THE EMPLOYMENT TRIBUNALS

Claimant: **Grzegorz Wiszniowski**

Respondent: **County Durham and Darlington NHS Foundation Trust**

Heard at: **By CVP** **On:** **1 and 2 and 3 September 2021**

Before: **Employment Judge Beever**
Ms S Don
Mr K Smith

Representation:

Claimant: **In person**
Respondent: **Mr B Williams, Counsel**

RESERVED JUDGMENT AND REASONS

The claimant's claim for detriment pursuant to section 47B ERA is not well founded and is dismissed

REASONS

1. By an ET1 presented on 22 July 2020 the claimant brought claims for race discrimination and for being subjected to detriment for making protected disclosures.

2. At a Preliminary Hearing on 6 November 2020, EJ Garnon helpfully set out a detailed statement of the law. He also ordered the claimant to provide further information about his protected disclosure and detriment allegations [71]. The claimant complied with this Order by setting out further information [76]. At the outset of the final hearing, the tribunal was able to identify the specific Protected Disclosures and the specific Detriments relied on by the claimant and these formed part of the agreed issues to be determined.

3. The claimant represented himself at the Final Hearing. He informed the tribunal that English is not his first language but his command of the English language was without doubt fluent and he displayed an obvious ability to understand the proceedings.

4. At a time when he was professionally represented, the claimant withdrew his claim of race discrimination which was subsequently dismissed by a judgment of the tribunal on 25 September 2020.

The issues

5. The tribunal was provided with a short and very helpful bundle of documents described as Hearing Documents which included the cast list, a chronology, key documents list and list of issues.

6. There was further discussion at the outset of the hearing, which further clarified the issues for the tribunal. The claimant had clarified that his claim arose out of 8 alleged Protected Disclosures ("PDs"). The tribunal noted that, save for PD4, the alleged disclosures were contained in specific emails. It transpired that emails relating to PD2 and PD6 had not been disclosed by the claimant. In the discussion at the outset, the tribunal gave the claimant the opportunity to disclose emails and he declined to do so. The respondent did not request disclosure. The claimant was asked to explain how he would rely upon PD2 and PD6 in those circumstances. The claimant stated that he would not rely upon those emails and he would withdraw his claim insofar as it related to PD2 and PD6. The tribunal was satisfied that the claimant fully understood that his claim would proceed in respect of the remaining 6 PDs only.

7. There was also some discussion regarding the 2 alleged detriments. The tribunal was satisfied that the first alleged detriment related to communication with the claimant in the course of a telephone conversation on 1 May 2020. The second alleged detriment is said to relate to the refusal of the respondent to extend the claimant's contract. Mr Williams urged the tribunal to be cautious in extending that to include not only the lapse of the claimant's contract but also the subsequent failure of the respondent to offer the claimant a new contract. As explained below, the tribunal did not accept that submission and considered that the proper circumstances of the alleged detriment include the failure of the respondent to offer the claimant a new contract including a failure to accept the proffered signed contract that was submitted on the claimant's behalf on 7 May 2020.

8. Accordingly the issues that the tribunal was required to determine were:

   8.1. Did the claimant make a protected disclosure in any of the respects set out below, and as agreed with the parties at the outset of the hearing (abbreviated hereinafter as PD1, PD2 etc)?

8.1.1. Email from the Claimant to Jason Meecham (Inspector at Durham Constabulary) at 15.43 on 16 March 2020 (PD1);

~~8.1.2. Email from the Claimant to Caroline Davies (Detective Chief Inspector at Durham Constabulary) at 12.26 on 20 March 2020 (PD2); (~~withdrawn by the claimant on 1 September 2021)

8.1.3. Email from the Claimant to all team members at 12.54 on 24 March 2020 (PD3);

8.1.4. Verbal communication during teleconference at 17.00 on 24 March 2020 (PD4);

8.1.5. Email from the Claimant to Susan Waterworth (Lead Doctor for Respondent) at 19.31 on 24 March 2020 (PD5);

8.1.6. ~~Email from the Claimant to the BMA at 16.36 on 1 April 2020 (PD6~~) (withdrawn by the claimant on 1 September 2020)

8.1.7. Email from Peter Jackson (the Claimant's BMA Representative) to the Trust's Contract Manager, Medical Director and HR at 15.03 on 7 April 2020 (PD7); and

8.1.8. Email from the Claimant to the Trust, the Trust's Freedom of Speech Guardian and the BMA at 16.54 on 22 April 2020 (PD8).

8.2. <u>Did the Respondent subject the claimant to detriment in any of the respects set out below, and as agreed with the parties at the outset of the hearing?</u>

8.2.1. Refusing to offer the claimant further work after 30 April 2020

8.2.2. Refusing to extend the claimant's contract, including failing to offer the claimant a new contract and not accepting the claimant's signed contract submitted on his behalf on 7 May 2020.

8.3. <u>If yes, was the Detriment(s) on the ground of Protected Disclosure(s)?</u>

9. The hearing examined issues of liability only. In the event, judgment on liability was reserved and no evidence or submissions were received in respect of remedy.

<u>The Facts</u>

10. The tribunal heard oral evidence from the claimant and from the respondent's witnesses: Patricia Bannar-Martin (PBM) and Paul Cummings (PC). All witnesses were cross examined. For ease, each witness will be referred to herein by their

initials. Both the claimant and the respondent's representative made closing oral submissions. There was an electronic bundle of documents numbered to 450 pages placed before the tribunal.

11. The tribunal made its findings of fact having regard to all of the evidence and did so on a balance of probabilities.

Background

12. The respondent is an NHS Trust. The respondent provides hospital and community services to the local population. The respondent set up Total Healthcare in partnership with Durham police to provide forensic support.

13. The claimant was engaged by the respondent through a limited company. There is no dispute that he provided his services as a "worker" for the purposes of the protected disclosure provisions of the Employment Rights Act 1996.

14. The terms of the claimant's engagement were the subject of repeated fixed term extensions such that the claimant successfully and continuously worked for the respondent for a number of years until the events in question. The claimant describes working as a locum from 2011 and subsequently entering into a written contract for the provision of his services in September 2016. Contract extension documents were agreed annually, and more recently six-monthly, and were signed by the claimant as part of the respondent's procurement process. The most recent contract extension can be seen at [108], which covered the period of 3 October 2019 to 2 April 2020.

15. The claimant worked as a Forensic Medical Examiner (FME). As part of a rota of FMEs, the claimant provided his services to the Durham Police and was required to provide medical care and forensic assessment of persons in a variety of circumstances including those detained in police custody, attending upon complainants and alleged victims of crime and attending scenes of death.

16. The role of an FME was an important one because the Police in deciding what action to take in respect of an individual situation would seek the advice of an appropriate healthcare professional. The decision as to what advice to give was a matter of clinical judgement for the FME to make. That clinical judgement extended to decisions relating to whether it was necessary for the FME to attend on site or not.

17. The clinical general manager of the respondent at the material time was PBM. Her role entailed service management of a number of departments including its Total Healthcare provision in which the claimant was engaged. The Deputy Director of Medical Workforce since March 2015 was PC, responsible for supporting the Medical Director and the clinical workforce across the respondent.

18. In 2020, the country was affected by the pandemic crisis presented by COVID-19. The claimant's role was undoubtedly a front line role which exposed him on a day to day basis to the risks that the pandemic presented.

The Disclosures

19. Given the increasing crisis developing as a result of the pandemic, the claimant was naturally concerned as to how the respondent would react to the gravity of the situation and how it would act to ensure the safety and wellbeing of its workers. The claimant in his witness statement described how in the early months (January 2020 – March 2020) he awaited local implementation of guidelines and in the meantime continued to work as normal despite believing that he had inadequate PPE and without reassurance as to local protocols being put in place.

20. The crisis deepened as the country approached the government's first lockdown in March 2020. In the short term this did not impact upon the claimant's provision of services to the police. However, the claimant sent an email on 16 March 2020 to Jason Meecham who was the police officer responsible for police custody (PD1). The claimant regarded the police in this context as the principal in circumstances where the respondent was the agent and the claimant was the subcontractor.

21. The email [111] recites 5 points under the rubric "my thoughts and some ideas" and 8 "solutions", and the email concludes with the claimant saying that, "those above thoughts are just few problems we all will be facing in foreseeable future (sic)". The "thoughts and ideas" include, "3. Contamination – please be aware that Pandemia rules are exactly the same as Lockard formula. Just one CCP (or FME) during one shift can (without intention) contaminate with Coronavirus all Custodies in Co Durham by visiting them", and "4. Limited medical resources… Both CCPs and Doctors will advise sick absent due to increasing risk of contracting virus". Within the "solutions" section, the claimant states "1. Avoid risk of contamination… " and specifically, "2. Use private cars instead of 1 shared car – this way risk of contaminating personal next shift can be reduced", and "7. Delivery masks, goggles, set of protective clothing to each FME".

22. It was suggested to the claimant that this email was no more than suggesting ways of improvement. The claimant denied that, stating that whilst it might not have been his "intention" to whistleblow at the time, nevertheless he was identifying that nothing was being done in the face of the pandemic and with the resulting increasing risk of contamination.

23. There appears to be no response to the email. The email was subsequently disclosed by the claimant's BMA rep, Peter Jackson, in an email dated 27 April 2020 [199] to PBM.

24. The claimant was not the only person who was communicating with the respondent over concerns around safety and the pandemic. Dr Estemberg was also an FME at the material time and he was emailing in respect of his own concerns. For example, on 18 March 2020, Dr Estemberg emailed colleagues, including PBM, to express concerns about his safety and the need for proper PPE and training.

25. Approximately a week later, PBM invited the claimant and others to a teleconference on 24 March 2020 at 5pm. The invite was sent at 12:02hrs by the Custody Care Practitioner (CCP) team to a number of colleagues including the claimant, co-FMEs and Beth Stoker who was regarded by PBM as an integral part of the Sexual Offence Unit at the police (SARC). The tribunal accepted PBM's evidence that the purpose of the teleconference was to look at health and safety matters and, for example, one action from the meeting was to provide supplies of PPE to Beth Stoker who had said at the meeting that PPE was short.

26. In advance of the teleconference, the claimant sent an email (PD3) by way of "reply all" and thereby including PBM, in which he expressed some relief that it appeared to him that the respondent was starting to take some action in the face of the pandemic. The email [125] refers to the lack of an agenda for the meeting and recites, "OUR SAFETY. Our wellbeing. Our protection" and provides a cut-and-paste extract of a staff bulletin of the same day which rehearses the sentiment that the health and well-being of colleagues was of the utmost importance to the respondent and that one aspect of essential working was to consider a review of working practices and for example to minimise unnecessary travel. PBM responded 40 minutes later commenting that it was not a helpful email by reference to the use of "reply all". Her response stated, "we are having this call to discuss issues that have been raised to me regarding the lack of cooperation with guidelines on PPE".

27. It was suggested to the claimant that his email (PD3) failed to disclose any specific facts such that the claimant did not take the opportunity to identify for example his concerns as to health and safety. It was put to him that he might simply instead have said that there were "unsafe practices" and indeed give examples. The claimant in response acknowledged that he had not done so and instead reasoned that (i) English was not his first language, (ii) if the reply had been, say, "what you mean?", then he would have added more, (iii) the workplace was toxic such that there was an inability to communicate and any attempt to do so would, "be basically shushed down". Whatever the reason, it appeared that the claimant had not identified his concerns.

28. The teleconference took place that afternoon. The tribunal finds that there was discussion around the use of PPE which was led by PBM. The tribunal does not find that PBM was disinterested or discouraged the raising of issues for discussion around PPE.

29. The claimant contends that he made a verbal disclosure at the teleconference (PD4). The detail of this verbal disclosure is missing from the claimant's witness statement. The claimant was clear in his evidence about what he said. He referred the tribunal to [129] which is part of an email sent subsequently which contains a quote from the Chair of the GMC.

30. The claimant's evidence to the tribunal is that he spoke at the teleconference but was cut off by Dr Waterworth, the Clinical Lead for Forensic Managers and employed by the respondent. The claimant told the tribunal that he was, "not allowed to say more than just read out the quote from Marx" [at 129]. When pressed, he was very clear, "from my memory, it's correct, that's all I said". When the claimant cross-

examined PBM, his position was consistent and he alleged to PBM that he had been stopped when he was reading the bulletin. It is fair to record that PBM did not recall the words the claimant had used and did not recall stopping him from speaking.

31. The claimant said in evidence that because he felt he had been cut off, he sent the email that evening to Dr Waterworth at 19.31hrs (PD5). In that email [128], the claimant identifies the need for prompt action. He emphasised the need to act and that simply waiting for orders is short of how doctors should act. The claimant identified a number of "suggestions" including the manner of exchange of information, the need for examination and for the use of PPE and proper disinfection.

32. The tribunal is not aware of any response to this email. The claimant said that he believed that Dr Waterworth took no part in any further conversations on the topic. He complained that this was a yet further example of a systematic failure of the respondent in communication and implementation of safe processes.

33. The email was sent to PBM but only on 26 January 2021 and in connection with the current litigation. PBM gave evidence that it was received by her only during the litigation and that it had not come to her attention at the material time. The email was not forwarded to her nor was it documented that it was to be forwarded to her. PBM said that she would have expected Dr Waterworth to deal with the email appropriately and she denied that her lack of knowledge of the email reflected adversely on team communication.

34. At this point in the chronology, the claimant began to consider that his direct involvement might be counter-productive in the sense of escalating conflict and decided to ask the BMA to represent him and express his views on his behalf. It took a number of days for a BMA rep to be allocated. Peter Jackson (PJ) began to act for the claimant on 7 April 2020. The claimant in his witness statement said that he asked the BMA to communicate with the respondent from this moment on his behalf.

35. PJ wrote an email to PBM on 7 April 2020 at 16.39hrs (PD7). The list of issues identified PD7 as an email of the same date, at 15.03hrs, but the tribunal finds the difference to be an inadvertent error. PBM responded promptly, asking for a, "detailed list of the issues and concerns raised" so that PBM could discuss further with the Medical Director of the respondent. The response, on 9 April 2020 ,at 15.50hrs, also informed PBM that the BMA represented both the claimant and Dr Estemberg and in the email [149], PJ set out a number of detailed concerns and invited a facilitated discussion around what was regarded as casual or scant regard for health and safety on the part of the respondent. The email extended to particulars relating to increased risks resulting from the pandemic and intertwined with the poor management of the claimant's contract renewal.

36. PJ's email was forwarded by PBM to PC. PC responded on 19 April 2020 by agreeing that the issues warranted further discussion but proposed a delay in such discussions in order to focus on the respondent's Covid-19 response. That response did not deter PJ who wrote on 21 April 2020 [189] to PC and to the respondent's Medical Director, Jeremy Cundall (JC) again restating the concerns of the FMEs, the

claimant and Dr Estemberg, and asserting that no resolution or improvement had been achieved.

37. The claimant was sufficiently concerned and suspicious of the respondent's delay in responding that he decided to contact the respondent's Freedom of Speech Guardian ("the Guardian"). The claimant felt that this was no longer a "discussion between professionals" but had become "a whistleblowing matter". Contacting the Guardian is an acknowledged route for disclosure of whistleblowing matters in the respondent, and he did so on 23 April 2020, at 10.02hrs (PD8). The tribunal noted again that this detail was different from the specific pleaded protected disclosure in the list of issues but concluded that the difference was not material and the claimant could properly rely upon the email as an alleged protected disclosure.

38. In the email [182], the claimant disclosed a previous email written by his BMA rep, PJ, which in turn stated that FMEs had urgent Covid 19 concerns and attached in support the same email that had been sent on 9 April 2020 to PBM and referred to above in connection with PD7.

39. The Guardian responded promptly to say that the email was received and that the lines of communication were open. The Guardian responded to a later email in which she described that her role was to oversee matters. That having been said, it is clear to both the claimant and subsequently to the tribunal that there is no evidence of the Guardian having any involvement in the case following receipt of emails from the claimant. When pressed on that point, the claimant acknowledged that he simply did not know what the Guardian had done or had not done.

40. In the meantime, while the claimant was contacting the Guardian, PC had responded to PJ on 23 April and had suggested a discussion to take place on 24 April 2020. That call took place on 24 April 2020. The call discussed the concerns highlighted by Dr Estemberg and the claimant and put forward by the BMA.

41. Following on from the 24 April telephone call, on 27 April 2020, PJ provided further information to PC [199]. This is not a disclosure relied on by the claimant. The email was copied to PBM. The email also attaches an earlier email (which is PD1 as referred to above), for the purpose of establishing that "some of these issues are over a month old but no changes have been implemented". It is by this process that PD1 first came to the attention of PBM and PC.

42. The email dated 27 April 2020 was a detailed statement of concerns that were held by the FMEs and expressed on their behalf by their BMA rep. PC took time to consider a response and he told the tribunal that he needed the assistance of PBM to help to formulate a response. That response was sent by letter on 1 May 2020 [225]. The letter was sent in response to concerns raised by both the claimant and Dr Estemberg and the tribunal finds that it was a conscientious and detailed response to the BMA assertions regarding safety issues in the pandemic. There is no suggestion that PJ rejected the response or considered it to be inadequate. PJ wrote on 6 May 2020 [232] suggesting a conference call to "keep the discussions going" and include feedback from the FMEs. In the event, PJ wrote to PC on 15 May 2020 [253], in which he paid tribute to the service provided during the pandemic and

identified how the discussions had progressed and concluded by thanking PC for his time and efforts.

The Claimant's contract extension

43. On 2 April 2020, the claimant received a proposal to extend his current contract for six months from April 2020 to October 2020. The proposal [143] took the same format as previous six monthly extension documents and invited the claimant to contact the procurement officer in the event of any queries. In the email from PJ on 9 April 2020, above, complaint was made about the lack of notice (three months' prior notice was expected).

44. The claimant responded on 22 April 2020 [140]. The claimant referred to the 2 April 2020 letter as one seeking his agreement to an extension to his contract. In his response, he said, "I do not accept the contract extension" and that "the terms stated in the contract had not been accepted at this time". The gist of the letter was that discussions and representations regarding the improvement of day-to-day working practices would be needed if the extension would be accepted but that in the meantime the claimant would continue to work shifts allocated to him.

45. The claimant described this as an "acceptance on a conditional basis". However, he did not sign. The reason he did not sign at that stage was because the respondent's delay in responding to concerns raised by the BMA had made the claimant "suspicious of obstacles". Nonetheless, the claimant remained optimistic that a resolution would be found to the concerns that he was raising and he was content to continue working in the meantime.

46. An email from PBM to PC on 30 April 2020, at 12.35 hrs (and prior to DCI Davies' email of the same date, see below), indicated that the respondent would have to, "stop using the FMEs immediately if we don't get a return of their contracts".

47. At this point, neither Dr Estemberg nor the claimant had returned their contracts. Dr Estemberg appeared to be as active as the claimant in raising his safety concerns. Indeed PJ continued to act for both FMEs.

48. It appeared to the tribunal that matters were coming to a head, and the urgency of the situation was not lost on the BMA rep. On 1 May 2020, 11.49hrs, he wrote to both Dr Estemberg and the claimant and informed them that PBM was "seeking confirmation today" and he advised both doctors to sign the contract extension. Dr Estemberg agreed and he did sign the extension albeit that he applied a caveat (which the tribunal has not seen) relating to the need to discuss and agree working practices. The claimant did not sign, but it appears that he was seeking further advice from the BMA as at 11.49hrs on 1 May 2020 [229].

49. Later on 1 May 2020, PBM spoke to Dr Estemberg to confirm that his signature would be acceptable only if the caveat were removed. Dr Estemberg agreed to remove the caveat. He therefore provided his unconditional acceptance to the contract extension.

50. By contrast, the claimant did not. His reasoning is apparent from his email to the Guardian on 1 May 2020, at 11.59hrs, where he states that the contract that the respondent wanted signing did not take into consideration the claimant's personal safety nor provided any security. What complicated matters for the claimant was the fact that he then had a telephone meeting with PBM (see below) at which he was informed that he would be allocated no further shifts pending an investigation of concerns raised about him. It is not immediately clear why this should have had an impact on the claimant signing his contract especially given the advice from the BMA. However, his evidence to the tribunal was that he did not sign the contract because following the telephone meeting of 1 May 2020, he decided to try to sort out the "suspension" and then take up the contract issue at a later date.

51. The claimant regarded the concerns raised about him as being "not genuine" and "not genuinely held by the people that made those concerns". The claimant believes that PBM then used those false concerns as an excuse to suspend the claimant from work whereas the real reason was that he was in fact blowing the whistle. That allegation does not appear in the claimant's witness statement. When challenged by Mr Williams as to why he had not made this allegation before, the claimant said that it was because he felt that, "the documents should speak for themselves, and that he should remain neutral and take no judgement (sic)". That is not a persuasive explanation for failing to make a relevant and serious allegation at any previous time.

52. As at 1 May 2020 therefore, the claimant's contract extension remained unsigned.

53. On 6 May 2020, the respondent wrote to the claimant informing him that as he had not agreed the contract extension period, his contract with the respondent, "has come to its natural end" [247].

54. The next event that happened was the email from PJ dated 7 May 2020 [249] seeking belatedly to accept the contract extension.

<u>Concerns regarding the claimant's conduct</u>

55. On 26 April 2020, a CCP, David Bell, raised with PBM issues that had arisen with the claimant's discharge of his duties on the previous overnight shift. The concerns related to the safe dispensing of medication. The reaction of one manager of the respondent was that this was dangerous and unacceptable [194]. The email hinted at "numerous complaints" that had been made regarding the claimant. PBM wrote to PC on 26 April 2020 at 13.31hrs and she stated that she, "can't continue to have issues with him and have previously discussed with Jeremy but we need a conclusion asap" [194]. The tribunal closely questioned PBM on these words. The tribunal is satisfied that the "issues" referred to are the concerns raised regarding the claimant's discharge of his duties; PBM regarded them as serious.

56. David Bell wrote another email on 27 April 2020, 08.27hrs, [197] and complained that the claimant was "extremely difficult" and "threatening". PBM responded to PC later on 27 April 2020 that "this is honestly becoming ridiculous now".

57. The situation appeared to escalate because on 30 April 2020, 14.12hrs, an email was sent by a Detective Chief Inspector of Durham Police, Caroline Davies [215]. In it, she described a "problem" with the claimant and forwarded to the respondent 2 emails from UNISON which recounted the events of the shift that CCP Bell had earlier disclosed. DCI Davies described the events, "on the surface of it, his actions fall far below what is expected from the service and compromise the safety and wellbeing of detainees and well as putting custody staff in a compromising position". DCI Davies requested an urgent review.

58. The result was that on the morning of 1 May 2020, PC held a telephone meeting with JC, the Medical Director. The purpose of the meeting was to discuss the concerns arising and identify a course of action. The authority to make a decision rested with the Medical Director. The conversation related to the police concerns. PC recalled that he was likely to have read out the relevant emails to JC. It was JC's view that it was not appropriate for further shifts to be given to the claimant while the matter was investigated. In an answer to a question from the tribunal, PC confirmed that this was solely a decision for JC to make.

59. Later the same morning, a telephone meeting between PBM and the claimant took place. PC was present, and it was a hands free meeting for him and PBM. PBM informed the claimant that it was the respondent's decision that he would not be allocated further shifts pending investigation of the concerns.

60. The claimant has described the meeting as a "suspension" meeting. This was after all the practical effect of the decision albeit that the tribunal is satisfied that the word "suspension" was not used by PBM.

61. The claimant had been undertaking shifts as normal up to 30 April 2020. As a result of the telephone meeting with PBM and PC, the claimant was offered no more shifts. The claimant later that day, at 15.27hrs, wrote to the Guardian [224] and informed her that he had been suspended and that the reason given to him was the alleged dispensing of medication over the phone.

62. With effect from 1 May 2020, the claimant was not allocated any further shifts.

63. On 5 May 2020, PBM sent to the claimant details of the "complaint raised to us by the police" and referred to setting up a discussion with the Medical Director and an additional meeting with PC. PBM had formed no view as to the merits of the allegation but had clearly considered that the complaint was of concern to the respondent. She outlined her view in the email on [239]. The claimant alleged that this was an edited version of the initial complaint raised but on further enquiry the tribunal was satisfied that DCI Davies had raised her concerns and when PBM proposed to send the concerns to the claimant, DCI Davies prepared an edited version. It was the edited version that was sent to the claimant by PBM and there was nothing untoward in that.

64. The respondent accepted that subsequent to the 5 May 2020 email, no meeting with the claimant took place and no further information was provided to him. In short, there was no investigation into the concerns raised by the police.

Renewing the Claimant's contract

65. On 7 May 2020, PJ sent an email to PBM [249]. The essence of the email was to identify and explain an apparent misunderstanding regarding the renewal of the claimant's contract and to attach a signed copy of the contract extension. The email stated, "… to be clear, Dr Wiszniowski is agreeable to accepting the terms of the contract in the Renewal letter for Contract SP1360 without amendment. A signed copy of which is enclosed."

66. PBM discussed the matter with procurement and with PC. The tribunal notes that there are no documented discussions which is surprising given the significance of the decision. PBM told the tribunal that she was not under instruction to make any specific decision and her discussions were around the options available to her. At that time, the respondent was in receipt of serious conduct concerns about the claimant. In the background there was a tender process which was a review of services under tender from NHS England the relevance of which was that the FME service might no longer be part of the service that the respondent was to deliver which additionally affected the respondent's view of its workforce at that time.

67. In an answer to a question raised by the tribunal, PBM denied that there were any particular pressures on staff numbers at this time and asserted that, "we didn't have particular workload issues". PBM was robustly challenged by the claimant but she confirmed that the "issues" [194] that she had with the claimant related to the clinical concerns expressed by the police. She denied any difficulties arising from any disclosures made by the claimant. When asked whether she found the concerns that he had been raising to be "not helpful", PBM said that was not the case and that, "every member of staff had legitimate concerns and I never undermined those concerns and they didn't come into consideration when renewal was discussed, and anyway we were addressing all those points and I can clearly say that they did not come into my decision".

68. PC gave evidence that the decision as to whether to accept the claimant's extended contract fell to PBM.

69. When no action had been taken on the 7 May 2020, PJ had to chase up a response which he did on 1 June 2020 [252], enquiring whether the respondent had accepted the claimant's re-engagement on the contract.

70. A telephone meeting was then arranged and took place on 9 June 2020, attended by PBM, PC and PJ. The position of the respondent was set out that as the claimant's contract had come to an end it would not be re-engaging in contract discussions. Later, on 22 June 2020, PC wrote to the claimant's advisers that no further investigation into the concerns raised by the police would take place but that if the claimant wished to provide a response then it would be held on record [242]. The claimant did not provide a response.

The Law

71. The statutory framework in relation to protected disclosures is set out in the Order of EJ Garnon [68].

72. The tribunal is mindful of the proper approach to dealing with a multiple PIDA detriment claim as identified in Blackbay Ventures Ltd (T/A Chemistree) v Gahir [2014] IRLR 416 requiring a tribunal to identify each disclosure relied upon together with the alleged or likely failure to comply with an obligation and to identify the nature of the obligation; to address the basis upon which the disclosure was said to be protected and qualifying; to determine whether the claimant had the necessary reasonable belief (Babula v Waltham Forest College [2007] IRLR 346) to determine, as appropriate, whether the claimant acted in good faith or whether the disclosure was made in the public interest (Chesterton Global Ltd (t/a Chestertons) and anor v Nurmohamed (Public Concern at Work intervening) 2018 ICR 731, CA); and where a detriment short of dismissal was alleged, identify the detriment and the date of the act or deliberate failure to act. The tribunal also notes that two communications can be aggregated so that together they convey sufficient factual content to establish a qualifying disclosure, the factual question (Simpson v Cantor Fitzgerald Europe [202] EWCA Civ 1601) being whether they can be read together.

73. In Cavendish Munro Professional Risks-v-Geduld, it was held there must be a disclosure of facts not simply voicing a concern, raising an issue or setting out an objection. In Kilrane-v-London Borough of Wandsworth [2018] ICR 1850, the Court of Appeal held that 'information' in the context of section 43B is capable of covering statements which might also be characterised as allegations. Thus, 'information' and 'allegation' are not mutually exclusive categories of communication, rather only that a statement which is general and devoid of specific factual content cannot be said to be a disclosure of information tending to show a relevant failure. It was said that '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'.

74. On detriment and causation, NHS Manchester v Fecitt [2012] IRLR 64, identified that liability arises if the protected disclosure is a material factor in the employer's decision to subject the claimant to a detrimental act. S.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 whistle-blower. Once detrimental action is identified, it is for the employer to establish the reason, not for the claimant to establish the reason. s.48(2). If an employer fails to prove that the act, or deliberate failure, complained of was 'in no sense whatsoever' on the prohibited grounds, a claimant will succeed. Western Union Payment Services UK Ltd v Anastasiou [2014] UKEAT/0135/13.

Discussion and Conclusions

75. Mr Williams made oral submissions reflecting the issues that the tribunal had to decide. He emphasised difficulties in the claimant's case arising from the fact that the claimant appeared to believe that this case was one of an institutional failure to respond to the dangers of the pandemic. He contended that the claimant had misunderstood the nature of a whistleblowing claim to the tribunal and had instead wrongly focused on the dangers presented by the pandemic and whether the respondent had discharged its obligations of making the workplace safe for its workers.

76. The claimant made oral submissions. He reiterated his complaint that the respondent had consistently failed to communicate with him and believed that if there had been effective discussions then a solution would have been found. The claimant repeated his view that PBM was the decision maker and yet she had never encouraged expressions of opinion and in effect, "instead of moving together, the respondent would simply "stick together"". It was a workplace that the claimant described as toxic. The claimant's concern was that there was no one who ever looked at the situation from the claimant's perspective and that he remained convinced that there was no wish on the part of the respondent to discuss his concerns. The termination of his contract was, in his view, a simple way out for the respondent in getting rid of one of the two whistleblowers. It was the claimant's view that in respect of Dr Estemberg the respondent would in due course "get to him", i.e., terminate his services.

Did the claimant make protected disclosures?

77. The claimant relies on 5 written emails and 1 verbal disclosure in the course of a teleconference. Some of those emails were written by the claimant's BMA rep. The respondent acknowledges, correctly in the view of the tribunal, that a protected disclosure can be made out by reference to a disclosure that is made on a claimant's behalf. In this case, where a disclosure is made by PJ, the claimant's BMA rep, the tribunal is satisfied that it was done with the instructions and approval of the claimant and on behalf of the claimant.

78. With the onset of the pandemic in the early part of 2020, the claimant grew increasingly concerned about the risks of contamination and consequent infection. Initially, he waited to see how the respondent would react. By March 2020, the claimant believed that the respondent was not doing enough to reduce the risks of contamination. The context in which the alleged disclosures were made was the increasing crisis that the country faced in March 2020 onwards and following the first national lockdown. No-one is likely to doubt the genuine fears held by the vast majority of the population at that time. The claimant held serious concerns and the tribunal is satisfied that his concerns were genuine and real and in good faith.

79. The tribunal reminded itself that a protected disclosure requires evidence of a disclosure of information. Information is more than setting out an objection or voicing a concern. It must have sufficient factual content to be capable of tending to show one of the matters listed in section 43B(1)(a)-(f). One relevant factor is whether the

claimant had the reasonable belief that the information he disclosed tended to show a relevant failure.

80. When the claimant wrote to Jason Meecham on 16 March 2020, he did so because he genuinely believed that not enough was being done to reduce risk of infection from coronavirus. He wrote because Mr Meecham was in charge of custodies and that was where the claimant was working on a day to day basis. His email is at [111] and is PD1. The email was characterised by the respondent as more of an improvement plan than a complaint. The tribunal finds that there is sufficient disclosure of factual content to amount to a disclosure of information. The claimant states that pandemic rules are no different to pre-existing rules with the result that physical attendance can unintentionally contaminate custodies across the county. The claimant states that there is limited medical resource and there is an increasing risk of contracting the virus. The claimant proposed steps that would reduce the risk of contamination. This disclosure of information is sufficient to tend to show that health and safety is likely to be endangered and is thus a relevant failure. The claimant believed that it was in the public interest and it was reasonable of him to believe that. The claimant did make a qualifying disclosure.

81. However, the email was sent on 16 March to the police. That was understandable but it is not a disclosure to his employer. The tribunal does not find that any of the other provisions of section 43C- 43H are engaged. Thus, the disclosure on 16 March 2020 was not a protected disclosure. This is not merely a technical point. PBM was not aware of the email, nor was it intended to be forwarded to her. The first time that PBM became aware of it was on 27 April 2020 when it was disclosed as an attachment to an email from PJ to PC and PBM accepted that she would have seen it then. By then, it was contained as part of the BMA submissions to the respondent.

82. The subsequent disclosure by PJ on 27 April 2020 can properly be regarded as taken together with the initial disclosure on 16 March 2020. The purpose of the email of 27 April was in part to highlight that concerns raised one month previously had not been addressed. The tribunal considers that it is appropriate to conclude that when taken together with [199], disclosure of the claimant's qualifying disclosure thereby became a Protected Disclosure because it was by then disclosed to his employer.

83. Thus the tribunal's conclusion is that PD1 is a protected disclosure but in circumstances where (i) it was not known to PBM prior to 27 April 2020 and, (ii) when disclosed, it was not by the claimant but in effect adopted by the BMA rep on behalf of both the claimant and Dr Estemberg, (iii) the respondent was already working on a detailed response to concerns raised by the BMA, which were set out in the respondent's letter dated 1 May 2020.

84. On 24 March 2020, after the claimant had been invited to a teleconference meeting on that day, the claimant emailed colleagues including PBM. This is PD3. His email was designed to reinforce the importance of the discussion and to suggest an agenda which would reflect the terms of the staff bulletin that day which highlighted

the importance of health and wellbeing. The claimant himself reinforced that importance, by stating "OUR SAFETY. Our wellbeing. Our protection". The tribunal concludes that the claimant genuinely wanted the meeting to be an opportunity to discuss health and wellbeing in the midst of the pandemic. However, despite the expressions used, there was no sufficient disclosure of factual information in the email that tended to show that health and safety of any individual was being endangered. The tribunal concludes that this was not a qualifying disclosure. PD3 cannot therefore be a Protected Disclosure.

85. PBM replied by stating that the compliance with PPE guidelines will be a subject for discussion at the 5pm teleconference. At the teleconference, the claimant spoke. This is PD4. The claimant's evidence was clear that his words amounted to the reading aloud of the quotation (in large font) on [126] before being cut off from speaking further. The claimant specifically stated in evidence that he does not recall saying any more than that.

86. The quoted words on [126] even if said in full do not amount to a disclosure of factual information sufficient to tend to show that health and safety is being endangered. The words were designed to motivate colleagues to be flexible in the face of crisis. It is an expression of a hope or a desire for improvement. It is not a qualifying disclosure. Accordingly PD4 cannot be a Protected Disclosure.

87. However, because the claimant had felt that he had been "cut off" in the teleconference, he wrote down in detail his thoughts in an email to the lead clinician, Dr Waterworth [128]. This is PD5. The claimant described the need to act and that waiting for others or waiting for orders was not how doctors should act. The claimant's statement of steps to be taken do, when seen in context of the teleconference immediately preceding it that had discussed PPE guidelines and equipment, amount to a disclosure of sufficient factual information so as to tend to show that health and safety of individuals was being endangered. The claimant believed that it was in the public interest and it was reasonable of him to believe that. The disclosure was a qualifying disclosure. The disclosure was to the lead clinician. It was a disclosure to his employer within the meaning of section 43C. Accordingly, PD5 is a Protected Disclosure.

88. PBM was not aware of PD5 at the time of disclosure. It came to her attention in January 2021 [128] in connection with these proceedings. Moreover, the claimant acknowledged that Dr Waterworth did not take any action or get involved with subsequent matters. There was a time when the claimant was invigorated by the fact that Dr Waterworth may have been willing to join in with the concerns expressed. However, in the event, there is no evidence that Dr Waterworth played any material role in the claimant's situation despite receiving that email. As lead clinician, it may well be that she ought to have done. It may well support the claimant's general point of view that the respondent was simply not taking action nor communicating with each other in any meaningful way. Whether that is the case or not however the tribunal concludes that Dr Waterworth was not part of any subsequent relevant

decision making and further that PBM and PC were not aware of PD5 until many months after May 2020.

89. The tribunal accepts the claimant's evidence that in early April 2020, he had come to the view that matters needed escalating as he was not making progress and indeed he felt that his direct approach was counter-productive. He instructed the BMA. Peter Jackson (PJ) acted for him and at the same time also acted for Dr Estemberg who throughout appeared to share the claimant's concerns and expressed them in emails to the respondent just as the claimant had done.

90. On 7 April 2020, PJ wrote on behalf of the claimant and Dr Estemberg [145]. This is PD7. The email itself is a request to facilitate discussions and does not disclose information sufficient to amount to a qualifying disclosure. However, the response of PBM was to request further details and PJ wrote again on 9 April 2020 with factual details [149]. The tribunal finds that it is appropriate to take these emails together. When taken together, the tribunal finds that there was a sufficient disclosure of information that tended to show that the health and safety of individuals was endangered. The claimant approved the draft of the email. Through his BMA rep, the claimant believed that it was in the public interest to make this disclosure and it was reasonable of him to believe that. The disclosure was to the claimant's employer. Accordingly, PD7 is a Protected Disclosure.

91. The claimant's subsequent email to the Guardian at [182] was made by the claimant who believed that it was in the public interest to do so and it was reasonable of him to believe that. The disclosure included a copy of the email previously sent by PJ and forming PD7. The repetition of a disclosure already made does not make it any the less a disclosure in itself. The tribunal is satisfied that the email disclosure to the Guardian was a qualifying disclosure. Disclosure to the Guardian was a disclosure made in accordance with a procedure which was authorised by the employer and accordingly PD8 was a Protected Disclosure within the meaning of section 43C(2).

92. The tribunal therefore concluded that the claimant made Protected Disclosures as follows:

92.1. PD1, in circumstances where the qualifying disclosure on 16 March 2020 was later disclosed by the claimant's BMA rep on 27 April 2020
92.2. PD5, a disclosure by the claimant to Dr Waterworth on 24 March 2020
92.3. PD7, a disclosure by the BMA rep on 7 and 9 April 2020
92.4. PD8, a disclosure by the claimant to the Guardian on 22 April 2020.

93. It is material to note that in respect of PD5 and PD8, these disclosures were not forwarded to PBM and she was not aware of them at the material time or prior to the detriments set out below. In respect of PD1 and PD7, the tribunal finds that they were in effect adopted by the BMA rep. The disclosures were as much the result of BMA representations as they were the claimant's.

Was the claimant subjected to detriment?

94. The claimant took part in a telephone meeting on 1 May 2020. Present also were PBM and PC. PBM, in effect acting as the claimant's manager, verbally informed the claimant that he would not be permitted to undertake any further shifts. In the tribunal's view, this was plainly a detriment because it prevented the claimant from working. The claimant had been performing normal shifts up to that point. The tribunal accepts that the respondent did not use the word "suspension" but the effect of the direction on 1 May 2020 not to be allocated any shifts was to all practical purposes a suspension and indeed this was how it was characterised by the claimant. The claimant was informed that it was to be effective "pending investigation" but even if time limited it was no less a detriment to the claimant to be unable to work.

95. The tribunal therefore concludes that the claimant was subject to a detriment when informed by telephone on 1 May 2020 that he would not be allocated any further shifts pending investigation into the concerns raised by the police about the claimant.

96. Secondly, the claimant's BMA rep, PJ, took part in a telephone meeting on 9 June 2020. Present also were PBM and PC. PBM verbally informed PJ that the claimant's contract with the respondent had come to its natural end and the respondent would not be re-engaging in contract discussions.

97. Strictly speaking, as the contract had indeed come to an end, the respondent had no contractual obligation to engage in further discussions. However the tribunal is satisfied that, in the context of the fact that the claimant had enjoyed continuous extensions for several years and his colleague Dr Estemberg had successfully extended his contract, the decision of the respondent not to re-engage in discussions with the claimant amounted to a detriment to him. It was a substantial disadvantage to him that he was thereby unable to continue working for the respondent notwithstanding that he had belatedly offered a signed contract for acceptance.

Was the claimant subjected to a detriment - the decision not to allocate further shifts - on the ground that he had made a Protected Disclosure?

98. The claimant had been carrying out shifts as normal up to 30 April 2020. The reason why his shifts stopped after that date was because the respondent decided not to allocate him further shifts. The tribunal is satisfied that the correct sequence of events is that on 26 April 2020 and latterly on 30 April 2020 the respondent was informed of circumstances relating to the claimant's discharge of duties which in the view of a Detective Chief Inspector had the potential to compromise the safety and well-being of detainees as well as putting custody staff in a compromising position. PBM herself expressed frustration in relation to these "issues" and recognised that they needed to be sorted out.

99. The matter was taken up by PC and the tribunal is satisfied that PC spoke with the Medical Director of the respondent on the morning of 1 May 2020 and discussed the

nature of the concerns with the Medical Director. The conclusion was reached that the concerns required investigation. No view was taken of the merits of the allegations but the decision was taken by JC that the claimant should not be allocated shifts – in effect suspended – pending investigation.

100. It was the Medical Director who had the authority to make that decision. He was as a result the decision maker. That decision was conveyed verbally to the claimant at the telephone meeting on 1 May 2020.

101. The reason that the claimant was not allocated any further shifts after 30 April 2020 was because the respondent wished to investigate the police concerns raised about the claimant and in the meantime the Medical Director had decided that the claimant should not be allocated any further shifts.

102. The claimant suggested that the police concerns were not genuine and further that the respondent had alighted upon those concerns as an excuse whereas in fact it acted as it did because the claimant had made protected disclosures. The tribunal rejects that suggestion. The police concerns had all the hallmarks of being genuine and were not raised by any person with any so-called agenda towards the claimant. The fact that the concerns had not been investigated does not make them any the less genuine. The respondent had not purported to reach any conclusion but in the tribunal's view the respondent was bound to act upon the clear request of the Detective Chief Inspector for an urgent review of a potentially dangerous situation.

103. This was no excuse alighted upon by the respondent. The Medical Director had no material involvement in parallel discussions with PJ regarding day-to-day working practices and it was not suggested by the claimant at tribunal that the Medical Director personally acted with ulterior motives.

104. The tribunal concludes that the decision not to allocate any further shifts to the claimant after 30 April 2020 was in no sense whatsoever because the claimant had made a protected disclosure.

<u>Was the claimant subjected to a detriment - the decision not to re-engage in contract discussions - on the ground that he had made a Protected Disclosure?</u>

105. The claimant repeatedly complained that there was an institutional failure on the part of the respondent. However, when questioned both by the respondent and the tribunal, the claimant asserted that the "protagonist", or decision maker, was PBM. This accorded with the tribunal's view of the evidence. The decision not to re-engage in contract discussions was made by PBM.

106. The respondent placed significant emphasis on the sequence of events which led to the claimant's contract coming to a natural end. Those events are relevant but do not determine the claim. The tribunal concluded that the appropriate circumstances which needed to be investigated by the tribunal included not only the ending of the claimant's contract, as evidenced by the letter dated 6 May 2020, but also the subsequent events which demonstrated that the respondent was not willing to

engage in further discussions with a view to the claimant continuing to work for the respondent. To the extent that this represented an extension of the List of Issues, the tribunal concludes that it was a proper interpretation of the claimant's claim to include both sets of events.

107. The claimant was offered an extension to his contract by letter dated 2 April 2020. In doing so, it is evident that the respondent was not affected by events during March 2020 relating to the claimant and in particular the claimant's emails and alleged disclosures regarding the pandemic and the respondent's apparent lack of response.

108. Further, the tribunal is satisfied that even as at 30 April 2020, the respondent had left open the opportunity to the claimant to confirm that he would extend his contract. This was an opportunity available both to the claimant and to Dr Estemberg. Indeed, PJ wrote to both urgently and advised them in clear terms that they should sign the contract. He gave them that advice on 1 May 2020 [230]. The email states that, "[PBM] is seeking confirmation today" the tribunal is satisfied that is a direct reference to the respondent's position, which is set out on [223], that the respondent, "will have to stop using the FMEs immediately if we don't get a return of their contracts".

109. Dr Estemberg raised similar concerns regarding the pandemic and made disclosures to his employer in similar circumstances to the claimant. In contrast to the claimant however, and acting upon the advice of the BMA rep, he submitted a signed contract on or about 1 May 2020. PBM did speak to him on the telephone but that was because he had entered a caveat and she informed him that it would need to be removed which it duly was.

110. The claimant instead did not submit a signed contract. His intention was that he had provided a conditional acceptance. Yet he did not sign a contract and objectively he did not accept the contract. The respondent genuinely concluded that it did not get a return of the claimant's contract. Consistent with the respondent's position that [223], the claimant was informed on 6 May 2020 that his contract had come to its natural end.

111. The respondent had no obligation to entertain the claimant's objections, whether or not characterised as conditional acceptance, and the reason why the claimant's contract came to an end on or before 6 May 2020 was simply because he did not accept the extension to his contract when it was offered. His belief that he needed to negotiate around issues of safety and day-to-day working practices was misguided and it is unfortunate that he did not accept the pragmatic advice of PJ as his colleague had done.

112. Dr Estemberg continued to be engaged to work for the respondent. There is no evidence to support the claimant's supposition that the respondent would be getting rid of Dr Estemberg let alone that it would do so because Dr Estemberg had also made disclosures.

113. However that is not the end of the matter. PJ wrote on 7 May 2020 undoubtedly as a direct consequence of the claimant being informed that his contract had come to an end. The email was a plain and direct request to re-engage in discussions with the claimant. It was open to the respondent to do so and although there would have been procedural matters to comply with – described as procurement issues by the respondent – these did not prevent the respondent.

114. Why then did the respondent decline to re-engage with the claimant? After all, the claimant had provided a signed copy of the contract extension on 7 May 2020 and expressly did so without amendment.

115. The tribunal finds that the fact that the respondent had written to the claimant on 6 May 2020 informing that his contract had come to an end could not be a sufficient reason to decline to re-engage in discussions with the claimant. The respondent had accepted Dr Estemberg's signed contract a matter of days earlier. The administrative letter dated 6 May 2020 may have created additional procurement processes to comply with but these did not change the essential nature of the decision that faced PBM. PBM herself acknowledged that it was not a decision for procurement but rather it was a decision for her.

116. The tribunal is satisfied that there were no issues as to a shortage of workforce or workload issues which might call into question why the claimant was not re-engaged. PBM was asked this question directly and the tribunal accepted her evidence.

117. At some point between receipt of the email dated 7 May 2020 from PJ and the telephone meeting that took place on 9 June 2020, the respondent made a decision that it would not re-engage in contract discussions with the claimant. The tribunal is satisfied that the decision was made by PBM and it was entirely within the remit of her role that she should do so. The tribunal is satisfied that she had not been instructed or unduly influenced by another as to the decision that she should take.

118. The claimant has repeatedly described the work environment as "toxic". He said that instead of "working together" in fact the respondent refused to engage and management in effect "stuck together" so as to "shush" any concerns. He complains of poor communication and a failure on the part of the respondent to respond to his concerns. The tribunal notes that this might be capable of indicating the respondent's attitude toward the claimant and its attitude toward those who make protected disclosures.

119. In her witness statement, PBM said that, "the reason we did not re-engage in contract discussions with [the claimant] is because the contract with Forpol Ltd had already come to its natural end. In addition, [the respondent] had been made aware of serious concerns regarding [the claimant's] conduct and we are also mindful of the potential tender process later that year". In her evidence to the tribunal, PBM was consistent.

120. The claimant contends that these reasons were an excuse and that the real reason was because he had made a protected disclosures. PBM denied that in evidence and asserted that many members of staff have legitimate concerns which she did not undermine. In addition, it was PBM's evidence that the respondent was addressing those points in any event. The tribunal notes that following the involvement of the BMA in April 2020, the representative in effect adopted the concerns raised by the claimant and raised the profile of those concerns. Those concerns were put forward on behalf of both the claimant and Dr Estemberg. Far from seeking to "shush" the concerns, the tribunal is satisfied that both PBM and PC took the concerns raised by the BMA seriously and provided a conscientious and detailed response on 1 May 2020.

121. This further supports the evidence of PBM. It does not provide evidence to support the claimant's case that the respondent adopted an adverse attitude toward the claimant or indeed anyone who was making disclosures. At no time did PJ suggest to PBM that she had sought to avoid the issues and instead the tone of the correspondence from him was both constructive and grateful for the efforts that the respondent was making.

122. Even as at the end of April 2020, it was open to the claimant to accept the extension of contract. In the event, he did not and his contract was determined by the respondent to have come to an end. This could not of itself be a sufficient reason to decline to re-engage but it represented a change in circumstances which caused PBM to reflect on her decision.

123. The claimant has persuaded himself that the police concerns were not genuine. The tribunal is satisfied that they were genuine and on the surface had the potential of endangering detainees and police staff. It was unsurprising in those circumstances that the decision of the respondent was to suspend the claimant and to commence an investigation. Further, it was understandable that PBM would take into account the fact that no investigation needed to be carried out if the claimant no longer had a contract with respondent and by contrast a full investigation would be required if he were to be re-engaged. To re-engage the claimant simply in order to suspend him pending an investigation represented a barrier to the decision to re-engage.

124. The tribunal is satisfied that PBM genuinely had in mind the fact that the claimant no longer had a contract. It was not the reason for her decision but it was the backdrop for her decision. The tribunal is satisfied that she decided not to re-engage with the claimant because it would involve the need for an investigation into the serious police concerns and also as a secondary matter the existence of a potential tender process created an additional element of uncertainty as to the requirement of her workforce.

125. This is not a case where the tribunal is required to determine whether the respondent put its workers at unnecessary risk during the initial months of the pandemic. Nor is it a case where the tribunal should decide whether the respondent

made the right decision in declining to re-engage in contract discussions with the claimant. The tribunal's task is to determine a claim under section 47B of ERA and in so doing to determine the reason why the respondent subjected the claimant to a detriment. The tribunal reminds itself that in circumstances where the claimant has established that he was subject to a detriment, it is for the respondent to establish the reason for the treatment.

126. The tribunal has looked to the respondent for an explanation. The tribunal has taken into account the lack of documentary evidence to explain the decision-making process for the detriments suffered by the claimant. The tribunal has accepted PBM's evidence. Her reasons for declining to re-engage in discussions with the claimant over his contract were genuine and substantial. There is no evidence that PBM refused to engage in discussions over pandemic concerns raised by the claimant and latterly his BMA rep and there is no evidence that the respondent displayed an adverse attitude to the claimant or to whistleblowers generally as a result. The respondent had reengaged Dr Estemberg when plainly it could have found an excuse not to do so.

127. The tribunal also had in mind the limited nature of its findings in respect of Protected Disclosures. The claimant did not succeed in respect of all of his alleged disclosures. PBM was not aware of PD5 and PD8 at the time of the detriments and the tribunal concludes that they did not operate on her mind as part of the decision making process. As regards PD1 and PD7, as set out above, the tribunal concludes that these were in effect adopted by the BMA and there is no evidence that the respondent adopted an adverse attitude to those disclosures or to the fact that the BMA was raising the issues or indeed that the claimant had previously raised issues whether or not amounting to protected disclosures.

Conclusion

128. Taking a step back, and considering the evidence as a whole, the tribunal asks itself the question of whether the detriments to which the claimant was subjected were done on the ground that the claimant had made Protected Disclosures. For the reasons expressed by the tribunal in the preceding paragraphs, the tribunal is satisfied that the Detriments to which the claimant was subjected following the making of Protected Disclosures were in no sense whatsoever as a result of the claimant making the Protected Disclosures or any of them.

129. The claimant's claim of detriment on the ground of protected disclosure fails entirely and is dismissed.

EMPLOYMENT JUDGE BEEVER

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON
20 September 2021
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