were incorporated into his contract and into the contract of other Clinical Specialists in the Emergency Department, there would appear to be little or no need for the ongoing negotiations to revise the Clinical Specialist contract which took place over 2014 and 2015, and with which he wanted to be involved.

69. It is important to look at the Claimant's evidence in cross-examination with precision. He said:

69.1. He was assured it [the November 2013 contract at pp355-359] would be replaced and this would have retrospective effect.

69.2. He only took the post because he was assured that the contract would be amended and include the national TCS.

70. This is evidence that a representation about what would happen in the future was made to him, rather than a collateral warranty about the contract actually entered into at that time. Therefore, it is consistent with him being employed on the contractual terms offered to him in the letter at p355-359, rather than some unspecified terms, not yet formulated.

71. As referenced by Dr. Howard, the Clinical Specialist contract was revised and issued in October 2015. The BMA did not agree the revised contract because of a disagreement (over whether the contract should specify a number of Planned Activities per week rather than hours per week). The Claimant did not agree to the revised terms and conditions as drafted in October 2015 (version 6), albeit this revised contract included provision for contractual paid sick leave and pension entitlement. We found that, throughout his employment, at least from November 2013, he was employed on the local Clinical Specialist contract signed in November 2013.

72. The Tribunal did not accept the Claimant's evidence and argument that the national terms and conditions for Associate Specialists applied to his local contract as a Clinical Specialist. His evidence was based on the Claimant's perception or belief about what should have been the position, rather than the objective facts as to the type of local contract entered into up to and including 2014 by the doctors in Emergency Medicine employed as Clinical Specialists.

Issue 1(a): 10 July 2014; alleged protected disclosure to Dr. Howard

73. The Claimant relied upon the email at p. 522 to 528 from himself to Dr. Howard as containing the alleged protected disclosure. We found that this email did contain disclosures of information, consisting of the text at the first two paragraphs of p.525 of his email, when read with the documents at the hyperlinks. These paragraphs state:

> "*The primary concern is regarding the shifts after the 4 night run in week 3 where we are scheduled to work on Wednesday having completed a night shift on Tuesday morning. As per the recommendations of the RCS/RCP/AOMRC, there needs to be a day off for every run of two days, hence we should be off on Wednesday & Thursday. I am quoting the relevant documents below with links. Even the CEM guidance for consultant job planning suggests similar arrangements.*
>
> *I am sure you understand that we will struggle to be effective on the proposed arrangement, given that we officially are acknowledged to perform at the level of someone legally drunk after just one night shift.*
>
> *Also, the rota has us working less than 1/3rd of our hours in the Normal Working Day (9-5) and the suggestion from the BMA/AOMRC is that to design a complaint rota with 48 hour full shifts, it will require at least 11 doctors. To make it compliant at 44 hour full shifts of which one is a CPD session, we will be looking for more doctors on the rota.*

Even when considered against the 7am to 7pm out of hours consideration of the SAS contract, we are spending 2/3rd of working time out of hours. This is not attractive and is against the spirit of the IWL guidance. While our remuneration is higher than the SD pay scale, this needs to be explored properly."

74. As Counsel submitted, this email does not state that the proposed rota is not compliant with the Working Time Directive ("WTD") nor the Working Time Regulations 1998 ("WTR"), nor that health and safety of patients or doctors was likely to be endangered, but we reminded ourselves that the statutory definition requires us to consider whether the Claimant had a reasonable belief that this disclosure tended to show any matters within section 43B(1) ERA.

75. The Claimant admitted in cross-examination that this email did not use the words "unsafe" nor did it refer to patient safety directly; but his evidence was that this did not need to be spelled out because the first paragraph p.525 raised a clear safety concern because he had used the words: "*we officially are acknowledged to perform at the level of someone legally drunk after just one night shift*". He stated that this made the same point.

76. The Claimant stated that the email referred to the WTD guidance showing the Directive was not complied with, which had health and safety consequences. When asked by the Tribunal where this was stated in the email, he stated that it was contained in the material at p.525 – 528. This material referred to specific hyperlinks as well as extracting material from documents. We accepted the Claimant's evidence that the documents referred to were produced in response to WTD or WTR.

77. In cross-examination (rather than in his witness statement), the Claimant relied on alleged verbal discussions about safety or the lack of it, the inference being that these took place about the same time. He did not specify with whom these conversations took place, nor where, nor when. We found that there were no such conversations of the type described raising safety concerns at or about this time. If there had been, the Claimant would have referred to these in his statement or some other document.

78. We found from the above evidence that the Claimant had a belief that the disclosures in his email (p.522-528) tended to show that the health and safety of an individual was likely to be endangered, or that the Working Time Regulations 1998 or the EWTD were likely to be breached by the rota.

79. We found, however, that his beliefs that health and safety was endangered and that the working time obligations were likely to be breached not to be reasonable. The guidance and recommendations that he relied upon was simply guidance; it did not establish any legal rule nor mandatory times.

80. Moreover, we found that the Claimant did not believe that in making this disclosure he was doing so in the public interest. He was making it as a negotiating point on behalf of the other Clinical Specialist doctors in the Emergency Department. We found his claim that he believed he was acting in the public interest to be mischievous.

81. Moreover, the guidance was produced in relation to Associate Specialists under the National Terms and Conditions and Consultant contracts. As Dr. Howard pointed out, the rota was compliant in any event, because it was a 12 doctor rota, with the Claimant's representations based on an 11 doctor rota; we found that the Claimant must have been aware of this. Furthermore, the Respondent ran any proposed shift rota through a software package which would highlight any shortcomings under the Working Time Regulations.

82. Moreover, the Claimant misrepresented to his employer what the guidance stated as to Clinical Specialists in the Emergency Department performing *"at the level of someone legally drunk after just one night shift"*. The guidance did not state that working a night shift caused doctors to work at a level consistent with being legally drunk; instead, in the context of working without adequate rest, it stated that missing one night's sleep would cause someone to work at this level: see p.2322. The Claimant and other doctors were required to ensure that they had adequate rest, and the rotas were so designed.

Issue 1(b): later in July 2014; alleged protected disclosure to Dr. Howard that the Respondent's recruitment of Clinical Specialist doctors from overseas on the terms of the Contract was discriminatory and unlawful to hold them to the Contract and not employ them on the national terms like the other doctors employed by the Trust.

83. The Claimant's witness statement evidence (paragraph 63) does not make clear that the actual disclosure alleged above was made.

84. No contemporaneous documents corroborate Claimant's case. Indeed, the Claimant's emails from 10 September 2014 at C69 and C71 do not mention discrimination. The email from the Claimant dated 18 September 2014 to Dr. Howard does not refer to or allege discrimination; moreover, her response on the same date (p576) does not respond to any such complaint.

85. We find that the documentary evidence supports Dr. Howard's account that no such disclosure was made to her in or about July 2014.

86. We find that, had such a disclosure been made, having seen her given evidence and noted her management skills and good sense, Dr. Howard would have responded in writing to what was a serious matter.

87. We find that, had the Claimant made such a protected disclosure, and had it been ignored at the time (by a lack of response), it is likely that he would have raised it with the BMA given he was discussing the Contract with his BMA representative.

88. The Claimant's evidence is inconsistent with the context at the time. The Respondent readily accepted the CS Contract needed changing. Caroline Howard wanted this as she told him prior to his recruitment that this contract was to be revised. Thus, we could not understand why he would make such a statement given there was no issue that the CS Contract needed revision.

Issue 1(c): 28 September 2014; alleged protected disclosure to Dr. Willis that the Respondent victimised the Claimant because he asserted the Respondent was discriminating against Clinical Specialist doctors and the rota was contrary to guidance around the WTD or the WTR and/or protected act

89. There was a dispute of fact over whether this disclosure was made. The Claimant contended that he had produced a document to support this allegation, namely an email from Amanda Saha, BMA, at C189.

90. The email of Amanda Saha (C189) sets out her notes of meeting of 29 September 2014. The notes refer to the Claimant having spoken with a Consultant. In fact, the notes record the Claimant raising concerns with Ms. Saha about the Acting Emergency Medicine Consultant role, and that this was raised with the Consultant referred to; they do not include any reference to discriminatory treatment of Clinical Specialist doctors, nor to the WTD (nor WTR) nor to the Claimant making this disclosure to Dr. Willis. The Tribunal found the notes were likely to be accurate and a good summary of the matters discussed, and that the issue of discrimination and likely breach of WTR/WTD was not discussed with Ms. Saha.

91. The Tribunal found it inconsistent with the Claimant's evidence about such a disclosure being made, because if such a belief was held as strongly as the Claimant now appeared to hold it, we found it very unlikely that he would not have expressed it to the BMA representative (even if she was not his own representative at that stage); Ms. Saha records that this was a long conversation (see C189). Had the Claimant referred to such a disclosure made by him to Dr. Willis, we find it very unlikely that Ms. Saha would not have referred to it in these notes.

92. When this inconsistency was put to him, the Claimant responded, as he generally did in cross-examination when a set of notes did not reflect his recollection of events, by saying that the notes were not accurate – in this case, that they were Ms Saha's own notes. Also, he said that he could not recall what was said verbatim in the meeting.

93. We found that the Claimant could not recall accurately what was said in the meeting with Ms. Saha, nor to Dr. Willis on 28 September 2014. We found that he was mistaken about what he said.

94. We are satisfied that the Claimant did not make the disclosure alleged.

95. We found that other evidence supported our finding, such as his emails to Ms. Totterdell and Mr. Warrior, of 1 October 2014, in which he did not make or repeat this alleged disclosure. Given that Ms Totterdell was Chief Executive, and Mr. Warrior was Acting Head of HR, we found that this was inconsistent with the Claimant's evidence, if he held the belief that he alleged.

96. The Claimant stated that he had raised this complaint of discrimination, but that the notes of his meetings with Ms. Totterdell were missing. We found the allegation that he raised it with her unlikely; in his email of 1 October 2014 to Ms. Totterdell, he stated that he was making a protected disclosure (p.595), but the disclosure was not this one (but allegations about recruitment to the Acting Consultant role).

Issues 2(a) – (b)(i) Respondent not informing him of Acting Consultant vacancy

97. The Claimant complains that because of the three alleged protected disclosures referred to above, he was subject to a detriment, in that the Respondent disadvantaged the Claimant compared to Dr. Kumar in respect of the Acting Consultant vacancy in the Emergency Department. His case was that Dr. Kumar was told about the post, whereas he was not, and that Dr. Kumar was groomed for it. We found that there was no causal link at all between the alleged disclosures (if they were made and were protected disclosures) and the alleged detriments.

98. We accepted the evidence of Dr Howard and Dr Willis that the Acting Consultant vacancy was communicated to all doctors in Emergency Medicine who attended the weekly teaching meetings, and we found that the Claimant would have found out about it at one such meeting. Moreover, as Dr Howard explained, the department was excited about this opportunity because it provided another career route for those clinical specialists who were in non-training roles. Therefore, it was very likely from discussion within the department that the Claimant would have found out about this vacancy even had he not attended one of the weekly teaching meetings. We have no hesitation in finding that the vacancy was not communicated only to Dr Kumar as alleged by the Claimant. In particular:

> 98.1. The job advert for this vacancy was sent for posting on the job site on 23 September 2014, evidenced by the email from the Medical HR Manager (at p.578).
>
> 98.2. This email shows that the closing date for the vacancy was 3 October 2014.
>
> 98.3. The Claimant admitted that he was aware of the advert by 29 September 2014 (before he sent the email to Ms. Totterdell on 1 October 2014). This is further evidenced by the email from Carol Church at p592.
>
> 98.4. We accepted the Respondent's oral evidence that the Claimant did not need a reference number to view the advert. The number was provided to him on 30 September at 0908, and this made it easier for him to search for the job advert.
>
> 98.5. The Claimant applied for the role before the closing date (see below).

99. Accordingly, we find that the Respondent took no steps to prevent the Claimant from applying for the vacancy. We could not understand why he was in any worse position than any other potential applicants. We find that there is no evidence that the Claimant was subjected to a detriment in this respect.

100. The Claimant applied for the role in any event. The Claimant was not subjected to any detriment at all in respect of the making of the application.

101. The Claimant had time to complete his application on 1 October, before the closing date of 3 October 2014.

Issue 1(d): 1 October 2014; Claimant informed Ms. Totterdell that the Respondent had imposed whistleblowing detriment by failing to inform him about the Acting Consultant Emergency Medicine vacancy

102. We found that the Claimant made no such disclosure on 1 October 2014. The limit of the disclosure made to Ms. Totterdell is that set out at in his email complaint at p.596; this is nothing like the alleged disclosure and there is no mention of any causative link between his treatment in the Consultant application and any earlier disclosures. It is not credible that the Claimant would have made such a serious disclosure (of victimisation for whistleblowing) yet not mentioned it in this email nor in a separate email to Ms. Totterdell or Mr. Warrior.

103. We did not accept the Claimant's evidence that he had any telephone call with Ms. Totterdell on 1 October 2014, because his email of 7 October, p.613, shows that he was still expecting a call from her. The reference to a telephone conversation on 1 October 2014 must be incorrect, which is demonstrated by p.613, which shows the Claimant still waiting for Ms. Totterdell to call. The Claimant conceded in cross-examination that he must have the wrong date – but he made no application to amend nor to evidence the correct date.

104. As we have noted, the Claimant was a very unreliable witness. Without any documentary corroboration of this alleged disclosure (in contrast to the documents which pointed the other way), we did not accept his evidence on this alleged disclosure.

105. In any event, it is clear from the response of Ms. Totterdell to the email from the Claimant (at p596, which he claimed in the email was a protected disclosure), that she understood him to be raising a possible grievance, not a protected disclosure of any type. In view of that response, we find it very unlikely that this correspondence led to any detriment to the Claimant imposed or created by Ms. Totterdell at any time. Furthermore, there was no evidence that Ms. Totterdell had communicated this email to the alleged perpetrators of the detriments relied upon. She left the Trust shortly after this email exchange. Dr. Howard, Mr. Rothnie and other witnesses did not know of it at the time of the alleged detriments.

106. We found that the alleged disclosure at p.596 was an employee's grumble, not a protected disclosure. We found that there was no disclosure of information; this email was allegation. Moreover, we found that the Claimant sent this email with a personal sense of grievance, not a belief that to do so was in the public interest.

107. We accepted that the Claimant believed that this email tended to show breach of some form of obligation; but we did not consider such belief to be reasonable; he did not identify any legal obligation which was likely to be broken during his evidence nor did he suggest such an obligation in his submissions.

Issue 2(b) i – The Respondent failed to shortlist the Claimant for the Acting Consultant position on 6 October 2014

108. We found as a fact that the Claimant was not subjected to any detrimental treatment by not being shortlisted or appointed to the Acting Consultant vacancy.

109. We found that Dr Howard went through the shortlisting process on 6 October 2014 for both Dr Kumar and the Claimant. Dr Howard had doubts that both Dr Kumar and the Claimant were eligible for the role. In respect of Dr Kumar, this is set out in Dr Howard's email to him of 6 October 2014 at page 611.

110. It is apparent that the Claimant replied to a similar email from Dr Howard about his eligibility on 7 October 2014 (p.614.1). His response shows that he did not meet the Advanced Life Support requirements of the post. Dr Howard responded to the Claimant by email explaining that, because he did not have two of the three Advanced Life Support courses, he could not be shortlisted.

111. In his witness statement at paragraph 90, the Claimant alleged that the reason he did not have the Advanced Life Support qualification was that he had cancelled his place on the course in October 2014 after discussion with Dr Willis. It is clear to the Tribunal that this is not true, being inconsistent with what he told Dr Howard in his email of 7 October 2014 in which he stated that he did not attend the course in May 2014 due to overbooking; and we found that he did not attend the course on 6 and 7 October 2014 due to rota difficulties as he claimed. Indeed, we found that in respect of the October 2014 Advanced Life Support course, what the Claimant had told Dr Howard was not true because the Claimant did not have rota difficulties for the October dates because he was "off" on 5 and 8 October 2014 and had booked annual leave on 6 and 7 October 2014, so he could have attended the course.

112. The Claimant conceded in cross-examination that his statement in his email of 7 October 2014 to Dr Howard was not correct insofar as it used rota difficulties as an excuse, and we found this was another example which damaged his credibility as a witness. We noted the Claimant's explanation for not telling the truth to Dr Howard, which was that he was having to deal with bankruptcy proceedings in October 2014 and had not wanted to disclose this, but we did not see why there was a need to invent any other excuse for non-attendance at the Advance Life Support course in October 2014 in any event. Whatever the reason, the fact remained the Claimant lacked the criteria in terms of Advanced Life Support and we accepted the evidence of the Respondent's witnesses on this point.

113. In any event, the vacancy information ("acting consultant in Emergency Medicine") demonstrated that candidates had to meet all of the College of Emergency Medicines guidance on the recommended requirements for locum consultant posts in Emergency Medicine: see page 590. The essential requirements for the role are set out below. This specification made clear that the "essential" requirements are ones that all candidates must meet (p.589). Further, it is apparent from the Person Specification that the role required at least two of the three Advanced Life Support qualifications were held by the candidate and that the candidate had "substantial experience" in Emergency Medicine. "Substantial experience" is defined in the College

of Emergency Medicines recommended requirements for locum consultant posts in Emergency Medicine: see p.614.4:

> *"Essential*
>
> 1. *At least seven years full-time postgraduate training (or its equivalent gained on a part-time or flexible basis); at least 5 of which will be in a specialty training programme or a substantive service appointment in Emergency Medicine.*
>
> 2. *At least 4 years, full-time (or equivalent part-time/flexible), experience of working in a Consultant led Emergency Department; including at least 2 years' experience of supervising junior staff*
>
>   *Or*
>
>   *Demonstrable, equivalent experience and competencies (equivalent to an ST6 Emergency Medicine Trainee)*
>
> 3. *Current provider status in 2 or more of the following advanced life-support courses ALS, ATLS, APLS or other recognised, equivalent courses."*

114. The Claimant did not have at least two of the required Life Support training qualifications and nor did he have the required experience in substantive posts in Emergency Medicine.

115. The Claimant accepted in cross-examination that the College of Emergency Medicines recommended requirements for locum consultant posts required at least five years' experience in substantive (not locum) jobs in Emergency Medicine. The Claimant understood that he did not have this experience, but he argued about the necessity for such a requirement contending that he had more than sufficient experience.

116. We found that the Claimant's reaction demonstrated a more general feature of his evidence which was that, as we have explained, his view or opinion was superior even when some rule or direction was mandatory.

Issue 2(b) ii – refusal of annual leave in October 2014

117. The Claimant mentioned to Dr Howard informally by email on 10 July 2014 that he planned to "*be away in early February 2015*" (p.529), but he mentioned no more detail on his planned absence.

118. In late summer 2014, the Claimant informed Dr Howard that he was looking to take a longer period of time off in February 2015 and he asked what the department could do to accommodate that, because the Claimant realised that he did not have enough leave left for the year to take off the period he sought. Dr Howard suggested the Claimant could work extra shifts ahead of February 2015 to build up some additional leave days. This was the extent of their conversation at this time. No promise was made to the Claimant and the Claimant did not provide any proposed

dates for the holiday and nor did he make any formal leave request or ask Dr Howard for formal or informal approval. We found that this was purely an informal chat about future holiday plans.

119. The Respondent's leave policy sets out that departments would determine their own local arrangements for authorising planned leave ensuring fairness to all staff. The policy requires managers to effectively organise existing workforce to cover absent employees, stating that it is only in "exceptional" circumstances that additional resources can be used which we understand to mean overtime or agency appointments. The overriding principles in the policy for determining requests for planned leave are:-

119.1. the quality of care available to patients and

119.2. the increased cost implications of using replacement staff (see page 3153).

120. The policy also states that employees would normally be required to give at least six weeks' notice of annual leave and that the maximum leave normally granted at any one time is two weeks and that applications for longer duration require special authorisation.

121. On 5 November 2014, the Claimant emailed Dr Howard's PA, Ms Verney, at page 638, stating:

> "*As per a longstanding request, I am tentatively booking leave from 02/02/15 onwards for as many days as I will have left and have discussed with Caroline previously about bringing forward leave from the next year. So probably ending mid March or all of March as well. Can you pencil this in please & I will confirm in the next couple of days.*"

122. We find that that email did not correctly set out the nature and facts of the conversation that the Claimant had had with Dr Howard earlier in the year.

123. Dr Howard responded on 5 November 2014 (p.637). We find that that sets out the true history of the matter. Moreover, we find that this email explains Dr Howard's reasons for refusing the leave applied for. It is apparent from this that his application was not given a blanket refusal. There is nothing in this email to lead to the inference that Dr Howard's decision was influenced at all by any of the alleged disclosure made by the Claimant up to that point.

124. In her email of 5 November, Dr Howard also pointed out that the Claimant was rostered to work nights from 17 to 19 February and from 27 February to 2 March inclusive so he would need to swap those shifts: this was a reference to the fact that the Emergency Department operated a policy that leave could not be booked to coincide with night shifts unless staff could work around this by swapping their night shifts with other doctors. We find that that was an existing policy and not something invented by Dr Howard to block the Claimant's leave application.

125. In any event, given the circumstances and the somewhat misleading email from the Claimant to Ms Verney, Dr Howard's email was extremely reasonable in its content. It included the following offer:

> "*We are prepared for you to work any off days to cover what would otherwise go out as locum shifts and bank these however of concern this MUST be done in advance and currently November shifts for locums have been out for over a month with no request from yourself and the December shifts have now been out for 5 days and are mostly filled. Please can you liaise with Lorraine urgently if you do wish to do some of these as lieu for banking days. We would only be able to add on these additional lieu days when they have been banked e.g. you do an extra shift and then that extends you to 11th March etc.*
>
> *I hope you realise that this is the only fair way of accommodating a variety of requests from clinical staff trying to be flexible as possible but also ensuring we have a safe staffed department.*"

126. From the above it is apparent that the Claimant did not have his leave application refused outright. The documentary evidence supports the oral evidence of Dr Howard that she was trying to support the Claimant's request by giving him advice about how to make his leave request workable. We find that her actions had nothing to do with any protected disclosure or any protected act. We find that this was a common situation involving a normal management response, where Dr Howard was applying the rules yet trying to be flexible to help a member of staff.

127. We accepted the evidence of the Respondent that the Claimant did not respond to Dr Howard's request to provide his exact dates for leave, and he did not work any additional shifts to "bank" any time off in lieu; he did work extra shifts but these were paid for and not "banked". Moreover, the Claimant admitted in cross-examination that although he had made new requests for leave by email to Ms Verney, he had not completed an annual leave request form despite being asked to do so by Ms Verney on 6 January 2015: see page 1935.

Issue 1(e): 13 November 2014; alleged protected disclosure to Mr Warrior and/or protected act

128. In the original list of issues agreed by the parties and at paragraph 40(v) of the first ET1, the Claimant alleged that this disclosure occurred on 16 October 2014. In the course of his cross-examination, the Claimant accepted that this date was incorrect and he applied to amend the date to 13 November 2014 (a date set out at paragraphs 107ff in his witness statement). The Respondent did not object to the amendment, which we granted.

129. It is important to note that at the time Mr Warrior was Acting Head of HR and Assistant Chief Executive. The Claimant alleged that the disclosure made to Mr Warrior was that the new contract and rota were discriminatory on grounds of race, that the Respondent was discriminating on grounds of race by recruiting a group of non-British doctors from overseas and refusing to employ them on the same terms as its other doctors, that the new rota was not compliant with the Working Time Directive

guidance, and that the Claimant was being victimised, contrary to discrimination law and whistle-blowing law, and harassed because he made these points to Dr Howard.

130. We find that this is such a serious set of allegations, had such disclosure been made, it is inevitable that Mr Warrior would have responded or passed the matter to a senior manager to respond to. There was no documentary evidence or oral evidence that any such response was made nor that any investigation was made, which we found would have been consistent with such a serious disclosure.

131. Moreover, Dr Althaf's email of 21 November 2014 to his BMA representative, Amanda Saha (p.648), provides an update following the meeting with Mr Warrior on 13 November 2014. This record of the meeting states as follows:

> "*The initial part of the meeting was a discussion of my personal issues with the department with the concern raised that I was being victimised for "being difficult". A vague offer of alternative positions/things that might persuade me to stay were mentioned but put on hold until my revalidation is completed in a fortnight and I meet again with Neil Rothnie, the Med Director. I asked then specifically about the progress of discussions re the AE contract and was told that he was planning to speak to you on Friday 14/11/14. Has this happened?*"

132. We find that if the alleged disclosure was made to Mr Warrior there would have been some reference to it by the Claimant in this email. Instead we note that the email refers to personal issues; we do not find the reference to the Claimant alleging that he was victimised for being difficult to inform Amanda Saha that he was being victimised for whistle-blowing or being discriminated against.

133. We found as a fact that the alleged disclosure to Mr Warrior was not made. We find that any disclosure made to Mr Warrior by the Claimant at that meeting was about "*personal issues*" and matters of the revised Clinical Specialist contract which was then under discussion with the Local Negotiating Committee. We found that the Claimant did not believe that those disclosures were in the public interest. They involved personal matters or matters in which the Claimant had a personal interest.

Issue 1(f): October 2014; alleged protected disclosure to Mr Rothnie

134. It was common ground that the Claimant met with Mr Rothnie on 23 October 2014. The Tribunal preferred Mr Rothnie's evidence about events at that meeting. We find that his evidence was corroborated by his contemporaneous notes at pages 627 to 629, which were more consistent with his account of events. This was the first time that Mr Rothnie had met the Claimant. This was an ordinary event in his working life and there was no need or reason for Mr Rothnie to be selective in his notetaking. Those notes are accurate although obviously not verbatim.

135. We found that Mr Rothnie was an experienced Medical Director and Clinician. He would have known the relevance of the alleged disclosures if they had been made to him and he would have noted them. He would have investigated and pursued the victimisation allegation that the Claimant alleged he disclosed. Looking at the notes we find that they are more in the nature of a career development or mentoring interview.

136. On the balance of all the evidence we found that the Claimant did not make the disclosures alleged at issue 1(f). For example, we noted that the notes at p. 627 record that the Claimant was supported by Dr Howard in respect of the conditions of practice imposed by the GMC on the Claimant; we found it inconsistent that this was recorded but there was no record of the treatment alleged by Dr Howard and Dr Willis, which is set out at paragraph 117 of the Claimant's witness statement. The most that the notes record is that the Claimant feels "*side lined*", which we find is a very different matter from the serious allegations made in the witness statement of the Claimant. A further example of this is on page 628 where it is noted that the Claimant "*does not feel he has a supportive relationship in the department*"; we note that this is far short of the treatment alleged in the witness statement.

Issue 1(g): October 2014; alleged protected disclosure to the General Medical Council and/or protected act

137. This alleged disclosure and protected act is not contained in the Claimant's witness statement. We found that there was no evidence other than the Claimant's allegation in cross-examination that he had made any such disclosure to the GMC or that he did a protected act in this regard. In particular, the logs of contact with the GMC in the Claimant's bundle (C125 to 133 and C233 to 242) do not record any protected disclosure or protected act. Secondly, the revalidation and licence history set out in the GMC's decision to withdraw the Claimant's licence to practice in May 2017 only mentioned contact from the Claimant starting on 22 December 2014 (see page 2188). Thirdly, the GMC's assistant registrar, when reviewing the question of the Claimant's engagement with revalidation, considered whether there was any evidence that the Claimant had been a whistleblower and he concluded that there was no independent evidence that the Claimant was a whistleblower, and did not refer to any such alleged disclosure (see page 2221).

138. In short, we found as a fact that no such disclosure was made to the GMC.

139. Moreover, we find that had such a disclosure or protected act been made to the GMC, none of the alleged perpetrators within the Respondent had any knowledge of it and could not have been influenced by it.

2ci: False allegation of bullying by the Claimant

140. Caroline Howard's witness statement (from paragraph 19-29) sets out the broad chronology for the ongoing negotiation and discussion aimed at introducing a new Clinical Specialist contract, and her dealings with the Claimant during the course of this. She understood that the new contract was in its final form by September 2014 and wrote to Clinical Specialists in her team to inform them that they would be given the opportunity to sign up to it or remain on their existing terms (p.576-577).

141. A number of queries were raised by members of the team and the BMA. Having met with HR, Dr. Howard then emailed a copy of the new contract to each Clinical Specialist with a covering letter explaining the changes and their options: p.597-609. This included that the new contract was based on 44 hours per week over a 26 week period (rather than a number of programmed activities), 4 hours CPD per week being

included in the rota, and it was based on the national Terms and Conditions of Service for Specialty Doctors, as amended by it.

142. The Claimant and the BMA were not satisfied with the new contractual terms. A Working Group was formed. The BMA asked that the Claimant be appointed to the Group. The Claimant alleged that, at a meeting of this Working Group on 19 December 2014, Dr. Howard accused him of bullying.

143. At the meeting, the Claimant stated that he was there to represent all doctors at his level (within the Respondent) and had been asked to speak on their behalf. Dr. Howard knew that three Clinical Specialists had approached her to say that they wished to sign the revised contract, but felt that the Claimant was pressuring them not to sign, with one using the term "*bullying*" to describe the Claimant's actions. Dr. Howard explained this to the Claimant in the meeting, and reminded him that each doctor could make their own decision. We accepted her account of events, which we found corroborated by the BMA representative's notes of the meeting (p.C245). We found that this was a further example of the Claimant's perception of events being incorrect.

144. In any event, Dr. Howard did not know of any disclosures or concerns raised by the Claimant prior to this meeting with Dr. Willis, Ms. Totterdell, Mr. Warrior, Mr. Rothnie or the GMC. We found that her actions at the meeting could not have been caused by any of these alleged protected disclosures, even if they had occurred (and we have found they had not been made).

2c(ii) February 2015: Claimant denied access to the local injury allowance policy; Respondent did not inform the Claimant of the scheme until March/April 2017

145. The Respondent operated a Temporary Injury Allowance ("TIA") Scheme. It was a local scheme. A copy is at p.2140. The effect of TIA is to top up pay if necessary to full pay if an employee is absent for certain reasons, as explained in Ms. Bridge's statement (paragraph 85).

146. On 12 February 2015, James Butcher (HR Business Partner) informed the Claimant that, because he was not employed under national terms and conditions, and had no contractual right to occupational sick pay, he would not be eligible for TIA: see p.708. This was Mr. Butcher's own interpretation of the local Scheme.

147. We find that Mr. Butcher would not have known of any of the alleged disclosures which pre-dated his letter, even had they been made. Therefore, even if any of the alleged disclosures had been made up to that point, they could not have affected his decision about eligibility.

148. Subsequently, Ms. Bridge came to a different view and decided that the Claimant was able to apply for TIA and that he was potentially eligible subject to meeting the Scheme criteria.

149. On 24 April 2017, the Claimant applied for TIA. Ms. Maton considered the Claimant's eligibility for the Injury Allowance. One of the criteria of TIA is that the absence from work must be attributed wholly or mainly to their NHS employment.

Based on the Occupational Health report of Dr. Boakye (p2244-2247), she decided that the Claimant did not meet the eligibility criteria because Dr. Boakye advised that, in the absence of a diagnosis, he could not comment on causation of the Claimant's injury and whether the resulting absence related to the Claimant's NHS employment.

150. On 1 September 2017, the Claimant was provided with the outcome of his TIA application by letter from Ms. Maton: p.2293-2295. We found that her decision was not influenced by any alleged disclosure nor by any alleged protected act. Her decision was based on her interpretation of the local policy; and this decision was cogently reasoned and made on the evidence before her, applying it to the criteria of the policy.

Issues 1(h) and 1(k): alleged protected disclosures to the Care Quality Commission on 17 March 2015 and 4 June 2015 and/or protected acts

151. At paragraph 153 of his witness statement, the Claimant states that he notified the Care Quality Commission ("CQC") on 17 March 2015 about "*the dangers to patients and staff safety arising from the practices of Southend University Hospital*." He contended that he made this call because he was shocked by the CQC report on the hospital, which put what he deemed to be a "positive gloss" on the situation at the hospital.

152. The details of the Claimant's contact with the CQC corroborates the Claimant's evidence that he had contact with the CQC on the dates alleged: see p.1098. However, we found as follows:

152.1. The call on 17 March 2015 was made to challenge the inspection report of the CQC of 29 October 2014. It was not a disclosure of information which in his belief tended to show a breach of a legal obligation nor health and safety risks. It could not have been a protected disclosure.

152.2. There is no alleged disclosure on 4 June 2015: see p.1098 record.

152.3. A protected disclosure is made on 5 June 2015: see p.1098.

152.4. In any event, we find that neither of the calls to the CQC were passed on to any of the alleged perpetrators in this case, nor to the Respondent at all. There was no documentary or oral evidence to suggest that this had occurred.

Issue 1(q): alleged protected disclosure to Health Education England ("HEE"), mid April 2015 and mid-2016 and/or protected act

153. At paragraph 167-170 of his witness statement, the Claimant stated that on 17 April 2015, he attended a feedback session for Clinical Specialists in Emergency Medicine to provide their comments to a visiting HEE team. The Claimant stated that he stayed behind after this session and made protected disclosures and did a protected act as set out at issue 1(q).

154. The Tribunal found that there was no evidence that the alleged perpetrators knew of whatever statements the Claimant made to the HEE when he stayed behind.

The Claimant did not explain how the Respondent would have known of his comments in such a meeting, which was after the feedback session; in his statement (paragraph 167), he states that "*other colleagues knew that I was intending to raise topics which had been critical of the Respondent*", but the inference is that the colleagues referred to were Clinical Specialists, not management.

155. Moreover, there is no mention in the subsequent HEE reports of any protected disclosures, nor complaints of discrimination, being made during their inspection: see p.766-769. The report is basically positive, including in relation to the shift rota, with no areas of significant concern referred to. This tends to suggest both that HEE did not understand any public interest disclosures were being made, and that the Respondent could not have known if any were made as alleged by the Claimant.

156. Furthermore, in correspondence from HEE of October 2017, disclosed by the Claimant during the hearing, HEE stated that it had no record of any protected disclosures: see p.3725. This leads to an inference that the "*topics*" raised by the Claimant were general concerns, not disclosures of information which he reasonably believed were made in the public interest.

157. In addition, the HEE viewed the concerns raised by the Claimant as HR matters between non-trainee doctors and the Respondent: see p.3728. Given that response, the Tribunal found it was unlikely that the concerns raised by the Claimant in the stay behind meeting would have been passed onto the Trust, because, whatever their content, HEE obviously viewed them as raising HR matters, not matters of public interest.

158. The Tribunal decided that had disclosures of information been made by the Claimant, which he reasonably believed were in the public interest and tended to show breach of legal obligations or raised health and safety matters, HEE would have raised this with the Respondent as whistleblowing.

159. There was no evidence – whether in the Claimant's witness statement nor in any of the documents we saw – to show that the Claimant had made any form of disclosure to HEE in "*mid 2016*". The email of 4 February 2016 (p.1098) from HEE does refer to a telephone call between HEE and the Claimant on that date; but the record of this call does not provide evidence that the Claimant made a protected disclosure on that date. Moreover, we could not understand how the Respondent would have found out about this call ahead of these proceedings, and we concluded that this call could have had no material influence on the alleged detriments which post-date this call.

Issue 1(i): 20 April 2015 (alleged protected disclosure to Mary Foulkes and/or protected act)

160. At Paragraph 33 of his Re-Amended Grounds of Claim (p.104), and p.67 of the Further and Better Particulars, the Claimant alleges the disclosure(s) made to Mary Foulkes, then the new HR Director at the Trust. At Paragraph 176 of his witness statement, the Claimant gave evidence as to the disclosures made. The Tribunal noted that these accounts were not consistent: in his witness statement, the Claimant alleged that he expressed his concern to Ms. Foulkes that he was being discriminated against because of his disability (referring to his shoulder problem); but there is no mention of

this in the Re-Amended Grounds of Claim which refers to the "*discriminatory nature*" of the new contract, which was a reference to alleged race discrimination, when viewed in context.

161. Further, given the gravity of the alleged public interest disclosures made to Ms. Foulkes at that meeting, we found that the documentary evidence from shortly after this meeting was inconsistent with the Claimant's case. In an email from the Claimant to Amanda Saha, on 7 May 2015, he summarised his statements in the meeting as follows (p.779):

> "*I met Mary Foulkes ….brought her up to speed with contract issues as well as my personal difficulties. Was promised that would be dealt with and invited me to attend JLNC.*"

162. Moreover, on 19 August 2015, Ms. Saha emailed Ms. Bridge. This referred to the involvement of Ms. Foulkes (stating that the Claimant met her on or around 7 April 2015) and that "*the situation regarding the contract in A&E was discussed*". There was no mention of any public interest disclosure nor allegations of discriminatory treatment.

163. Given these inconsistencies, and our overall view of the Claimant's evidence as unreliable, we preferred Ms. Foulkes' recollection of events set out in her email of 28 September 2015 at p.979 to that in the Claimant's witness statement. In that document, she explained that the Claimant felt it was taking a long time for the new contract to be agreed, and that he spent a significant time taking her through the history of the contract. We found that there would be no reason for Ms. Foulkes not to give an honest account of that meeting; and her account is credible and explains that she noted on her Ipad only for a reminder to ask Ms. Church to give her an update about the contract.

164. We concluded that it was unlikely that the Claimant made any protected disclosures to Ms. Foulkes. We find that had he raised the matters alleged in his witness statement, she would have recorded them and taken some further action in respect of them, whether by investigating herself, by emailing Mr. Rothnie or Sue Bridge, or delegating further inquiries to some member of her team.

165. In any event, whether or not the Claimant in fact made protected disclosures or did a protected act, we found that Ms. Foulkes did not view his statements as public interest disclosures or protected acts, evidenced by her email of 28 September 2015. There was no evidence that she told any of the alleged perpetrators of what was said to her in that meeting. We found that there was no evidence of those alleged to be responsible for detriments knowing about any disclosure of information made to her.

Issue 1(l): May 2015; alleged protected disclosure to John Findley and/or protected act

166. Mr. Findley was, in May 2015, the Respondent's Chief Operating Officer. The Claimant used to drop in to Mr. Findley's office for an informal chat, from time to time. At no point did the Claimant make public interest disclosures. Had he done so, the Tribunal were satisfied that Mr. Findley would have recorded what was said to him, and taken at least some action. Mr. Findley made no such record and he understood the

Claimant to be someone who had an opinion about everything, who was raising "*general gripes*": see his grievance interview at p.3106.

167. We accept the submission that Mr. Findley's statements during his grievance interview do have the ring of truth. As we observed from our experience in this hearing, the Claimant believed his opinion was right on all matters.

168. Further, the Tribunal found that Mr. Findley was unaware that the Claimant had made, or may have made, a protected disclosure when they met in May 2015. Consequently, we found that Mr. Findley would not have passed on the contents of this meeting to any other manager nor to any of the alleged perpetrators of the detriments. We reached these findings because:

168.1. In cross-examination (on 16 May 2019), the Claimant admitted that he was not aware of whether Mr. Findley understood that he was making protected disclosures.

168.2. Ms. Furley concluded, in her grievance report, that Mr. Findley did not believe that the Claimant was making public interest disclosures.

168.3. In his witness statement, at paragraph 191, the Claimant states that he told Mr. Findley not to raise any of his disclosures with Dr. Howard.

Issues 1(j), (p), (s): 25 May and 8 December 2016; alleged protected disclosures to the National Guardian's Office and/or protected acts

169. There is no evidence that the Claimant made a disclosure (of any sort) to the National Guardian's Office on 25 May 2016 nor on 8 December 2016. The Tribunal found no such disclosure was made on those dates.

170. The Claimant's witness statement (paragraph 280) refers to 6 December 2016, when the Claimant informally met the National Guardian, Ms. Hughes, at the GMC Conference. From his statement, and the email of 8 December 2016 sent by the Claimant to the Guardian's Office (p.1414), we found it likely that the Claimant made general allegations to Ms. Hughes, rather than disclosures of information. It was very unlikely that the Claimant would have gone into any detail of his complaints during a break at a Conference.

171. Moreover, the email of the 8 December does not make disclosures of information, but alleges whistleblowing detriment: it does not refer to discrimination, nor to a plan to prevent him succeeding in revalidation.

172. In any event, we found that the Claimant did not have a reasonable belief that any disclosure of information in the email of 8 December 2016 or at the GMC Conference on 6 December 2016 tended to show breach of a legal obligation nor any risk to health and safety. His belief in alleged victimisation of the Claimant in respect of revalidation was not reasonable in the circumstances that we set out below, and as explained in the evidence of Mr. Rothnie, Dr. Howard and Dr. Willis.

173. We noted that in his email at p1414, the Claimant complains about a number of bodies, and their alleged lack of support. This tended to support our view that any belief that he held that his disclosures tended to show a breach of a legal obligation or a risk to health and safety of himself or others would not be reasonable.

174. Further, we found that the alleged perpetrators of the detriments which post-dated these alleged protected disclosures had no idea of any allegation made to the National Guardian.

Issue 1(m): 26 November 2015: alleged protected disclosure to Monitor and/or protected act

175. A record of the Claimant's discussions with Katy Mackinlay, Complaints and Whistleblowing Manager for Monitor, on 26 November 2015 is at p.1018 – 1021.1. The matters raised related, in broad terms, to the regulation and performance of the Respondent as an NHS Foundation Trust. The Claimant called back on 30 November 2015 and made further allegations, which are not part of the pleaded case.

176. Having considered the substance of the statements made by the Claimant during that discussion, the Tribunal found that, although they showed that the Claimant believed his statement tended to show breach of various legal obligations, his beliefs were not reasonable. There are examples of the Claimant's beliefs in breach of legal obligations being unreasonable. For example, it was wholly unreasonable to believe that a promotion had been blocked as part of bullying and harassment, because he did not meet the Essential Criteria for the Acting Consultant role. As explained above, in that example, it was entirely false for the Claimant to state that the vacancy was only open over a weekend. As a further example, it was wholly unreasonable to believe that his revalidation was deferred for other than the good reasons provided in the evidence of Dr. Willis and Mr. Rothnie; his appraisal was not of sufficient standard to be acceptable to the Respondent.

177. The Claimant believed that the disclosures to Monitor during this discussion were made in the public interest. However, we found that it was not reasonable for the Claimant to believe that such disclosures were made in the public interest, because each of the matters that he relies upon as alleged harassment and discrimination are either unparticularised or did not occur in the manner complained of, or for the reasons complained of. A good example is the alleged harassment and discrimination by making false clinical allegations. We have set out below that there were genuine complaints made by members of the public about his clinical care, which required investigation.

178. In any event, there was no evidence that any member of the Respondent's management or other employee had seen these notes prior to this litigation. We found that the alleged perpetrators of alleged detriments occurring after November 2015 had no knowledge of the disclosures made to Monitor during that telephone conversation.

Issue 1(n): 4 December 2015; protected disclosure to David Amess, MP and/or protected act.

179. The only evidence about the disclosures made during this meeting is contained in the witness statement of the Claimant at paragraph 250. The Tribunal found that this evidence was too vague to prove, on a balance of probabilities, that the Claimant had made protected disclosures to Mr. Amess MP. For example, the Claimant's evidence was that he limited his disclosures, the inference being that he gave a "high level" overview of his case, rather than making specific disclosures of information.

180. In any event, there was no evidence that any employee of the Respondent knew of this meeting prior to these proceedings.

181. We found that the alleged perpetrators of any detriments occurring after 4 December 2015 could not have had knowledge of any disclosures made to the MP during this meeting.

Issues 1(o): 26 February 2016; protected disclosure to Mark Francois, MP and/or protected act.

182. This alleged disclosure is referred to briefly at paragraph 255 of the Claimant's witness statement. There are no particulars of what was said:

"*During this meeting, I limited my disclosure to non-clinical matters*…"

183. The subsequent letter from Mr. Francois MP to the Respondent (p.1118) does not mention either whistleblowing or discriminatory treatment; there was no evidence of a protected act. The letter suggests that the Claimant's complaints focussed on the length of the investigation into his conduct.

184. We found that the Claimant made no protected disclosure to Mr. Francois MP at this meeting. The focus of the meeting was on the disciplinary proceedings, and the Claimant's treatment because of the delay.

185. We found that it was unlikely, given the example of the Claimant's complaint to Monitor, that the Claimant had a reasonable belief that his disclosures to Mr. Francois MP were in the public interest.

186. In any event, there was no evidence that any employee of the Respondent knew what the Claimant had stated in this meeting with Mr. Francois MP. Although Mr. Rothnie knew of the letter from Mr. Francois MP, because he was asked about it by Mr. Tobias who was responding to it, neither he nor any other alleged perpetrator knew of the contents of the meeting.

Issue 1(r): October 2016; protected disclosure to Parliamentary Select Committee, and/or protected act

187. There was no evidence from the Claimant about this alleged disclosure (and it was not included in the schedule at the end of his witness statement). In the light of

this, the Tribunal suggested that the Claimant may wish not to proceed with this allegation. He refused to do so, demonstrating again his lack of objectivity.

188. We found that no disclosure was made by the Claimant to a Parliamentary Select Committee in October 2016. Moreover, we could not understand how, even if such a disclosure had been made, the alleged perpetrators within the Respondent would know of it.

Issue 2(d)(i): alleged refusal to make reasonable adjustments to allow the Claimant to continue working, despite making adjustments for a colleague with a similar injury

189. The Claimant's evidence in respect of this alleged detriment is at paragraphs 158 and 159 of his witness statement. The Claimant admits that adjustments were made to his duties by Dr. Howard; and as we have explained in our findings below, he signed his agreement to those adjusted duties, without registering any complaint: see the letter from Dr. Howard, 11 February 2015 (p.707). We emphasise that, in the context of this Claimant's numerous complaints about different bodies and individuals, the lack of any complaint about the adjustments agreed with Dr. Howard proves that he agreed to them and that these were all the adjustments that he sought. The position was that the Respondent was prepared for the Claimant to remain off sick, but that he insisted that he could write patient notes and other documents and consequently was fit for work.

190. We accepted Dr. Howard's evidence at paragraphs 74-77 of her witness statement. The Respondent did not refuse to make reasonable adjustments; indeed, the Claimant made his own adjustments to allow him to keep working.

Issue 2(d)(ii): May 2015: Claimant denied leave to undertake mandatory training

191. The Respondent's study leave policy, across the Trust, required a minimum of six weeks' notice before study leave could be taken: p.2456. We find that this would have been a well-known rule amongst doctors employed at the hospital. The planned leave policy goes on to state that the line manager is ultimately responsible for authorising whether leave can take place on the days requested, balancing the needs of the service and the development of the employee. Contrary to the Claimant's opinion, therefore, the requirement to provide six weeks' notice was a necessary, but not on its own a sufficient condition for the grant of study leave, with the line manager retaining overall discretion.

192. In any event, the Claimant was well aware of the six weeks' notice rule, because Dr. Howard had reminded the Claimant and his colleagues about it in June 2014 and again in January 2015 (p.521 – which referred to study leave being planned as far in advance as possible – and the email at p685, which complained about late requests, explained that it is not fair for other staff to pick up slack if doctors are not there, and asked that leave requests are made as early as possible).

193. By email on 13 April 2015, the Claimant requested study leave to attend an Advanced Paediatric Life Support Course on 21 and 22 May 2015. The course was in Stoke Mandeville, about 70 miles from Southend. Dr. Howard knew the journey time by car was about two hours and we infer that the Claimant would also have known this.

194. The application was considered by Dr. Howard, who coincidentally is a medical director of the same course. She knew that it was an intensive course and precisely what the course involved.

195. The application was declined by Dr. Howard for the two reasons stated on the application form:

195.1. The notice provided was too late (being 5 weeks and 3 days);

195.2. The Claimant was due to be on night shift on 22 May 2015.

196. Dr. Howard was concerned that the Claimant was due to work a night shift on 22 May 2015. She knew that she could not cover the night shift with other doctors; we accepted her evidence about shortfall in Clinical Specialist doctor numbers to cover the rota. Moreover, she knew that the course would not finish until 1800 on the second day of the course (and even if he was allowed to do the practical exam first, he would not finish much earlier), after which the Claimant would need to drive back to Southend. She believed that it was necessary for patient safety reasons and to comply with the EWTD that the Claimant had the normal policy of 11 hours rest before he began his night shift; this would not be possible if he attended the course on 22 May.

197. We found that Dr. Howard's reasons for refusing leave were supported by other evidence, including the email from Mr. Currell, General Manager, to the Claimant p.800, explaining: the leave policy; the requirement for "at least" six weeks notice; that Emergency doctors are not allowed leave when rostered for nights); and evidence of the costs of agency cover for the Emergency Department at night and the fact that it was unreliable. The Claimant's evidence on this point was not corroborated by any other evidence.

198. Dr. Howard also took into account the policy that doctors could take leave when rostered to work a night shift (where they had swopped their nightshift with another doctor) and that the Claimant knew that he could have swopped his night shift on 22 May with another doctor in the department (which he had been reminded of when seeking extended annual leave, p.637-638), but he failed to do that.

199. On 17 April 2015, after being informed by her PA that the Claimant had given her PA the impression that he was going to go on the course anyway, Dr. Howard emailed him as follows:

"*It is not acceptable that you go to the course and then come into work the night shift. This would be totally against EWTD and would be unsafe…*" (p.827)

200. The Claimant could not have been in any doubt that this was a direct management instruction.

201. Before the Tribunal, there was a dispute of fact, with the Claimant's evidence suggesting that he had agreed with the course trainer that he could do the second day of the course on another occasion. We found the Claimant's evidence about this not credible. We accepted Dr. Howard's evidence from her experience running such

courses and her explanation why this would not have been agreed to by those running the course; her evidence was corroborated by the email from Stewart McMorran, medical director of the course attended by the Claimant in May 2015 (p1796). We found it not credible that the Claimant would have been given such permission. In any event, the Claimant never asked Dr. Howard if he could attend one day of the course, nor did he give evidence about any arrangements made for attending the second day.

202. We found that the reasons why Dr. Howard refused this application for study leave were those that she gave, which had nothing to do with any alleged protected disclosure nor any alleged protected act.

2(d)(iv) Respondent prevented the Claimant from negotiating new contractual terms for himself and colleagues by excluding him from working groups from January 2015 to 28 May 2015

203. We found that this allegation by the Claimant to be misleading. Although not part of the Local Negotiating Committee, the Claimant was invited to the LNC meeting on 17 October 2014.

204. After this, in November 2014, a working group was formed to take forward the matter of the Clinical Specialist revised contract. The Claimant was asked to be part of that group, and agreed (see email from Ms. Saha, 26 November 2014, p.652).

205. The working group met on 19 December 2014. The Claimant attended that meeting. In fact, the working group did not meet again.

206. We found that Dr. Howard was frustrated by the delay in agreement being reached for the new Clinical Specialist contract.

207. During his exclusion, the Claimant was not allowed to contact staff at the hospital save Ms. Bridge and BMA representatives. This included his colleagues, despite this being part of his Working Group commitment. However, the Working Group never met for a second time. The issue was progressed at the LNC, involving the BMA. Ms. Bridge did invite the Claimant to write to his colleagues and prepared a draft. This was never sent as by then all the Clinical Specialist doctors, except the Claimant, had signed the contract. As a member of staff and BMA member, the Claimant was consulted throughout. He argued that he was an accredited representative, but we found that he was just a member of the Working Group. He argued before us that there was a detriment, because there may have been further action up to industrial action; this was the first time the risk of industrial action had ever been mentioned and we found this allegation fanciful.

208. The next LNC meeting after 20 March 2015 was on 19 July 2015. Ms. Saha raised concerns over the proposed new Clinical Specialist contract. Mary Foulkes (Head of HR) explained that the negotiations were at an end; the contract was in final form. The Claimant did not dispute that this was stated.

209. We find that there was no detriment to the Claimant as alleged between January and 28 May 2015. The BMA negotiated significantly improved contractual terms for

Clinical Specialist doctors in the Emergency Department, albeit not all those sought by the Claimant nor indeed by the BMA.

210. In the circumstances, a reasonable worker would not have considered the lack of further Working Group meetings, or the fact that he could not attend LNC meetings, to be a detriment, even if the Claimant did perceive this to be the case.

2(d)(iii) Alleged unsubstantiated clinical allegations against the Claimant, May 2015; 2(d)(vi) The Respondent wrongly attempted to exclude him in May 2015

211. The Claimant was excluded on 28 May 2015 due to a number of concerns being raised about the Claimant's conduct and, in some respects at least, concern about him as a clinician. The relevant chronology is as follows.

212. On 12 May 2015, Dr. Howard raised two specific concerns about the Claimant with Mr. Rothnie: persistent lateness and a failure to complete statutory and mandatory training, contrary to express instructions and despite having paid CPD time to do so. The Claimant described his persistent lateness as a minor matter in his Re-Amended Claim (paragraph 35), but we did not accept this; we found that it was a more serious matter, not least because he was repeatedly late, despite warnings, and missed handover meetings. We accepted the evidence of Dr. Howard, corroborated as it was by the emails of 14 March 2014, 24 March 2014, 18 November 2014, 13 May 2015 (recording about 20 late attendances in less than 6 months): see pp 503, 507, 647, 788.

213. On 21-22 May 2015, the Claimant attended the APLS course in Stoke Mandeville, contrary to the direction of Dr. Howard (see above).

214. On 22 May 2015, Dr. Howard attended a complaint meeting with two doctors from the Stroke team in respect of a patient treated by the Claimant. It is important to note that a formal complaint was made by the patient's family.

215. On 25 May 2015, a further concern was made by Dr. Willis, who raised a concern with Dr. Howard that the Claimant had seen a patient and recorded limbs as normal after a fall; the patient was reviewed and found to have a fractured right elbow and fractured wrist. The patient had told the reviewing doctor that no prior examination had been conducted.

216. On 26 May 2015, two nurses complained to Dr. Howard about the Claimant's conduct on night shift 24/25 May 2015: see p.833. This included a complaint that he had said he was aiming for "*50 breaches*" before and after midnight, and a complaint that he had fallen asleep whilst writing notes. Dr. Howard had received a photograph, posted under her office door, which suggested that the Claimant was asleep whilst on duty in the Emergency Department.

217. These concerns are all described in Dr. Howard's email, 26 May 2015, to Mr. Rothnie at p.824. The first two clinical concerns are similar: that the Claimant had not carried out the examination that he had documented. Because of her concerns about these "*significant missed diagnoses*", and in view of patient safety, she reviewed

his cases from the recent shifts, and set out her concerns about a number of other cases.

218. Mr. Rothnie followed the appropriate procedure. He took advice from NCAS, which he kept in contact with throughout. He was advised to review the "*previous GMC material*", a reference to the Fitness to Practise case papers which had led to Conditions of Practice being imposed. Dr. Howard had decided to recruit the Claimant despite these and acted as his supervisor to facilitate the meeting of the Conditions.

219. Subsequently, on 27 May 2015, NCAS confirmed patient safety was a priority, advised Dr. Rothnie that he consider some form of restriction on the Claimant's practice until the concerns had been addressed, specifically referring to the lack of out of hours supervision which meant that he might need to be restricted from this (see p.846).

220. On 28 May 2015, Mr. Rothnie attended a meeting with Dr. Howard, Mr. Findley (Chief Operating Officer) and an interim HR Business Partner. The meeting discussed the NCAS advice. We accepted Mr. Rothnie's evidence as to the reasons for the exclusion; those at the meeting considered that the Claimant's conduct had been serious enough to justify the exclusion. These are set out in the Exclusion Template (p.847-849); they clearly include the clinical concerns referred to in the two cases of missed diagnoses and the advice of NCAS (even if these are not referred to in the exclusion letter).

221. The conduct concerns are set out in the exclusion letter to the Claimant of 2 June 2015 (p.852). This set out all the allegations of misconduct by the Claimant, including failure to follow reasonable management instructions to complete Statutory and Mandatory training, failure to engage in the Appraisal and Revalidation process (which we address below in more detail), and attendance on a course on 22 May when leave had been refused. Of these allegations, the comments about the number of breaches was potentially a clinical matter of concern. The letter set out that an investigating officer, Mr. Fitzgerald, had been appointed to investigate.

222. Given the above circumstances, there was good reason to exclude the Claimant so that inquiries could be made into the conduct and clinical matters. Mr. Rothnie and those at the meeting on 28 May 2015 acted to exclude in order to control the clinical risks and to ensure patient safety. Dr. Howard and Mr. Rothnie had no part to play in raising the complaints and the concerns which led to the exclusion. The reasons for the exclusion had nothing to do with any protected disclosure or protected act by the Claimant.

223. We accepted Mr. Rothnie's evidence to the Tribunal's questions that he had to act on the evidence brought to him; he was not part of any plan to force out or to remove the Claimant from employment. The Claimant was not excluded simply because Dr. Howard desired this; Dr. Howard was a senior clinician running the Emergency Department, and Mr. Rothnie had to act on her legitimate concerns. In his decision-making, Mr. Rothnie had to take account of the impact that the Claimant was having on the running of the Emergency Department, and where there was evidence that, as the senior doctor at night, he made comments that there would be "*50 breaches*" and there were emails of concern from two senior sisters.

Issue 2(d)(vii) Unnecessarily excluded the Claimant from work from July 2015 to December 2016, causing him financial loss, loss of opportunity to maintain skills as a doctor and obtain Revalidation with GMC;

Issue 2(d)(x) Prevention of the Claimant from practising medicine whilst excluded

224. The Claimant's exclusion was reviewed on 29 June 2015, following a request from the Claimant's representative, who argued that his punctuality and statutory/mandatory training issues were being dealt with under other processes. The Claimant was on full pay when suspended and had no financial loss until he was absent sick. A period of long-term sickness absence began on 3 April 2017.

225. At the time of the review, Mr. Rothnie informed the Claimant that he would like to support him to maintain his skills, but given the allegations, it was inappropriate for this to be in the Emergency Department: see p.911, exclusion review letter. He asked the Claimant to indicate areas in the hospital where he felt a placement would be useful.

226. The clinical concerns were directly raised with the Claimant at the exclusion review meeting on 29 June 2015 (the two missed diagnosis cases). By this stage, NCAS had advised Mr. Rothnie that the previous concerns leading to the GMC imposing Conditions of Practice were similar to the existing issues in terms of clinical risk; and, moreover, the clinical concerns potentially were probity or conduct related because the Claimant's notes suggested that he had carried out examinations which never happened.

227. The Claimant argued against his exclusion, claiming the allegations were unwarranted and that he was being victimised by Dr. Howard. As Mr. Rothnie understood, however, Dr. Howard had supported the Claimant when Conditions of Practice had been imposed by the GMC, even when the Claimant had made a clinical error; but he realised that Dr. Howard was exasperated by the Claimant who was apparently ignoring clear management instructions (such as in respect of repeated lateness and the decision about study leave for 21-22 May 2015).

228. Mr. Rothnie decided to maintain the exclusion. This was due to patient safety concerns, given the clinical cases raised, and the impact the Claimant's behaviour was having on the department.

229. Mr. Rothnie reviewed the exclusion in mid-July 2015. He wrote to the Claimant on 23 July to confirm his decision, and to ask him to suggest options for a supervised placement as an alternative to exclusion.

230. The Claimant asked the Respondent about gaps there were in the GP rotation. He was asked to provide his CV if he was interested: p.933. On 30 July, Sue Bridge told him of two gaps. As accepted by the Claimant in cross-examination, he did not supply his CV. This was a matter of the Claimant's choice; it had nothing to do with any protected disclosure or protected act.

231. On 5 August 2015, the Claimant responded to Mr. Rothnie suggesting a GP post (p935). On 14 August, Ms. Bridge explained that information on GP placements had

been provided by Ms. Spall from Medical HR. The Claimant made no attempt to contact Ms. Spall about any GP placements, whether at this point or in the months after this.

232. In about August 2015, Mr. Rothnie was looking into possible redeployment options for the Claimant. GP practice was the Claimant's first preference, followed by dermatology and intensive care. Mr. Rothnie, who did not have GP placements within his remit, spoke to Ms. Barton, and she agreed to check, but did not believe any positions (referred to in the evidence as "attachments") were available. The Respondent did not provide dermatology services directly, so Mr. Rothnie could not pursue this.

233. Mr. Rothnie believed that he may be able to find the Claimant a placement in the Intensive Care Unit, and spoke to the ICU lead.

234. After this, we find that there was a delay in searching for a placement. Mr. Rothnie is a busy clinician and manager; he was dealing with other busy clinicians. The Claimant's position was likely to have been overtaken by other priorities, but this had nothing to do with any protected act or disclosure. In fact, the ICU only replied to Mr. Rothnie's request in December 2015, explaining that there were no vacancies.

235. On 9 November 2015, Mr. Rothnie wrote to the Claimant, stating that he reviewed his exclusion, and would now consider a short-term placement. This letter (p.1005ff) updated the Claimant on the investigation and his preliminary review of the clinical cases. At that time, Mr. Rothnie believed that the investigation would soon be concluded, as explained in the letter. Also, the preliminary review concluded that there was a case to answer in respect of three cases. Mr. Rothnie proposed to meet the Claimant on 25 November to discuss the matters outlined including a further review of exclusion and the possible placement.

236. In fact, due to the Claimant's request, the meeting to review his exclusion did not take place on that date. The meeting was held on 16 December 2015, with Ms. Bridge also in attendance.

237. At this meeting, Mr. Rothnie explained that the next stage in the clinical case investigation was for the Claimant to assess the cases and provide a response. The Claimant was informed that the disciplinary investigation report was not complete, and they discussed a clinical placement elsewhere in the Trust.

238. Mr. Rothnie told the Claimant that he was keen to offer a clinical placement, but that the Respondent did not provide dermatology services, which were based at Basildon, so Mr. Rothnie could not pursue this.

239. The Claimant stated that if there was no placement in critical care, he would like to do General Practice. Mr. Rothnie explained that he did not control this, nor whether he could do a supernumerary role in GP rotation or GP practice.

240. The Respondent's notes of the meeting are at p.1090 – 1097, taken by a notetaker. These are an accurate summary.

241. Unknown to Mr. Rothnie and Ms. Bridge, the Claimant was making a surreptitious recording of the meeting. This included the exchange between Mr. Rothnie and Ms. Bridge during the adjournment; we find that the Claimant left some form of recording device in the room during the adjournment; as explained earlier in this set of Reasons, we found that his evidence that his recording device picked it up outside the room was not credible.

242. The Claimant set great store by the recording of the conversation between Ms. Bridge and Mr. Rothnie, alleging that an inference should be drawn from it that there was a conspiracy against him. We did not agree. At the meeting on 16 December 2015, the Claimant noticed Mr. Rothnie had a photograph of him, which appeared to show him asleep on duty, and some papers in a folder. Mr. Rothnie said in evidence that he had the photo, but it played no part in the disciplinary process (We note Mr. Fitzgerald records in his report that he did not see such a photo). The Claimant infers that Mr. Rothnie had the draft investigation report in the folder and after the meeting had it amended. Mr. Rothnie did not recall having the draft report in the folder, albeit there is an email of 1 December 2015 showing that he had been sent the draft report. We do not accept the conspiracy theory of the Claimant. We do not believe this photograph ever played a part in the disciplinary process.

243. After this meeting, Mr. Rothnie worked to secure a GP placement for the Claimant. On 19 February 2016, Mr. Rothnie informed the Claimant that he had managed to organise a potential clinical placement for him, which Ms. Barton could arrange. On 23 February, Ms. Barton informed the Claimant that she had arranged for him to meet Professor Babar, on 25 February, and that, if he joined the practice, he would need to be incorporated onto the "Performers List", which is a statutory requirement for working in General Practice. Ms. Barton provided the application form, with instructions.

244. Professor Babar wanted proof that the Claimant was on the Performers List and had indemnity insurance before allowing the Claimant to start. On 5 May, the Claimant requested proof of the correct indemnity insurance; this was provided on 19 May by Ms. Beamister after a delay caused by the practice requiring the hospital to fund the insurance.

245. On 19 May, Professor Babar requested the Performers List and DBS checks. Ms. Beamister chased the Claimant about his application to join the Performers List, over June and July 2016, with no response.

246. Subsequently, on 1 August 2016, the GP Dean and Head of School emailed the Claimant to inform him that he was not permitted to undertake the GP placement because he was not on the GP register nor in GP training: see p.1216.

247. On 3 August 2016, Professor Babar pointed out that he had assumed that the Claimant had completed all his GP training, because the Claimant had informed him that he had completed all the formalities and processes of becoming a GP, which was not the case. This email (p.1221) displays a degree of irritation with the Claimant; the inference is that he felt the Claimant had wasted his time going to "*great lengths*" to help the Claimant.

248. The Claimant's response to this email again displays his inability to accept responsibility for events, stating that he had never claimed to be on the GP Register. This is a strange response given that he had sought a GP placement.

249. In short, the Claimant's ultimate failure to secure a placement outside the Emergency Department was not the fault of Mr. Rothnie nor due to deliberate delay by him. It was due to circumstances beyond Mr. Rothnie's control, and, in part, from at least December 2015, due to the Claimant's own fault in pursuing a GP placement which he was most unlikely to have secured in the absence of completed GP training. Mr. Rothnie had no idea that the Claimant lacked complete GP training.

250. In her evidence, Dr. Willis explained that the Claimant could undertake work during his exclusion for his appraisal. She explained that he could do work in the Quality Improvement area, albeit not the pathway he wanted to do (asthma guidance, FIB, fluid replacement for children, which required discussion within the department); and he could read national guidance and reflect on it; and he could set out clinical cases that he had learned from and talked about in teaching. We accepted her evidence, and we found that such work would have helped the Claimant to maintain his skills insofar as this was possible during exclusion.

251. As we explain below, the Claimant's exclusion, and the length of it, had no effect on his opportunity to secure Revalidation with the GMC.

Issue 2(d)(viii) Unnecessary and excessively detailed and lengthy disciplinary investigation, into minor matters; 2(d)(xi) prolonged exclusion after investigation completed

252. We found that the disciplinary investigation was both necessary and not excessively detailed. The investigation was proportionate given the allegations.

253. As the Respondent admitted, there was a delay in the completion of the investigation report and the overall process (see paragraph 198 submissions). The Tribunal found that this was an unfortunate delay which did not reflect well on the Respondent. However, from the primary facts, we did not infer that this delay was materially influenced by any protected disclosure or protected act. As we explain below, it was a product of the number of matters, including the different allegations, the number of witnesses, the need for the Claimant to review the clinical concerns, the need for Consultants to review the clinical cases, and the fact that the witnesses and decision-makers in these two processes (into conduct and capability) were busy clinicians.

254. Between the review of exclusion meeting and 13 August 2015, Mr. Rothnie reviewed the allegations. On 13 August, he set out the Terms of Reference for the disciplinary investigation: p.937ff; at that stage, he was also to undertake a preliminary review of the clinical issues, to decide whether a formal investigation was required. The Claimant was offered the opportunity to comment on the terms of reference and he did not submit any comments.

255. Subsequently, Anthony Fitzgerald was appointed to investigate. We heard no evidence that he knew of the alleged protected disclosures and protected acts. It was

not put to Mr. Rothnie or any other witness in cross-examination that he had influenced Mr. Fitzgerald because the Claimant had made the alleged protected disclosures or protected acts.

256. By 7 October, Mr. Rothnie anticipated that the investigation report would be completed by the end of October 2015: see his email to Claimant, p980.

257. A meeting to review the exclusion was to take place on 25 November, but this had to be re-arranged to 14 December, see p.1012.

258. Under the terms of the relevant policy, MHPS, the investigation should have been completed within 4 weeks of the appointment of Mr. Fitzgerald as investigator: see p.1168 email from Ms. Saha, quoting the MHPS. The delay in completing the report was caused by the reasons given in the report, in part as shown in the email at p.1009 (time to allow interviewees to amend their interview notes) and in part due to delay by Mr. Fitzgerald. The report explains (p.1036):

> "…*because of the number of allegations it has been necessary to interview various members of staff. It is recognised that this has taken some time to organise, owing to leave etc. Operational pressures have also negatively impacted on the availability of staff for interview and prolonged the time required* …"

259. At the meeting on 16 December, Mr. Rothnie explained that he anticipated that the report would be completed that week: see p.1029. In fact, the report was not finalised until February 2016. The Tribunal considered it unlikely that Mr. Rothnie would promise that the report would be provided, and then delay it deliberately, because the delay would invite complaint from the Claimant.

260. In addition, Mr. Rothnie was aiming to get the Claimant's response to both the conduct matters and the clinical concerns. At the meeting on 16 December, he asked the Claimant for his comments on the clinical cases. This request was repeated by letter of 10 February 2016 p.1103, with a deadline of 28 February 2016. The Claimant was offered the opportunity to make an appointment to view the notes and tapes.

261. On 17 February, the Claimant emailed stating that he could not respond to the complaints on the basis of a "*short period of acce*ss" and requested copies of the notes and 21 days to respond. Mr. Rothnie granted this request.

262. Thereafter, Mr. Rothnie awaited the Claimant's response. He sought advice from NCAS on 26 April. NCAS advised Mr. Rothnie that it was usual (under MHPS) to consider whether conduct and capability issues should be determined together: see p.1128.

263. Attempts were made for the Claimant to view the case notes at the Respondent's premises on 20 May (when he did not complete his review, because he could not access a disc, and he was given paper copies to take away) and then to review the notes with a Consultant on 19 July 2016 as the Claimant wanted: see p.1170,1194. The Claimant reviewed the notes with Professor Grunwald.

264. We would describe the process of the Claimant's reviewing the case notes as protracted. This did cause further delay to the disciplinary process, because Mr. Rothnie had been seeking to consider both conduct and capability or clinical concerns together.

265. The Respondent did, however, try to fix a disciplinary hearing. On 23 May 2016, a hearing was proposed on 31 May. The Claimant representative was not available; and Ms. Saha, on behalf of the Claimant, objected to Professor Grunwald as Chair, explaining that this was contrary to the MHPS (arguing that a case manager could not be Chair under this process). The Respondent accepted the objection, and further correspondence about a mutually convenient date followed. It was not until 7 September that the hearing was fixed for 28 October 2016.

266. A disciplinary hearing into the conduct matters took place on 28 October 2016. The Panel consisted of Mike Salter, Consultant Vascular Surgeon and Associate Medical Director, Gina Quantrill, Head of Patient Access, and Professor Rotimi Jaijesimi, Consultant Obsetrician and Associate Medical Director. This was an independent panel, who had no knowledge of the alleged protected disclosures or protected acts; it was never put to the Respondent's witnesses before us that they had influenced the Panel for any reason.

267. On 25 November 2018, the Panel provided its decision (p.1376ff), which was that the Claimant was guilty of misconduct. The Panel upheld Allegation 1 (failure to follow reasonable management instructions, in relation to statutory and mandatory training), partially upheld Allegation 2 (attending training course on 21-22 May 2015 despite the lack of permission), Allegation 4 (being late to work in breach of contractual requirements, and Allegation 5 (being asleep on duty and therefore neglecting duties on nightshift of 24-25 May 2015). Allegation 3 was not upheld. A first written warning was imposed.

268. No decision was made about the clinical concerns, however, until Professor Grunwald's case review in August 2016 and December 2016. Professor Grunwald, having reviewed all the evidence including with a Stroke Consultant, decided not to uphold the concerns.

269. The delay in the completion of the disciplinary investigation and the disciplinary process had no effect on his attempted Revalidation with the GMC.

Issue 2(d)(ix) Conducted the disciplinary proceedings unfairly by preventing the Claimant from defending himself in that he was not allowed to speak to colleagues who may have been witnesses, denied access to Respondent's IT systems

270. The Respondent did not prevent the Claimant from defending himself as alleged.

271. When the Claimant was excluded, he was informed that he should contact Sue Bridge if he wished to access any potential evidence, including from staff witnesses: see exclusion letter, p.854. The Tribunal considered that this was a routine step in these circumstances.

272. At the exclusion review meeting on 29 June 2015, it was explained to the Claimant that he had been restricted from contacting individuals in the department in order to ensure that the investigation process was not compromised. As Mr. Rothnie explained, the restriction was in place to protect him from any allegation of changing or influencing the investigation, as it would have been in any such case. It was explained to him that he could continue to contact LNC members and his BMA representative (about the new contract discussions), and Sue Bridge if he wished to contact members of the department.

273. After this meeting, the Claimant did not approach Ms. Bridge about speaking to potential witnesses for the disciplinary hearing.

274. The Respondent admitted that after exclusion, the Claimant initially was restricted in his use of the Respondent's IT systems. However, the Respondent agreed to reinstate his access at the review meeting on 29 June 2015, to enable him to complete his appraisal and revalidation. The Claimant was informed by email on 1 July 2015 that the restriction had been lifted: see p.959.

275. On 5 August 2015, the Claimant complained that he did not have IT access. He had never raised this with Ms. Bridge prior to this; she believed that he did have IT remote access from at least 1 July. On learning of his complaint, Ms. Bridge told him that the restriction was lifted: see p.957. The Claimant responded that he could not log on due to passwords having expired.

276. The Claimant did not dispute in evidence before us that the photograph of him allegedly sleeping on duty in the Emergency Department was not put to him by the investigator, and that it was not included in the investigation report. We found that it played no part in the disciplinary case against him. In any event, we find that the photograph was irrelevant: the Claimant admitted when interviewed that he was asleep on duty, describing it as a "*microsleep*".

277. The Claimant alleged that the investigation was flawed, because the investigator did not interview relevant witnesses. Before us, he referred to Mr. Allen, the recipient of the comment alleged to be made by the Claimant that, on 24-25 May, he was aiming for 50 breaches that night before midnight, and 50 after. Allegation 3 was that this comment was made with the intent to undermine the Emergency department processes and national standards.

278. We found that there was no need for the investigator to interview Mr. Allen for the following reasons. First, the Claimant admitted making comments regarding 50 breaches before and after midnight; secondly, it would not be possible to determine his intent in making the comment by interviewing Mr. Allen. Of course, he was cleared of this allegation (Allegation 3).

279. Moreover, prior to the disciplinary hearing, the Claimant had not challenged the scope of the investigation. He had received the interview notes prior to the hearing. At the disciplinary hearing, when this was raised by a Panel Member, Ms. Saha said that the Claimant had assumed others would have been interviewed: see notes of hearing, p.1364.

280. The Claimant was invited to a disciplinary hearing on 23 May 2016, and then again on 15 September 2016. Both letters explained that he had a right to call witnesses: see p.1151 and p.1316. He was asked to provide names in advance so that they could be made available.

281. At no time did the Claimant ask Ms. Bridge, nor inform the Respondent, that he wished to interview or call any witnesses for the disciplinary hearing.

282. On 9 December 2016, the Claimant appealed the disciplinary outcome. James O'Sullivan was appointed as the appeal officer. We accepted Mr. O'Sullivan's evidence. From his evidence and in his position as Chief Finance Officer, he was patently honest in his account of events and clearly independent of the Emergency Department line management. Moreover, the other members of the Panel were not connected to the Emergency Department: Emma Gray was Clinical Lead for Surgery and Ronan Fenton was Medical Director for Essex Success Regime.

283. We found that the appeal consisted of a fair review. Mr. O'Sullivan began by asking the Claimant to provide particulars of his grounds of appeal, which he chased up: see paragraph 17 witness statement of Mr. O'Sullivan.

284. Due to the unavailability of Ms. Saha, then Mr. Fenton, and then Ms. Saha again, the appeal hearing could not take place until 10 March 2017.

285. Mr. O'Sullivan approached the appeal with an open mind, and he did not discuss the case with anyone but the Panel members and the Employee Relations adviser, Ms. Glean.

286. In any event, Mr. O'Sullivan did not know of the alleged protected disclosures or protected acts. The Claimant accepted in cross-examination that there was no evidence that Mr. O'Sullivan (and Mr. Salter and Mr. Fitzgerald) had any knowledge of the alleged protected disclosures or protected acts. We found that any protected disclosures or protected acts could not have influenced Mr. O'Sullivan (or Mr. Salter and Mr. Fitzgerald) in any way.

287. Mr. O'Sullivan decided to uphold the written warning for the reasons that he provided. Although the length of the disciplinary process was not part of the appeal, he was not surprised by it, because it was not unusual for investigations and disciplinary processes to take that amount of time within the Trust.

288. Moreover, as Mr. O'Sullivan explained, the Claimant did not attempt to call any witnesses at the disciplinary hearing or the appeal. Prior to making the appeal decision, Mr. O'Sullivan considered whether the disciplinary process was unfair, because Mr. Allen was not interviewed. Mr. O'Sullivan decided that, because Allegation 3 was not upheld (the intent element not being proved), there was no need for further investigation. We found that this was an entirely sensible and reasonable approach.

Issue 2(d)(xi) & (xii) Prolonged exclusion unnecessarily after investigation had concluded and after disciplinary proceedings had finished

289. The Claimant's exclusion continued after the investigation by Mr. Fitzgerald. This was hardly surprising; there was a case to answer found. Exclusion protected the Claimant from allegations of interference with witnesses in the disciplinary process. The Tribunal found that this was not influenced by any protected disclosure or protected act, given that the disciplinary outcome was not provided until 25 November 2016.

290. The exclusion was continued after the disciplinary outcome letter. The Tribunal found that this was not influenced by any protected disclosure or protected act.

291. The disciplinary outcome letter was provided on 25 November 2016; but the second clinical case review was not concluded until about 8 December 2016. The clinical concerns had led to the decision to exclude, after NCAS advice.

292. On 23 December 2016, Mr. Rothnie emailed the Claimant to confirm that the exclusion had been lifted and that he could now return to work. He explained that a return to work plan to support his return to clinical duties would be drawn up with Dr. Howard. Given the Claimant's grievance about his working relationships in the Emergency Department, Mr. Rothnie arranged for the Claimant to return to work in the interim on supernumerary duties in the Bedwell Acute Medical Service as a temporary placement.

293. We found that the reality was that, after the repeated lateness, the misconduct allegations, the failures to follow management instructions, and the missed diagnoses, Dr. Howard had no confidence in the Claimant.

294. In any event, from the conclusion of the second clinical review, the Claimant's exclusion lasted for only a further two weeks, which was not connected with any disclosures or protected acts.

Issue 2(d)(v) first list & issue 10(a) second list: Obstructing revalidation by the GMC from October 2014 to 25 October 2017;

295. Where there was any conflict of evidence on these matters, we preferred the evidence of the Respondent's witnesses, Neil Rothnie, Caroline Howard, Claire Willis and Nicholas Coker.

296. We attached little weight to the witness statement of Dr. Plews, for several reasons: he could not attend to give oral evidence and be cross-examined (reportedly due to ill-health); he sought to give his opinion about matters which were really questions of fact and/or where he was not an appointed expert; and he had not been provided with a number of documents by the Claimant (being those marked in red on the Schedules prepared by the Respondent).

297. We found that the Claimant was given every opportunity to meet deadlines and comply with requirements. The reasons that he did not do so were because he did not agree with the Respondent's process for appraisal and the revalidation process, and

because he did not want to reflect on the Conditions of Practice imposed on him by the GMC following incidents with a former employer. The Claimant limited his engagement with the Respondent's appraisal process to the extent that he could not have a successful appraisal.

298. The Tribunal found that it was incomprehensible why the Claimant would not accept the appraisal system as a whole. He dismissed the attempts to carry out the appraisal process by several appraisers (Dr. Howard, Dr. Willis and Dr. Coker). The Claimant stated in cross-examination that there was a "*difference of opinion*" about what constituted a completed portfolio, claiming that the Respondent's policies did not meet the revalidation rules in the Rules and Guidance for Responsible Officers in the Medical Act; and the Respondent did not comply with nationally set requirements. He stated that the opinions of the Respondent's witnesses were not valid because of this. This is a further example where the Claimant considered his opinion superior to those of other professionals.

299. Moreover, if the Respondent's process had a systemic failure affecting all doctors within the Trust, this would be the same for all doctors, so we could not understand how or why this related to the alleged or any protected disclosure or protected act.

300. In short, the Respondent did not "*obstruct*" the Claimant's revalidation with the GMC at any time. The Claimant's alleged protected disclosures and protected acts had nothing to do with the actions of the Respondent's witnesses in respect of revalidation.

301. At the start of the hearing, the Respondent produced a "Schedule of Appraisal/Revalidation Events", consisting of a chronology and identifying relevant documents relating to this issue. We found that Schedule to be accurate. We do not need to repeat each event in that chronology to explain why we accepted the Respondent's evidence on this issue.

Revalidation process

302. For each Emergency doctor employed by the Respondent, an annual appraisal must be completed; the Respondent gives each doctor a deadline for completion of the appraisal each year. Each doctor was required to complete an appraisal portfolio evidencing various competencies. A medical appraiser would be appointed, and an appraisal meeting would be held. It is important to recognise that the Respondent's medical appraisers took their role seriously; the appraisal was not a tick box, quick exercise. The doctor was required to provide his appraisal documents at least 14 days ahead of the appraisal (by releasing them for inspection on the software system used).

303. The requirements for revalidation of doctors are set by the GMC. Completing an appraisal is also part of the General Medical Council ("GMC") revalidation process, which takes place every 5 years. This applies to all doctors, and the aim is to ensure that doctors remain fit to practise medicine.

304. The Respondent has a Revalidation Office and it took its responsibilities in respect of revalidation seriously.

305. Depending on the outcome of the appraisal, the Responsible Officer of the Trust (Mr. Rothnie) then had three options: to recommend revalidation to the GMC; to recommend deferral; or a non-engagement recommendation. A recommendation of non-engagement can lead to the doctor's licence to practice being withdrawn. The Claimant's case was the first time that Mr. Rothnie had ever had to recommend non-engagement.

306. The Claimant complained about each of three medical appraisers that were appointed in sequence for him.

Dr. Howard as Medical Appraiser

307. The Claimant's first revalidation date was 22 December 2014, which he was informed of on 30 July 2014: see p.536.

308. Dr. Howard arranged three dates for the appraisal: 20 October 2014 (Claimant informed on 18 September 2014); 4 November 2014 (Claimant informed 12 October 2014; and told documentation required by 21 October 2014); 20 November 2014 (Claimant was told documentation to be completed and released by 6 November 2014). The appraisal meetings had to be re-arranged because the Claimant had not completed his appraisal portfolio, and/or whatever he had done had not been uploaded. At the very outset, Dr. Howard offered to assist him if he required help: see email 12 October 2014, p.619.

309. In Dr. Howard's email of 21 October 2014 (p.625), the Claimant was warned that the failure to upload all the documents could lead to a "failure to engage" referral to the GMC. She was concerned that a second meeting was often required, and that she was due to go on leave on 22 November, which meant that he could go past the revalidation date.

310. In addition, Dr. Howard had conversations with the Claimant to try to find out why he would not complete the appraisal portfolio. She was frustrated that he appeared to understand that it would affect his revalidation and licence to practice, yet he did not do what was required. An appraisal portfolio would generally take doctors about 8-10 hours to complete their first online appraisal. By this stage, each doctor on the Emergency Department rota had 4 hours CPD built into their working hours, which could be used for preparation of the appraisal.

311. We found that the Claimant did fail to co-operate with Dr. Howard, maybe in part because he was upset at not being short-listed for the Acting Consultant post, and maybe in part due to his perceived dispute over the Clinical Specialist contract terms, in addition to the overall factors set out above (that he did not believe the Respondent's appraisal and revalidation process was necessary).

312. Dr. Howard had no choice and could not sign off his appraisal. This had nothing to do with any protected disclosure nor any protected act.

313. On 10 November 2014, Mr. Rothnie reviewed the contents of the Claimant's appraisal documents. He sent the Claimant advice on how to improve his appraisal portfolio and again referred him to sources of advice from the Royal College and

Specialty associations: see emails at p.657-658. Ms. Beamister provided a full list of appraisers within the Trust.

314. In his email at p657, Mr. Rothnie included the following:

> "*It is also important that you outline your GMC issues reflect on them and confirm that you have been adhering to the requirements which they set (evidence of regular meetings with supervisor, etc.)*
> *…*
> *Whilst we can provide some assistance, it is the individual doctor's responsibility to ensure that their appraisal portfolio is of an adequate standard and that it is submitted to their appraiser in a timely fashion. This will enable the appraiser to review the portfolio prior to the appraisal meeting. If the appraiser feels that the portfolio is inadequate then they can highlight deficiencies to the appraisee prior to the meeting so that these can be resolved*."

315. These emails were designed to help the Claimant with his appraisal and the revalidation process. We found that this email was also a warning to the Claimant, reminding him that it was his professional obligation to ensure he received an adequate appraisal.

316. The Claimant did not respond to this advice by disputing its contents, or by contending that the law or GMC guidelines differed from the Respondent's Appraisal and revalidation process in a material way.

317. In cross-examination, the Claimant alleged that the requirement to outline the fitness to practise issues raised by the GMC, to reflect on them and to confirm that the Conditions of Practice ("COP") had been adhered to, would have stopped him bringing a legal challenge against the GMC. We found that this was unrealistic and not credible because:

317.1. It had not been raised as an explanation before this case.

317.2. We did not accept that his compliance with COP imposed by the GMC could affect any legal action against the GMC (no explanation was provided as to how it would or might do so). We found his compliance could be seen as positive for his appraisal.

318. We do not know whether this was an invention designed by the Claimant in an attempt to excuse his failure to complete his appraisal portfolio to an adequate standard, in a timely way, because we found that failure inexplicable.

Dr. Willis as Medical Appraiser

319. On 13 November 2014, the Claimant approached Dr. Willis to be his appraiser. The Claimant told her that Mr. Rothnie had viewed his portfolio and was largely happy with it. Dr. Willis agreed to be his appraiser, but explained about the short time frame, bearing in mind the revalidation date. On the same date, Mr. Rothnie explained that he had not reviewed the portfolio and that further information may be required.

320. Dr. Willis found that the Claimant did not release his portfolio for her to view and did not hear from him.

321. On 19 December 2014, Mr. Rothnie emailed the Claimant to warn him that, because his appraisal had not been completed, there was a risk that he would have to make a non-engagement recommendation to the GMC, which would put the Claimant's licence to practice at risk. The Tribunal found this warning to be more than reasonable and an appropriate step on the evidence before Mr. Rothnie.

322. Subsequently, on 19 December, Mr. Rothnie met the Claimant. The notes are at p659-660, and we find them to be accurate. The Claimant discussed recent personal difficulties, including his failed challenge to the GMC's decision to impose an Interim Order which had led to him being made liable for legal costs. Mr. Rothnie agreed to make a deferral recommendation to the GMC. Mr. Rothnie also offered to refer him to Occupational Health. This was action which is not consistent with the allegations of victimisation by Mr. Rothnie, but was, rather, supportive of the Claimant.

323. The Claimant then submitted his appraisal. Dr. Willis found that it fell far short of the required standard. It was not detailed and did not show evidence of compliance with the GMC's Conditions of Practice.

324. On 2 January, they met and Dr. Willis set out the areas in which it failed (see paragraph 27 of her statement, and evidenced by her notes of her review), explaining it needed to address CPD activity (including statutory and mandatory training), Quality Improvement, and more reflection and learning relating to his previous GMC Conditions of Practice.

325. The Claimant submitted a revised appraisal portfolio, which Dr. Willis again found to be substandard, and not revised in the manner discussed. Detailed advice was sent by email explaining what was required to meet GMC standards (p.682-684).

326. We find that the Claimant had no intention of revising it in accordance with the advice received from Dr. Willis. His opinion at that time (and maintained in evidence) was that the Respondent's appraisal guidance was at odds with GMC guidance and national guidance, and that it did not comply with the Medical Act. It became apparent in his evidence that he perceived that his opinion about his appraisal carried more weight than that of any appraiser, despite the lack of evidence that he had had any training on this issue.

327. The Claimant accepted before us that there were outstanding matters to be concluded but alleged that the requirements of the Trust were inappropriate. He believed that reflecting on his dispute with the GMC would damage his legal action against the GMC.

328. On 21 January 2015, Mr. Rothnie followed up by agreeing with Dr. Willis and providing bullet point guidance so the Claimant could ensure the appraisal met GMC standards.

329. The Claimant did not respond. On 9 February 2015, Mr. Rothnie warned him that he was considering making a non-engagement recommendation to the GMC.

330. Eventually, due to the Claimant's delay, a further appraisal meeting was arranged for 2 April 2015. Dr. Willis could not see any change to the portfolio and asked Ms. Beamister about this (see p.736). When the Claimant attended the meeting, 25 minutes late, this was pointed out to him; he said that he could do it immediately and it would take 30minutes. Dr. Willis waited a further 2 hours but heard nothing, so the appraisal did not proceed.

331. Dr. Willis invited the Claimant to a further meeting on 17 April 2015. She explained what was required and that he should use his CPD time to complete safeguarding training. By this time, he had informed her that he did not agree with the revalidation process at all, viewing it as a series of hoops doctors were required to go through.

332. Dr. Willis viewed the Claimant's documentation ahead of the appraisal meeting. She decided insufficient amendment had been made and provided details to the Claimant.

333. The appraisal meeting took place on 17 April. The Claimant's appraisal still did not meet all the requirements necessary for Dr. Willis to sign it off. She explained the areas requiring further work before Mr. Rothnie could recommend revalidation. The Claimant's evidence that Dr. Willis told him that the appraisal satisfied GMC requirements for revalidation is not credible in the light of her detailed and reliable evidence and the following:

333.1. The emails of 16.4.15 and 20.4.15 (p.751, 753) corroborate Dr. Willis's evidence.

333.2. The most Dr. Willis agreed to was that, if Mr. Rothnie was happy with the section on the GMC Conditions of Practice, she would accept that.

333.3. Mr. Rothnie made it clear that the Claimant was required to reflect on the GMC fitness to practise proceedings, and the Claimant had not made required changes: see email to Claimant 20 April 2015, p.773.

333.4. The appraisal portfolio had been reviewed by two other consultants, who agreed with Dr. Willis' view that it was insufficient.

334. As we have explained above, Dr. Willis had no idea that the Claimant had made any protected disclosure or protected act to Health Education England during their visit on 17 April 2015. This visit had no effect on her decision to refuse to sign off the appraisal.

335. After this, Mr. Rothnie requested a further 4 month deferral of the revalidation date from the GMC to allow the Claimant further time to complete the appraisal (see email to Claimant, p.773).

336. On 8 May 2015, Dr. Willis, to her credit, stood down as appraiser, because she felt that she could not be sure that she would be objective given events during her time as appraiser. Her belief, which we accepted as correct in fact, was that the Claimant

was not actively engaging in the process. We found Dr. Willis to be an experienced appraiser who did seek to apply the GMC standards and did try to provide constructive support for the Claimant.

Non-engagement submission

337. On 18 May 2015, in a meeting with Mr. Rothnie, the requirements for the Claimant's appraisal were set out again. Again, the Claimant was warned that a "non-engagement" referral would be made to the GMC if no appraisal was completed: see the summary of this meeting in the letter of 26 May 2015 (p.835-837). The Claimant was told that he needed to book an appraisal meeting before 26 June.

338. On 28 May 2015, the Claimant was excluded. He made no attempt to arrange an appraisal meeting in any event. On 5 August 2015, he emailed Mr. Rothnie alleging that his appraisal had been unfairly refused on 22 April and that he had been unable to access the IT system. In fact, his appraisal had not been agreed, and his restriction to the IT system had been removed on 1 July. In any event, the Claimant was informed that he must complete his appraisal to an adequate standard: see letter p.937, which specifically informed the Claimant that when he confirms that the appraisal portfolio is complete, Mr. Rothnie will appoint an appraiser outside the department.

339. On 21 August 2015, Mr. Rothnie had not received any evidence that the Claimant had completed his appraisal; the deferred date for revalidation was now 22 August 2015. He informed the Claimant that he had no option but to make a recommendation of non-engagement to the GMC: see email p.977. A recommendation of non-engagement was made.

340. The Claimant alleged that he had completed the appraisal documentation on 21 August 2015; but we find that he had not done so, and, in any event, it was too late notice to avoid the recommendation that the Responsible Officer was required to make.

341. Strangely, and for reasons not explained by him, the Claimant downloaded and submitted to the GMC on 20 October 2015 a version of his portfolio that he did not provide to any appraiser, further indicating his lack of co-operation. The failure to provide this to his appraiser was bizarre, because this version may well have been sufficient to pass the appraisal, according to Dr. Willis' evidence.

342. Despite the non-engagement recommendation, Mr. Rothnie urged the Claimant to complete his portfolio, offering to progress revalidation if he felt it was completed: see correspondence on 3 and 19 February 2016.

343. The GMC failed to make a decision until July 2016. Meanwhile, Mr. Rothnie chased up with the Claimant whether he had completed his appraisal. When raising this with the Claimant on 16 December 2015, the Claimant provided no evidence of engaging with the process stating that he was awaiting the GMC decision.

344. On 11 July 2016, the Claimant was allowed more time by the GMC to comply with the revalidation requirements, with an extension to 7 January 2017. As explained to the Claimant, the decision made was in part because the Responsible Officer had demonstrated willingness to support the Claimant with revalidation. The GMC also

concluded that Mr. Rothnie had been left with "*no alternative*" but to make a non-engagement recommendation (C167). This all points to a lack of victimisation by Mr. Rothnie. The Claimant was given one more attempt to undertake the appraisal.

345. Moreover, the Assistant Registrar made clear that the Claimant's supporting documentation was deficient and that he needed to focus specifically on CPD, Quality Improvement, and his reflection on the previous GMC Fitness to Practise investigation, stating that he needed to agree with the Responsible Officer what exactly was required (see p.1201).

346. Mr. Finn, Employer Liaison Adviser of the GMC, stated to the Claimant that the onus was on him to provide an appraisal, compliant with GMC criteria. He told the Claimant to engage with the Trust: see letter 1215.1.

347. After the GMC decision, Mr. Rothnie heard nothing from the Claimant, despite the advice to him that it was his responsibility to complete the appraisal. Therefore, on 7 September 2016, Mr. Rothnie wrote to set out his expectations and the process to be followed.

348. The Claimant was informed that his new appraiser was Mr. Coker, Lead Appraiser of the Trust. Mr. Coker, a Consultant Anaesthetist, had been allocated because he did not know the Claimant and was not aware of any of the proceeding circumstances.

349. The Claimant was given a deadline that the appraisal meeting was held by 31 October 2016, with it signed off by 14 November 2016.

350. Despite all the above, the Claimant did not contact Dr. Coker to arrange a meeting until 18 November 2016, after a further letter from Mr. Rothnie.

351. As the above facts demonstrate, Mr. Rothnie was responding to the Claimant's failures to engage with the appraisal process. He was not influenced in any way by any alleged protected disclosures and protected acts.

Dr. Coker as Medical Appraiser

352. We accepted Dr. Coker's evidence. In evidence, he explained that he was baffled by the conduct of the Claimant, whom he found "*evasive*".

353. In his telephone calls with the Claimant, Dr. Coker found the Claimant was focussing on his disputes with the Respondent and NHS England, rather than the appraisal process.

354. Despite the deadline of 14 November 2016, the portfolio was not complete and the appraisal not signed off. Ms. Bemister extended the time.

355. Dr. Coker arranged an appraisal meeting on 20 December 2016. But in the lead up to the meeting, he could not see any documents in the portfolio by 12 December; and he wondered if the Claimant really intended to attend (evidenced by his email to Ms. Bemister, p1871). This was not a surprising response in view of the telephone

conversation on 29 November 2016 in which the Claimant promised to provide his portfolio long before the agreed appraisal date of 20 December.

356. Dr. Coker realised in the lead up to the meeting that the appraisal portfolio was grossly inadequate. He had logged on the appraisal (Zircadian) system to check what updating the Claimant had done. There was no up to date information and none of the necessary commentary or reflection on his GMC fitness to practise proceedings. The Claimant essentially admits this in his email to the GMC of 19 December referring to making only "*limited entries*" in preparation for the appraisal meeting (p.1487).

357. As a result, having spoken to Mr. Rothnie to check the contents of the portfolio were as he saw them, Dr. Coker cancelled the appraisal meeting. He explains why at paragraph 22 of his witness statement. The Claimant could have attended courses whilst excluded or explained why no evidence was available; but instead pages were blank.

358. The Claimant contacted Dr. Coker by email on 19 December 2016, to ask for the meeting to be reinstated, claiming he had updated his portfolio. It was too late to reinstate it as Dr. Coker explained.

359. Dr. Coker attempted to assist the Claimant, as did the other appraisers. He was not influenced in any way by any protected disclosure or protected act; he did not know of the alleged disclosures or acts.

Second non-engagement submission

360. In the light of the information received from Dr. Coker, Mr. Rothnie was obliged, as the Responsible Officer, to make a further non-engagement submission. His reasons were set out for the Claimant in his letter of 19 December 2016 (p.1873).

361. A recommendation of non-engagement was made to the GMC. On 10 February, at its request, a time-line and further documents were provided to the GMC.

362. In response to the request for evidence of engagement in revalidation process, the Claimant failed to provide any, claiming he was not required to have an appraisal because he had not been in practice: see REV7a form p.2317.1.

Withdrawal of Licence to Practice

363. The GMC decided to withdraw the Claimant's licence to practice. The reasons are set out in detail by the Assistant Registrar (see p.2187 – 2226), who concluded that the Claimant had failed without reasonable excuse to comply with the revalidation requirements.

364. The Claimant appealed this decision. His appeal was subsequently struck out. His licence to practice was withdrawn on 25 October 2017 (p.2034). None of the Respondent's managers or fellow clinicians would have played any role in that decision.

Claimant's case on obstruction of revalidation

365. At this hearing, the Claimant's case appeared to be that the Respondent required evidence of CPD and training compliance which was not necessary. We found, accepting the Respondent's evidence, that he was not required to do more CPD than any other doctor; and the Respondent had given him guidance on CPD supporting information: see p.752, email 21 January 2015 from Ms. Bemister.

366. The Claimant's case was also that the statutory/mandatory training requirements were not achievable. We found that this argument was not credible.

367. Although mandatory training set out by the Respondent may not be a specific GMC requirement for revalidation, it had to be completed for a successful appraisal with the Respondent. From September 2014, the Claimant along with other doctors were allocated 4 hours per week for CPD work to complete mandatory training. From the records that we saw, some of the modules could be completed relatively quickly.

368. There was evidence to show that the Claimant was reminded on numerous occasions to do his CPD and his statutory/mandatory training. For example, on 12 May 2015, he had not completed it, despite a specific instruction to use his rota'd CPD hours in April 2015 (see p.785).

369. The Claimant argued that his exclusion (from 28 May 2015) made it impossible for him to undertake the Quality Improvement activity required for his portfolio. The Tribunal disagreed:

369.1. As Dr. Willis explained, he could have done this activity whilst excluded, albeit not what he wanted to do.

369.2. He could have referred to Quality Improvement activity done prior to May 2015 (as explained to him by Mr. Rothnie on 7 September 2016, p.1277).

369.3. The Claimant was given specific guidance on how to rectify the gaps in the Quality Improvement supporting information, well before exclusion: see email from Dr. Willis, 16 April 2015, p.751.

369.4. The Claimant did do work on his appraisal, but did not provide the amended version to his appraisers.

Issue 10c Second Claim: Failure to pay sick pay, April 2017 to 25 October 2017

370. It was admitted that the Claimant was not paid any contractual sick pay for this period. However, we found that this was no detriment to the Claimant, because he was not entitled to be paid contractual sick pay at any point during his employment. The Claimant was not entitled to Sick Pay under the terms of the contract entered into in November 2013 (p.355-359) which governed the terms of his employment: see Clause 9 of that contract. Prior to accepting the offer of employment, he knew that he was not entitled to Sick Pay under the contract offered: see emails at p.492-493. The Claimant refused to enter into the revised Clinical Specialist contract, available from October 2015, which did provide for occupational sick pay.

371. The Claimant was paid Statutory Sick Pay. This was explained to him by Ms. Bridge on 22 March 2017 (p.1956). She reminded him that he still had the option to move to the new contract, and would then receive contractual sick pay.

372. The Claimant chose not to move to the new CS contract, thereby denying himself a contractual entitlement to sick pay.

373. The reason for non-payment of contractual sick pay was because the Respondent believed that he was not entitled to sick pay. This was nothing to do with any alleged protected disclosure nor protected act.

Issue 10b Second Claim: failure to follow sickness absence policy so as to facilitate a return to work during period April to October 2017, because Respondent hoped Claimant would not return to his job

374. The Claimant's witness statement does not identify what the alleged failures were, nor why the Respondent's witnesses did not facilitate a return to work.

375. We accepted the evidence of Traci Maton, which was barely challenged in cross-examination, and hardly at all in respect of the material period. In particular, we found that she had no knowledge of the alleged protected disclosures and protected acts, so her treatment of the Claimant could not have been influenced by such matters.

376. The Claimant was absent sick on 3 April 2017. His notification of this is at p.2112.

377. Having gone absent sick on 3 April 2017, Ms. Maton emailed the Claimant and his representative to explain that she wished to use a meeting on 12 April to discuss the Claimant's condition and any support that the Trust could put in place. Ms. Maton explained that the Claimant would be invited to a sickness review meeting after the OH appointment, which he requested with an external OH doctor. This OH appointment was on 15 May 2017. We set out the relevant parts of the report of Dr. Boakye, OH doctor, below.

378. We accepted that the Respondent followed the Long-Term Sickness Absence Policy (paragraph 82 of Sue Bridge statement) (p.2729)

379. A sickness review meeting was held on 23 May 2017. The intention was to see what support could be put in place, with a view to the Claimant returning to work. At the meeting, which the Claimant insisted on recording despite a management instruction not to, he wished to discuss matters which were not connected to support, such as his grievance appeal and TIA application. The Tribunal decided, for reasons given at the time, not to hear this recording, because we did not need to hear it to understand from the meeting notes that the meeting was a fractious one.

380. Ms. Maton steered the matters to his health, which was discussed with the likelihood of return to work. The OH report was considered.

381. Ms. Maton suggested, as recommended by Dr. Boakye that the Claimant spoke to his GP about referral to his local mental health service; she advised that his GP would need the opinion of the local talking therapies service, before referral to a Consultant. The Claimant refused, his view being that this was not appropriate for him.

382. This is corroborated by the letter sent after the sickness review meeting. In this letter, it can be seen that the OH Consultant assessed the Claimant as unfit to work and was likely to remain unfit until a final diagnosis had been made of his musculo-skeletal condition: see p.2275 (and p.2246, OH report).

383. After this, the Claimant sent in sickness certificates covering July and August 2017. In July 2017, the Respondent knew that the GMC had decided to withdraw his Licence to Practise, and it was awaiting the appeal of that decision. The Claimant could not return to work without a Licence to Practise.

Issues 2-6 Second Claim: complaint of unfair dismissal

384. On 9 May 2017, the GMC decided to withdraw the Claimant's licence to practice, subject to his right to appeal. A fully reasoned decision is at p.2187-2226.

385. On 24 October 2017, the Registration Appeals team struck out the Claimant's appeal due to his failure to provide an appeal bundle. The GMC withdrew the Claimant's licence to practice from 25 October 2017: see email p.2304.

386. As a result of the withdrawal of his licence to practice, Mr. Rothnie wrote to inform the Claimant that his contract of employment with the Trust terminated automatically. In his decision, Mr. Rothnie relied on section 47 Medical Act 1983.

387. The Respondent has taken the same approach in other cases, where the licence has been withdrawn or a doctor suspended from practice by the GMC.

388. Mr. Rothnie took the action that he did because the Claimant's licence to practice was withdrawn and the Claimant's appeal against that decision of the GMC had been dismissed. The termination of the Claimant's contract of employment was in no way influenced by the alleged protected disclosures or protected acts. Moreover, Mr. Rothnie awaited the outcome of the GMC appeal process before informing the Claimant that his contract was terminated; and the Respondent could not have had any influence upon the decision that the Claimant's appeal be struck out for his failure to submit an appeal bundle.

Was the Claimant a disabled person at the relevant times?

389. The Claimant alleges that he was disabled due to the following impairments:

389.1. Autoimmune rheumatological disorder from early 2015;

389.2. Type 2 diabetes from early 2015;

389.3. Stress from late 2014.

Autoimmune rheumatological disorder from early 2015?

390. On 26 July 2018, the Respondent conceded that the Claimant was disabled due to a musculo-skeletal condition from 15 May 2017, and that the Respondent had knowledge of this from receipt of the Occupational Health Report of that date.

391. The Claimant's case was that this impairment was caused by an autoimmune rheumatological disorder, although there was no evidence that this was ever diagnosed; this theory was the product of the Claimant's opinion, but we concluded that the causation of the musculo-skeletal condition was not relevant.

392. We considered the Impact statement. The Claimant had a flu jab at the Hospital on 9 October 2014 and at first had local symptoms of discomfort. The symptoms did not settle, and about two weeks later, he began experiencing pain in his right shoulder. The pain progressively grew worse from mid October – mid December 2014, by which point it was very painful, and it meant that the Claimant could not hold or pick up heavy objects, or carry his two year old son.

393. The Claimant saw the Respondent's Occupational Health Physician, Dr. Sofoluwe on 10 February 2015 as a self-referral. He was informed by the Claimant that the symptoms had progressively worsened such that he was unable to write and it was impacting on his ability to do clinical assessment of patients. Dr. Sofoluwe recorded this in a letter to Dr. Howard. He advised that if modifications were not possible, the Claimant would need to be absent sick (see p.700).

394. The Claimant met Dr. Howard the following day, noted in a written record (p.706). They agreed adjustments to his role that the Claimant felt were necessary; Dr. Howard felt that these could be accommodated. We preferred Dr. Howard's account of that meeting.

395. In contrast to what he told Dr. Sofoluwe, the Claimant stated that he was able to write, albeit with pain, and that he did not need to be absent sick. Dr. Howard checked with Dr. Sofoluwe, who confirmed that the Claimant had told him that he was unable to write (p716-717).

396. This caused Dr. Howard to ensure that the Claimant agreed the position, and therefore wrote to him on 11 February 2015. The agreed job modifications were recorded: p.707.

397. The Claimant signed to confirm his agreement with the adjustments set out in Dr. Howard's letter: see p.707. In the Impact Statement, the Claimant alleges that his suggestions were rebutted (paragraph 8), but we find that this is not correct, nor is this consistent with the objective facts.

398. We found that the Claimant's evidence about the meeting on 11 February 2015 was unreliable. We do not consider that the Claimant would have signed the letter of 11 February, without complaint in an email or on the letter, if (as he claims at paragraph 158 of his witness statement) he required further reasonable adjustments to his duties. We found that he did not mention in that meeting that more minor activity could cause pain; had he done so, it is very likely that Dr. Howard would have recorded

this and sought the advice of Dr. Sofoluwe as to whether the Claimant could continue in work.

399. Moreover, we find that this inconsistency about being able to write leads to an inference that his evidence before us on this issue and the Claimant's account of his symptoms in his Impact Statement as to the degree of impairment experienced by him in February 2015 are unreliable.

400. After these adjustments were put into place, the Claimant did not raise any concerns about them nor seek further adjustments for shoulder or musculo-skeletal symptoms prior to his exclusion in May 2015.

401. Dr. Sofoluwe referred the Claimant to Mr. Packer, Consultant Orthopaedic Surgeon. We considered the evidence of Mr. Packer, in his letter of 2.3.15 (p.259) following review of the Claimant in Clinic on 25.2.15, which states:

> "*On examination today, there was not an awful lot to find. There was no evidence of swelling or deformity at the site of the injection and really no tenderness. Examination of the shoulder was otherwise unremarkable.*
>
> *He has had imaging of the area which has not shown very much. Certainly the shoulder itself appears to be normal….."*

402. Mr. Packer signed the Claimant off sick for two weeks for physiotherapy. After the physiotherapy, the Claimant returned to work on 18 March 2015. In his return to work meeting with Dr. Willis, he explained that the symptoms had improved but pain and a reduced range of movement remained. It was decided that he would work normal hours and let Dr. Willis or Dr. Howard know of any problems. There is no evidence that he raised any problems concerning his ability to work with them (p.728-1).

403. The Claimant's physiotherapist reported back to Mr. Packer on 13 April 2015. This report stated that the physiotherapy had helped to a certain extent, but not completely alleviated his symptoms (p261). The report does not suggest that the impairment may last 12 months in total, although it does state physiotherapy management has "*plateaued*". In any event, it was not suggested to any of the Respondent's witnesses that they had seen this report prior to this litigation, and given that it was a confidential medical record, we found that they would not have seen it until these proceedings.

404. On 22 April 2015, the Claimant returned to Mr. Packer for further assessment. Mr. Packer reported to the GP that pain at the site of the injection had now settled, but physiotherapy had uncovered impingement and tendonitis; as a result, Mr. Packer decided to give a further injection of depo-medrone and lidocaine. The inference from this report is that symptoms were likely to settle within 6 weeks. (p.262). It was not suggested that the Respondent had seen this report ahead of these proceedings.

405. On 26 May 2015, the Claimant was seen again in the Orthopaedic Clinic. His shoulder abduction had "*improved significantly*" from the previous week (p266). Again, the inference from that document is that the Claimant's symptoms should improve.

406. Based on all the evidence, particularly that set out above, we found that the impairment had a substantial adverse effect on the Claimant's ability to do normal day to day activities from about the start of December 2014. However, we found that the evidence during the period from February to 28 May 2015 (when he was excluded) did not show that the substantial adverse effect could well last 12 months or more in total from 1 December 2014. In particular, we relied on the evidence of Mr. Packer, Consultant Orthopaedic Surgeon in his letter of 2.3.15 (p.259, which merely refers to some local scarring relating to the injection) and the opinion of Mr. Packer after review on 22 April 2015 (symptoms anticipated to settle over 6 weeks, p262).

407. Moreover, over the period February to May 2015, the Respondent did not have actual or constructive knowledge that the substantial adverse effect could well last 12 months. Mr. Packer's report of early March 2015 indicated that this would not be likely to be the case; and Dr. Howard had found that the Claimant told her that he could write and did not need to be off sick.

408. In addition, in the letter of 11 February (see p707-708), Dr. Howard had asked him to tell her immediately if his injury or ability to carry out tasks changed. The Claimant never raised with Dr. Howard that there was any change to his health and there is no evidence that he reported to her that he had any difficulty performing any work or day to day activities at work.

409. Furthermore, up to his exclusion in May 2015, the Claimant did not seek any further adjustments, such as reduced hours, less working time spent on his feet, or desk duties.

410. The Claimant did not mention to Dr. Howard that he had an autoimmune disorder at any point.

The Respondent's knowledge during and after the period of exclusion

411. The Claimant's Impact Statement alleged that the Respondent had knowledge of his alleged autoimmune rheumatological disorder impairment and its effects throughout his exclusion. This was not put to any witness of the Respondent and the Tribunal rejected it.

412. Moreover, the medical evidence does not support such an allegation. For example, the Claimant was not referred to a Consultant Rheumatologist until after his appointment for an MRI scan on 15 August 2016. The MRI scan was "*reassuringly normal*" in the opinion of the Consultant, Mr. Datta (p.277). Further, when seen by the Consultant Rheumatologist, she records that his pain had improved over time and was now only "1/10", albeit there had been a flare up a few weeks earlier. In the light of this material, we found it unlikely that, during his exclusion, the Claimant would have felt the need to report anything about his condition to the Respondent.

413. The Claimant alleges (paragraph 22 Impact Statement) that on 26 January 2017, his GP wrote to Jo Furley, Operations Director, to provide details of the conditions that he required management for. In fact, that letter (p281) contains no evidence that would put the Respondent on notice that the Claimant had an impairment

with a long-term substantial adverse effect. Furthermore, the letter contains an incorrect summary of the medical evidence. For example, the Claimant was not under review for "*rheumatic disorder which is suspected to be a result of flu vaccination in October/November 2014*"; see, in comparison, the true picture explained in the letter of 2.11.16 of the Consultant Rheumatologist (p279).

414. From all the evidence heard, the Tribunal concluded that the Respondent did not have actual or constructive knowledge that the Claimant's musculo-skeletal impairment had a substantial adverse effect, which had lasted or was likely to last more than 12 months, until the sickness review meeting on 10 March 2017 attended by the Claimant and Traci Maton. As recorded in the letter that followed that meeting (p.1919 ff), there was sufficient evidence provided by the Claimant in that meeting for the Respondent to have at least constructive notice that the Claimant was a disabled person with that impairment.

415. The subsequent report of Dr. Boakye of 15 May 2017 merely provided his opinion on whether the Claimant was likely to be a disabled person. But the Respondent had sufficient notice prior to that report.

Type 2 Diabetes from early 2015?

416. From the evidence before us, this part of the Claimant's case relies on a blood test in May 2015, which showed an abnormal fasting glucose level and random glucose blood test: see p266 (letter 28 May 2015 from Mr. Sivaji, Associate Specialist, Orthopaedics). We find that the Claimant formed an opinion that this meant that he had Type II Diabetes.

417. A blood test in December 2016 demonstrated that his blood sugar level was normal: see the report of 18 May 2017 from Dr. Boakye, Consultant Occupational Health Physician p.2246.

418. By the letter to Ms. Furley, 26 January 2017, his GP states that the Claimant has been under review for "*pre-Type II Diabetes Mellitus*" since mid 2015.

419. The Tribunal concluded that, as a matter of fact, the Claimant did not have the physical impairment of Type 2 diabetes from early 2015, nor at any point up to October 2017. The fact that the GP records for 4 June 2015 refer to "*diabetes*" is weak evidence; it is equally consistent with the GP's letter of 26 January 2017.

420. In any event, if the Claimant had such a physical impairment (whether labelled Type II diabetes or not), there was no evidence that it had a more than a trivial adverse effect on the Claimant's day to day activities. In particular, the Impact Statement (paragraph 38) states that it has not manifested itself "*in obvious clinical symptoms other than vague tiredness, difficulty with night shifts, including needing to eat/drink to keep sugar levels up".* Working nights in an Emergency Department is not a normal day-to-day activity. Moreover, in determining whether an impairment has a substantial adverse effect, the Tribunal should take account of how far the Claimant could reasonably be expected to modify his behaviour to prevent or reduce the effects of an impairment on normal day-to-day activities: see paragraph B7 of the "*Guidance on Matters to be taken into account in determining questions relating to the definition of*

disability". Eating and drinking during any shift was a reasonable step for the Claimant to take.

421. We heard no further oral evidence about the effect of the alleged diabetes; this was not mentioned to Dr. Howard and nor were any symptoms of diabetes complained of to her. The Claimant did not mention to Dr. Howard that he had Type II diabetes at any point.

422. We concluded that, if the Claimant had such a physical impairment, whether clinically diagnosed as Type II diabetes or not, it did not have more than a trivial effect on his ability to perform normal daily activities.

Stress from late 2014?

423. There was conflicting evidence, even on the Claimant's case, that he had a mental impairment due to stress until mid-2015 at the earliest. In his Impact Statement, paragraph 39, the Claimant states that he suffered from "*work-related stress and anxiety since mid-2015*"; his witness statement (paragraph 154) refers to experiencing stress at work from October 2014, with his shoulder symptoms affecting his mood.

424. The term "stress" is not a reference to an impairment, but the Tribunal understood that it could cause physical or mental impairments. It was alleged in his evidence that a symptom of the Claimant's stress was anxiety; but this was inconsistent with the second ET1 and the Further and Better Particulars of the second Claim do not refer to "*anxiety*" at all: see p.231. We concluded that the Claimant had minor anxiety symptoms, or else anxiety would have formed part of the pleaded case.

425. At paragraph 43 of the Impact Statement, the Claimant set out his alleged symptoms caused by stress. It is notable, however, that there is no medical evidence recording any of those symptoms except anxiety. In particular:

425.1. By a letter to the GMC, dated 26 January 2017, the Claimant's GP states that he has been under stress and anxiety due to work conflicts and ongoing disciplinary proceedings, grievance complaints and potential loss of licence to practice since mid- 2015.

425.2. The report from Dr. Boatye, 18 May 2017 refers to "*underlying stress*". At p.2246, it states that he has a negative score for depression (not a pleaded impairment) and only a "*borderline score for anxiety*". There is no mention of any of the stress-related symptoms alleged in the Impact Statement, which is a striking omission given the detailed nature of the report.

425.3. The Claimant is described as having work-related stress by his GP on 12 October 2017.

426. We inferred from the lack of mention of symptoms other than anxiety in the medical records, the report of Dr. Boakye about the scoring for anxiety, and the lack of any prescribed medication, that it is likely that the stress symptoms stated in the Impact

Statement were exaggerated, given the unreliable nature of the Claimant's evidence in many areas including this one (such as, in relation to when stress symptoms began).

427. Indeed, the Claimant told his GP that he was "*unable to complete his appraisal portfolio in time due to the cumulative stress*" (p.317). This is untrue, for the reasons set out above.

428. In any event, all the evidence pointed to the stress being a reaction to events at work. We found that, at the material times, the stress had not produced any mental or physical impairment even if it had produced anxiety symptoms.

The alleged PCPs

429. We did not find that, at any point, there was a PCP which required overseas doctors in the Emergency Department to work under a local contract, with no sick pay provision, nor a PCP that required such doctors to work under a local contract with no pension provision. The reality was that doctors who applied for the Clinical Specialist roles in the Emergency Department were often from overseas, attracted by the salary which contained a premium to attract such doctors. The Claimant is incorrect to allege that there was such a "requirement".

430. In any event, the Clinical Specialist doctors in the Emergency Department had the option to sign the new, revised, Clinical Specialist Contract which did provide for sick pay. From 2015 onwards, the Claimant could also have accepted a new contract containing terms as to sick pay and pension, but chose not to do so.

431. Further, neither of those alleged PCPs placed the Claimant at any substantial disadvantage in relation to a relevant matter in comparison with other Emergency Department doctors.

432. The third PCP alleged at issue 15c (second list of issues) is that all doctors were required to work a full-time shift "on their feet" with limited ability to have rest breaks or work whilst seated or with reduced hours.

433. There was no evidence that being required to work "on his feet" during a shift, or to work full-time, or to work with the same rest breaks as other Emergency Department doctors, put him at a substantial disadvantage in respect to any matter in comparison with non-disabled doctors. We heard no evidence that shoulder pain and discomfort was affected by, or exacerbated by, being on his feet on a full shift all day. At no point did the Claimant request as adjustments an increase in rest breaks, nor a reduction in working hours, nor the provision of desk duties, even after Dr. Howard had invited him to raise matters in her letter of 11 February 2015.

434. The Claimant compared himself to a colleague, Dr. Meza-Budani, who broke his wrist and had his arm in plaster for a short time. The NHS has a "bare below the elbows" rule which is important for hygiene and infection control. Consequently, with his arm in a cast, Dr. Meza-Budani could not carry out any clinical duties. On his return to work, this doctor was placed on desk duties involving writing and typing. It is obvious from those facts that his situation was different to that of the Claimant. We did not accept the Claimant's evidence on this point.

435. Moreover, the third alleged PCP did not exist at the point at which the Respondent had actual or constructive knowledge that the Claimant was a disabled person due to his musculo-skeletal symptoms or any autoimmune rheumatological disorder.

436. A return to work plan required him to attend for three days per week at the library at Southend Hospital to complete mandatory training and to become familiar with current policies and protocols of the Respondent. In addition, he was required to attend Bedwell Acute Medical Service for two days per week.

437. The return to work plan did not require him to work a full-time shift; and it did not require him to work on his feet, or limit his ability to have rest breaks. In fact, he worked reduced hours and was mainly seated carrying out CPD in the library, with clinical duties on only two days per week.

438. The Claimant went absent sick from 3 April 2017.

Claimant's knowledge of the Employment Tribunal

439. We found that the Claimant was aware of the Employment Tribunal and its jurisdiction over matters concerning the Equality Act 2010 and whistleblowing. We found that in his evidence, he tried to minimise his knowledge and understanding; but we rejected that attempt. His evidence in cross-examination that he was "*partially aware of some rights to bring a claim*" was not credible, given the fact that he had brought a Claim against a former employer in 2002.

440. Furthermore, the Claimant knew of the public interest disclosure jurisdiction of the Tribunal from at least Autumn 2014, when he referred to making a protected disclosure to Ms. Totterdell.

441. From what we saw and heard of the Claimant, at all times, he was equipped and able to use Information Technology to find out all he needed to know in respect of the length of time limits.

442. Moreover, we found that the Claimant believed he had potential Employment Tribunal complaints against the Respondent from or about Autumn 2014 at the latest.

443. There are other pieces of evidence showing that the Claimant was a litigant who had knowledge of both the Tribunal's jurisdiction and the importance of time limits:

443.1. By inference from his cross-examination (in which he stated that extensions of time were permitted depending on the Judge's discretion), we found that he knew that there were time limits which applied to his complaints in the Employment Tribunal.

443.2. On 27 November 2015, he told NCAS that he had made protected disclosures in 2014: see p.1015-1016. He told NCAS that he had legal advice. The inference is that he well knew what a protected disclosure was in 2014.

443.3. On 23 March 2016 (correspondence with GMC), he accepted a whistleblowing detriment claim was to be brought in the Employment Tribunal.

443.4. On 15 April 2016, he stated that he was at the point of making a Claim in the Employment Tribunal: see p.1134.

443.5. He was represented by a firm of solicitors for a period in 2017, after his first Claim was issued, and, for a period from April 2018, by the Medical Defence Society.

The Law

Employment Rights Act 1996 Part IVA

444. We directed ourselves to the relevant statutory provisions of Part IVA Employment Rights 1996 ("ERA"), and considered the statutory wording. We were conscious of the importance of not adding any form of gloss to the statutory wording. We also considered guidance from the appellate courts in a number of cases.

445. Section 43B(1) includes, where relevant:

"*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) …;

(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) …

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

446. We recognised that "disclosure" for the purpose of Section 43B means more than mere communication. It requires a revelation or disclosure of facts: *Cavendish Munro Risks Management Ltd v Geduld* [2010] ICR 325 at paragraph 27

447. Section 43B(1) does recognise a distinction between "information" and "an allegation": see *Geduld* at paragraph 20. But we were cautious about approaching *Geduld* as if there was a clear dichotomy between information and allegations. As explained by Mr. Justice Langstaff in *Kilraine v Wandsworth LBC* [2016] IRLR 422 at paragraph 30:

"The dichotomy between "information" and "allegation" is not one that is made by the statute itself. It would be a pity if Tribunals were too easily seduced into asking whether it was one or the other when reality and experience suggest that

very often information and allegation are intertwined. The decision is not decided by whether a given phrase or paragraph is one or rather the other, but is to be determined in the light of the statute itself. The question is simply whether it is a disclosure of information. If it is also an allegation, that is nothing to the point."

448. A pure allegation, statement of position, opinion or complaint will not amount to information: see *Smith v London Metropolitan University* [2011] IRLR 884.

449. The "wrongdoing" provisions of s.43B(1) were subject to some examination in *Babula v Waltham Forest College [2007] EWCA Civ. 174, [2007] ICR 1026*. As the EAT explained in *Soh v Imperial College* UKEAT 0350/14, the following propositions are well-established:

449.1. The Tribunal should follow the words of the statute. No gloss upon them is required. The key question is whether the disclosure of information, in the reasonable belief of the worker making the disclosure, tends to show a state of affairs identified in section 43B: in this case, that a person had failed to comply with a legal obligation to which he was subject.

449.2. Breaking this down further, the first question for the Tribunal to consider is whether the worker actually believed that the information he was disclosing tended to show the state of affairs in question. The second question for the Tribunal to consider is whether, objectively, that belief was reasonable (see *Babula* at paragraph 81). If these two tests are satisfied, it does not matter whether the worker was right in his belief. A mistaken belief can still be a reasonable belief.

449.3. Whether the worker himself believes that the state of affairs existed may be an important tool for the Tribunal in deciding whether he had a reasonable belief that the disclosure tended to show a relevant failure. Whether and to what extent this is the case will depend on the circumstances.

450. More recently, in *Chesterton Global v Nurmohamed* [2017] IRLR 837, the Court of Appeal held that (with our emphasis added):

450.1. In applying s.43B, the tribunal had to ask whether the worker believed, at the time of making it, that the disclosure was in the public interest and whether, if so, that belief was reasonable. The tribunal had to recognise that there could be more than one reasonable view as to whether a particular disclosure was in the public interest. The necessary belief was simply that the disclosure was in the public interest; the particular reasons why the worker believed that to be so were not of the essence. While the worker had to have a genuine belief that the disclosure was in the public interest, that did not have to be the predominant motive in making it. There was not much value in providing a general gloss on the phrase "in the public interest": Parliament had chosen not to define it and the intention must have been to leave it to tribunals to apply it as a matter of educated impression (see paras 26-31).

450.2. An approach to public interest which depended purely on whether more than one person's interest was served by the disclosure would be mechanistic and require the making of artificial distinctions. Whether disclosure was in the public interest depended on the character of the interest served by it rather than simply on the number of people sharing that interest. However, it could not be said that mere multiplicity of persons whose interests were served by disclosure could never convert a personal interest into a public interest. The statutory criterion of "in the public interest" did not lend itself to absolute rules, still less when the decisive question was what could reasonably be believed to be in the public interest (paras 35-36). The correct approach was that in a whistleblower case where the disclosure related to a breach of the worker's own contract of employment, or some other matter under s.43B(1) where the interest was personal in character, there might nevertheless be features of the case that made it reasonable to regard disclosure as being in the public interest as well as in the personal interest of the worker. The question was to be answered by the tribunal considering all the circumstances of the particular case, but it could be useful to consider: the numbers whose interests the disclosure served; the nature of the interests affected and the extent to which they were affected by the wrongdoing disclosed; the nature of the wrongdoing disclosed; and the identity of the alleged wrongdoer (paras 34, 37).

451. From *Korashi v Abertawe Bro Morgannwg University* [2012] IRLR 4, a case involving a doctor in a hospital setting, it is helpful to consider the relevant paragraphs of the judgment, 61-62 (with our emphasis added):

"61. There seems to be no dispute in this case that the material for the purposes of s43B(1)(a)-(e) would as a matter of content satisfy the section. In our view it is a fairly low threshold. The words "tend to show" and the absence of a requirement as to naming the person against whom a matter is alleged put it in a more general context. What is required is a belief. Belief seems to us to be entirely centred upon a subjective consideration of what was in the mind of the discloser. That again seems to be a fairly low threshold. No doubt because of that Parliament inserted a filter which is the word "reasonable".

62. This filter appears in many areas of the law. It requires consideration of the personal circumstances facing the relevant person at the time. Bringing it into our own case, it requires consideration of what a staff grade O&G doctor knows and ought to know about the circumstances of the matters disclosed. To take a simple example: a healthy young man who is taken into hospital for an orthopaedic athletic injury should not die on the operating table. A whistleblower who says that that tends to show a breach of duty is required to demonstrate that such belief is reasonable. On the other hand, a surgeon who knows the risk of such procedure and possibly the results of meta-analysis of such procedure is in a good position to evaluate whether there has been such a breach. While it might be reasonable for our lay observer to believe that such death from a simple procedure was the product of a breach of duty, an experienced surgeon might take an entirely different view of what was reasonable given what further

information he or she knows about what happened at the table. So in our judgment what is reasonable in s43B involves of course an objective standard - that is the whole point of the use of the adjective reasonable – and its application to the personal circumstances of the discloser. It works both ways. Our lay observer must expect to be tested on the reasonableness of his belief that some surgical procedure has gone wrong is a breach of duty. Our consultant surgeon is entitled to respect for his view, knowing what he does from his experience and training, but is expected to look at all the material including the records before making such a disclosure. To bring this back to our own case, many whistleblowers are insiders. That means that they are so much more informed about the goings-on of the organisation of which they make complaint than outsiders, and that that insight entitles their views to respect. Since the test is their "reasonable" belief, that belief must be subject to what a person in their position would reasonably believe to be wrong-doing."

Protected disclosures

452. For a qualifying disclosure to be protected, it must be made in accordance with any of sections 43C – 43H: section 43A ERA. These subsections set out various categories of person to whom a disclosure may validly be made, and the conditions attached to disclosures made to each of them.

453. By section 43C(1), a qualifying disclosure is made if a disclosure is made by the worker to his employer and, where the worker reasonably believes that the relevant failure relates solely or mainly to any other matter for which a person other than his employer has legal responsibility, to that other person.

454. By section 43F(1), a qualifying disclosure is made if the worker makes the disclosure to a person prescribed by order under this section made by the Secretary of State and:

"(b) reasonably believes –

(i) that the relevant failure falls within any description of matters in respect of which that person is so prescribed, and

(ii) that the information disclosed, and any allegation contained in it, are substantially true."

455. Section 43F(2) provides:

"(2) An order prescribing persons for the purposes of this section may specify persons or descriptions of persons, and shall specify the descriptions of matters in respect of which each person, or persons of each description, is or are prescribed."

456. The Public Interest Disclosure (Prescribed Persons) Order 2014 was made under section 43F ERA. It includes the following bodies and the description of the matters prescribed:

<table>
<tr><td>Health Education England</td><td>Matters relating to –

(a) Health Education England's functions under sections 97(1) and 98(1) of the Care Act 2014 (which relate to planning and delivering education and training for health care workers and to ensuring sufficient skilled and trained health care workers are available for the health service throughout England);

(b) the functions exercised by Local Education and Training Boards, including any functions of Health Education England exercised by Local Education and Training Boards on its behalf; or

(c) any activities not covered by (a) or (b) in relation to which Health Education England exercises its functions.

Section 97(1) Care Act 2014 provides that HEE must perform on behalf of the Secretary of State the duty under section 1F(1) of the National Health Service Act 2006 (planning and delivery of education and training), so far as that duty applies to the functions of the Secretary of State.

Section 98 Care Act 2014 provides that HEE must exercise its functions with a view to ensuring that a sufficient number of persons with the skills and training to work as health care workers for the purposes of the health service is available to do so throughout England.</td></tr>
<tr><td>A member of the House of Commons.</td><td>Any matter prescribed in this column of the Schedule to the Order.</td></tr>
<tr><td>Monitor</td><td>Matters relating to –

(a) the regulation and performance of NHS foundation trusts; and

(b) any activities not covered by (a) in relation to which Monitor exercises its functions.

Monitor was established by section 2 of the Health and Social Care (Community Health and Standards) Act 2003.</td></tr>
</table>

457. Section 43G ERA provides:

43G.- Disclosure in other cases.

(1) A qualifying disclosure is made in accordance with this section if –

[...]

(b) [the worker] reasonably believes that the information disclosed, and any allegation contained in it, are substantially true,

(c) he does not make the disclosure for purposes of personal gain,

(d) any of the conditions in subsection (2) is met, and

(e) in all the circumstances of the case, it is reasonable for him to make the disclosure.

(2) The conditions referred to in subsection (1)(d) are –

(a) that, at the time he makes the disclosure, the worker reasonably believes that he will be subjected to a detriment by his employer if he makes a disclosure to his employer or in accordance with section 43F,

(b) that, in a case where no person is prescribed for the purposes of section 43F in relation to the relevant failure, the worker reasonably believes that it is likely that evidence relating to the relevant failure will be concealed or destroyed if he makes a disclosure to his employer, or

(c) that the worker has previously made a disclosure of substantially the same information –

(i) to his employer, or

(ii) in accordance with section 43F.

(3) In determining for the purposes of subsection (1)(e) whether it is reasonable for the worker to make the disclosure, regard shall be had, in particular, to -

(a) the identity of the person to whom the disclosure is made,

(b) the seriousness of the relevant failure,

(c) whether the relevant failure is continuing or is likely to occur in the future,

(d) whether the disclosure is made in breach of a duty of confidentiality owed by the employer to any other person,

(e) in a case falling within subsection (2)(c)(i) or (ii), any action which the employer or the person to whom the previous disclosure in accordance with section 43F was made has taken or might reasonably be expected to have taken as a result of the previous disclosure, and

(f) *in a case falling within subsection (2)(c)(i), whether in making the disclosure to the employer the worker complied with any procedure whose use by him was authorised by the employer.*

Detriment complaints under section 47B ERA and the test of causation

458. Under section 47B ERA:

> "(1) *A worker has the right not to be subjected 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*."

459. The proper test as to whether a detriment has been suffered is set out in *Shamoon v Chief Constable of the RUC* [2003] UKHL 11, ICR 337 at paragraphs 34-35. It was not necessary for the worker to show that there was some physical or economic consequence flowing from the matters complained of. In short, per Lord Hope:

> "*Is the treatment of such a kind that a reasonable worker would or might take the view that in all the circumstances it was to his detriment? An unjustified sense of grievance cannot amount to "detriment"."*

460. Section 47B(2) ERA precludes a claim of detriment where it amounts to dismissal.

Burden of proof under section 47B ERA detriment complaints

461. Under section 48(2) ERA 1996 where a claim under section 47B is made, "*it is for the employer to show the ground on which the act or deliberate failure to act was done*".

462. Section 47B will be infringed if the protected disclosure materially influenced (in the sense of being more than a trivial influence) the employer's treatment of the whistleblower: see *Fecitt v. NHS Manchester [2012] IRLR 64*, an approach that mirrors the approach adopted in unlawful discrimination cases and reinforces the public interest in ensuring that unlawful discriminatory considerations are not tolerated and should play no part whatsoever in an employer's treatment of employees and workers.

Decision-making process

463. We sought to apply the guidance set out in *Harrow LBC v Knight* [2003] IRLR 140 and in *Blackbay Ventures v Gahir* [2014] IRLR 416, helpfully summarised in the Submissions of Ms. McCann.

Automatic unfair dismissal: section 103A ERA

464. On a claim of unfair dismissal for making a protected disclosure under section 103A ERA, a tribunal must identify whether the making of the disclosure had been the reason, or principal reason, for the dismissal: *Kuzel v Roche Products Ltd* [2008] IRLR 530.

465. What was the set of facts or beliefs operating on the mind of the employer causing it to dismiss is a question of direct evidence or inference from the primary facts.

Jurisdictional points

466. Section 48 (3) ERA provides that an employment tribunal shall not consider a complaint under section 48 unless it is presented –

> "(a) before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them, or
>
> (b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months."

467. Section 48(4) provides that –

> "For the purposes of subsection (3) –
>
> (a) where an act extends over a period, the "date of the act" means the last day of that period, and
>
> (b) a deliberate failure to act shall be treated a done when it was decided on;
>
> and, in the absence of evidence establishing the contrary, an employer shall be taken to decide on a failure to act when he does an act inconsistent with doing the failed act or, if he has done no such inconsistent act, when the period expires within which he might reasonably have been expected to do the failed act if it was to be done."

468. In *Arthur v London Eastern Railway* [2007] ICR 193, the following guidance was provided on the application of section 48(3) ERA:

468.1. The aim of s.48(3) was to exclude from the jurisdiction of tribunals any complaints that were not made timeously. In general, a complaint to a tribunal had to be made within three months of the act complained of. However, Parliament considered it necessary to make exceptions to the general rule where an act or failure in the three-month period was not an isolated incident.

468.2. An act extending over a period may be treated as a single continuing act and the particular act occurring in the three-month period may be treated as the last day on which the continuing act occurred.

468.3. The provisions in s.48(3) regarding the complaint of an act that was part of a series of similar acts was also aimed at allowing employees to complain about acts of detriment that were outside the three-month period. However, there had to be a necessary connection between the acts in the three-month period and the acts outside it. The acts had to be

part of a series and had to be similar to one another. The last act or failure within the three months might be treated as part of a series of similar acts or failures occurring outside the period and, if it was, a complaint about the whole series of similar acts or failures would be treated as being in time.

468.4. It was not a particularly enlightening exercise to ask what made acts part of a series, or what made one act similar to another. It was preferable to find the facts before attempting to apply the law. In order to determine whether the acts were part of a series, some evidence was needed to determine what link, if any, there was between the acts in the three-month period and the acts outside the three-month period. Even if it was decided that there was no continuing act or series of similar acts, that would not prevent the complainant from relying evidentially on the pre-limitation period acts to prove the acts or failures that established liability. It would in many cases be better to hear all the evidence and then decide the case in the round, including limitation questions.

468.5. It is possible that a series of apparently unconnected acts could be shown to be part of a series or to be similar in a relevant way by reason of them all being done to the claimant on the ground that he had made a protected disclosure (post, paras 39, 41).

469. The burden is on the Claimant to show that it was not reasonably practicable to present the complaints in time. Reasonably practicable does not mean "reasonable" nor "physically possible". It means "reasonably feasible": *Palmer v Southend on Sea BC* [1984] ICR 372.

470. In *Palmer*, May LJ explained that the test was an issue of fact for the Tribunal and gave examples of facts that may be relevant in certain cases: see p.385B-F. This concludes:

"*Any list of possible relevant considerations, however, cannot be exhaustive and, as we have stressed, at the end of the day the matter is one of fact for the industrial tribunal taking all the circumstances of the given case into account*."

The Equality Act 2010

Discrimination by Victimisation

471. Section 27 provides, where relevant:

"*A person (A) victimises another person (B) if A subjects B to a detriment because –*

(a) B does a protected act, or

(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act –

(a) *bringing proceedings under this Act;*

(b) *giving evidence or information in connection with proceedings under this Act;*

(c) *doing any other thing for the purposes of or in connection with this Act;*

(d) *making an allegation (whether or not express) that A or another person has contravened this Act.*"

472. The detriment must be "because of" the protected act, but this is not a "but for" test: see *Bailey v Chief Constable of Greater Manchester* [2017] EWCA Civ. 425. Although motivation is not required, the necessary link in the mind of the discriminator between the doing of the acts and the less favourable treatment must be shown to exist: see *R (E) v Governing Body of JFS* [2009] 1 AER 319, approving *Nagarajan v London Regional Transport* [1999] IRLR 572 on this point.

473. If the tribunal is satisfied that the protected act is one of the effective reasons for the treatment, that is sufficient to establish discrimination. It need not be the only or even the main reason.

474. The proper test as to whether a detriment has been suffered is set out in *Shamoon,* above.

Burden of proof in discrimination cases

475. We reminded ourselves of the reversal of the burden of proof provisions within section 136(2) EA 2010, as explained in *Igen v Wong* [2005] EWCA Civ. 142 and *Madarassy v Nomura* [2007] ICR 867.

476. The burden of proof is not shifted simply by showing that the claimant has suffered a difference in treatment or detrimental treatment and that he has a protected characteristic or has done a protected act: *Madarassy*; *Bailey v Chief Constable of Greater Manchester* [2017] EWCA Civ. 425.

477. It is important, however, not to make too much of the role of the burden of proof provisions at section 136. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they do not apply where the tribunal is in a position to make positive findings on the evidence one way or the other: *Hewage v Grampian Health Board* [2013] UKSC 37.

Disability Discrimination

478. In this case, complaints of failure to make reasonable adjustments (section 20-21 EA 2010) are alleged. The Tribunal directed itself to the relevant law as follows.

Duty to make reasonable adjustments

479. Given the carefully drawn statutory duty to make reasonable adjustments, it is helpful to set out the relevant statutory provisions at the outset:

"*20 Duty to make adjustments*

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements.

(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(4) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.

21 Failure to comply with duty

(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

(2) *A discriminates against a disabled person if A fails to comply with that duty in relation to that person ...*"

480. Paragraph 20 of Schedule 8 EA 2010 provides a limitation on the duty where the Respondent lacks the requisite knowledge:

"20. Lack of knowledge of disability, etc.

(2) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know -

(a) in the case of an applicant or potential applicant, that an interested disabled person is or may be an applicant for the work in question;

(b) [in any case referred to in Part 2 of this Schedule], that an interested disabled person has a disability and is likely to be

placed at the disadvantage referred to in the first, second or third requirement."

481. A statutory Code of Practice on Employment has been published by the Equality and Human Rights Commission 2011 ("the Code"). The Courts are obliged to take it into consideration whenever relevant.

482. Chapter 6 of the Code is concerned with the duty to make reasonable adjustments, and emphasises that the duty is one requiring an employer to take positive steps to ensure disabled people can progress in employment. The Code includes:

482.1 The phrase "provision, criterion or practice" (which is not defined in the EA 2010) should be construed widely so as to include any formal or informal policies, rules, practices, arrangements, conditions, prerequisites, qualifications or provisions. It may include one-off decisions and actions. (paragraphs 4.5 and 6.10).

482.2 Paragraphs 6.23 to 6.29 of the Code give guidance as to what is meant by "reasonable steps".

482.3 Paragraph 6.28 identifies some of the factors which might be taken into account when deciding whether a step is reasonable. They include the size of the employer; the practicability of the proposed step; the cost of making the adjustment; the extent of the employer's resources; and whether the steps would be effective in preventing the substantive disadvantage.

483. In *Carrera v United First Partners Research*, the Employment Appeal Tribunal held that a PCP did not require an element of compulsion; an expectation or assumption placed upon an employee may suffice. HHJ Eady gave the following guidance at paragraph 31-37:

483.1. The identification of the PCP was an important aspect of the Tribunal's task; the starting point for its determination of a claim of disability discrimination by way of a failure to make reasonable adjustments.

483.2. It is important to be clear as to how the PCP is to be described in any particular case.

483.3. The protective nature of the legislation meant a liberal rather than an overly technical approach should be adopted to the meaning of "provision criterion or practice".

483.4. The Tribunal had taken an unduly narrow view of the Claimant's identification of the PCP, and that it should, instead, have adopted a real world view of what a requirement was in the context of the case.

484. An Employment Tribunal considering a claim that an employer has discriminated against an employee by failing to comply with the duty to make reasonable adjustments must identify:

484.1. the relevant provision, criterion or practice made by the employer; and/or

484.2. the relevant physical features of the premises occupied by the employer and/or the auxiliary aid required;

484.3. the identity of non-disabled comparators (where appropriate); and

484.4. the nature and extent of the substantial disadvantage suffered by the Claimant.

485. The above steps follow the guidance provided in _Environment Agency v Rowan_ [2008] IRLR 20 at paragraph 27.

486. Substantial disadvantage is such disadvantage as is more than minor or trivial. The Code (at paragraph 6.16) emphasises that the purpose of the comparison is to determine whether the disadvantage arises in consequence of the disability and that, unlike direct or indirect discrimination, there is "no requirement to identify a comparator or comparator group whose circumstances are the same or nearly the same" as those of the disabled person.

487. In _Archibald v Fife_ [2004] IRLR 651, the House of Lords held what steps are reasonable depends on the circumstances of the particular case, which the employment tribunal must establish (paragraph 43).

488. Even where the duty is engaged, not all adjustments will be reasonable even where they overcome the disadvantage.

Burden of proof in complaints of failure to make reasonable adjustments

489. In respect of the application of these provisions in complaints of breach of the duty to make reasonable adjustments, guidance is set out in _Project Management Institute v Latif_ [2007] IRLR 579 (Elias P, as he then was, presiding) at paras 44, 53-54 that.

490. In short, if the burden shifts, the employer must show the disadvantage would not have been eliminated or reduced by the proposed adjustment and/or that the adjustment was not a reasonable one to make.

Jurisdiction: Time Limits

491. Section 123 EA 2010 provides so far as relevant that:

"(1) … proceedings on a complaint … may not be brought after the end of –

(a) the period of 3 months starting with the date of the act to which the complaint relates, or

(b) such other period as the employment tribunal thinks just and equitable.

…

(3) For the purposes of this section –

(a) conduct extending over a period is to be treated as done at the end of the period;

(b) failure to do something is to be treated as occurring when the person in question decided on it.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something –

(a) when a person does an act inconsistent with doing it, or

(b) if a person does no inconsistent act, on the expiry of the period in which the person might reasonably have been expected to do it."

492. In respect of the failure to comply with the duty to make reasonable adjustments imposed by section 20 EA 2010, to determine when the failure is to be treated as occurring, section 123(4) EA 2010 must be applied. The proper application of these provisions has been recently considered in *Abertawe Bro Morgannwg University Local Health Board v Morgan* [2018] EWCA Civ. 640 at paragraphs 11-15:

492.1. Applying subsection 123(4)(b), the failure to comply with the duty is to be treated as occurring on the expiry of the period in which the employer might reasonably have been expected to make the adjustments.

492.2. Ascertaining when the respondent might reasonably have been expected to comply with its duty is not the same as ascertaining when the failure to comply with the duty began.

492.3. The period in which the employer might reasonably have been expected to comply with its duty ought in principle be assessed from the claimant's point of view, having regard to the facts known or which ought reasonably to have been known by the claimant at the relevant time.

493. The principles to be applied in the application of section 123(1) EA 2010 have recently been summarised in *Abertawe Bro Morgannwg University Local Health Board v Morgan*, to which we have directed ourselves. The ET's discretion to extend time under the "just and equitable" test is the widest possible discretion: *Morgan* at paragraph 17.

494. There is no justification for reading into the statutory language any requirement that the Tribunal must be satisfied that there was a good reason for the delay, nor that time cannot be extended in the absence of an explanation of the delay from the claimant. The most that can be said is that whether there is any explanation or apparent reason for the delay and the nature of any such reason are relevant matters to which the tribunal must have regard. If a claimant gives no direct evidence about

why he did not bring his claims sooner a Tribunal is not obliged to infer that there was no acceptable reason for the delay, or even that if there was no acceptable reason that would inevitably mean that time should not be extended: *Abertawe Bro Morgannwg University Local Health Board v Morgan* at paragraph 25.

494.1. Factors which are almost always relevant to consider when exercising any discretion whether to extend time are:

(a) the length of, and reasons for, the delay and

(b) whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh). See *Morgan* at paragraph 19.

Submissions

495. We have explained that the parties made oral submissions, supplemented by submissions in writing, all of which we considered. The Claimant also produced a handwritten list of documents that he wished to be considered, entitled "Documents for the attention of the Tribunal", which we considered.

496. The Claimant produced copies of the following authorities:

Michalak v Mid Yorkshire Hospitals NHS Trust, Leeds Employment Tribunal, Case: 1810815/2008

Hussain v Surrey and Sussex Healthcare NHS Trust [2011] EWHC 1670

Mattu v University of Hospitals of Coventry and Warwickshire NHS Trust [2012] EWCA Civ. 641

West London Mental Health NHS Trust v Chhabra [2013] UKSC 80

NHS Fife Board v Stockman UKEATS/0048/13

Norman & Douglas v National Audit Office UKEAT/0276/14

Fynes v St. George's Hospital NHS Trust [2014] EWHC 756

McMillan v Airedale NHS Foundation Trust [2014] EWCA Civ. 1031

Beatt v Croydon Health Services NHS Trust [2017] EWCA Civ. 401

Jahangiri v St. George's University Hospitals NHS Foundation Trust [2018] EWHC 2278

Stewart v NHS Business Services Authority [2018] EWHC 2285

Al-Obaidi v Frimley Health NHS Foundation Trust [2018] EWHC 2494

497. The Claimant referred to some of these authorities in his oral submissions. From our consideration of the cases, we noted that they were decided on different facts to those in the present case, or in different contexts. For example, *McMillan* and *Al-Obaidi* concerned injunction applications; and one (*Michalak*) was a first instance decision which dealt with remedy (not liability). We did not disagree with the points of law applied or made in the list of cases above, but that they were of limited or no relevance in this case given our findings of fact.

498. Counsel for the Respondent provided a bundle of authorities, containing key cases within her submissions. It would not be proportionate to list them here.

499. We took into account each of the submissions made, even if not all submissions are referred to below.

Conclusions:

500. Applying the above law to the findings of fact made, the Tribunal reached the following conclusions on each of the agreed issues.

Conclusions on the First List of Issues

Issue 1 (protected disclosures) and Issue 3 (protected acts)

501. From our findings of fact, we have concluded that the alleged protected disclosures were not made; and, where disclosures were made, they were not protected disclosures.

Issue 1(a): 10 July 2014, to Dr. Howard

502. We concluded that a disclosure was made which the Claimant believed tended to show that a legal obligation (the WTD or WTR 1998) was breached or was likely to be breached by the proposed rota.

503. However, the Tribunal found that this belief was not a reasonable belief. We repeat our findings of fact at paragraphs 80-83. The Claimant must have been aware that the rota was compliant with those legal obligations in respect of Working Time (because it was a 12 doctor rota); and the Claimant's reference to his colleagues performing as if "*legally drunk*" after one night shift betrays that his perception of risk was exaggerated.

504. We found that the Claimant did not believe that the disclosure was made in the public interest. But, if we are wrong about this, it was not a reasonable belief in any event.

Issue 1(b): later in July 2014; alleged protected disclosure to Dr. Howard that the Respondent's recruitment of Clinical Specialist doctors from overseas on the terms of the Contract was discriminatory

505. We concluded that no such disclosure was made on or about the date alleged. We repeat paragraphs 84-89 of the findings of fact.

Issue 1(c): 28 September 2014; alleged protected disclosure to Dr. Willis

506. We concluded that no such disclosure was made. We repeat paragraphs 90-94 of the findings of fact.

Issues 2(a) – (b)(i) Respondent not informing him of Acting Consultant vacancy

507. This alleged detriment did not occur. No other doctor was given preferential treatment and the Respondent was informed of the Acting Consultant vacancy in the same way as any other Clinical Specialist in the Department. We repeat the findings of fact at paragraphs 97-101. In the circumstances, where this was such an important career opportunity, it was inevitable that the Clinical Specialists and the other clinical staff in the Department would have discussed it; therefore, whether or not he was expressly told, the Claimant well-knew of this vacancy by the time that it was advertised.

Issue 1(d): 1 October 2014 to Ms. Totterdell - the Respondent had imposed whistleblowing detriment by failing to inform him about the Acting Consultant vacancy

508. We concluded that no such disclosure was made to Ms. Totterdell on the date alleged, or at all. We repeat the findings of fact at paragraphs 102-106 above.

Issue 1(e): 13 November 2014; alleged protected disclosure to Mr Warrior and/or protected act

509. We repeat the findings of fact at paragraphs 128-133: no such alleged disclosure was made, nor did such a protected act take place. We were sure that if such a serious allegation had been made, Mr. Warrior would have communicated this in some way to Mr. Rothnie or a HR officer, or some other person, and that a written record would exist.

Issue 1(f): October 2014; alleged protected disclosure to Mr Rothnie

510. We concluded that no such disclosure was made on or about 23 October 2014. We repeat the findings of fact at paragraphs 134-136. Had such a serious matter been disclosed, we are satisfied that Mr. Rothnie would have stated this in his notes of that meeting. We accepted the evidence of Mr. Rothnie in respect of what was said to him.

Issue 1(g): October 2014, to GMC

511. We found that the disclosure of fact alleged was not made to the GMC, and no such protected act was done by the Claimant. We repeat paragraphs 137-139 of the findings of fact above.

512. In respect of alleged disclosure 1(g), this could not have been a protected disclosure in any event, because the GMC is not a “prescribed person” in respect of the subject matter of the alleged disclosure. The GMC does not have functions about the way in which NHS Trusts are managed, but only in respect of “*matters relating to the registration and fitness to practise of a member of a profession regulated by the*

Council' and any other activities in relation to which the GMC has functions: see Schedule to the Public Interest Disclosure (Prescribed Persons) Order 2014. The alleged disclosure does not come within sections 43G or 43H ERA.

Issues 1(h) and 1(k): disclosures to the Care Quality Commission, 17 March and 4 June 2015

513. We repeat our findings of fact at paragraphs 151-152 above. We concluded that the Claimant did not make protected disclosures to the CQC or do a protected act on the dates alleged.

514. Having studied the disclosure made on 5 June 2015, on the basis that it might be argued that it formed part of series of correspondence which could potentially amount to a disclosure of information (because it was made in a return call to that made on 4 June 2015, see p1098), we concluded that it was not a disclosure of information. From the call record, no specific facts were disclosed; we find that the call was likely to have consisted of a series of allegations, and was not a qualifying disclosure of information: see *Kilraine* and *Geduld*.

515. In any event, any statements made by the Claimant to the CQC (whether on 4 or 5 June or 17 March 2015) were not known to the Respondent, and could not have caused the detriments alleged.

Issue 1(i): 20 April 2015 (alleged protected disclosure to Mary Foulkes and/or protected act)

516. We repeat our findings of fact at paragraphs 160-165 above. We concluded that the alleged disclosure was not made, and the alleged protected act did not occur. The Claimant's own case in respect of this allegation is inherently inconsistent: compare Paragraph 33 of his Re-Amended Grounds of Claim (p.104 - which refers to an alleged disclosure of the "*discriminatory nature*" of the new contract, which is by inference a reference to race discrimination) to his witness statement (in which the disclosure alleged is that he was being discriminated against because of his disability). Moreover, the contemporaneous documentary evidence satisfied us that this alleged disclosure was not made and this protected act did not occur.

Issue 1(q): mid-April 2016 and mid-2016; disclosures to HEE about disclosures made to Dr. Howard and others

517. The Claimant did not make the protected disclosures on or about the dates alleged to HEE. We repeat our findings of fact at paragraphs 153-159 above.

518. In any event, the Respondent did not know of any disclosures made by the Claimant to HEE on either of the dates relied on.

519. Furthermore, the HEE is not a "prescribed body" for the disclosures alleged. HEE is a prescribed body for the purposes of an alleged protected disclosure only in relation to matters identified above. Therefore, these alleged disclosures cannot be protected. The only matter alleged to have been disclosed which potentially falls within

the "description of matters" for which they are a prescribed body is that relating to suspected financial irregularity concerning release for SAS study days funded by HEE.

520. In respect of that matter, we concluded that the Claimant did not make a disclosure of information, which he reasonably believed tended to show financial irregularity or breach of a legal obligation; this is not mentioned in his email to HEE of 25 October 2017 (p.3729-3730). At most, the Claimant's email of 1 November 2017 suggests the Claimant had a suspicion over the funding of study days; but he made no disclosure of information about this.

Issue 1(l): May 2015; alleged protected disclosure to John Findley and/or protected act

521. We repeat our findings of fact at paragraphs 166-168 above. We concluded that no protected disclosure was made and no protected act was done.

522. In any event, we concluded that whatever statements were made to Mr. Findley in May 2015, they had no material influence on the alleged detriments which post-date this alleged disclosure because the relevant managers of the Respondent (who would have to be actors or decision makers in respect of the alleged detriments) did not know of them.

Issue 1(j)(p) & (s): 25 May and 8 December 2016; alleged protected disclosures to the National Guardian's Office and/or protected acts

523. We repeat our findings of fact at paragraphs 169-174 above. We concluded that no protected disclosures were made on the dates alleged.

524. In any event, we concluded that whatever statements were made to the National Guardian, they could not be protected disclosures. The National Guardian is not a "prescribed body" under the 2014 Order. As a result, the Claimant would need to bring these disclosures within the ambit of sections 43G or 43H ERA, which, on the evidence, he is unable to do, because:

> 524.1. Section 43G(1)(e) requires that, in all the circumstances, it is reasonable to make the disclosure. This objective test cannot be met by the Claimant in the circumstances of this case, where he provided no evidence of the disclosures nor of evidence to establish that any belief was reasonable when viewed objectively.
>
> 524.2. Section 43H requires the worker to reasonably believe that the information disclosed, and any allegation, are substantially true. The Claimant is unable to show on the evidence any disclosure was made with such a reasonable belief.
>
> 524.3. The disclosure must be that the relevant failure is an "*exceptionally serious*" one. From the findings of fact, we concluded that whatever complaint was made, even if serious, was not "*exceptionally serious*".

525. Finally, we concluded that whatever statements were made to the National Guardian in December 2016, they could have had no material influence on the alleged

detriments which post-date this alleged disclosure, because the Respondent did not know of them (and it was never suggested to any Respondent witness that they did know of them).

Issue 1(m): 26 November 2015: alleged protected disclosure to Monitor and/or protected act

526. We repeat our findings of fact at paragraphs 175-177 above. We concluded that no protected disclosures were made on the date alleged, because we found:

526.1. Although they showed that the Claimant believed his statements tended to show breach of various legal obligations, his beliefs were not reasonable.

526.2. It was not reasonable for the Claimant to believe that such disclosures were made in the public interest.

1(n): 4 December 2015: alleged protected disclosure to David Amess MP and/or protected act

527. The Claimant has not proved that he made a protected disclosure. We repeat our findings of fact at paragraphs 179-180 above. In any event, there was no evidence that any employee of the Respondent knew of this meeting prior to these proceedings.

528. Moreover, there is insufficient evidence to prove that the meeting on 5 December 2015 contained a protected act by the Claimant. The reference to "discrimination", without more, does not amount to something done under the Equality Act 2010.

Issue 1n: 26 February 2016; protected disclosure to Mark Francois, MP and/or protected act.

529. The Claimant has not proved that he made a protected disclosure to Mr. Francois MP. We repeat our findings of fact at paragraphs 182-185 above.

530. Moreover, there is insufficient evidence to prove that the meeting on 16 February 2016 contained a protected act by the Claimant. The reference to "discrimination", without more, does not amount to something done under the Equality Act 2010.

Issue 1(r): October 2016; protected disclosure to Parliamentary Select Committee, and/or protected act

531. We found that no such disclosure was made and no such protected act occurred in October 2016. We repeat the findings of fact at paragraphs 187-188.

Issues 2 and 4: Detriment Claims and Jurisdiction (time limits)

532. We have decided to consider together the issues of whether the Tribunal has jurisdiction for each complaint and what if any detriments occurred. Where we have

found that the Tribunal lacked jurisdiction, we have gone on to give alternative findings on the merits of the complaint. This is to allow the parties to know our full conclusions in any complaint where a party considers we have made an error on the issue of jurisdiction.

Issues 2(a) – (b)(i) Respondent not informing Claimant of Acting Consultant vacancy

533. This complaint was presented in the first Claim, on 5 May 2017. From the findings of fact, at the latest, the Claimant knew of the vacancy on 29 September 2014 (when he applied for it). Therefore, any omission must have ended on, if not before, that date. Accordingly, this complaint was presented over two years outside the primary limitation period.

534. In respect of these complaints of whistleblowing detriment, we concluded that there was no link between this omission and the other alleged detriments; it did not form part of any series. Moreover, it was not part of any continuing act. We noted that this complaint is made against Dr. Howard; but there was no evidence that she was involved in actions or decisions leading to the alleged detriments complained of after May 2015.

535. The Claimant adduced no evidence to show that it was not reasonably practicable to present the complaint in time. Indeed, from the evidence in this case, it is clear that it was reasonably practicable for the Claimant to have presented this complaint in time, given his computer and IT skills (evident from the hearing), his previous experience with a Tribunal Claim (see below), and the availability of advice from the BMA.

536. We went on to consider this allegation as a victimisation complaint under section 27 EA. The question was whether this complaint was presented within such further time as was just and equitable. We considered that it was not presented within such further time as was just and equitable. In particular:

536.1. The delay was very long in this case. The complaint was stale when it was presented.

536.2. There was no evidence of any reason (let alone a good reason) for the delay.

536.3. It is a relevant factor that there was no good reason for the delay. In particular:

536.3.1. Although a lay person, albeit a professional one, the Claimant was very aware of his rights to bring a claim against his employer in the Employment Tribunal. He held this knowledge prior to his employment with the Respondent. At p.1018, the note of his telephone call to Katy McInlay of Monitor refers to Employment Tribunal proceedings brought against a former employer in North Devon.

536.3.2. The Claimant knew of the existence of time limits for presenting his complaints: see findings of fact at paragraph 443.1 above.

536.3.3. The Claimant admitted in cross-examination to being in receipt of legal advice in his meeting with Ms. Maton on 17 March 2017.

536.3.4. The Claimant received advice and assistance from his BMA representative, Amanda Saha, from 2014 onwards. This was in relation to a number of matters, which featured in his complaints including the revised Clinical Specialist contract matters, his exclusion, and clinical and behavioural issues.

536.3.5. In cross-examination, but not in his witness statement, the Claimant stated that he had been advised by Ms. Saha to await the outcome of the internal grievance proceedings before presenting his Claims. We found that was unlikely to be an accurate account of what was said to him, because Ms. Saha appeared a competent representative judging by her documentary submissions and such a representative was more likely to advise an employee to file proceedings on a protective basis awaiting a grievance outcome.

536.4. The Claimant was intelligent and sufficiently able with IT to have made all necessary inquiries online.

537. For the avoidance of doubt, we accepted that the Respondent suffered only minor prejudice as a result of the delay, given the clear evidence of Dr. Howard and Dr. Willis. After weighing this factor, however, we did not conclude that this made the extension required just and equitable. The factors set out in the sub-paragraphs above outweigh this factor. In this case, we concluded that to allow the extension of time required would render the statutory limitation period virtually pointless. The Claimant has not put forward any (or any sufficient) evidence to show that it would be just and equitable to extend time.

538. If the Tribunal has jurisdiction to consider these complaints under section 47B ERA and section 27 EA, we concluded that this alleged detriment did not occur. No other doctor was given preferential treatment and the Claimant was informed of the Acting Consultant vacancy in the same way as any other Clinical Specialist in the Department. We repeat the findings of fact at paragraphs 97-101. In the circumstances, where this was such an important career opportunity, it was inevitable that the Clinical Specialists and the other clinical staff in the Department would have discussed it; therefore, whether or not he was expressly told, the Claimant well-knew of this vacancy by the time that it was advertised.

2ci: False allegation of bullying by the Claimant

539. We concluded that the Tribunal did not have jurisdiction to consider these complaints of victimisation under section 27 EA or detriment under section 47B ERA, made against Dr. Howard, for the same reasons set out in our conclusions under issues 2(a)-(b)(i) above.

540. If the Tribunal does have jurisdiction to consider these complaints, we concluded that the Claimant was not subjected to the detriment alleged. We repeat our findings of fact at paragraphs 140-144 above. The statement made by Caroline Howard, that another Clinical Specialist had told her that he felt the Claimant was "bullying" him not to sign, was not a false statement.

541. In any event, the fact that Dr. Howard made this statement to the Claimant had nothing to do with any of the alleged disclosures.

2c(ii) February 2015: Claimant denied access to the local injury allowance policy; Respondent did not inform the Claimant of the scheme until March/April 2017

542. These complaints are presented almost two years outside the primary limitation period. The act of refusal was the decision of Mr. Butcher on 12 February 2015, p.708. This was an act with continuing consequences. There could be no continuing act until April 2017, when the Claimant's right to apply was accepted by Ms. Bridge.

543. Moreover, the act of refusal of 12 February 2015 is the only allegation against Mr. Butcher. He left the Respondent's employment in or about February 2015.

544. We concluded that this alleged detriment was not part of any continuing act; it was not part of a continuing state of affairs. It was the result of the interpretation of the policy made by Mr. Butcher, albeit one that was mistaken.

545. Furthermore, directing ourselves to section 48 ERA, this act by Mr. Butcher was not part of a series of similar acts or failures. Mr. Butcher did not know of any of the alleged disclosures which pre-dated his letter. Therefore, such disclosures could not have affected his decision about eligibility.

546. We concluded that it was reasonably practicable for the Claimant to have brought this complaint under section 47B ERA within the primary limitation period. We repeat our reasons set out under issues 2(a)-(b)(i) above.

547. We concluded that this complaint of victimisation under section 27 EA was not presented within such time as was just and equitable. We repeat our reasons in our conclusions to issues 2(a)-(b)(i) above. Furthermore, in this complaint, there is more prejudice to the Respondent, where the witness (Mr. Butcher) has left his employment.

548. If the Tribunal has jurisdiction to hear this complaint of victimisation or whistleblowing detriment, our conclusions are as follows.

549. In around April 2017, Ms. Bridge decided that the Claimant was able to apply for TIA and that he was potentially eligible subject to meeting the Scheme criteria. He applied.

550. Ms. Maton decided that the Claimant did not meet the eligibility criteria, for objective reasons which were not influenced by any protected disclosure or protected act. In particular, she concluded that he had no entitlement because:

550.1 He was not absent from work for an injury/health condition wholly or mainly attributable to his NHS employment ("wholly or mainly" being defined in the policy as meaning a "contributory causal connection", see p.2144); and

550.2 The incident was not recorded as an incident via the Trust's Incident Reporting System at the time it occurred or as soon as reasonably practicable thereafter.

551. We concluded that the Claimant had not suffered the alleged detriment. We repeat our findings of fact at paragraphs 145-150 above. A reasonable worker would not, in circumstances where he did not meet the criteria for a policy, view an initial failure to accept an application as a detriment, in circumstances where an application was subsequently accepted and found not to meet the criteria.

Issue 2(d)(i): alleged refusal to make reasonable adjustments to allow the Claimant to continue working, despite making adjustments for a colleague with a similar injury

552. The Respondent contended that this complaint was *res judicata*, and that the Tribunal had no jurisdiction to hear it for that reason.

553. We concluded that this was a complaint of a failure to make a reasonable adjustment dressed up as a complaint of victimisation or whistleblowing detriment. We agreed with Counsel's submissions and concluded as follows:

553.1 The Claimant had presented an identical complaint in his first Claim Form, which was then withdrawn in his amended and re-amended Grounds (submitted by his then solicitors): see, for example, p.116 paragraph 29 (where the allegation is deleted).

553.2 The withdrawal of the complaints of disability discrimination by failure to make reasonable adjustments was recorded at the Preliminary Hearing Summary of Regional Employment Judge Taylor (25 August 2017), whereby the complaint was dismissed on withdrawal: see summary, paragraph 7, p.97.2.

553.3 The dismissal of the failure to make reasonable adjustment complaints is a final determination of those complaints within the first Claim. As a matter of law, they cannot be re-litigated. To allow them to be re-labelled as whistleblowing detriment or victimisation would be an abuse of process.

554. In any event, we concluded that these complaints of victimisation and section 47B ERA detriment were presented out of time and the Tribunal lacked jurisdiction. Our reasons are as follows.

555. These complaints relate to a period from February 2015 and ending with his exclusion in May 2015. These complaints are presented again in the second Claim presented on 28 February 2018, making them over two years out of time.

556. These complaints do not form part of a series of similar detriments, nor are they part of conduct extending over a period. It is directed against Dr. Willis and Dr. Howard alone; they do not feature as alleged perpetrators in respect of any subsequent complaints and we have found that they were not influenced by the alleged disclosures or acts.

557. In any event, for the reasons set out under our conclusions to issues 2(a)-(b)(i), it was reasonably practicable for the Claimant to present the complaint under section 47B ERA in time.

558. For the reasons set out in our conclusions to issues 2(a)-(b)(i), this complaint of victimisation was not submitted within such further time as was just and equitable.

559. Finally, if we are mistaken in respect of matters of jurisdiction, we accepted Dr. Howard's evidence at paragraphs 74-77 of her witness statement. We repeat our relevant findings of fact above. The Claimant did not suffer the detriment alleged: the Respondent did not refuse to make reasonable adjustments, but made adjustments to allow him to keep working.

Issue 2(d)(ii): May 2015: Claimant denied leave to undertake mandatory training

560. We concluded that the Tribunal did not have jurisdiction to consider these complaints of victimisation or detriment under section 47B ERA, made against Dr. Howard, for the same reasons set out under our conclusions to issues 2(a)-(b)(i) above.

561. If the Tribunal does have jurisdiction to consider these complaints, we concluded that the Claimant was not subjected to the detriment alleged. There was no denial of leave, when the circumstances are viewed in their entirety; the Claimant knew how to ensure that study leave was obtained. We repeat our findings of fact at paragraphs 191-202 above.

562. In any event, insofar as Dr. Howard denied the late request for study leave, the fact that Dr. Howard acted as she did had nothing to do with any of the alleged disclosures or any protected act. It was for the reasons that she gave including her concern to ensure patient safety.

Issue 2(d)(iv) Respondent prevented the Claimant from negotiating new contractual terms for himself and colleagues by excluding him from working groups from January 2015 to 28 May 2015

563. These complaints are over 18 months out of time, taking 28 May 2015 to be the end date of a continuing act. In respect of these complaints, there was not a series of similar acts nor a continuing state of affairs pointing to the existence of a policy or practice continuing after 28 May 2015. The Claimant was invited to be part of the working group; and there was only one working group meeting, which he attended.

564. We concluded that it was reasonably practicable for the Claimant to present this complaint under section 47B ERA in time, for the reasons given in our conclusions to issues 2(a)-(b)(i) above.

565. We concluded that this complaint of victimisation was not presented within such further time as was just and equitable in the circumstances set out in our conclusions to issues 2(a)-(b)(i) above.

566. We concluded that the Tribunal did not have jurisdiction to consider these complaints of victimisation or detriment under section 47B ERA for the reasons set out in our conclusions to issues 2(a)-(b)(i) above.

567. If the Tribunal has jurisdiction to consider these complaints, we repeat our findings of fact at paragraphs 203-210. We concluded that there was no detriment to the Claimant as alleged between January and 28 May 2015. The Claimant did not suffer a detriment of being excluded from working group meetings.

568. In any event, a reasonable worker would not have considered the lack of further working group meetings, or the fact that he could not attend LNC meetings, to be a detriment, even if the Claimant did perceive this to be the case. After all, the BMA negotiated improved contractual terms for Clinical Specialist doctors in the Emergency Department, albeit not all those sought by the Claimant.

2(d)(iii) Alleged unsubstantiated clinical allegations against the Claimant, May 2015;
2(d)(vi) Wrongly attempted to exclude him in May 2015

569. The Claimant was excluded on 28 May 2015. We concluded that this was, also, the relevant date of the alleged unsubstantiated allegations. These complaints were presented over 18 months outside the primary time limits.

570. The Claimant alleges in his unamended Claim (paragraph 28, p.20) that he has been targeted through the disciplinary process, with "*timekeeping going onto exclusion*". He refers to a "*sustained programme of harassment*" aimed at forcing him to quit his job.

571. In his Re-Amended Claim (p.98ff), the same wording is not used. However, the Claimant alleges a course of action, which includes imposing detriments on the Claimant because of protected disclosures and victimisation, which is continuing: see paragraph 26. It is in this context that the Claimant alleges that the Respondent made unsubstantiated clinical allegations. Moreover, the Claimant alleges that the exclusion made it more difficult for the Claimant to be revalidated, by preventing him from being able to practice: see paragraph 34 (p.104).

572. In cross-examination, when the Claimant was asked who was involved in the alleged obstruction of his revalidation, he listed a number of people, including Dr. Howard, Dr. Willis, Dr. Coker, and Mr. Rothnie. It is apparent from that list that the Claimant's evidence was that there was a plan or programme to obstruct his revalidation. We interpreted his case to be that this plan had the aim of forcing him from the Respondent's employment.

573. We have considered the guidance in *Hendricks*. However, from the facts that we have found, we concluded that there was no continuing state of affairs in the form of a plan by the Respondent's witnesses to have the Claimant removed from his role. We

concluded that the decisions taken Dr. Howard, Dr. Willis, Mr. Rothnie and Dr. Coker were made on the evidence that they had before them at the time; they did not act in concert and their actions were not influenced by the Claimant's alleged protected disclosures or protected acts. Therefore, the clinical allegations and the decision to exclude the Claimant were not part of a continuing act.

574. Moreover, these decisions were not part of a series of similar acts within section 48(3)(a) ERA.

575. We concluded that it was reasonably practicable for the Claimant to present this complaint under section 47B ERA in time, for the reasons set out in our conclusions to issues 2(a)-(b)(i) above.

576. We took into account the Claimant's grievance and its contents. However, concluded that this complaint of victimisation was not presented within such further time as was just and equitable in the circumstances as set out in our conclusions to issues 2(a)-(b)(i) above. Further, we concluded that the Tribunal did not have jurisdiction to consider these complaints of victimisation under section 27 EA or detriment under section 47B ERA.

577. In any event, if the Tribunal has jurisdiction to consider these complaints, our conclusions are as follows.

578. The clinical allegations were not "unsubstantiated" or baseless. We found that Dr. Howard was an honest witness, who held a number of genuine clinical concerns when she reported to Mr. Rothnie by email on 26 May 2015 (p.824-826). These concerns were raised against a background in which she had warned to the Claimant in January 2015 (p.691-692) that he had not recorded any patient complaints against him in his appraisal (a potential probity issue reported to her by Dr. Willis) and, since then, an escalating situation culminating in events over the weekend of 22-24 May 2015, after which specific complaint was made about his behaviour by Sister Charrey.

579. Of the clinical concerns contained in the email of 26 May 2015 from Dr. Howard, two concerns about the Claimant concerned Dr. Rothnie in particular: one was the alleged misdiagnosis of a stroke, which was raised at a patient complaint meeting on 22 May 2015; and one was that the Claimant had examined a patient on 25 May 2015, but missed that he had suffered a fractured elbow and wrist, which were only noticed by a reviewing doctor. In respect of the second patient, he had complained that the Claimant had not examined him, which is what the family members said in respect of the first patient concern. These matters required investigation, because they both raised questions about the Claimant's probity, specifically that he had recorded examinations which may not have been carried out.

580. Dr. Howard and Mr. Rothnie had no part to play in generating these two concerns. They arose during the Claimant's ordinary work in the Department. The raising of the clinical concerns by Dr. Howard was not influenced in any way by the alleged or any protected disclosure or protected act.

581. Given her experience of the Claimant, and the significant missed diagnosis of 25 May 2015, we concluded that it was a prudent step for a manager in Dr. Howard's position to examine other recent cases involving the Claimant which concerned her.

582. In any event, when the two key matters of concern referred to were investigated by an independent person (against whom the Claimant raised no complaint), there was no suggestion that the concerns were not genuine. Professor Grunwald concluded in her reports August 2016 and December 2016 that although the clinical concerns were not upheld, in the first case, there was a weakness in the system for recording examinations (and concluded that the Claimant had examined the patient before booking in, hence the absence of a record) and in the second case that the fractures had been missed by the Claimant.

583. There was good reason to exclude the Claimant so that inquiries could be made into the conduct and the above clinical matters. Mr. Rothnie and those at the meeting on 28 May 2015 acted to exclude the Claimant in order to control the clinical risks and to ensure patient safety. Mr. Rothnie took advice from an appropriate source, NCAS, prior to the decision to exclude. We repeat our findings of fact at paragraphs 211 to 223.

584. The reasons for the exclusion had nothing to do with any protected disclosure or protected act by the Claimant.

Issue 2(d)(vii) Unnecessarily excluded the Claimant from work from July 2015 to December 2016, causing him financial loss, loss of opportunity to maintain skills as doctor and obtain Revalidation with GMC;

Issue 2(d)(x) Prevention of the Claimant from practising medicine whilst excluded

585. The Claimant was excluded on 28 May 2015 and remained excluded until 23 December 2016. We found that these complaints were of two continuing acts: the exclusion up to 23 December 2016 and the prevention from practising medicine, which was a state of affairs up to December 2016.

586. Therefore, we concluded that, bearing in mind the dates of Early Concilation (23 February to 6 April 2017), these complaints were presented in time. This is despite the fact that we found that no plan existed to harass the Claimant and force him to quit his job.

587. We concluded that the Tribunal did have jurisdiction to consider these complaints of victimisation under section 27 EA and detriment under section 47B ERA.

588. As to the merits of these complaints, the Tribunal relies on its findings of fact at paragraphs 224-251 above.

589. We concluded that the Claimant's exclusion was for lawful and non-discriminatory reasons in the first instance, for the reasons set out in the section of conclusions to issues 2(d)(iii) and (vi) above. The reasons related to conduct and clinical concerns.

590. The exclusion was reviewed; there was no complaint about the frequency or substance of the reviews.

591. By the date of the exclusion review meeting on 29 June 2015 (which considered with the Claimant the two missed diagnosis cases), NCAS had advised Mr. Rothnie that the previous concerns leading to the GMC imposing Conditions of practice were similar to the existing issues in terms of clinical risk; and that the clinical concerns potentially were probity or conduct related because the Claimant's notes suggested that he had carried out examinations which never happened. Mr. Rothnie made a further decision to maintain the exclusion. We find that this decision was not influenced by the alleged or any protected disclosures or protected acts.

592. At the time of the review, Mr. Rothnie informed the Claimant that he would like to support him to maintain his skills, but this should be in a placement outside the Emergency Department: see p.911, exclusion review letter. He asked the Claimant to indicate areas in the hospital where he felt a placement would be useful. We concluded that this was a genuine invitation for the Claimant to suggest appropriate areas for a placement.

593. Mr. Rothnie reviewed the exclusion again in mid-July 2015, upheld the exclusion and asked the Claimant to suggest options for a supervised placement as an alternative to exclusion. We concluded that this search for such a placement was a genuine exercise to support the Claimant.

594. The exclusion was reviewed at least in November and December 2015, as we set out in the findings of fact. The meeting on 16 December 2015 did address the potential placement. The Claimant stated that if there was no placement in critical care, he would like to do General Practice. Mr. Rothnie explained that he did not control this, nor whether he could do a supernumerary role in GP rotation or GP practice.

595. The Claimant did not dispute that his preferred options for a placement were GP practice, dermatology, and intensive/critical care. We found that the Claimant was not prevented from practising in these areas, but that he was unable to do so for a variety of reasons which were not the fault of Mr. Rothnie nor anyone connected to the Claimant's management. In particular:

595.1 Having asked the Respondent about any gaps that there were in the GP rotation, the Claimant did not help himself. From about August 2015, he made no attempt to contact Ms. Spall about any GP placements, whether at this point or in the months after this.

595.2 After Mr. Rothnie had secured a placement for him with Professor Babar in February 2016, and after indemnity insurance had been arranged by the Respondent, the Claimant failed to respond to requests for confirmation that he was on the "Performers List". After almost 6 months, it transpired that the Claimant was not on the GP Register nor in GP training, so could not practice as a GP. Therefore, all the attempts to get a GP placement for the Claimant were a waste of time, as the Claimant would probably have known.

595.3 The Respondent did not provide dermatology services and a placement in this service could not be arranged by it at that time.

595.4 Mr. Rothnie tried to find the Claimant a placement in the Intensive Care Unit, and spoke to the ICU lead. There was a delay in pursuing this, due to the fact that Mr. Rothnie was busy with his work, not due to any protected act or alleged disclosure. The ICU only replied to his request in December 2015; and the ICU were not keen to accommodate extra people due to the impact that it would have on the existing team (see p.1094).

596. In short, the Claimant's ultimate failure to secure a placement outside the Emergency Department was not due to deliberate delay by Mr. Rothnie. It was due to circumstances beyond his control; and Mr. Rothnie did not know that the Claimant had not completed his GP training.

597. As we explain in our findings of fact, the Claimant's exclusion, and the length of it, had no effect on his opportunity to secure Revalidation with the GMC.

598. In any event, as we explain in our findings of fact, Mr. Rothnie's actions and decisions in respect of the decision to exclude, the length of the exclusion, and the inability to find a placement for the Claimant, were not influenced by any alleged protected act or protected disclosure.

Issue 2(d)(viii) Unnecessary and excessively detailed and lengthy disciplinary investigation, into minor matters

599. The Respondent did not argue that these complaints were out of time. For the reasons set out in the above section of conclusions, we have concluded that the Tribunal had jurisdiction to consider these complaints.

600. As we explain in our findings of fact at paragraphs 252-269, we found that the disciplinary investigation was both necessary and not excessively detailed.

601. There was a delay in the completion of the investigation report and the overall process (admitted at paragraph 198 Respondent's submissions).

602. From the primary facts, we did not infer that this delay was materially influenced by any protected disclosure or protected act. As we have explained, it was a product of the number of matters. Some of these are referred to in the investigation report (p.1036); and one factor was that the investigator, Anthony Fitzgerald, caused delay by not completing his report until 2 February 2016 (taking 6 months); but we heard no evidence that he knew of the alleged protected disclosures and protected acts, nor that Mr. Rothnie nor any other manager had influenced this delay.

603. The process of the Claimant reviewing the case notes was protracted. This did cause further delay to the disciplinary process, because Mr. Rothnie had been seeking to consider both conduct and capability or clinical concerns together.

604. Due to the reasons set out in the findings of fact, the Respondent was unable to fix a disciplinary hearing as early as it wished (on 31 May 2016). There were innocent reasons which meant that the disciplinary hearing into the conduct matters did not take place until 28 October 2016, with the Panel (which was independent of the alleged perpetrators) not providing its decision until 25 November 2018.

605. No decision was made about the clinical concerns, however, until Professor Grunwald's case review in August 2016 and December 2016. It was not put to Mr. Rothnie or any other witness that her case reviews had been delayed deliberately, nor was it suggested that she did not act independently.

606. We concluded that the length of the disciplinary investigation was not reasonable; but we concluded, from our findings of fact, that the reasons for this delay were not influenced by the alleged or any protected acts.

607. Moreover, the delay in the completion of the disciplinary investigation and the disciplinary process had no effect on his attempted Revalidation with the GMC.

608. Furthermore, we concluded that the disciplinary investigation was not "*excessively detailed*" - whatever the precise meaning of this complaint is. From the investigation report and the notes of the disciplinary hearing, we cannot see that any of the evidence collected or steps taken were unnecessary or irrelevant. Those involved in the investigation and disciplinary hearing were not part of the Claimant's line management, and it was not put to any Respondent witness that they were influenced by the alleged disclosures or protected acts.

609. We accepted the submission that the Respondent was duty bound to investigate clinical concerns and conduct issues that were, on their face, potentially serious and which could have consequences for patient safety. They were certainly not "*minor matters*".

Issue 2(d)(ix) Conducted the disciplinary proceedings unfairly by preventing the Claimant from defending himself in that he was not allowed to speak to colleagues who may have been witnesses, denied access to Respondent's IT systems

610. The Respondent did not prevent the Claimant from defending himself as alleged. We repeat our findings of fact set out at paragraphs 270-288 above. In particular:

> 610.1. In the experience of the Tribunal, it is common for those employees suspended pending investigation to be directed not to contact potential witnesses directly, to avoid the risk of being found to have tried to compromise an investigation. We found that this was the reason for this direction in this case.
>
> 610.2. On exclusion, the Claimant was told to contact Ms. Bridge if he wished to access potential witnesses. This was repeated to him at the first review meeting. The Claimant did not approach Ms. Bridge about adducing evidence from staff witnesses.

610.3. The Claimant did not provide any witness names in advance of the disciplinary hearing despite invitations to do so (see invitation letters, p.1151 and p.1316).

610.4. The Claimant's IT access was reinstated in principle from July 2015; it was the Claimant's choice not to point out until 5 August 2015 that, in practice, he did not have access. Access was then restored. In any event, we did not find that lack of IT access for about 9-10 weeks had any effect on the fairness of the disciplinary process.

610.5. Mr. Allen, alleged to be a potential witness for the Claimant (but not mentioned to Ms. Bridge at the time) was not likely to have been a relevant witness, because the Claimant did not dispute using the words alleged. Mr. Allen could not give evidence about the Claimant's intention in using those words; and, in any event, the relevant allegation was not upheld by the disciplinary hearing panel.

611. The Tribunal concluded that the disciplinary process, whilst slow, was a reasonable one. From our findings of fact, we concluded that it was a fair process.

612. In any event, we concluded that the conduct of the disciplinary process was not influenced by the alleged or any protected act or alleged protected disclosure. Mr. Fitzgerald and Mr. Salter did not know of these.

613. The original disciplinary hearing was followed by a thorough and fair appeal: we accepted the evidence of Mr. O'Sullivan. It was not alleged by the Claimant that he was materially influenced by (or even knew of) the alleged or any disclosures.

614. In submissions, the Claimant referred the Tribunal to *West London Mental Health NHS Trust v Chhabra*, in which the Supreme Court explained key features of "*Maintaining High Professional Standards for the Modern NHS*": see paragraphs 3-6, and 30. In this case, the Claimant did not specify any breach of the MHPS as a detriment (and the MHPS does not feature in the Lists of Issue). In any event, we found no evidence that the investigator, Mr. Fitzgerald, was not impartial or objective; the scope and detail of the report prepared by him pointed to an independent investigation involving a number of different witnesses interviewed at different times.

Issue 2(d)(xi) & (xii) Prolonged exclusion unnecessarily after investigation had concluded and after disciplinary proceedings had finished

615. The Claimant's exclusion was not prolonged unnecessarily after the investigation and the disciplinary proceedings had concluded for the reasons set out in our findings of fact at paragraphs 289-294.

616. The investigating officer found there was a case to answer. Exclusion protected the Claimant from allegations of interference with witnesses in the disciplinary process.

617. We concluded that this continued exclusion was not influenced by any alleged protected disclosure or protected act.

618. The exclusion was continued after the disciplinary outcome letter. The Tribunal found that this was not influenced by any alleged protected disclosure or protected act, but wholly by the fact that the second clinical case review was not concluded until about 8 December 2016. The clinical concerns had led to the decision to exclude in the first place, after NCAS advice.

619. From the conclusion of the second clinical review, the Claimant's exclusion lasted for only a further two weeks (until 23 December 2016), which was not connected with any alleged protected disclosures or protected acts.

Issue 2(d)(v) first list & issue 10(a) second list: Obstructing revalidation by the GMC from October 2014 to 25 October 2017;

620. The Tribunal concluded that the Respondent did not obstruct the Claimant's revalidation by the GMC. On the contrary, the Respondent supported the Claimant in attempts to facilitate his revalidation by the GMC. The objective reality was that the Claimant did not engage properly with the appraisal process, as explained by Dr. Willis, Dr. Howard and Dr. Coker. Our reasons are set out in the findings of fact above at paragraphs 295-369. In summary:

620.1. The requirements for revalidation are set by the GMC. The Respondent dealt with the revalidation process in a professional way.

620.2. The Respondent provided three different appraisers for the Claimant, changing appraisers twice after the Claimant failed to comply with directions to complete his appraisal.

620.3. Dr. Willis and Mr. Rothnie provided advice and guidance to the Claimant to enable him to complete the appraisal process successfully. This was not followed by the Claimant.

620.4. Mr. Rothnie arranged for the lead appraiser in the Trust, Dr. Coker, to act as appraiser in this case. The Claimant failed to co-operate with Dr. Coker, who found the conduct of the Claimant baffling.

620.5. The Claimant sought to have Mr. Rothnie removed as the Responsible Officer. This was despite the fact that Mr. Rothnie had extended the revalidation date and requested deferrals to the revalidation date. His approach to Mr. Rothnie's necessary actions as Responsible Officer demonstrates that the Claimant would not take responsibility for his own actions.

620.6. The conduct of the Claimant meant that Mr. Rothnie had to make his first non-engagement recommendation to the GMC.

620.7. Despite the non-engagement recommendation, the GMC allowed the Claimant further time (to 7 January 2017) to complete his appraisal and obtain revalidation. The Claimant's conduct meant that, despite this extra time, he did not complete his appraisal by the revalidation date.

620.8. As a result, Mr. Rothnie had no real choice but to make a second non-engagement recommendation to the GMC.

620.9. The GMC's Assistant Registrar reached his own decision, independently of any of the Respondent's managers, to withdraw the Claimant's licence to practice, subject to appeal.

620.10. The Claimant's appeal to the GMC against the withdrawal decision was struck out. This was a decision taken by a further decision-maker; it was a further decision made independently of the Respondent. The reason for the decision was that the Claimant had, again, failed to comply with a direction to do something.

621. The Claimant's failure to obtain revalidation by the GMC had nothing to do with any alleged protected disclosure or protected act. It was his own fault and we found his actions baffling. We concluded that the real causes of his failure may well have been that he did not agree with the Respondent's process for appraisal and the revalidation process, and because he did not want to reflect on the Conditions of Practice imposed on him by the GMC following incidents during his work with a former employer.

Conclusions on the Second List of Issues (Claim 3200438/2018)

Issues 2-7: Was the Claimant's employment terminated by operation of law or was he dismissed?

622. The Claimant alleged that he was unfairly dismissed on 30 October 2017.

623. As we have found, the GMC decided that the Claimant's licence to practice was withdrawn. The Claimant's appeal against this decision was dismissed, with the licence being withdrawn on 25 October 2017.

624. The effect of section 47(1) Medical Act 1983 is that the Claimant could not hold a position as a doctor in the Emergency Department once he did not hold a licence to practice (i.e. from 25 October 2017): see *Tarnesby* above. His contract automatically terminated by operation of law on 25 October 2017.

625. Accordingly, we concluded that there was no decision to dismiss the Claimant; there was no dismissal in law.

626. As a result of this conclusion, the complaints of unfair dismissal under both sections 98 and section 103A ERA must fail.

627. In the alternative, if we have erred in law and there was a dismissal, we concluded that the decision to dismiss was not materially influenced by the alleged protected disclosures. We repeat the findings of fact at paragraph 388 above.

628. If there was a dismissal, we concluded that Mr. Rothnie had no alternative but to dismiss. The Claimant could not continue to be employed as a doctor, given that he had no licence to practice. Moreover, he was, in reality, refusing to engage with the appraisal process which was necessary to secure revalidation.

629. The Claimant argued that, despite the loss of his licence to practice, the Respondent should have redeployed him so that he could have continued to be employed in a non-clinical role. This allegation had not been pleaded, nor raised previously. We did not agree with the Claimant's argument. But if we are wrong in this, our conclusion was that in view of his lack of co-operation when in a professional role, bordered by a framework of professional duties imposed by the GMC, the Claimant would not have accepted any non-clinical role and the duties of an employee within such a role. In losing his licence to practice, the Claimant had acted as if his opinion about rules was more important than that of his managers and his professional body. We concluded that he would not have accepted a non-clinical, non-professional, position. His dismissal would have been inevitable within 4 four weeks of 25 October 2017 in any event.

630. Moreover, if there was a dismissal, the Claimant was entirely to blame for it due to his actions especially his failure to engage properly in the appraisal process. This was entirely his fault.

631. Accordingly, we concluded that, had we found that he had been unfairly dismissed, the Claimant's compensation would be reduced to nil under a combination of the provisions in sections 122 and 123 ERA.

<u>Issue 8: Breach of Contract: Notice Pay</u>

632. This head of complaint is wrongful dismissal. We concluded that it must fail because the Respondent did not breach the Claimant's contract of employment by dismissal without notice. The Respondent could no longer employ the Claimant due to the operation of section 47 Medical Act 1983.

<u>Issues 9-13: Whistleblowing detriment</u>

Issues 11-13 Jurisdiction

633. The Tribunal deemed that the Claimant had presented his second Claim on 9 March 2018: see p.221.2. Given the dates of early conciliation (24 January to 9 February 2018), any complaint within the second ET1 arising from events before 25 October 2017 would, on its face, be outside the three month primary limitation period within the respective statutory provisions.

634. The complaints at issues 10(a), (b) and (c) were all presented outside the primary limitation period.

635. In respect of issue 10(a), if there was a continuing act, the last act or failure by the Respondent must have been prior to the GMC's decision on 7 May 2017 to withdraw the licence to practice. The last act by the Respondent was the email of 10 February 2017 from Mr. Rothnie to the GMC, setting out a timeline and evidence showing support provided for the Claimant. After that, the Respondent had no involvement in the GMC decisions. This act is over 8 months out of time.

636. In respect of issue 10(c), the latest act or failure to act in this respect is the decision of Ms. Bridge on 22 March 2017 (p.1956) to refuse to pay contractual sick pay. This act is over 7 months out of time.

637. In respect of 10(b), we accepted that the Tribunal did not have jurisdiction to hear this complaint. As we explained at paragraphs 374-375 of the findings of fact, the Claimant does not particularise what alleged breaches of the policy are relied upon. Therefore, the Claimant has failed to establish any factual basis at all for the complaint.

638. In any event, if we take the Respondent's suggested last act as the letter of Ms. Maton of 7 June 2017 (p.1956), the complaint is presented over 3 months out of time.

639. We have considered sections 48(3) – (4) ERA. We are satisfied that there was no continuing act of which each of the matters at issues 10(a) to 10(c) formed part. We have set out our relevant findings of fact in respect of these issues above at paragraphs 295-370, 374-383, and 370-373.

640. We considered *Arthur.* We concluded that there was no connection between acts inside the limitation period and those set out in issues 10(a)-(c), which are outside it.

641. The Claimant did not identify which acts inside the limitation period were part of a series with the matters in issues 10(a)-(c); but, in any event, we concluded from our findings of fact that there was no series of similar acts or failures. From our findings of fact, the necessary link did not exist.

642. Having considered that the complaints in issues 10(a)-(c) were all out of time, we considered whether it was reasonably practicable for them to have been presented in time. We were certain that it was reasonably practicable for them to have been presented in time. In particular:

> 642.1. We heard no evidence from the Claimant to prove that it was not reasonably practicable to have presented these complaints in time.
>
> 642.2. We repeat the reasons set out under issues 2(a)-(b)(i) at paragraph 537 above which demonstrate reasonable practicability.

Issue 10: Merits of whistleblowing detriment complaints

643. We have provided our conclusions on the merits in respect of the complaint at issue 10(a) (obstructing revalidation by the GMC from October 2017 to 25 October 2017) above. This complaint fails. The actions of Mr. Rothnie and other Respondent managers were not influenced by the alleged protected disclosures.

644. In respect of issue 10(b) (failing to adhere to the Respondent's sickness absence policy to facilitate his return to work), we concluded that, on the evidence that we heard and given the absence of any particularised allegation, the Respondent did adhere to its Long-term Sickness Absence policy. The Respondent did consider what support could be provided to get the Claimant back to work. We repeat our findings of

fact at paragraphs 374-383. We concluded that the Respondent did not block the Claimant's return to work. The fact was that he was certified as not fit to work over the period 3 April to the termination of his employment in October 2017. Additionally, on 3 May 2017, the GMC decided to withdraw the Claimant's licence to practice.

645. In respect of issue 10(c), we repeat our findings of fact at paragraphs 370-373. The Claimant was not entitled to contractual sick pay for the period April 2017 to 25 October 2017. The Claimant steadfastly refused to enter into the revised Clinical Specialist contract, which contained an entitlement to contractual sick pay. Instead, the contractual terms on which he remained employed in April 2017 were those agreed in November 2013 (at p.355-359), which did not contain any entitlement to sick pay.

Issues 14-19 Disability discrimination:

Jurisdiction: Issues 18-19

646. On the face of our findings of fact, the Respondent had knowledge of the musculo-skeletal impairment and its substantial adverse effect (and, if he had such impairment, the alleged diabetes) on 10 March 2017.

647. We concluded that a reasonable time to make the adjustments sought in respect of sick pay and pension would be at least one month. It is likely that administrative steps required to make these adjustments would take this long. Therefore, the breach of the duty to make these adjustments could not occur until 10 April 2017.

648. A reasonable time to make the adjustments sought in respect of reduced hours, rest breaks, and seating would take less time. We would have expected that any reasonable adjustments which were not made could have been made on 13 March 2017 when the Claimant returned to work.

649. Therefore, the complaints of disability discrimination are all out of time. The three month limitation period, in respect of the PCPs in respect of sick pay and pension, expired on or about 10 July 2017, and in respect of the working arrangements adjustments (issue 15(c)) on about 13 June 2017.

650. The complaints of disability discrimination were therefore presented about 3 and 4 months out of time.

651. We directed ourselves to section 123(1) EA 2010. We understood that the "just and equitable" formulation conferred the widest possible discretion on the Tribunal. We applied the more recent guidance in *Morgan.*

652. We concluded that it would not be just and equitable to extend time for the Tribunal to hear any of the disability discrimination complaints for the following reasons:

652.1. The delay in presenting the disability discrimination complaints in this case was substantial.

652.2. It is a relevant factor that there was no good reason for the delay. In particular, we repeat the facts and matters set out at 537.3 above**.**

652.3. By August 2017, the Claimant was represented by solicitors. We infer that he would have received legal advice about his proposed second Claim.

652.4. On 6 June 2017, the Claimant received the ET3 Response to the first Claim. This raised limitation/jurisdiction as a defence. In the light of that pleading, the Claimant was well aware that limitation periods needed to be observed.

652.5. It is a factor in the Claimant's favour that the delay did not prejudice the Respondent, because it had retained all the necessary paperwork, and could call witnesses to address the complaints. However, on the facts in this case, we concluded that allowing the extensions of time required would prejudice the Respondent over and above the prejudice inherent in defending a claim brought outside the statutory limitation period. In these Claims, the Respondent is faced with a raft of allegations under section 47B ERA and section 103A ERA over a long period of time. It would be prejudiced by facing a new front of allegations (disability discrimination by failure to make reasonable adjustments) when the thrust of the Claimant's case has always been whistleblowing detriments and, in the second Claim, dismissal.

652.6. The Claimant has not put forward any (or any sufficient) evidence to show that it would be just and equitable to extend time. For instance, the Claimant did not allege that a mental impairment or disability caused him to delay presentation of the second Claim.

652.7. As we have explained, the Claimant was intelligent and sufficiently able with IT to have made all necessary inquiries online.

653. In addition to our conclusions on the issue of jurisdiction, we have provided our conclusion on the remaining issues in respect of the disability discrimination complaints.

Issue 14: Whether the Claimant was a disabled person at relevant times

654. The Tribunal concluded that the disability discrimination complaints were something of an afterthought by the Claimant. They were added in the second Claim onto his principal Claim (alleged whistleblowing detriment and dismissal) without proper or any evaluation of their merit (or lack of merit).

Issue 14a: Whether Claimant was disabled due to autoimmune rheumatological disorder from early 2015?

655. For the period February - May 2015, we concluded that a musculo-skeletal impairment, which may or may not be caused by autoimmune rheumatological disorder, had a more than trivial adverse effect on the Claimant's ability to carry out

day to day activities, given the degree of pain and the effects referred to in the Impact Statement.

656. In accordance with a consistent line of authority (such as *Power v Panasonic* [2003] IRLR 151) and the "Guidance on Matters to be taken into account in determining questions relating to the definition of disability", we do not consider it is necessary to be able to reach a conclusion as to a diagnosis of the impairment, nor the cause of the musculo-skeletal symptoms, nor is it material that the Claimant has alleged an impairment (autoimmune rheumatological disorder) for which there is little support on the objective, documentary, evidence. The Claimant's case has remained that he had musculo-skeletal symptoms.

657. However, from inconsistencies in his case, we concluded that the Claimant's account of his symptoms was unreliable and probably exaggerated. He told Dr. Sofoluwe that he could not write, but told Dr. Howard that he could do so. Moreover, his alleged impaired writing ability, and the degree of pain alleged in his Impact Statement, was not consistent with Dr. Packer's examination nor his ability to carry out work duties (save those adjusted) without complaint after February 2015.

658. As a result of the above, we found that there was no evidence that, at any point during February 2015 to May 2015 that this musculo-skeletal impairment could well last 12 months. In particular, we took account of the evidence of Mr. Packer, of 2 March 2015 (p.259) following his review of the Claimant in Clinic on 25 February 2015 and the lack of any complaint about symptoms or their effect by the Claimant to Dr. Howard after his return to work in February 2015 and up to his exclusion in May 2015.

659. Whilst the Claimant was excluded from 28 May 2015 until 23 December 2016, the evidence did not suggest that the Respondent would know of the Claimant's autoimmune rheumatological disorder nor of any musculo-skeletal symptoms caused by it.

660. We concluded that, on balance, the Respondent did not have actual or constructive knowledge that the Claimant could well be a disabled person due to an impairment causing musculo-skeletal symptoms until March 2017, when he met Traci Maton.

Issue 14b: Whether Claimant was disabled due Type II diabetes from early 2015?

661. The Claimant was not a disabled personal due to Type II diabetes at the material times. Our relevant findings of fact are at paragraphs 416-422 above.

662. In summary, we concluded that the Claimant did not have the impairment of Type II diabetes, nor any physical impairment caused by diabetes.

663. Further, it we are wrong about this, we concluded that any such diabetes impairment did not have more than a trivial adverse effect on the Claimant's ability to perform normal daily activities.

Issue 14c: Whether the Claimant was disabled by stress from late 2014?

664. We found that, at the material times, the stress had not produced any mental or physical impairment even if it had produced some anxiety symptoms. We repeat the findings of fact at paragraphs 423-428 above. Consequently, on his pleaded case, the Claimant was not a disabled person at material times because of any mental impairment.

665. Furthermore, we found that the work-related stress symptoms, at the material times, did not have a substantial adverse effect on the Claimant's ability to perform normal day to day activities. The reliable evidence did not suggest that this part of the statutory test was made out.

Issues 15 – 17: Alleged failure to make reasonable adjustments - merits

Alleged PCPs at issue 15(a)-(b)

666. As we have explained in our findings of fact at paragraphs 429-438, the alleged PCPs at issues 15(a) and 15(b) of the second list of issues did not exist at any time.

667. Therefore, there was no duty on the Respondent to make the adjustments at issue 17(a) and (b).

668. If we are wrong about this, the Respondent did make reasonable adjustments, by offering the new contract which provided for both sick pay and pension entitlement. The Clamant refused to accept the new contract.

Alleged PCP at issue 15(c)

669. If, contrary to our findings of fact, the Claimant did have Type II diabetes, the existence of this impairment and any substantial adverse effect, was only known to the Respondent when he referred to it on 10 March 2017, at the sickness review meeting with Ms. Maton.

670. The Respondent only had knowledge that the Claimant was a disabled person due to his musculo-skeletal impairment, from the same meeting on 10 March 2017; the substantial adverse effect had lasted more than 12 months by that date.

671. Consequently, the complaints in respect of adjustments alleged to be reasonable between February and May 2015 must fail.

672. From 13 March 2017, when he returned to work, the Claimant was not subject to the PCP at issue 15(c), for the reasons set out at paragraphs 432-437 of the findings of fact. When he returned to work, he worked reduced hours, and worked three days per week in the library doing CPD work. In the library, he had the freedom to take breaks as and when he wished (see witness statement of Ms. Maton, paragraph 13, 18, and the letter of 13 March 2017, pp1919-1922).

673. In any event, if this PCP did exist at the material times, the Tribunal did not understand from the evidence that the musculo-skeletal condition put him at a substantial or any disadvantage when required to work on his feet.

674. Furthermore, if the PCP at issue 15(c) did exist, and if it did put him at a substantial disadvantage, reasonable adjustments were made for him, as set out in our findings of fact and the paragraphs above.

675. There is no evidence that, after his return to work and prior to being absent sick in April 2017, the Claimant was required to work a full shift, on his feet, with limited ability to take rest breaks and with a limited ability work seated, nor that he was required to work full-time hours. We heard that, from his return to work, he was supposed to work two days per week on clinical matters. We accepted the Respondent's evidence on the adjustments made, which were not challenged by the Claimant.

676. There is no evidence that the seating provided from 13 March to 3 April 2017 placed the Claimant at any substantial disadvantage, nor why such an adjustment was reasonable in a context where the Claimant could take rest breaks as he desired when working in the library setting and where, when in a clinical context, he generally needed to be on his feet. We concluded that if the Claimant suffered any disadvantage due to seating, it was trivial: see para 306 of his witness statement which referred to "*unable to obtain adequate seating etc*", which is no evidence of more than trivial (if any) disadvantage.

Issues 20-23: Victimisation

Issues 22-23: Jurisdiction

677. We have concluded that the Tribunal did not have jurisdiction to hear the complaints at issues 21(a) to 21(c). We have explained above, in respect of issue 10, why these complaints were presented outside the statutory limitation period.

678. We considered our discretion under section 123(1) Equality Act 2010. We concluded that it would not be just and equitable to extend time to hear these complaints. We repeat our reasoning on this point in our conclusions at issues 18-19 above.

Issues 20-21: Merits

679. We have given our conclusions in respect of issue 21(a) – (c) above within our conclusions to Second Claim issue 10 above (concluding that the Respondent did not subject the Claimant to any of the alleged detriments due to the alleged protected acts or protected disclosures).

Issues 24-27: Breach of Contract/unlawful deduction from wages

680. In respect of jurisdiction, we concluded that the Tribunal had jurisdiction to consider the contractual claims, which were outstanding at the date that the Claimant's employment ended.

681. However, we concluded that the Tribunal did not have jurisdiction to hear the complaint under section 13 ERA. The last in the series of deductions must have been before his exclusion in May 2015. It was reasonably practicable for the Claimant to have presented this complaint within three months of the date of the last deduction; and he produced no evidence to show why it was not reasonably practicable to do so.

682. In any event, we have set out our conclusions on the merits of these complaints.

683. Each of the matters set out at issue 24a to 24f fails, whether approached as complaints of unlawful deductions from wages or breach of contract. Our reasons are as follows.

684. As a matter of fact, the Claimant was not employed or entitled to be employed on national terms and conditions under a set of terms drafted in 2008. We repeat the findings of fact at paragraphs 57-72 above. In any event, if this were the case, the breach of contract and/or section 13 ERA complaint as expressed in issue 24a would fail.

685. The Claimant was not employed on the 2002 version of national terms and conditions for hospital doctors.

686. The Claimant was not entitled to be paid contractual sick pay at all. He was not entitled to sick pay under the terms of the contract entered into in November 2013 (p.355-359) which governed the terms of his employment: see Clause 9 of that contract. Prior to accepting the offer of employment, he knew that he would not be entitled to contractual sick pay under the contract offered: see emails at p.492-493.

687. The Claimant had no contractual entitlement to a Temporary Injury Allowance. This was a scheme to provide benefits to employees of the Trust where certain conditions were met. The Claimant was found not to have met those conditions. There can be no claim for breach of contract.

688. The Claimant was not entitled under his contract to employer pension contributions from October 2013 to 25 October 2017. Under the terms of the contract entered into in November 2013 (p.355-359), which governed the terms of his employment, he was not entitled to become a member of the NHS Pension Scheme: see Clause 9 of that contract. Prior to accepting the offer of employment, he knew that he was not entitled to pension contributions under the contract offered: see emails at p.492-493.

689. The Claimant was contracted to work 42 hours per week. We have found that the Claimant was not rostered to work the equivalent of 48 hours per week. In any event, if we are wrong and the Claimant was rostered to work for more than 42 hours per week, there is no entitlement to overtime within the contract of employment at p.355-359. Therefore, the claim for unpaid overtime must fail.

690. Furthermore, there could not have been any unlawful deduction from wages, because overtime was not a contractual entitlement, nor did we hear evidence that it would have been payable under any form of agreement or policy. Consequently, any

alleged sum due in respect of overtime would not be properly payable under section 13 ERA and the definition of “wages” within section 27 ERA.

Summary

691. For all the above reasons, all the complaints fail and the Claims are dismissed.

Employment Judge Ross

20 September 2019

APPENDIX 1 – FIRST LIST OF ISSUES

IN THE EAST LONDON EMPLOYMENT TRIBUNAL
CASE NUMBER: 3200410/2017

BETWEEN:

Mr Saleem Althaf

Claimant

and

Southend University Hospital NHS Foundation Trust

Respondent

AGREED LIST OF ISSUES

The Claimant claims under Section 47B of the Employment Rights Act 1996 (ERA 1996) and Section 27 of the Equality Act 2010 (EA 2010). All references to the ET1 refer to the relevant paragraphs in the Claimant's Re-Amended Grounds of Claim dated 30 August 2017.

Disclosures

1. Did the Claimant make any qualifying disclosure pursuant to ERA Section 43B(1)(b) and/or Section 43B(1)(d). If so, was the disclosure protected pursuant to ERA Sections 43C – 43F. The alleged disclosures are as follows:

   (a) ET1 [40.i] That he informed Dr Howard on 10 July 2014 that the proposed rota did not follow relevant professional guidance, was not compliant with the European Working Time Regulations (EWTR) guidance and put patients' and doctors' health and safety at risk;

   (b) ET1 [40.ii] That he informed Dr Howard in discussions later in July 2014 that the Respondent's recruitment of Clinical Specialist doctors from overseas on the terms of the Contract was discriminatory and that it was

unlawful for the Trust to hold them to the Contract and not employ them on the national terms like the other doctors employed by the Trust;

(c) ET1 [40.iii] That he informed Dr Willis on 28 September 2014 that the Respondent had victimised him because he had asserted that the Respondent was discriminating against the Clinical Specialist doctors and the rota was contrary to guidance around the EWTR;

(d) ET1 [40.iv] That he informed Ms Totterdell on 1 October 2014 that the Respondent had imposed a detriment on him contrary to whistleblowing law by failing to inform him about the consultancy vacancy for which he could apply;

(e) ET1 [40.v] That he informed Mr Warrior on 16 October 2014 that the new contract and the rota were discriminatory on grounds of race, that the Respondent was discriminating on grounds of race by recruiting a group of non-British doctors from overseas and refusing to employ them on the same terms as its other doctors, that the new rota was not compliant with the EWTR guidance, and that the Claimant was being victimised contrary to discrimination law and whistleblowing law and harassed because he made these points to Dr Howard;

(f) ET1 [40.vi] That he informed Dr Rothnie, in October 2014, that he had made disclosures about the Clinical Specialist doctors' terms of employment and rota as described above and that Caroline Howard and others had subjected him to detriments as a result contrary to whistleblowing law;

(g) ET1 [40.vii] That he informed the General Medical Council in October 2014 stating that he was being bullied and harassed by the Trust because he had stood up to Dr Howard and the Trust by pointing out that the Clinical Specialist rota was not compliant with guidance around the EWTR and put

patient and doctor health and safety at risk and that the recruitment of Clinical Specialist doctors overseas, the Contract, the new terms and the rota were all discriminatory on grounds of race;

(h) ET1 [40.viii] That he informed the Care Quality Commission on 17 March 2015 and 4 June 2015 of his concerns about working hours and rota safety, the bullying culture, inadequate staffing and exploitation of IMGs.

(i) ET1 [40.ix] That he informed Mary Foulkes, HR Director, on 20 April 2015 that due to the disclosures he had made to Dr Howard and others he had been victimised, bullied and penalised and that the Trust had not taken action to fulfil its duties to put right the issues, including revalidation. He also stated that the risk to patients' and doctors' safety had escalated;

(j) ET1 [40.x] That he informed the National Guardian on 8 December 2016 that he had made disclosures which were protected under whistleblowing law, which he detailed, and that the Respondent had obstructed his revalidation with the GMC as a way of imposing detriment on him as a whistleblower contrary to whistleblowing law; and

(k) ET1 [31.i] That he reported to the Care Quality Commission on 17 March 2015 and 4 June 2015 his disclosures made to Dr Howard and others about the discriminatory nature of the terms of employment and rotas of the Clinical Specialist doctors and their recruitment from overseas, the risks to the health and safety of patients and doctors posed by the Clinical Specialist doctors' rotas, the fact the rotas didn't comply with EWTR guidance, the fact that they should be employed on national terms, the suspected financial irregularity concerning release for SAS study days funded by HEE, the fact that he had been victimised, bullied and penalised as a result of making these disclosures and the fact that the Trust had not taken action to put right those issues and that the risk to patients' and doctors' health and safety had escalated as a result;

(l) ET1 [31.ii] That he informed John Findlay, a director of the Trust in May 2015 about disclosures he made to Dr Howard and others about the discriminatory nature of the terms of employment and rotas of the Clinical Specialist doctors and their recruitment from overseas, the risks to the health and safety of patients and doctors posed by the Clinical Specialist doctors' rotas, the fact the rotas didn't comply with EWTR guidance, the fact that they should be employed on national terms, the suspected financial irregularity concerning release for SAS study days funded by HEE, the fact that he had been victimised, bullied and penalised as a result of making these disclosures and the fact that the Trust had not taken action to put right those issues and that the risk to patients' and doctors' health and safety had escalated as a result;

(m) ET1 [31.iii] That he informed Monitor on 26 November 2015 about disclosures he made to Dr Howard and others about the discriminatory nature of the terms of employment and rotas of the Clinical Specialist doctors and their recruitment from overseas, the risks to the health and safety of patients and doctors posed by the Clinical Specialist doctors' rotas, the fact the rotas didn't comply with EWTR guidance, the fact that they should be employed on national terms, the suspected financial irregularity concerning release for SAS study days funded by HEE, the fact that he had been victimised, bullied and penalised as a result of making these disclosures and the fact that the Trust had not taken action to put right those issues and that the risk to patients' and doctors' health and safety had escalated as a result;

(n) ET1 [31.ix] That he informed David Amess MP on 4 December 2015 about the disclosures he made to Dr Howard and others about the discriminatory nature of the terms of employment and rotas of the Clinical Specialist doctors and their recruitment from overseas, the risks to the health and safety of patients and doctors posed by the Clinical Specialist doctors'

rotas, the fact the rotas didn't comply with EWTR guidance, the fact that they should be employed on national terms, the suspected financial irregularity concerning release for SAS study days funded by HEE, the fact that he had been victimised, bullied and penalised as a result of making these disclosures and the fact that the Trust had not taken action to put right those issues and that the risk to patients' and doctors' health and safety had escalated as a result;

(o) ET1 [31.v] That he informed Mark Francois MP on 26 February 2016 about disclosures he made to Dr Howard and others about the discriminatory nature of the terms of employment and rotas of the Clinical Specialist doctors and their recruitment from overseas, the risks to the health and safety of patients and doctors posed by the Clinical Specialist doctors' rotas, the fact the rotas didn't comply with EWTR guidance, the fact that they should be employed on national terms, the suspected financial irregularity concerning release for SAS study days funded by HEE, the fact that he had been victimised, bullied and penalised as a result of making these disclosures and the fact that the Trust had not taken action to put right those issues and that the risk to patients' and doctors' health and safety had escalated as a result;

(p) ET1 [31.vi] That he informed the National Guardian's office on 25 May 2016 about disclosures he made to Dr Howard and others about the discriminatory nature of the terms of employment and rotas of the Clinical Specialist doctors and their recruitment from overseas, the risks to the health and safety of patients and doctors posed by the Clinical Specialist doctors' rotas, the fact the rotas didn't comply with EWTR guidance, the fact that they should be employed on national terms, the suspected financial irregularity concerning release for SAS study days funded by HEE, the fact that he had been victimised, bullied and penalised as a result of making these disclosures and the fact that the Trust had not taken action to put right those issues and that the risk to patients' and doctors' health and

safety had escalated as a result;

(q) ET1 [31.vii] That he informed Heath Education England in mid-April 2015 and mid-2016 about disclosures he made to Dr Howard and others about the discriminatory nature of the terms of employment and rotas of the Clinical Specialist doctors and their recruitment from overseas, the risks to the health and safety of patients and doctors posed by the Clinical Specialist doctors' rotas, the fact the rotas didn't comply with EWTR guidance, the fact that they should be employed on national terms, the suspected financial irregularity concerning release for SAS study days funded by HEE, the fact that he had been victimised, bullied and penalised as a result of making these disclosures and the fact that the Trust had not taken action to put right those issues and that the risk to patients' and doctors' health and safety had escalated as a result;

(r) ET1 [31.viii] That he informed the Parliamentary Select Committee in October 2016 about disclosures he made to Dr Howard and others about the discriminatory nature of the terms of employment and rotas of the Clinical Specialist doctors and their recruitment from overseas, the risks to the health and safety of patients and doctors posed by the Clinical Specialist doctors' rotas, the fact the rotas didn't comply with EWTR guidance, the fact that they should be employed on national terms, the suspected financial irregularity concerning release for SAS study days funded by HEE, the fact that he had been victimised, bullied and penalised as a result of making these disclosures and the fact that the Trust had not taken action to put right those issues and that the risk to patients' and doctors' health and safety had escalated as a result;

(s) ET1 [32] That on 8 December 2016 he reported to the National Guardian disclosures he made to Dr Howard and others about the discriminatory nature of the terms of employment and rotas of the Clinical Specialist

doctors and their recruitment from overseas, the risks to the health and safety of patients and doctors posed by the Clinical Specialist doctors' rotas, the fact the rotas didn't comply with EWTR guidance, the fact that they should be employed on national terms, the suspected financial irregularity concerning release for SAS study days funded by HEE, the fact that he had been victimised, bullied and penalised as a result of making these disclosures and the fact that the Trust had not taken action to put right those issues and that the risk to patients' and doctors' health and safety had escalated as a result;

<u>Detriment Claims</u>

2. Did the Respondent subject the Claimant to a detriment on the ground that he had made one or more of the protected disclosures listed at paragraph 1 above? The detriments relied upon are as follows:

(a) Because of Disclosures at paragraphs 1(a) – (c) above (ET1 [40.i to 40.iii]) the Respondent has submitted the Claimant to the following detriments:

(i) The Respondent disadvantaged the Claimant compared to Dr Kumar when applying for the consultancy vacancy Dr Kumar obtained ET1 [43A.i].

(b) Because of Disclosures at paragraphs 1(a)-(d) above (ET1 [40.i to 40.iv]):

i. The Respondent failed to shortlist the Claimant for that position in October 2014; and
ii. The Respondent denied the Claimant permission to take annual leave in October 2014, having informally given permission in July 2014 ET1 [43A.ii and 43Aiii].

(c) Because of Disclosures at paragraphs 1(a)-(g) above (ET1 [40.i to 40.vii]):

i. The Respondent made false allegations of bullying against the Claimant in December 2014;

ii. The Respondent also in February 2015 denied the Claimant access to the local injury allowance policy and in fact did not inform the Claimant of the scheme until March / April 2017 [ET1 43C.i and 43C.ii];

(d) Because of Disclosures at paragraphs 1(a)-(s) above (ET1 [40.i to 40.xi]):

i. The Respondent refused to make reasonable adjustments to allow the Claimant to continue working, despite making adjustments for a colleague with a similar injury from February 2015 onwards;

ii. the Respondent denied the Claimant leave to undertake mandatory training in May 2015;

iii. The Respondent made unsubstantiated clinical allegations against the Claimant without any evidence in May 2015;

iv. The Respondent prevented the Claimant from negotiating new contract terms for himself and his colleagues by excluding him from working groups from January 2015 and from work from 28 May 2015;

v. It obstructed his revalidation by the GMC from October 2014 until the present day;

vi. It wrongly attempted to exclude him from work in May 2015;

vii. The Respondent unnecessarily excluded the Claimant from work from July 2015 to December 2016 causing him financial loss and depriving him of the opportunity to maintain his skills as a doctor and obtain revalidation with the GMC;

viii. It subjected the Claimant to an unnecessary and excessively detailed and lengthy disciplinary investigation into minor disciplinary allegations which caused the Claimant financial loss, and damaged his career and his prospects of obtaining revalidation with the GMC;

ix. It conducted the disciplinary proceedings unfairly by preventing the Claimant from defending himself in that he was not allowed to speak to colleagues who might have been witnesses for him and he was denied access to the Respondent's systems, which he needed to gather written evidence to help in his defence;

x. It prevented the Claimant from practising medicine while he was excluded;

xi. It prolonged the period of exclusion unnecessarily after the investigation had finished; and

xii. It prolonged the period of exclusion unnecessarily after the disciplinary proceedings had finished ET1 [43D.i – 43D.xii].

<u>Victimisation Claim</u>

3. Did the Respondent subject the Claimant to a detriment pursuant to Section 27 EA 2010 because he did or the Respondent believed he would do a protected act? The Claimant relies on the following as alleged protected acts:

(a) alleging that the Respondent was contravening the Equality Act by discriminating on the grounds of race in relation to his own recruitment, terms of employment and harassment and victimisation contrary to the Equality Act and bringing proceedings under the Equality Act against the Respondent;

(b) alleging that the Respondent was contravening the Equality Act by discriminating on the grounds of race in relation to the recruitment, terms of employment of doctors in the Clinical Specialist Group;

(c) assisting doctors in the Clinical Specialist Group end the alleged discrimination against them under the Equality Act and assert their rights not to be discriminated against by the Respondent on grounds of race, if necessary by bringing proceedings under the Equality Act against the Respondent;

(d) providing representation, support, evidence or information to end the Respondent's alleged discrimination contrary to the Equality Act on the grounds of race or in proceedings under this Act brought by or on behalf of the Clinical Specialist Group doctors; and

(e) doing any other things that might be necessary to end the Respondent's

alleged race discrimination against him and the other doctors in the Clinical Specialist Group which were in contravention of the Equality Act.

(f) bringing a complaint of race discrimination against the Respondent.

(g) bringing a complaint of disability discrimination against the Respondent.

(h) bringing a claim of harassment contrary to the Equality Act relating to race or disability discrimination against the Respondent.

Time Limits

4. Pursuant to the time limits set out in Sections 48(3) and 48(4A) ERA 1996 and in Section 123 EA 2010, does the Tribunal have jurisdiction to consider each of the Claimant's complaints under Section 47B ERA 1996 and under Section 27 EA 2010? In particular:

(a) Did the Claimant submit his complaints of detriment to the Tribunal before the end of the period of three months, beginning with the date of the act or failure to act to which the complaint relates or, where the act or failure is part of a series of similar acts or failures, the last of them; or

(b) Within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to have been presented before the end of the period of three months; and/or

(c) Did the Claimant submit his complaints of victimisation to the Tribunal within three months starting with the date of each relevant act to which the complaint relates; and

(d) If not, do the complaints relate to conduct extending over a period and have the complaints been brought within three months of the end of that period?;

(e) Alternatively, would it be just and equitable for the Tribunal to extend the time limit for claims under the Equality Act 2010 pursuant to s123(1)(b)?; and

(f) To what extent (if any) does the extension of time for early conciliation affect the applicable limitation provisions?

Remedy

5. To what remedy, if any, is the Claimant entitled on a just and equitable basis

in respect of financial loss or injury to feelings? In particular:

(a) Should the Claimant be awarded aggravated damages and if so, what amount?

(b) Has the Claimant mitigated any losses he has suffered adequately or at all? If not, should any award of compensation be reduced and if so, by how much?

(c) Should any award of compensation be reduced to reflect any contributory fault by the Claimant? If so, by how much?

(d) Should any award of compensation be reduced where it appears any disclosure was not made in good faith? If so, by how much?

(e) Should any award of compensation be reduced or increased to reflect any unreasonable failure to follow the ACAS Code of Practice on Disciplinary and Grievance Procedures?

(f) Should the Claimant be awarded interest and if so at what rate and on what amount(s)?

17 October 2017

APPENDIX 2 – SECOND LIST OF ISSUES

IN THE EMPLOYMENT TRIBUNAL

EAST LONDON

B E T W E E N:

DR SALEEM ALTHAF

Claimant

and

SOUTHEND UNIVERSITY HOSPITAL NHS FOUNDATION TRUST

Respondent

AGREED LIST OF ISSUES

The Claimant advances the following claims:

a. Unfair dismissal under s.98 Employment Rights Act 1996 ("ERA")

b. Automatic unfair dismissal under s.103A ERA

c. Notice pay

d. Whistleblowing detriment under s.47B ERA

e. Failure to make reasonable adjustments under s.20 Equality Act 2010 ("EA")

f. Victimisation under s.27 EA

g. Breach of contract;

h. Unlawful deductions from wages under s.13 ERA.

Jurisdiction/Preliminary matters

1. Does the Tribunal have jurisdiction to hear the Claimant's claims on the basis that they have been brought out of time?

Unfair dismissal (section 98 ERA)

2. Was the Claimant's employment terminated by operation of law pursuant to section 47(1) of the Medical Act 1983;

3. If not, was the Claimant's employment terminated by operation of law by virtue of frustration?

4. If not, did the Respondent have a potentially fair reason for dismissal? If the Claimant was dismissed, the Respondent contends that the reason for dismissal was that the Claimant could not continue to work in the position which he held without contravention of a duty or restriction imposed by or under an enactment (s.98(2)(d) ERA) or by reason of the capability or qualifications of the Claimant for performing work of the kind which he was employed by the Respondent to do

(s.98(2)(a) ERA), or for some other substantial reason.

5. If the Respondent establishes that the Claimant was dismissed for a fair reason, did the Respondent act reasonably in dismissing the Claimant in accordance with s.98(4) ERA? In considering this issue, did the Respondent cause or contribute to the circumstances leading to the Claimant's dismissal?

Automatic Unfair Dismissal (section 103A ERA)

6. The Claimant relies on the alleged protected disclosures in the List of Issues for Claim 1.

7. Was the reason (or, if more than one, the principal reason) for the Claimant's dismissal that he made a protected disclosure?

Notice pay

8. Is the Claimant entitled to damages for failure by the Respondent to provide the Claimant with contractual notice pay or statutory notice pay?

Whistleblowing detriment under s.47B ERA

9. The Claimant relies on the alleged protected disclosures in the List of Issues for Claim 1.

10. Did the Respondent subject the Claimant to a detriment on the ground that he had made a protected disclosure? The alleged detriments relied upon are as follows:

    a. Obstructing the Claimant's revalidation by the GMC from October 2014 until 25 October 2017;

    b. Failing to follow the Respondent's sickness absence policy so as to facilitate a return to work during the period April 2017 to 25 October 2017 as the Respondent hoped that the Claimant would never return to his job;

    c. Failing to pay any sick pay to the Claimant for the period April 2017 to 25 October 2017.

11. Has the Claimant presented his claim to the Tribunal before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them (allowing for the ACAS Early Conciliation process)?

12. If not, was it reasonably practicable for the Claimant to have presented the claim to the Tribunal within that time limit?

13. If not, has the Claimant presented his claim within a time period that the Tribunal considers reasonable?

Failure to make reasonable adjustments

14. Was the Claimant disabled within the meaning of s.6 of the Equality Act 2010 at the relevant time? The Claimant relies upon the following:

    a. Autoimmune rheumatological disorder from early 2015;

    b. Type 2 diabetes from early 2015;

    c. Stress from late 2014.

15. Did a provision, criterion or practice ("**PCP**") of the Respondent's put the Claimant at a substantial disadvantage compared with persons who were not disabled? The alleged PCPs relied upon are as follows:

    a. Requiring overseas qualified doctors in the department, including the Claimant, to work under a local contract with no sick pay provision.

    b. Requiring overseas qualified doctors in the department, including the Claimant to work under a local contract with no pension provision.

    c. Requiring all doctors to work a full time shift "on their feet" with limited ability to have rest breaks, or work whilst seated or with reduced hours.

16. If so, did the Respondent know or ought it have known that the Claimant was disabled and likely to be at a substantial disadvantage compared with persons who were not disabled and, if so, at what date did the Respondent have that knowledge? The Claimant contends that the Respondent had actual or constructive knowledge by February 2015 and no later than 3 April 2017.

17. If so, did the Respondent fail to make such adjustments as were reasonable to avoid that substantial disadvantage? The alleged failures relied upon are as follows:

    a. Failing to extend sick pay to the Claimant so as to enable him to take time off for treatment and convalescence in the period February 2015 to May 2015 and April 2017 to 25 October 2017;

    b. Failing to provide access to the NHS Pension and make employer contributions in the period February 2015 to 25 October 2017;

    c. Failing to reduce the Claimant's hours in the period February 2015 to May 2015 and 13 March 2017 to 3 April 2017;

    d. Failing to give the Claimant appropriate rest breaks in the period February 2015 to May 2015 and 13 March 2017 to 3 April 2017;

    e. Failing to offer appropriate seating in the period February 2015 to May 2015 and 13 March 2017 to 3 April 2017.

18. Has the Claimant presented his claim to the Tribunal before the end of the period of three months starting with the date of the alleged failure or, for conduct extending over a period, the date on which that period ends (allowing for the ACAS Early Conciliation process)?

19. If not, is it just and equitable to extend the time limit?

Victimisation

20. Claimant relies on the alleged protected acts in the List of Issues for Claim 1.

21. Did the Respondent subject the Claimant to a detriment because the Claimant had done (or the Respondent believed he had done or may do) a protected act? The alleged detriments relied upon are as follows:

    a. Obstructing the Claimant's revalidation by the GMC from October 2014 until 25 October 2017.

    b. Failing to follow the Respondent's sickness absence policy so as to facilitate a return to work during the period April 2017 to 25 October 2017 as the Respondent hoped that the Claimant would never return to his job;

    c. Failing to pay any sick pay to the Claimant for the period April 2017 to 25 October 2017.

22. Has the Claimant presented his claim to the Tribunal before the end of the period of three months starting with the date of the act to which the complaint relates or, for conduct extending over a period, the date on which that period ends (allowing for the ACAS Early Conciliation process)?

23. If not, is it just and equitable to extend the time limit?

Breach of contract / Unlawful deductions from wages

24. Has the Respondent breached the Claimant's contract of employment or did it make an unauthorised deduction from wages pursuant to s.13 ERA by:

    a. Failing to employ him on national terms and conditions in respect of the 2008 contract;

    b. Failing to adhere to the 2002 terms and conditions if found not liable for the above;

    c. Failing to pay contractual sick pay from 3 April 2017 to 25 October 2017;

    d. Failing to pay the Claimant a Temporary Injury Allowance;

    e. Failing to pay employer pension contributions from October 2013 to 25 October 2017;

    f. Rostering the Claimant to work for up to the equivalent of 48 hours per week when he was contracted to work 42 hours per week.

25. Has the Claimant presented his claim to the Tribunal before the end of the period of three months starting with the date of the alleged deduction or, in the case of a series of deductions, the date of the last deduction in the series (allowing for the ACAS Early Conciliation process)?

26. If not, was it reasonably practicable for the Claimant to have presented the claim to the Tribunal within that time limit?

27. If not, has the Claimant presented his claim within a time period that the Tribunal considers reasonable?

Agreed at the Preliminary Hearing on 27 July 2018