# EMPLOYMENT TRIBUNALS

**BETWEEN**

**Claimant:** Mr M Iftikhar

**Respondent:** Dorset County Hospital NHS Foundation Trust

**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

**Heard at:** Southampton **On:** 6 to 24 September 2021 (last date parties attended 21 September 2021)

**Before:** Employment Judge Gray
**AND**
**Members:** Mr N Cross and Mr N Knight

**Appearances**
For the Claimant: Mr N Smith, Counsel
For the Respondent: Mr S Gorton, QC

**RESERVED JUDGMENT ON LIABILITY ONLY**

**The unanimous judgment of the tribunal is that:**

- **The complaints of detriments 1 to 4 for making a protected disclosure are dismissed on withdrawal**

- **The complaints of unfair dismissal, detriments 5 to 8 for making a protected disclosure and automatic unfair dismissal (section 103A Employment Rights Act 1996), fail and are dismissed.**

## REASONS

### BACKGROUND OF THE CLAIM AND THIS HEARING

1. This is a case concerning complaints of unfair dismissal, automatic unfair dismissal and detriment said to arise because of alleged protected disclosures.

2. In short, the Claimant was a long serving consultant within the Obstetrics and Gynaecology Department at an NHS hospital whose employment, the Respondent says ended fairly, due to dysfunction within that Department. The Claimant asserts that he suffered eight detriments and was automatically and unfairly dismissed on the grounds of / for the principal reason of having made ten alleged protected disclosures.

3. It is not the Claimant's case that those that dismissed him did so directly on the grounds that he "blew the whistle" because the Claimant has accepted that there is no evidence that they did so knowingly. The Claimant's challenge is that the decision-making panel was misled, and that this misleading was by design and motivated by the Claimant's alleged disclosures. In short, that the panel was misled as to the causes of the dysfunction in the Department, the spotlight being unfairly placed on the Claimant on the grounds of his alleged disclosures, to cause his dismissal, and make that the principal reason. The Claimant builds this argument around the legal precedent set by the Supreme Court in the case of ***Royal Mail Group v Jhuti [2019] UKSC 55***.

4. This claim has a long and complicated administrative history in getting to this final hearing. There was an application for Interim Relief that was refused. There have been six case management hearings in this matter, which encompassed an adjournment of the final hearing from 2020 to now, as well as a Deposit Order being made by consent (dated 3 October 2019).

5. This case also encompasses a significant amount of evidential material that the parties wanted to present the Tribunal for consideration at this final hearing (lasting 15 days) to determine the matters of liability only.

6. We were provided with an agreed Hearing Bundle (both paper and pdf versions) consisting of 2,721 pages.

7. We were also provided with a witness statement bundle consisting of the following 24 witness statements (as per the index of the witness bundle). In respect of the Claimant's supporting witnesses and the Respondent's witness, R Jee, these were taken as read without challenge from the respective other side:

    CLAIMANT'S WITNESS STATEMENTS
    1. Claimant 1/9/20
    2. V M Leonard 28/8/20

3. T Asmussen 31/8/20
4. N Vaitkiene 1/9/20
5. M Perumalla x
6. C Pappin 21/8/20
7. A Hilton 1/9/20
8. F Shah 30/8/20
9. A Khan 1/9/20
10. S Morgan 28/8/20

RESPONDENT'S WITNESS STATEMENTS

11. A J Hutchison 1/9/20
12, A O'Donnell 17/8/20
13. C Abery-Williams 14/8/20
14, C Youers 14/8/20
15. E Hallett 13/8/20
16. J A Doherty 21/8/20
17. M B Joffe 31/7/20
18. P A Lear 30/7/20
19. P Miller -
20. R Boniface 17/8/20
21. R Jee 20/8/20
22. K S Jordan
23. T Hall 12/8/20
24. W A Ward 10/8/20

8. It was in recognition of the volume of material we were to be presented that during previous case management hearings the parties had agreed to prepare:

    a. An agreed chronology;

    b. A core bundle (which we were also provided with as paper and pdf versions);

    c. A reading list of what from the core bundle should form part of our pre-reading along with the witness statements.

9. We were also provided with the agreed list of issues which is 14 pages long and which in the main has been in place in an agreed form since its production on the 24 April 2020.

10. We have been greatly assisted in this matter by the parties' representatives and their Counsel with the preparation of the full and agreed chronology with linked reading list as well as full and helpful written and oral submissions both Counsel provided us with.

11. The Timetable for this final hearing had been agreed at previous case management hearings, and due to the efforts and co-operation of both Counsel it was broadly met, with evidence and submissions being concluded at lunch time on Tuesday 21 September 2021 (day 12).

12. The decision was then reserved as Claimant's Counsel confirmed they were requesting written reasons, so it was not proportionate to bring the parties back for an oral judgment, as well as compile written reasons. The parties were therefore released on the 21 September 2021.

13. We set out below a copy of the agreed list of issues. There were some clarifications and amendments to this agreed list of issues in respect of the decisions that we had to make that arose since its original production, at case management and during the final hearing, these were:

    a. The Claimant confirming that the individuals who the Claimant says were responsible for his dismissal by reason (or principle reason) of whistleblowing were Paul Lear, Julie Doherty, Mark Warner and Patricia Miller.

    b. In relation to the time limit jurisdictional issues we had to decide it was agreed that based on the claim form being presented on the 20 November 2018 and there being no ACAS certificate due to the application for interim relief, acts complained about before the 21 August 2018 are potentially out of time. It would therefore appear that detriments 7 and 8 and the dismissal are in time. Claimant's Counsel confirmed that in respect of issue 5.3, no evidence was submitted as to whether it was reasonably practicable for the Claimant to have presented his claim in time, and if not, was it presented within a reasonable time thereafter, so we are not required to decide that issue.

    c. The withdrawal of detriments 1 to 4 by the Claimant during the final hearing and it being agreed that they would be dismissed on withdrawal as part of our judgment.

    d. Confirmation by Claimant's Counsel during oral closing submissions that we were not being asked to determine if the alleged disclosures 1 to 3 were protected qualifying disclosures as they were no longer relied upon as being the grounds for any of the pursued detriments or the principal reason for the Claimant's dismissal.

    e. The application of MHPS terms is no longer an issue pursued by the Claimant as it is accepted, they did not apply to the reasons for the Claimant's dismissal.

f. We also note here that during closing oral submissions by Claimant's Counsel he made an application to amend the unfair dismissal claim so as to expressly refer to matters that had arisen during the evidence of Professor Hutchison. However, on discussion and hearing submissions this was not pursued as it was understood such matters were part of the considerations the Tribunal had to make relevant to section 98 of the Employment Rights Act 1996.

## THE AGREED LIST OF ISSUES

### 1. Unfair Dismissal

1.1. What was the reason for dismissal? The Respondent asserts it was for some other substantial reason justifying dismissal ("SOSR"), namely the breakdown of relationships between the Claimant and his colleagues.

1.2. Was the decision to dismiss for SOSR reasonable in all the circumstances, including the size and administrative resources of the Respondent's undertaking?

1.3. Did the Respondent conduct as reasonable an investigation as was warranted in the circumstances? Was the investigation within the range of reasonable options open to the Respondent?

1.4. Was the decision to dismiss a fair sanction, that is, was it within the range of reasonable responses open to a reasonable employer when faced with these facts? While the test is whether generally the decision was fair, regard may be had to the following:

1.4.1. Did the breakdown of relationships between the Claimant and his colleagues cause a substantial disruption to the Respondent's operational services and have a detrimental impact on patient safety?

1.4.2. Was it fair to select the Claimant for dismissal rather than other members of the team?

1.4.3. Was the relationship breakdown beyond repair?

1.4.4. Did the Respondent take reasonable steps to solve the problem without resorting to dismissal, for example was adequate consideration given to redeployment, change in working hours or mediation?

1.4.5. Did the Respondent consider whether there were any alternatives, short of dismissing the Claimant?

1.4.6. Was the decision to dismiss the Claimant pre-determined?

1.5. Did the Respondent adopt a fair procedure? In particular:

1.5.1. Did the Respondent's actions fall within their own applicable and relevant internal procedures (including the NHS Maintaining High Professional Standards in the Modern NHS Framework if applicable) and was that procedure followed?

1.5.2. If it was not followed, was a fair procedure otherwise followed?

1.5.3. If it did not adopt a fair procedure, would the Claimant have been fairly dismissed in any event and/or to what extent and when?

1.6. If the dismissal was unfair, did the Claimant contribute to it by culpable conduct?

**2. Public Interest Disclosure Claims**

2.1. The Claimant relies upon 10 disclosures as set out in schedule 1 attached. The parties' respective factual and legal positions are set out in schedule 1.

2.2. The relevant issues to be decided in respect of the disclosures are as follows:

2.2.1. What did the Claimant say or write?

2.2.2. In any or all of the disclosures in the schedule, was information disclosed which in Claimant's reasonable belief tended to show that:

2.2.2.1. A person has failed, is failing or is likely to fail to comply with a legal obligation to which he was subject (43B(1)(b) ERA), or

2.2.2.2. A criminal offence had been, is being, or is likely to be to be committed (43B(1)(a) ERA), or

2.2.2.3. Health and safety of an individual has been, is being, or is likely to be endangered? (43B (1)(d)) ERA 1996).

2.2.3. Did the Claimant reasonably believe the disclosure was in the public interest?

2.2.4. If so, to whom was the disclosure made? Was this to the employer (s43C (1)(a) ERA 1996) or a prescribed person (s43F(1)(a))?

**3. Detriment complaints**

3.1. If protected disclosures are proved, has the Claimant proved that, on the ground of any protected disclosures found, he was subjected to a detriment by the employer or another worker for whom the employer is vicariously liable? The Claimant relies upon 8 detriments as set out in schedule 1 attached. The parties' respective factual and legal positions in respect of the detriments are set out in schedule 1

3.2. If the act of detriment was done by another worker, can the Claimant show that the other worker was aware that he had made a protected disclosure and treated him less favourably on the grounds of it?

3.3. Can the employer show that it took all reasonable steps to prevent that other worker from doing that thing or acts of that description?

**4. Automatic Unfair Dismissal complaints**

4.1. Was the making of any proven protected disclosure the principal reason for the Claimant's dismissal?

4.2. The Claimant's case is that the Boniface report wrongly lead a disciplinary panel to conclude that the Claimant should be dismissed. The disciplinary panel did not have retribution in mind but were misled by the Boniface report. The Claimant therefore says that the real reason for his dismissal was that he was a whistleblower and relies on ***Royal Mail Group v Jhuti [2019] UKSC 55.***

4.3. The Respondent denies that the decision to dismiss the Claimant was an act of whistleblowing detriment. The Respondent says the reason given for the dismissal of the Claimant was not a pretext to conceal the real reason for the Claimant's dismissal. Moreover, the Respondent says that the Claimant was not dismissed by a disciplinary panel or for misconduct. The Respondent says the Claimant was fairly dismissed for "some other substantial reason justifying dismissal" namely the breakdown of the relationship between the Claimant and his colleagues. The Respondent says that the decision was within the range of reasonable responses open to the panel, given the serious nature of the dysfunctionality of the team and the impact this was having on patient safety prior to the exclusion of the Claimant.

4.3.1. Has the Respondent proved its reason for dismissal?

4.3.2. If not, does the tribunal accept the reason put forward by the Claimant?

4.3.3. If the tribunal does not accept the reason put forward by the Claimant, what does the tribunal find to be the reason for dismissal?

**5. Time Limit/limitation issues**

5.1. The Claim Form was presented on 20th November 2018. Accordingly, any act or omission which took place more than three months before that date (allowing for any extension under the early conciliation provisions is potentially out of time, so that the tribunal may not have jurisdiction.

5.2. Can the Claimant prove that there was an act (proven detriment(s) on the grounds of his protected disclosures) that was part of a series of similar acts and if so, was the last of those acts within 3 months of 20 November 2018? Accordingly, is such conduct in time?

5.3. If the Claim was not presented in time, was it reasonably practicable for the Claimant to have done so, and if not, was it presented within a reasonable time thereafter?

**6. Remedies**

6.1. If the Claimant succeeds, in whole or part, the tribunal will be concerned with the issues of remedy.

6.2. Has there been a f*ailure to follow 2009 ACAS Code of Practice 1 on Disciplinary and Grievance Procedures? If so, what is the correct uplift to be applied?*

6.3. There may fall to be considered reinstatement, re-engagement, a declaration, compensation for loss of earnings, injury to feelings, and/or the award of interest.

**SCHEDULE 1**

**DISCLOSURES AND DETRIMENTS**

**The Claimant relies on the disclosures set out below and says that these were Protected Disclosures.**

**The Respondent denies that the Claimant made Protected Disclosures. The Respondent says that a relevant issue is whether at any time, the Claimant raised his alleged protected disclosures in accordance with the Respondent's Whistleblowing/Raising Concerns policy, or with any one of its 5 Freedom to Speak Up Guardians, its Senior Independent Officer or Whistleblowing Lead.**

**The parties respective factual and legal positions are set out below.**

**1. Disclosures 1 and 2: Letters 30/5/13 and 22/7/13 from Claimant to Will Ward**

1.1. The parties agree that the Claimant sent Letters to Will Ward dated 30/5/13 and 22/7/13.

1.2. The Claimant says that in these letters he provided information regarding Alison Cooper receiving overpayments of salary for work that had not been undertaken and that this information amounted to a protected disclosure. The Respondent denies that these letters were protected disclosures.

1.3. The Claimant says the information in the letters tended to show failure to comply with a legal obligation by Alison Cooper (s43B1(b)ERA) namely her own contract of employment, implied terms of trust and confidence and the Respondent's Finance Policy and Policy on Overpayment of Salary, Allowances, Travel and Subsistence (Po019) ("the Overpayments Policy"). This information, in the Claimant's reasonable belief also tended to show that a

criminal offence may be being committed by Alison Cooper (s43B(1)(a)ERA) as under the Theft Act 1978 an employee may be guilty of theft by keeping salary overpayments and treating them as their own. The Claimant says his belief was reasonable and made in the public interest as the Respondent's financial difficulties were having an impact on service provision to the public and also related to the spending of public monies. The disclosure was made to the Respondent (43C ERA).

1.4. The Respondent denies that the letters in the reasonable belief of the Claimant were either made in the public interest or tended to show either that there had been or may have been a commission of a criminal offence or breach of a legal obligation by any person. The Respondent says there is no reference to breach of a legal obligation, criminal behaviour, the Trust's financial difficulties and their impact on service provision in these letters.

**2. Disclosure 3: Verbal disclosures to Catherine Abery-Williams in or around January 2015**

2.1. The Claimant alleges that in January 2015 he informed Mrs Abery-Williams of 'potentially fraudulent' behaviour by a colleague, Mr Siddig.

2.2. The parties agree that the Claimant verbally raised an issue concerning Mr Siddig's attendance (or otherwise) at the RCOG conference which took place in December 2014. This was raised verbally to Catherine Abery-Williams in a meeting [in January 2015].

2.3. The Claimant says that this was a protected disclosure and that he provided information about Mr Siddig being granted study leave to attend the RCOG conference in December 2014 but did not attend the conference or inform management to cancel his study leave. This information, in the Claimant's reasonable belief, tended to show an overpayment being made to Mr Siddig. The Claimant will say that this tended to show that the Respondent and Mr Siddig were failing to comply with legal obligations to which they were subject (s43B1(b)ERA) namely the employees' own contracts of employment, implied terms of trust and confidence and the Respondent's Overpayments Policy. The Claimant says that this information, in the Claimant's reasonable belief also tended to show that a criminal offence may be being committed by Mr Siddig (s43B(1)(a)ERA) as under the Theft Act 1978 an employee may be guilty of theft by keeping salary overpayments and treating them as their own. The Claimant says his belief was reasonable and made in the public interest as the Respondent's financial difficulties were having an impact on service provision to the public and also related to the spending of public monies. The disclosure was made to the Respondent (43C ERA).

2.4. The Respondent does not accept that this was a protected disclosure. The Respondent does not agree that the Claimant had a reasonable belief that this disclosure tended to show an alleged breach of any legal obligation or the potential commission of a criminal offence and/or that it was in the public interest.

**3. Disclosure 4: Verbal disclosure to Tony Hall during a meeting towards the end 2015**

3.1. The parties agree that the Claimant met the Respondent's Counter-Fraud Specialist Tony Hall towards the end of 2015 and raised concerns about payments being made to his colleague Alison Cooper.

3.2. The Claimant says that during this meeting he disclosed information in respect of on-call overpayments to Alison Cooper and Mr Siddig, overpayments to Alison Cooper for extra colposcopy work which had not taken place, information regarding Beena Dandawate's allegedly fraudulent behaviour in respect of leave arrangements to attend an RCOG congress in India. The Claimant says that this information tended to show that the Respondent, Alison Cooper, Mr Siddig and Beena Dandawate were failing to comply with legal obligations to which they were subject (s43B1(b)ERA) namely the employees' own contracts of employment, implied terms of trust and confidence and the Respondent's Overpayments Policy. This information, in the Claimant's reasonable belief also tended to show that a criminal offence may be being committed by the employees in question (s43B(1)(a)ERA) as under the Theft Act 1978 an employee may be guilty of theft by keeping salary overpayments and treating them as their own. The Claimant's belief was reasonable and made in the public interest as the Respondent's financial difficulties were having an impact on service provision to the public and also related to the spending of public monies. The disclosure was made to a prescribed person under 43F ERA. The Claimant had a reasonable belief that the information he was disclosing was substantially true and was a matter in respect of which the NHS Counter Fraud Authority had prescribed responsibility.

3.3. The Respondent denies that this was a protected disclosure. The Respondent says that whilst other colleagues may have been mentioned, this was not in the context of concerns being raised about them. The Respondent says the Claimant did, however, mention that he had been reported to the GMC by his colleagues.

3.4. It is not admitted by the Respondent that this conversation amounted to a protected disclosure. The Respondent says that there was no disclosure of any information tending to show a person or persons failing to meet their legal obligations or committing criminal offences. The Respondent says the Claimant did not have any reasonable grounds for believing that any "disclosure" that was made during this conversation tended to show these matters were in the public interest. In fact, the Respondent's case is that during this meeting Mr Hall explained to the Claimant that he had found no evidence of fraud but said that if further evidence came to light he would be happy to investigate further.

**4. Disclosure 5: Letter to GMC 21/9/2015**

4.1. The Claimant sent a letter by email from Viv Leonard to Dale Brown, Investigating Officer General Medical Council ("GMC") on 21/9/15. The Respondent accepts that this letter was sent to the GMC. The Claimant says

that Viv Leonard also sent a copy to Paul Lear in the Hospital Internal mail. Pending discovery receipt by Mr Lear is not admitted by the Respondent.

4.2. The Claimant says that he provided information about the poor financial practices of the Respondent and the Claimant produced evidence that overpayments of on-call supplements by the Respondent to Alison Cooper would have been known to her as set out in paragraph 16 of the Clarification Document. The Claimant also disclosed information tending to show poor reporting of annual leave and study leave, leading to possible fraud by Mr Siddig. This information tended to show that the Respondent, Alison Cooper and Mr Siddig were failing to comply with legal obligations to which they were subject (s43B1(b)ERA) namely the employees' own contracts of employment, implied terms of trust and confidence and the Respondent's Finance Policy and Policy on Overpayment of Salary, Allowances, Travel and Subsistence (Po019) ("the Overpayments Policy"). This information, in the Claimant's reasonable belief also tended to show that a criminal offence may be being committed by the employees in question (s43B(1)(a)ERA) as under the Theft Act 1978 an employee may be guilty of theft by keeping salary overpayments and treating them as their own. The Claimant's belief was reasonable and made in the public interest as the Respondent's financial difficulties were having an impact on service provision to the public and also related to the spending of public monies. The disclosure was made to the Claimant's employer (as the letter was copied to the Respondent (43C ERA) and the GMC (43F ERA). The Claimant had a reasonable belief that the information he was disclosing was substantially true and was a matter in respect of which the GMC had prescribed responsibility.

4.3. The Respondent states that this letter was the Claimant's response to allegations made against him by his work colleagues and should not therefore be properly regarded as a protected disclosure by the Claimant.

4.4. The Respondent says that as this letter was not addressed to the Respondent it should not be properly regarded as a protected disclosure to the Respondent.

4.5. The Respondent accepts that the Claimant makes allegations concerning his colleagues Mr Siddig and Ms Cooper, including that these individuals either claimed too much pay from the Respondent, were overpaid, or misused their annual leave and/or study leave entitlement. However, the Respondent says that none of these allegations constitute information tending to show that the Respondent (or the Claimant's colleagues) was failing to comply with their legal obligations. The Respondent asserts that there was no clear allegation of wrongdoing by the Claimant, nor is there any reference in the letter to the various legal obligations or criminal offences now relied upon.

4.6. In particular, the Respondent's case is that the Claimant does not clearly allege wrongdoing on the part of Ms Cooper, stating '*It is not for me to say if Ms Cooper's probity is in question'*. The Respondent says that this is inconsistent with the Claimant's assertion now that he was making a protected disclosure about alleged unlawful or criminal behaviour on her part.

4.7. With regard to the Trust the Respondent's case is that the Claimant merely states that it '*took a very lenient approach'* toward recovering overpayments. This is inconsistent with the Claimant's assertion now that he was making a protected disclosure about alleged unlawful or criminal behaviour on the Trust's part.

4.8. The Respondent says this letter was in fact a "tit for tat" response to allegations made against him by his colleagues. It was not in the public interest and he could not have reasonably believed that it was.

**5. Disclosure 6: Letter 28/8/2015 Claimant to Paul Lear**

5.1. The parties agree that the Claimant wrote a letter to Paul Lear (Medical Director) dated 28/8/15 voicing concerns over Mr Shoukrey's clinical practice of investigating women with post-menopausal bleeding.

5.2. The Claimant says this was a protected disclosure to his employer (s 43c ERA) because the letter contained information tending to show that the Respondent was failing or was likely to fail to comply with a legal obligation to which it was subject, namely that it was employing a surgeon who was performing unnecessary, damaging and negligent re-section procedure in breach of its duty of care towards patients and/or that there was danger to the Health and Safety of individuals in the Respondent's care. The Claimant's case is that this disclosure relates to a breach of a legal obligation (S43B1(b) ERA 1996) by Mr Shoukrey, namely a breach of Duty of Care which is obligation in tort, a breach of Mr Shoukrey's own contract of employment and the implied term of trust and confidence. The disclosure also relates to potential danger to the Health and Safety of individuals in the Respondent's care (s43B1(d) ERA 1996) The Claimant was acting in accordance with his duty as a Doctor to act where he believed that patient safety and patient care and dignity was being compromised. The Claimant will say that this disclosure was made in the public interest as the Respondent is a public body providing care to members of the community.

5.3. The Respondent denies that this letter was a protected disclosure on the basis that the letter does not suggest that the Respondent or any other person was failing to meet its legal obligations, nor that the health and safety of anyone had been or was being or was likely to be endangered. The Respondent says the highest the Claimant puts it is to say "it would therefore be helpful for us all to have a definite opinion on his practice by the external independent investigation." The Respondent says that a subsequent review of the Claimant's colleague's practice raised no concerns in any event.

5.4. The Claimant alleges that the Respondent 'took no action' on the information and that he informed the GMC on 28 June 2016. The Respondent denies this and notes that in his letter to the GMC the Claimant himself states that the Trust had established a post-menopausal bleeding Task and Finish Group which had 'already resulted in improvements for patients to access the service'.

**6. Disclosure 6A: Verbal disclosure to Patricia Miller during meeting on 19/5/16**

**6.1.** The parties agree that there was a meeting between the Claimant and Patricia Miller in 2016 when the dysfunction of the gynaecology team and the detrimental impact on patient safety was discussed. The Claimant says this meeting took place on 19/5/16. The Respondent says this meeting was in early 2016, but does not confirm the date.

**6.2.** The Claimant says that this verbal discussion was a protected disclosure to his employer (s43 c ERA 1996). The Claimant says he provided information in the form of two examples where patient safety was being detrimentally affected.

**6.3.** The first example involved the Claimant's colleagues, Mr Shoukrey, Mr Siddig, Miss Dandawate and Margaret Perumalla in a delayed surgical intervention for an emergency admission in the week commencing 9/5/16. The Claimant says he informed Patricia Miller that due to a disagreement between the above colleagues regarding who should carry out the emergency surgery on this patient, there was more than 48 hours delay in taking her to theatre.

**6.4.** The second example was in relation to Mr Siddig supervising Mr Shoukrey's surgical work on 20/1/16 in respect of a specialist surgical procedure, which he did not himself undertake. Brenda O'Connell, the Theatre Nurse in charge of the Day Surgery theatre list on 20/1/16 raised concerns about this with Mr Siddig on 20/1/16 (confirmed in writing on 16/3/16). Matthew Hough (Consultant Anaesthetist) witnessed this and approached the Claimant on the same day in the afternoon at the private Winterbourne Hospital and his words were "Ifti, what is going on between MS and MNS? The Theatre staff in Day Surgery were very unhappy today and were questioning MS....." It was understood that Mr Siddig was supervising Mr Shoukrey with a view to preparing a satisfactory report on his operating skills, in order to ease the restriction on his practice. Some of the consultants, including the Claimant had reservations regarding this arrangement due to the common knowledge of collusion between the two of them. The Claimant says the arrangement on 20/1/16 placed patient safety at risk as Mr Siddig did not have the skills to supervise the specialist procedure being undertaken.

**6.5.** The Claimant's case is that these disclosures relate to potential danger to the Health and Safety of individuals in the Respondent's care (s43B1(d) ERA 1996). The disclosures were made in the public interest as the Respondent is a public body providing care to members of the community.

**6.6.** The Respondent denies that this verbal discussion was a protected disclosure. The Respondent says that the conversation centred on the dysfunctionality within the department, the implications for patient safety and the fact that colleagues reporting each other to the GMC was unhelpful. The Respondent decided that the issues which the Claimant had raised should be considered under the Trust's Whistleblowing Policy and an independent investigation was commissioned into the same. The outcome was fed back to

the Claimant, together with a copy of the independent report, on 21st July 2016. The Respondent will say that the Claimant did not consider these concerns were raised as protected disclosures at the time and that he confirmed in his grievance dated 15/8/18 that that it was the Respondent that had taken this step.

**6.7.** The Respondent denies that the conversation was considered by the Claimant to be a protected disclosure and thus denies that it should be regarded as meeting the relevant statutory definition.

**7. Disclosure 7 Verbal disclosure during meeting with Catherine Abery Williams on 31/10/16**

**7.1.** The parties agree that there was a meeting between the Claimant and Catherine Abery-Williams on or around 31/10/16.

**7.2.** The Claimant says that during this meeting he provided Catherine Abery-Williams with information about overpayments being made to Alison Cooper for her Hospital Based Pathology Co-ordinator Role (HBPC) and that this was a protected disclosure to his employer (s43c ERA 1996). The Claimant provided a copy of Ms Cooper's electronic job plan to the Divisional Manager and informed her of the fraudulent entry of 4 hours entitlement for the HBPC role (her entry being "meetings outside my working week"). The Claimant says this information tended to show that the Respondent and Alison Cooper were failing to comply with legal obligations to which they were subject (s43B1(b)ERA) namely the employees' own contracts of employment, implied terms of trust and confidence and the Respondent's Overpayments Policy. The Claimant says that this information, in his reasonable belief also tended to show that a criminal offence may be being committed by Alison Cooper (s43B(1)(a)ERA) as under the Theft Act 1978 an employee may be guilty of theft by keeping salary overpayments and treating them as their own. The Claimant says his belief was reasonable and made in the public interest as the Respondent's financial difficulties were having an impact on service provision to the public and also related to the spending of public monies.

**7.3.** The Respondent denies any protected disclosure was made during the meeting on 31/10/16. The Respondent says that the Claimant repeated previous concerns about Mrs Cooper and payment in respect of her HBPC role. The Respondent says there was therefore no disclosure of new information tending to show any breach of any legal obligation or any tendency to commit criminal acts. Further, the Respondent does not agree that it would have been within the reasonable belief of the Claimant that raising such issues was at that time, in the public interest, given that the issues had previously been raised in 2013 and dealt with by the Trust.

**8. Disclosure 8: Meeting with Julie Doherty 16/2/2017**

**8.1.** The parties agree that the Claimant brought the issue of irregular payments being made to Alison Cooper to Julie Doherty during the period when Julie

Doherty was Divisional Director. The Respondent cannot recall the date. The Claimant says this was on 16/2/17.

**8.2.** The Claimant says that the information disclosed to Julie Doherty during this meeting was a protected disclosure to his employer (s43c ERA 1996). The Claimant says he presented an electronic copy of Ms Cooper's job plan to Julie Doherty and informed her of the fraudulent entry of 4 hours entitlement for the HBPC role (her entry being "meetings outside my working week"). The Claimant says that this information, in his reasonable belief, tended to show overpayments being made to the Respondent's employees. The Claimant says that this tended to show that the Respondent and Alison Cooper were failing to comply with legal obligations to which they were subject (s43B1(b)ERA) namely the employees' own contracts of employment, implied terms of trust and confidence and the Overpayments Policy and/or that a criminal offence may be being committed by Alison Cooper (s43B(1)(a)ERA) as under the Theft Act 1978 an employee may be guilty of theft by keeping salary overpayments and treating them as their own. The Claimant says his belief was reasonable and made in the public interest as the Respondent's financial difficulties were having an impact on service provision to the public and also related to the spending of public monies.

**8.3.** The Respondent denies that the discussion between the Claimant and Julie Doherty amounted to a protected disclosure. As the matter had previously been investigated by the previous Divisional Director, the Respondent says that the Claimant agreed that allegations would not be reinvestigated.

**8.4.** The Respondent does not admit that the Claimant presented an electronic copy of Ms Cooper's job plan to Mrs Doherty. The Respondent denies that Mrs Doherty agreed that this "appeared to be a fraudulent claim". The Respondent says that 3 years had elapsed since the Claimant had first sent this information to Will Ward (in November 2013) and had been informed that this was a "genuine mistake" by the Trust, & that sums would be recovered from Ms Cooper. The Respondent says therefore that this was not a disclosure of information tending to show a person had breached a legal obligation or committed a criminal offence and nor was it in the public interest and the Claimant could not have reasonably believed it was in the public interest.

**9. Disclosure 9: Meetings with Megan Joffe from Edgecumbe 10/7/17 and 11/9/17 and interview by telephone on 27/9/17.**

9.1. The parties agree that the meetings between the Claimant and Megan Joffe took place on 19/7/17 and 11/9/17 and that there was a phone interview on 27/9/17.

9.2. The Claimant says that he made protected disclosures to his employer on these dates (43c ERA 1996) as it is averred that Megan Joffe was acting as the Respondent's agent.

9.3. The Claimant says he provided Megan Joffe with information about all the allegedly fraudulent behaviour in the department, in particular over payments

to Ms Cooper and Mr Siddig and his own arrest. The Claimant says he then sent supporting documents by email to Megan Joffe as set out in paragraph 33 of the Clarification document. The Claimant says the information provided tended to show that the Respondent, Alison Cooper and Mr Siddig were failing to comply with legal obligations to which they were subject (s43B1(b)ERA) namely the employees' own contracts of employment, implied terms of trust and confidence and the Overpayments Policy. The Claimant's case is that this information, in his reasonable belief also tended to show that a criminal offence may be being committed by Alison Cooper and Mr Siddig (s43B(1)(a)ERA) as under the Theft Act 1978 an employee may be guilty of theft by keeping salary overpayments and treating them as their own. Insofar as the Police arrest details were concerned, the Claimant says he was disclosing information tending to show a breach of legal obligation namely that the Respondent had wrongly involved itself in the arrest and questioning of the Claimant by the Police on false grounds which was unlawful and a breach of the implied term of trust and confidence. The Claimant says his belief was reasonable and made in the public interest as the Respondent's financial difficulties were having an impact on service provision to the public and also related to the spending of public monies.

9.4. The Respondent denies that any of the Claimant's interactions with Mrs Joffe and/or Edgecumbe constituted protected disclosures. The Respondent denies that Mrs Joffe acted as agent for the Respondent and further denies that it was her role to investigate the alleged overpayments to the Claimant's colleagues.

**The Claimant relies on the following detrimental treatment.**

**The Respondent denies that the Claimant was subject to detrimental treatment on the ground that he made protected disclosures.**

**The parties respective factual and legal positions are set out below.**

**10. Detriment 1: Accusation by Paul Lear that the Claimant had made "inappropriate comments"**

10.1. The Claimant says that Paul Lear made false accusations on 9/5/16 and 12/5/16 that he had made inappropriate comments in the workplace and had acted in a threatening and intimidating manner. The Claimant says that these false allegations related to the Claimant's disclosures 1-6 as set out above The Claimant says this placed him at a disadvantage in the workplace as the implication was that the Claimant's disclosures were inappropriate and he was labelled as intimidating and threatening for raising legitimate complaints.

10.2. The Respondent says it does not have a copy of the letter dated 9/5/16, however, even if (which it is not admitted) the contents are as reported by the Claimant, the Respondent says this cannot be detrimental treatment of the Claimant by Mr Lear due to the Claimant's protected disclosure because Mr Lear was merely reporting what was reported to him. The Respondent further asserts that at paragraph 39 of the amended Clarification Document the

Claimant acknowledges that Mr Lear and Catherine Abery Williams "appeared to accept the Claimant's explanation" during their meeting. The Respondent says this is at odds with the Claimant's assertion that Mr Lear subjected the Claimant to unlawful detriment due to whistleblowing.

**11. Detriment 2: Accusation of theft by Respondent and arrest on 30/6/16.**

11.1. The parties agree that the Claimant was accused of theft and was arrested at the Respondent's premises on 30/6/16.

11.2. The Claimant alleges that this was a whistleblowing detriment. The Claimant says that the Respondent was aware 8 days prior to the Claimant's arrest that there was no evidence that the (allegedly stolen) equipment belonged to the Respondent. The Claimant considers that it should have been clear to the Respondent and the individuals involved (Mark Warner, Emma Hallett, Patricia Miller, Paul Lear and Scott Sherrard) that there was insufficient evidence that the property alleged to have been stolen, ever belonged to the Respondent. The Claimant says that despite this, the individuals involved facilitated the police arrest of the Claimant. The Claimant will say that the individuals involved jumped on the spurious allegation of theft against the Claimant, seeing it as an opportunity to get rid of him because of his disclosures 1 – 7 above as he was a troublemaking whistleblower. There was no attempt to investigate the matter internally as an alternative to a criminal charge. The Claimant's arrest appeared publicly on the front page of the local newspaper (Dorset Echo) a week later). The Claimant avers that the police arrest was engineered by the Respondent in the hope that the Claimant would be convicted of an offence of dishonesty or that his reputation would be so badly damaged he would be forced to leave the Trust/ face censure form the GMC. The Claimant says he was substantially disadvantaged as a result of the Respondent's actions, which caused him to suffer distress and humiliation.

11.3. The Respondent denies that it accused the Claimant of theft as a whistleblowing detriment. The Respondent accepts that the Claimant was arrested by the Police at their premises. The Respondent says that this was following the provision of information to counter-fraud and the police by a third party about an alleged theft involving the Claimant. The Respondent says that this was not instigated by the Trust. The Respondent accepts that the Claimant was misled about the reason for the meeting on 30/6/16 but states that this was to facilitate his arrest and thus at the request of the police. The Respondent says that as far as it is aware, the criminal allegations and the Claimant's arrest had nothing whatever to do with the Claimant's alleged protected disclosures. The Respondent says it co-operated with the police in keeping the allegations against the Claimant confidential and facilitating his arrest at the request of the police.

**12. Detriment 3: Removal of gynae oncology lead role from 6/7/17**

12.1. The parties agree that the Claimant was advised by Paul Lear by letter dated 6/7/17 that he was being temporarily released from his role as gynae

oncology lead. The Claimant says that this decision was reinforced by Richard Jee on 1/10/17 when he emailed the Claimant asking him to stand down from the role as he had been erroneously advised that the Claimant had resumed the position as Lead. It is not in dispute that the Claimant received a letter from the Chair of the Disciplinary Panel, Will McConnell on 01/18/17 indicating he would recommend Paul Lear consider the Claimant's permanent removal from the Lead role.

12.2. The Claimant says that on 18/1/18 he asked for an explanation as to the contractual basis on which he could be removed from the role. The Claimant says he did not receive a reply to this. The Claimant alleges detrimental treatment by Paul Lear, Richard Jee and Will McConnell. The Claimant says that the decision to remove him from the gynae oncology lead role formed part of the Respondent's ongoing bullying of him because of his disclosures above and was part of the Respondent's sustained campaign to undermine him and make his position untenable. The Claimant says he raised this by email to Richard Jee on 18/10/17. The Claimant says that he suffered the disadvantage of losing the responsibility and status of this Lead position.

12.3. The Respondent denies that the conduct of the disciplinary proceedings in 2017 and 2018 and the associated decisions made, including the outcomes thereof, constituted a whistleblowing detriment to the Claimant. The Respondent specifically denies that the Claimant's gyae oncology lead was removed from him as an act of whistleblowing detriment.

**13. Detriment 4: Disciplinary Proceedings on 12/01/18**

13.1. The Claimant says the disciplinary proceedings on 12/01/18 were detrimental treatment of the Claimant by Richard Jee. Richard Jee presented the Trust case at the disciplinary hearing and the Claimant says he vigorously submitted that the Claimant was guilty of gross misconduct in his closing statement. The Panel disagreed and the Claimant says that on his way out of the hearing room Dr Jee slammed the door in frustration. The Claimant received a First Formal warning. During proceedings, the Claimant says that a comprehensive 8-page witness statement (including appendices) in support from the Claimant's colleague (Hilary Maxwell, Clinical Nurse Specialist for Gynae Oncology) was excluded from the documents to be used by the panel by Dr Jee. The Claimant complained in advance of the hearing but received no response. On the day of the Hearing the Claimant produced copies of the witness statement and it was admitted into evidence. The Claimant's case is that the Respondent's conduct towards him was prejudicial and again evidenced a desire to dismiss Claimant and or severely damage his reputation.

13.2. The Respondent denies that the disciplinary proceedings and associated decisions constituted whistleblowing detriments. The Respondent denies that the statement of Hilary Maxwell was not before the disciplinary panel. The Respondent asserts that whilst Mrs Maxwell's statement was not originally placed in the pack of documents to go before the panel by the investigating officer as she did not consider it was relevant, it was placed before the panel by the Claimant. The Respondent says that given that the outcome of the

hearing was a first written warning, the Claimant's assertion that the Respondent's conduct evidenced a "desire to dismiss the Claimant" is misconceived.

**14. Detriment 5: the Edgecumbe Report**

14.1. The Claimant says that the Edgecumbe Report findings were detrimental treatment of him by Paul Lear and Patricia Miller who commissioned the report and by Megan Joffe acting as the Respondent's agent. The Claimant says that he contributed fully and openly to the Edgecumbe Report without knowing that it would be used against him. It is the Claimant's case that once published it was clear that the focus of the report was on the activities of the Claimant. The Claimant avers that the report was detrimental to him and evidences a desire by management to have him removed. The Claimant says that the Edgecumbe report was used in place of a disciplinary investigation and it disadvantaged the Claimant as he was not given the right to be accompanied, and no real opportunity to defend himself. The Claimant says that the report dedicated 9 paragraphs to the Claimant's individual assessment and he was the only one chosen for exclusion and disciplinary action as a result which disadvantaged him and was a detriment. The Claimant says that at the subsequent panel hearing, the Medical Director Paul Lear stated that he had asked Edgecumbe to focus on the Claimant. The Claimant avers that Paul Lear commissioned the report to reinforce a decision he had already made. The Claimant will rely on the whole report at trial. The Claimant relies on each finding against him as individual detriments. During the panel hearing the Claimant's panel representative questioned Richard Boniface on why the Claimant had been selected when the report blamed two other people, he said someone had to go and they had selected the Claimant. The Claimant avers that he was selected as he was perceived as the troublemaker due to his disclosures 1-10 as set out above.

14.2. The Respondent denies that the assertions made by the Claimant with regard to the Edgecumbe report itself are anything other than his criticisms of this report. The Respondent says these do not constitute sustainable or credible allegations of whistleblowing detriment. The Respondent notes that the Claimant makes various allegations with regard to how the Edgecumbe report was relied upon by the Respondent ( for example that the report 'was used in place of a disciplinary process') and says that these allegations are misconceived. The Respondent denies that the Edgecumbe report was used in the place of disciplinary investigation as the Claimant was not dismissed following a disciplinary process. The Respondent denies that Paul Lear stated during the panel hearing that he had asked Edgecumbe to "focus on the Claimant". It is further denied by the Respondent that Mr Lear asked Edgecumbe to focus on the Claimant as an act of whistleblowing detriment. The Respondent denies that the independent HR investigator Richard Boniface stated at the disciplinary hearing "there was no particular reason why the Claimant had been selected for exclusion and disciplinary action" or that "there was a choice of three individuals and he was simply selected". The Respondent does not consider that this assertion, even if it were true, would constitute a whistleblowing detriment. The Respondent further denies that Megan Joffe

acted as the agent of the Respondent or subjected the Claimant to whistleblowing detriment.

**15. Detriment 6: Suspension on 2/2/18**

15.1. The Claimant says that Paul Lear's decision to suspend the Claimant on 2/2/18 at 12:30pm was detrimental treatment because of the Claimant's protected disclosures. The Claimant says that he received the suspension letter at the very same time he had planned a second mediation meeting with Mr Shoukrey and Mr Siddig, following a successful first mediation meeting on 28/1/18. The Claimant was suspended for 9 months, and he says this caused a significant detriment to his health and to his clinical skills; and de-skilled him. The Claimant says his private practice forms only 10% of his normal total weekly commitments, so insufficient to maintain his skills. As a result, the Claimant could not progress with his CPD and Appraisal requirements. The Claimant's Appraisal was due in May 2018 with specific onsite training requirements which he was unable to fulfil. The Claimant says he was also due for recertification in Colposcopy in September 2018 and was unable to fulfil the clinical requirements because he was excluded. The Claimant's alleges that at the disciplinary panel hearing Richard Boniface stated that there was no particular reason why the Claimant had been selected for exclusion and disciplinary action. There was a choice of three individuals and he was simply selected. It is averred by the Claimant that this was wholly disingenuous and the real reason was because the Claimant was perceived as a troublemaking whistleblower because of his disclosures 1-10 as set out above.

15.2. The Respondent admits that the Claimant was excluded on 2/2/18. The Respondent denies that this was a whistleblowing detriment, rather that it was due to the concern the Trust had as to the unacceptable level of dysfunctionality within the team which the Edgecumbe report had confirmed. The Respondent says that when invited by Paul Lear on 2/2/18 to corroborate the Claimant's claims about a fresh process of informal mediation, both Mr Siddig and Mr Shoukrey declined to do so. The Respondent denies that this decision was part of engineering a disciplinary panel decision to dismiss the Claimant.

15.3. With regard to CPD, the Respondent says that it arranged for the Claimant to attend CPD IT Prep Training on 29/5/18 but says that the Claimant failed to attend this training. The Respondent says it was the Claimant's responsibility to organise his appraisal, but he did not do so. The Respondent also avers that if the detrimental effect on his clinical skills was a genuine concern of the Claimant then he would have reported this to the private hospital where he worked, which as far as the Respondent is aware, he did not do. Whilst the Respondent accepts the Claimant would not have been able to complete his re-certification in colposcopy in September 2018 as a consequence of his exclusion the Respondent reiterates that the Claimant's exclusion was not as a consequence of him having made protected disclosures and notes that this would not have been a significant detriment to the Claimant as once he returned to work in the NHS he could complete his re-certification based on work he had done for the Respondent in the past.

**16. Detriment 7: Pre-determined disciplinary outcomes**

16.1. The Claimant says that the disciplinary outcome following the Boniface report was predetermined and this was detrimental treatment by Julie Doherty and Paul Lear. The Claimant avers that Mr Boniface's true role was to provide a report that would wrongly lead to the conclusion by a Panel that the Claimant should be dismissed. It is not the Claimant's case that the Panel deciding the matter were themselves party to this unlawful purpose. The Claimant will rely on the Supreme Court's judgment in Royal Mail Group Ltd v Jhuti [2019] UKSC 55. The Claimant's case is that the Boniface Report's singular focus on the Claimant as the central cause of alleged dysfunction is at odds with the broad findings of the Edgecumbe report which ascribes fault to alleged dysfunction much more broadly and in far more complex terms. The Claimant will say that Richard Boniface therefore did not investigate the matters leading to the breakdown of the relationships, and simply asked whether or not matters in the department would be improved if the Claimant was dismissed. The Claimant avers that the Respondent had already made the decision to dismiss the Claimant and this was because of his disclosures 1-10 as set out above.

16.2. The Respondent denies that the Boniface report and the "disciplinary" panel decision was "engineered by management" to secure the Claimant's dismissal. The Respondent says that neither the authors of the Edgecumbe report nor Mr Boniface made the decision to dismiss the Claimant.

16.3. The Respondent says that the Claimant has failed to specify which individuals had "already made the decision to dismiss the Claimant" , when this was decision was allegedly made and how/why he says it is on the grounds of his protected disclosures. The Respondent argues therefore that this element of the claim is misconceived. The Respondent denies that the decision to dismiss the Claimant was "already made" prior to the panel hearing. The Respondent denies the appointment of individuals to fill the Claimant's role and denies that this is evidence which supports a claim of whistleblowing detriment.

**17. Detriment 8: Failure to deal with grievance prior to disciplinary decision**

17.1. The Claimant avers that the Respondent's failure to deal with his grievance before the disciplinary hearing (10/9/18), was detrimental treatment because of whistleblowing by Julie Doherty. On 16 August 2018 the Claimant submitted a detailed grievance. A core complaint was: "If this exclusion had not happened I am confident that a mutual accord between myself Messrs Siddig and Shoukrey would have been achieved bringing a positive momentum for the rest of the team". By a letter dated 10/09/18 Dr Julie Doherty advised the claimant that the Panel Hearing would not be deferred pending a conclusion to the grievance. The Claimant avers that this was a detriment because the determination of this issue was of central importance to the decision to dismiss and ought to have been considered before the panel hearing at which a decision was taken to terminate the Claimant's employment.

17.2. The Respondent denies that on 25 June 2018 Julie Doherty told Mrs Rothery that the Trust would not have the Claimant back in the department. The Respondent admits that the Claimant's grievance was not dealt with before the panel hearing. The Respondent says that the panel hearing was not a disciplinary hearing and with regard to the Claimant's grievance issues which were relevant to the panel hearing, the Claimant was invited to raise these with the panel and was informed that the relevant documents would be placed before the panel and in due course this took place. The Respondent therefore denies that the Claimant was subjected to any unlawful whistleblowing detriment. The Respondent says that the remainder of the Claimant's grievance was dealt with separately and that this does not constitute whistleblowing detriment

## THE FACTS

14. We found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.

15. We observe that the matters we are being invited to consider refer back to 2005, albeit that our focus has been directed to 2012 onwards.

16. Clearly this is a long time ago and a significant time period, with the dismissal being in 2018. We recognise that the accuracy of memories fade and have therefore considered carefully documents that existed contemporaneously to the matters we are being asked to determine (please note for parts of the judgment we have included screen shots of the text from certain relevant documents where it is helpful to see the full context and proportionate to include it in this way).

17. As to the witness evidence in this claim, we would observe that the Respondent's witnesses did appear credible as they would answer questions without hesitation and make clear when they did not know the position. The Claimant however appeared more evasive, for example this was seen when he was answering questions put to him about attending with a solicitor representative to the Mr Jee hearing and whether he worked or not for private practice during his sick leave periods before the panel hearing. It appeared to us that he was evasive when questions as to the correctness of his actions were suggested by a question raised, even though it was not a matter of conduct that he had been challenged about during his employment. This was not the case with the Respondent's witnesses.

18. The Respondent is an NHS foundation Trust hospital.

19. The Claimant's employment commenced with the Respondent on the 1 April 1994 as a consultant in the Obstetrics and Gynaecology ("O&G") Department.

20. It is not an employment history without incident. On the 4 August 2009 the Claimant is disciplined receiving a first written warning for misconduct relating

to public money, see page 181 of the hearing bundle, which relates to a claim for travel expenses not incurred.

21. There was then a County Court claim brought against the Claimant by the Respondent for recovery of public monies that was unsuccessful, and the Claimant was successful in his counterclaim against the Respondent (11 February 2011) (see page 189).

22. Matters progress positively in 2012 with the Claimant taking over from Alison Cooper ("AC") as Clinical Director ("CD") of O&G on the 21 May 2012 (see pages 240, 242, and 286). The Claimant describes this at paragraphs 2 and 3 of his witness statement. Save for the phrasing of the quotation in paragraph 3 "my fingers had been burnt" being "your" fingers had been burnt this is not in dispute. The Claimant is supported by his colleagues in his application to become CD. Due to the Claimant's "fingers being burnt" (in respect of the non-application of Trust polices), he is considered the right person to bring openness, transparency, equity and accountability to the department.

23. It is noted that in 2012 the Respondent is not in good financial shape and on the 10 July 2012 Will Ward ("WW") (Divisional Director) writes to senior staff in respect of an urgent £200,000 funding shortfall (see page 251).

24. It is then on the 23 July 2012 that the Claimant submits a grievance to the then CEO setting out 21 grievance complaints going back to matters in 2005 (see pages 252 to 255). It is submitted by the Respondent that this is indicative of the Claimant having a personality were he finds it difficult to let go of matters and at times has a tendency not only to hold onto the past, but to bring it back to life in a negative and destructive manner. The Respondent submits … "Call it 'raking' over matters, 'dredging' up the past, the evidence points conclusively to this.".

25. WW refers to the grievance raised by the Claimant in his witness statement at paragraph 3 saying … "I was surprised that this letter had been sent, given his appointment as CD. My impression was that MI was struggling to move on from the circumstances which led to the County Court claim and remained unhappy with the Trust.". WW was cross examined about this, confirming that he was surprised at the timing of it.

26. We were referred to an email dated 17 October 2012 sent to the Claimant by Mark Power ("MP") (Director of Workforce and Human Resources) and copied to WW which notes … "I fail to understand how your actions in continually raising past issues will serve to help you continue in your role, or further strengthen your working relationships and contribution as part of your management team. On the contrary, it can only lead to ill-feeling and division, and therefore is in direct conflict with your role. I suggest you should give this careful consideration.".

27. The Claimant in cross examination explained it as him wanting to hold those that remained at the Respondent to account. He accepted though that a sort of line was drawn in October 2012.

28. It is then in 2013 that the Claimant made what he alleges to be ***protected disclosures one and two*** to WW on the 30 May 2013 (see page 291) and on the 22 July 2013 (see page 295). The query raised by the Claimant is over the number of Programmed Activities (PA's) in respect of colposcopy clinics and corresponding payments made to AC and then further stating that to his knowledge AC had wrongly received payment for a 9th PA during the period 09/12 to 01/13. The Respondent disputes that these were protected disclosures, however it is not a matter we need to determine as these are no longer alleged disclosures relied upon by the Claimant in respect of his pursued complaints, as confirmed during the Claimant's Counsel's oral closing submissions.

29. What is relevant though is whether the AC PA matter was ever resolved by the Respondent. The Claimant asserts it was not and that his continued pursuit of this matter is him being a "conscientious whistle-blower". The Respondent asserts it was a matter resolved and by the Claimant's continued pursuit of this matter (amongst others) he was a "dog with a bone".

30. It is the Claimant's assertion (as confirmed in closing submissions) that Emma Hallett ("EH") (Deputy Director Workforce) in 2015 stated this matter was resolved to the GMC, and that her motive for doing so was to set a course that would result in the Claimant's dismissal and that her motive for this was the Claimant's whistleblowing about it within the alleged fifth protected disclosure. This was not an allegation put to EH in cross examination. We address the facts relating to this matter as they arise chronologically in the paragraphs below.

31. Around the middle of 2013 there is a reporting of clinical concerns raised about a fellow consultant Mamdouh Shoukrey ("MNS") by Jo Hartley (Head of Midwifery) who raises with the Claimant on the 25 July 2013 multiple concerns over MNS's clinical practice (see page 2353).

32. On the 13 September 2013 MP, in presence of the Claimant, informs MNS that immediate restrictions are imposed on his O&G practice. The Claimant is instructed to monitor and supervise MNS's restricted work. (see page 299).

33. The agreed chronology records that on the 24 January 2014 further issues arise in respect of MNS's practice during supervision (see pages 2358 to 2359).

34. Subsequently, although there is no specific date presented to us (the agreed chronology refers to it being in Spring 2014 however, Respondent's Counsel refers to it in closing submissions as being mid 2013), MNS raises concerns about the Claimant's professional misconduct (see pages 321 to 329).

35. As to matters of finance it is agreed fact that on the 21 October 2013 the Respondent's management discovered there had been overpayments for on call work to Mohammed Siddig ("MS") (Consultant O&G) and AC (see pages 302 to 304).

36. This matter is then subsequently resolved as is confirmed by an email dated 16 November 2013 by WW sent to the Claimant, EH and others headed "RE: on call supplement overpayments (page 309). It records … "Thanks very much – I think the evidence is pretty conclusive now then – we have agreed job plans at the lower rate, so the consultants confirmed that they were happy with that rate, but the payroll wasn't changed. This was a genuine mistake at the trust end. The rotas confirm the frequency of on call duties as do the levels of pay to other staff at the same frequency.".

37. We see that WW writes to MS about arrangements for recovery of on call payments on the 21 January 2014 (see page 331).

38. This matter becomes part of the Claimant's concerns as to whether MS and AS repay the amounts. The Claimant pursues an answer to this issue as can be seen for example on the 19 May 2014 where he asks Catherine Abery-Williams ("CAW") whether the over-payments will be recovered from AC and MS for the last 6 years, (see page 342).

39. There is clearly a resolution of the on-call matter though. We have seen that on the 23 October 2014 Claire Redford (Payroll) writes to AC and MS apologising for the overpayments and setting out the scale of the overpayments and the deductions for pay to be made in recovery of the outstanding sums (£25,883 and £16166 respectively) (pages 350 to 351). What ultimately happened is then explained by Katherine Jordan ("KJ") (an Interim Manager) in her unchallenged evidence at paragraphs 10 and 11 of her witness statement, and that the owed sums were … "repaid by the working of additional sessions for free by Mr Siddig and Miss Copper.".

40. The Claimant's involvement in this matter is complained about by MS as can be seen from page 353 which is a document recording his concerns dated 28 November 2014. MS says he believed he had agreed he would he work off the amount, but without his agreement the Claimant and WW decided that he should repay it. MS records:

"

**I have been very disappointed with this because as a senior consultant colleague, I would have expected Mr. Iftikhar, as clinical director, to show me the courtesy of meeting up with me to discuss this and listen to my points of view in the matter, especially as he had changed what had been previously agreed. Instead, our service manager and divisional manager were the ones who conveyed the message to me without allowing me to have any say in the matter. Mr. Iftikhar is not communicating with his colleagues appropriately. I don't think he has the appropriate leadership skills for this position.**

"

41. We note that this complaint by MS about the Claimant cannot be linked to any of the protected disclosures the Claimant says he has made, being alleged disclosures one and two relating to AC's PAs.

42. The Claimant maintained during cross examination that he still considers MS and AC would have been aware of these overpayments and are therefore guilty of fraud.

43. The Claimant's continued view on this, despite what the facts support, does appear to support the conclusions reached by Megan Joffee ("MJ") in the Edgecumbe report and how she explained "chronic embitterment" when asked about it in cross examination.

44. MJ explained that chronic embitterment affects an individual's behaviour, work and social interactions. MJ said that as she understands it there were responses to the Claimant's concerns and none were satisfactory and he continued to be aggrieved about it and in that situation he was chronically embittered and that she did not know what answers would satisfy him. Further, she understood that many of his issues were answered and he remained unsatisfied with them. MJ explained that when chronically embittered unless you get the answer you want then you can remain chronically embittered. This does support the Respondent's assertion that the Claimant is a "dog with bone" rather than "conscientious whistle-blower".

45. As noted, it is the Claimant's assertion that his continued pursuit of the AC PA matter, which he says was never resolved, is him being a "conscientious whistle-blower". He asserts that the Respondent (through EH) deliberately asserted that it had been resolved to portray him as a "dog with a bone" to lead to his dismissal.

46. We have therefore carefully considered the facts presented to us about this matter.

47. About the AC PA issue WW addresses alleged disclosures one and two in paragraphs 3 to 11 of his witness statement.

48. After alleged disclosure one WW expresses that the Claimant had not provided "specific evidence of failure to complete paid work, more a non-specific concern based on some brief informal encounters", (see letter dated 1 July 2013 (page 292 to 293)). WW goes on to state in this letter to the Claimant:

    "

Given that the additional payment constituted seven PA's, it would appear that five of these are absolutely definitely accounted for. Although Miss Cooper did not take any leave during this period, one might reasonably expect that one-seventh of the time might be spent on leave (in fact the proportion is close to one-fifth), which would really leave only one session to be accounted for, which might explain the 10 July reference. The only way to pursue this further would be to discuss with Miss Cooper her diary during this period and I am not sure that there is any great value in trying to pursue this over a single session. Obviously as her direct line manager, it would be for you to address this directly in person with Miss Cooper if you felt it was important to identify this final session, although I have to say, the overall approach and attitude to her work would tend to suggest that she had gone out of her way to make sure that she was doing the correct amount overall.

I hope this draws the matter to a conclusion.

"

49. The Claimant then replies on the 22 July 2013 with alleged disclosure two.

50. WW replies on the 24 July 2013 (see page 296). As WW confirms in his witness statement (paragraph 7) … "… I specifically said that it would be helpful if he had specific details (for example copy emails) that he shared them with me rather than leaving it to me to interpret what he was thinking. I explained that these Issues were for him to investigate in the first instance, though I would wish to know If there was 'any question of intentional impropriety'. I explained in some detail the steps I expected him to take, to check with AC and identify if there were any serious concerns here. I went on to say that I had checked the personal file myself (although MI could have also done this) and it seemed to me that AC may have thought she had returned to 8 PAs from 31 July 2012 but the paperwork had only been updated in January 2013.".

51. As maintained by WW in cross examination it would not be uncommon for errors like this to happen. He explained that the first thing to explore is whether there was an admin error, most likely explanation. Further, that the issue here was the pay hadn't changed at the time expected, a pay change requires action but pay staying the same requires no action. WW said that if the Claimant had approached AC about how many PAs she expected to be paid it could have resolved the situation immediately.

52. Chronologically we then have the email from the Claimant dated 1 November 2013 to WW where the Claimant seeks an agenda item with WW about the AC PA matter (see page 306), which records the Claimant saying … "I have also put on the agenda regarding our previous correspondence on Alison Cooper's alleged overpayments for extra colposcopy work in 2012/13 for a significant number of months.".

53. The agreed chronology refers to this email at paragraph 12, and then goes on in the same paragraph to refer us to the emails at pages 308 to 312, suggesting the Claimant seeks clarification from WW on this issue and the on-call payments.

54. We have looked at the email from the Claimant dated 18 November 2013 to WW (see page 308), which is also copied to EH and which follows the email

addressing the on-call matter (page 309). In that the Claimant raises the need to look at pay scales for all the consultants in the O&G, and he would like WW to look into it because being inexperienced in that field … "sometimes I have failed to understand levels of payment to MS and AC. Although this has now been partially explained I think there is a need to have 100% clarity.". There is nothing in that email specific to his issue with AC's PAs that the Claimant says he made alleged protected disclosures one and two about. The Claimant's witness statement then moves from this email to him in May 2014 asking CAW for the Job Description of AC's HBPC role (see paragraph 14).

55. On the 4 April 2014 WW then writes to the O&G consultant cohort to reflect on a 'difficult time' in the department and confirms that the majority of the issues (concerning MNS) were not initially raised within the O&G team (see page 336):

"

It is also important to note that the majority of the issues were not initially raised within the O&G medical team. In particular anaesthetists and midwives have highlighted concerns, though other non-O&G surgeons have also been involved. For this reason, part of the plan at the end of the investigation was to true and support Mr Shoukrey to clearly re-establish his position within the trust, above reproach. To do this the support of his immediate colleagues is important, and clearly any in-fighting is likely to be detrimental to this goal. Such episodes can never be enjoyable for any of those concerned, but once resolved, it is important to move on. It cannot be helpful to keep going over past events that cannot be changed.

"

56. We note that WW expressly states in this email that … "… any in-fighting is likely to be detrimental…" to the goal of supporting MNS to re-establish his position within the Trust and … "It cannot be helpful to keep going over past events that cannot be changed.".

57. As to the Claimant's actions around this time we are referred to a statement dated 1 May 2014 from Gemma Harris ("GH") Gynaecology sister about an incident and the Claimant's role in it (see pages 338 to 339). It concludes:

"

This is not the first time that I feel Mr Iftikhar has either used me or tried to cause disharmony within my team. He repeatedly uses the nursing team and states we have made complaints about his medical colleagues. I have no issue in escalating my concerns regarding members of the medical team and I would do this through the correct channels. As the head of the nursing team I feel that we have a lack of trust in our clinical lead. I would not consider discussing important matters with him now unless I had another present to verify my account.

If the relationship between myself and my nursing team had not been so strong, this may have completely disrupted our working relationship and caused irreparable damage.

"

58. There is no evidence to suggest that this account by GH was motivated by the alleged protected disclosures one and two the Claimant says he made before

this. We have no reason to not accept that this is a true reflection of what GH thought at that time about the Claimant.

59. It is noted in the agreed chronology that on the 2 June 2014 the Claimant succeeds in an appeal and is awarded a Clinical Excellence Award. Despite this it is a matter that the Claimant revisits in his grievance submitted just before the panel hearing is due to take place, which we refer to below.

60. On the 30 September 2014 Beena Dandewate ("BD") another Consultant, complains to the Claimant about his handling of her job planning (see page 347). There is no evidence to suggest that this account by BD was motivated by the alleged protected disclosures one and two the Claimant says he made before this.

61. It is then by a joint statement signed by MS, AC, BD and MNS dated the 10 October 2014 that these consultants complain to the Medical Director Paul Lear ("PL"). It says:

"

**We are writing to you as the Medical Director to inform you of our concerns about Mr. Iftikhar. We feel that he has consistently taken advantage of his position as Clinical Director to do as he wishes without giving regards or respect to our opinions. Instead of striving to maintain the department as a team working together, he has tried to cause disharmony between the doctors and nursing staff. On several occasions, he has acted in a manner which is potentially misleading. This has resulted in us losing all trust and confidence in him. We do not think that he has the appropriate leadership skills for this position. Overall we think that it is not in the best interests of the department for things to carry on in this way, so we would request that Mr. Iftikhar be removed from the position of Clinical Director.**

"

62. As the alleged disclosures made by the Claimant up to this point (numbers one and two) relate to AC's PA matter, which he has not spoken to AC about, it cannot be said that this joint statement is submitted on the grounds of any alleged protected disclosures the Claimant may have made. As we have also found factually the matters GH and BD raise appear completely independent of any alleged disclosures the Claimant may have made.

63. It is also of note that PL does not act against the Claimant upon receipt of this joint statement, instead on the 21 October 2014 he replies inviting them to provide specific examples of matters relied upon before any decision is made to move the matter to a formal investigation (see page 349). The conduct of PL is not an issue for the Claimant at this stage. It only changes with alleged detriment one which was then withdrawn during this Tribunal hearing.

64. On the 14 November 2014 BD complains to the Claimant about his handling of a leave application (see page 352). BD then produces a three-page complaint dated 24 November 2014 (pages 354 to 356) about the Claimant. Again, there is nothing to suggest that these matters are raised because of the alleged protected disclosures one and two the Claimant has made about AC's PAs.

65. MS, AC, BD and MNS then write a second joint letter of complaint about the Claimant dated 2 December 2014 indicating that the only consultants not to have expressed concerns are part time (see page 357).

66. It is then recorded as agreed fact that on the 3 December 2014 the Claimant attends a Royal College of Obstetricians and Gynaecologists (RCOG) conference expecting to find MS in attendance him having booked study leave for that purpose (see page 582 to 583).

67. By letter dated 4 December 2014 AC writes a personal letter of complaint to PL about the Claimant's leadership ability (see page 358):

> "
>
> Over the time that Mr Iftikhar has been Clinical Director a number of medical staff have expressed their concerns to me about his behaviour and his leadership ability. This has ultimately led to an unsettled, unhappy and fragmented department. I do not think that this is an appropriate environment in which to care for patients, or a pleasant environment to work in and, as such, I support my consultant colleagues in expressing our anxieties and concerns to you as Medical Director, about his role as Clinical Director.
>
> "

68. There does not appear to be any evidence linking what AC says here to the alleged protected disclosures one and two the Claimant asserts he made about AC's PAs. The Claimant has not raised the PA issue with AC directly (we note later in our fact find that the Claimant is recorded as saying at page 894 (an email dated 27 February 2017) that he never brought the matter up with AC directly). As a contemporaneous document it records how AC and a number of medical staff view the Claimant's leadership ability at that time.

69. Chronologically we then get to the Claimant's ***alleged protected disclosure three***. It is said that in mid-January 2015 the Claimant meets with CAW to set out events as to MS' non-attendance at the RCOG conference and a further meeting with Sarah Jackson present who confirmed she had phoned MS at the relevant time who confirmed he was in London. The Respondent disputes that these were qualifying protected disclosures, however it is not a matter we need to determine as these are no longer alleged as disclosures relied upon by the Claimant in respect of his pursued complaints as confirmed during the Claimant's Counsel's oral closing submissions.

70. As detailed in the agreed chronology on the 28 January 2015 Tony Hall ("TH") (counter fraud) contacts the Claimant to investigate MS' non-attendance at RCOG conference (see page 361).

71. We then have an email dated 17 February 2015 from AC where she emails PL asking whether he proposes to investigate the joint concerns of the four consultants about the Claimant's role as CD (see page 362).

72. On the 18 February 2015 MNS emails PL about his clinical concerns about the Claimant, his alleged malicious conduct towards him and seeking removal of him as CD (see page 363). We note that MNS to this point has not been the subject matter of any of the Claimant's alleged disclosures it is therefore not apparent that his complaints are motivated by any alleged disclosures the Claimant says he made.

73. It is then on the 1 April 2015 that PL writes to the Claimant to inform him that he is the subject of an investigation both into clinical concerns (of which there are seven) and concern about his leadership (see page 365). The Claimant does not allege that this action is a detriment due to any disclosures he may have made.

74. On the 1 April 2015 PL also writes to AC, BD, MNS and MS to inform them that the clinical concerns raised by MNS will be investigated under the NHS' Maintaining High Professional Standards (MHPS) proposing a facilitated team meeting (mediation) to deal with the difficult working relationships (see page 367):

"

**From the information provided to me it is clear that there are difficult working relationships between Mr Iftikhar and some of his consultant colleagues. There are issues relating to his leadership style and communication and operational issues, such as the listing of patients, annual leave allocation/approval and job planning etc. In order to resolve these issues I suggest that a facilitated team meeting is held. This will provide a safe and supportive forum for these issues to be aired but more importantly, it will assist the team to agree how it will work together moving forward. Prior to this**

"

75. An issue of concern about the Claimant is his leadership style and communication.

76. In a separate letter to MNS dated 2 April 2015, PL points out that MNS has produced no evidence of the Claimant's alleged malice towards him (see page 369):

"

**Your concerns relate to the investigations that occurred in to your practice in 2013/14. Mr Iftikhar (and others) raised concerns in relation to your practice which were subsequently investigated. It is my view that he acted appropriately in doing so, in his role as Clinical Director. The decision to investigate the issues raised was made by me; Mr Iftikhar was not involved in this process.**

**It is clear from your written statement you believe that Mr Iftikhar acted maliciously towards you, but unfortunately I have no evidence to support this belief.**

"

77. By a joint letter dated 30 April 2015 AC, BD, MNS, MS and now GH write to PL to recap on the meeting they had with him on 28 April 2015. They say in the letter that it was confirmed that the clinical concerns would be investigated by an external expert and that it was agreed that the Claimant would be removed from his role as CD (see page 371). The letter also refers to the potential for matters to be referred to the GMC. PL was asked about this letter in cross examination and he confirmed that he remembered reading it and thought he had said he would keep it under review as he couldn't say he could remove the Claimant.

78. On the 30 April 2015 MNS provides a table of the seven clinical complaints he has about the Claimant (see page 383).

79. There is then an email dated 1 May 2015 (page 372) from EH to the five consultants, including the Claimant where she proposes the instruction of Dorset Mediation. It confirms:

> "
>
> **As summarised by Mr Lear, it has become apparent that there is presently a difficult working relationship between Mr Iftikhar and most of the other Consultants in the team. Issues relating to Mr Iftikhar's leadership style and communication have been raised, alongside operational issues, such as the listing of patients, annual leave allocation/approval and job planning etc. In order to resolve these issues Mr Lear has suggested that a facilitated team meeting is held. This will provide a safe and supportive forum for these issues to be aired but more importantly, it will assist the team to agree how it will work together moving forward.**
>
> "

80. There is no evidence to suggest that this was originally written by PL and then repeated by EH because of any alleged disclosures by the Claimant. It records an issue of concern is the Claimant's … "leadership style and communication".

81. The agreed chronology then records that on the 8 May 2015 TH's report into MS' allegedly fraudulent study leave is delivered (see page 374). Then on the 24 August 2015 CAW confirms with MS the outcome of the investigation into the study leave fraud matter (see page 406), and that the … "investigation found there was no intent to commit fraud and no further action is required in relation to this matter.". This is therefore a concluded matter so far as the Respondent is concerned.

82. By email dated 14 May 2015 PL writes to AC to confirm that he is not going to push the Claimant out of his role. Also, that he will be referring the clinical concerns to an external expert via a contact at Salisbury hospital (see page 380).

83. By a letter dated 18 May 2015 the Claimant writes to PL expressly stating that his colleagues' unhappiness in his role is due to his management of them for the first time as per trust policy (see page 385). What the Claimant does not say here is that the unhappiness is related to the three alleged disclosures he says he has made, the first two raising matters about AC's PAs and the second about MS' study leave. This contemporaneous document shows that it is the

Claimant's view at this time that what is happening between the consultants is related to his management of them, not any disclosures he may have made.

84. By letter dated 20 May 2015 MS, AC, MNS, MS and GH write to the GMC stating there has been no satisfactory response from PL to their concerns which they now ask the GMC to investigate.

85. By letter dated 20 May 2015 MS, AC, MNS, MS and GH write to PL to confirm they will not go through a mediation session and that they have forwarded their concerns to the GMC (see page 390). There would appear to be a change of heart though as within the agreed chronology it is recorded that on the 7 July 2015 CAW invites the parties to a pre-mediation meeting. Then on the 4 August 2015 AC, MS, BD, MNS and GH consent to mediation on condition that if they are "all still unhappy with Mr Iftikhar as the clinical lead he is replaced forthwith" (see page 403). The mediation process then appears to commence with an opening session around the 23 September 2015 (see page 451) and it remains underway in mid-October 2015 (see page 467). There is limited documentation about the mediation presented to us, which is understandable as presumably it was a confidential process between the parties. It is common ground though that this mediation process is unsuccessful. In cross examination PL confirms that he was informed by the mediators that they fear matters are worse than where they started.

86. By letter dated 24 July 2015 Dr Margaret Peramulla, Dr Asia Khan and Dr Daby write to PL to express they are "saddened and appalled" that colleagues continue to undermine the Claimant's integrity and that they support him 100%. (see page 401). The Claimant accepted in cross examination that he had gathered these views. We note that the format of the document (the statement with joint signatures underneath) does compare closely to those previously submitted by the other consultants about the Claimant.

87. On the 11 August 2015 PL confirms that Mr Ed Neale ("EN") (O&G consultant Bedford) will review the clinical allegations made by MNS. PL also confirms he is considering commissioning a Royal College of Obstetricians and Gynaecologists ("RCOG" review) of the department due to the 'escalating situation'. (see page 404):

"

**In general, I am becoming increasingly concerned at the escalating situation within the department and the potential impact on patients and on that basis, I am considering commissioning an RCOG review of the department. I will discuss this further with you also.**

"

88. This RCOG review did not happen in the end as the cost was prohibitive, and PL went on to consider alternative review options (see page 467).

**Alleged Protected Disclosure 6: Letter 28/8/2015 Claimant to Paul Lear**

89. Chronologically we then get to the Claimant's alleged protected disclosure six, that he submits (as confirmed in closing submissions) was a material influence for the alleged detriments 6, 7 and 8.

90. The parties agree that the Claimant wrote a letter to PL dated 28 August 2015 (see page 423) voicing concerns over MNS's clinical practice of investigating women with post-menopausal bleeding.

91. In the agreed list of issues the Claimant says this was a protected disclosure to his employer because the letter contained information tending to show that the Respondent was failing or was likely to fail to comply with a legal obligation to which it was subject, namely that it was employing a surgeon who was performing unnecessary, damaging and negligent re-section procedure in breach of its duty of care towards patients and/or that there was danger to the Health and Safety of individuals in the Respondent's care.

92. It also states that the Claimant will say that this disclosure was made in the public interest as the Respondent is a public body providing care to members of the community.

93. The Respondent denies that the letter to PL was a protected disclosure on the basis that the letter does not suggest that the Respondent or any other person was failing to meet its legal obligations, nor that the health and safety of anyone had been or was being or was likely to be endangered. The Respondent says the highest the Claimant puts it is to say … "it would therefore be helpful for us all to have a definite opinion on his practice by the external independent investigation.".

94. What the Claimant says about this disclosure in evidence is at paragraph 48 of his witness statement:

    "A clinical incident was reported by Hilary Maxwell (CNS) (p400a) when it was discovered in June 2015 that MNS had failed to diagnose an endometrial cancer. I was concerned that he would do the same again because his practice did not comply with the standard guidelines to investigate PMB, which is to take a biopsy of the womb lining. The practice of re-secting fibroids is a much more invasive process. On 28/8/15 I wrote a letter to PL highlighting this issue p423."

95. Upon reviewing the documents referred to it is clear that the report by Hilary Maxwell is that referred to in paragraph 48 of the agreed chronology where on the 7 July 2015 Hilary Maxwell raises concerns about a particular surgical practice of MNS's. We are referred to page 400aa not 400a.

96. The Claimant says in his letter at page 423:

    "

There have been concerns raised in the past about Mr Shoukrey's common and unusual practice of resecting submucous fibroids in patients with PMB.

I have previously been approached informally by consultants and middle grade staff in the department regarding this and personally had discussed the matter with Mr Shoukrey, during his previous investigations. The procedure itself is quite invasive and probably unwarranted for this condition because uterine fibroids would normally be regarded as incidental findings during investigations for PMB.

Incidentally, on my return from leave, another patient (D626189) has come to my attention whom Mr Shoukrey has listed for a hysteroscopy, endometrial biopsy + resection of fibroid from his PMB clinic.

His current investigation includes an example of his practice where, rather than performing an endometrial biopsy on a patient with PMB, he carried out resection of a submucous fibroid. It would therefore be helpful for us all to have a definite opinion on his practice by the external independent investigator.

"

97. The content of this letter does not suggest the practice is wrong in law just that it is unusual.

98. He says it is probably unwarranted ... but it would be helpful to have a definite opinion on his practice.

99. As to the being approached informally by consultants and middle grade staff the Claimant goes on to explain in his witness statement at paragraph 48 that:

"After consulting WW, I invited my colleagues' comments (p424 - 427). Historically BD and MS had informed me of their concerns regarding MNS practice, however they had now changed their position in order to back up MNS (p424-427).".

100. We have reviewed the emails at pages 424 to 427 and they do not support that there has been a change of position by BD or MS. Instead they suggest they are surprised at the change of position by the Claimant on the matter, by him now being critical of what MNS is doing.

101. Of note is also what AC says about the matter (see page 425):

"

Dear Mr. Iftikhar
As this has already gone to Paul Lear, prior to letting us know your concerns and you have asked for a view from the external investigator, it seems that our views are not relevant now.
However, in the spirit of trying to resolve the ever widening issues dividing this department I would suggest we try to support our fellow colleagues rather than inflame an already difficult situation.

"

102. What the Claimant writes in his alleged disclosure letter and his witness statement potentially supports a belief that he was disclosing information which

tends to show that the practice of re-secting fibroids is a much more invasive process.

103. The Claimant has not said in his witness statement why he believed this disclosure was made in the public interest.

104. About the concerns raised as to the Claimant's clinical practice it is confirmed in a letter dated 4 September 2015 from PL to the Claimant in respect of the EN investigation (see page 435) that:

"

Ed Neale Investigation

I informed you that I am expecting the written response from Mr Neale in relation to the clinical concerns raised against you by your colleagues shortly, but that the informal feedback I had received from him so far was that there was no cause for concern. I will share the formal outcome with you as soon as it is available.

"

105. We have been referred to an email from Sarah Burt ("SB") (Service Manager for Women's Health) to CAW dated 4 September 2015 (pages 432 to 433) which reports a number of difficult encounters she has had with the Claimant and her email concludes with … "I feel it is important I bring this issues to your attention, as there are not the first incidences where I have found Mr Iftikhar to be obstructive and unsupportive, however it was particularly noticeable over the last week or so.". There is no evidence to suggest that what SB says here is in any way motivated by any alleged protected disclosures the Claimant says he made.

**Alleged Protected Disclosure 5: Letter to GMC 21/9/2015**

106. Chronologically we then get to the Claimant's alleged protected disclosure five, that he submits (as confirmed in closing submissions) was a material influence for all the alleged detriments still pursued (5, 6, 7 and 8).

107. The Claimant sent a letter by email from Viv Leonard to Dale Brown, Investigating Officer General Medical Council ("GMC") on 21 September 2015 (see pages 443 to 449). The Respondent accepts that this letter was sent to the GMC. The Claimant says that Viv Leonard also sent a copy to PL in the Hospital Internal mail.

108. In cross examination PL confirmed that he most likely did receive a copy of this. He confirmed that he would assume he received the document as he had read it and it could have been received around the third week of September. He had no reason to dispute the Claimant's evidence that it had been sent to him in the internal post.

109. It is the Claimant's case as set out in the agreed list of issues that he provided information about the poor financial practices of the Respondent and

the Claimant produced evidence that overpayments of on-call supplements by the Respondent to Alison Cooper would have been known to her. The Claimant also disclosed information tending to show poor reporting of annual leave and study leave, leading to possible fraud by Mr Siddig. This information tended to show that the Respondent, Alison Cooper and Mr Siddig were failing to comply with legal obligations to which they were subject namely the employees' own contracts of employment, implied terms of trust and confidence and the Respondent's Finance Policy and Policy on Overpayment of Salary, Allowances, Travel and Subsistence (Po019) ("the Overpayments Policy").

110. It states that the Claimant's belief was reasonable and made in the public interest as the Respondent's financial difficulties were having an impact on service provision to the public and also related to the spending of public monies.

111. The Respondent accepts that the Claimant makes allegations concerning his colleagues Mr Siddig and Ms Cooper, including that these individuals either claimed too much pay from the Respondent, were overpaid, or misused their annual leave and/or study leave entitlement. However, the Respondent says that none of these allegations constitute information tending to show that the Respondent (or the Claimant's colleagues) was failing to comply with their legal obligations. The Respondent asserts that there was no clear allegation of wrongdoing by the Claimant, nor is there any reference in the letter to the various legal obligations or criminal offences now relied upon.

112. The Respondent says this letter was in fact a "tit for tat" response to allegations made against him by his colleagues. It was not in the public interest and he could not have reasonably believed that it was.

113. The Claimant provides evidence on this alleged disclosure in paragraph 35 of his witness statement:

"… I provided information about the additional PA's to AC. I highlighted that AC and MS ought to have been aware they were being overpaid on-call supplements. I disclosed information tending to show poor reporting of annual leave and study leave, leading to possible fraud by MS and BD. Out of courtesy, Viv sent a copy of this letter to PL in the Hospital internal post."

114. As to the Claimant's reasonable belief that he makes it in the public interest he does not address this specifically in his evidence in respect of this disclosure.

115. The written submissions from Claimant's Counsel do not direct us to specific evidence of the Claimant save to say about the on call payments of AC that … "… there is plainly evidence that he believes this matter is being disclosed in the public interest, he refers to the fact that he has brought "openness and accountability to the department which is appreciated by the majority of the staff and divisional senior management". Belief in the public interest element is manifest. It is reasonably held for the reasons set out above….", which is with reference to the previous alleged disclosures he had made.

116. In the Claimant's Counsel's oral submissions, we were directed to consider paragraphs 4 and 5 of the Claimant's witness statement. They say:

"4. The Trust have rigorous financial policies in place, to ensure the proper use of public funds including the Financial Policy p76-93 and Overpayments Policy p.135-142. The policies are explicit that overpayments should always be repaid p138 para 1.8, All employees have a responsibility for checking they are being paid correctly (p138.parai.2) and it is a potential offence to fail to disclose this under s.3 The Fraud Act (p140,para5). I knew first hand of the hard-line approach that could be taken by the Trust as I was disciplined for "fraud" and received a warning following a mistaken travel claim in 2009 (p181-182) and in respect of the County Court action against me referred to above. However, the Trust did not apply these policies consistently.

5. The NHS was and is under huge financial pressure p251, p257 and my role as CD involved close scrutiny of finances. I started receiving monthly financial reports in September 2012. Concerns were reported to me regarding inconsistent practices for rewarding additional work p250. It was important to me that there was complete transparency over payments and that Trust policies were followed (p288-289 and applied."

117. It is not in dispute that these polices were in place, nor that the Respondent was experiencing difficult finances at that time. The Claimant did seem certain and genuine in cross examination as to his concern about fraud and the public finances. He confirmed in cross examination that he still believes that AC is guilty of fraud and the Trust management are complicit.

118. It was put to the Claimant in cross examination that by him, while the mediation process was live, sending his alleged protected disclosure five to the GMC it was a serious attack against professional colleagues, a two-faced response. The Claimant responded that he has a right to respond to the allegations against him. We would observe that this is more than responding to allegations it is making allegations against his colleagues which, in the middle of a mediation process would not be helpful and may be a reason for its ultimate failure. The Claimant did confirm that if there had been a further mediation arranged, he would raise his allegations of fraud by AC with the parties.

119. On the 5 October 2015 PL writes to the Claimant enclosing the EN report (see page 466) and says:

"

Having reviewed the investigation report my *provisional* view is that there is no significant shortfall in your performance and no serious issues with the care you provide. However; there are areas where you could benefit from reflecting on your practice. We discussed at our meeting on 3rd September 2015 your wish to be transparent with your colleagues as such I am asking if you would consider allowing your colleagues to review the report and its findings, in the interests of openness and clarity within the department.

"

120. We note from the EN report (page 471) that it says … "The series of cases presented to me, and the way in which they are presented do not in my opinion present sufficient evidence to call into question the practice of MI.". At the end of the report it is recorded (page 472) … "It is my opinion that the allegations that have been made and the clinical scenarios they portray suggest a significant breakdown of communication within the department which could in itself put patient safety at risk. I would suggest attempts are made address this issue as a matter of urgency.".

121. It is then by letter dated 19 October 2015 that the Claimant writes to AC, MS, MNS, and BD (page 473) stating:

"

There has been a concerted campaign to undermine me as a clinician and Clinical Lead for some time now. As you all know this has proven unsuccessful, as should have been the case.

Can I please ask you now to bury the past and move forward. We have considerable challenges ahead as regards the future of Maternity Services in our organisation and need to pull together and demonstrate unity.

"

122. The Claimant was asked about this letter in cross examination and he agreed that what he wrote was to tell his colleagues that they had got it all wrong, they were unsuccessful, and they need to bury it. He was asked if he thought this letter was on reflection wise and sensible. The Claimant confirmed that it was, although if he had to redo it knowing it offended them, but it is how he felt, he had to tell them off.

123. This correspondence did not go down well with his colleagues who responded on the 2 November 2015 (see page 488) saying:

"

There has not been a concerted effort to undermine you. What there has been is considerable concern about your behaviour, decisions and leadership qualities as the Clinical Director, which has sadly led to the disruption and bad feeling within the department which has been ongoing for a considerable length of time now. As you are also aware this has not been resolved. We are in the middle of mediation and the GMC have yet to report their findings,

Mr Siddig came to see you many months ago to discuss our concerns about you as the Clinical Director, and sadly despite this we have seen no change in your approach.

The fact that you have written this letter in the middle of arbitration between us suggests that you have not reflected on the concerns of your colleagues and appear to lack insight into your behaviour. The concerns raised are not just from the majority of the consultant body but also from a senior member of the nursing staff too.

Good leadership involves many qualities which include participating as part of a team, listening to your colleagues, encouraging cohesiveness rather than division and a democratic approach to problems. None of which we feel you have exhibited and despite Mr Siddig's discussions with you and the ongoing concerns we have raised not only with the Trust and the GMC we have not seen any obvious change

In your behaviour sadly. This forces us to take a vote of no confidence in you and to request that you resign as Clinical Director forthwith.

We have and will continue to behave in a professional way to protect our patients and to contribute actively towards the plans for the future of the department as we hope you will despite the ongoing differences between us.

"

124. This response is generated by the Claimant's correspondence in which he wants to tell his colleagues off. It relates to the way the Claimant is communicating with them. His colleagues say it demonstrates poor leadership by the Claimant which is what their concerns have been about. This expression of their views at this stage is therefore completely independent of any alleged disclosures the Claimant may have made up to this point.

125. By email dated 18 November 2015 MS, AC, MNS and BD write to the Claimant to complain about the distribution of work in job plans sent to them by the Claimant on the 12 November 2015 (see pages 490 to 491). This is correspondence generated by what the Claimant says to his colleagues about job plans and is not related to any alleged protected disclosures the Claimant says he has made.

126. The agreed chronology records that in November 2015 the GMC's expert report from Professor Lamont is received and we are referred to the conclusion at page 521. This records that:

"

> In trying to interpret and assimilate the evidence against Mr Iftikhar, I am struck by the acrimony that is directed against him by Mr S which I think is relevant to the case. Without doubt this is related to the experience of Mr S who was investigated and whose practice was curtailed (in his perception) by Mr Iftikhar.
> "

127. The Mr S referred to is MNS about which the Claimant says he made a protected disclosure (alleged disclosure 6) on the 28 August 2015. However, we would observe that as the GMC referral (May 2015) and the clinical concerns being investigated (there are no medical reference dates post the 17 August 2015 (see page 509) the majority being in 2013/2014), all predate the alleged disclosure, it would appear that the observed acrimony between the Claimant and MNS can have nothing to do with any alleged protected disclosures the Claimant has made about MNS.

**Alleged Protected Disclosure 4: Verbal disclosure to Tony Hall during a meeting towards the end 2015**

128. Chronologically we then get to the Claimant's alleged protected disclosure four, that he submits (as confirmed in closing submissions) was a material influence for alleged detriment 5.

129. The parties agree that the Claimant met TH towards the end of 2015 and raised concerns about payments being made to his colleague Alison Cooper.

130. The Claimant says in the agreed list of issues that during this meeting he disclosed information in respect of on-call overpayments to Alison Cooper and Mr Siddig, overpayments to Alison Cooper for extra colposcopy work which had not taken place, information regarding Beena Dandawate's allegedly fraudulent behaviour in respect of leave arrangements to attend an RCOG congress in India. The Claimant says that this information tended to show that the Respondent, Alison Cooper, Mr Siddig and Beena Dandawate were failing to comply with legal obligations to which they were subject namely the employees' own contracts of employment, implied terms of trust and confidence and the Respondent's Overpayments Policy. This information, in the Claimant's reasonable belief also tended to show that a criminal offence may be being committed by the employees in question as under the Theft Act 1978 an employee may be guilty of theft by keeping salary overpayments and treating them as their own. The Claimant's belief was reasonable and made in the public interest as the Respondent's financial difficulties were having an impact on service provision to the public and also related to the spending of public monies.

131. The Respondent denies that this was a protected disclosure. The Respondent says that whilst other colleagues may have been mentioned, this was not in the context of concerns being raised about them. The Respondent says the Claimant did, however, mention that he had been reported to the GMC by his colleagues.

132. It is not admitted by the Respondent that this conversation amounted to a protected disclosure. The Respondent says that there was no disclosure of

any information tending to show a person or persons failing to meet their legal obligations or committing criminal offences. The Respondent says the Claimant did not have any reasonable grounds for believing that any "disclosure" that was made during this conversation tended to show these matters were in the public interest. In fact, the Respondent's case is that during this meeting Mr Hall explained to the Claimant that he had found no evidence of fraud but said that if further evidence came to light, he would be happy to investigate further.

133. TH confirms in paragraph 1 of his witness statement that between 2012 and 2016 (so at the time of this alleged disclosure) he was the Fraud and Investigations Manager for the Trust.

134. The Claimant addresses this alleged disclosure in paragraph 23 of his witness statement:

"Tony Hall (TH) from Counter Fraud contacted me on 28.01.15 p361 to arrange a meeting to discuss the situation with MS. Viv Leonard arranged a further meeting with me towards the end of 2015 to discuss the possible fraudulent payments being made to AC in respect of her HBPC role. I provided TH with a copy of AC job plan p460-464 and a letter from Trish Dyer (p456). He looked at the entry "HBPC — for meetings outside my working week" p464 and commented that it looked fraudulent and said he would investigate. He said he had dealt with another time fraud issue for another Consultant in the Trust and had corrected it. I then asked him to look at BD Study Leave application p554-558 and I told him that I had polite conversations with BD and she had not put a claim in. TH commended me for preventing fraud in relation to this issue."

135. As this is an alleged verbal disclosure, we have considered TH's witness evidence about what is alleged. He says at paragraphs 20 to 22

"20. MI asked me for a meeting at some point, possibly in 2015, to discuss alleged overpayments to his colleague, Alison Cooper [Consultant]. I met with him in his office, although I cannot recall when. He alleged that Ms Cooper was being paid to attend meetings that she was not attending and gave me a copy of her job plan. I do not recall him mentioning overpayments to Mr Siddig and/or any issues with Beena Dandawate [Consultant]."

21. I took steps to investigate MI's concerns. I spoke informally with Emma Hallett [Deputy Director of Workforce], Paul Lear [Medical Director] and Catherine Abery—Williams, in person. It was clear that I was not the first person MI had raised this issue with. The Trust was well aware of the concerns and was dealing with them. There was no reason for me to intervene.

22. I met with MI on 5 February 2016. I explained to MI that there was nothing further for me to do. I did not say I was "powerless" to investigate but procedurally, as the Trust was aware and dealing with the issue, there were no steps for me to take. MI may have said that he felt the Trust did not want the issue investigated, but I explained that was not the case…."

136. TH denied in cross examination that he said to the Claimant that it looked fraudulent, he confirmed that he would never had said that. He did not recall saying it looked like time fraud. He also disagreed that he said he was told not to investigate the matter, confirming that part is nonsense and they cannot tell him not to investigate. He also confirmed his independence and that he was not put off, he says he was given an account that it had been looked at and dealt with, which he accepted.

137. CAW does confirm what TH says, see paragraph 13 of her witness statement:

"13. Tony Hall did ask me about the overpayments. I confirmed to him that both Mr Siddig and Ms Cooper were not disputing the overpayments. There had been a mistake by the Trust and so the Trust was dealing with the matter. There was no alleged fraud and therefore Tony said there was nothing for him to Investigate. This was not an attempt by the Trust to curtail an investigation. To my knowledge, the matter of the overpayments was nothing to do with MIs dismissal in November 2018."

138. CAW's witness evidence refers to the on-call matters and neither PL nor EH refer to speaking to TH in their witness statement as TH refers to in his witness statement. It was not put to PL or EH that they did not communicate with TH as he says, therefore we accept what TH says.

139. We also accept what TH says the Claimant discussed with him … "… alleged overpayments to his colleague, Alison Cooper [Consultant]. I met with him in his office, although I cannot recall when. He alleged that Ms Cooper was being paid to attend meetings that she was not attending and gave me a copy of her job plan.".

140. The agreed chronology records (at paragraph 72) that on the 18 January 2016 the Claimant attends a 2-day GMC Interim Orders Tribunal hearing. We are referred to pages 542 to 550 about this and with particular reference to page 549, saying that the Claimant is exonerated. Having reviewed that page, it says:

"

15. The tribunal has determined that, based on the information before it today, it is not necessary to impose an interim order on your registration for the protection of members of the public.

16. In reaching its decision, the tribunal determined that the issues regarding communication, cohesion and leadership within the department where you work cannot be placed solely within your scope of responsibility. They are, therefore, insufficient to raise concerns that your fitness to practise may be impaired.

17. The tribunal noted that Mr Neale was of the view that the allegations and the clinical scenarios they portray suggest a significant breakdown of communication within the department which could put patients at risk. The tribunal has already been referred to information which suggests that the communication problems cannot be laid solely with you.

"

141. This says that it is not the Claimant's sole responsibility, but note what is suggested is … "a significant breakdown of communication within the department which could put patients at risk." (paragraph 17).

142. By email dated 25 January 2016 the Claimant writes to PL saying that the allegations against him are malicious, and…

"

> It has been nearly 18 months since I have been receiving insulting correspondence signed by 4-5 colleagues and this harassment, bullying and possible racism continues. In previous correspondence I have asked senior management to protect me as the anger directed against me is due to implementation of Trust policies.

"

143. The Claimant suggests it is possible racism and the anger has been directed against him due to the implementation of trust polices, and not therefore "the blowing of the whistle".

144. We record from the agreed chronology that it was in January 2016 that the Claimant steps down as Clinical Lead (see paragraph 74 of the agreed chronology).

145. It is then on 1 February 2016 that AC is appointed as the Claimant's replacement as Clinical Director (see paragraph 75 of the agreed chronology).

146. It is then on the 5 February 2016 that the Claimant corresponds with the GMC about BD's allegedly fraudulent study leave application in 2014 (see pages 552 to 558). It is unclear why this is pursued by the Claimant at this point,

as he is no longer in the CD role, and it was the Claimant's evidence that this issue was resolved by him.

147. It is agreed (as per the agreed chronology (see paragraph 76)) that in February 2016 the Respondent engages Mr Hisham Rahman and Mr Ed Neale to conduct a review of O&G department and the report is then produced on the 1 March 2016 (as confirmed at paragraph 80 of the agreed chronology) which can be seen at pages 560 to 578.

148. We note from that report the following:

a. Page 563 – the terms of reference for the report record that the concern is that the standards of care provided by the O&G Department fall below that which is acceptable to the Trust, and one of the six matters identified as being of particular interest is … "That they can function as a team."

b. Page 573 – the findings and conclusions section:

"

> We could find no mention on the Trust risk register of the dysfunctional relationship amongst the O&G consultant body in spite of several letters of a whistle blowing nature against each other, the unusually high level of GMC referral, internal and external investigations into their practice and the attempts at mediation that have been made.

"

c. Page 574 – there is reference to a perceived lack of consistency, two consultant factions and the referrals to the GMC …

"

> There is a perceived lack of consistency of medical leadership within the department which has led to 2 consultant factions and risks of poor patient care and experience. However we found evidence that these factions and interpersonal issues run deeper than just medical staff – some senior nursing staff may also be affected, possibly due to poor Trust responses to concerns that have been raised in the past.

> We were concerned at the number of GMC referrals within the department. This appears to be being used either without recourse to Trust governance processes first, or through lack of confidence in them. We believe the Trust should ensure the governance and whistle blowing policies are well publicised within the department, and that all individuals are aware of their obligations to the organisation as well as the GMC.

"

d. Page 577:

"

> Within the cancer services we saw evidence that some interpersonal relationships were preventing patient pathway efficiency due to poor communication between colleagues.
>
> In our review of outpatients we found evidence of administrative processes being used by individuals as an excuse to cause further rifts in the interpersonal relationships within the department. It is current practice if two doctors are working in the clinic side by side for them each to have a separate list of patients, and to leave as soon as they have completed their list. We heard evidence of this leading on occasions to patients waiting over an hour to be seen if the other list has more complex patients on it that take more time. This leads to poor patient experience and can adversely impact on supervision of juniors. Consideration should be given to having single list for each consultant team in OPD to improve both patient experience and junior supervision
>
> We gained an impression from some consultants that they feel disempowered due to the perceived uneven distribution of clinical and administrative leadership. We feel it is important all doctors realise their obligations under Good Medical Practice (GMC) and that they are accountable as leaders within their service. Consideration should be given to designing this into the department by means of a variety of clinical and administrative leadership roles for every consultant which can be defined through SMART objectives, and for which they can each be held to account.

"

e. Page 578 – the recommendations:

"

> 12. Implement team building support
>
> 13. Identify separate mentoring/coaching for the new clinical lead
>
> 14. Alongside job planning the meeting structure of the department should be reviewed to separate business, and governance and quality. In addition consideration should be given to consultant only meetings to clear issues, improve relationships and find common ground for improved communication

"

149. We note about all this that as AC has only been in post for a month, this report would be flagging matters as to how the team was operating under the Claimant's lead and this raised, risks of poor patient care and experience. This is a full and detailed report into the situation.

150. It is submitted to us by Respondent's Counsel that … "Objectively, the Neale/Rahman service review in February 2016 identifies the dysfunction as a lack of consistency of medical leadership within the department leading to 2 factions p574". This is what the report records and it would relate to when the Claimant was in the CD role as AC only took on the role from the 1 February 2016.

151. By email dated the 2 March 2016 the Claimant sends an email to (as the agreed chronology refers to them) … "supportive colleagues" about the IOP outcome (see page 580). The Claimant says:

"

> I appreciate this will most likely have had an impact upon you all. On my part, although this was not of my doing, I apologise on behalf of my other colleagues for the effect this may have had upon you too.

"

152. The Claimant accepted in cross examination that he did not have the agreement of his other colleagues to make such an apology on their behalf. The Claimant having written and circulated such a statement without consent is unlikely to assist in eliminating dysfunction in the O&G department.

153. The Claimant continues to provide further material to the GMC about his colleagues as can be seen with the references at paragraphs 82, 83 and 85 of the agreed chronology. On the 4 March 2016 he corresponds with the GMC about the MS alleged fraud matter (see page 581). On the 11 March 2016 he corresponds with the GMC about AC performing on call duties from her home outside the permissible travel time to the hospital (see page 585). On the 21 March 2016 the Claimant provides information to GMC in relation to the AC PA matter asserting there was little if any evidence of them having taken place (see page 588).

154. Although not in the bundle of documents it would appear that PL receives a letter from the GMC seeking information on AC. It may be that the GMC does so on the back of the recent correspondence sent to it by the Claimant.

155. By letter dated 19 April 2016 EH replies on behalf of PL (as he is on annual leave and asked EH to do so) to the GMC (see page 597). The letter says about the AC PA matter:

"

> It has been reported to you that Miss Cooper was in receipt of extra Programmed Activities for a number of months for additional Colposcopy clinics which never took place. I attended several job planning meetings between Miss Cooper and Mr Iftikhar between 2012 and 2015. At the July 2015 meeting Mr Iftikhar mentioned some annualised clinics that were included in Miss Cooper's job plan but that she had not undertaken. As her job plan included more PAs than she was contracted for, I explained to Mr Iftikhar that this was not work that Miss Cooper had been paid to do. The annualised clinics were subsequently removed from her job plan.

"

156. The Claimant refers to this correspondence from EH to the GMC in paragraph 36 of his witness statement …

"Emma Hallett (EH) Head of Operational HR wrote to GMC with the Trust's response to my disclosures on 19.4.16 p597-600. It is highly significant that she makes the direct connection between my whistleblowing concerns about the probity of AC and MS and their complaints to the GMC about me. She refers to 'two consultant factions', She states that she had no reason to believe that AC

was aware of the overpayments prior to January 2014. EH provided information about the extra PA's (pp597- 600) without any investigation into this issue. The information she has provided was incorrect and in my view EH deliberately misled the GMC."

"… At best EH was unprepared to properly investigate the issues of financial probity raised, at worst, she sought to cover up the financial irregularities.".

157. Based on the way that the Claimant has confirmed he argues his case this is a crucial piece of correspondence. The Claimant submits that this is wrong information that ultimately leads him to being seen as the "dog with a bone", rather that the "conscientious whistle-blower". It is the Claimant's case that this wrong information was created by EH on the grounds of his alleged protected disclosure five to the GMC.

158. EH was cross examined about what she wrote to the GMC. She was asked if the paragraph about AC's PAs was designed by her to assure the GMC that there were no ongoing issues re PAs. EH confirmed that it was her account of that issue. She was asked how she knew that the PA issue was resolved in 2013 and she confirmed that she did not know it was resolved at that time, but that she was able to resolve subsequently. EH explained that in her view the job plans, and PA position, resulted in a neutral position i.e. no gain for AC. EH was then asked if broadly speaking was she trying to help out AC by writing the letter, and she confirmed no, that was the facts.

159. EH was not challenged in cross examination that what she did was because of alleged protected disclosure five or any other particular disclosure. We note that this is not an allegation made against EH until closing submissions. We address this factual matter further under alleged detriment five below.

160. Chronologically we then get to the alleged first detriment which has now been withdrawn so we do not need to address this matter, as PL's conduct at this time is no longer being challenged by the Claimant.

161. By email and letter dated 17 May 2016 the GMC write to PL with the outcome of its investigations into the allegations of misconduct made by AC, MS, MNS and BD (see pages 616 to 624). The agreed chronology highlights from this (with reference to page 624) that … "It is not the regulators place to decide on the rights and wrongs of internecine disputes".

162. A letter dated 19 May 2016 from PL to the Claimant records matters discussed at a meeting between the Claimant, PL, CAW and the Divisional Work Force Manager on the 12 May 2016 (see pages 625 to 627). It records (at page 626):

"

I asked you if you felt you could get back to a good working relationship with your colleagues and you said that there had been unhappiness with you in the clinical director role which you were no longer in and with all the GMC matters concluding in June you felt that technically there should be no further issue. I asked if you felt that there would be willingness for moving forward following the failure of the external mediation which indicated relationships were worsening rather than improving. I asked if you thought there was a will to get better and you said that until matters were resolved with your colleague Mr Shoukrey you would remain cautious to say anything positive. You told me that due to differing cultures you did not believe that you could build a relationship with Mr Shoukrey and Mr Siddiq.
"

163. The Claimant was asked in cross examination what he meant by "differing cultures". He explained that MS is from Sudan and MNS from Egypt, the same part of Africa so they will be with each other on everything whether right or wrong. The Claimant was asked if this is what he was referring to when asserting that he believes racism was a primary motivator for MS and MNS. The Claimant responded that he was only talking about their culture, threatening comments, singled out because of race and because of religion. He was asked if he thought racism may have played a part and he replied it may have, he did believe that was why they did not threaten MS. It was put to the Claimant that he also mentioned religion and the Claimant responded by saying he takes back religion but stands by being singled out because of race. He was asked if he was accusing PL of racism and the Claimant said that is how he felt at the time because of their race. The cross-examination questions then moved to alleged detriment one which has now been withdrawn.

164. The responses by the Claimant to these questions do not support that he is being acted against in his view for whistleblowing reasons. The Claimant does raise allegations of race discrimination in his submissions to the panel hearing, but they are not part of his claim to this Tribunal. It is difficult to see how the Claimant could work with MS and MNS moving forward if he held these views about them.

**Alleged Protected Disclosure 6A: Verbal disclosure to Patricia Miller during meeting on 19/5/16**

165. Chronologically we then get to the Claimant's alleged protected disclosure six A, that he submits (as confirmed in closing submissions) was a material influence for the alleged detriments 6, 7 and 8.

166. The parties agree that there was a meeting between the Claimant and Patricia Miller ("PM") the CEO in 2016 when the dysfunction of the gynaecology team and the detrimental impact on patient safety was discussed. The Claimant says this meeting took place on 19 May 2016. The Respondent says this meeting was in early 2016 but does not confirm the date.

167. The Claimant submits in the agreed list of issues that this verbal discussion was a protected disclosure to his employer. The Claimant says he provided information in the form of two examples where patient safety was being detrimentally affected.

168. The first example involved the Claimant's colleagues, Mr Shoukrey, Mr Siddig, Miss Dandawate and Margaret Perumalla in a delayed surgical intervention for an emergency admission in the week commencing 9/5/16. The Claimant says he informed Patricia Miller that due to a disagreement between the above colleagues regarding who should carry out the emergency surgery on this patient, there was more than 48 hours delay in taking her to theatre.

169. The second example was in relation to Mr Siddig supervising Mr Shoukrey's surgical work on 20/1/16 in respect of a specialist surgical procedure, which he did not himself undertake. Brenda O'Connell, the Theatre Nurse in charge of the Day Surgery theatre list on 20/1/16 raised concerns about this with Mr Siddig on 20/1/16 (confirmed in writing on 16/3/16). Matthew Hough (Consultant Anaesthetist) witnessed this and approached the Claimant on the same day in the afternoon at the private Winterbourne Hospital and his words were "Ifti, what is going on between MS and MNS? The Theatre staff in Day Surgery were very unhappy today and were questioning MS....." It was understood that Mr Siddig was supervising Mr Shoukrey with a view to preparing a satisfactory report on his operating skills, in order to ease the restriction on his practice. Some of the consultants, including the Claimant had reservations regarding this arrangement due to the common knowledge of collusion between the two of them. The Claimant says the arrangement on 20/1/16 placed patient safety at risk as Mr Siddig did not have the skills to supervise the specialist procedure being undertaken.

170. The Claimant's case is that these disclosures relate to potential danger to the Health and Safety of individuals in the Respondent's care. The disclosures were made in the public interest as the Respondent is a public body providing care to members of the community.

171. The Respondent denies that this verbal discussion was a protected disclosure. The Respondent says that the conversation centred on the dysfunctionality within the department, the implications for patient safety and the fact that colleagues reporting each other to the GMC was unhelpful. The Respondent decided that the issues which the Claimant had raised should be considered under the Trust's Whistleblowing Policy and an independent investigation was commissioned into the same. The outcome was fed back to the Claimant, together with a copy of the independent report, on 21st July 2016. The Respondent will say that the Claimant did not consider these concerns were raised as protected disclosures at the time and that he confirmed in his grievance dated 15 August 2018 that it was the Respondent that had taken this step.

172. The Respondent denies that the conversation was considered by the Claimant to be a protected disclosure and thus denies that it should be regarded as meeting the relevant statutory definition.

173. The Claimant addresses this disclosure in paragraphs 49 to 51 of his witness statement:

"49. I met with PM on 19.5.16 to complain that since leaving the CD role I had been discriminated against and subjected to bullying and harassment by my colleagues. AC and CAW had provided inaccurate information to PL and as a result of this PL had behaved in a threatening manner a week earlier. PM dismissed my concerns but asked me directly whether team dysfunction was affecting patient care. I confirmed that it was and I gave two examples: The first involved my colleagues MS, MNS, BD and MP in a delayed surgical intervention for an emergency admission in the week commencing 9.5.16. Due to a disagreement between the above colleagues regarding who should carry out the emergency surgery on this patient, there was more than 48 hours delay in taking her to theatre.

50. The second example related to MS supervising MNS' surgical work on 20.1.16 in respect of a specialist surgical procedure, which he did not himself undertake. Brenda O'Connell, the Theatre Nurse in charge on 20.1.16 raised concerns about this with MS on 20.1.16 (confirmed on 16.3.16 p 587a) ) Matthew Hough (Consultant Anaesthetist) witnessed this and approached me later on the same day at the Winterbourne Hospital asking me what was going on between MS and MNS and highlighting how unhappy theatre staff had been about the situation. It was understood that MS was supervising MNS with a view to preparing a satisfactory report on his operating skills, in order to ease the restrictions on his practice. The arrangement on 20.1.16 placed patient safety at risk as MS did not have the skills to supervise the specialist procedure being undertaken. I gave PM an email from the GMC confirming the second referral p608-609, PM Indicated this was all going to the CQC and the GMC and she would need to speak to PL.

51. The Trust treated this conversation as a protected disclosure and commissioned a whistleblowing investigation by Richard Jones dated 24.5.16 at p632-633."

174. As this is an alleged verbal disclosure, we have considered PM's witness evidence about what is alleged. She says at paragraph 4:

"4. My own direct involvement in the facts leading to MI's Tribunal case began in a meeting I had with him in early 2016, I cannot recall the precise date of our meeting but note that MI states it took place on 19 May 2016. MI had requested a meeting and my recollection is that he spent the majority of the time speaking about the breakdown in relationships between the consultants in the O&G team, He talked about the fact that he had been the subject of multiple referrals to the GMC but I explained that my understanding was that there had been several referrals to the GMC "each way". I explained that my view was that such referrals and cross referrals were unlikely to improve those personal relationships. I asked MI several times if he was saying that he thought dysfunctionality within the team was leading to patient safety issues. After he agreed that this was what he was saying I said to him that I would therefore need to discuss this with the HR Director and Medical Director as it was potentially serious. I do not recall MI giving me specific examples or instances when he said that patient safety had been compromised. MI certainly did not say to me that he felt he had been discriminated against or victimised by his

consultant colleagues. As someone who is mixed race herself I would have certainly picked up on any suggestion of discrimination and insisted that it be formally investigated. I did not, I am sure, appear nervous or speculate about matters ending up before the GMC and CQC as MI suggests not least because it was clear the GMC were already involved. With a dysfunctional team the CQC would already have been aware of this following my regular quarterly catch up meetings with them. MI did not state that he was raising whistleblowing concerns or that he intended to make a disclosure in accordance with any of the relevant Trust policies and procedures. Rather, I took the initiative and said that we would need to look into the issues he had raised. This is what led 'to the Trust instructing Richard Jones, an external consultant, to undertake a view of the team ~ terms of reference page 632 of the bundle."

175. PM in cross examination indicated that the Claimant may have set out the specific examples that he refers to in his witness statement.

176. On the 24 May 2016 PL instructs Richard Jones ("RJ") to conduct a 'whistleblowing investigation' into the contention that the breakdown of relationships is detrimentally affecting patient safety'. The terms of reference say (see page 632) …

"

Specifically, it has been alleged that **the breakdown of relationships within the gynaecology team is detrimentally affecting patient safety**. Accordingly, the Trust now wishes to investigate this further.

"

177. As noted by Claimant's Counsel in his written submissions the examples the Claimant says he raised with PM are examples addressed in the report of RJ completed on the 23 June 2016 (see page 706).

178. We have also noted that in the letter dated 21 May 2016 from the Claimant to PL referring to a campaign of bullying and harassment towards him (see page 631), it says it is cc to PM with the Claimant writing … "I met with her on the 19.5.16 to discuss my concerns".

179. For these reasons we accept the Claimant's account about this matter.

180. Between the instruction of RJ and the circulation of RJ's report chronologically we get to the alleged second detriment concerning the Claimant's arrest, which has now been withdrawn. As this has been withdrawn, we have not spent time recording findings of fact on this matter, save to note that a third party raised the allegation, the Police were involved and ultimately no further action is taken against the Claimant. Also, on the 7 November 2016 the agreed chronology records (at paragraph 129) that the Claimant meets with PL and receives an apology for distress caused by the arrest (see page 848).

181. It is on the 20 July 2016 that PL writes to those concerned to confirm the outcome of RJ's whistleblowing investigations (see page 757).

182. The conclusions from RJ's report record (see page 708):

"

**6.1 Breakdown of relationships**

**The evidence seems clear that there has been and remains a breakdown in relationships between some consultants within the O&G department.** On the basis of the interviews it appears that in terms of number this is possibly 4/5 of the consultant number, as the investigator believes that one of the original number is trying to put past differences in the past.

**In addition 2 of the senior nurses have become involved in the various disputes and possibly up to 3 of the middle grades** may be said to be on one side or another, albeit their interactions with the disputes were sometimes superficial.

**There is though some evidence that there is a relaxation of tension following the decision of the previous clinical lead to step down.** Therefore there is an opportunity for the trust to build upon this to bring about better relationships between colleagues.

"

183. There is then some final comments on the relationships (see page 709) suggesting that "a line in the sand" be drawn:

"

Almost everyone involved in these disputes agreed that there needed to be an end to internal in-fighting. Given on-going GMC/NCAS processes will have to be allowed to run their course, there is still a need to build on the present opportunity of a new clinical lead to resolve issues. Thus one way forward may be to suggest "a line in the sand" be drawn from a date to be agreed – perhaps at a feedback session from this investigation – this would need to be accompanied by an amnesty for past issues which would allow the GMC processes to roll on whilst avoiding further tit for tatt actions.

"

184. There was no finding that the breakdown of relationships was detrimentally affecting patient safety, and this is highlighted in PL's letter:

"

You will recall it was alleged that the breakdown of relationships within the gynaecology team was detrimentally affecting patient safety. I am pleased to report that the investigation did not find any evidence to support this allegation. It was reassuring to read of the efforts of the team to ensure that patients are not in any way involved or impacted by the ongoing situation within the department.

However, it will be of no surprise that the investigator found clear evidence of the breakdown in relationships between some consultants within the O&G department. Mr Jones also indicated that these relationship issues have spread to the middle grade doctors and nursing teams, albeit to a lesser extent. As stated in the investigation, it would be naïve to believe that these relationship problems cannot have a potential impact on patient care or safety. When reading the report it was also evident how difficult it must be for staff to work in the current atmosphere within the department. For these two reasons, the present difficulties must be resolved.

"

185. By letter dated 21 July 2016 PM writes to the Claimant following the disclosure of the RJ report (see page 759). It says:

"

In summary, the investigation did not find evidence which substantiated your concerns. However, it will be of no surprise that the investigator found clear evidence of the breakdown in relationships within the team that you outlined to me.

As stated in the investigation, it would be naïve to believe that these relationship problems cannot have a potential impact on patient care or safety. It is therefore vital that these problems are resolved as a matter of urgency in order to irradiate any potential threat to patients. Some recommended outcomes have been included in the report and Mr Lear will be writing to the whole team to outline how these should be taken forward.

The report is an interesting read - I ask that you to reflect upon it. It contains comments relating to your leadership of the department whilst Clinical Director and there is clearly a group of staff that view many of the current issues as having commenced during your tenure. However, regardless of how or why we have reached the current situation, the important point now is that there is commitment from all members of the team to reach resolution and remove any potential impact on patients. I specifically request that you carefully consider your own role and responsibilities in this regard.

"

186. PM addresses this matter in paragraphs 5, 6 and 7 of witness statement:

"5. After we received Mr Jones' report I wrote to MI with a copy of it on 21 July 2016 (page 759). In my letter I summarised that Mr Jones had not found evidence to support MI's contention that the breakdown in relationships within the O&G team was detrimentally affecting patient safety. However, he had found clear evidence of a breakdown in relationships within the team.

6. I stressed that it would be naive for the Trust to assume that such relationship problems could not affect patient safety and urged MI to consider his own role and responsibility in seeking to resolve such relationship issues going forward.

7. MI did not reply to my letter."

187. PM was cross examined about this letter; it being suggested to her that it was intended as a threat to the Claimant. PM confirmed that what she intended is what the letter says. Having considered how the matter was raised, what the outcome of the RJ investigation was we accept what PM says about what she wrote and why.

188. By letter dated 28 July 2016 PL writes to the Claimant inviting him to a meeting to discuss the Rahman review. In the letter the Claimant is accused of misleading the Trust in respect of who it was that raised concerns about MNS practice of resecting fibroids (see page 762):

"

Mr Shoukrey

You will recall that you were interviewed by Paul Lewis in relation to a grievance submitted by Mr Shoukrey. In relation to the letter you sent me dated 28th August 2015 relating to Mr Shoukrey's practice of resecting submucous fibroids you were asked which Consultants had raised concerns to you regarding this practice and you referred to Miss Dandawate and Mr Siddig. However, during the investigation both Miss Dandawate and Mr Siddig denied raising concerns of this nature to you. The grievance process has recently been concluded and the report concluded that at best, this anomaly

indicates that you should have carried out more thorough research before raising the matter formally, or at worst, it indicates that you did not raise the matter in good faith. I will require you to explain your actions in relation to this matter so that I am able to assess whether any further action is necessary.

"

189. On the 6 September 2016 the Claimant meets with the Divisional Director Julie Doherty ("JD") and PL to discuss this letter. The agreed chronology records that the Claimant maintained that MS and BD had raised concerns over MNS' practice and he was not surprised they had denied this. See PL's letter dated 13 September 2016 (page 799).

190. As we have already noted though, the emails the Claimant relies upon do not appear to support a change of view by BD or MS.

**Alleged Protected Disclosure 7 Verbal disclosure during meeting with Catherine Abery-Williams on 31/10/16**

191. Chronologically we then get to the Claimant's alleged protected disclosure five, that he submits (as confirmed in closing submissions) was a material influence for all the alleged detriments still pursued (5, 6, 7 and 8).

192. The parties agree that there was a meeting between the Claimant and CAW on or around the 31 October 2016.

193. The Claimant asserts in the agreed list of issues that during this meeting he provided Catherine Abery-Williams with information about overpayments being made to Alison Cooper for her Hospital Based Pathology Co-ordinator Role (HBPC). The Claimant says this information tended to show that the Respondent and Alison Cooper were failing to comply with legal obligations to

which they were subject namely the employees' own contracts of employment, implied terms of trust and confidence and the Respondent's Overpayments Policy. The Claimant says that this information, in his reasonable belief also tended to show that a criminal offence may be being committed by Alison Cooper as under the Theft Act 1978 an employee may be guilty of theft by keeping salary overpayments and treating them as their own. The Claimant says his belief was reasonable and made in the public interest as the Respondent's financial difficulties were having an impact on service provision to the public and also related to the spending of public monies.

194. The Respondent denies any protected disclosure was made during this meeting. The Respondent says that the Claimant repeated previous concerns about Mrs Cooper and payment in respect of her HBPC role. The Respondent says there was therefore no disclosure of new information tending to show any breach of any legal obligation or any tendency to commit criminal acts. Further, the Respondent does not agree that it would have been within the reasonable belief of the Claimant that raising such issues was at that time, in the public interest, given that the issues had previously been raised in 2013 and dealt with by the Trust.

195. About this disclosure the Claimant says, at paragraphs 71 and 72 of his witness statement:

"71. There remained unresolved issues about my job plan p766-770, 787-791, 878-879, 893. Oddly my protected trainee time had been removed, even though I still had a trainee, my protected time for office based admin had also been removed and protected time for a bi-monthly locality cancer meeting which had been removed p1363. All of this had been removed without any consultation with me by AC. I was already working more PA's than I was being paid for and these changes would add to this p589. During a job plan meeting between all the O&G consultants and Family Services management on 21.9.17 (p1072,1073) once again I asked for transparency regarding time allocation for Lead roles. AC was categoric when she said "senior management would never agree to it".

72. On 31.10.16 I met with CAW and AC to discuss the situation p844. As soon I started raising the issues with my PA's directly with AC, she (AC) left the meeting saying she had another meeting to go to. After AC had left, I provided CAW with information about overpayments being made to AC in her HBPC role I provided a copy of AC electronic job plan p478-481. I also provided CAW with evidence regarding meetings related to the HBPC role p456. CAW said, "it looks fraudulent".

196. As this is an alleged verbal disclosure, we have considered CAW's witness evidence about what is alleged. She says at paragraphs 23 to 25 …

"23. Alison Cooper and I met with MI on 31 October 2016. The purpose of the meeting was to discuss MI's job plan.

24. At the meeting, MI turned the discussion around and shifted the focus onto issues he had raised previously around Ms Cooper's payment for a role as HBPC ("Hospital Based Pathology Coordinator') and payment for colposcopy clinics. MI was querying what evidence there was that Ms Cooper was carrying 'out the HBPC role and doing the colposcopy clinics, and therefore whether she was being overpaid. I do not recall MI providing me with any evidence of his allegations at the meeting, such as Ms Cooper's job plan ~ I would have been able to access Ms Cooper's job plan myself if necessary. I did not say that I agreed with MI but did say I would look into the issue, as I was aware it had been raised previously and my understanding was that it had already been resolved but I wanted to check. The meeting got quite heated - MI was speaking quite unpleasantly to both myself and Ms Cooper. Fortunately, Ms Cooper had a prior engagement to attend and left part-way through. the meeting. My handwritten note of the meeting can be seen at page 844.

25. Immediately after the meeting on 31 October 2016, I called Ms Cooper to check she was ok, and then I called Paul Lear to inform him of how the meeting had been conducted and that MI was raising historic issues. MJ had already raised the Issue of Allison Cooper's job plan and overpayments in 2013, and had been assured at that time by Will Ward that it was a genuine mistake at the Trust end [309]."

197. CAW was asked about this meeting in cross examination and confirmed that she could not remember if the HPBC matter was raised completely or specifically in front of AC, but she could recall the Claimant raising PAs before AC left. CAW confirmed that she thought the Claimant had acted in an unprofessional way in front of AC.

198. CAW was asked whether in her knowledge the matter was resolved in 2012. CAW replied that WW had investigated and concluded there was no intention of fraud, she had done extra session, then CAW believed that WW had reverted back to the Claimant and if there was further information then the Claimant should come back. CAW was asked if she had knowledge that there had been a complete investigation into the issues of PAs and she confirmed that she was satisfied that WW had done an investigation.

199. From this it is clear in our view what has been raised by the Claimant as to the information and his belief.

200. By letter dated 10 November 2016 (pages 852 to 853) PL writes to the Claimant confirming that CAW and AC had reported that the recent job planning meeting had been very difficult. The Claimant is accused of a worsening attitude and raising issues that AC had acted fraudulently in respect of her HBPC role. The letter says (at page 852):

"

Both Catherine Abery Williams and Alison Cooper have reported that they found their recent job planning meeting with you to be very difficult. They both reported that you interrupted them frequently during the meeting and that they found it difficult to speak. They also perceived your behaviour at the meeting to be threatening/bullying towards them. This is obviously not appropriate behaviour.

Alison reports to me that whilst you have not always seen eye to eye with each other, your behaviour and attitude towards her has worsened since she returned to the role of Clinical Director. Catherine reports that you raised issues regarding Alison's HPBC role after your job planning meeting and made allegations that Alison is acting fraudulently in this respect. I am aware that you raised this matter previously when you were Clinical Director and that this was clarified during the job planning process with Dr Ward. It is not conducive to a productive working relationship to raise historic issues that have previously been dealt with. In the context that you have already raised other historic issues relating to Alison directly with the GMC I fully understand why she is feeling threatened by this behaviour and request that you reflect upon this.

I expect you to effectively and respectfully communicate with your colleagues at all times. This is reflected in the Good Medical Practice guidance which states that you must work collaboratively with colleagues, respecting their skills and contributions, that you must treat colleagues fairly and with respect, and that you must be aware of how your behaviour may influence others within and outside the team.

As a general point, neither Alison nor Catherine feel that you are actively demonstrating your willingness to move forward with the rest of the department. The department has been through a very difficult period and there is much work to be done to make the improvements that are required for the benefit of patients. This requires the commitment of **all** team members. I expect all the Consultants to contribute fully as senior members of the team and of the Trust.

"

201. We note from this letter that an issue of concern for the Respondent is that CAW and AC found the Claimant to be bullying and threatening towards them both, interrupting them frequently. This relates to the Claimant's conduct at the meeting towards both CAW and AC and not to what he then says specifically to CAW about allegations of fraud about AC.

202. We note from this letter that PL conveys his understanding that the matter of AC's PAs was clarified during the job planning process with WW when the Claimant was CD. There is nothing to suggest that PL recorded this position because of any alleged protected disclosures the Claimant may have made.

203. The Claimant says he did not receive this letter until after his meeting with JD on 20 February 2017. It is noted in the chronology (at paragraph 135) that it is on the 21 February 2017 CAW emails the Claimant a copy of the letter dated 10 November 2016 (see page 894).

204. The Claimant was asked about the 10 November 2016 letter in cross examination and he confirmed that the job planning meeting was an opportunity for him to raise fraudulent behaviour, it was a turning point for him, he was not going to let it go. He was asked if he thought a job planning meeting like this was the appropriate forum to make the allegations. The Claimant confirmed, of course, the job plan is interlinked, job plans are interlinked the department is given money, if one person overpaid and another under paid, that is the forum.

205. We have considered the Claimant's email dated 27 February 2017 at page 894 and it supports that the issue here is his conduct at the meeting not what he was saying:

"

With regards to Alison Cooper's claim of 4 hours a week to attend meetings (as per her job plan),I have only brought this matter to the attention of Julie Doherty and Catherine Abery-Williams. I have never brought this up with Alison Cooper directly and therefore fail to understand why she felt threatened by me.
As we are going through a Team job planning exercise, of course everyone has a right to express their choices and opinions.

"

206. As AC records in her email dated 21 September 2017 about job plan meetings (see page 1059)

"

We tried to engage with MI and a couple of the meetings were cancelled on both sides. CAB and myself did meet specifically on one occasion to talk about his job plan . The meeting was completely unproductive as he was rude, talked over us both and refused to discuss his job plan. It culminated in him claiming after I left of me acting fraudulently as he wanted to know what I did in one of my sessions.

"

207. During the cross examination of Sophie Jordan ("SJ"), we were also made aware of a similar meeting where the conduct of the Claimant is raised.

208. SJ was being asked about comments she was credited with in the Richard Boniface report. At paragraph 2.56 at page 1501, SJ is credited as saying the Claimant is overbearing and dictatorial. SJ confirmed that she had witnessed that in a meeting, and they were her words. SJ says she confirmed he was bullish with AC (as mentioned in paragraph 2.54 of the notes).

"

2.54 SJ said she had not seen him shout or get loud but she had heard that was the case from others. SJ said he was bullish with AC but she felt that was because he was passionate when in the meeting with her and RJ.

2.55 RB asked what behaviours MI exhibits.

2.56 SJ said overbearing, dictatorial and aggressive. SJ said these were her words. SJ added it could be the due to this why there are some people who avoid interacting with him.

2.57 RB asked for names.

2.58 SJ said AC – who is not scared of much, BD – say similar and TA – which would be interesting to know his view.

"

209. The Claimant then on the 10 February 2017 corresponds with Julie Doherty ("JD") about issues over his job planning, raising concerns over unilateral job planning decision about his job planning (see page 878). This then leads to the meeting with JD where alleged disclosure eight is said to have been made.

**Alleged Disclosure 8: Meeting with Julie Doherty 16/2/2017 [now said to be 20/2/2017]**

210. Chronologically we then get to the Claimant's alleged protected disclosure eight, that he submits (as confirmed in closing submissions) was a material influence for all the alleged detriments still pursued (5, 6, 7 and 8).

211. The parties agree that the Claimant brought the issue of irregular payments being made to Alison Cooper to Julie Doherty during the period when Julie Doherty was Divisional Director. The Respondent cannot recall the date. The Claimant now says in evidence that this was on the 20 February 2017.

212. The Claimant submits that the information disclosed to Julie Doherty during this meeting was a protected disclosure to his employer. The Claimant says he presented an electronic copy of Ms Cooper's job plan to Julie Doherty and informed her of the fraudulent entry of 4 hours entitlement for the HBPC role (her entry being "meetings outside my working week"). The Claimant says that this information, in his reasonable belief, tended to show overpayments being made to the Respondent's employees. The Claimant says that this tended to show that the Respondent and Alison Cooper were failing to comply with legal obligations to which they were subject namely the employees' own contracts of employment, implied terms of trust and confidence and the Overpayments Policy and/or that a criminal offence may be being committed by Alison Cooper as under the Theft Act 1978 an employee may be guilty of theft by keeping salary overpayments and treating them as their own. The Claimant says his belief was reasonable and made in the public interest as the Respondent's financial difficulties were having an impact on service provision to the public and also related to the spending of public monies.

213. The Respondent denies that the discussion between the Claimant and Julie Doherty amounted to a protected disclosure. As the matter had previously been investigated by the previous Divisional Director, the Respondent says that the Claimant agreed that allegations would not be reinvestigated.

214. What the Claimant says about this is at paragraph 73 in his witness statement:

"73. During a meeting with JD on 20.2.17 explained that my Job Plan was well over 10 PA's p589 and I asked again for corrections to be made (p893). I also asked JD to investigate the issues with AC's job plan and in particular her HBPC role. I presented JD with an electronic copy of AC's job plan p478-481 and Trish Dyer's letter p456. JD said, it appeared fraudulent but she would not re-investigate. JD then mentioned a letter sent by PL following the meeting on 31.10.16.. I had not received this letter and CAW forwarded it to me, the next day. The letter from PL dated 10.11.16 and associated internal emails are atp850-853. I was upset that my legitimate concerns about my job plan were conveyed to PL as me being disruptive because AC said she felt threatened by my behaviour. This letter indicated that it was not helpful to raise historic issues which had previously been dealt with (referring to the information disclosed about AC job plan). However, this matter had not been dealt with - it had never been investigated by the Trust. I raised my concerns by email p 894-895 but I did not receive any response. All I wanted was transparency in job planning

and I had strong suspicions that AC was being paid more than she was entitled to and this ought to be investigated. The issues with my job plan continued p922-924 and AC complained again about me querying her 8PA p1059-1060."

215. As this is an alleged verbal disclosure, we have considered JD's witness evidence about what is alleged. She says at paragraphs 3 and 4:

"3. I agree that I met with MI about job planning in February 2017. In his claim form, MI states that this meeting was on 16 February 2017. I do not recall the specific date but agree that we met. MI raised questions with me about payments that had been made to his colleague Alison Cooper for her HBPC role. I checked with Catherine Abery-Williams who explained to me that various payments to Miss Cooper had been looked at by the previous Divisional Director Will Ward who had concluded that there was no fraudulent behaviour on Miss Cooper's part. My recollection is that when I explained this to MI he accepted that we would not reopen that investigation.

4. I do not recall MI showing me an electronic copy of Miss Cooper's job plan. I did not say to him that it appeared to me that Miss Cooper had made a fraudulent claim."

216. From this it is clear in our view what has been raised by the Claimant as to the information and his belief.

217. Chronologically we then get the Claimant's email to PL dated 27 February 2017 (see page 894 and as mentioned above) where the Claimant confirms that he never brought up this matter with AC directly, which we note is what WW was directing him to do (as referred to above and as set out by WW in paragraph 4 of his witness statement).

218. It is then on the 30 June 2017 that the Claimant writes to TH in relation to his original contact with him over potential fraud concerning AC (see page 930). TH did not reply, and the agreed chronology records the Claimant follows it up with a phone call a few weeks later. The Claimant having confirmed in cross examination that his job planning meetings were the correct forum to raise matters of fraud concerning AC there appears to be no obvious reason for this change of direction now.

219. The agreed chronology records at paragraph 144 that on the 6 July 2017 PL writes to the Claimant regarding a new matter relating to his private treatment of a cancer patient. The Claimant is subject to restricted duties. He is released from the Cancer lead role (see page 932). There was then an investigation carried out (see pages 935 to 937). This matter relates to the alleged third detriment which is no longer pursued as a complaint of detriment by the Claimant.

220. The agreed chronology records at paragraph 160 that on the 12 January 2018 there is a disciplinary hearing (alleged fourth detriment) where Richard Jee ("RJ") presents a case against the Claimant (see page 1268). This matter

relates to the alleged fourth detriment which is no longer pursued as a complaint of detriment by the Claimant. We have therefore factually not dwelled on this matter in our fact findings but do record that the Claimant did accept in cross examination that him being allowed to submit documents late in the disciplinary process and attend the hearing with a solicitor were all reasonable actions by the Respondent. About attending with a solicitor, the Claimant was evasive and defensive when asked if he had sought permission to attend with his solicitor, before he turned up with her. He ultimately confirmed he had not, asserting it was not an issue for the Respondent. The agreed chronology then records at paragraph 161 that by letter dated 15 January 2018 the Claimant was issued with a first written warning (see page 1355 to 1356). The Claimant is also informed that he should not return to the cancer lead role.

**Alleged Detriment 5** – **The Edgecumbe Report**

221. It is on the 15 February 2017 that PL makes initial contact with Edgecumbe Consulting seeking help in relation to the problems in the O&G department (see page 881). We note chronologically this is prior to the eighth alleged protected disclosure referred to above.

222. It is recorded in the agreed chronology (at paragraph 137) that on the 8 March 2017 PL and CAW make an unsolicited visit to the Claimant to inform him that there was going to be an investigation into the department by Edgecumbe Consulting. The agreed chronology says that the … "focus was on C" and we are referred to page 899. Looking at the notes from the meeting with the Claimant it doesn't suggest this, they record:

"Talked about ongoing issues/relationships in dept, lack of cohesiveness

Explained Edgecumbe + how teams function, psychology And asked to come into dept to look where problems are + solveable Had in history explained changes needed to be made Its v.expensive

Asked if happy to engage in process – replied yes.

Agree it should work better but doesn't + not cohesive 'will be open + honest + co-operate'. Bmth, poole look @ us as dysfunctional.

PL explained will want to do some depth conversations, etc with some used MI and MNS relationship as an example.

Will talk to MI in depth + MNS in depth (NCAS will feed into this) more than others."

223. If there is to be a focus it is on the relationship between the Claimant and MNS.

224. It is then on the 13 March 2017 (see paragraph 138 of the agreed chronology) the Claimant writes to PL expressing his concerns as to being singled out and references 'a campaign of bullying' (see page 901). Considering this document we note that the Claimant does not say that what is happening is because of any of the alleged disclosures that he has made up to this point, and he refers back to his email dated 27 February 2017 (see page 894 and as also referred to above).

225. The agreed chronology records at paragraph 141 that on the 12 June 2017 Dr Megan Joffe ("MJ") (the Edgecumbe investigator) has two conversations with AC before amending her original proposal for the investigation (see page 925). The agreed chronology then records (at paragraph 142) that there is then a formal letter dated 12 June 2017 from Edgecumbe to PL setting out scope of investigation, methodology and costs (see page 926).

226. It is then on the 20 July 2017 that Sophie Jordan ("SJ") revises the terms of reference (paragraph 146 of the agreed chronology) for Edgecumbe (see page 945). They say:

"

It is the expectation of the Trust that your overall report will address the following points:

- Key causes and contributory factors underlying the team difficulties and team cohesiveness;
- The likelihood that the current situation is/has the potential to impact service delivery;
- The likelihood of the them being able to work and function safely and effectively both within their current make-up and structure or once that is amended;
- The changes that will need to be made by the team (individually and as a team) and where necessary by others outside the team;
- The recommended actions that need to be taken (short, medium and long term);
- The resource and support required to achieve progress.

"

227. About her instruction and the report MJ confirmed in cross examination, that the review was a request to hear peoples' views and give their (Edgecumbe's) judgment on the interpersonal dynamics.

228. MJ confirmed that her findings and recommendations were absolutely genuinely meant, and it was then up to the Trust what to do. She confirmed that once the report is in it is up to them what they follow through on and it does depend on resources. It is stated in the opening paragraph of the recommendations:

"

**Recommendations**

131. Based on your Terms of Reference we provide you with the following recommendations, recognising that the decision to engage in any of these will be determined by considerations of the availability to you of the necessary managerial, human resource and financial resources required. This will of course, need to take into account not only the pressures and priorities of the Trust across all its services but also the extent to which it feels able to contain sufficiently any continued disruptive behaviour, given its recognised and long-standing effect on the staff and, by extension, the integrity of the service – and for how long it could do so.

"

229. MJ accepted that the Claimant was being open and honest in telling her about all the things that he wanted to tell her about. MJ confirmed that she was aware of the long historical background, but she was not there to look at it. MJ recalls saying to the Claimant a number of times how does what he is telling her relate to what she needs to do which is looking at dynamics and that she is not there to look at alleged fraud. MJ confirmed that the Claimant had sent her things about alleged fraud, but it was not her job to look at those.

230. In relation to the allegations concerning AC's PAs, MJ confirmed that the Claimant had sent her a lot of documents and she had left that choice to him, asking of the Claimant how they are relevant to the current dysfunction and that he was unable to say how they related.

231. MJ was challenged about the use of the word "difficult" about the Claimant in paragraph 88 of the report (see page 990):

"

Mr Iftikhar

88. The team dynamics and narratives of the majority of those interviewed appeared to be very much focused on the role of Mr Iftikhar. We understood from the interviews that Mr Iftikhar is trusted by most of his colleagues as being a competent surgeon. He was praised by one colleague for always being willing to see extra patients compared to most of his colleagues who were more boundaried. However, Mr Iftikhar was referred to by all those interviewed (with the exception of the middle grade staff) as being a difficult individual and central to the tensions in this team. His actions were described by more than one person as "an indiscriminate gunning [for us]" and it was thought that the only person to escape is Miss Ryan. In his role as the Gynaecology Lead, before Ms Dandewatte, he was described as "leaving everything to his secretary", and "picking and choosing" what he wanted to be involved in.

"

232. MJ confirmed that the word difficult is not in adverted commas it was a summary word from her as to what she heard that would make him a difficult individual. MJ confirmed that when she reviewed her notes of her interviews with Tilo Asmussen ("TA") (this issue is raised about what it is suggested was said at paragraph 7 of TA's witness statement) and Nora Vaitkiene ("NV") (at paragraph 9 of NV's witness statement) that they didn't say the word difficult, but they described behaviour that contributed to her use of that description word. She understood why TA and NV would raise it as an issue in their evidence, because they had not used that word about the Claimant.

233. MJ was cross examined about the changes made between the draft and final reports (at page 996 versus page 1076t), which related to what was said about the Claimant and MS. MJ confirmed that those came about after a general discussion with PL and PM where they asked if she could make the report clearer in respect of leadership. MJ confirmed that she thought this was

a reasonable request and addressed it by making the additions she then did in her own words to make her findings clearer about the issues around leaderships.

**Alleged Protected Disclosure 9: Meetings with Megan Joffe from Edgecumbe 10/7/17 and 11/9/17 and interview by telephone on 27/9/17.**

234. The parties had agreed that the meetings between the Claimant and MJ took place on 19 July 2017 and 11 September 2017 and that there was a phone interview on 27 September 2017.

235. The Claimant says that he made protected disclosures to his employer on these dates as it is averred that MJ was acting as the Respondent's agent.

236. The Claimant submits he provided MJ with information about all the allegedly fraudulent behaviour in the department, in particular over payments to AC and MS and his own arrest. The Claimant says he then sent supporting documents by email to MJ as set out in paragraph 33 of the Clarification document. The Claimant says the information provided tended to show that the Respondent, AC and MS were failing to comply with legal obligations to which they were subject namely the employees' own contracts of employment, implied terms of trust and confidence and the Overpayments Policy. The Claimant's case is that this information, in his reasonable belief also tended to show that a criminal offence may be being committed by AC and MS as under the Theft Act 1978 an employee may be guilty of theft by keeping salary overpayments and treating them as their own. Insofar as the Police arrest details were concerned, the Claimant says he was disclosing information tending to show a breach of legal obligation namely that the Respondent had wrongly involved itself in the arrest and questioning of the Claimant by the Police on false grounds which was unlawful and a breach of the implied term of trust and confidence. The Claimant says his belief was reasonable and made in the public interest as the Respondent's financial difficulties were having an impact on service provision to the public and also related to the spending of public monies.

237. The Respondent denies that any of the Claimant's interactions with MJ and/or Edgecumbe constituted protected disclosures. The Respondent denies that MJ acted as agent for the Respondent and further denies that it was her role to investigate the alleged overpayments to the Claimant's colleagues.

238. About this disclosure the Claimant is very brief saying at paragraph 83 of his witness statement:

"83. I was interviewed by MJ on 10.7.17 [amended to be 10.8.17] and 11.9.17 and had a telephone interview on 27.9,17. I sent MJ information by email to highlight my concerns that I was not liked because I was bringing effective management and accountability to O & G (p975a-b). I highlighted my concerns over AC's potentially fraudulent conduct over her job plan and the Trust's unwillingness to investigate (976a-d) and details of my arrest (977a-b)."

239. Considering the submissions of Claimant's Counsel on this matter … it is also addressed briefly … "MJ was sent the documents set out at para 33 of the amended clarification of claim. Central to this was the disclosure of the AC's job plan and Trish Dyer's email as discussed above. MJ was an 'agent' of R in that she was authorised by the employer by virtue of her instructions to receive information from C and others as part of her investigation into dysfunction. To that extent the disclosure to her was a qualifying disclosure under s 43C (2) ERA.".

240. Respondent's Counsel submits that … "Tellingly, C sought to use E in order to further prosecute his complaints against his consultant rivals by seeking to influence (or dominate) the E process with his 3 interviews and raising allegations of fraudulent behaviour p976a;".

241. As we have already found MJ was not engaged to investigate matters of fraud, and we note that matters concerning the Claimant's reasonable belief as to what he is disclosing and why it is in the public interest to make these alleged disclosures to MJ has not been specifically addressed in his witness evidence.

242. The Edgecumbe report is completed on the 15 September 2017 (see pages 978 to 1000). The agreed chronology confirms that it is on the 5 January 2018 the Edgecumbe report is then distributed.

243. Respondent's Counsel in his submissions asserts that the report identifies that the Claimant is … "a serious source of tension if not the centre and cause of it.".

244. We were directed to the following paragraphs of the report, 94 to 96 (page 991), 119 (page 994), 123 (page 995) and 126 to 129 (page 995).

245. Having reviewed these they do record findings such as … "… "the problem of Mr Iftikhar" which he may be exploiting. For example, Mr Iftikhar appears to concentrate a good deal of negative energy on those he sees as having less experience, power, authority confidence and status than himself. The problems this dynamic poses could be seen as a deflection from the real work of system redesign with which senior clinicians and senior management are inadvertently colluding." (paragraph 94, page 991).

246. Further at paragraph 95 (page 991) … "In summary, Mr Iftikhar presented himself as the party who has suffered most in the tensions and also as innocent of contributing to the tensions. At the same time he acknowledged that his colleagues found him challenging. Much of his narrative was about justifying his actions and raising questions about the way in which he feels he has been treated.".

247. We also note at paragraph 96 (page 991) how it is recorded that the Claimant was keen to talk about issues concerning himself more than issues related to team working, although he acknowledged there was a problem with it. Further that he consumed a greater proportion of time of the review, providing

a great deal of information and requesting two additional interviews. The paragraph notes that … "… This reflected what we had described to us about his behaviour in the Trust and the experience of those around him, especially Trust managers.".

248. At paragraph 119 (page 994) … "The competition, rivalry and lack of trust between Messrs Iftikhar, Shoukrey and Saddig is detrimental to the functioning of this service as a whole.". Further that the power struggle between MS and the Claimant seems central to the dysfunction. … "… together they form a destructive dynamic that is not working in support of a cohesive team and which inevitably has an impact on patient care. Additionally the shifting alliances between and behind these individuals makes for a highly unstable environment and an ongoing culture of a lack of trust.".

249. The dysfunction of the team is clearly identified and that it is a risk to patient safety (see paragraph 123 at page 995).

250. At paragraph 126 (page 995) … "… the breakdown in trust in this team is such that the likelihood of the team being able to achieve safe and effective working within its current make-up is very small.".

251. We also note paragraph 128 (page 995) says that given … "the previous mediation exercise failed to result in any observable change in behaviour we do not feel that this option would enable this team to develop the trust that is necessary to begin the process of repair unless it was carried out in a very different way.". Further it is observed that it is unlikely either the Claimant or MS would … "achieve behavioural change to an effective and sustained level" (paragraph 129, page 995).

252. About the fifth alleged detriment the Claimant says that the Edgecumbe Report findings were detrimental treatment of him by Paul Lear and Patricia Miller who commissioned the report and by Megan Joffe acting as the Respondent's agent.

253. It was initially submitted in oral closing submissions by Claimant's Counsel that this alleged detriment is on the grounds of alleged disclosures 6A, 7, 8 and 9. After instruction from the Claimant this was revised to 4, 5, 7 and 8 and that 1, 2 and 3 fed into the disclosures. It was confirmed that we do not need to decide if alleged disclosures 1, 2 and 3 are protected disclosures as it is not the Claimant's case that any of those were the grounds for any of the complaints still pursued.

254. We remind ourselves that:

f. Disclosure 4 was that to TH

g. Disclosure 5 was the letter to the GMC and also sent to PL

h. Disclosure 7 is the verbal disclosure to CAW

i. Disclosure 8 is the meeting with JD

255. In his witness statement (paragraph 38) PL says that … "I confirm that I commissioned the report from Edgecumbe.". He refers to his meeting with the Claimant with CAW and his follow up email. He confirms that … "I explained that the intention was to seek Edgecumbe's view on the difficult working relationships within the O&Gs consultants team…". Then at paragraph 39 … "There was no agenda or plan to dismiss MI when commissioning the Edgecumbe Report. My predominant concern was the potential that dysfunctional relationships had to compromise patient care…".

256. It was not put to PL or PM that they commissioned the report on the grounds of any of those asserted disclosures, nor that what was written in the report was on the grounds of any of those asserted disclosures.

257. It was not put to MJ that what she did or wrote was on the grounds of any alleged disclosures made by the Claimant.

258. About the Edgecumbe report the Claimant says (paragraph 84) … "I had welcomed the Edgcumbe Report as an opportunity for the matters between my colleagues and myself to be completely brought out into the open by an independent person and resolved. I was completely honest and open with MJ. At no point did I think that the findings of the review would be used against me.".

259. In cross examination the Claimant absolutely accepted that a situation had arisen which the Trust needed to address as to dysfunction in the department. Further, that everyone said the mediation had not been useful. The Claimant accepted that Edgecumbe was a sensible and reasonable step for the Trust to take.

260. From this evidence we accept the reasons of PL for commissioning the report and MJ's explanation for the report and its content.

261. We have considered carefully the submissions made by Claimant's Counsel on this matter.

262. Claimant's Counsel submits that … "the Edgecumbe findings make multiple detrimental findings which are based on the assumption that C continued to wrongly 'rake over old coals'.".

263. We are then referred to … "para 89 of the report ("continuing to raise issues that are apparently in the past"), para 90 ("little insight...moral high ground") para 91 ("Mr Iftikhar display signs of Chronic embitterment") and tellingly para 92 ("he was reported to raise issues that have already been dealt with and that exhausted management patience because if they did respond it started another round of correspondence")".

264. We are also referred to the fact that the report (at paragraph 92) expressly refers to PL's letter dated 10 November 2016 (at page 852).

265. In his submissions Claimant's Counsel says … "… There is specific mention of the letter from the Medical Director (para 92) at (852). There is no doubt that this letter is also based on the misconception that matters were resolved fully, long before.".

266. It is the Claimant's case therefore that this wrong assumption is the material influence, rather than the actual disclosures themselves, on what the report says.

267. It was confirmed in closing oral submissions that the Claimant holds EH responsible for creating this wrong assumption and that she did this on the grounds of a protected disclosure made by the Claimant, although as noted, which disclosure in particular, or any of the alleged disclosures for that matter being her motive (if this is what she did) was not put to EH. We also note that it was not put to PL in cross examination that he wrote the letter dated 10 November 2016 (at page 852) on the grounds of any alleged protected disclosure the Claimant made. For completeness we note that it was not put to MJ that what she wrote in the report was on the grounds of any of the alleged disclosures, including the alleged ninth disclosure that is said to have been made to her.

268. There is then chronologically matters around the Claimant's exclusion.

269. The Claimant describes at paragraphs 96 and 97 of his witness statement his actions after reflecting on the contents of the Edgecumbe report. He says he made a conscious decision to engage with MS and MNS. He describes how he met with SJ on the 26 January 2018 and that she confirmed that the Trust were fully supportive of his actions and she advised the Claimant to keep her informed.

270. The Claimant describes in paragraph 97 … "MNS, MS and myself had a positive first meeting on 28.1.18, out of hours in MS' office. We discussed all the issues which are believed to be root causes of the inter personal relationship between the three of us. I apologised to both of them if my efforts had come across as heavy handed and caused them distress. The meeting was very cordial, productive and we all agreed to put all the issues in the past and look forward to our harmonious future. We also agreed to roll out this dialogue to the rest of the team with the support of SJ. After the meeting we spent some time in the hospital for refreshments and the meeting concluded with friendly handshakes. I reported back to SJ that the meeting had gone well p1364-1368. Examples of our improved relationship as a direct result of my efforts including MNS ringing me from theatre for advice and assistance, demonstrating a renewed trust in me. Also, I referred a private patient to MS for advice, something which had not happened for several years. On 1.2.18 p1369 MS and I liaised over swapping some on call shifts, illustrating the improvement in our working relationship.".

271. By email dated 30 January 2018 the Claimant emails SJ stating… "Mr Siddig Mr Shoukrey and I met on Sunday 28th January. I thought you would be pleased to know we had a very constructive meeting." (see page 1365).

272. SJ replies (page 1364) … "excellent news can you share the outcome of the meeting so I can work on any support actions / required.

273. The Claimant then forwards the email from SJ to MS and MNS on the 30 January 2018 (page 1364) writing … "Please see email exchange below. Could you let me have your comments please on how best we should respond to Sophie. I am more than happy if you would like to reply directly to Sophie, but please keep me included in the email correspondence.". There does not appear to be a reply to this email either to the Claimant or any further emails to SJ from the Claimant, MS or MNS about the matter.

274. SJ was cross examined about this matter. She could not recall the conversation on the 26 January 2018, but she did not dispute what the Claimant says in paragraph 96 of his witness statement.

275. It is submitted by Respondent's Counsel that … "The fact that C could see how serious matters were and his purported rapprochement with MS and MNS on 28/1/18 was no doubt motivated with a sense of anticipating where matters were going. Tellingly, no such rapprochement was identified with AC nor BD;". We note that there is no witness evidence from the Claimant to support that he did or was going to try to do so with AC and BD.

276. PL accepted in cross examination that he had been appraised of an attempt in reconciliation with MNS and MS. About it he said that he didn't think the swapping of duties represented anything other than a swapping of duties. Also, that it was when he and CY went to see the Claimant about the Claimant's thoughts as to exclusion that they had a direct conversation where the Claimant raised he had managed to talk to his colleagues and that everything was fine and they were getting on fine and see a future. PL confirmed that just before he proceeded to inform the Claimant about being excluded, he went with CY to see MNS and MS and they invited them to join a meeting with them and the Claimant to see how they could go ahead. PL confirmed that MNS and MS both completely declined to come. PL said that therefore he was concerned as to the validity of that collaboration.

277. CY confirmed in cross examination that she recalled that the Claimant suggested that they should approach MS and MNS and PL decided to do that. Her recollection as to when the Claimant raised this was at the exclusion meeting.

278. PL was asked in cross examination why it was at that point of time the Claimant was to be excluded. PL replied that it was because the decision had been reached by execs and non-execs that we needed to proceed with a HR

investigation to look very closely at the working relationships and whether there was a possibility of remediation, and that it was driven by HR.

**Alleged Detriment 6 – The Claimant's Suspension on 2/2/18 at 12:30pm**

279. The Claimant says that PL's decision to suspend him on 2 February 2018 at 12:30pm was detrimental treatment because of his protected disclosures.

280. It was submitted in closing submissions by Claimant's Counsel that this alleged detriment is on the grounds of alleged disclosures 5, 6, 6A, 7 and 8.

281. We remind ourselves that:

a. Disclosure 5 was the letter to the GMC and also sent to PL

b. Disclosure 6 is the letter to PL

c. Disclosure 6A is the verbal disclosure to PM

d. Disclosure 7 is the verbal disclosure to CAW

e. Disclosure 8 is the meeting with JD

282. It was not put to PL that he suspended the Claimant when he did on the grounds of any of those disclosures. Respondent's Counsel also submits that it was clearly… "the decision of the Board based on their assessment of the E report on 31/1/18 p1374. PL conveyed the news p1379.".

283. The minutes of the Board meeting record (at page 1375) its decision as … "The meeting endorsed and approved an independent investigation to be carried out on Mr Iftikhar, and that he be excluded during the course of the investigation with immediate effect.".

284. We have therefore considered carefully the submissions made by Claimant's Counsel on this matter which submit that the decision of the Board is not recorded in detail in the minutes and further that … "There is no mention here of the Board being the sole decision maker and the ET is entitled to draw a strong inference that the Panel were heavily influenced by the representations made to them by Pl but more likely MW / and or PM. PL's evidence in XX was this was "very much driven by HR". The minutes do seem to evidence the involvement of MW and or PM as central to the issue and the process…".

285. PM was questioned about this in cross examination. PM confirmed that in the NHS when an investigation is going to start it is considered whether the investigated remaining at work raises a patient safety issue or could interfere with the investigation. PM confirmed that when the Board discussed the options they saw some of the comments made by psychiatrist (MJ) and that "we thought

collectively" that the Claimant would interfere with the investigation and that people would not speak openly, so the Board thought he could interfere.

286. PM did clarify that when she referred to "we" (which is also how she referenced the matter in her witness statement (paragraphs 23 and 24)) she meant the Board's decision and that it was the Board's decision, not hers, although she did agree with it but she was not asked for her view on this decision by them.

287. During the cross examination of the Claimant about his exclusion he did agree that if he is the eye of the storm then it is appropriate to take him out.

288. It was not put to PM that her actions in this matter were done on the grounds of any of the Claimant's alleged disclosures.

289. We find that the decision to suspend (or exclude) the Claimant was made by the Board of directors at the meeting on the 31 January 2018.

290. PM was cross examined about her involvement in upholding the suspension, but it is not alleged that she upheld the suspension on the grounds of any of the Claimant's alleged disclosures.

291. PM explained that after the recommendation that the Claimant's exclusion be lifted (as the Claimant had appealed his exclusion), she had sought the views of the divisional leadership team (RJ and SJ, see page 1448) as they would be responsible for the service and would look at the broader view.

292. As is recorded in the agreed chronology (paragraph 172) on the 3 May 2018 RJ and SJ write to PM confirming inter alia that after meeting the consultants, all of them except one have confirmed that the Claimant's "exclusion has markedly changed the dynamics of the department for the better" (see page 1452). *One of the consultants felt that there is still not a functioning team.".*

293. PM decided that the exclusion should not be lifted after considering the views relayed back to her.

294. There is no suggestion that PM is materially influenced by any disclosures the Claimant says he made.

295. What the Claimant challenges in the allegation he makes, as articulated in the agreed list of issues, is that the decision of PL to activate that exclusion on the 2 February 2018 at 12:30 was because of the alleged protected disclosures.

296. As recorded in the agreed chronology (paragraph 166) on the 2 February 2018 the Claimant is given a letter confirming that the Respondent is instructing

an "independent HR professional" (Richard Boniface ("RB")) to consider inter alia the breakdown in relationships between the Claimant and his team / alternatives to his dismissal and whether absent such 'feasible' steps the Claimant should be dismissed (see page 1379).

297. The letter records at page 1380 that:

"

An independent HR professional will be instructed by the Trust to report in a short period of time on:-

(1) The issue of the breakdown in the functioning of the team, and specifically working relationships between yourself and the team.

(2) Whether there are any feasible steps that can be taken short of recommending the termination of your employment that would address the serious state of matters in the team.

(3) If no such steps can be identified, to consider making a recommendation of termination of your employment with the Trust.

"

298. In cross examination PL was asked after all the previous reports, why have another and he confirmed that it was the thinking of the Trust Board at the time, the non-execs were particularly keen to get issues resolved, and they wanted to be clear that if a decision was made it was the right one achieved as independently as possible.

299. The Claimant is interviewed by RB on the 19 March 2018 and the notes are at pages 1568 to 1580. These notes are an agreed set of notes, signed by the Claimant and he confirmed in cross examination that he had added detail as tracked changes (it is shown as underlined text in the notes).

300. The notes support that even so far as the Claimant is concerned the issues in the department are not on the grounds of his alleged disclosures:

Paragraph 2.4 "… MI said that when he was CD they initially worked effectively as a team with no problems. MI said he should have been softer with them and listened more as it got out of control when MNS clinical concerns started and he passed the maternity concerns on to AR as he is not an obstetrics specialist."

Paragraph 2.11 about him undertaking the CD role "…MI said maybe he did not have the training or the personality to do that role.

Paragraph 2.23 … "MI said he thought there was a lack of trust between all of them. MI said how they build that trust he could not say."

Paragraph 2.62 about his colleagues … "MI said they were alright and they had supported him to be CD. MI said it was his fault but he had no training and put

polices and processes in not as he should have done. MI said WW had said a culture of openness is needed to be promoted. MI added he wished he had not become CD."

301. The Claimant confirmed in cross examination about the interview notes in relation to paragraph 2.3 that what he meant by letting them down as CD was by being too aggressive in implementing the Trust policies, he maintained he didn't do anything wrong but that he was probably too harsh, but was not backed by management.

302. On the 11 May 2018 the Claimant is invited to a panel hearing on 31 May 2018 (see page 1454).

303. It was suggested by the Claimant that the decision about his dismissal was inevitable because the panel had already been booked. PM responded to this in cross examination by confirming that in most cases where an investigation is ongoing they would always set up a provisional date for a panel, because when Doctors are involved they cannot cancel any clinical commitments within 6 weeks, so to make sure there is not a delay they would pencil in a date with the panel. We accept this explanation.

304. On the 18 May 2018 RB's report is completed (see pages 1459 to 1482).

305. Then on the 25 May 2018 the Panel hearing is postponed due to the Claimant's ill health (see page1640).

306. Chronologically there is then the involvement of the National Clinical Assessment Service (NCAS). On the 12 June 2018 they write to JD in respect of the alleged non application of MHPS (see page 1652). We note here that the non-application of the MHPS is no longer pursued as an issue by the Claimant.

307. About what the NCAS say in their correspondence to Mark Warner dated 12 June 2018 (at page 1664), was explored in cross examination as it suggests the decision has already been made to dismiss the Claimant for SOSR:

"

> We discussed the long history of this case and the two reports from Edgecumbe and Richard Bonniface. The Trust intends to bring an end to Dr 20480's employment on some other substantial reason in that he is highlighted in the reports as one of the main causes behind the dysfunctional relationships within the department and the major concern is that dysfunctional teams are a potential patient safety risk and can delay necessary changes to systems. Dr 20480 understandably refuted this view when I spoke with him, and considers the Trust has been misled by misinformation and misunderstanding within the department.

"

308. About this CY confirmed that what the letter records is not accurate.

309. PM also did not agree the letter was accurate confirming that there are number of in accuracies, her surname is wrong, Melanie Harris was not there

and that they did not talk about their express wish, but talked about the report and the possible outcome to dismiss.

310. We accept the Respondent's evidence on this. We also note that none of the attendees at the NCAS meeting were part of the panel that took the decision to dismiss the Claimant.

311. It is on the 19 July 2018 that the Claimant is informed there will be a new panel hearing on 23 August 2018 (see page 1674).

312. It is then on the 15 August 2018 that the Claimant raises a detailed grievance (see pages 1682 to 1739).

313. Respondent's Counsel submits about this that the Claimant … "has a personality so that he finds it difficult to let go of matters and at times has a tendency not only to hold onto the past, but to bring it back to life in a negative and destructive manner. Call it 'raking' over matters, 'dredging' up the past, the evidence points conclusively to this. C's ascendancy to the CD role gave rise to the extraordinary letter and grievance to the CEO in 2012 going back to issues in 2012 p252. C's grievance in this case suffers from the same problem of C being incapable of moving on.".

314. The Claimant was cross examined about this grievance. He accepted it went back to matters in 2006 and that in 2018 he was dredging up matters that were 10 years old. He agreed that his CEA appeal was successful so that is why he did not raise a grievance about that at the time. He agreed that he did understand JD's rationale for what she did about the grievance.

315. On the 21 August 2018 AH writes to the Claimant to confirm that his grievance has been shared with the panel and that the further documents referred to as being released on request should be provided by the 31 August 2018.

316. We then chronologically get to the alleged detriment eight.

**DETRIMENT 8 - The Claimant avers that the Respondent's failure to deal with his grievance before the disciplinary hearing (10/9/18), was detrimental treatment because of whistleblowing by Julie Doherty.**

317. On the 10 September 2018 JD refuses the Claimant's application for an adjournment of the Panel Hearing pending resolution of the grievance (see pages 1751 to 1752).

318. It was submitted in closing submissions by Claimant's Counsel that this alleged detriment is on the grounds of alleged disclosures 5, 6, 6A, 7 and 8.

319. We remind ourselves that:

a. Disclosure 5 was the letter to the GMC and also sent to PL

b. Disclosure 6 is the letter to PL

c. Disclosure 6A is the verbal disclosure to PM

d. Disclosure 7 is the verbal disclosure to CAW

e. Disclosure 8 is the meeting with JD

320. It was not put to JD in cross examination that this was her motivation for what she did.

321. JD provides her reasons for what she did in paragraphs 14 to 21 of her witness statement.

322. We note from that in particular paragraph 21 … "Moreover, the decision which I made about the handling of MI's grievance was not because he was a whistleblower. I made my decision because we needed to bring the panel hearing process to a conclusion without further delay. It had been over three months since the original panel hearing had been arranged and it had been postponed twice. I would have made the same decision in respect of anybody else, given the amount of time which had elapsed, irrespective of whether they were regarded, or regarded themselves, as a "whistleblower".

323. In cross examination JD confirmed that what was in her mind about the grievance the Claimant submitted was the dysfunction of the team. She explained that the main essence was dysfunction, no one was disagreeing there was dysfunction of the team, the grievance was going to be heard just not at the same panel. JD confirmed that points 1 to 17 of the grievance refer to historical issues, there was dysfunction and it was how they move forward. Her decision was 18 to 23 were the relevant issues for the hearing panel. JD confirmed that whistleblowing was not in her perception.

324. JD also confirmed in cross examination that she did not accept that the management case was dismissal but that it was whether dismissal was the appropriate action or whether there were any alternatives. JD confirmed that she presented the case as she found it and the decision was open to the panel, there was no predetermined outcome.

325. We have therefore considered carefully the submissions made by Claimant's Counsel on this matter. In short it is submitted that the exclusion of the material adversely affected the outcome at the Claimant's panel hearing.

326. About this we would note that there has been no challenge put in oral evidence as to what particular documents should have been referred to by reference to those actual documents and what difference such documents would have made to the outcome. If the documents relevant to the grievance were important then we would have expected copies of those to be before us and for the Claimant to have provided further copies with his appeal against his

dismissal, and they were not. Further, we note that the grievance was heard before the appeal (the grievance outcome is not challenged by the Claimant), so the Claimant had the outcome of that to assist the appeal if matters were found to be relevant or upheld.

327. We accept the explanation given by JD for doing what she did.

328. It is also asserted by the Claimant that there is a predetermination of the decision to dismiss as the Respondent had already hired a third consultant, when only two were needed at that time. CY was asked about this in cross examination and confirmed that they were appointing 2 consultants but had 3 appointable candidates, and there were recruitment difficulties for middle grades. The possibility to not lose an appointable candidate didn't want to be missed and the candidate was taken in as middle grade rota and to cover for the Claimant's on call while he was not there. We accept this explanation and the Respondent's evidence on this matter.

329. It is submitted by Claimant's Counsel that there is a concern about the fairness of any dismissal because as was established during cross examination the … "new MD AH had twice visited the O and G department attended meetings run by Jo Hartley…" and had therefore observed the department functioning without the Claimant present. Claimant's Counsel submits that … "AH was also forced to accept that this that this interaction meant that he could not be an impartial chair of the panel.".

330. We have considered carefully what is submitted and what AH said about this matter in cross examination. AH said that he had not spoken to them about the panel hearing and that he had sat in meetings they held under Jo Hartley, as she chairs the governance and general business meetings, which in his view and opinion were functioning well. He confirmed that he had not spoken to the consultants individually within the context of the meeting. He confirmed that he had asked how the department was functioning and getting on, and that he attended two such meetings probably in August or September 2018.

331. He explained that part of his role as medical director was to visit all the areas and it would have been strange for him not to visit the O&G department. He viewed attending such meetings as being part of his job at the Trust. He explained that one of the first things for him to do on arriving (he had commenced the role on 2 July 2018, see paragraph 1 of his witness statement) was to get around to see departments. It was not individual discussions with people, he joined the meeting and left the meeting and at that time he didn't remember if he had received all the pre-material for the panel hearing. He confirmed that attending in that way was part of his role as Director.

332. He agreed that he was not observing dysfunction. He did not agree that he should have stepped back from the panel only agreeing that he understood the point Claimant's Counsel was making being that it may have been inappropriate to chair the panel.

333. All AH agreed therefore was he understood Claimant's Counsel's point. AH was not acting as a witness at the panel hearing and there is no evidence that what AH knew he imparted to the other panel members (AO was not cross examined about this matter, despite her evidence coming after AH's). There is no evidence presented to us that what AH did had any negative sway on matters. We accept what AH says and that he was carrying out his role as a Director.

334. On the 27 September 2018 a new panel hearing date is set for the 2 November 2018 (see page 1754).

335. The Panel hearing then takes place on the 2 November 2018 and we have been referred to the timetable (page 1781) and the notes (page 1783 to 1817). The Claimant does not attend due to ill health but is represented at the hearing and has submitted a statement of case dated 26 October 2018 (page 1778).

**DETRIMENT 7 – Disciplinary outcome following the Boniface report was predetermined and this was detrimental treatment by Julie Doherty and Paul Lear**.

336. It is the Claimant's alleged seventh detriment that the disciplinary outcome following the Boniface report was predetermined and this was detrimental treatment by Julie Doherty and Paul Lear.

337. The Claimant avers in the agreed list of issues that Mr Boniface's true role was to provide a report that would wrongly lead to the conclusion by a Panel that the Claimant should be dismissed. It is not the Claimant's case that the Panel deciding the matter were themselves party to this unlawful purpose. The Claimant will rely on the Supreme Court's judgment in Royal Mail Group Ltd v Jhuti [2019] UKSC 55. The Claimant's case is that the Boniface Report's singular focus on the Claimant as the central cause of alleged dysfunction is at odds with the broad findings of the Edgecumbe report which ascribes fault to alleged dysfunction much more broadly and in far more complex terms. The Claimant will say that Richard Boniface therefore did not investigate the matters leading to the breakdown of the relationships, and simply asked whether or not matters in the department would be improved if the Claimant was dismissed. The Claimant avers that the Respondent had already made the decision to dismiss the Claimant and this was because of his disclosures 1-10 as set out above.

338. The Claimant has confirmed that the individuals who the Claimant says were responsible for his dismissal by reason (or principle reason) of whistleblowing were Paul Lear, Julie Doherty, Mark Warner and Patricia Miller.

339. The Respondent denies that the Boniface report and the "disciplinary" panel decision was "engineered by management" to secure the Claimant's dismissal. The Respondent says that neither the authors of the Edgecumbe report nor Mr Boniface made the decision to dismiss the Claimant.

340. We would observe that what the Respondent submits about the authors of the Edgecumbe report and Mr Boniface is correct factually, they did not make the decision to dismiss the Claimant.

341. It was submitted in closing submissions by Claimant's Counsel that this alleged detriment is on the grounds of alleged disclosures 5, 6, 6A, 7 and 8.

342. We remind ourselves that:

a. Disclosure 5 was the letter to the GMC and also sent to PL

b. Disclosure 6 is the letter to PL

c. Disclosure 6A is the verbal disclosure to PM

d. Disclosure 7 is the verbal disclosure to CAW

e. Disclosure 8 is the meeting with JD

343. It was not put to PL of JD that they were responsible for his dismissal by reason (or principle reason) of whistleblowing nor on the grounds of any of those disclosures.

344. It was also not expressly put to PM either, but when asked about it being her private desire for the Claimant to be dismissed she denied this, saying it was relationship breakdown and that people whistle-blow all the time, not reason for dismissal.

345. Evidentially it was not PL's, JD's, MW's or PM's decision to dismiss the Claimant. This was the decision of the panel chaired by AH. It is the Claimant's case that the panel were misled to do it.

346. Respondent's Counsel submits that … "C's case implied RB was a con-conspirator when no such case was put to RB. The allegation (if it were ever explicitly made) is wholly without merit: RB was an independent professional dealing with matters on their merits…. Manifestly it is an allegation of no merit: nothing was pre-determined; RB was instructed, and RB reported; a panel was seised of matters; the panel decided C's fate. Nothing was pre-determined.".

347. We have considered the matters that RB was cross examined on. He confirmed that he resented the idea that he had been lent on to give an outcome. He would never be led in that way. As to the use of the word feasible in the TORs, he did not agree this should have been "possible". He confirmed that it was to seek solutions that where balanced and when looked at objectively would have a sufficient chance of a positive sustainable outcome, and not leave the Trust with a dysfunctional department. Feasible he said means a chance of success. RB also did not accept that his report was saying it would be "perverse" to keep the Claimant.

348. We have also considered what the Claimant agreed about the RB report in cross examination.

349. The Claimant agreed that the report's key findings say there is a breakdown and a non-sustainable breakdown. The Claimant was asked if he accepted that it recorded, he was not trusted as a colleague and he replied yes, and that he had replied there is a lack of trust amongst all of us.

350. The Claimant accepted that as of now he would not trust AC or MS with non-clinical work matters. He would trust BD, and could work with MNS … "If he can get out of the box where he blames me for the restrictions". He was asked if (by reference to page 1464) it was reasonable for colleagues to hold a lack of trust in him just as he has a lack of trust in them, and the Claimant agreed of course, if that is their opinion.

351. The Claimant agreed that the dysfunction would have continued, he said unless mediation was arranged.

352. It was put to the Claimant … "If you had gone into mediation with AC a key part would have been your accusation of lack of probity". He confirmed … "could not have a mediation without it.". The Claimant confirmed that this would also need to be addressed with MS.

353. It was put to the Claimant … "you accept when faced with the Boniface report and the conclusions looking at in May 2018, you accept the trust were entitled to have this put to panel". … "Yes, that was the process given". Also put … "It should go to panel?" … "that was the next step. It was put … "accept proper course to take?" … "That was the path given to me and Boniface and we all had to get there now as that is the conclusions he has reached.".

354. From these facts we do not find that Mr Boniface's true role was to provide a report that would wrongly lead to the conclusion by a Panel that the Claimant should be dismissed.

**The dismissal**

355. The letter of dismissal dated 12 November 2018 from AH is at pages 1819 to 1822 of the bundle.

356. As Claimant's Counsel's written closing submissions say… "The panel was to all intents and purposes independent, save for the news that Prof Hutchison had first-hand experience of the department as stated above. It was not put to them that they dismissed because C blew the whistle. That was not C's case."

357. AH deals with the reasons for dismissal in paragraphs 11 to 20 of his witness statement.

"11. After the hearing we discussed our conclusions. We agreed that the breakdown in relationships within the O&G team was irretrievable, based upon what we had seen in the various external reports and heard from the witnesses…"

12. We considered that the report from Mr Boniface was particularly compelling and that it was consistent with earlier reports which also identified a fundamental breakdown in professional working relationships within the department. Importantly it included interview notes from a variety of members of the O&G team, some of whom had left the Trust …".

13. Mr Boniface was clear that he had not been led by the Trust in reaching his conclusions (2.48, 1794). He said that he had considered whether or not the breakdown in relationships was due to race or other protected characteristics but could find no evidence to support this (2.44, 1793). He was clear that *"It was about people not getting on, regardless of race or religion or background, but it was dysfunction and something had to change"*.

14. Paul Lear, the former Medical Director at the Trust, explained that the reasoning the Trust had in seeking the report from Mr Boniface was that after reading the Edgecumbe Report it was his view that all roads led back to MI, but that the Trust had wanted to get a further external HR view *"to identify whether that was really it"* (3.64, 1800)…..

15. MI's consultant colleagues who were called by management confirmed that since his exclusion the dynamic in the team had dramatically improved, even though they had been short staffed. Mr Siddig spoke about moving from a situation where MI was not open and did not consult his colleagues but would "go behind people" (5.4) such that honesty and trust had been lost, to a situation where they now felt "comfortable and every morning wake up and are ready to come to hospital but they didn't feel that before" (5.34).

16. I could understand Mr Siddig's feelings since during my 25 years working as an NHS consultant I had never before come across a situation in which consultants within a team were repeatedly referring each other to the GMC. This is extraordinary and to my mind said a lot about how the department had been run.

17. Mr Shoukrey said that the department had turned around "780 degrees" and the team now "supported each other and communicated" (6.10). His description of the clinical governance and MDT meetings as now being a 'fair environment' which was "focused on learning and being a team, which was something they hadn't felt for a long while' was in stark contrast to Audrey Ryan's description of a "truly bruising' experience when she had been asked to review the case notes of her fellow consultants.

18. Miss Dandawate described the fact that she had previously felt undermined whereas since MI's exclusion she "didn't feel intimidated and she felt for the first time moving towards a positive department' (7.15).

19. Having heard this evidence, we as a panel concluded that Mi's presence in the clinical team had led to an irretrievable breakdown in relationships which was both serious and very likely to adversely affect patient care and safety.

20. We considered whether there were any feasible steps short of dismissal which we could take which would address this serious state of affairs. In particular we considered whether a further round of mediation might lead to a resolution but detected no enthusiasm amongst the team for this approach. We concluded that there were no feasible alternatives and that the only appropriate outcome was the termination of Ml's employment. As a panel this was our collective and unanimous view."

358. In cross examination AH confirmed:

a. That he had a handle on the cause of dysfunction in this case, and that the Edgecumbe report and the Claimant's statements explained a lot of that quite clearly.

b. He had experience of dealing with a similar situation of dysfunction in a small department when he worked at Manchester.

c. About the Claimant's grievance he confirmed the panel queried the extent of its inclusion. He didn't think the issues were directly relevant to their concern which was if relationships could be put back together. The fundamental question for him was patient safety and how quickly it could be sorted with a way forward.

d. As to his understanding as to whether matters sorted or not being important (i.e. the AC PA matter), he confirmed that it was a factor, the main issue though was patient safety in the department.

e. He was asked why he did not just let the Claimant explain his case in the round and confirmed … "Because the issue for the panel was the urgent and immediate issue of patient safety in that department and the matters in 1 to 17 go back many years would not help us to address that question and important to recognise in departments where consultants are at war with each other patients suffer and many examples of that, the historical examples of that were relevant but were they the primary purpose, I would say no.".

f. In response to the suggestion that he dismissed mediation out of hand he said … "No that is completely incorrect, would not dismiss out of hand. The mediation process is confidential it is without prejudice it is trying to create a code of conduct that members of team agree but if don't adhere to it then the mediation process has failed. Easy to look back and say it wasn't done properly, doesn't mean right, nothing here in what you highlighted to suggest not done properly, does say not followed up but it would not be followed up by Trust as it is a matter for the team and for the Claimant to take forward.".

g. As to the recommendations in the Edgecumbe report not being attempted first he said… "It is easy in retrospect to look at individual points in time looking at reports and documents and not to be aware of the continuing unrest on an ongoing basis that makes it extremely difficult to implement things. Trying to implement things that sound sensible, it is extraordinarily difficult if open warfare going on.". … "This is a general melt down in the unit which it was clear to me would not be able to be put back together again in a time period that would be appropriate.".

h. As to the Claimant's exclusion AH did not accept that once the Claimant was excluded it was harder for him to come back to work. He agreed that relationships with colleagues is usually the reason for exclusion.

i. As to placing reliance on the consultants that are against the Claimant, he did not agree … "No I don't accept that, it was not only those four we were asking about working relationships and how now, if we had heard still infighting different matter, when I arrived at Trust I sat in meetings to see how they were functioning in my view was not perfect but it was functioning at a safe level and confirmation of statements is what see for myself.". The rest of this line of questioning has been referred to above.

359. About the recommendations in the Edgecumbe report it was not accepted by the Respondent that none had been actioned. Katherine Jordan (KJ) was asked about this and did not agree with the statement that nothing was actioned, referring to how she was … "a party with job plans for consultants and met with all consultants and Claimant through that period, all over that, we did 141 and 143 [the recommendations], myself and Richard Jee, trying to standardise across, so they were reviewed"…. "also, para 147 was done with Hilary Maxwell … also, … we did involve the QI team with the job planning team and had an away day, invited all consultants and the juniors joined us as well...".

360. We accept the evidence of AH on these matters.

361. AO deals with the reasons for dismissal in paragraphs 21 to 25 of her witness statement:

21. I was confident at the conclusion of the panel hearing that I had been provided with sufficient information in the bundle and from the testimony of witnesses to reach an independent and unbiased opinion. I was satisfied that, having heard the evidence of Mr Boniface and the witnesses, I was not being misled in any way.

22. The panel members and I discussed our views on the case and the decision to be made. We agreed that there was a consistent narrative, both in the Boniface Report and evidence at the hearing, that working relationships in O&G had broken down, and MI was at the centre of that breakdown. The series of poor relationships within the team seemed to 'emanate' from him, and O&G had been functioning better while MI had been absent.

23. Given the break down in working relationships, during the panel discussions I was vocal about the fact that I felt it would be incredibly damaging to have MI return to O&G. In the past I have dealt with dysfunctional teams of consultants where attempts to resolve matters and mediate had been ineffectual, therefore my view was coming not from a theoretical place, but practical experience. In my experience, there is often one person - one consultant — who is the common focus or centre of the issues. My view was that removing the person at the centre of the issues does not necessarily make a team perfect, but could make it better - it would become possible for the team to function again.

24. The panel members and I gave a lot of thought to alternatives to dismissing MI. We discussed what it might look like - whether mediation was an option; what support MI might require; what alternative roles, including non-clinical roles, there could be. MI did not seem to have insight into his own faults or involvement with the O&G break down in relationships, or a willingness to change, so mediation was unlikely to be effective. The panel and I were concerned that MI, even in a different role, could have a negative impact on O&G ~ a team that was functioning better but still fragile.

25. From my perspective, there was no alternative to dismissal. The panel members and I agreed that MI would be dismissed."

362. In cross examination AO confirmed:

a. She felt that future mediation was unlikely to gain further traction. Further, that they did explore ways in which mediation could be undertaken differently and whether the use of different mediation companies and styles of mediation would be helpful. Also, that mediation was not the only alternative to dismissal … "in panel deliberation we spent a considerable time on could we bring the Claimant to a non-clinical role could we change role in department considered a number of other ideas, not just mediation, reason we considered mediation would not benefit was there was a lack of trust.". … [Mediation] … "requires people coming in with no agenda and seeing it as a neutral act, not an agenda, so whole host of reasons why a mediation not be successful.".

b. As to asking those who have been aggrieved creating a biased outcome, AO did not agree … "I don't think that is a fair assessment, everybody in the team owe a duty of care to, and all are having an unpleasant experience and causing them distress, equal duty of care as to the Claimant, and everybody.". It was then put it depends on those giving the information to you, that they didn't have an agenda … AO replies … "But team were 15 people interviewed by Boniface, some not there anymore and they had no axe to grind, message consistent about dysfunction in the team, this is a dysfunctional team and what options are there." … "We had witnesses in front of us and we had witnesses from Boniface report, 15 people for a 360 report, is minimal number not based on who was in front of us but based on those assessments.".

363. AO confirmed to the tribunal panel about the reason for dismissal that … "from the Boniface report, there did not appear to be a reasonable alternative, but everything I had treated with a degree of caution, keen to ensure consider other options. Factors that swayed me were not just verbal evidence, but written submissions before that, spoke to lack of trust and confidence in team not just consultant team, spilling out to other members, toxic culture, difficult to turn around unless something turned around. Not just theory but personal experience, another one-person vortex, turn around being a completely difficult task recruiting etc, to release toxic bit enables other relationships to mature, take out link allows trust and confidence. What we heard clearly was department was functioning in a better way, now a culture on learning on incidents and not a culture of blame and criticism and that for me was what was going to turn around for patient safety.".

364. We accept the evidence of AO on these matters.

365. The Claimant did accept the reason for dismissal in cross examination. He was asked if he accepted AH and the panel acted in a professional way and confirmed … "I wasn't there but from what I have read I can't blame the panel for any detriment to me as they based on what they had and heard.". He confirmed that … "They did not dismiss me because I am a whistle-blower.". He accepted that the reasons in the dismissal letter were the reasons they terminated his employment. Further, the Claimant accepted in cross examination that given the state of the O&G something needed to be done and that choosing him could be legitimate if it was done fairly and properly.

366. The reason of the panel is therefore the irretrievable breakdown in relations.

367. To further support this reason Respondent's Counsel referred us in his written submissions to the evidence of the Claimant's supporting witnesses. Claimant's Counsel also reminds us to take into consideration the evidence of the Claimant's supporting witnesses.

368. We have considered their statements and note from them:

a. V Leonard, paragraph 18 … "I was aware of the growing animosity towards Mr Iftikhar from MNS, MS, AC and BD during Mr Iftikhar's time as CD as he introduced changes."

b. N Vaitkiene, paragraph 3 … "After joining the Trust, Mr Iftikhar informed me in a matter-of-fact way that there were deep divisions within the consultant body. He did not blame anyone, however he said the problems had been ongoing for several years and voiced his frustration that the Trust management was unable to provide support in resolving the issues. This resonated with comments of all other colleagues about the Trust management being unhelpful. Audrey Ryan also briefed me on the issues in a neutral way."

c. M Perumalla, paragraph 13 … "It seemed to me that MS, AC, BD and MNS had their own personal reasons for wanting Mr Iftikhar to be removed. Mr Iftikhar was trying to bring about positive changes as CD which they were unhappy about. They joined forces to seek his removal as CD and later dismissal when they were eventually given a platform to voice their ire at the panel hearing determining Mr Iftikhar's dismissal."

d. C Pappin, paragraphs 5 and 6 …. "5. I was aware of the issues between Mr Iftikhar and Messer's Shoukrey and Siddig, Miss Dandawate and Miss Cooper. The problems seemed to take a downward turn when Mr Shoukrey's medical practice was restricted in 2013. Mr Iftikhar and Ms Ryan were blamed heavily by Messrs Shoukrey and Mr Siddig for the restrictions. I felt very strongly that the concerns over Mr Shoukrey's clinical ability, and his lack of insight into this, were totally genuine, and that this was not an individual witch hunt started by Mr Iftikhar. It seemed to me that Mr Iftikhar was very much taking the blame for Mr Shoukrey's restrictions, because he was CD, when both the departmental director and medical director were involved too." … "6. My personal ability to work clinically was not affected by the issues with relationships, however clinical meetings certainly became tense and awkward, the political atmosphere was not conducive to good teamwork, or cohesive decision making, and the department was never working as one. It felt as though the department was divided. There were many difficult personalities within the department, with more than one person with little or no Insight.".

e. F Shah, paragraph 6 … "The O & G was a dysfunctional and disjointed department. Staff were not happy, nobody seemed to get along and there was a high level of sickness absence. There were underlying issues that should have been dealt with by management. This is the reason why this was not my first choice for Consultant position and I withdrew as soon as I had another job offer."

369. This witness evidence does support there being dysfunction, division and animosity within the O&G department, that has broad negative consequences.

370. We also accept what Respondent's Counsel submits about this evidence that … "i) nearly all witnesses confirmed the deeply unsatisfactory nature of the dysfunction in the OGD: NV even records that C informed her of the "deep divisions" within the OGD consultant body and (ii) the dysfunction stemmed from interpersonal relations as opposed to any identified w/b concerns e.g. Perumalla para 13, Pappin para 6 and Shah para 6.".

371. We also note what V Leonard says about being aware of the growing animosity towards the Claimant as he introduced changes while CD, so not because of his alleged disclosures, and paragraph 5 of C Pappin that the … "problems seemed to take a downward turn when Mr Shoukrey's medical practice was restricted in 2013", so again not because of the Claimant's alleged disclosures.

372. Chronologically the agreed chronology then confirms the Claimant appeals his dismissal (23 November 2018) submitting a statement of case (pages 1839 to 1844) and a further detailed statement of appeal case (page 2185). In January 2019 there is the outcome of the Claimant's grievance (page 1952) by Neal Cleaver (page 1882). On the 14 January 2019 the Claimant objects to PM being appointed as the chair of Appeal Panel (see page 2201). On the 13 May 2019 is the appeal against the dismissal (notes page 2477) and on the 16 May 2019 the appeal is dismissed (page 2491).

373. The Claimant raises no allegations against the appeal or grievance processes.

**THE LAW**

**Unfair dismissal (sections 94 and 98 of the Employment Rights Act 1996)**

374. Pursuant to section 94 of the Employment Rights Act 1996 ('ERA 1996') an employee has the right not to be unfairly dismissed by their employer. Whether or not an employee has been unfairly dismissed is determined in accordance with section 98 ERA 1996:

> ***(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***
>
> ***(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held….***
>
> ***(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.***

375. It is for the Respondent to prove on the balance of probabilities, the sole or principal reason for dismissal. In considering fairness the burden is neutral.

376. We were referred to the case authority of ***Royal Mail Group v Jhuti*** (the judgment of the Court of Appeal and in particular paragraphs 23 to 25), by

Respondent's Counsel as a helpful legal summary of matters to consider when determining a complaint of unfair dismissal. We have also been referred to the Supreme Court decision on this case in respect of the automatic dismissal complaint, section 103A ERA 1996 (and return to this below).

377. We were reminded of ***BHS v Burchell [1978] IRLR 379*** and ***London Ambulance Service NHS Trust v Small [2009] IRLR 563***, when considering a reasonable procedure, and that as directed by Respondent's Counsel pursuant to in ***Perkins v St George's Healthcare NHS Trust [2005] IRLR 934*** the same factors can be considered where there is a dismissal for SOSR. Respondent's Counsel submits that … "The Court of Appeal has decided that (i) a breakdown in relations (or dysfunction) dismissal is more appropriately an SOSR and (ii) the Burchell guidelines can be applicable as the headnote makes clear in Perkins v St George's Healthcare NHS Trust [2005] IRLR 934:

> The employment tribunal had also not erred in determining the fairness of the claimant's dismissal on the basis of the test set out in British Home Stores Ltd v Burchell. Whilst Burchell itself was a "conduct" case, there is no reason why the principles it sets out should be limited to cases arising under s.98(2)(b). Accordingly, whilst the dismissal in the present case was more properly categorised as being for some other substantial reason, the tribunal had not directed itself erroneously on the fairness issue by following the Burchell approach."

378. These factors are, when considering whether or not if the dismissal was reasonable the Tribunal must have regard to whether, at the time of dismissal, the employer:

a. genuinely believed matters against the employee;

b. had reasonable grounds on which to base that belief; and

c. at the time it had carried out as much investigation as was reasonable in the circumstances.

379. The parties were in agreement that MHPS did not apply in this claim. We were referred by both Counsel to the case of ***Ezsias v North Glamorgan NHS Trust [2011] IRLR 550***. We note from the head note:

> The contractual disciplinary procedures only apply to issues of conduct or competence, not to allegations of a breakdown in working relationships. Those procedures do not apply to cases where, even though the employee's conduct caused the breakdown of their relationship, the employee's role in the events which led up to that breakdown was not the reason why action was taken against him. Employment tribunals will, however, be on the lookout, in cases of this kind, to see whether an employer is using the rubric of "some other substantial reason" as a pretext to conceal the real reason for the employee's dismissal.

380. The Tribunal must be careful not to substitute its view for that of the employer and should consider instead whether the employer acted within the range of responses available to a reasonable employer when considering both whether dismissal was reasonable and all other aspects of fairness, for example whether the investigation was reasonable (consider - ***Iceland Foods [1982] IRLR 439***, ***Post Office and Foley [2000] IRLR 827*** and ***Sainsbury PLC v Hitt [2003] ICR 111***).

381. Employers faced with employees who refuse to cooperate with each other should take reasonable steps to try to improve the relationship and satisfy themselves that the situation is irredeemable before deciding that dismissal is the only answer. Failure to take reasonable steps to improve relationships will make the dismissal unfair ***Turner v Vestric Ltd 1980 ICR 528***.

382. We were also referred to ***Moyes v Hylton Castle Working Men's Social Club and Institute Ltd 1986 IRLR 482***, where the EAT overturned the employment tribunal's decision that the involvement of the two officials in the capacity of both witness and judge did not make the dismissal unfair, the EAT held that this was a breach of natural justice and that any reasonable observer would conclude that justice did not appear to have been done and had not been done. This is raised by Claimant's Counsel on the basis that AH was, he submits, a witness to there not being dysfunction when the Claimant was not there, and then had to make the decision as to whether dismiss the Claimant.

**Protected disclosures (relevant sections from 43A to 43L ERA 1996)**

383. Under section 43A of the ERA 1996 a protected disclosure is a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H. Section 43B(1) provides that a qualifying disclosure means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following – (a) that a criminal offence has been committed, is being committed or is likely to be committed, (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject, (c) that a miscarriage of justice has occurred, is occurring or is likely to occur, (d) that the health or safety of any individual has been, is being or is likely to be endangered, (e) that the environment has been, is being or is likely to be damaged, or (f) that information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed.

384. Under Section 43C(1) a qualifying disclosure becomes a protected disclosure if it is made in accordance with this section if the worker makes the disclosure – (a) to his employer, or (b) where the worker reasonably believes that the relevant failure relates solely or mainly to – (i) the conduct of a person other than his employer, or (ii) any other matter for which a person other than his employer has legal responsibility, to that other person.

385. Under Section 43F(1) of the Act a qualifying disclosure becomes a protected disclosure if it is made in accordance with this section if the worker –

(a) makes the disclosure in good faith to a person prescribed by an order made by the Secretary of State for the purposes of this section, and (b) reasonably believes – (i) that the relevant failure falls within any description of matters in respect of which that person is so prescribed, and (ii) that the information disclosed, and any allegation contained in it, are substantially true. Under the Public Interest Disclosure (Prescribed Persons) Order 1999 the Schedule of prescribed persons includes the General Medical Council ("the GMC").

386. A disclosure of information can still amount to a qualifying disclosure if the information was already known to the recipient (section 43L (3)).

387. We have been referred by both Counsel to a number of case authorities about matters relevant to consider when deciding if a qualifying protected disclosure has been made:

388. We were referred to the guidance given by the EAT as to the structured approach that should be adopted when approaching a whistleblowing case as a whole as set out in ***Blackbay Ventures v Gahir [2014] ICR 747 at para 98***.

389. Also, to the guidance in ***Williams v Michelle Brown AM UKEAT/044/19***.

390. Further, specifically, in respect of breach of a legal obligation, mere assertion of a belief in such a state of affairs is not sufficient as explained in ***Eiger Securities v Korshunova [2017] ICR 561***.

391. Also, ***Twist DX v Armes UKEAT/0030/20/JOJ***, it is not necessary that a disclosure of information specifies the precise legal basis of the wrongdoing asserted.

392. In summary what we need to consider is whether:

a. there has been a disclosure of information;

b. the worker believes that the disclosure is made in the public interest;

c. If the worker does hold such a belief, is it reasonably held;

d. the worker believes that the disclosure tends to show one or more of the matters listed in sub-paragraphs (a) to (f);

e. if the worker does hold such a belief, is it reasonably held.

393. Although it is not possible to draw a clear dichotomy between information and a mere 'allegation' or expression of opinion, in order to amount to a 'disclosure of information' the statement relied on 'must have a sufficient factual content and specificity such as is capable of tending to show one of the matters listed in subsection (1) (see ***Kilraine v Wandsworth LBC [2018] EWCA Civ 1436; [2018] ICR 1850*** at para 35 and at paras 21 and 29-36).

394. Disclosures must be viewed in the context in which they are made, and any context relied on as forming part of the basis on which a claimant says they made a protected disclosure should be set out in the claim form and clearly in evidence (***Kilraine*** paras 41-42).

395. The focus is on whether in the reasonable belief of the worker (at the time) the information provided tended to show one or more of the matters relied on. It is not whether the worker genuinely / reasonably believed that there had been such a failure. The worker must also believe at the time that the disclosure is made in the public interest.

396. Both aspects involve a subjective and objective element; i.e., that the worker believes the information tended to show the matters relied on was in public interest *and* that they were reasonable in holding that belief (***Chesterton v Nurmohamed [2017] EWCA Civ 979; [2018] ICR 731*** at paras 8(1) and 27).

397. A belief can be reasonable even if it is wrong (***Chesterton*** at para 8(2)).

398. There may be a range of reasonable views as to whether a disclosure is made in the public interest (***Chesterton*** at para 28).

**Detriment on the ground of a protected disclosure (section 47B)**

399. Under Section 47B 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. This provision does not apply to employees where the alleged detriment amounts to dismissal.

400. Under section 48(2) of the Act, on a complaint to an employment tribunal it is for the employer to show the ground on which any act, or deliberate failure to act, was done.

401. Section 47B and Section 48(2) provides:

***...47B Protected disclosures***

***(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.***

***(1A) A worker ("W") has the right not to be subjected to any detriment by any act, or any deliberate failure to act, done—***

***(a) by another worker of W's employer in the course of that other worker's employment, or***

***(b) by an agent of W's employer with the employer's authority, on the ground that W has made a protected disclosure.***

***(1B) Where a worker is subjected to detriment by anything done as mentioned in subsection (1A), that thing is treated as also done by the worker's employer.***

***…48 Complaints to [employment tribunals]***

***(2) On a complaint under subsection (1) …(1A) … it is for the employer to show the ground on which any act, or deliberate failure to act, was done.***

402. Detriment has been broadly interpreted in the whistleblowing and discrimination context and will be made out if a reasonable worker would or might take the view that the treatment had been to their detriment; it does not require a physical or economic consequence (***Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337***).

403. A worker is subjected to a detriment *on the grounds of* a protected disclosure if the protected disclosure was a material (more than trivial) influence on the alleged perpetrator's treatment of the whistlebower (see ***Fecitt and Ors v NHS Manchester [2011] EWCA Civ 1190; [2012] ICR 372 at para 45***).

404. In respect of the operation of the burden of proof LJ Elias said as follows in ***Fecitt***:

"41…The fact that it was the claimants, the victims of harassment, who were redeployed was obviously not a point lost on the tribunal. It was evidence from which an inference of victimisation could readily be drawn. But the tribunal was satisfied that the employer had genuinely acted for other reasons. Once an employer satisfies the tribunal that he has acted for a particular reason - here, to remedy a dysfunctional situation - that necessarily discharges the burden of showing that the proscribed reason played no part in it. It is only if the tribunal considers that the reason given is false (whether consciously or unconsciously) or that the tribunal is being given something less than the whole story that it is legitimate to infer discrimination in accordance with the principles in Igen Ltd v Wong.

…51.... I entirely accept that, 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."

405. In ***International Petroleum Limited and ors v Osipov and ors UKEAT/0058/17/DA*** guidance is given on the operation of the burden of proof provisions:

"115. Mr Forshaw submits and I agree that the proper approach to inference drawing and the burden of proof in a s.47B ERA 1996 case can be summarised as follows:

(a) the burden of proof lies on a claimant to show that a ground or reason (that is more than trivial) for detrimental treatment to which he or she is subjected is a protected disclosure he or she made.

(b) By virtue of s.48(2) ERA 1996, the employer (or other respondent) must be prepared to show why the detrimental treatment was done. If they do not do so inferences may be drawn against them: see London Borough of Harrow v. Knight at paragraph 20.

(c) However, as with inferences drawn in any discrimination case, inferences drawn by tribunals in protected disclosure cases must be justified by the facts as found."

**Automatic unfair dismissal**

406. S.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) for the dismissal is that the employee made a protected disclosure.***

407. In ***Kuzel v Roche Products [2008] IRLR 530*** the Court of Appeal made some preliminary observations on the operation of s.103A and its interaction with unfair dismissal generally.

408. We observe that the Court of Appeal held in ***Kuzel*** that, having rejected the reason for dismissal advanced by the employer, a tribunal is not then bound to accept the reason advanced by the employee: it can conclude that the true reason for dismissal was one that was not advanced by either party.

**Separability from disclosures and the Jhuti argument**

409. During oral submissions Counsel were reminded that we had the benefit of a recent EAT decision that seemed to have a number of similarities to this case, ***Ms L Kong v Gulf International Bank (UK) Ltd: EA-2020-000357-JOJ (previously UKEAT/0054/21/JOJ)***. It was noted that there were factual similarities and the case authorities analysed by His Honour Judge Auerbach, were also referred to us by Counsel in this case.

410. It was expressed to Claimant's Counsel that ***Kong*** appeared to be a more relevant case authority to the facts in this matter than ***Sinclair v Trackwork [2021] IRLR 557***, referred to in his written submissions which is a

case under section 100 of the Employment Rights Act, automatic unfair dismissal in Health and Safety cases.

411. After a short adjournment for Claimant's Counsel to read the Kong decision, he confirmed that it was a helpful authority and that he relied upon it as well as the authorities it referred to such as ***Cadent Gas V Singh UKEAT/0024/19BA*** (which he had already referred to in his written submissions).

412. Considering then paragraph 72 of the ***Kong*** decision which sets out His Honour Judge Auerbach's conclusions after reviewing the relevant case law:

"72. I note the following points. First, the general rule that the motivation that can be ascribed to the employer is only that of the decision-maker(s) continues to apply. Secondly, there is no warrant to extend the exceptions beyond the scenario described by Underhill LJ, which will itself be a relatively rare occurrence, and the surely highly unusual variation encountered in Jhuti. Thirdly, whether in the scenario contemplated by Underhill LJ, or in the variation described by Lord Wilson, two common features are that (a) the person whose motivation is attributed to the employer sought to procure the employee's dismissal for the proscribed reason; and (b) the decision-maker was peculiarly dependent upon that person as the source for the underlying facts and information concerning the case. A third essential feature is that their role or position be of the particular kind described in either scenario, so as to make it appropriate for their motivation to be attributed to the employer.".

413. As in the ***Kong*** decision we were also referred to the case authorities that deal with the separability from disclosures. As Claimant's Counsel puts it with reference to ***Martin v Devonshires Solicitors [2011] ICR 352*** … "the EAT held that an employer will not be liable if it can show that the reason for its act or omission was not the protected act as such, but rather one or more features and / or consequences of it which were properly and genuinely separable from it. It is a modern legal formulation of the adage that "it's not what you do but the way that you do it".". Claimant's Counsel also referred us to ***Woodhouse v West North West Homes Leeds Ltd [2013] IRLR 773***.

414. Respondent's Counsel addresses this point by also referring us to an extract from ***Panayiotou v Kernaghan [2014] IRLR 500, [2014] ICR D23***:

> "There is, in principle, a distinction between the disclosure of information and the manner or way in which the information is disclosed. An example would be the disclosing of information by using racist or otherwise abusive language. Depending on the circumstances, it may be permissible to distinguish between the disclosure of the information and the manner or way in which it was disclosed. An employer may be able to say that the fact that the employee disclosed particular information played no part in a decision to subject the employee to the detriment but the offensive or abusive way in which the employee conveyed the information was considered to be unacceptable. Similarly, it is also possible, depending on the circumstances, for a distinction to be drawn

between the disclosure of the information and the steps taken by the employee in relation to the information disclosed."

**Time limits**

415. Of relevance to the question of time limits are the provisions in relation to section 48 ERA 1996.

416. Section 48(1A) of the ERA 1996 confers jurisdiction on claims pursuant to section 47B to the employment tribunals, and section 48(3) provides that an employment tribunal shall not consider a complaint under this section unless it is presented – (a) before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them, or (b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months. Section 48(4) says for the purposes of subsection (3) – (a) where an act extends over a period, the "date of the act" means the last day of that period, and (b) a deliberate failure to act shall be treated as done when it was decided on.

417. Claimant's Counsel submitted that this was a claim where alleged detriments 5 and 6 were part of a series of similar acts or failures to alleged detriments 7 and 8.

**THE DECISION**:

418. The logical order to address the issues we must determine, based on the facts proven on the balance of probability, is:

a. Firstly, whether the Claimant has made a qualifying disclosure that was protected based on who he made it too.

b. Secondly, whether the Claimant has been subjected to detrimental treatment and then to decide if that was on the grounds of any of the proven protected disclosures.

c. Thirdly, to address any relevant time limit jurisdictional issues that arise from those findings.

d. Fourthly, what the reason, or principal reason for the dismissal was.

e. Fifthly, the fairness of dismissal for that reason.

419. Considering then the alleged protected qualifying disclosures and for each whether (where relevant):

a. there has been a disclosure of information;

b. the worker believes that the disclosure is made in the public interest;

c. If the worker does hold such a belief, is it reasonably held;

d. the worker believes that the disclosure tends to show one or more of the matters listed in sub-paragraphs (a) to (f);

e. if the worker does hold such a belief, is it reasonably held; and

f. to whom the disclosure is made.

420. We address the alleged protected disclosures chronologically:

**Alleged Protected Disclosure 6: Letter 28/8/2015 Claimant to Paul Lear**

421. The parties agree that the Claimant wrote a letter to PL dated 28 August 2015 (see page 423) voicing concerns over MNS's clinical practice of investigating women with post-menopausal bleeding.

422. In the agreed list of issues the Claimant says this was a protected disclosure to his employer because the letter contained information tending to show that the Respondent was failing or was likely to fail to comply with a legal obligation to which it was subject, namely that it was employing a surgeon who was performing unnecessary, damaging and negligent re-section procedure in breach of its duty of care towards patients and/or that there was danger to the Health and Safety of individuals in the Respondent's care.

423. The Respondent denies that the letter to PL was a protected disclosure on the basis that the letter does not suggest that the Respondent or any other person was failing to meet its legal obligations, nor that the health and safety of anyone had been or was being or was likely to be endangered. The Respondent says the highest the Claimant puts it is to say … "it would therefore be helpful for us all to have a definite opinion on his practice by the external independent investigation.".

424. The content of the letter (at page 423) does disclose information, but it does not suggest the practice is wrong in law just that it is unusual. The Claimant says it is probably unwarranted ... but it would be helpful to have a definite opinion on his practice.

425. What the Claimant writes in his alleged disclosure letter and his witness statement potentially supports a belief that he was disclosing information which tends to show that the practice of re-secting fibroids is a much more invasive process, but it does not tend to show that the Respondent was failing or was likely to fail to comply with a legal obligation to which it was subject, namely that it was employing a surgeon who was performing unnecessary, damaging and negligent re-section procedure in breach of its duty of care towards patients nor that there was danger to the Health and Safety of individuals in the Respondent's care.

426. Further the Claimant has not said in his witness statement that he believed and why he believed, this disclosure was made in the public interest.

427. We therefore do not find that this is a qualifying disclosure.

**Alleged Protected Disclosure 5: Letter to GMC 21/9/2015**

428. The Claimant sent a letter by email from Viv Leonard to Dale Brown, Investigating Officer General Medical Council ("GMC") on 21 September 2015 (see pages 443 to 449). The Respondent accepts that this letter was sent to the GMC. The Claimant says that Viv Leonard also sent a copy to PL in the Hospital Internal mail.

429. In cross examination PL confirmed that he most likely did receive a copy of this. He confirmed that he would assume he received the document as he had read it and it could have been received around the third week of September. He had no reason to dispute the Claimant's evidence that it had been sent to him in the internal post.

430. It is the Claimant's case as set out in the agreed list of issues that he provided information about the poor financial practices of the Respondent and the Claimant produced evidence that overpayments of on-call supplements by the Respondent to Alison Cooper would have been known to her. The Claimant also disclosed information tending to show poor reporting of annual leave and study leave, leading to possible fraud by Mr Siddig. This information tended to show that the Respondent, Alison Cooper and Mr Siddig were failing to comply with legal obligations to which they were subject namely the employees' own contracts of employment, implied terms of trust and confidence and the Respondent's Finance Policy and Policy on Overpayment of Salary, Allowances, Travel and Subsistence (Po019) ("the Overpayments Policy").

431. The Respondent accepts that the Claimant makes allegations concerning his colleagues Mr Siddig and Ms Cooper, including that these individuals either claimed too much pay from the Respondent, were overpaid, or misused their annual leave and/or study leave entitlement. However, the Respondent says that none of these allegations constitute information tending to show that the Respondent (or the Claimant's colleagues) was failing to comply with their legal obligations. The Respondent asserts that there was no clear allegation of wrongdoing by the Claimant, nor is there any reference in the letter to the various legal obligations or criminal offences now relied upon.

432. The Claimant provides evidence on this alleged disclosure in paragraph 35 of his witness statement:

> "… I provided information about the additional PA's to AC. I highlighted that AC and MS ought to have been aware they were being overpaid on-call supplements. I disclosed information tending to show poor reporting of annual leave and study leave, leading to possible fraud by MS and BD. Out of courtesy, Viv sent a copy of this letter to PL in the Hospital internal post."

433. As to the Claimant's reasonable belief that he makes it in the public interest he does not address this specifically in his evidence in respect of this disclosure. Instead he relies upon paragraphs 4 and 5 of his witness statement. They say:

"4. The Trust have rigorous financial policies in place, to ensure the proper use of public funds including the Financial Policy p76-93 and Overpayments Policy p.135-142. The policies are explicit that overpayments should always be repaid p138 para 1.8, All employees have a responsibility for checking they are being paid correctly (p138.parai.2) and it is a potential offence to fail to disclose this under s.3 The Fraud Act (p140,para5). I knew first hand of the hard-line approach that could be taken by the Trust as I was disciplined for "fraud" and received a warning following a mistaken travel claim in 2009 (p181-182) and in respect of the County Court action against me referred to above. However, the Trust did not apply these policies consistently.

5. The NHS was and is under huge financial pressure p251, p257 and my role as CD involved close scrutiny of finances. I started receiving monthly financial reports in September 2012. Concerns were reported to me regarding inconsistent practices for rewarding additional work p250. It was important to me that there was complete transparency over payments and that Trust policies were followed (p288-289 and applied."

434. It is not in dispute that these polices were in place, nor that the Respondent was experiencing difficult finances at that time. The Claimant did seem certain and genuine in cross examination as to his concern about fraud and the public finances. He confirmed in cross examination that he still believes that AC is guilty of fraud and the Trust management are complicit.

435. The accepted factual position as to the content of the letter to the GMC and PL in our view does disclose information with sufficient factual content and specificity such as is capable of tending to show one of the matters listed in subsection (1), being in this case the legal obligations on employees as to financial probity and to not commit fraud.

436. For these reasons we do find that the Claimant has made a qualifying disclosure here and it is protected by him disclosing this information to PL at the Respondent.

**Alleged Protected Disclosure 4: Verbal disclosure to Tony Hall during a meeting towards the end 2015**

437. The parties agree that the Claimant met TH towards the end of 2015 and raised concerns about payments being made to his colleague Alison Cooper.

438. The Claimant says in the agreed list of issues that during this meeting he disclosed information in respect of on-call overpayments to Alison Cooper and Mr Siddig, overpayments to Alison Cooper for extra colposcopy work which had not taken place, information regarding Beena Dandawate's allegedly fraudulent behaviour in respect of leave arrangements to attend an RCOG

congress in India. The Claimant says that this information tended to show that the Respondent, Alison Cooper, Mr Siddig and Beena Dandawate were failing to comply with legal obligations to which they were subject namely the employees' own contracts of employment, implied terms of trust and confidence and the Respondent's Overpayments Policy. This information, in the Claimant's reasonable belief also tended to show that a criminal offence may be being committed by the employees in question as under the Theft Act 1978 an employee may be guilty of theft by keeping salary overpayments and treating them as their own. The Claimant's belief was reasonable and made in the public interest as the Respondent's financial difficulties were having an impact on service provision to the public and also related to the spending of public monies.

439. It is not admitted by the Respondent that this conversation amounted to a protected disclosure. The Respondent says that there was no disclosure of any information tending to show a person or persons failing to meet their legal obligations or committing criminal offences. The Respondent says the Claimant did not have any reasonable grounds for believing that any "disclosure" that was made during this conversation tended to show these matters were in the public interest. In fact, the Respondent's case is that during this meeting Mr Hall explained to the Claimant that he had found no evidence of fraud but said that if further evidence came to light, he would be happy to investigate further.

440. TH confirms in paragraph 1 of his witness statement that between 2012 and 2016 (so at the time of this alleged disclosure) he was the Fraud and Investigations Manager for the Trust.

441. We accept what TH says about what he and the Claimant discussed … "… alleged overpayments to his colleague, Alison Cooper [Consultant]. I met with him in his office, although I cannot recall when. He alleged that Ms Cooper was being paid to attend meetings that she was not attending and gave me a copy of her job plan.".

442. This would in our view be information tending to show some type of fraudulent activity and based on what the Claimant believes about the finances and policies of the Respondent we accept he reasonably believed it and raised it in the public interest. The Claimant is after all telling this information to the Fraud and Investigations Manager for the Trust. We therefore find that this element was a qualifying protected disclosure being made to TH at the Respondent.

**Alleged Protected Disclosure 6A: Verbal disclosure to Patricia Miller during meeting on 19/5/16**

443. The parties agree that there was a meeting between the Claimant and Patricia Miller ("PM") the CEO in 2016 when the dysfunction of the gynaecology team and the detrimental impact on patient safety was discussed. The Claimant says this meeting took place on 19 May 2016. The Respondent says this meeting was in early 2016 but does not confirm the date.

444. The Claimant submits that this verbal discussion was a protected disclosure to his employer. The Claimant says he provided information in the form of two examples where patient safety was being detrimentally affected.

445. The Respondent denies that this verbal discussion was a protected disclosure. The Respondent says that the conversation centred on the dysfunctionality within the department, the implications for patient safety and the fact that colleagues reporting each other to the GMC was unhelpful.

446. The Claimant addresses this disclosure in paragraphs 49 to 51 of his witness statement providing details of the clinical examples he provided to PM.

447. PM in cross examination indicated that the Claimant may have set out the specific examples that he refers to in his witness statement.

448. On the 24 May 2016 PL instructs Richard Jones ("RJ") to conduct a 'whistleblowing investigation' into the contention that the breakdown of relationships is detrimentally affecting patient safety'.

449. As noted by Claimant's Counsel in his written submissions the examples the Claimant says he raised with PM are examples addressed in the report of RJ completed on the 23 June 2016 (see page 706).

450. For these reasons we accept the Claimant's account and find that this is a qualifying protected disclosure. The Claimant provides reasons for his thinking on the matters of patient safety which would be a public interest matter and he discloses this information to PM at the Respondent which then results in a 'whistleblowing investigation'.

**Alleged Protected Disclosure 7 Verbal disclosure during meeting with Catherine Abery-Williams on 31/10/16**

451. The parties agree that there was a meeting between the Claimant and CAW on or around the 31 October 2016.

452. The Claimant asserts in the agreed list of issues that during this meeting he provided Catherine Abery-Williams with information about overpayments being made to Alison Cooper for her Hospital Based Pathology Co-ordinator Role (HBPC). The Claimant says this information tended to show that the Respondent and Alison Cooper were failing to comply with legal obligations to which they were subject namely the employees' own contracts of employment, implied terms of trust and confidence and the Respondent's Overpayments Policy. The Claimant says that this information, in his reasonable belief also tended to show that a criminal offence may be being committed by Alison Cooper as under the Theft Act 1978 an employee may be guilty of theft by keeping salary overpayments and treating them as their own. The Claimant says his belief was reasonable and made in the public interest as the Respondent's financial difficulties were having an impact on service provision to the public and also related to the spending of public monies.

453. The Respondent denies any protected disclosure was made during this meeting. The Respondent says that the Claimant repeated previous concerns about Mrs Cooper and payment in respect of her HBPC role. The Respondent says there was therefore no disclosure of new information tending to show any breach of any legal obligation or any tendency to commit criminal acts. Further, the Respondent does not agree that it would have been within the reasonable belief of the Claimant that raising such issues was at that time, in the public interest, given that the issues had previously been raised in 2013 and dealt with by the Trust.

454. It is clear from considering the witness evidence of the Claimant and CAW that there is a consistency about what is raised about AC's PAs, and that the Claimant considers and communicates that he considers it to be fraudulent.

455. From this evidence, and the Claimant's belief on matters as referred to above, we find that it is a qualifying disclosure, protected by having been made to CAW at the Respondent.

456. The fact the Respondent knows the information is not a reason to prevent it being a qualifying disclosure as a disclosure of information can still amount to a qualifying disclosure if the information was already known to the recipient (section 43L(3) of the ERA 1996).

**Alleged Protected Disclosure 8: Meeting with Julie Doherty 16/2/2017 [now said to be 20/2/2017]**

457. The parties agree that the Claimant brought the issue of irregular payments being made to Alison Cooper to Julie Doherty during the period when Julie Doherty was Divisional Director. The Respondent cannot recall the date. The Claimant now says in evidence that this was on the 20 February 2017.

458. The Claimant submits that the information disclosed to Julie Doherty during this meeting was a protected disclosure to his employer. The Claimant says he presented an electronic copy of Ms Cooper's job plan to Julie Doherty and informed her of the fraudulent entry of 4 hours entitlement for the HBPC role (her entry being "meetings outside my working week"). The Claimant says that this information, in his reasonable belief, tended to show overpayments being made to the Respondent's employees. The Claimant says that this tended to show that the Respondent and Alison Cooper were failing to comply with legal obligations to which they were subject namely the employees' own contracts of employment, implied terms of trust and confidence and the Overpayments Policy and/or that a criminal offence may be being committed by Alison Cooper as under the Theft Act 1978 an employee may be guilty of theft by keeping salary overpayments and treating them as their own. The Claimant says his belief was reasonable and made in the public interest as the Respondent's financial difficulties were having an impact on service provision to the public and also related to the spending of public monies.

459. The Respondent denies that the discussion between the Claimant and Julie Doherty amounted to a protected disclosure. As the matter had previously

been investigated by the previous Divisional Director, the Respondent says that the Claimant agreed that allegations would not be reinvestigated.

460. As we have already identified a disclosure of information can still amount to a qualifying disclosure if the information was already known to the recipient.

461. It is clear from considering the witness evidence of the Claimant and JD that there is a consistency about what is raised about AC's PAs, and that the Claimant considers and communicates that he considers it to be fraudulent.

462. From this evidence, and the Claimant's belief on matters as referred to above, we find that it is a qualifying disclosure, protected by having been made to JD at the Respondent.

**Alleged Protected Disclosure 9: Meetings with Megan Joffe from Edgecumbe 10/7/17 and 11/9/17 and interview by telephone on 27/9/17.**

463. The parties had agreed that the meetings between the Claimant and MJ took place on 19 July 2017 and 11 September 2017 and that there was a phone interview on 27 September 2017.

464. The Claimant submits that he made protected disclosures to his employer on these dates as it is averred that MJ was acting as the Respondent's agent.

465. The Respondent denies that any of the Claimant's interactions with MJ and/or Edgecumbe constituted protected disclosures. The Respondent denies that MJ acted as agent for the Respondent and further denies that it was her role to investigate the alleged overpayments to the Claimant's colleagues.

466. About this disclosure the Claimant is very brief saying at paragraph 83 of his witness statement:

"83. I was interviewed by MJ on 10.7.17 [amended to be 10.8.17] and 11.9.17 and had a telephone interview on 27.9,17. I sent MJ information by email to highlight my concerns that I was not liked because I was bringing effective management and accountability to O & G (p975a-b). I highlighted my concerns over AC's potentially fraudulent conduct over her job plan and the Trust's unwillingness to investigate (976a-d) and details of my arrest (977a-b)."

467. Considering the submissions of Claimant's Counsel on this matter … it is also addressed briefly … "MJ was sent the documents set out at para 33 of the amended clarification of claim. Central to this was the disclosure of the AC's job plan and Trish Dyer's email as discussed above. MJ was an 'agent' of R in that she was authorised by the employer by virtue of her instructions to receive information from C and others as part of her investigation into dysfunction. To that extent the disclosure to her was a qualifying disclosure under s 43C (2) ERA.".

468. As we have found factually, MJ was not engaged to investigate matters of fraud, and we note that matters concerning the Claimant's reasonable belief as to what he is disclosing and why it is in the public interest to make these alleged disclosures to MJ has not been specifically addressed in his witness evidence.

469. For these reasons we do not find that the Claimant has proven on the balance of probability that he has made a protected qualifying disclosure as he asserts. In any event we note that based on the Claimant's Counsel's closing oral submissions this alleged ninth disclosure is no longer relied upon for any of the alleged detriments.

470. We now address the alleged detriments we are being asked to determine chronologically.

471. We note here that it is not submitted to us that what the Claimant alleges as detrimental treatment in alleged detriments 5 to 8 does not amount to detrimental treatment. Our focus has instead been directed to motive. As set out in the legal summary concerning detriment for making a protected disclosure, it is:

a. for the Claimant to show that a ground or reason (that is more than trivial) for detrimental treatment to which he is subjected is a protected disclosure he made.

b. The Respondent must be prepared to show why the detrimental treatment was done. If they do not do so inferences may be drawn against them.

c. As with inferences drawn in any discrimination case, inferences drawn by tribunals in protected disclosure cases must be justified by the facts as found.

472. We therefore consider for each alleged detriment whether the Claimant has shown that a ground or reason for the alleged detrimental treatment to which he is subjected is a protected disclosure he made. Then whether the Respondent has shown, based on the facts we have found, why they acted the way they did, which is not a false reason (whether consciously or unconsciously) or something less than the whole story.

**Alleged Detriment 5 – The Edgecumbe Report**

473. On the 15 February 2017 PL makes initial contact with Edgecumbe Consulting seeking help in relation to the problems in the O&G department. At a meeting on the 8 March 2017 between the Claimant, PL and CAW he is informed of the investigation and agrees to it. There is a change of view on the 13 March 2017, before then reverting to supporting it. As the Claimant confirmed in evidence, he … "… welcomed the Edgcumbe Report as an opportunity for the matters between my colleagues and myself to be completely

brought out into the open by an independent person and resolved.". The Claimant absolutely accepted that a situation had arisen which the Trust needed to address as to dysfunction in the department. He accepted that Edgecumbe was a sensible and reasonable step for the trust to take.

474. About her instruction and the report MJ confirmed in cross examination, that the review was a request to hear peoples' views and give their (Edgecumbe's) judgment on the interpersonal dynamics. She confirmed that her findings and recommendations were absolutely genuinely meant, and it was then up to the Trust what to do. She confirmed that once the report is in it is up to them what they follow through on and it does depend on resources.

475. The Edgecumbe report is completed on the 15 September 2017 (see pages 978 to 1000). The agreed chronology confirms that it is on the 5 January 2018 the Edgecumbe report is then distributed.

476. Respondent's Counsel in his submissions asserts that the report identifies that the Claimant is … "a serious source of tension if not the centre and cause of it.". Having reviewed the references in the report we were directed to, as we have detailed in our fact find set out above, we agree they record this and that dysfunction of the team is clearly identified and that it is a risk to patient safety. Also, that … "… the breakdown in trust in this team is such that the likelihood of the team being able to achieve safe and effective working within its current make-up is very small.". Further, about mediation as a potential method of resolution … " … we do not feel that this option would enable this team to develop the trust that is necessary to begin the process of repair unless it was carried out in a very different way.".

477. About the fifth alleged detriment the Claimant says that the Edgecumbe Report findings were detrimental treatment of him by Paul Lear and Patricia Miller who commissioned the report and by Megan Joffe acting as the Respondent's agent.

478. It was confirmed that this alleged detriment is on the grounds of alleged disclosures 4, 5, 7 and 8.

479. We remind ourselves that:

j. Disclosure 4 was that to TH

k. Disclosure 5 was the letter to the GMC and also sent to PL

l. Disclosure 7 is the verbal disclosure to CAW

m. Disclosure 8 is the meeting with JD

480. We have found that all of these are protected qualifying disclosures.

481. In his witness statement (paragraph 38) PL says that … "I confirm that I commissioned the report from Edgecumbe.". He refers to his meeting with the Claimant with CAW and his follow up email. He confirms that … "I explained that the intention was to seek Edgecumbe's view on the difficult working relationships within the O&Gs consultants team…". Then at paragraph 39 … "There was no agenda or plan to dismiss MI when commissioning the Edgecumbe Report. My predominant concern was the potential that dysfunctional relationships had to compromise patient care…".

482. It was not put to PL or PM that they commissioned the report on the grounds of any of the asserted disclosures, nor that what was written in the report was on the grounds of any of those asserted disclosures.

483. It was not put to MJ that what she did or wrote was on the grounds of any alleged disclosures made by the Claimant.

484. From this evidence we accept the reasons of PL for commissioning the report and MJ's explanation for the report and its content.

485. Having considered the submissions made by Claimant's Counsel on this matter he submits that … "the Edgecumbe findings make multiple detrimental findings which are based on the assumption that C continued to wrongly 'rake over old coals.".

486. It is the Claimant's case therefore that this wrong assumption is the material influence, rather than the actual disclosures themselves, on what the report says.

487. It was confirmed in closing oral submissions that the Claimant holds EH responsible for creating this wrong assumption and that she did this on the grounds of a protected disclosure made by the Claimant, although as noted, which disclosure in particular, or any of the alleged disclosures for that matter being her motive (if this is what she did) was not put to EH. For these reasons If the assumption were wrong it could be an assumption genuinely wrongly formed, rather than one deliberately cultivated on the grounds of the Claimant's alleged protected disclosures.

488. We note that it was not put to PL in cross examination that he wrote the letter dated 10 November 2016 (at page 852) on the grounds of any alleged protected disclosure the Claimant made. The submission by Claimant's Counsel that … "There is no doubt that this letter is also based on the misconception that matters were resolved fully, long before.", suggests another source for the misconception as it is not submitted it arises from EH, nor was it put to EH that she had perpetuated this misconception to PL. Therefore, if it is a wrong misconception it would not appear to be by design on the grounds of any protected disclosures the Claimant may have made.

489. We have also considered if this is a wrong misconception. It is the Claimant's asserted position that AC is guilty of fraud, i.e. she did it deliberately to gain payments she was not entitled to. This is something he maintains to

date (as confirmed by him in cross examination). Whether this is correct or not (i.e. AC committed fraud on the PAs she was paid for in 2012/13) does not appear to have been specifically investigated by the Respondent or a decision expressly made on that particular issue. This though is because when it was a raised in 2013, WW was impressing upon the Claimant that he should investigate it, by way of discussions with AC and review of job plans. The Claimant did not raise this issue with AC, had he done so it may have clarified matters.

490. From the facts we have found about the interaction between WW and the Claimant on AC's PAs therefore it does not appear to be a wrong assumption/misconception by EH or PL. WW was expecting the Claimant to pursue the matter and revert back to him if he did identify an issue, which the Claimant did not do.

491. We also accept that the view held by EH on the AC PA matter (about what WW had done and what she then looked at) was genuinely held and not something she manufactured on the grounds of any protected disclosures the Claimant may have made.

492. For completeness we note that it was not put to MJ that what she wrote in the report was on the grounds of the alleged ninth disclosure that is said to have been made to her.

493. From these primary facts there is no evidence that the detrimental findings in the report about the Claimant are by design on the grounds of the Claimant's "whistleblowing" or motivated on the grounds of the Claimant's "whistleblowing". MJ was clear in her evidence as to the independent process she undertook and conclusions she reached and why, we accept this.

**Alleged Detriment 6 – The Claimant's Suspension on 2/2/18 at 12:30pm**

494. The Claimant says that PL's decision to suspend him on 2 February 2018 at 12:30pm was detrimental treatment because of his protected disclosures.

495. It was submitted in closing submissions by Claimant's Counsel that this alleged detriment is on the grounds of alleged disclosures 5, 6, 6A, 7 and 8.

496. We remind ourselves that:

f. Disclosure 5 was the letter to the GMC and also sent to PL

g. Disclosure 6 is the letter to PL

h. Disclosure 6A is the verbal disclosure to PM

i. Disclosure 7 is the verbal disclosure to CAW

j. Disclosure 8 is the meeting with JD

497. We have found that all but disclosure 6 are protected qualifying disclosures.

498. It was not put to PL that he suspended the Claimant when he did on the grounds of any of those disclosures.

499. It was not put to PM that her actions in this matter were done on the grounds of any of the Claimant's alleged disclosures.

500. We accept the Respondent's evidence on this matter and find that the decision to suspend (or exclude) the Claimant was made by the Board of directors at the meeting on the 31 January 2018. There is nothing proven on the balance of probability from the primary facts we have found to suggest that this decision was on the grounds of any of the protected disclosures the Claimant says he made.

501. This is consistent with the allegation that the Claimant makes which, as articulated in the agreed list of issues, is that the decision of PL to activate that exclusion on the 2 February 2018 at 12:30 was because of the alleged protected disclosures.

502. We do not find this. From the primary facts we have found there is no evidence that PL did what he did on the grounds of the Claimant's "whistleblowing". PL was activating the decision of the Directors to exclude and before he did so he verified the Claimant's account of a successful informal mediation being underway. MNS and MS did not support that. In our view this indicates why the Trust's decision may have been appropriate as the Claimant could be said to be interfering in the process by his interactions with MNS and MS that do not appear to be appreciated in the way he asserts. The Claimant did agree during cross examination that if he is eye of storm then appropriate to take him out.

**DETRIMENT 8 - The Claimant avers that the Respondent's failure to deal with his grievance before the disciplinary hearing (10/9/18), was detrimental treatment because of whistleblowing by Julie Doherty.**

503. On the 10 September 2018 JD refuses the Claimant's application for an adjournment of the Panel Hearing pending resolution of grievance (see pages 1751 to 1752).

504. It was submitted in closing submissions by Claimant's Counsel that this alleged detriment is on the grounds of alleged disclosures 5, 6, 6A, 7 and 8.

505. We remind ourselves that:

a. Disclosure 5 was the letter to the GMC and also sent to PL

b. Disclosure 6 is the letter to PL

c. Disclosure 6A is the verbal disclosure to PM

d. Disclosure 7 is the verbal disclosure to CAW

e. Disclosure 8 is the meeting with JD

506. We have found that all but disclosure 6 are protected qualifying disclosures.

507. JD provides her reasons for what she did in paragraphs 14 to 21 of her witness statement. It was not put to JD in cross examination that any of the disclosures were her motivation for what she did. In cross examination JD confirmed that what was in her mind about the grievance the Claimant submitted was the dysfunction of the team. She explained that the main essence was dysfunction, no one was disagreeing there was dysfunction of the team, the grievance was going to be heard just not at the same panel. JD confirmed that points 1 to 17 of the grievance refer to historical issues, there was dysfunction and it was how they move forward. Her decision was 18 to 23 were the relevant issues for the hearing panel. JD confirmed that whistleblowing was not in her perception. JD also confirmed in cross examination that she did not accept that the management case was dismissal but that it was whether dismissal was the appropriate action or whether there were any alternatives. JD confirmed that she presented the case as she found it and the decision was open to the panel, there was no predetermined outcome.

508. The Claimant was cross examined about this grievance. He accepted it went back to matters in 2006 and that in 2018 he was dredging up matters that were 10 years old. He agreed that his CEA appeal was successful so that is why he did not raise a grievance about that at the time. He agreed that he did understand JD's rationale for what she did.

509. We have therefore considered carefully the submissions made by Claimant's Counsel on this matter. In short it is submitted that the exclusion of the material adversely affected the outcome at the Claimant's panel hearing.

510. About this we would note that there has been no challenge put in oral evidence as to what particular documents should have been referred to by reference to those actual documents and what difference such documents would have made to the outcome. If the documents relevant to the grievance were important then we would have expected copies of those to be before us and for the Claimant to have provided further copies with his appeal against the Claimant's dismissal, and they were not. Further, we note that the grievance was heard before the appeal (the grievance outcome is not challenged by the Claimant), so the Claimant had the outcome of that to assist the appeal if matters were found to be relevant or upheld.

511. From these primary facts we accept the explanation given by JD for doing what she did. There is no evidence that any alleged failure to deal with the Claimant's grievance before the disciplinary hearing was on the grounds of the Claimant's "whistleblowing".

**DETRIMENT 7 – Disciplinary outcome following the Boniface report was predetermined and this was detrimental treatment by Julie Doherty and Paul Lear**.

512. It is the Claimant's alleged seventh detriment that the disciplinary outcome following the Boniface report was predetermined and this was detrimental treatment by Julie Doherty and Paul Lear.

513. The Claimant avers in the agreed list of issues that Mr Boniface's true role was to provide a report that would wrongly lead to the conclusion by a Panel that the Claimant should be dismissed. It is not the Claimant's case that the Panel deciding the matter were themselves party to this unlawful purpose. The Claimant will rely on the Supreme Court's judgment in Royal Mail Group Ltd v Jhuti [2019] UKSC 55. The Claimant's case is that the Boniface Report's singular focus on the Claimant as the central cause of alleged dysfunction is at odds with the broad findings of the Edgecumbe report which ascribes fault to alleged dysfunction much more broadly and in far more complex terms. The Claimant will say that Richard Boniface therefore did not investigate the matters leading to the breakdown of the relationships, and simply asked whether or not matters in the department would be improved if the Claimant was dismissed. The Claimant avers that the Respondent had already made the decision to dismiss the Claimant and this was because of his disclosures 1-10 as set out above.

514. Claimant has confirmed that the individuals who the Claimant says were responsible for his dismissal by reason (or principle reason) of whistleblowing were Paul Lear, Julie Doherty, Mark Warner and Patricia Miller.

515. The Respondent denies that the Boniface report and the "disciplinary" panel decision was "engineered by management" to secure the Claimant's dismissal. The Respondent says that neither the authors of the Edgecumbe report nor Mr Boniface made the decision to dismiss the Claimant.

516. We would observe that what the Respondent submits about the authors of the Edgecumbe report and Mr Boniface is correct factually, they did not make the decision to dismiss the Claimant.

517. It was submitted in closing submissions by Claimant's Counsel that this alleged detriment is on the grounds of alleged disclosures 5, 6, 6A, 7 and 8.

518. We remind ourselves that:

a. Disclosure 5 was the letter to the GMC and also sent to PL

b. Disclosure 6 is the letter to PL

c. Disclosure 6A is the verbal disclosure to PM

d. Disclosure 7 is the verbal disclosure to CAW

e. Disclosure 8 is the meeting with JD

519. We have found that all but disclosure 6 are protected qualifying disclosures.

520. It was not put to JD of PL that they were responsible for his dismissal by reason (or principle reason) of whistleblowing nor on the grounds of any of those disclosures.

521. It was also not expressly put to PM either, but when asked about it being her private desire for the Claimant to be dismissed she denied this, saying it was relationship breakdown and that people whistle-blow all the time, not reason for dismissal.

522. Evidentially it was not PL's, JD's, MW's or PM's decision to dismiss the Claimant. This was the decision of the panel chaired by AH. It is the Claimant's case that the panel were misled to do it.

523. Respondent's Counsel submits that … "C's case implied RB was a con-conspirator when no such case was put to RB. The allegation (if it were ever explicitly made) is wholly without merit: RB was an independent professional dealing with matters on their merits…. Manifestly it is an allegation of no merit: nothing was pre-determined; RB was instructed, and RB reported; a panel was seised of matters; the panel decided C's fate. Nothing was pre-determined.".

524. We have considered the matters that RB was cross examined on. He confirmed that he resented the idea that he had been lent on to give an outcome. He would never be led in that way. As to the use of the word feasible in the TORs, he did not agree this should have been "possible". He confirmed that it was to seek solutions that where balanced and when looked at objectively would have a sufficient chance of a positive sustainable outcome, and not leave the Trust with a dysfunctional department. Feasible he said means a chance of success. RB also did not accept that his report was saying it would be "perverse" to keep the Claimant.

525. We have also considered what the Claimant agreed about the RB report in cross examination.

526. The Claimant agreed that the report's key findings say there is a breakdown and a non-sustainable breakdown. The Claimant was asked if he accepted that it recorded, he was not trusted as a colleague and he replied yes, and that he had replied there is a lack of trust amongst all of us.

527. The Claimant accepted that as of now he would not trust AC or MS with non-clinical work matters. He would trust BD, and could work with MNS … "If he can get out of the box where he blames me for the restrictions". He was asked if (by reference to page 1464) it was reasonable for colleagues to hold a lack of trust in him just as he has a lack of trust in them, and the Claimant agreed of course, if that is their opinion.

528. The Claimant agreed that the dysfunction would have continued, he said unless mediation was arranged.

529. It was put to the Claimant … "If you had gone into mediation with AC a key part would have been your accusation of lack of probity". He confirmed … "could not have a mediation without it.". The Claimant confirmed that this would also need to be addressed with MS.

530. It was put to the Claimant … "you accept when faced with the Boniface report and the conclusions looking at in May 2018, you accept the trust were entitled to have this put to panel". … "Yes, that was the process given". Also put … "It should go to panel?" … "that was the next step. It was put … "accept proper course to take?" … "That was the path given to me and Boniface and we all had to get there now as that is the conclusions he has reached.".

531. For these reasons we find that there are no primary facts from which it can be found on the balance of probability that RB's true role was to provide a report that would wrongly lead to the conclusion by a Panel that the Claimant should be dismissed. We do not find that the "Disciplinary outcome following the Boniface report was predetermined and this was detrimental treatment by Julie Doherty and Paul Lear".

532. With these findings it is not necessary for us to address the time limit jurisdictional issues.

**The Dismissal**

533. Now to consider the reason for the dismissal and the fairness of dismissing for that reason.

534. This is a case where dysfunction in the O&G department is not in dispute. What is, is the cause of the dysfunction and the motive for the Claimant being portrayed as, the Respondent submits "a dog with a bone" instead of as the Claimant asserts "the conscientious whistle-blower".

535. We have found as fact the Claimant does pursue the on-call matters in respect of AC and MC despite its resolution so far as the Respondent is concerned. The Claimant's involvement in the on-call matter is complained about by MS as can be seen from page 353 which is a document recording MS' concerns dated 28 November 2014. MS says he believed he had agreed he would he work off the amount, but without his agreement the Claimant and WW decided that he should repay it. This complaint by MS about the Claimant

cannot be linked to any of the protected disclosures the Claimant says he has made, being alleged disclosures one and two relating to AC's PAs.

536. The Claimant maintained during cross examination that he still considers MS and AC would have been aware of these overpayments and are therefore guilty of fraud. The Claimant's continued view on this, despite what the facts support, does appear to support the conclusions reached by MJ in the Edgecumbe report about the Claimant and how she explained "chronic embitterment".

537. This does support the Respondent's assertion that the Claimant is a "dog with bone" rather than "conscientious whistle-blower".

538. About the AC PA matter this concludes with WW expecting to hear further from the Claimant if there is an issue. WW does not.

539. As to the work restrictions placed on MNS. By email dated 4 April 2014 (see page 336) WW expressly states that … "… any in-fighting is likely to be detrimental…" to the goal of supporting MNS to re-establish his position within the Trust and … "It cannot be helpful to keep going over past events that cannot be changed.".

540. As to the Claimant's actions around this time the statement dated 1 May 2014 from GH a Gynaecology sister about an incident and the Claimant's role in it (see pages 338 to 339) and records she has a lack of trust in him. There is no evidence to suggest that this account by GH was motivated by the alleged protected disclosures one and two the Claimant says he made before this. We have no reason to not accept that this is a true reflection of what GH thought at that time about the Claimant.

541. On the 30 September 2014 BD another Consultant, complains to the Claimant about his handling of her job planning (see page 347). There is no evidence to suggest that this account by BD was motivated by the alleged protected disclosures one and two the Claimant says he made before this.

542. It is then by a joint statement signed by MS, AC, BD and MNS dated the 10 October 2014 that these consultants complain to PL about the Claimant and his conduct in the Clinical Director role and how they have lost trust and confidence in him.

543. As the alleged disclosures made by the Claimant up to this point (numbers one and two) relate to AC's PA matter, which he has not spoken to AC about, it cannot be said that this joint statement is submitted on the grounds of any alleged protected disclosures the Claimant may have made.

544. As we have also found factually the matters GH and BD raise appear completely independent of any disclosures the Claimant may have made.

545. There is then a further complaint from BD to the Claimant on the 14 November 2014 about his handling of a leave application (see page 352). Then

BD produces a three-page complaint dated 24 November 2014 (pages 354 to 356) about the Claimant. Again, there is nothing to suggest that these matters are raised because of the alleged protected disclosures one and two the Claimant has made about AC's PAs.

546. MS, AC, BD and MNS then write a second joint letter of complaint about the Claimant dated 2 December 2014 (see page 357).

547. By letter dated 4 December 2014 AC writes a personal letter of complaint to PL about the Claimant's leadership ability (see page 358). There does not appear to be any evidence linking what AC says here to the alleged protected disclosures one and two the Claimant asserts he made about AC's PAs. The Claimant has not raised the PA issue with AC directly. As a contemporaneous document it records how AC and a number of medical staff view the Claimant's leadership ability at that time.

548. On the 18 February 2015 MNS emails PL about his clinical concerns about the Claimant, his alleged malicious conduct towards him and seeking removal of him as CD (see page 363). We note that MNS to this point has not been the subject matter of any of the Claimant's alleged disclosures it is therefore not apparent that his complaints are motivated by any alleged disclosures the Claimant says he made.

549. On the 1 April 2015 PL writes to AC, BD, MNS and MS proposing a facilitated team meeting (mediation) to deal with the difficult working relationships (see page 367). There are issues of concern about the Claimant concerning his leadership style and communication.

550. Matters do not calm down and eventually lead to the instruction of Dorset Mediation. This also refers to concerns being the Claimant's … "leadership style and communication". There is no evidence to suggest that this was originally written by PL and then repeated by EH because of any alleged disclosures by the Claimant.

551. The agreed chronology then records that on the 8 May 2015 TH's report into MS' allegedly fraudulent study leave is delivered (see page 374). Then on the 24 August 2015 CAW confirms with MS the outcome of the investigation into the study leave fraud matter (see page 406), and that the … "investigation found there was no intent to commit fraud and no further action is required in relation to this matter.". This is therefore a concluded matter so far as the Respondent is concerned, however, it is not for the Claimant who raises it as part of his disclosure five, the letter to the GMC, copied to PL dated 21 September 2015.

552. By a letter dated 18 May 2015 the Claimant writes to PL expressly stating that his colleagues' unhappiness in his role is due to his management of them for the first time as per Trust policy (see page 385). What the Claimant does not say here is that the unhappiness is related to alleged disclosures he says

he has made. This contemporaneous document shows that it is the Claimant's view at this time that what is happening between the consultants is related to his management of them, not any disclosures he may have made.

553. By letter dated 20 May 2015 MS, AC, MNS, MS and GH write to the GMC stating there has been no satisfactory response from PL to their concerns which they now ask the GMC to investigate. We agree, as submitted by Respondent's Counsel, that this is a significant step by these individuals. We also note that this action by the consultants is not raised as a detriment by the Claimant as being done because of any alleged protected disclosures he may have made up to this point.

554. By letter dated 20 May 2015 MS, AC, MNS, MS and GH write to PL to confirm they will not go through a mediation session and that they have forwarded their concerns to the GMC (see page 390). There would appear to be a change of heart though as within the agreed chronology it is recorded that on the 7 July 2015 CAW invites the parties to a pre-mediation meeting. Then on the 4 August 2015 AC, MS, BD, MNS and GH consent to mediation on condition that if they are "all still unhappy with Mr Iftikhar as the clinical lead he is replaced forthwith" (see page 403). The mediation process then appears to commence with an opening session around the 23 September 2015 (see page 451) and it remains underway in mid-October 2015 (see page 467). There is limited documentation about the mediation presented to us, which is understandable as presumably it was a confidential process between the parties. It is common ground though that this mediation process is unsuccessful. In cross examination PL confirms that he was informed by the mediators that they fear matters are worse than where they started.

555. It was put to the Claimant in cross examination that by him, while the mediation process was live, sending his alleged protected disclosure five to the GMC it was a serious attack against professional colleagues, a two-faced response. The Claimant responded that he has a right to respond to the allegations against him. We would observe that this is more than responding to allegations it is making allegations against his colleagues which, in the middle of a mediation process would not be helpful and may be a reason for its ultimate failure. The Claimant did confirm that if there had been a further mediation arranged, he would raise his allegations of fraud by AC with the parties.

556. By letter dated 24 July 2015 Dr Margaret Peramulla, Dr Asia Khan and Dr Daby write to PL to express they are "saddened and appalled" that colleagues continue to undermine the Claimant's integrity and that they support him 100%. (see page 401). The Claimant accepted in cross examination that he had gathered these views. We note that the format of the document (the statement with joint signatures underneath) does compare closely to those previously submitted by the other consultants about the Claimant. It does appear to be a course of conduct taken by the Claimant in defending his management of the team and not something you would expect to see from the leader of a team, involving juniors in a disagreement between the seniors.

557. Chronologically we then get to the Claimant's alleged protected disclosure six. About the Claimant being approached informally by consultants and middle grade staff in connection with this matter the Claimant says that … "Historically BD and MS had informed me of their concerns regarding MNS practice, however they had now changed their position in order to back up MNS (p424-427).". We have reviewed the emails at pages 424 to 427 and they do not support that there has been a change of position by BD or MS. Instead they suggest they are surprised at the change of position by the Claimant on the matter, by him now being critical of what MNS is doing.

558. Of note is also what AC says to the Claimant about his actions (see page 425) where she calls for support of colleagues, rather than inflaming a difficult situation.

559. We have also been referred to an email from SB (Service Manager for Women's Health) to CAW dated 4 September 2015 (pages 432 to 433) which reports a number of difficult encounters she has had with the Claimant and her email concludes with … "I feel it is important I bring this issues to your attention, as these are not the first incidences where I have found Mr Iftikhar to be obstructive and unsupportive, however it was particularly noticeable over the last week or so.". There is no evidence to suggest that what SB says here is in any way motivated by any alleged protected disclosures the Claimant says he made.

560. About the letter dated 19 October 2015 that the Claimant writes to AC, MS, MNS, and BD (page 473), the Claimant agreed that what he wrote was to tell his colleagues that they had got it all wrong, they were unsuccessful, and they need to bury it. He was asked if he thought this letter was on reflection wise and sensible. The Claimant confirmed that it was, although if he had to redo it knowing it offended them, but it is how he felt, he had to tell them off.

561. This correspondence did not go down well with his colleagues who responded on the 2 November 2015 (see page 488). This response is generated by the Claimant's correspondence in which he wants to tell his colleagues off. It relates to the way he is communicating with them. His colleagues say it demonstrates poor leadership by the Claimant which is what their concerns have been about. This expression of their views at this stage is therefore completely independent of any alleged disclosures the Claimant may have made up to this point.

562. By email dated 18 November 2015 MS, AC, MNS and BD write to the Claimant to complain about the distribution of work in job plans sent to them by the Claimant on the 12 November 2015 (see pages 490 to 491). This is correspondence generated by what the Claimant says to his colleagues about job plans and is not related to any alleged protected disclosures the Claimant says he has made.

563. The agreed chronology records that in November 2015 the GMC's expert report from Professor Lamont is received and we are referred to the conclusion at page 521. This records acrimony towards the Claimant from

MNS. The Claimant's alleged disclosure six about MNS is made on the 28 August 2015. However, we would observe that as the GMC referral (May 2015) and the clinical concerns being investigated (there are no medical reference dates post the 17 August 2015 (see page 509) the majority being in 2013/2014), all predate the alleged disclosure, it would appear that the observed acrimony between the Claimant and MNS can have nothing to do with any alleged protected disclosures the Claimant has made about MNS.

564. On the 18 January 2016 the Claimant attends a 2-day GMC Interim Orders Tribunal hearing. We are referred to pages 542 to 550 about this and with particular reference to page 549, saying that the Claimant is exonerated. Having reviewed that page, it says that it is not the Claimant's sole responsibility but note what is suggested is … "a significant breakdown of communication within the department which could put patients at risk.".

565. By email dated 25 January 2016 the Claimant writes to PL saying that the allegations against him are malicious, and suggests it is possible racism and the anger has been directed against him due to the implementation of Trust polices, and not therefore saying it is "the blowing of the whistle".

566. It is then on the 5 February 2016 that the Claimant corresponds with the GMC about BD's allegedly fraudulent study leave application in 2014 (see pages 552 to 558). It is unclear why this is pursued by the Claimant at this point, as he is no longer in the CD role, and it was the Claimant's evidence that this issue was resolved by him.

567. In February 2016 the Respondent engages Mr Hisham Rahman and Mr Ed Neale to conduct a review of O&G department and the report is then produced on the 1 March 2016 (pages 560 to 578). It is submitted to us by Respondent's Counsel that … "Objectively, the Neale/Rahman service review in February 2016 identifies the dysfunction as a lack of consistency of medical leadership within the department leading to 2 factions p574". This is what the report records and it would relate to when the Claimant was in the CD role as AC only took on the role from the 1 February 2016.

568. By email dated the 2 March 2016 the Claimant sends an email to (as the agreed chronology refers to them) … "supportive colleagues" about the IOP outcome (see page 580) offering an apology on behalf of his other colleagues. The Claimant accepted that he did not have the agreement of his other colleagues to make such an apology on their behalf. The Claimant having written and circulated such a statement without consent is unlikely to assist in eliminating dysfunction in the O&G department.

569. The Claimant continues to provide further material to the GMC about his colleagues. By letter dated 19 April 2016 EH replies on behalf of PL (as he is on annual leave and asked EH to do so) to the GMC (see page 597) following a request from it for information. Based on the way that the Claimant has confirmed he argues his case this is a crucial piece of correspondence. The Claimant submits that this is wrong information that ultimately leads him to being seen as the "dog with a bone", rather that the "conscientious whistle-

blower". It is the Claimant's case that this wrong information was created by EH on the grounds of his alleged protected disclosure five to the GMC.

570. EH was not challenged in cross examination that what she did was because of alleged protected disclosure five or any other particular disclosure. We note that this is not an allegation made against EH until closing oral submissions. Also, the resolution of the AC PA matter is referred to by PL in his letter dated 10 November 2016 and it was not put to PL in cross examination that he wrote the letter dated 10 November 2016 (at page 852) on the grounds of any alleged protected disclosure the Claimant made.

571. A letter dated 19 May 2016 from PL to the Claimant records matters discussed at a meeting between the Claimant, PL, CAW and the Divisional Work Force Manager on the 12 May 2016 (see pages 625 to 627). It records the Claimant having communicated that he did not believe he could build a relationship with MNS or MS due to differing cultures. The responses given by the Claimant in cross examination about this matter do not support that he is being acted against in his view for whistleblowing reasons. The Claimant does raise allegations of race discrimination in his submissions to the panel hearing, but they are not part of his claim to this Tribunal. It is difficult to see how the Claimant could work with MS and MNS moving forward if he held these views about them.

572. By letter dated 10 November 2016 (pages 852 to 853) PL writes to the Claimant confirming that CAW and AC had reported that the recent job planning meeting had been very difficult. We note from this letter that an issue of concern for the Respondent is that CAW and AC found the Claimant to be bullying and threatening towards them both, interrupting them frequently. This relates to the Claimant's conduct at the meeting towards both CAW and AC and not to what he then says specifically to CAW about allegations of fraud about AC.

573. The Claimant was asked about the 10 November 2016 letter in cross examination and he confirmed that the job planning meeting was an opportunity for him to raise fraudulent behaviour, it was a turning point for him, he was not going to let it go. He was asked if he thought a job planning meeting like this was the appropriate forum to make the allegations. The Claimant confirmed, of course, the job plan is interlinked, job plans are interlinked the department is given money, if one person overpaid and another under paid, that is the forum.

574. It is not clear in our view though why a job planning meeting is the appropriate forum to raise allegations of fraud. The Claimant had seen matters work through the Respondent's whistleblowing report procedure with the involvement of RJ. This was a meeting about the Claimant's job planning, and he is wanting to challenge what he perceives as errors in his PAs (see paragraph 71 of his witness statement).

575. On the 30 June 2017 the Claimant writes to TH in relation to his original contact with him over potential fraud concerning AC (see page 930). TH did not reply, and the agreed chronology records the Claimant follows it up with a phone call a few weeks later. The Claimant having confirmed in cross

examination that his job planning meetings were the correct forum to raise matters of fraud concerning AC there appears to be no obvious reason for this change of direction now.

576. It was suggested by the Claimant that the decision about his dismissal was inevitable because the panel had already been booked. PM responded to this in cross examination by confirming that in most cases where an investigation is ongoing they would always set up a provisional date for a panel, because when Doctors are involved they cannot cancel any clinical commitments within 6 weeks, so to make sure there is not a delay they would pencil in a date with the panel. We accept this explanation.

577. We accept the Respondent's evidence about what the NCAS are recorded to have said. We also note that none of the attendees at the NCAS meeting were part of the panel that took the decision to dismiss the Claimant.

578. As to the suggestion that there was a predetermination of the decision to dismiss as the Respondent has already hired a third consultant, when only two were needed at that time. We accept the Respondent's evidence as to why this happened at that time and there is nothing to suggest this is done because of the Claimant's alleged disclosures.

579. It is submitted by Claimant's Counsel that there is a concern about the fairness of any dismissal because as was established during cross examination the … "new MD AH had twice visited the O and G department attended meetings run by Jo Hartley…" and had therefore observed the department functioning without the Claimant present. Claimant's Counsel submits that … "AH was also forced to accept that this that this interaction meant that he could not be an impartial chair of the panel.".

580. All AH agreed was he understood Claimant's Counsel's point. AH was not acting as a witness at the panel hearing and there is no evidence that what AH knew he imparted to the other panel members (AO was not cross examined about this matter, despite her evidence coming after AH's). There is no evidence presented to us that what AH did had any negative sway on matters. We accept what AH says and that he was carrying out his role as a Director. We would observe that if the evidence had been AH had observed dysfunction while the Claimant was not there, but hidden this, that could raise questions as to fairness. This did not happen.

581. We accept the evidence of AH and AO as to the reason for the Claimant's dismissal being the irretrievable breakdown in relations. This is accepted by the Claimant as the reason of AH and AO and this dynamic existing in the O&G department is supported by the evidence of the Claimant's supporting witnesses.

582. It is the Claimant's case that the panel has been misled (the Jhuti argument).

583. As confirmed by Claimant's Counsel in oral closing submissions, it is asserted that the Claimant's ultimate dismissal being for the principal reason of making a protected disclosure, hinges on what EH is said to have wrongly stated in respect of AC's PAs to the GMC.

584. Based on our findings we do not accept that was wrongly stated, and even if it was, we accept what EH says, which it was her communicating what she understood. There is no evidence that it was deliberately misleading on the grounds of any disclosures the Claimant may have made.

585. Considering paragraph 72 of the ***Kong*** decision referred to above there is no evidence proven on the balance of probability that any person other than the panel made the decision to dismiss, nor that if there was any wrong information presented to the panel about the Claimant it was produced to procure the employee's dismissal for the proscribed reason; nor that the panel was peculiarly dependent upon the producer of such "wrong information" (if there were any) as the source for the underlying facts and information concerning the case. There is no evidential basis to find that this is a ***Jhuti*** type case.

586. We have not found any of the alleged detriments to be on the grounds of any of the proven disclosures. From our fact find the Claimant does appear to be the primary focus of the dysfunction in the department and this is not due to his "whistleblowing". For all these reasons there is a clear separation for what happened to the Claimant, including his dismissal and the protected disclosures he made.

587. We therefore find that the principal reason for the Claimant's dismissal is the irretrievable breakdown in relations. This is a reason that can amount to some other substantial reason and is a fair reason.

588. Owing to the Claimant's actions as described above, the identified patient safety concerns that the team dysfunction can cause, the previous failed mediation, and it not being supported by MS and MNS that the Claimant's efforts post Edgecumbe with MS and MNS will resolve matters, and no attempt by the Claimant to include AC and BD in his reconciliation efforts, all this in our view supports that the decision of the panel to dismiss was a reasonable one. It was not pre-determined, it was based on what they genuinely believed, which is based on reasonable grounds, after a reasonable investigation (as detailed above we find that RB's findings are independent).

589. We accept that the Respondent did take reasonable steps to solve the problem without resorting to dismissal and that the panel did consider whether there were any alternatives, short of dismissing the Claimant.

590. MHPS is no longer relevant based on these findings as confirmed by the submissions of both Counsel. We do not find any procedural unfairness. The

Claimant also had a right of appeal, exercised it and makes no complaint about it.

591. We find that the dismissal of the Claimant is reasonable in all the circumstances for some other substantial reason.

592. For all these reasons the unanimous judgment of the tribunal is that:

a. The complaints of detriments 1 to 4 for making a protected disclosure are dismissed on withdrawal.

b. The complaints of unfair dismissal, detriments 5 to 8 for making a protected disclosure and automatic unfair dismissal (section 103A Employment Rights Act 1996), fail and are dismissed.

593. For the purposes of Rule 62(5) of the Employment Tribunals Rules of Procedure 2013, the issues which the tribunal determined are at paragraph 13; the findings of fact made in relation to those issues are at paragraphs 14 to 373; a concise identification of the relevant law is at paragraphs 374 to 417; how that law has been applied to those findings in order to decide the issues is at paragraphs 418 to 592.

Employment Judge Gray
Date: 12 October 2021

Judgment sent to Parties: 12 October 2021

FOR THE TRIBUNAL OFFICE