Case No: 1804127/2019
1804569/2019
1804704/2019
1804705/2019
1806726/2019

EMPLOYMENT TRIBUNALS

Claimant	Respondents
Mr A Razzaque	v **Petrie Tucker and Partners Limited trading as "MyDentist" (1)**
	Ms K Whitley (2)
	Ms S Balderstone (3)
	Ms S Bellwood (4)

Heard at: Leeds **On: 1 to 9 March and 17 March 2021**

Before:

Employment Judge JM Wade

Mr D Dowse

Ms J Noble

Appearance:

For the Claimant: **In person**

For the Respondent: **Mr C Breen (counsel)**

This has been a remote hearing by CVP because of the pandemic, with which the parties were content. References to page numbers are references to the hearing file.

A proportionate summary of the written reasons below was provided orally in an extempore Judgment delivered on 17 March 2021, the written record of which was sent to the parties on 23 March 2021. A written request for written reasons was received from the claimant on 5 April 2021. The reasons below are now provided in accordance with Rule 62 and in particular Rule 62(5) which provides: In the case of a judgment the reasons shall: identify the issues which the Tribunal has determined, state the findings of fact made in relation to those issues, concisely identify the relevant law, and state how the law has been applied to those findings in order to decide the issues. For convenience the terms of the Judgment given on 17 March 2021 are repeated below:

JUDGMENT

1 The claimant's complaint of unfair dismissal against the first respondent is not well founded and is dismissed.

2 The claimant's complaints of protected disclosure detriment against all respondents are also dismissed.

REASONS

Introduction and Issues

1. These combined claims (and three others) were presented after a dismissal of Mr Razzaque in July 2019. He had worked as a dental nurse/decontamination assistant at the first respondent's Keighley surgery. The first respondent operates a large number of dental practices. The second respondent is the first respondent's whistleblowing guardian; the third respondent was the Keighley practice manager; and the fourth respondent, the area manager.

2. In the first claim form, the claimant certified that he presented a case of unfair dismissal only, because he sought interim relief. It was clear from the outset that the claimant's case was that he had been dismissed because he was a whistle blower.

3. The application for interim relief was refused and the claimant then presented seven further claim forms, which were consolidated and clarified in case management. That work identified the distinct alleged detriments, the alleged disclosures, and Equality Act claims. In a judgment with reasons sent to the parties on 9 September 2020, the Employment Judge dismissed further applications to amend, dismissed all Equality Act claims, dismissed claims against three respondents, and said this:

"All allegations in claim numbers 1804127/2019, 1804569/2019, 1804704/2019, 1804705/2019 and 1806726/2019 other than those set out in the Annex are struck out as having no reasonable prospect of success".

4. That Annex is attached to these reasons. There are eleven alleged disclosures and sixty allegations of detriment. The Annex is amended to include the primary limitation dates for each set of allegations adopting the following analysis identified in case management:

4.1. 1804127/2019 v R1. No EC. Claim presented: 28.7.19. Earliest date in time: 29.4.19

4.2. 1804569/2019 v R2 EC began 27.6.19. ECC issued 27.7.19. ET1 presented 27.8.19. Earliest date in time 28.3.19

4.3. 1804704/2019 v R3 EC began 4.7.19. ECC issued 4.8.19. Claim presented 4.9.19. Earliest date in time 5.4.19

4.4. 1804705/2019 v R1 EC began 4.7.19. ECC issued 4.8.19. Claim presented 5.9.19. Earliest date in time: 6.5.19

4.5. 1806726/2019 v R4 EC began 26.9.19. ECC issued 11.10.19. Claim presented 11.11.19. Earliest date in time 27.6.19

5. The Annex enabled the parties and the Tribunal to take a structured approach to examining the claimant's case. All allegations against the second respondent were presented in time. Most allegations against the third and fourth respondents were potentially out of time.

6. The matters of dispute between the parties were principally matters of fact. As a result, by the conclusion of the hearing, the real issues in dispute had somewhat narrowed, facts having been clarified. The essential issues were:

   6.1. What was the principal reason for dismissal? Was it the making of protected disclosures, including applying Jhuti (there were clearly protected disclosures made, but Mrs Pringle, who dismissed the claimant, said she did not know of them and the claimant argued his case on the basis that she did not know of them)? Or was the reason for dismissal Mrs Pringle's reason – the claimant's conduct in being absent without leave? The claimant did not allege unreasonableness in the dismissal, if the respondent established its conduct reason.

   6.2. Were the alleged detriments established in fact? Did the claimant hold an unjustified sense of grievance about various episodes?

   6.3. Were the detriment complaints against the third and fourth respondents presented in time – as the claimant presented no evidence as to why it was not reasonably practicable to have presented earlier, the only issue was whether any act or failure was part of a series of similar acts or failures, and if so, was the last of them presented in time?

   6.4. Were any detriments materially influenced by the making of disclosures ?

   6.5. The Tribunal recognised that issues 3 and 4 are inherently linked in that if the employer's acts are influenced by the making of disclosures over time, that can be the common thread linking a series of similar acts or failures such as to render earlier complaints in time.

The Hearing

7. The hearing proceeded with some delay and difficulty. The Tribunal read on the first morning (the claimant's statement was surprisingly short given the allegations), and agreed a regime of regular breaks during the evidence. The claimant's evidence started at 2pm on the first day and was completed by the end of the second day. On the third day the claimant was too fatigued to continue, similarly on the morning of the fourth day. The Tribunal resumed at 2pm on the fourth day and the claimant confirmed he was content and prepared to continue. We heard the third respondent and the claimant took her through his case. It was proportionate to allocate a day and a half for the third respondent, as the main alleged protagonist, but no more, and we intervened to enable the allegations to be put. The third respondent had retired from the respondent in 2020.

8. On the sixth day we heard the fourth respondent, Mrs Pringle (who dismissed the claimant), Mrs Thomas (who completed an investigation after the claims were presented) and the second respondent. The Tribunal indicated we would hear the parties' submissions at 10 am on day seven, and then deliberate for the rest of the day. The claimant was unable to proceed in the morning, telling the Tribunal of a stomach upset. We heard submissions in the afternoon.

9. The Tribunal and the respondent's counsel and witnesses exhibited the patience to be expected in a fair hearing, faced with a litigant in person whose attendance was disrupted, with some documentary evidence on the file, and oral evidence from the claimant, that he was receiving medication in connection with mental ill health. The Tribunal made adjustments and gave directions within Rule 47.

10. We were able to allocate additional time for further deliberations and Judgment the following week, considering it in the interests of justice that the Tribunal be able to deliberate without delay and for the parties to hear the Tribunal's decisions when made.

The Law

11. Section 43A and 43B of the Employment Rights Act 1996 ("ERA") set out what disclosures to the employer qualify for protection – in effect what amounts to whistleblowing in law.

12. Section Section 47B ERA relevantly provides at 47b (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".

13. Detriment simply means where the reasonable worker would take the view that he was disadvantaged in the circumstances in which he had to work. Being subjected to detriment does not extend to innocuous matters or those where the employee has an unjustified sense of grievance. See for example paras 27 to 28 of Jesudason v Adler Hey Children's NHS Foundation Trust [2020] EWCA Civ 73.

14. In cases where the whistleblower is complaining that the employer has subjected him to a detriment short of dismissal, section 48(2) provides that the onus is on the employer to show the ground on which any act, or failure to act, was done.

15. Section 47B will be infringed if the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistleblower. NHS Manchester v Fecitt and others [2011] EWCA Civ 1190.

16. Where the whistleblower is subject to a detriment without being at fault in any way, tribunals will need to look with a critical - indeed sceptical - eye to see whether the innocent explanation given by the employer for the adverse treatment is indeed the genuine explanation. The detrimental treatment of an innocent whistleblower necessarily provides a strong *prima facie* case that the action has been taken because of the protected disclosure and it cries out for an explanation from the employer. Fecitt at paragraph 51

17. Section 48(3) ERA provides: "An employment tribunal shall not consider a complaint under this section unless it is presented – 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…".

18. Section 94 of the ERA provides employees with the right not to be unfairly dismissed.

19. Section 98 ERA 1996 relevantly provides:

> (1)In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—
>
> (a)the reason (or, if more than one, the principal reason) for the dismissal, and [etc]
>
> … (2) A reason falls within this subsection if it –
>
> (b) relates to the conduct of the employee
>
> (4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—
>
> (a)depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
>
> (b) shall be determined in accordance with equity and the substantial merits of the case.

20. Section 103A provides: "An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or if more than one, the principal reason) is that the employee made a protected disclosure."

21. The reason for dismissal is the set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee: *Abernethy v, Mott, Hay and Anderson* [1974] ICR 323, CA.

22. In *Kuzel v Roche Products Ltd* [2008] EWCA Civ 380, [2008] ICR 799, the Court of Appeal addressed the location of the burden of proof under section 103A. It held that a burden lay on an employee claiming unfair dismissal under the section to produce some evidence that the reason for the dismissal was that she had made a protected disclosure but that, once she had discharged that evidential burden, the legal burden lay on the employer to establish the contrary: see paras 57 and 61 of the judgment of Mummery LJ.

23. Section 98 is silent as to which individual within an organisation counts as the "employer", for the purpose of ascertaining the reason for dismissal and whether the employer acted reasonably or unreasonably.

24. In Royal Mail Group Limited v Jhuti [2019] UKSC 55 the Supreme Court was asked the question: "in a claim for unfair dismissal can the reason for dismissal be other

than that given to the employee by the decision maker?" Its answer was: "Yes, if a person in the hierarchy of responsibility above the employee determines that she (or he) should be dismissed for a reason but hides it behind an invented reason which the decision-maker adopts, the reason for the dismissal is the hidden reason rather than the invented reason". The claimant said this was such a case.

Evidence and Approach to Fact Finding

25. The claimant's witness statement, signed on 12 February 2021, comprised three short paragraphs. He identified that the information provided was true to the best of his information and belief; that the agreed bundle contained documents which corresponded to a list of verbatim audio transcriptions; and, finally, "I was subjected to detrimental treatment and unfairly dismissed by my Employer on the grounds that I made protected disclosures in the public interest".

26. In the circumstances the Tribunal asked the claimant whether he would wish us to treat any of the claim documents as his evidence and he and Mr Breen agreed that was a pragmatic approach. The claimant said we should use the particulars of claim attached to claim number 1804705/2019 (page 153 to 202) as his evidence. Thirty five of the sixty detriment allegations arose from these claim particulars.

27. The Tribunal also directed that the transcripts of the claimant's workplace recordings were admissible and permitted supplemental evidence from the third respondent as appropriate about those.

28. As to those recordings, colleagues in Keighley were not permitted to have their mobile telephones about them when they were working. There were lockers provided. From 2017 to 2019 the claimant made recordings of conversations with his colleagues without their knowledge using a digital dictation device.

29. We reject the claimant's evidence that the recordings presented to the Tribunal were made by chance, and that the claimant had inadvertently activated a digital recorder which he kept in his pocket for work related purposes. It is possible that this occurred on one or two occasions, but not for the recordings material to this case. There were fifty nine pages of recording transcripts, covering forty conversations which the claimant listed numerically at the request of the Tribunal. Some were very short. The respondent accepted the transcripts were accurate representations of what could be heard, having been sent the audio files, and the Tribunal was not called upon to listen to the recordings.

30. We find that the claimant used the recorder to enable him to gather evidence of potential wrong doing he perceived by his colleagues, or for other reasons. From his recorded exchange with a dentist and others it is clear he knew he was recording conversations and he was selective in the matters he chose to record.

31. The claimant had also taken a great number of photographs of records and other matters at the respondent's practice. Those documents too informed our findings.

32. We also had written statements from the respondent's witnesses and an electronic file of over two thousand pages, to which there were a number of additions during the course of the hearing, including the claimant's new joiner form from the commencement of his work at Keighley.

33. The agreed hearing file was more than two thousand pages in length.

34. Outline findings of fact

35. The claimant started as a trainee dental nurse at the respondent's Saltaire practice in 2014. The respondent operates over six hundred dental practices. On 27 June 2016 the claimant moved to the Keighley branch because that was nearer his home. He had three children at the time, and he reduced his working hours to Monday to Thursday, starting at lunchtime and then a full day on Saturday, finishing in the evening. The claimant's brother was a dentist at the Keighley branch. By the time of his dismissal the claimant had four children.

36. The respondent had in place an attendance policy, a disciplinary policy and a whistleblowing policy, all consistent with those commonly seen in place for large employers in heavily regulated sectors.

37. The claimant's job title was trainee dental nurse and decontamination operative, which meant a substantial part of his time was spent in the decontamination room cleaning instruments using various technical equipment and processes – it was a vital role[1].

38. The claimant was expected to attend team meetings conducted by the third respondent or her deputy and specific decontamination meetings. The claimant was rigorous about hygiene and cross contamination and known to be so. He operated to unforgiving standards. When he saw bad practice by colleagues he told management including the third respondent. His comments or reports were often acted upon. For example a note of the meeting on 3 December 2018 records various decontamination action items, including praise for the claimant. Beyond that note the third respondent could not recall specifically, but we find that the claimant did mention colleagues not always cleaning equipment before sterilising them, nor inspecting them with the magnifier.

39. One of the claimant's tasks (and those of any colleague working in the decontamination room) was to complete a "Daily Sterilisation Room Checklist", to verify that standard procedures had been observed. The checklist needed to be checked and validated each week by the head nurse as infection control lead.

40. In the round we accept the claimant made the verbal disclosures at PD1 to 8 and 10 in the Annex, and in doing so he reasonably believed he did so in the public interest because he believed health and safety was at risk, or, on one occasion, that the treatment amounted to unlawful discrimination towards him (PD3), and on another occasion that a criminal offence had been committed towards him (PD5). PD8 (colleagues leaving early) was most likely not reasonably believed by the claimant to be made in the public interest - this was driven by the claimant's personal sense of unfairness at having been inadvertently the wrong side of a locked gate – but we proceeded on the basis that it was, because it was pragmatic

[1] We do not draw any adverse inference from the third respondent considering the claimant's job title was a decontamination operative, rather than a dental nurse, until the claimant provided disclosure during the hearing of an email attaching his role terms . We had accepted she did not recall her original email to him (which confirmed the dual role); she knew he qualified in the dental nurse role in 2018 and she knew that he worked as such on Saturdays. She simply did not recall the original document and saw his decontamination role has his principal role.

to focus on the conduct of the respondents and the reasons for that conduct within the time allocated for this hearing.

41. Exclusively "dental nurse" positions came up at Keighley from time to time, but the claimant did not seek to apply for them because the decontamination hours suited him and these were hours that were only available working primarily in the decontamination area. On Saturdays the claimant worked in a surgery assisting a dentist as required, enabling him to qualify as a dental nurse in March 2018. He was provided with a new badge identifying him as such in December 2018.

42. In February 2017 the claimant had a "sparkling clean" treatment at the practice, which he was asked to pay for. He did so and made no complaint about that at the time to the third respondent. He later came to see unfairness in it because others had had treatment and not been charged.

Allegation 9/PD3

43. In August 2017 the claimant was unhappy because a dentist asked him to carry a whitening light upstairs (rather than asking female dental nurses). He made no written complaint at the time but considered this unfair and discriminatory and said as much to colleagues.

44. On 25 January 2018 the same dentist referred to the claimant as, "the terror of Keighley"…being back" when she visited him in the decontamination room. The claimant challenged her at the time and then strongly complained about the comment to Ms Butterfield, then the deputy or assistant practice manager. Ms Butterfield, who had been present, was asked by the claimant to bring the dentist to a meeting, and that he wished to complain to HR. Ms Butterfield did so and made a note of events, which broadly reflected in its details much of the two recordings made by the claimant. He had recorded both the exchange with the dentist and his conversation with Ms Butterfield to complain. In her note, which the claimant wished placed on his file, Ms Butterfield referred to the comment as "my little Keighley terror" as opposed to "the Keighley terror"; and the claimant had amended it in manuscript to agree the notes.

45. The claimant received an unreserved, full, sincerely written apology from the dentist the next day. The claimant can have no justified sense of grievance about the respondent not disciplining the dentist or using its grievance procedure, because a) he requested a meeting with the dentist and had it; b) he received the unreserved apology; c) he did not provide his recording at the time as evidence of the precise comment made; d) he did not pursue it further setting out why it was grounds for grievance or disciplinary action in context.

PD 5

46. On 6 September 2018 the claimant alleged that a dentist had punched him in the chest at around 5.10pm. A colleague called the third respondent when the claimant went home early, having made that allegation. The third respondent started to investigate and spoke to the dentist that evening and the claimant the next day. The claimant had contacted the police within half an hour of the alleged incident. The claimant had a number of days off with stress after the incident.

47. The respondent's then area Manager investigated the matter, involving the head of employee relations, interviewing various witnesses and delivering an outcome on 16 October 2018. This was plainly a serious matter. No further steps were taken. Neither the dentist nor the claimant would take part in mediation. Neither of them were satisfied with the outcome. The respondent found there was physical contact but with no aggression or intent – the dentist accepted he made contact but was showing the claimant what he did with his brother, and if he touched him and caused pain it was an accident. The dentist had apologised profusely when the claimant had tacked him about it before he left the same night. The claimant recorded this conversation but did not provide the recording to the investigation or mention that he had it.

48. In 2018 the claimant had stopped doing computer updates for "autoclave" logs and others were attending to it. In November he had some training in relation to that. To take up those duties again required him being allocated access or log in to the lead nurse's computer in an office away from the decontamination room. That had not happened by 2019 but there was nothing untoward about that – it was a task every couple of weeks or so and the third respondent had not yet decided who should have the ongoing responsibility.

Allegation 15

49. Around 10 December 2018 the claimant needed a plaster. We find the third respondent may well have said he should get his own plasters (rather than use the first aid box) or words to that effect. We make that finding because evidence from a witness in Mrs Thomas' investigation corroborates it and the third respondent could not recall it. The claimant says she remined him to use the accident book – that may well have been the reason for her to be firm about matters if she was.

Allegation 18 (and 5)

50. The claimant was required to wear PPE when working in the decontamination room. On 12 December 2018 the claimant had used a defective apron by repairing it with Sellotape because the practice was without disposable aprons (it had received a box of defective ones). The third respondent had said "I think we can do better than that" or words to that effect, and removed the disposable apron considering it looked unprofessional and had ordered new ones. The third respondent had laughed about the apron because she found it comical. She behaved this way because of the selotaped apron, in no way influenced by the claimant's 2016 disclosure.

51. PD 8/Absence Management/ Allegations 19 to 28

52. On 9 January 2019 the claimant's holiday request dated 2 January (for dates in February) was refused by the third respondent because others had booked the dates he sought first. She provided him with alternative dates to accommodate his holiday before the end of March 2019. Those dates were 16, 27 and 28 February and 2,5,6,7,9,21 and 22 March.

53. On the same day Ms Balderstone told the claimant he should have been at the team meeting – she did so in the decontamination room with the head nurse present. She did not shout – she asked him to write down the next meeting date.

54. From 23 January to 4 February[2] the claimant was absent with an ankle sprain. The first respondent operated a standard absence management procedure. The ankle absence was a third absence in 12 months (previously for tonsillitis and a viral infection – the September punch allegation absence had not been counted for absence management purposes). The third respondent met him on 5 February to let him know that absence caused problems for colleagues and he was given a first warning, and told that further absence would could trigger a final warning. The claimant signed the notes of that meeting with the third respondent.

55. He explained that he had had to climb the wall to leave work because colleagues on reception had left early leaving him locked in (he worked till 8pm that evening). That is how the injury had arisen, he said. The third respondent then looked into how the incident arose and advised colleagues that they must not leave early.

56. The claimant asked for a sitting role while his ankle recovered and the third respondent asked a colleague to help him in the decontamination room; that colleague did not observe the stringent procedures to which the claimant adhered and left him to his work. The fact that the claimant did not appear on the rota for the following week was almost certainly because of his sick leave absence.

57. On 19 February the claimant had permission to leave work early for reasons relating to an appointment for his child – he was not refused that leave.

58. On 20 February there was a meeting about the practice becoming an advanced oral health centre, and the claimant did not attend. When the third respondent went to find him, she said he should be at the meeting and commented on the build up of decontamination work from the previous day. She talked to the claimant about the previous week and complaints about decontamination work not being done – on balance this was the day when the third respondent had a conversation with the claimant about all aspects of work including team work[3]. She did not berate him or shout; she simply wanted to encourage him to focus on the basics and teamwork; and to attend relevant meetings and to attend to relevant tasks.

59. On 22 February the claimant was allocated to reception between 6.30pm and 8pm; the dental nurses were asked to cover decontamination. While working on reception the claimant had access to the respondent's systems and could access policies and so on.

60. On 25 February a dental nurse colleague had collected metal trays from the decontamination room for her surgery and the claimant had recovered those. The colleague returned to take them back and told the claimant to order new ones. He considered this sabotaging his work – the surgeries used plastic trays. The third respondent had no involvement in the colleague's actions and had she known, would have instructed the colleague to use plastic trays.

61. On 27 February, a day when the claimant was on leave, a service engineer visited the practice unannounced and certified the claimant's decontamination colleague as competent to use particular equipment. The claimant was annoyed that he had

[2] 714
[3] 509

missed that opportunity and the colleague had the certificate, when he did not. It was not arranged by the third respondent so that he would miss out on training.

62. During February 2019 there was also various operations issues connected with the use of metal trays by the surgeries and the method for distributing clean and dirty instruments between the decontamination room and the surgeries by use of red and green "pods". There was dialogue about that between the claimant and the third respondent and others.

63. It was part of surgery life that dental nurses who worked in particular surgeries regarded those rooms as "their surgeries" and they were responsible for making sure dentists and patients had the right clean equipment at the right time. At times they would talk to the claimant about those operational issues (see for example the claimant's recording 10).

64. In the round matters arising in February 2019 were operational issues and no reasonable employee would consider any of these matters anything to be complained about. The claimant has an unjustified sense of grievance about events in January and February, and nothing that the third respondent did was influenced by the claimant raising issues with her (or having made the disclosures PD1 to PD7). We do not find that the third respondent shouted at him at any time. That would be entirely inconsistent with the recordings of her conversations with him, and the impression she made giving her evidence. She was at times firm, for instance when there was a build up of work, or in relation to the claimant's need to attend meetings, but otherwise good humour featured in her interactions with the claimant.

<u>March/April sickness absence and further absence management</u>

65. As arranged with the third respondent, the claimant was on leave for the first week of March, then back at work for a week. On 14 and 16 March he took extensive photographs of the Daily Sheets and other logs, and other evidence of poor hygiene as he saw it. The daily sheets photographed had not been countersigned by the head nurse and had other deficiencies.

66. The claimant was then absent for three weeks, certified by his GP because of stress, from 18 March to 7 April. The third respondent was in touch with him on 23 March to understand the reason for absence and whether she could arrange a welfare meeting. This was the claimant's fourth absence within a year. The claimant said to the third respondent that this stress absence all went back to the punch or alleged punch from the dentist the previous year and gossip about that. He also alleged the dentist had said to him, "he would get him for this", and there were witnesses to that. He did not, however, want a welfare meeting with the third respondent to discuss those matters. He did not say anything about being concerned for standards of hygiene when he was on holiday or otherwise.

67. The third respondent sought advice from human resources, and was advised to keep matters under review, and if the absence became four weeks or longer, it would be treated as long term absence and a welfare meeting should then be held.

68. In her communications with HR, the third respondent provided appropriate information including her records of absence, and was provided with helpful advice about the ground to be covered at a return to work meeting with the claimant. As

with the recordings of the third respondent, there is nothing in the third respondent's communications at the time which suggested she bore the claimant any ill will or had any ulterior motive in her treatment of him.

69. On 4 April the third respondent completed a standard Infection Prevention Society audit form for the decontamination room and noted that the head nurse had not been countersigning appropriate logs. The third respondent wrote that the head nurse was now aware this needed to be done and she took steps to countersign the sheets herself. Other staff had identified the head nurse as "slack" in discussion with the claimant.

<u>PD 9 Written disclosure to the second respondent – the first respondent's speak up guardian</u>

70. Before the claimant returned to work on 8 April 2019, he lodged a lengthy whistle blowing complaint to the first respondent's "Speak Up Guardian", identified in its whistleblowing policy.

71. The policy ran to seven pages, set out the matters which could be raised and how to raise them, including informally, with line management, through a whistleblowing telephone line, or if the matter was so serious or the employee preferred not to pursue those options, there was the option to contact the second respondent through an on line form.

72. The policy provided: "…*What will happen next? Once you have reported your concern, following one of the steps above, mydentist will look into the matter and make an initial assessment of what action should be taken. This might involve an internal inquiry or a more formal investigation. You will be told who is handling the matter, how you can contact them and whether your further assistance may be needed, if you have provided your personal details for such to happen. Subject to any legal constraint, you will be kept informed of the progress of the investigation and its outcome. You have an assurance that the matter will be dealt with promptly and within a reasonable time*….and….

Victimising anyone for, or deterring them from, raising a concern under this policy is a disciplinary offence and will be dealt with under the disciplinary procedure"…and…

"*you will not be at risk of losing your job or suffering any form of detrimental treatment for raising a genuine concern under this policy. Provided you are acting honestly, it does not matter if you are mistaken or there is an innocent explanation for your concern, so please do not think we will ask you to prove it. We do not extend this assurance to someone who maliciously raises a matter they know is untrue."*

73. The claimant's nine page letter raised cross-contamination/health and safety issues only, as evidenced by the photographs he had taken. He did not, however, attach the evidence he had secured, nor did he raise any of the allegations about treatment of him by the third respondent (or indeed the dentists he alleged had punched him or been rude to him), or others.

74. The letter made lengthy criticisms and concerns about decontamination matters at the practice, which the claimant said he had witnessed. It was highly critical of the

third respondent and the head nurse in matters of cross infection risks. It made extensive reference to the Employment Rights Act 1996 and the final paragraph said this*: "I am asking the Company to ensure that I am not subjected to any detriment for having blown the whistle. For the avoidance of doubt I am profoundly concerned that Management in the practice will try and get rid of me for blowing the whistle and/or make my life a living hell. In the event I am subjected to detriment I will assert my statutory rights ..in the Employment Tribunal. I am asking my employer to warn [the third respondent and the head nurse] that I will hold them personally liable pursuant to …. In the event they subject me to any form of detrimental treatment for having blown the whistle."*

75. That letter was forwarded by the second respondent to the first respondent's in house counsel, Ms Connolly, who forwarded it to the area manager/fourth respondent, and the respondent's head of compliance, with an instruction that it be investigated. The second respondent did not acknowledge the claimant's letter and neither did Ms Connolly at that stage.

76. The letter was not sent to the third respondent before the claimant returned to work and she had no knowledge of it when she next met with him.

<u>PD10/Allegations 36 to 42/ events from 8 April/return to work</u>

77. The claimant recorded one of his conversations with the third respondent on his return to work on 8 April. The third respondent had received advice on matters to be discussed on return to work, the first matter being, "reason for absence". When she asked the claimant about that he said in addition to stress he also had physical pain issues (shoulder, arm, back, left knee, foot, pelvis) and so he was asked to complete a self certificate about physical pain to supplement the GP certificate. On the self certificate he asked for an assessment of the "pod tube handle" (equipment within the decontamination room) because it was causing him pain, and a sitting job to accommodate his foot pain.

78. These matters all came as a complete surprise to the third respondent because she had prepared for a conversation about stress. The recorded conversation indicated that she was concerned to discuss the real issues there might have been with the "pod tube handle", but she also wanted to explore the underlying reason for stress, which had earlier said related to the September dentist incident, and why the physical pain had not been mentioned previously. The claimant said he had mentioned physical pain to the previous head nurse, and there was discussion to the effect that his decontamination room colleague had no problem with the equipment. The claimant said he could not continue in decontamination unless the pod handle was changed.

79. The third respondent asked the claimant to work in the records office – reception was not an option because the Keighley surgery had just acquired "advanced oral heath centre" status, and those on reception had recently received additional training. The third respondent said she would take further advice if the claimant would stay in records for the time being. The third respondent also said there would be a formal interview due to absence (for the same reasons as previously – triggering the next stage of absence management) and that she would set up a meeting, because of the pressure that the claimant's absence put on other colleagues (who had been covering decontamination duties).

80. Again, there is nothing, in context, in this recorded conversation which indicates any ill will, or malevolent intent towards the claimant by the third respondent.

81. After that recorded conversation she spoke to the claimant again and arranged for support in the decontamination room, pending further advice (and colleagues - F and the head nurse - were allocated to that), but it was difficult to make further adjustments for his physical complaints without occupational health advice. She asked if he would sign forms to enable the respondent to seek GP/specialist advice for the physical issues, but the claimant would not agree to that. The third respondent also wanted to undertake a stress risk assessment for the claimant and he took away the forms for that but did not complete them on 9 April.

82. On 9 April the claimant met the third respondent with the head nurse present, and signed notes on the respondent's absence tracker to confirm the previous day's conversation, which were broadly faithful to his recording of it (Page 545). Again, had the third respondent been seeking to retaliate against him for previous disclosures this might have been apparent in a partial or inaccurate reflection of their conversation – there was nothing of the kind.

83. On 10 April the third respondent asked the claimant to bring the stress risk assessment form with him to work the next day. That was the last opportunity because the claimant was due to go on leave on 12 April and then due back at work on or around the 23 April.

84. On 10 April, in the evening, the claimant took a great many photographs of documents in the decontamination room.

85. In doing so he observed, by comparison with the photographs he had taken in March, that the third respondent had countersigned the Daily Sheet on 8 April and made notes about the ultrasound device. He considered that in starting to countersign these sheets when she had not done so in the past, the third respondent was trying to put right or cover up elements of the issues he had whistle blown about. This was a completely wrong perception.

86. The third respondent had identified that the lead nurse had not been countersigning the sheets in her standard audit on 4 April. She had wanted to put that right as appropriate. She did not know on 10 April that the claimant had reported hygiene matters to the speak up guardian.

87. The claimant was seen by the third respondent at 3.30pm on 11 April. On his case he had received a fit note from his GP signing him fit for work with adjustments the day before. He did not present it then or mention it and the third respondent did not mention or chase the stress risk assessment. There was nothing in that 3.30pm meeting which the claimant alleged was inappropriate or detrimental and the following day he was on leave.

88. He spoke to the third respondent on 23 April, on the day he was due to return from work after holiday, and again on 24 April. He recorded the latter conversation. He said he would not be attending work because of pain to his shoulder. The third respondent said she would take advice and get back to him. That was a short conversation.

89. She then rang the claimant and asked him again to drop his GP fit note in and that she would need him to sign the medical records access form. The claimant did not record that second conversation, but its contents are apparent from contemporaneous emails the third respondent was exchanging with HR seeking advice.

Allegation 45

90. The third respondent then meant to drop off the medical access form at the claimant's house herself, but she gave a colleague a lift that evening and when they came to the claimant's house, the colleague offered to get out of the car and post the letter for the third respondent. As there was no post box, she knocked on the door and gave the claimant the envelope with the forms. The claimant did not then complete them and the respondent had no access to the claimant's medical records, either then, nor throughout these proceedings.

91. While the claimant could have some sense of upset at a colleague knowing his address (in circumstances where he had not given permission for that), and by that he had suffered disadvantage or detriment, the third respondent did not do so because the claimant had submitted PD9. She did do without thinking and because it was convenient and a colleague asked to help – she was trying to get medical advice to assist with the claimant's absence from work. In no sense whatsoever was there any connection between the disclosure and the claimant's address becoming known to the colleague.

92. The claimant then rang the Keighley surgery on 30 April. The third respondent was not available, but the head nurse took a detailed note and recorded that the claimant said he would be back at work on 10 June, but had a fit note from his GP until then. He said he had been advised to refrain from work because the employer was not making adjustments. The claimant was asked again to provide that fit note. He did not complain about the medical records form being dropped off.

The disputed further fit note ("the second note")[4]

93. The claimant's oral evidence was that on 10 April he had been to visit his GP again (necessarily before work) and had tried to give the lead nurse that fit note that day, but her door was closed, so he took a photo of it. The evidence before the Tribunal was a photograph of a fit note taken at 12.57 on 10 April 2019. It purportedly advised the claimant that he may be fit for work for two months (10 April to 9 June 2019) taking account of advice to avoid heavy lifting/stretching and long periods of standing. The respondents' case was that such a fit note was never seen, nor provided to the respondent, despite a number of requests. We accept the respondent's case for the following reasons.

94. The Tribunal reviewed the information provided by the parties about this fit note in their pleadings and witness evidence. It is very unusual for the existence or provision of a fit note to be in dispute. It is a pivotal matter in this case because it goes to the heart of the claimant's case: he says the third respondent and others were in a conspiracy to suppress evidence and victimise him because of his disclosures.

[4] 2088

95. The claimant's first claim, submitted on 28 July 2019, said that he had sent a fit note in on 20 April with a relative[5].

96. The first fit note that the claimant presented, identifying the reason for absence as stress, was photographed by the claimant on 23 March 2019, in relation to an absence between 18 March and 7 April. That is consistent with the claimant visiting his GP, receiving a fit note, and taking a photograph of it for his own records when he provided it to the respondent. That makes sense entirely.

97. On 8 April the claimant completed a self-certification for physical pain[6]. On his oral evidence he had then visited a GP on 10 April, told the GP about his physical pain and his need for adjustments, gained the second note saying that he might be fit for work with light duties, photographed it when he was in the practice ("on the floor"). His further oral evidence was that he then gave that to the head nurse, saying, "I need to hand this in". This account of giving the second note to the head nurse did not appear in the first claim form and is at odds with what was said in the claim form. The claimant was then on leave from 12 to 20 April.

98. On 20 April he attended the premises and took a photograph of the rota which had him scheduled to work in the decontamination room on his return to work.

99. He then did not attend work on 23 April and had phoned in. We have his transcript of the call with the third respondent on 24 April. He said, "I've seen my GP today", knowing he was being recorded, "and he said when I return to work you should amend my duties so I can sit down and work somewhere". When asked by the third respondent, when the GP had advised on return to work, the claimant replied "when I'm feeling better..obviously I'm still in pain". He said the GP had said he should avoid lifting, stretching and long period of standing". The third respondent said she would get back to him and to leave it with her – she would consult HR and the area manager and see what they can do. She had clarified that the claimant, could "come back to work provided he can sit down to work and not raise his arm" and the claimant relayed that GP advice.

100. That conversation makes no sense if at the time the claimant had a fit note, and had handed it to the head nurse on 10 or 20 April, or sent it in with a relative: he would have said to the third respondent: you should have the note [I have sent it in, given it to [the head nurse] and so on." In all likelihood the third respondent would have said, I will go and find it or words to that effect. There would have been no need for the relaying of the information or for there to be any doubt about matters. The claimant would also not have said, he had seen the GP "today" on 24 April (if he had previously seen him on 10 April).

101. The claimant recorded in a note to himself on his digital recorder (transcript 2) that he had telephoned the practice on 27 April, discovered that a colleague was working, visited the practice, and given him a photocopy of the fit note that he had made from his telephone. The claimant's evidence was that the colleague had then opened the head nurse's door, and left the fit note for her in the office.

102. Again, if that account is accurate, the further developments raise more questions. The claimant rang and spoke to the head nurse on 30 April, and said he

[5] 52
[6] 522

had been given a fit note from 10 April to 10 June and he expected to be back at work on 10 June, which the head nurse recorded in a comprehensive note. It beggars belief, on the claimant's case that he did not say to her: but you know all this because I gave you the fit note (on the 10th),; further, another colleague put a second copy of it in your office on 27 April. The claimant said nothing of the kind; nor did he then provide the note by email to the head nurse, after she again encouraged him to send it in. It is simply incredible that having taken a photograph of the note on 10 April, the claimant did not, at any stage in this chain of events, email the fit note to the third respondent when he knew that this would enable him to discuss adjustments and return to work, and on his case reveal the treachery of the head nurse's concealment of his fit note.

103. When asked this question the claimant's answer was that he believed the senior nurse was trying to frame him by hiding or not revealing his fit note, and he believed the same of the third respondent.

104. From 1 May the third respondent tried to call the claimant[7]. The claimant's mobile phone may well have been switched off (his records were not available to the Tribunal), which explains the lack of call time in the third respondent's records, or the claimant may have simply "hit the red button" on seeing the call. The idea that the third respondent called the claimant and then terminated the call in order to create some sort of fake record of contact with the claimant is simply fanciful against the chain of events that we have recorded.

105. This chain of events is entirely consistent with the third respondent, both before and after the 8 April disclosure, taking part in ordinary absence management in accordance with the respondent's absence management procedure.

106. Having corroborated and cross-checked everything that the claimant has said about the second fit note, it is clear that at best he has been a very bad historian. His evidence cannot be relied upon. At no stage was the second note, which the claimant claimed to have given to the respondent not once, but twice, provided to the respondent. He did not provide it on the 10th, when he obtained it, for reasons best known to himself, when he was at work and was in the best position to have discussions with the third respondent about the physical matters allegedly causing pain; and. he did not provide it subsequently. The idea that the head nurse and/or the third respondent were seeking to "frame him" by concealing the existence of the note is simply nonsense – at all material times he had a record of it and could have provided an electronic copy. It is also significant that his failure to provide that note on 10 April occurred before the third respondent had any knowledge of PD9.

107. Finally on this pivotal matter, it is extraordinary that across the chain of events from 10 April, culminating in a dismissal in July, at no stage did the claimant provide the photograph of the fit note by email direct to HR or to those scheduled to conduct meetings with him to discuss an allegation that he was absent without leave. The note was only provided in the claimant's late disclosure, together with the other photographic evidence.

<u>The "whistleblow" investigation</u>

[77] 1107

108. The fourth respondent had interviewed the third respondent about the claimant's clinical/cross contamination complaint, on 11 April, between around 4 and 5pm. The fourth respondent did not name the claimant when asked who had been in touch, but the third respondent knew it was the claimant from the nature of the questions asked. They went through each allegation, including, for example, an allegation about PPE and the practice being without aprons for a period.

109. On the morning of 18 April the fourth respondent emailed the claimant, saying:

"Dear Abdul

On the back of your email to [the second respondent] group clinical director on ninth April I would like to assure you that the concerns raised in your whistleblowing have been taken seriously and are being investigated accordingly. As your concerns raised are of a clinical nature the senior clinical team are assisting with the investigations. As part of the ongoing investigations we may need to speak to you further can you confirm, if required, you would be happy [sic] answer further questions in relation to the concerns raised in your whistleblow. Also as you did not raise your concerns anonymously please confirm if you are happy for team members to be made aware who has raised the concerns. Thank you regards"

110. The claimant did not at any stage reply to that email or engage with the fourth respondent in the investigation. He did not provide her with the photographic evidence he had collated about the matters in his letter.

111. Later on 18 April 2019 the fourth respondent interviewed the claimant's decontamination room colleague, and the head nurse.

<u>May to July – the first, third and fourth respondents treat the claimant as absent without leave</u>

112. The third respondent was taking advice from Ms Dickinson of HR, in relation to the claimant's ongoing absence.

113. Twice in early May the third respondent was provided with draft letters, which Ms Dickinson indicated would be sent to the claimant informing him that his absence was being treated as unauthorised.

114. The first letter dated 2 May mentioned the contact on 30 April from the claimant in which he had advised he had a medical certificate but told him he had failed to provide it. The first letter also set out parts of the respondent's absence procedure and warned him that the absence was classed as unauthorised (implicitly because of the absence of fit note). It is clear that these were standard template letters.

115. The second letter dated 8 May referred only to the lack of contact as the reason for absence being classed as unauthorised. It said that if there was no contact by 15 May the first respondent would consider processing the claimant as a leaver. The claimant may have received these letters together given their relative proximity in date (his claim form refers to "letters") or he may not have received the first one. It adds little to his case whether he received the first one then or not. He rang the third respondent on 13 May at 4.50. The third respondent asked him if he was okay and if he had received the letters. The claimant said he had only received one letter on 10 May. He was asked again for his fit note. He asked whether he was on leave the following week and the third respondent told him that he had leave booked 25

May to 1 June. She repeated the need for the fit note and the claimant asked for a meeting. She offered that week, but the claimant agreed 20 May instead. The third respondent followed that short conversation with a letter the following day to the claimant's personal email address, as well as posting the letter. She alerted him again to the need for his medical certificate because his current absence was regarded as un authorised due to the failure to provide a medical certificate.

116. The claimant did not attend that meeting on 20 May. He was sent a further letter by Ms Dickinson indicating that he would be processed as a leaver from his last working day if he did not make contact by 23 May. The claimant did not make contact and did not provide his fit note.

117. On 11 June, the day after the date when he had told the respondent his fit note expired, Ms Dickinson invited the claimant to an informal meeting on 17 June to discuss his unauthorised absence with a different practice manager in the third respondent's absence. That letter indicated that he may then be required to attend a disciplinary hearing. The letter provided him with the respondent's attendance policy and a log of the contact made with him from May, principally by letter (it did not include the telephone contact in April).

118. On 13 June the claimant contacted Ms Dickinson asking for a copy of the letter dated 2 May and she responded the next day with that copy. She also asked him to confirm he would be attending an investigation meeting on 17 June and that he had received the letter of 11 June. That meeting was then re-arranged to 24 June to be held at the Keighley practice by a different practice manager, Ms Tynan.

119. When the claimant did not attend that meeting that practice manager decided on the information before her to refer the matter to a disciplinary hearing. On 25 June Ms Dickinson informed the fourth respondent of these developments and asked her to appoint a practice manager to conduct a disciplinary hearing. The disciplinary charge was: "*failure to follow the absence reporting procedure. Since the 23 April 2019 you have failed to attend work and update the reasons for your absence. After numerous attempts to contact you this has resulted in you being unauthorised from the business*". The claimant was told that the allegation could amount to gross misconduct, potentially, and summary dismissal could result. He was sent a pack of documentation including the letters that had been sent to him.

120. The disciplinary hearing was due to take place on 3 July 2019 at the Saltaire practice at 11 AM, with a further and different practice manager, but Ms Dickinson in HR was on leave from that date.

121. On the morning of that hearing the claimant telephoned the Saltaire practice to say that, "*he made a protected disclosure 8 April 2019 to the group clinical director [the second respondent] regarding health and safety breaches and putting patients at significant risk of harm and has [sic] as a a result has been receiving detrimental treatment from employer".*

122. The Saltaire practice manager provided this information in an email the same day to Ms Dickinson. Being on leave, Ms Dickinson had handed her caseload of around fifteen employee relations matters to an HR colleague in a handover note, which, as to the claimant's situation, said the practice manager would be in touch in the disciplinary hearing adjournment. The handover note provided no information

about the claimant being a whistleblower nor was it likely Ms Dickinson saw that email at that time.

123. The third respondent was in touch with HR in early July to understand what had happened with the claimant because he was not at work and she had heard no more. The fourth respondent, of course, knew of the claimant's whistleblowing because she was investigating his cross contamination allegations.

124. When it became apparent that the 3 July hearing had not taken place, Ms Dickinson's HR colleague provided a draft invitation letter for a further disciplinary hearing to take place on 22 July at the respondent's Shipley practice. The claimant was sent an information pack and invitation on 17 July. The delay between 3 July and 17 July occurred because HR was seeking to identify yet another practice manager, previously not involved, to conduct the re-arranged meeting - that was apparent from contemporaneous emails. The Saltaire practice manager had herself commenced leave after the claimant sent his email on 3 July. The fourth respondent did not know this and wanted to wait to find out whether any meeting had taken place before and/or its outcome before fixing a further date. The impression given by the communications at the time was that disciplinary meetings in connection with absence were a routine activity for practice managers, HR and the fourth respondent, but the progress of this one was affected by annual leave arrangements for multiple staff.

125. Mrs Pringle undertook the meeting on 22 July, the claimant having been sent a further pack containing the information relevant to the disciplinary charge of being absent without leave. He did not attend the meeting. Mrs Pringle rang the practice manager who had been scheduled to conduct the meeting on 3 July. She was told he had rung the practice and said he was not attending because he had made some sort of complaint. She did not know anything about the nature of that complaint or that it was in relation to cross contamination or other issues, or that it had been made pursuant to the respondent's whistleblowing procedure. She accepted in evidence that if she had seen the note of the claimant's call, referring to protected disclosures and feeling victimised because of that, she would have investigated further before taking any decision to dismiss. She did not consider on the information she had, however, that a second failure to attend, without explanation, left her with any alternative but to dismiss the claimant. That was her decision having reviewed all the information she had. She was accompanied by a colleague to take notes in that hearing, and after waiting for the claimant for some time, she took the decision to proceed, and she set out her deliberations in manuscript notes. HR typed up those notes as a decision to summarily dismiss the claimant in a letter to the claimant sent to him on 24 July 20219.

126. It was plain that Mrs Pringle's reason to dismiss the claimant was solely his absence without fit note or further explanation, and his failure to engage with the opportunities afforded to him to provide that explanation. His making of a complaint, whatever that was, she considered, was not a reason not to attend and engage with those opportunities.

Submissions

127. The claimant focussed his arguments on his unfair dismissal case, that the principal reason for dismissal was the making of disclosures. He did not advance

a case that if the respondent established the reason was conduct, there was anything unreasonable about the respondent's dismissal of him.

128. He said that Mrs Pringle was appointed by Ms Bellwood, to decide a disciplinary allegation against him. Ms Bellwood had investigated the claimant's cross infection/hygiene disclosures within PD10. The claimant alleges that Ms Bellwood created a bogus or false reason for dismissal in collaboration or conspiracy with Human Resources (Ms Dickinson), accepting that Mrs Pringle did not know he was a whistle blower.

129. The reason Mrs Pringle did not know, was because Ms Dickinson, it is alleged, removed from the file the email (which he described as a note) describing his call on 3 July explaining his non attendance was by reason of having made protected disclosures and having been subjected to detriments; or that Ms Dickinson deliberately omitted to provide that to Mrs Pringle to secure his dismissal as a whistle blower.

130. In his detriment case, the claimant identified for the Tribunal that the test for us was whether his disclosures had had a material influence on the conduct of the second, third and fourth respondents towards him.

Discussion, Further Findings and Conclusions

131. The claimant did not provide any evidence to this Tribunal in his short statement about why it was not reasonably practicable for him to have presented the detriment complaints earlier. That was notwithstanding he had taken part in a hearing and received a judgment concerning limitation issues in the proceedings already, and knowing it was an issue in the complaints before this Tribunal. He was asked by Mr Breen on a number of occasions why he had not presented grievances in relation to the lengthy allegations against the third respondent, when it was clear from his grievances about the two dentists that he knew this was a course open to him – he gave no evidence to reasonably explain why he had not done so. There was no material from which we could find it was not reasonably practicable for him to have presented detriment complaints in a timely fashion as and when matters arose.

132. That being the case the Tribunal focussed, proportionately, on making findings about key events later in 2018, and the 2019 allegations, given that the last act or involvement of the third respondent was early May 2019, prior to the claimant's dismissal in July.

133. The primary limitation dates affecting allegations against the third respondent were 29 April and 6 May 2019. We considered whether there were facts which could support a conclusion of protected disclosure detriment on or after those dates by her, and whether earlier matters were part of a series of similar acts or failures.

134. As we indicated above, this is a case where there are disputes about why things happened, and in some cases whether they happened. The claimant believes there was a conspiracy to frame him for being absent without leave. Beyond the oral evidence of the respondents and the claimant, after the 2019 claim particulars were received, the respondent's Head of HR completed an investigation, interviewing over twenty staff at the surgery and beyond in relation to the complaints submitted to the Employment Tribunal.

135. The only evidence in those interviews which is at all corroborative of the claimant's complaints against the third respondent is from a colleague, Mr Shah, to the effect that the claimant had felt picked on by the third respondent in relation to being discouraged from spending time in "Surgery 9". The note of the interview records that Mr Shah had told him at the time that he should see matters from the third respondent's point of view; and he reassured the claimant that he was not being picked on at that time. The weight we place on those interviews is, of course, restricted because we did not hear from any of those former colleagues directly. Nevertheless, the material is part of the evidential landscape.

136. We further take into account that the respondent had conducted a very thorough investigation into the alleged punch by a dentist in September 2018 bringing in staff from outside this dental surgery to conduct interviews. It had provided a detailed outcome to the parties. Both the dentist and the claimant were very unhappy about that outcome (physical contact but no harm intended) and both refused to take part in any mediation between them. Clearly it had been an event of some unhappiness for them both. Similarly, the January 2018 dentist remark was addressed in the way the claimant wanted at the time, with a documented meeting and full written apology given - this was not a respondent, which, by its track record, was wont to sweep matters under the carpet.

137. A further observation is that the claimant's recordings, admitted as part of his witness evidence, have been at the heart of our findings of fact, particularly in relation to allegations against the third respondent. We have taken into account that the dates and times on some of the earlier recordings were not wholly reliable, the claimant told us. The conversations with the third respondent on 8 and 24 April were, however, the claimant's account of what was said and when. The claimant made much of the third respondent saying she would get back to him after the first conversation on 24 April, and she did exactly that after she had advice, including asking him for his fit note.

138. There is absolutely no hint in those recordings of the third respondent treating the claimant with anything other than courtesy and as a manager reasonably would in the relevant circumstances. Equally corroborative of a lack of influence of the claimant having made protected disclosures on the third respondent's dealings with him, it is clear the claimant was well able to contrive conversations with colleagues to capture evidence which he felt would corroborate his position. For example on hygiene, or the punch allegation. Yet there are no recordings of the third respondent shouting at him or treating him with ill will because of his rigorous reporting of hygiene matters or bad practice – and it would have been equally easy for him to contrive such an encounter if the third respondent's treatment of him, including shouting, was as he described it.

139. The fact that he did not have such evidence correlates with the Tribunal's assessment of the third respondent when we heard her giving evidence: she had been entirely matter of fact and reasonable and reactive to the claimant when he raised concerns and we find there was nothing amiss in her dealings with him.

140. As far as linking the third respondent with a conspiracy to dismiss him, the claimant made much of the HR log of contact or letters with him, which formed part of the disciplinary pack for his hearings. He said the third respondent (and Ms

Dickinson) had omitted the April telephone contact from the log, and that this was clear manipulation to put him in a worse light and ensure he was sacked.

141. To the contrary it is very clear from the third respondent's communications to HR that she was giving full information, a contemporaneous and full account of her engagement with the claimant on a day to day basis. She did so in order to seek advice about his absence management and there was no hint of any ill will towards him in any of those communications. Again, that was entirely consistent with the recordings that the claimant made of her, and her presentation in front of the Tribunal and generally her dealings recorded in contemporaneous documents. The April contact was relayed by the third respondent to HR in clear terms.

142. A further evidential issue going to the claimant's credibility arose in relation to his photographs. They carried the date of the day that they were taken. It was clear from those photographs that the claimant has visited the practice and taken photographs at length on a number of occasions including when he was said to be unfit for work or, on his case, signed fit to work with adjustments by his GP, but not attending work because adjustments were not being made. Yet he clearly attended for the purpose of taking photographs. That was prior to a possible return to work. We have concluded the claimant was seeking to remain absent from work while collecting evidence to demonstrate that he was being poorly treated.

143. Having made those overarching observations we address the claimant's case.

144. It was clearly part of his job as a dental nurse/decontamination operative to raise concerns about hygiene and cross-contamination. We have accepted that he did so between 2016 and 2019 (see above).

145. Allegation 2 (not being permitted to work in surgery 4) and Allegation 7 (not being allowed to do online coursework or training) were detriments said to last until 22 July 2019.

146. The claimant did not attend work after 11 April 2019 as we have found above by his own choice and these two alleged detriments did not, even if they arose before 11 April, continue or occur during his voluntary period of absence. These matters also have no merit: the third respondent restricted access to Surgery 4 on the first floor at the weekends for practical reasons, and the claimant completed his relevant dental nurse training by early 2018 in any event. We know he was deployed to reception in February 2019 and could have done training if time allowed, then. For limitation purposes these allegations do not fall into the period from 29 April 2019.

147. We then looked at the allegations concerning the third respondent that are, on their face, in time. These are allegations 29 to 33 and 46 and 47 and they are wholly determined by the fit note and other findings above. The third respondent did not manipulate HR or Ms Tynan by concealing a fit note and framing the claimant – the treatment of the claimant through the respondent's absence management procedure was wholly driven by his failure to provide that note, despite requests and contact from the third respondent. Similarly the respondent's stoppage of his pay. These complaints are wholly without merit. The only contact telling the respondent that his absence was related to his protected disclosures was the telephone call on 3 July 2019.

148. There being no in time complaints with merit against the third respondent, or for which the first respondent is liable, the earlier complaints are also dismissed: there is no later in time act in respect of which the earlier complaints could form a series. That being said, albeit we have not addressed every single factual allegation in the chain going back to 2016 because of our finding about the fit note, we can say from those we have examined that there is no merit in them, even if they had been presented in time. All detriment complaints against the third respondent (and those alleged to be her actions for which the first respondent would be liable) are dismissed.

149. The claimant's case on dismissal is the Jhuti one: that there were some "Iagos" manipulating evidence and leaving out something that a dismissing person might need to have in front of their consideration, such that we could find someone in the hierarchy decided the claimant was to be dismissed because of his whistleblowing, but hid that behind his absence.

150. A general point is that if HR, or the second to fourth respondents, did make the decision to dismiss the claimant for his whistleblowing, given his absence without certification, they did not do so in a hurry. HR indicated twice that he may be processed as a leaver if he was not in touch, as happened in some AWOL cases. He was not. HR then advised an informal review meeting, which was discussed with him, but to which he did not attend. HR then twice scheduled a disciplinary hearing working with different practice managers. The claimant had every opportunity to explain his concerns about being framed, and/or the reason for his absence in writing, and by sending in the fit note. He did not do so.

151. Given our finding about the fit note it is clear that neither the third respondent nor the head nurse were Iagos – they were simply not provided with the fit note despite requests. Nor, for the reasons above, can the third respondent be said to have concealed the degree of contact with the claimant in April or May to secure his dismissal. In any event his contact on 30 April was known to Mrs Pringle because she included it in her deliberations about his absence.

152. That leaves Ms Dickinson or Mr Bunce of HR, and the second and fourth respondents, the latter alleged to have manipulated or been instrumental in the claimant's dismissal.

153. The part HR was said to play, was in not providing the claimant's reason for not attending on 3 July to Ms Pringle, albeit the note was emailed to Ms Dickinson. There are two possible explanations for that. The email evidence suggested ineptitude (or better put, inefficiency, in addressing holiday handover) or oversight. The claimant said, without evidence, conspiracy. The overwhelming impression given by the communications between HR and Ms Pringle is a degree of lack of clarity about what was going on, arising because of the constant "handing of the baton" between different practice managers and different HR advisors and the fourth respondent, because of holidays being taken by many of them at this time.

154. There were a handful of employee relation matters that Ms Dickinson had to hand over to Mr Bunce when she went on holiday and she appeared to do so in the briefest of terms as far as the claimant was concerned. The only material missing information in the disciplinary pack was the note of a reason not to attend on 3 July. Faced with the alternative of an Iago, Ms Dickinson, cleverly

manipulating the position so that Ms Pringle can dismiss for absence in ignorance of the claimant's whistleblowing, and an oversight or inefficiency in handover arrangements, we find, from the documentation we have seen, the latter. Had HR wished to progress the dismissal for absence, they would have simply removed the claimant from payroll at an earlier stage as the letters indicated. We also had the oral evidence of the fourth respondent and we considered her a witness of truth, as to the lack of knowledge of the message the claimant had left, and the simple focus on organising practice managers who could conduct a hearing with the claimant in the middle of a holiday period.

155. That leaves us with the second and fourth respondents as Iagos. It is more convenient to deal with the fourth respondent first and the allegations of detriment against her. Those allegations might give rise to a finding that she could have been an Iago in relation to the dismissal.

156. The fourth respondent did ask the claimant if he wanted his identity disclosing to colleagues, when arguably she did not need to, because he had already said that he wanted the speak up guardian (the second respondent) to protect him from detrimental treatment by the third respondent and head nurse. It is alleged that the fourth respondent engaged in cover ups and white washing and procured his dismissal by organising independent managers to dismiss him. We accept the fourth respondent's evidence that the role she played in dismissal was to organise an independent manager to hear the absence case against him – that is a normal chain of events reflecting the fact that the claimant was absent from work, was not in contact with her, and had not provided a fit note. She did not chase contact with the claimant after her initial email, but that, we find, was in circumstances where he continued to say he was ill and had a fit note.

157. It is clear the claimant can have a legitimate sense of grievance about the failure between the 8th and the 18th of April of anyone, but particularly the second respondent, to acknowledge his thorough, detailed and lengthy expression of concerns about clinical and contamination issues.

158. It is undesirable and unreasonable that he did not receive a prompt acknowledgment. That was not the fourth respondent's omission. When asked to conduct an investigation, she set about it within two days, attending the surgery and interviewing the third respondent on 11 April, and assisted by a clinical lead. She did not instruct the third respondent or anyone else that they should not take any detrimental treatment towards the claimant, but she knew that he was on leave and she knew that the policy instructed staff not to victimise whistle blowers. That was the reason she gave for not issuing such an instruction. It was unnecessary, knowing the third respondent, as she did, in these circumstances. She also interviewed the lead nurse and the claimant's other decontamination colleague. She did not disclose the claimant's identity to them.

159. There were no questions put to the fourth respondent to establish that her subsequent report in August 2019 was in any way a cover up, or that the allegations of cross-contamination had not been properly addressed by the respondent. She cannot be said to have engaged in whitewashing or a cover up given that report. In light of the claimant's failure to respond to her contact, her failure to provide him with an update or further contact does not give rise to any inference that she sought

his dismissal, or contrived it, because he was a whistle blower. The claimant said he believed a cover up had started when he saw that the third respondent had started countersigning records in early April and from then was determined not to engage with the respondent. The fourth respondent was not to know that from his lack of contact. For these reasons the detriment complaints against the fourth respondent are dismissed and we reject the suggestion that she was a person in the hierarchy who decided the claimant was to be dismissed for whistleblowing and sought to hide that behind absence.

160. Finally we come to the second respondent. The detriment allegations are set out against her (numbered 53 to 58).

161. The respondent's policy gave rise to a legitimate expectation on the part of the claimant that he would have the courtesy of an acknowledgement, and support, from the Freedom to Speak Up Guardian.

162. We find that irrespective of the expectations created by the policy, the operational reality was that the second respondent did, typically, nothing in relation to contact to her as the Guardian from staff, because that was the expectation of the Board: all she was to do was to pass that contact on to someone else to address operationally. The "Speak Up Guardian" was, in reality, a fictional fig leaf.

163. The claimant was not to know that. The lack of contact from the second respondent contributed to his sense of grievance about these matters and he has established detrimental treatment by her as alleged, save for allegation 55 (the matter was not such that he could have a legitimate expectation it would be reported to the respondent's Board because of the size of this organisation and because his allegations were under investigation).

164. As to the remaining allegations, we come back to the reason why question: Why was it that the second respondent did not take any of the action that he might have expected of her? Unsatisfactory and unattractive as it is, we accept her evidence that it was because, to paraphrase, those action items were delegated: it was never her role to support staff and take the action the policy suggested she would. The one action she usually took was to acknowledge such a communication – which was a matter of courtesy to which she did not attend on this occasion, but would ordinarily have attended. We find this was an oversight, accepting her evidence. This does not generate any basis, given our fig leaf findings, to find that the disclosure to her by the claimant was the reason why none of the policy items were actioned.

165. For these reasons the claimant's allegations of detriment against the second respondent are also dismissed. There was no evidential basis to suggest that the second respondent had done anything (at all) in relation to this matter, or had any involvement in the circumstances giving rise to his dismissal, either by generating a false reason for dismissal, or otherwise.

166. The respondent's reason for dismissal was Mrs Pringle's reason – absence without leave, a reason relating to the claimant's conduct. For all these reasons the allegation of unfair dismissal by reason of protected disclosure is also dismissed. The claimant did not argue that his dismissal for absence was unreasonable (if the Tribunal found that was the respondent's reason), but it will be apparent from our

findings above that had he done so, the Tribunal would have considered the respondent acted reasonably within Section 98(4) in treating that reason as sufficient to dismiss in all the circumstances.

167. The claimant's claims are dismissed. This is a unanimous decision reached by this Tribunal deliberating over two days.

Employment Judge JM Wade

Date 14 June 2021