Case Number: 2601726/2020

EMPLOYMENT TRIBUNALS

Claimant: Mr Efe Ekakitie

Respondent: Sharief Healthcare Limited

Heard at: Midlands (East) attended on 19th and 20th July 2021 and thereafter by CVP

On: 19th, 20th, 21st 22nd,23rd, 26th 27th 28th 29th July 2021 and deliberations with members; 30th July 16th and 17th August 2021.

Before: Employment Judge Broughton and Members; K Srivastava and A Greenland

Appearances:
Claimant: Anna Williams, Counsel

Respondent: Tim Kenward, Counsel

JUDGMENT

The unanimous decision of the Employment Tribunal is that:

1. The claimant was disabled during the relevant period pursuant to section 6 of the Equality Act 2010

2. The claimant was a worker as defined under section 230 (3)(b) Employment Rights Act 1996 and an employee under the extended definition under section 83 (2) of the Equality Act 2010 and a worker as defined by section 43K (1)(a) ERA and section 43K (1) (C) ERA..

3. The claim of harassment related to the claimant's disability in respect of the incident on 16 August 2019, brought pursuant to section 26 EqA, is struck out on the grounds that it is out of time.

4. The claim of harassment related to the claimant's disability in respect of the incident on 7 January 2020, brought pursuant to section 26 EqA, **is well founded and succeeds**.

5. The claims that the claimant was subjected to detriments pursuant to section 43B ERA are not well founded and are dismissed, while those which relate to events in August 2019 are struck out as being brought out of time.

REASONS

Background

1. The claimant presented his claim to the Employment Tribunal on 25 May 2020.

2. The claim related to events which took place between 1 August 2019 and 18 January 2020 when the claimant worked as a Locum Pharmacist for the respondent.

Preliminary Hearing 20 August 2020

3. The matter came before Employment Judge Britton at a preliminary hearing on 20 August 2020, when the claim against the second named respondent, Sharief Healthcare Limited (Hortonville Pharmacy), being a branch of the first respondent's limited company, was dismissed upon withdrawal. The claim is pursued against the first respondent only, and hence the first respondent is hereafter referred to as the respondent.

4. At the preliminary hearing Employment Judge Britton was informed that (not having been set out in the pleadings) shortly after being contacted via an employment agency (PPR UK), the claimant supplied his services to the respondent via a limited company, of which he was a director and shareholder and which invoiced the respondent. The record of that hearing noted that Employment Judge Britton had made the observation that it followed that the claimant was an *employee* of the limited company that he had set up and thus not an employee of the respondent and therefore could not pursue a claim under section 103A of the Employment Rights Act 1996 (ERA).

5. The preliminary hearing therefore recorded that the claim of automatic unfair dismissal for making a protected disclosure ('whistleblowing') pursuant to section 103A of the Employment Rights Act 1996 (ERA) was dismissed upon withdrawal. Section 103A only applying to 'employees' i.e. individuals who have entered into or work or worked under a contract of employment as defined by section 230(1) ERA.

6. There was also as recorded, a further discussion about the claimant's status. For the purposes of section 47B ERA, the term 'worker' and 'employment' have the extended meaning under section 43K ERA and Employment Judge Britton determined that he could therefore bring that claim.

7. Following that preliminary hearing therefore, the issues in terms of the 'whistleblowing' claims, were narrowed to a claim of detrimental treatment by reason of whistleblowing pursuant to section 47B of the ERA.

8. Employment Judge Britton observed that the claimant under section 47B ERA was, based on the legal jurisprudence, limited to a claim for detrimental treatment short of dismissal and thus he could not make the very substantial claim for loss of earnings post 18 January 2020, as per his schedule of loss. Following legal advice, the claimant who had initially confirmed that he accepted that his claim must be limited to detrimental treatment short of dismissal, had sought to withdraw that concession prior to today's hearing and the respondent did not oppose.

9. When calculating the amount of compensation to be awarded, a tribunal must pursuant to section 49(2)(a) have regard to '*the infringement to which the complaint relates'* and section 49(2)(b) requires tribunals to also have regard to '*any loss*

which is attributable to the act, or failure to act, which infringed the complainant's right'. S.49(3) expressly provides that *'loss'* for this purpose will be taken to include: (a) *any expenses reasonably incurred by the complainant in consequence of the act or failure to act which is the subject of his or her complaint*, and (b) *loss of any benefit which he or she might reasonably be expected to have had but for that act or failure to act*. When ascertaining the loss, a tribunal should apply the same rule concerning the duty of a person to mitigate his or her loss as applies to damages recoverable under the common law of England and Wales or Scotland: section 49(4). In ***Roberts v Wilsons Solicitors LLP and ors 2018 ICR 1092, CA***, the Court of Appeal held that the phrase 'attributable to' does import the common law concept of 'but for' causation.

10. The claimant also brought a claim of disability discrimination and it was confirmed at the preliminary hearing that this claim was limited to a claim of *harassment* only pursuant to Section 26 of the Equality Act 2010 (EqA). In relation to his disability it was confirmed he had a spinal condition and the conduct complained of, related to the removal of a chair he complains that he required to carry out his work as a Locum Pharmacist.

11. The claimant was ordered by Employment Judge Britton to provide further particulars of his claim and in respect of the harassment claim; medical evidence and an impact statement.

Today's Hearing – Preliminary Matters

12. A joint bundle had been provided to the Employment Tribunal which numbered 226 pages. There was supplemental disclosure and the Tribunal bundle increased to 278 pages.

13. Within the additional disclosure was a witness statement from a Ms Hazel Smith (page 227/228). Counsel for the respondent explained that Ms Smith was a former employee of the respondent who had been prepared to provide a signed witness statement but was reluctant to attend the hearing to give evidence. She was, he explained, nervous about attending. No application for a witness order had been made by the respondent.

14. Counsel for the claimant informed the Tribunal that she had no instructions to object to the inclusion of the witness statement however, invited the Tribunal to attach less weight to the evidence which was not being given under oath and in the absence of an opportunity for the claimant to challenge her evidence under cross examination. Counsel for the respondent conceded that less weight was to be attached to the witness statement. The Tribunal considered it to be in the interesting of the overriding objective to allow the statement to be admitted into evidence.

15. There was some discussion about the list of issues which had been prepared.

16. Mr Kenwood, Counsel for the respondent informed the Employment Tribunal (and this was not contested by Counsel for the claimant) that Counsel previously representing both parties had communicated and agreed a list of issues back in December 2020. Mr Kenwood on Tuesday of the previous week, (13th July 2021) had updated the list of issues. The list of issues dated 3 December 2020 was included within the bundle (page 70P and 70Q). The amendment which Counsel for the respondent had made was to paragraph 2; in terms of the definition of worker he had included "*as defined by Section 83(2)(a) of the Equality Act 2010"* to cover the disability discrimination complaint. The draft list of issues had referred only to the Employment Rights Act 1996 (ERA).

17. Mr Kenwood had also amended the remedy section which Counsel for the claimant raised no issue with. He had also included an additional paragraph 1 to address the time limitation point. As this is a jurisdictional point Counsel for the claimant accepted that this was a matter that needed to be addressed by the Tribunal.

18. Counsel for the claimant did object however, to the respondent including within the list of issues whether the claimant was a worker. Counsel for the claimant explained that the claimant had not understood that this was a contested issue however, she did not appear to have an explanation for why the list of issues prepared by Counsel for the claimant on 3 December 2020 identified the claimant's status as a worker as an issue. It was not submitted by Counsel for the respondent that there had been any explicit concession about the claimant's employment status. Counsel for the claimant accepted that this was a jurisdictional issue and that it should remain in the list of issues to be determined however, this had not been addressed in any detail in the claimant's evidence in chief. Counsel for the claimant asked to be able to address this in supplemental questions because it had not been clear she argued that this remained an issue. Counsel for the respondent had no objection to supplemental questions to address this issue and in the circumstances the Employment Tribunal considered it in the interests of the overriding objective to permit the claimant to do so.

19. We then turned to look at the most recent list of issues which had been prepared and there was some discussion in relation to it.

20. The Tribunal queried in relation to the malpractice being a breach of the legal obligation under section 43B(1)(b) of the ERA, which legal obligation the claimant was relying upon. Counsel for the claimant informed the Tribunal that the legal obligation is The Misuse of Drugs Regulations 2001(**Regulations**) but generally the regulations concerning controlled drugs.

21. A copy of the Regulations was not included within the bundle and the Tribunal informed the claimant that if those specific Regulations were being relied upon a copy should be disclosed and included within the bundle. The Tribunal is not familiar with those Regulations. A copy was later provided and the Respondent did not object to its inclusion within the bundle.

22. Mr Kenwood made the Tribunal aware that there was a reference to the Regulations in the supplemental witness statement which the claimant had produced on the previous Friday 16 July (paragraph 5 of his supplemental statement). The Tribunal enquired why a supplemental statement had been prepared by the claimant to which Counsel for the claimant explained that the claimant's representatives had noticed after an exchange of witness statements, that his original witness statement did not cover one of the protected disclosures and therefore a supplemental statement was prepared to address that. That alleged protected disclosure was part of his pleaded case. Exchange of witness statements took place on Monday 12 July and a supplemental statement was provided on Friday 16 July 2021. The respondent confirmed that it did not seek to oppose the supplemental witness statement. The Employment Tribunal considered it in the interests of the overriding objective to permit the claimant to admit that supplemental statement into evidence.

Disclosures

23. The claimant confirmed that for the purposes of section 43F of the ERA 1996, Counsel for the claimant confirmed that disclosure was to the General Pharmaceutical Council (**GPhC**) and this related to the disclosure on 16 September 2019 **only.**

Disability

24. In relation to the disability claim; the respondent accepts that the claimant had a spinal condition. The name of the condition was not included within the list of issues and Counsel for the claimant confirmed that it is a multiple generative condition of the spine and that there had been a different diagnosis within the medical evidence.

25. The respondent informed the Tribunal that whilst it accepts the claimant had a physical impairment, it does not accept that the effects of the condition met the requirements of section 6 EqA and therefore disability is not conceded.

Video evidence

26. The Tribunal had been sent an email attaching two short video recordings. The Tribunal had not had an opportunity to look at the videos nor had the Tribunal started its reading in before these preliminary points were addressed in the morning. These were videos produced by the respondent covertly in the workplace however, Counsel for the claimant informed the Tribunal that she had no instructions to object to those being submitted into evidence. Counsel for the respondent informed the Tribunal that they were very short videos which they wanted the Tribunal to view the claimant working. It was not alleged that these recordings infringed the data protection legislation. Given the lack of objection and the respondent's contention that they were relevant, the Tribunal agreed to view them.

Applications to amend – first day of the hearing

27. The claimant made an application to amend the claim on the first day of the hearing, to include an additional disclosure based on an email the claimant had sent to the regional locum consultant at PPR UK, Mr Dattani. Counsel for the claimant argued that the need for the amendment came about as a result of the respondent's disclosure at 6.30pm on the previous Friday (16 July 2021) which shows that this email from Mr Dattani had been forwarded to the respondent. Counsel for the respondent raised with the Tribunal that this amendment was a matter which had only come to his attention when he arrived at the tribunal that morning and he needed to take instructions on the amendment application.

28. There followed an adjournment so that the Tribunal could commence its reading. Later that morning on reconvening, the parties informed the Tribunal that they had updated the list of issues as ordered by the Tribunal (the list of issues set out in a document now dated 19 July 2021) and the respondent's Counsel had taken instructions and was not opposing the amendment by the claimant to include the additional disclosure which was alleged to have taken place on 6 August 2019 to Ms Bryony Gleave of the respondent, and which now appears as 3.1 in the list of issues.

Further amendment

29. Counsel for the claimant on reconvening informed the Tribunal that the claimant now wished to make a further amendment to the list of issues to amend the detriment at 5.1 such that it did not take place as alleged on 23 August (the allegation relating to the removal of his chair) but 16 August. Counsel for the claimant informed the Tribunal that it had not been clear to her when this detriment had taken place and whilst taking instructions during the adjournment the claimant had confirmed that it was actually 16 August and not 23 August. Counsel for the respondent had not had the opportunity to take instructions on this further amendment but objected on the basis that he felt that this materially changed the basis of the claim.

30. It was decided to address that further amendment application at the start of the second day of the hearing, once Counsel for the respondent had taken instructions and the Tribunal had finished its reading of the case papers.

Second day of the hearing: 20 July 2021

31. With regard to the further application to amend the list of issues, at 5.1, Mr Kenwood confirmed that he had now taken instructions and the respondent was not objecting. The list of issues was thus further amended. There was then a further short adjournment during which Counsel for the claimant was ordered to confirm on reconvening, which detriments it was being alleged were on the grounds of which of the qualifying disclosures; this was not set out in the list of issues or in the pleaded case.

32. The Tribunal has added to the list of issues set out below (in italics and bold type) a cross reference to which detriments were alleged to be on the grounds of which alleged protected disclosures, as confirmed by Counsel for the claimant.

Evidence

33. The claimant gave evidence under oath and was cross examined by the respondent. He did not call any other witnesses. The respondent produced witness statements for the following witnesses who gave evidence under oath and were cross examined by the claimant; Ms Salma Akbar, previously employed by the respondent as a Pharmacy Manager, Mr Sanjay Nath, engaged as a self-employed contractor working as an Area Manager, Mr Abdul Sharief, employed as a Director and Clinical Lead based at Head Office who also on occasion carries out the role of a Responsible Pharmacist. The respondent also produced a witness statement admitted into evidence for Hazel Smith previously employed by the respondent as a Pharmacy Supervisor, she did not attended the hearing, did not give audience under oath and was not cross examined. The respondent had also produced a witness statement for Mr Luca Cara employed by the respondent as a Pharmacy Dispenser, the circumstances surrounding Mr Cara are dealt with further below.

34. The claimant started to give his evidence on the second day after the preliminary issues had been addressed however, although giving his evidence behind a Perspex screen at the witness table, he wanted to retain his face mask. The claimant explained that he was a healthcare worker and was concerned about catching the Covid virus , particularly in light of the current variant which is very infectious. Counsel for the respondent objected to the claimant keeping his face mask on, on the basis that the claimant had indicated that he was prepared to attend the Tribunal to give evidence and the respondent's Counsel considered the respondent would be in a worse position than if the claimant was giving video evidence where his full face could be seen. One of the Tribunal Members (both of whom were participating via CVP with the Employment Judge in attendance at the hearing), also raised a concern that he was having difficulty hearing what the claimant was saying while he was wearing a face covering.

35. With the agreement of all parties, the claimant gave evidence in a separate room via video link. He was then comfortable in removing his face covering and he could be heard clearly. The respondent requested that the hearing be converted to a CVP hearing for the duration of the hearing so that all parties were on an equal footing. The claimant did not object. In the circumstances the Tribunal considered it to be in the interests of the overriding objective, including putting the parties on an equal footing to convert the hearing to a CVP hearing with all parties, witnesses and the Employment Tribunal attending via CVP.

Luca Cara – Witness Order

36. On the morning of the 27 July 2021, on the 7th day of the hearing, an application was made orally following an application in writing on 26 July 2021 by the respondent for a witness order to be granted by the Tribunal to require the attendance of Mr. Luca Cara as a witness. A witness statement had been produced by Mr. Cara, although not signed. Mr. Cara remained employed by the respondent, as a full-time Dispenser His evidence is directly relevant to the alleged protected disclosures and alleged treatment of the claimant, while at the respondent's Acklam branch.

37. The Tribunal considered the representations and submissions of Mr. Kenward which were essentially that Mr. Luca Cara remains employed by the respondent and has given notice of termination however he remains employed until the end of this week but is reluctant to give evidence because he is concerned about his 'recall of events'.

38. The claimant did not seek to dispute the relevance of Mr Cara's evidence.

39. The Tribunal considered the likelihood that Mr. Cara maybe a hostile witness. Mr. Kenward made submissions that he understands Mr. Cara is reluctant rather than hostile. The respondent was calling Mr. Cara to confirm his witness statement. An order was not sought with the intention that he will be cross examined by the respondent.

40. After considering the submissions of both parties and in particular the relevance of Mr. Cara's evidence and that the Tribunal were informed that he is reluctant rather than hostile, an order was made for his attendance at 10.00am at the Tribunal on Wednesday 28th July 2021 as requested by the respondent. The Tribunal was informed that Mr. Cara remained in work and the respondent would be serving the witness order on him personally in work that same day.

41. In the event Mr Cara attended the Tribunal on 28 July 2021 under the witness order however, before he was sworn in, he informed the Tribunal that he had never consented to making a statement and did not wish to do so . He stated that the document which appeared to be a witness statement for him, had arrived that morning but that he had told the respondent to disregard it, and that he had stressed for the past few weeks that he did not wish to give a statement. Counsel for the respondent applied to discharge the witness order and in the circumstances the Tribunal agreed to grant the discharge . The witness had not signed his statement and had not been sworn in. The claimant did not seek to make an application to call Mr Cara to give evidence on their behalf, either on a voluntary attendance basis or under a witness order. Mr Cara was therefore released without giving evidence and the witness order was discharged.

Amendment to the claim – 27 July 2021

42. The claimant also sought to make further amendments to the claim on the 7th day of this 10 day hearing and the day before, according to the original timetable at least, the parties were due to make their submissions. The application was to add two further alleged detriments pursuant to section 47B ERA; the first relates to an email which was sent by Mr. Sanjay Nath to the GPhC on 7 February 2020 and which appears at page 213 – 215 of the bundle and what was said in that email and the second application relates to an email dated 28 August 2019 which appears at page 252. It is an email again from Mr. Sanjay Nath to Miss Lisa Hickey of the respondent's HR team.

43. We heard submissions from the claimant and the respondent, who opposed the amendment applications.

44. The claimant made the application without notice, on the morning orally. The claimant's Counsel explained that her instructing solicitors were on leave the day before and she was therefore not in a position to take instructions before and hence was unable to put the respondent on notice. After hearing the submissions of Counsel for the claimant, the respondent's counsel was offered but declined an adjournment to take instructions before making his submissions.

45. Both parties referred to ***Selkent Bus Co Ltd v Moore 1996 ICR 836 EAT*** **,** and the applicable criteria that the Tribunal is required to take into account; the nature of the amendment, the applicability of time limits and the timing and the manner of the application and the requirement to exercise the discretion having regard all the circumstances and in particular to any injustice or hardship which would result.

46. The Tribunal gave its decision on the amendment application to the parties orally at the hearing. No request has been made for written reasons.

47. The Tribunal decided unanimously that it was not in the interests of the overriding objective under rule 2, to allow the amendment applications.

The issues and claims

48. After a number of amendments were made to the issues, including the withdrawal on the third day of the hearing of an allegation that the claimant had been subject to the detriment of a chair being taken away from him on 7 January 2020, the agreed issues to be determined by the Tribunal are as follows;

1. *Have any of the complaints of the Claimant been made outside the primary three- month time limit and, of so, should the Tribunal extend time in relation to each of these complaints?*

2. *Was C (a) a "worker" as defined by section 230(3) of the Employment Rights Act 1996 or alternatively section 43K of the Employment Rights Act 1996 ("ERA 1996") and / or (b) in employment as defined by section 83(2)(a) of the Equality Act 2010 ("EqA 2010")?*

3. *Did C make qualifying disclosures under* ***section 43B(1)(b) or (d) of ERA 1996*** *on the following dates:*

    3.1 *On 6 August 2019 to Bryony Gleave of the Respondent ('R')*
    3.2 *On 19th August 2019 to the Head Office of R;*
    3.3 *On 23 August 2019 by letter to R's Head Office;*
    3.4 *On 16th September 2019 to GPhC;*
    3.5 *On 16th November 2019 to the Local Manager at Trentham pharmacy;*
    3.6 *On 28th December 2019 to the Local Manager at Hawtonville pharmacy;*
    3.7 *On 7th January 2020 to the Local Manager at Queensway pharmacy;*
    3.8 *On 11th January 2020 to the Local Manager at Trentham pharmacy (verbally)?*

4. *Were these disclosures protected under* ***sections 43C or 43F*** *(to the GPhC)* ***of ERA 1996?***

5. *Was C subjected to the following detriments by R:*

   5.1 *On 16th August 2019 (date amended from 23 August) his chair was taken away from him;* ***on the grounds of protected disclosure 3.1 only***

   5.2 *On 30th August 2019 his shifts at Acklam Pharmacy were cancelled;* ***on the grounds of protected disclosure 3.1 to 3.3. inclusive***

   5.3 *On 13th January 2020 his shifts at Queensway pharmacy were cancelled;* ***on the grounds of protected disclosure 3.7 only***

   5.4 *On 18th January 2020 his shifts with R were cancelled?* ***on the grounds of all the alleged protected disclosures 3.1 to 3.8***

6. *If so, did any of the above protected disclosures materially (in the sense more than trivially) influence R's treatment of C in subjecting him to each of the above detriments for the purposes of* ***section 47B of ERA 1996****?*

7. *Is C disabled within the meaning of* ***section 6 EqA 2010*** *by reason of his spine condition, and, if so?*

   As confirmed during the hearing, the respondent does not dispute that the Claimant had an impairment, the issues to be determined are;

   7.1 *Did it have a substantial adverse effect on his ability to carry out day-to-day activities?*

      7.1.1 If not, did the claimant have medical treatment, including medication, or take other measures to treat or correct the disability?

      7.1.2 Would the disability have had a substantial adverse effect on his ability to carry out day-to-day activities without the treatment or other measures?

      7.1.3 Were the effects of the disability long-term? The Tribunal will decide:

         7.1.3.1 did they last at least 12 months, or were they likely to last at least 12 months?
         7.1.3.2 if not, were they likely to recur?

8. *If so, did R harass C by taking away his chair on 16th August 2019 and / or 7th January 2020 within the meaning of* ***section 26 EqA 2010****?*

   8.1 *was that unwanted conduct?*

   8.2 *Did it relate to disability*

   8.3 *Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?*

   8.4 *If not, did it have that effect? The Tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.*

Remedy

9. *(1) For the purposes of ERA 1996 section 49, what compensation is it just and equitable for the Tribunal to award in respect of any loss attributable to any unlawful detriment to which C was subjected?*

(2) For the purposes of EqA 2020 section 124 what compensation is the Claimant entitled to in respect of any breach of EqA 2010 section 26?

10. *Should any award be reduced:*
(a) where any disclosure was not made in good faith pursuant to ERA 1996 section 49(6A);

(b) where C contributed to any relevant act on the part of R pursuant to ERA 1996 section 49(5); or

(c) due to any failure of C to mitigate any loss.

Findings of Fact

49. The Tribunal made its findings of fact based on a balance of probabilities. All the evidence has been considered in full however, the findings address the evidence relevant to the Tribunal's determination of the issues. References to numbers are to page numbers in the joint bundle. Emboldened words throughout the judgment are the Tribunal's own stress.

50. Before addressing the substantive claims, we shall address the preliminary issues of whether the claimant was disabled at the relevant time, as defined by section 6 EqA and his employment status. We shall address the issue of time limits after making our substantive findings of fact.

Disability – findings of fact

51. The claimant produced a Disability Impact Statement (page 31 to 33). He describes his impairment as long standing back pain which affects his shoulders, neck, scapular and lumber region of his spine since April 2016.

52. He has produced copies of letters and reports following consultations and a table showing the medication he has been prescribed.

53. The covering letter from his GP enclosing the records, dated 24 September 2020 (age 37) states;

"He is suffering from ***back pain*** *and* ***initially presented with symptoms on 21 April 2016. Please find attached copies of al [sic] consultations, medications and hospital letter regarding his back pain****…"* and *" I am unable to confirm his current prognosis and it is difficult to say whether his condition constitutes a disability ."*

19 June 2018 – Lumbar Spine examination

54. There is a letter dated 19 June 2018 from Consultant Radiologist Dr Neil Graham (page 41) which refers to ***persistent low back pain*** and "*Tender L5-S but cannot identify cause and recommends that an MRI may be appropriate"*.

23 July 2018 – MRI .

55. There is a report on 23 July 2018 from Consultant Radiologist, Dr Betarse (page 61) following an MRI which includes the following comments;

"left buttock and leg pain? 1.5 weakness. Previous L5-S1 disc degeneration".

56. It also identifies the following;

Cervical spine

"*Mild degenerative changes.*

CT2/C3, C3/C4 and C4/C5: Mild disc desiccation. Disc height is preserved. No significant disc prolapse or urological compromise seen.

C5/C6:Mild disc desiccation. Minor posterior disc bulge with mild encroachment into the left exit foramen with probable irritation of the left C6 nerve root…

C6/C7: Moderate disc desiccation and loss of height. Minor posterior disc bulge indenting the thecal but no evidence of significant cord or nerve root compression"

Thoracic spine

"*Mild degenerative changes. No significant disc herniation, cord or nerve root compression seen*".

Lumbar spine

There are also reports of Mild disc desiccation of L4/L5 and 1.5/S1 and ; "*Bilateral face joint degenerative changes worse on the left side causing moderate recess/foraminal stenosis with associated compression of the existing left 1.5 nerve root."*

98 The conclusion is ; "*C5-C6 mild degenerative changes with probable irritation of the exiting left C6 nerve root. L5 S1 left facet joint degenerative changes causing left lateral recess/foraminal stenosis* ***associated compression of L5 nerve root*** (page 42)".

5 September 2018 - Dr Aturia report

57. In a report of 25 September 2018 from Dr Sarah Aturia, Consultant in Pain Management (page 38) in response to a referral from a Consultant Orthopaedic Surgeon, Mr James and an assessment on 24 September, it refers to;

"*Mr Ekaktie presented today with a* ***history of low back and leg pain****. He tells me the condition started in 2015 and is associated with his work pattern and work stations. He tells me in 2016 the paid was very intrusive and he had to attend his GP for this".*

58. This report is therefore consistent with a letter from his GP describing reports of symptoms from 21 April 2016.

59. In terms of diagnosis Dr Aturia in her report on 25 September 2018 states that his MRI diagnostic report showed;

"…*bilateral facet joint degenerative changes, worse on the left causing moderate lateral recess and foraminal stenosis* ***with associated compression of the exiting left L5 nerve root.*** *He also has a* ***mechanical component to his pain*** *affecting his left lower lumbar facets, left sacroiliac and left piriformis muscles".*

60. Dr Aturia reports that the claimant was;

"…*limiting his standing time to 30 minutes when his symptoms are at their worst*".

And;
…"tells me the symptoms are variable with a dull ache in the left buttock region ***but on standing his leg pain progresses as a wave laterally to below his ankle on the left.*** *The score on the pain scale is 4-10 but can go up to 10-10 on getting up. He only gets pins and needles, numbness and sharp shooting pains when he lies on the same side. This is aggravated when getting up with relief by anti-inflammatory drugs, but* ***these only take the edge of the buttock pain but not the leg symptoms"…***

61. The impact of the buttock and leg pain condition is described in the report as;

- Pain – variable with pain increasing on standing
- Urgency – bowel/bladder sphincter following pain
- Limiting standing time to 30 minutes when symptoms at their worst

Shoulder pain

62. The report of Dr Aturia also reports shoulder pain;

"*Mr Ekitias has since Mr Wallace for bilateral shoulder pain and analgesia used on Celecoxib, Omeprazole and Codeine which make him drowsy".*

Treatment

63. The report goes on to refer to his name being put down on the waiting list for left lumbar facet joint, left sacroiliac joints, epidural and piriformis injections. Dr Aturia asked his GP to refer him for physiotherapy and advised the claimant to acquire a TENS machine.

27 September 2018 - Dr Lotzof report

64. There is a report of 27 September 2018 from Dr Kevin Lotzof, Consultant Radiologist (page 40) following an examination, refers in his report following an MRI of the Scapula Lt (shoulder blade) ; "***to pain and swelling around the shoulder blades*** and appearances suggest "*grade 1 sprains of the medical aspect of both the infraspinatus and the subscapularis muscles as well as the inferior portion of the trapezius muscle".* The MRI of the right Scapula has " *entirely normal appearance".*

<u>2019</u>

28 January 2019 - Mr Richard Bryant

65. Dr Bryant Consultant in Elbow and Shoulder Injury (page 43 and 60) refers to a diagnosis of "*left C6 root entrapment with intermittent pain and numbness in left*

hand. Left scapula pain is disabling him and taking him off work" . The scapula is the shoulder blade.

66. It refers to the Claimant having had;

*"**approximately two years of pain in his neck and his left scapula** and denies any history of injury at all"*

And;

*"**Most of the pain is definitely around the medial border of the scapula and worse with any sort of movement. Due to this pain he has now not worked for a month, He does get some neck pain when stretching his neck. He can make his scapula pain worse but if he sits typing or moves his neck in a certain direction he gets pain along the radial border of his arm below his elbow into the index finger**. His hand goes dead after typing for about 20 minutes. He has no particular leg symptoms."*

And;

"He has normal scapula thoracic rhythm with no dyskinesia but he is very tender along the medial border of the scapula and on his rhomboid. When he tenses his rhomboid this reproduces most of his pain and he is very sore.

He has had an MRI of his whole spine which show some C5/6 bulging particularly affecting the left C6 root. This would seem to fit in with his left forearm and hand symptoms. The MRI certainly shows some amount of oedema… but this seems to be centre around the medial border of the scapula..."

29 March 2019 – Dr Cooper

67. This report on 29 March 2019 states (page 44) refers to pain and ;

"Findings are in keeping with a strain type injury . Appearances are otherwise normal"

14 February 2020 – Dr Kotais

68. Consultant Radiologist, Dr Kotais following an examination on 14 February 2020 (page 45) reports;

"I *wonder if this has been clinically **waxing and waning** as there were muscle signal changes in this area on the original scan in September 2018 but these were not obvious as intervals studies"*.

There is reference to histological evaluation and suggestion of; "***urgent** dermatological and rheumatological assessment in the first instance".*

1 May 2020 – report

69. In a report in May 2020 (page 46), which does not include the name of the consultant at the foot of the document, it states;

"***He has been under the care of Mr* Bryant *, Shoulder Surgeon almost the past 3 years for left sided shoulder pain**… He also at that time had a lot of neck pain with a radiation down both of his shoulders reflecting a radicular pathology*".

There is mention of pain and discomfort in elevating and abducting his arm and a lot of neck pain.

22 May 2020 - letter

70. The claimant is referred to Musculoskeletal Services (p.47). This letter on 22 May 2020 from Mr Hanley, Extended Scope Practitioner in Musculoskeletal therapy Service, states that his problems have been going on for **two years** and they are awaiting MRI results.

Medication

71. The claimant's oral evidence under oath, is that he takes medication but it does not take away his pain, this includes Celecoxib 200mg capsules taken twice daily which is an anti-inflammatory drug, Omeprazole taken once daily (to protect his stomach from bleeding which is a side effect of the Celecoxib), Codeine 30mg tablets one to be taken four times daily when required (a pain killer) and he refers to having previously been given injections into his shoulders but these have made his symptoms worse.

72. The claimant complains in his evidence that he finds it painful and difficult to bend his neck downwards for any length of period whilst working at his computer desk. That would appear consistent with the above reports regarding the pain across his shoulder region. The claimant complains that his back pain has got progressively worse since 2016 and has spread to his upper back including shoulders, scapula and back of his neck. The claimant complains of increasing pain through 2019. That description would appear to be supported by the medical evidence and in particular the 25 September 2018, 28 January 2019 and 1 May 2020 report/letters.

73. In terms of how his back pain affects him, he complains in his impact statement that he is no longer able to;

- carry shopping with his left arm due to numbness and frequent spasms of pain
- cannot stand for more than 30 minutes at a time because of his severe lower back pain caused by nerve entrapment
- cannot sit for more than 30 minutes due to left lumbar side pain as nerves getting pinched causing significant pain and he has to stand after half an hour
- his left arm does not allow him to change gear so he cannot drive manual cars any longer
- he has to climb stairs very slowly and painfully due to his left lower back pain he has to hold on to railings to lift his left side taking him unusually longer time than before
- he cannot sleep on his left side and if he mistakenly falls asleep on his left he wakes up with numbness which means he has to remain in bed for longer after waking to allow the numbness to pass.

74. In his statement of evidence, (para 9) he refers to the following additional effects;

- *Back pain in my lower back persisting throughout the day requiring me to sit often*
- Left and right scapula pains worse on my left scapula making it difficult for me to carry objects heavier than 1kg on my left arm
- Neck pain on the back of my neck resulting in numbness on my left arm.
- I also find it very difficult to bend my neck downwards for any length of period whilst working from a computer desk. I am required to keep my neck straight while looking at computer screen.

75. The earliest reports from consultants are produced are from June 2018 although the claimant alleges he started suffering with a bad back from April 2016. The claimant seemed to imply there had been other consultations but that his GP must have decided which records to produce however, the GP does refers in his letter to enclosing all consultations, medications and back pain which would seem to indicate that he has enclosed all the relevant documents and we find on a balance of probabilities, that given the claimant has not given evidence about any other reports or consultations, that there are no other relevant reports/letters,

76. The claimant was able to sit throughout the hearing and counsel for the respondent challenged him in cross examination on his ability to do so with the symptoms he describes; the claimant's evidence is that his condition affects his spine and sitting is preferred to standing and that he self-manages the pain with various medications, he is after all a trained pharmacist. His evidence is that he would not be able to sit for as long as thirty minutes if he had not taken medication.

77. It was put to the claimant in cross examination that there was no need for him to sit all the time however, the clamant referred to pain as subjective, that without pain killers he would not be able to sit for more than thirty minutes and if he stood all day he would be sick and that he knows how best to treat his condition.

78. The claimant's evidence under cross examination was that when he worked for the respondent, the condition was worse than it is now. When he is sitting he does not place as much weight on the spine which gives him some relief.

79. It was put to him that his evidence was inconsistent in that when he worked for the respondent there was no suggestion that he could only sit for thirty minutes. The claimant denied that it was inconsistent and that it was not for the respondent to have formed any impression of what he could or could not do and that he could sit for longer if he managed his level of medication. He required the chair he stated, all the time and that; " *when I worked for the respondent my condition was worse than now , at the time I always needed to sit"* but that "*even now unless take sufficient medication cannot sit for more than 30 minutes"*

80. He was referred to what he says in his witness statement about a problem driving cars, climbing stairs and sleeping and it was out to him that none of those effects had been mentioned in the medical reports. The claimant referred to the medical reports clearly setting out which of his nerves are damaged and he refers to the findings of the MRI scan.

81. The claimant was taken to the document of 23 July 2018 at page 61 and the results of the MRI scan which referred to '*mild degenerative changes'*. It was put to him that there was nothing particularly unusual about that for someone of the claimant's age. The claimant disputed that and referred to the clinical detail in the record which referred to the left shoulder and arm pain. He referred to the fact that he presented with pain as recorded and that his spine is compressed.

82. Dr Aturia had recommended stretching exercises, physiotherapy and injections. The claimant argued under cross examination, that to be injected itself indicates a disabling condition if injection into the spine is required.

83. The claimant did not deny under cross examination that at the beginning of 2019 he had not disclosed his health issues when he started work for the respondent. He filled in a form on the Locumbay website and said he had been able to do all the requirements of the role and there was no mention of his spinal condition. The claimant referred to there being no legal obligation on him to disclose his disability

but further, his undisputed evidence was that there was no question on the form asking whether he had a disability.

84. The claimant was also referred to document 194(b) and that on his first shift on 30 May 2019 he was recorded as being paid mileage for a journey to work of 126 miles and it was put to him that this was not consistent with someone with a back condition as described. The claimant gave evidence that at that time, he had not said he could not drive and that this was only a 63 mile journey which he could cope with, with medication.

85. It was put to him that he had travelled for an hour and a half to get to work . The claimant repeated that his major issue was not with sitting, it was standing. Medication allows him to sit. Standing compresses the nerves at the bottom of his back which is more disabling and that he knows what is best for him when he is working.

Submissions

86. We set out below a summary only of the submissions which we have considered in full.

Respondent's submissions

87. The Respondent submits that the burden of proof is on the claimant to establish that he falls within the definition of relevant person for the purposes of the Equality Act 2010.

88. Counsel refers to the guidance and matters to be taken into account in determining questions relating to the definition of disability issued by the Secretary of State under the Equality Act 2010 section 6 (5) (guidance) and particularly the section on normal day to day activities.

89. The relevant impairment relied upon by the claimant as amounting to the relevant disability is simply as Counsel submits, identified as a "*back disability*" in his claim form and a disability "*relating to his spine*" as set out in the Tribunal Case Management Order at 26f paragraph 5.

90. The specific directions made by the Tribunal on 20 August 2020 required the Claimant to produce a report from his GP setting out a description of his spinal/muscular skeletal condition, when it first manifested itself, summary of the treatment to date including medications, physical limitations it imposes upon the Claimant, the current prognosis and whether (in the opinion of the GP) the impairment constitutes a disability for the purposes of the Equality Act.

91. The claimant accepted that the report from his GP failed to satisfy the requirements of the order of the Tribunal.

92. The respondent submits although the claimant dates his condition back to April 2016 he has not disclosed any medical evidence in relation to the period between April 2016 and June 2018. The first document in time is an x-ray report from 27 June 2018 (page 41) in which it is suggested that the x-ray of the lumbar spine was essentially normal and a definitive cause for any symptoms was not identified.

93. The report following the MRI examination of the spine on 23 July 2018, in relation to the cervical spine showed mild degenerative changes, there was also a mild/moderate disc desiccation (page 61) the findings in relation to the lumbar spine Counsel submits where similar.

94. Counsel then referred Dr Aturia's report of 25 September 2018. The history given dated back to 2015/2016 and suggested that the Claimant had attended his GP but no medical evidence has been disclosed regarding this. Counsel submits that there was no suggestion it was necessary for the Claimant to sit all the time, the history given was that the claimant "*is limited to standing time of 30 minutes when the symptoms are at their worst".*

95. Counsel referred to the letter dated 28 January 2019 from Mr Bryant the Consultant Elbow and Shoulder Surgeon (page 43-50) and submits that there is no evidence to suggest that this continued for any length of time and indeed by May 2019 the claimant was undertaking regular shifts with the respondents. Pain simply refers to pain in his neck and left scapula which could be made worse if the claimant was sat typing and moved his neck in a certain direction. He was otherwise described as fit and well.

96. Further MRI examinations in March 2019 where the findings were described as being in keeping with a sprain type injury. Effectively this was the most recent medical evidence at the point in time where the Claimant started working with the Respondent.

97. Counsel referred to his GP not being able to confirm whether his condition constitutes a disability as per the definition under section 6 schedule 1 of the Equality Act.

Claimant's Submissions

98. Counsel for the claimant argues that by the relevant time namely, August 2019 to January 2020, the effects of the impairment had clearly been experienced for 12 months. The claimant gave evidence that he was experiencing back pain in early 2017 (supported by the medication records at page 49).

99. He started taking Naproxen first, before being prescribed Celecoxib another anti-inflammatory and Codeine which is a pain killer and has been taking this medication since that point.

100. It is submitted that the claimant received a diagnosis in September 2018 and the effects of pain when getting up, limited standing time and pain when lying on his side were presenting at that time.

101. From then until 27 May 2020 there is evidence of constant medical intervention (page 38 to 48).

102. It is submitted by January 2019 the claimant had experienced pain for 2 years but the pain became worse with movement and was described by the Consultant as "*disabling*" and the claimant had difficulty typing.

103. The claimant was using a chair due his impairment while working with the respondent at the end of 2019 and the start of 2020 and by May 2020 the claimant had been under the care of a Shoulder Surgeon for the previous 3 years for left sided shoulder pain.

104. In relation to sitting for longer than 30 minutes it is submitted that it was clarified that the claimant managed the symptoms with medication.

105. Within the Tribunal bundle page 49 to 57 is a list of the medication that the claimant had been taking since 27 July 2016 shows at least from 19 January 2017 the

claimant has been taking almost consistently some form of painkiller whether that is Diazepam, Co-codamol or Codeine. He took 15mg of Codeine in September 2017 and that the medication increased to 30mg from 29 March 2018, he continued taking that medication throughout 2018 and 2019.

Legal Principles

Disability

106. The definition in section 6 (1) Equality Act 2010 (EqA) is the starting point for establishing the meaning of 'disability. The supplementary provisions for determining whether a person has a disability are set out in Part 1 of Schedule 1 to the EqA.

107. The Government has issued 'Guidance on matters to be taken into account in determining questions relating to the definition of disability' (2011) ('**Guidance**') under S.6(5) EqA. The Guidance does not impose any legal obligations in itself but courts and tribunals must take account of it where they consider it to be relevant para 12, Sch 1, EqA and ***Goodwin v Patent Office 1999 ICR 302, EAT*.**

108. The Equality and Human Rights Commission (EHRC) has published the Code of Practice on Employment (2015) ('**the EHRC Employment Code'**), which provides some guidance on the meaning of 'disability' under the EqA and this also does not impose legal obligations but must be taken into account where it appears relevant to any questions arising in proceedings.

109. The Equality Act 2010- the statutory definition:

Section 6. Disability

(1) A person (P) has a disability if—

(a) P has a physical or mental impairment, and

(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

110. Schedule 1 to the EqA set out supplementary provisions:

Part 1: Determination of disability

2. Long-term effects

(1) The effect of an impairment is long-term if—

(a) it has lasted for at least 12 months,

(b) it is likely to last for at least 12 months, or

(c) it is likely to last for the rest of the life of the person affected.

(2) If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur.

5 Effect of medical treatment

(1) An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if—

(a) measures are being taken to treat or correct it, and

(b) but for that, it would be likely to have that effect.

(2) "Measures" includes, in particular, medical treatment and the use of a prosthesis or other aid.

Meaning of 'substantial'

111. *Substantial* is defined in S.212(1) EqA as meaning '*more than minor or trivial'*.

112. EAT in ***Aderemi v London and South Eastern Railway Ltd 2013 ICR 591, EAT***. The EAT commented on the definition of 'substantial' in S.212(1) EqA,

113. In determining whether an adverse effect is substantial, the tribunal must compare the claimant's ability to carry out normal day-to-day activities *with the ability he or she would have if not impaired*.

114. We have considered and applied where we consider it relevant the 'Guidance on matters to be taken into account in determining questions relating to the *definition* of disability' (2011) (**Guidance**)

Case Authorities

115. The time at which to assess the disability is the date of the alleged discriminatory act: ***Cruickshank v VAW Motorcast Limited 2002 ICR 729 EAT.***

116. **Goodwin v Patent Office 1999 ICR 302 EAT**: The EAT set out guidance on how to approach such disability cases.

117. In ***J v DLA Piper (2010 ICR 1052) the Employment Appeal Tribuna*l** gave important guidance as to the approach to the determination of disability which Employment Tribunals should adopt; at paragraphs 39 and 40 of their judgment.

118. In ***All Answers Ltd v W 2021 IRLR 612, CA****,* the Court held that, following ***McDougall v Richmond Adult Community College 2008 ICR 431, CA*****,** the key question is whether, as at the time of the alleged discrimination, the effect of an impairment has lasted or is likely to last at least 12 months. That is to be assessed by reference to the facts and circumstances existing at that date and so the tribunal is not entitled to have regard to events occurring subsequently.

119. The impairments do not need to be related or interact with each other for their combined effect to be considered: ***Ginn v Tesco Stores Ltd EAT 0197/05*****.**

Disability- conclusions and analysis

120. The burden of proof is on the claimant to establish that he meets the. definition under section 6.

121. The relevant time is the time when the acts of discrimination took place, in this case that is he period from **16th August 2019** to the **7 January 2020** and whether throughout or at any point during that relevant period, there was an impairment

which had a substantial adverse effect on normal day to day activities and had lasted for or was likely to last for 12 months (or the life of the claimant): ***Cruickshank v VAW Motorcast limited.***

Impairment

122. The respondent concedes that the claimant had a physical impairment at the relevant time, namely a spinal condition but does not accept that this impairment had a substantial adverse effect on his ability to carry out normal day to day activities and that the effects had not at any stage during the relevant period, lasted or was likely to last for 12 months.

Effects

123. There are reports from consultations in June 2018 reporting low back pain and in July 2018, buttock and leg pain. The claimant was referred to a consultant in Pain Manager in September 2018 and Dr Aturia reported on 25 September that the claimant had a history of low back and leg pain.

124. Dr Aturia referred to the restrictions or effects of his condition, namely the need to limit his standing time to 30 minutes when symptoms are at their worst. It referred to the buttock and leg pain causing variable pain increasing when standing

125. The medical report of Mr Bryant is dated January 2019, 7 months before the first act of alleged discrimination and before therefore the start of the relevant period, however, he reported that the claimant had been suffering neck and shoulder (left scapula) pain for approximately two years by that stage. Pain which became worse with movement and he had been off work due to this condition, for a month. It reported worse symptoms if he sat typing or moves his neck in a certain direction.

126. The claimant had a further consultation on 29 March 2019 with Dr Cooper who refers to the 'patients pain' and a 'sprain type injury'. There is no report of the impact on his day to day activities .

127. There is no further medical evidence, until after the last alleged act in January 2020, other than continued prescriptions for painkillers. The next report is 14 February 2020 but this post -dates the relevant period.

128. The claimant's evidence about the medication he takes is consistent with the medication list (page 49 -57) which confirms prescribed medications and dosages and appears to show that he has been prescribed pain relief medication consistently (Celecoxib and Codeine), from February 2017 to January 2020. Before that the claimant was prescribed Butec from July 2016 and then Diazepam in January 2017. In March 2018 the claimant was prescribed Codeine at 30 mg with 1-2 tablets to be taken every 6 hours as required , changing to one to be taken daily in October 2018 and then from about November 2018 one 4 times a day as and when required, with the last prescription noted in February 2020. This would indicate we find, a level of ongoing need for pain relief and thus experience of pain throughout this period, consistent with the reports of pain by his GP from 2016. The advice to take Codeine as and when required, indicates that the pain varies and that the claimant is required to self-manage the pain, by assessing when he requires pain relief.

129. We conclude on the evidence including the claimant's own oral evidence, that the claimant as at the start and throughout the relevant period, suffered with a physical impairment which was Musculoskeletal. There does not appear to be a clear diagnosis from the medical evidence, however it is not necessary for the cause of

an impairment to be established in order for someone to meet the definition within section 6 EqA (as set out in the Guidance).

130. Whatever the cause of the impairment, the effects appear to have caused pain. There is reference to persistent low back pain in June 2018, mild degenerative changes in the cervical spine in July 2018 and history of low back and leg pain in September 2018 .

131. Although the medical evidence is of limited assistance in determining the effects, we are satisfied on a balance of probabilities that as at August 2019 and throughout to January 2020, the claimant was suffering with pain in his upper back namely the shoulders and thomboid and neck region, and intermittent pain in his left hand and that this had started in April 2016. The pain appears to have fluctuated over this period however, he was prescribed some form of pain relief consistently from February 2017 to September 2020.

132. From January 2019 while the claimant, we find on the evidence, continues to experience pain, the reference is to neck and shoulder pain, with some reference to effects on his left forearm and hand symptoms. There is no further mention in the medical reports specifically to lower back, buttock or leg pain from January 2019. The medical reports appear to indicate that the pain is focused on the neck and shoulder region/upper back. There is mention of oedema and bulging of the left C6 root following an MRI scan of the whole spine .

133. The medical evidence which refers to left C6 root entrapment and intermittent pain and numbness in left hand would appear however to support the adverse effects as described by the claimant of left and right scapular pains, worse in his left scapular region making it difficult for him to carry objects heavier than 1kg on his left arm due to numbness and frequent spasms of pain and that his left arm does not allow him to change gear so he cannot drive manual cars any longer. There is no medical evidence to indicate that this problem had been cured after January 2019 and before January 2020 and that these effects were no longer being experienced during the relevant period.

134. The Guidance does not specify that the reasonable restriction must prevent the ability to carry with both hands and we consider it reasonable to consider it a substantial effect where someone is limited to the use of one hand to carry shopping . The claimant refers to not being able to lift weights in his hand of more than 1 kg. Counsel for the respondent does not challenge this account in cross examination (he focused on the claimant's ability to sit and stand and drive) or seek to argue that 1kg was more than moderate. 1kg is the weight of an normal bag of sugar for household use and the Tribunal consider that to be far less than an average bag of grocery shopping, and would be classed as moderate.

135. We conclude that these effects were being experienced during the relevant period or would have been but for the pain relief medication and find that they were *more than minor or trivial.*

136. The medical evidence relating the neck and upper back/shoulder pain, was reported as having lasted approximately two years as at 28 January 2019, with no medical evidence to indicate that this problem had been cured after January 2019 (and before January 2020) and the reports would appear to be consistent with the effects described by the claimant of finding it difficult to bend his neck downwards for any

length of time whilst working from a computer desk and being required to keep his neck straight while working on a computer screen.

137. The Guidance also refers to difficulty operating a computer. The claimant complains that he had to adjust his posture to avoid pain. The Guidance provides that it would not be reasonable to conclude that a person who employed an avoidance strategy was not a disabled person. In determining a question as to whether a person meets the definition of disability it is important to consider the things that a person cannot do or can only do with difficulty.

138. The claimant also describes other effects; that he cannot stand for more than 30 minutes at a time because of his severe lower back pain caused by nerve entrapment, cannot sit for more than 30 minutes due to left lumbar side pain as nerves getting pinched causing significant pain, he has to climb stairs very slowly and painfully due to his left lower back pain, he has to hold on to railings to lift his left side taking him unusually longer time than before , he cannot sleep on his left side and if he mistakenly falls asleep on his left he wakes up with numbness which means he has to remain in bed for longer after waking to allow the numbness to pass.

139. In his statement of evidence (para 9) he refers to the following effects; *Back pain in my lower back persisting throughout the day requiring me to sit often*

140. The entries in the medical reports do support to a certain extent the effects described by the claimant; the report on 25 September 2018 refers to the claimant limiting his standing to 30 minutes when his symptoms are at their worst and numbness and shooting pains when he lies on his side. While there is no medical report to assist the Tribunal, setting out in detail what the effects are, on balance the Tribunal conclude that despite the absence of reference to lower back and leg pain after January 2019, there is however evidence within the reports of degenerative changes to the cervical and thoracic spine, with reference (e.g. page 61) to degenerative changes worse on the left side and compression of a nerve root.

141. The focus on the reports during 2019 appear to be on the upper back and neck region however, given the medical evidence of degenerative changes of the spine and 'probability of irritation of exiting' nerve roots, we conclude on a balance of probabilities, that also taking into consideration the claimant's oral evidence, he continued to experience lower back pain managed by medication and coping mechanisms, such as limiting his standing and changing his posture at his work station.

142. Pursuant to section 5 of Part 1 Schedule 1 EqA we are required to consider the likely effects but for measures, which includes medication, taken to treat or correct an impairment. The evidence of the claimant is that he managed the symptoms and in particular the pain, by taking medication and this allows him to sit and stand for longer. As a Pharmacist, he was more able than most to effectively manage his own pain relief and therefore able to drive to work and to sit with the assistance of ongoing pain relief medication (the ongoing need for which throughout the relevant period is supported by the medication history provided by his GP).

143. The Guidance refers to the impact on being able to stand for 'prolonged periods' without pain. 'Prolonged' is not defined. Neither Counsel sought to make submissions or produce any cases on what is 'prolonged'. Counsel for the respondent did not seek to argue that 'prolonged' is more than 30 minutes and we

consider that 'prolonged' does mean more than 30 minutes, perhaps somewhere more in the region of an hour.

144. The Guidance also gives examples of using stairs with difficulty due to pain. The claimant, describes climbing stairs but slowly and painfully Guidance - Appendix

145. We have taken into consideration that the Guidance refers to an impairment not necessarily preventing someone being able to carry out normal day to day activities but that it may have a substantial adverse effect if a person can do them but with difficulty due for example pain (indirect effects) : Guidance B9 and D22.

146. We conclude on a balance of probabilities that the impairment taking into account the indirect effects, had the effects the claimant describes or would be' likely' to have that effect without the measures (i.e. the pain relief medication), during the relevant period : Guidance B12. We conclude that the cumulative adverse effects of the impairment (and singular adverse effects including the restrictions on carrying, standing and sitting) were more than minor or trivial: Guidance B4

Long term

147. We conclude that the claimant suffered with this impairment since 2016 and that as at August 2019, the adverse effects had lasted for more than a year as supported by the ongoing referrals and the consistent pattern of prescriptions for pain relief medication.

148. While we conclude that the claimant experienced pain and limitations as described, we conclude that these were not consistent throughout the period April 2016 to January 2020 but fluctuated based on the medical reports which vary in their emphasis on the pain the claimant is experiencing and the reference to pain and the prescription for pain relief to be taken '*as and when required'*.

149. The medical evidence and the claimant's oral evidence does not suggest that the impairment is ' cured' at any point. The claimant complains it is ongoing, which would appear to be supported by the medical evidence. The prescriptions did not alter in their dosage for the period from February 2017 to January 2020 and we find on a balance of probabilities, that the pain fluctuates but based in the Guidance It is not necessary for the effect to be the same throughout the period which is being considered when determining whether the 'long-term' element of the definition is met.

Summary conclusion

150. We conclude based on the medical reports and claimant's evidence, that as at August 2019, given the history to his condition, lack of diagnosis and ongoing treatment, the substantial adverse effects on his normal day to day activities of the impairment had lasted 12 months and that these effects continued throughout the relevant period.

151. We conclude that the effects fluctuated during the 12 month period prior to the start of the relevant period (and during it) and that there were times when the pain and thus restrictions on his activities were less severe, hence the repeat prescriptions of pain relief to be taken as and when required but that the pain fluctuated and continued up to and during the relevant period and that it is likely that without the pain relief, the effects would have been substantial.

152. In conclusion we find that the claimant has established that he was disabled at the relevant time on a balance of probabilities, for the purposes of section 6 of the EqA by virtue of the spinal condition which affects his shoulders, neck and back. Further, we conclude that a substantial adverse effect of the impairment during the relevant period included pain when standing for prolonged periods of about 30 minutes and that the use of chair helped to alleviate the pain.

Preliminary issue - Employment Status

153. We shall now address the preliminary issue of the claimant's employment status.

154. The respondent has 40 pharmacies which supply in the main, medication for NHS prescriptions.

Claimant's qualifications

155. The undisputed evidence of the claimant is that he has a Bachelor Of Pharmacy Degree (B Pharm). He achieved his registration in 2010. The claimant has been a registered Pharmacist since 2010 and from that date has been able to practice in the UK and has been working in a variety of pharmacists.

Work with the respondent

156. The claimant's undisputed evidence is that he was contacted by PPR UK about covering a number of shifts for the respondent as a Locum Pharmacist. He first became aware that he was actually working for the respondent on 1 August 2019 although he had worked for them previously, he had not realised that the previous pharmacies he had worked at were owned by the respondent. We are however only concerned with the employment status of the claimant from 1 August 2019, the first detriments the claimant complains about took place on 16 August 2019.

157. PPR UK it is not in dispute, helps to source Locum Pharmacists for pharmaceutical companies, locums and full time employees. PPR UK did not hire the claimant but simply introduced him to the respondent. PPR UK have a contractual agreement with the respondent and receive a fee for introducing the claimant. The claimant is required however to then agree terms and conditions direct with the respondent via a website called Locumbay.

Agreement between PPR UK and the respondent

158. There is a document setting out the terms and conditions of business (page 76 – 79) as between PPR UK (defined as Agent) and the respondent (defined as the Client). Those terms and conditions were between those two parties only. The claimant was not a party to that agreement.

159. 1.2 of that document states as follows;-
*Payment of the Locum at the Rate is the **sole responsibility and obligation of the Client, who must make sure payment directly and forthwith to the Locum on receipt of the Locum's invoice**, unless the Locum and the Client agree an alternative schedule payment.*

160. 1.3 of that document states as follows;-

The Locum and the Client shall share sole responsibility for ensuring that all income tax, national insurance contributions and other statutory payments as assessable under schedule D of the Finance Act are paid as necessary.

161. The conditions go on to set out the fees of the Agent which provides as follows;

2.1 The Client agrees;-
2.2.1 To pay the Agent's fee of £20 per day plus VAT for Pharmacists
2.2.2 To pay the Agent's fee of £30 per day plus VAT for emergency Pharmacists – Less than 48 hours notice
2.2.3 To notify the Agent immediately if any further bookings are offered to the Locum
2.2.4 To pay the Agent's fee on receipt of invoice on the day of booking within 14 days.

162. The terms and conditions document also then sets out what the terms apply to cancellation. The applicable provisions are as follows;-

3.1 A Locum whose book services are cancelled by a Client, may without limitation retain rights to seek compensation or damages from the Client.
3.2 Client cancellations made less than 48 hours before the booking, will incur the Locum Booking Fee as outlined above in
3.3 Client's must give two weeks notice for the cancellation of any regular bookings. Failure to do so will incur an invoice for the full months bookings.
3.4 Where a Locum cancels a confirmed booking;-
3.4.1 PPR UK will use its best endeavours to find a suitable alternative replacement Locum for the Client
3.4.2 PPR UK shall bear no liability for any loss or damage of the Client arising from said cancellation.

Suitability

163. The terms and conditions document also sets out the provisions with regards to ensuring the suitability of the Pharmacist and they provide as follows;-

6.1 The Agent endeavours to make every reasonable effort to ensure to [sic] suitability of Locums & Full time candidates selected on behalf of Clients but does not personally establish the references and does not except [sic] responsibility for any loss, expense, damage or delay, however occasioned including consequential indirect loss or profit and liability therefore is hereby excluded saving respect of any deliberate or negligent act of the Agent causing death or injury to any person.

6.2 PPR UK has no contract for services with the Locum. For the avoidance of doubt a Client that procures the engagement of a Locum through the PPR UK services is jointly responsible with the engaged Locum for any contract for services between them, save that any such contract for services will not limit the Client's responsibilities and obligations under this contract .

164. Further within the document, it confirms at paragraph 8.1 that PPR UK is;
"*an Employment Agency and will operate as an Employment Agency in relation to the Client"*

Locumbay

165. The Tribunal find that the arrangement was that a Locum once introduced via PPR UK (or indeed via another agency or applying directly) would need to sign up to Locumbay, an online booking portal, owned by Sharief Limited. It is a platform to introduce users to the respondent The respondent's undisputed evidence is that Sharief Limited is a holding company which owns the website and the claimant did not refute that

Locumbay terms and conditions

166. There is an agreement (page 80 - 87) setting out the terms and conditions as between Locumbay owned by Sharief Limited (**Agreemen**t) and the claimant which states;

"This agreement ("Terms of Service" or "Agreement" or "Terms and Conditions") is a contract between you and {Sharief Limited if you are a user of www.Locumbay.com. …hereinafter referred to as "the website" or "the Site". The site is offered to you based on the condition that you accept this Agreement. You are required to kindly review the terms and conditions or the terms of service set out below before using the Website. If you continue to use the Site after such time, this will signify your acceptance of this agreement."

167. The Agreement goes on to set out services offered by Locumbay.com;

"Pharmacies in the United Kingdom must have a working pharmacist within their premises during its working hours, as a legal condition. When a pharmacist is off for sickness/holiday/etc ***the Pharmacy must locate a suitable replacement*** *to cover their shift where their regular pharmacist is not available. The pharmacist that works to cover shifts is referred to as a "Locum".*

This website will enable the pharmacy to post an advertisement for the vacancy, which requires a locum pharmacist. The locum can then accept the job on offer assuming they meet all the service criteria the pharmacy wishes them to fulfil. Once the job is accepted, the locum pharmacist is required to complete the job. Once this is done, the pharmacy must pay the pharmacist the fee as agreed on locumbay.com (however please note that Locumbay.com does not hold any responsibility and hence cannot be held liable for any non-payment of fees by the employer or non-completion of any job allocated to the Locum, as elaborated in the terms to follow).

168. The Agreement goes on (page 82 through to 87) to set out the terms and conditions for signing up to Locumbay.com which apply as between the Locum and the end user i.e. the respondent . It states at page 82 as follows;-

Upon the Employer awarding a project to a Locum and the Locum's acceptance of a project on the Website, the employer agrees to purchase, and the Locum agrees to deliver the services in accordance with the following agreements;-
(1) this Agreement, and
(2) any other contractual provisions accepted by both the Locum and Employer uploaded to the Site, to the extent not inconsistent with this Agreement and
(3) the project terms as awarded and accepted on the Website to the extent not inconsistent with this Agreement…

169. The definition of the Employer is set out at page 81 and provides as follows;-
"www.locumbay.com provides a platform to introduce Users who wish to provide professional services related to healthcare and pharmacist (as Locums) and ***Users who seek such professional services (hereinafter referred to as "Employers")*** *(respectfully or jointly referred to as the parties and individually as a party)."*

170. The Tribunal find that the respondent agreed to be bound by the terms and conditions of the Agreement when it offered the claimant a project and the claimant accepted the terms when he accepted that work. The Agreement envisages that other terms and conditions may apply as between the respondent and the Locum., however it is not in dispute that there are no other documents setting out any other applicable terms and conditions.

Independent contractor

171. *At page 82 the Agreement goes on to state that;*
"each User acknowledges and agrees that the relationship between Users is that of ***independent contractors****. Nothing in this agreement creates a partnership, joint venture, agency or employment relationship between;-*
(1) Users
(2) Between us and any User.

[Tribunal stress]

172. Mr Sharief accepted in cross examination that it is common within the industry for people to be called 'independent contractors'. Mr Nath is an Area Manager for the respondent and within his statement he appears to use the term 'independent contractor' interchangeably or alongside, it seems that of employee (w/s para 1 and 2);

1. *"I am engaged by the First Respondent ("the Company") …as a* ***self-employed contractor…***

2. I joined the Company as a Pharmacist. I am ***now employed*** *as an Area Manager…"*

Obligation to personally perform the work and Substitution

173. The Agreement does not include any provision permitting the claimant to send a replacement/substitute if he cannot attend a shift whether due to sickness or otherwise.

174. The Agreement provides that where an RP cancels a shift, the Locum may have to make a 100% full payment or the difference in fees if ' **they'** are able to find a suitable replacement. It is not asserted that ' hey' is a reference to the Locum. Further, elsewhere within the documents (page 80) it provides that: "*When a pharmacist is off for sickness/ holiday etc, the Pharmacy must locate a suitable replacement to cover the shift …"* . A natural reading of to the terms if that it is for the Pharmacy not the RP to find a replacement.

175. The respondent does not assert that in practice the claimant (or indeed any of its Locum's) were permitted to put forward a replacement RP if they were unable to work a shift.

176. The claimant's evidence is that he could "*absolutely not*" send someone in his place because the contractual arrangement is with him as the licence holder and RP.

177. Mr Sharief gave evidence under cross examination, that a locum could send a replacement; "*as long as it was a qualified pharmacist*" and even suggested that it was part of an RP's professional duties to do his best to find a replacement. When it was put to him however that the respondent does not allege that's its own employees have failed in their duty or care if they are ill and do not sent in a substitute, he stated; " *we don't require them to but they can do – we won't stop them helping by getting a replacement – if a locum cancelled and has a replacement we will consider it"* . Further under cross examination Mr Sharief conceded that the RP could not send a substitute as of right, the respondent would consider and decide if they were appropriate and he accepted the responsibility was on the respondent

to make sure the pharmacist has the suitable qualifications and have in place professional indemnity insurance.

178. We were not taken to any document identifying any right the RP has to appoint a replacement or any obligation on them to do so. The Employee Handbook (page 88) does not set out any such obligation on an employed Pharmacist. Further, it is not alleged by the respondent this had happened in practice with the claimant and indeed Mr Shariff did not give an example of where this had actually happened in practice with any other Locum.

179. When claimant was unable to attend for a shift due to sickness while working for the respondent (page 202CA), the text message as between Mr Nath and Mr Cara states; " *Head office have found someone for tomorrow*". There is no indication that the claimant was responsible for trying to find a replacement or any expectation to that effect.

180. The Tribunal find that there the claimant had no contractual right and was under no obligation to send a replacement/ substitute and this did not happen in practice.

181. Mr Sharief's evidence on this issue the Tribunal find was not a true reflection of the expectations of the respondent or what happens in practice, it was a theoretical proposition about what could happen and what restrictions they would impose in practice if it did, no more.

Claimant's duties as RP

182. It is not in dispute that a Pharmacy must have an RP responsible for running that particular Pharmacy and it cannot normally open for business without one present

183. The claimant disputed in cross examination that when he was working as the RP he was accountable to the Pharmacy Manager or the Superintendent. The claimant gave evidence under cross examination that while acting as RP, there is nothing "*any other Pharmacist can say about my role*" however, he accepted that If there are issues with employees then he would need to contact the Pharmacy Manager because as he is not an employee, he cannot deal with employee issues however, he is ultimately responsible while signed in as RP, for oversight of the controlled drugs register and to ensure that Misuse of Drugs Regulations have been complied with.

184. The Medicines Act 1968 provides at section 70 that the RP ; "*is in charge of the business at those premises, so far as concerns)the retail sale at those premises of medicinal products (whether they are on a general sale list or not), and the supply at those premises of such products in circumstances corresponding to retail sale*.

185. It is common between the parties that the RP is in charge of the *safe and effective running* of the Pharmacy.

186. It is not disputed that when the claimant worked as an RP for the respondent, he was not allowed to work at the same time for another pharmacy as its RP.

187. Mr Sharief's undisputed evidence under cross examination, was that the respondent has never had to shut a pharmacy for the day when an RP has not turned up, it may have to be shut for a couple of hours but they have always managed to find a replacement RP. He disputed that a Locum was integral to the respondent's business personally, the RP role was '*key'* he accepted but not the individual RP.

NHS

188. It is not in dispute that the vast majority of the prescriptions the claimant was dealing with and checking were NHS prescriptions.

Limited company

189. The claimant gave evidence that in around August 2019 he had a Limited Company called Click health Limited which he asserts he used for invoicing purposes only because it was more tax efficient. It was put to the claimant that he was the sole shareholder of the limited company and he accepted that he was at that point, although the structure of the business has changed since.

190. It is not in dispute however that it was the claimant who personally entered into the Agreement and not his limited company and that the licence to practice is held by the claimant personally.

191. The claimant accepted under cross examination that it was not a requirement of the respondent that he set up a Limited Company. He referred to Click Health Limited as an Umbrella Company for IR35 purposes. It is not alleged by the respondent that he entered into any agreement or terms and conditions with Click Health Limited.

Invoicing/Payment

192. The Tribunal finds that Locumbay also provides an invoicing service. Mr Sheriff under cross examination explained that an invoice would be submitted to the respondent by the Locum but the invoice would be prepared by them logging on to the website and creating the invoice and submitting it to the respondent.

193. There are a number of examples of invoices within the bundle and the Tribunal find that the invoices were generated through the Locumbay website. The invoices within the bundle (page194B to 94AL) have the Locumbay header generated by www.locumbay.com/view-invoice ending with an invoice number. The claimant did not pay for this service. The invoices were addressed from the claimant personally to the respondent. Click Health Limited did not generate the invoices.

194. The invoices include the following wordings;

"The above independent contractor is a registered pharmacist in the UK and has performed their duties as a pharmacist in accordance to the specified pharmacies Standard Operating Procedures. Any taxes of National Insurance required for the above income will be paid independently by the ***above named person****.*

Invoices must be authorised by the branch manager before being paid by accounts. This usually takes 14 to 28 days however, it can be delayed in some circumstances.

…locums will be paid direct into their account"

.

195. In response to questions from the Tribunal the claimant explained and it was not disputed, that the invoiced sums were then paid by the respondent into the business bank account of Click Health Limited by bank transfer, rather than paid direct to him because these were the bank account details he had chosen to provide..

Polices

196. Mr Nath explained that the respondent's whistleblowing policy contained in the staff handbook which applied to the claimant while he worked for the respondent ; " *yes absolutely don't have to be an employee to have whistleblowing policy applied to you".* The whistleblowing legislation however only applies to those defined as 'workers' however Mr Sharief was not questioned on his understanding of the concept of ' worker' in the context of the application of this policy to Locums.

Standard Operating Procedures (SOP).

197. It is common between the parties that every pharmacy is required by law to have in place certain procedures to ensure compliance with its regulatory obligations including the Regulations. These procedures are referred to as the Standard Operating Procedures (**SOPs**). On being accepted for a role as a Locum Pharmacist, it is common between the parties that the claimant was required to study the SOPs and comply with them. Each pharmacy has slightly different SOPs' but the respondent has a standard set of SOPs' slightly modified to reflect for example whether an individual pharmacy has a manual or electronic drugs register.

Pay – hours

198. The claimant's evidence is that he had no control over the rate of pay. He was informed of what the fee was via the Locumbay website, which it is not in dispute, would advertise which pharmacies required a Locum, what the hours were and what the hourly rate of pay was.

199. The claimant indicated the work he was interested in and applied. He had to produce his personal licence to practice and his passport via the Locumbay website. The respondent's Head Office would then process and approve or reject the application. The claimant's evidence is that he has no control over the hourly rate or the hours he worked and he did not negotiate the terms with the respondent.

200. Mr Sharief gave evidence under cross examination that the rates of pay were " *usually negotiable",* he confirmed that he meant with the agency and not the with the individual locum, however neither he nor the claimant cited any example of where the claimant had himself negotiated his hourly rate of pay.

201. The Tribunal find that in practice, the Locum's did not normally negotiate the hourly rate. It was set out on the website and in practice this determined what the claimant was paid.

Control

202. The claimant was robust in his evidence that as RP he was in charge of the safe and effective running of the Pharmacy.

203. He was however subject to control in a number of material respects, for example the respondent set the hours he had to work. When he was late for a shift at the Trentham Pharmacy, he took photographs of the traffic and felt the need to explain to the Pharmacy Manager why he had been late. Ms Akbar's evidence which we accept, is that she spoke to him about his punctuality.

204. The claimant was required to perform the work of an RP and while he was responsible for the safe and effective running of the pharmacy, while on shift, he did the work given to him, for example he would check the prescriptions given to him by

the Dispensers, he could not simply refuse to do that work. Further, the claimant had to comply with the respondent's SOP's, that was mandatory.

205. The respondent felt that it had the right to set the rules about the claimant's use of his personal mobile phone while he was working on a shift (addressed in the findings of fact on the substantive claim)

206. We find that although the claimant in the role of RP was in charge of the safe and effective running of the pharmacy he was still in a position of subordination to the respondent while performing this work ; he could not dictate his hours, he could not control where he carried out the work, he was required to carry out the work in accordance with the SOP's of the individual pharmacy, he was spoken to if he was late.

Notice

207. The claimant's evidence is that he would have to give notice to the respondent if he wanted to cancel an assignment, he believes that he was required to give the respondent 2 or 3 weeks' notice. If he was unable to attend work because of sickness, he would have to call in at 7.00am or 8.00am to let them know he would not be in. He cannot recall if there was any sanction but believes he would have been penalised for not informing them.

208. Mr Sharief gave evidence under cross examination, that if a Locum cannot attend a shift due to sickness they are required to inform the respondent, in the same way as an employee. Mr Nath described how if a Locum cancels and lets them down they will be less keen on them "*coming back"* and if the cancellation was at very short notice, the respondent would have to find a replacement (he made no mention of the Locum having any obligation do so) and that the rates are higher for short notice bookings.

209. If the respondent wanted to cancel his shift, the claimant gave evidence that his understanding was that the respondent was required to give him sufficient notice, he believes it was about 3 weeks but he was unable out identify where that was set out in writing, in terms which applied directly as between him and the respondent.

210. There are provisions regarding cancellation which are set out at the foot of page 6 of the Agreement (page 85) and state as follows;-

"By accepting a shift you are entering an agreement. ***All cancellations must be made 2 weeks prior to the shift date****. If a Locum fails to complete a shift, the Pharmacy Company have the right to request 100 per cent full payment from yourself the Locum or the difference in fees if* ***they*** *are able to find a suitable replacement".*

[Tribunal Stress]

211. The reference to 'All cancellations' does not specify that it relates only to cancellations by the Locum but the Tribunal find that the natural reading of this provision is that it is setting out the obligation on the Locum and it was not put to Mr Sharief, who was the only witness for the respondent in a position to really give evidence about how Locumbay worked, that it related to a cancellation by either party. Mr Sharief in cross examination agreed however, that once a Locum is booked there is "*an agreement between the two*" . There is a requirement on the 'Client' (i.e. the respondent) to give, not to the claimant but PPR UK notice if the respondent wants to cancel a Locum's services. However, the agency terms and conditions

provides that a Locum may seek damages or compensation for a cancellation. The Agreement between the claimant and Locumbay does not expressly provide that shifts can be cancelled at will.

Limited company

212. The claimant set up the limited company he explained, for invoicing purposes only. It was put to him under cross examination that the money was paid to the limited company by the respondent and the limited company would then in turn pay him, which he did not deny but he denied that this meant that he was an employee of his own limited company. The claimant denied this and said that it was an umbrella company.

213. His evidence was that he set it up in about August 2020.

214. He was taken to (page 26(f)); the record of the preliminary hearing where it was recorded that; " *shortly after initially being supplied to work via an agency at the start of the engagement, he thereafter was supplied via a limited company he had set up. It invoices for his services to the First Respondent who then paid the involves to the limited company. It follows that he was an employee of that limited comp*any." However, Judge Britton did not refer to the claimant not being able to bring a claim he was a worker within the wider definition under section 43K ERA. In any event, whatever may have been said at that hearing without the benefit of seeing the documents, we have seen the documents and the invoices are not from the limited company but in the name of the Claimant personally .The agreement he entered into via Locumbay is not alleged by the respondent to be with the limited company and he communicated directly with the respondent over matters such as when he was absent on sick leave.

164. The invoices were paid into bank account of Click Health Limited. The claimant may have been able to work via his limited company but he did not do so while he worked for the respondent.

Tax

215. It Is not in dispute that the claimant when working as a Locum was responsible for paying his own tax and National Insurance.

Other terms

216. There was no provision for holiday or sick pay.

The Legal Principles - Employment status

Equality Act 2010

217. The Equality Act 2010 (EqA) uses the term 'employee' to identify those who are entitled to protected from harassment. The scope of what is meant be employment is set out at section 83(2)

"(2)"Employment" means—

(a)employment under a contract of employment, a contract of apprenticeship or ***a contract personally to do work;***

218. The claimant does not contend that he was an employee of the respondent but asserts that he worked under a contract personally to do work and thus falls within the wider definition.

219. This last category under section 83 (2)(a) encompasses some self-employed people and it is not in dispute between the parties that, as Counsel for the respondent puts it; "*there is no reason difference in substance between a worker under the ERA 1996 and an employee (under the extended definition) under the EqA 2010"*

Section 230(3)(b) Employment Rights Act 1996

220. The Employment Rights Act 1996 section 43B protects '*workers*' and section 230 (3)(b) defines a worker as;

(*3)In this Act "worker" (except in the phrases "shop worker" and "betting worker") means an individual who has entered into or works under (or, where the employment has ceased, worked under)—*

(a)a contract of employment, or

(b)any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or ***perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual;***

and any reference to a worker's contract shall be construed accordingly.

221. The claimant does not contend that he was an employee as defined by the ERA but a worker under section 230 (3) (a limb b worker) and employed under a contract personally to do work under section 83 (2)(a) the EqA .

Section 43k (1)(a) ERA

222. Additionally, in victimisation cases, the definition of worker under the ERA for whistleblowing protection is extended as follows;

(1)For the purposes of this Part " worker " includes an individual who is not a worker as defined by section 230(3) but who—

(a)works or worked for a person in circumstances in which—

(i)he is or was introduced or supplied to do that work ***by a third person****, and*

(ii)the terms on which he is or was engaged to do the work are or were in ***practice substantially determined not by him but by the person for whom he works or worked, by the third person or by both of them.***

(2)For the purposes of this Part " employer " includes—

(a)in relation to a worker falling within paragraph (a) of subsection (1), the person who substantially determines or determined the terms on which he is or was engaged,

Section 43K(1)(c) ERA

223. Further, section 43K(1)(c) ERA the claimant will also be a worker if he worked as a person providing services in accordance with arrangements made by the National Health service Commission board under section 126 of the National Health Services Act 2006.

43K Extension of meaning of "worker" etc. for Part IVA.

(1)For the purposes of this Part " worker " includes an individual who is not a worker as defined by section 230(3) but who—

(c) works or worked as a person providing services in accordance with arrangements made—

(i)by the National Health Service Commissioning Board under section 126 of the National Health Service Act 2006,

(2)For the purposes of this Part " employer " includes—

(b)in relation to a worker falling within paragraph (c) of that subsection, the authority or board referred to in that paragraph.

The National health Service Act 2006 section 126 provides ;

3)The arrangements are arrangements for the provision to persons who are in England of—

…

(b)persons who are registered pharmacists,

Case law

The starting point in considering the question of the relationship between the parties will be the terms of any written agreement between them: ***Autoclenz v Belcher [2011] UKSC 41.*** We have also considered**:** ***Addison Lee v Gascoigne UKEAT/0289/17/LA.*** **The** determination of employment status requires the Tribunal to investigate and evaluate the factual circumstances in which the work was performed: ***Clark v Oxfordshire Health Authority 1998 IRLR 125 CA.***

224. We have had regard to the guidance in **Ready Mixed Concrete (South East) Ltd v Minister** of **Pensions and National Insurance 1968 1 All ER 443 QBD** and ***Nethermere (St Neots) Ltd v Gardiner and anor 1984 ICR 612*****.**

225. The 'limb b' definition of a worker consists of the following three elements as set out by Elias P in ***James v Redcats (Brands Ltd) [2007] ICR 1006 EAT;***

a) A contract to perform or undertake to do work or services
b) An obligation by that individual to do the work personally
c) The other party must not be a client or customer of a business run by the individual (i.e. the individual is not in business on their own account)

226. As clarified by the His Honour Judge David Richardson in **Plastering Contractors Stanmore Ltd v Holden UKEAT/0074/14/LA** at paragraphs 21:-"*The first question*

which an Employment Tribunal must consider when it applies the statutory *definition is whether there was a contract between the putative worker and employer at all."*

227. In relation to the obligation to perform work personally, it is well established now that a *limited* right to of the individual to provide a substitute is not inconsistent with the existence of an obligation to work personally; ***Pimlico Plumbers Ltd v Smith [2018] I.C.R 1511***

228. The fact that a legal right to provide a substitute is never exercised in practice does not of itself, mean it is not a genuine right; ***Express and Echo publications v Tanton [1999] IRLR 367.***

229. We have had regards to the guidance in **Cotswold Developments Construction Ltd v Williams UKEAT/0457/05** at paragraph 53

230. In ***McTigue v University Hospital Bristol NHS Foundation Trust*** 2016 ICR 1155 EAT Simler P summarised the correct approach to determining whether an individual is a worker within the meaning of S.43K(1)(a).

Submissions on Employment Status

231. The parties made written and oral submissions. We have considered them in full however we set out in their judgment only a summary of those submissions.

Respondent's Submissions

232. It is submitted that there was no separate contractual agreement between the respondent and the locum Pharmacist. There is no provision in the PPR UK Agreement for cancellations although this may involve the respondent incurring a financial liability, but this is a contractual term between the Agency and the respondent.

233. The document (p.80 to 87) is applicable to booking work through the Locumbay website and is a contract between a user of the website and the company owning the website i.e. Sharief Limited which is not the respondent

234. The agreement makes it plain that the relationship between the user is that of independent contractor.

235. The respondent refers to the oral evidence of Abdul Sharief that the "*locum can send replacement so long as qualified Pharmacist*" and denied that locum was an integral part of the business.

236. The respondent argues that the claimant is indicating that he had no accountability other than to GPhC and thus suggests there is no element of control.

237. In terms of the applicable of section 43K(1) c) ERA, counsel in oral submissions stated that he had no instructions on a case referred to by claimant in connection with another Tribunal case he has brought: ***Mr Ekakitie v Bookachemist Recruitment limited 1804981/2020*** . Counsel was' 'neutral' on the issue of whether section 43k(1)(c) ERA applied and made no submissions either way.

238. The Respondent referred to a number of cases which we have considered: ***Hospital Medical Group Limited v Westwood [2012] EWCA Civ1005 [2012] IRLR CA, Suhail v Barking Havering and Redbridge University Hospitals NHS Trust***

[2015] UKEAT 0536/13/EAT, Windle v Secretary of State for Justice 2016 ICR712CA and ***The decision of Lord Justice Elias in Quashie v Stringfellows Restaurant Limited [2013] IRLR 1999 CA***

Claimant's Submissions

239. The Claimant referred to a number of cases which we have considered; ***Uber BV v Aslam [2021] UKSC5, Elemi v Mitcham [2001] IRLR262, Cotswold Developments Construction Limited v Williams [2006] IRLR181, Hospital Medical Group Limited v Westwood [2012] IRLR83, Bates Van Winkelhof v Clyde and Co LLP [2014] UKSC32***

240. With regards to personal service counsel referred to ***Pimlico Plumbers v Smith [2017] EWCA Civ51*** and ***Chatfield Roberts v Philips UK EAT/0049/18.***

241. With regards to a summary of the law on mutuality of obligation of the clients/customer exception counsel referred to the following cases which we have considered: -***Nursing and Midwifery Council v Summerville UKEAT/0258/20, Windle v Secretary of State for Justice [2016] ECA Civ459*** and ***Community Based Care Health Limited v Narayan UKEAT0162/18***

242. It is accepted that the respondent was responsible for paying the claimant directly.

243. The fact that the claimant invoiced for his services via a Limited Company does not it is submitted alter this position. Moreover, the respondent required a registered Pharmacist to do the role it could not be performed by a Company.

244. Counsel refers to the label of independent contractor not being determinative ***Autoclenz v Belcher [2011] for all England 745.***

245. There is a requirement for there to be at least one Pharmacist present without which the pharmacy would be required to close. It is submitted that on this basis the claimant's work was integral to and integrated into the respondent's business.

246. In relation to mutuality of obligations, it is submitted that this is not a prerequisite of a worker status. The fact that the claimant was not obliged to perform a minimum level of work does not distract from the significant subordination and integration into the respondent's business while he was working on shifts and that there were ongoing 'Umbrella' obligations governing this relationship with the respondent.

247. The customer of client logically seemed to be the patients attending the Pharmacy. The claimant it was submitted was pursuing the respondent's business interests rather than being in business on his own account.

248. With respect to section 43K(1)(a) counsel submits that the fact that the claimant is a Limited Company does not prevent this section from applying – ***Croke v Hydro Aluminium Worcester Limited [2007] ICR130***3.

249. Counsel referred to ***Keppel Seghers UK Ltd v Hinds [2014] IRLR 754*** and the guidance at paragraph 51.

Section 43K(1)(c)

250. Counsel submits the Claimant must also be a worker if you have worked as a person providing services in accordance with arrangement made by the National Health

Commissioning Board under section 126 of the National Health Service Act 2006 which provides as follows.

251. Section 43K(2) The Employment Rights Act Employer – Includes… "in relation to a worker falling within paragraph (c) of that subsection, the authority of board referred to in that paragraph".

252. The Employment Tribunal indicated that the Claimant had the required status on this basis in analogous circumstances ***Mr Ekakite v Bookachemist Recruitment Limited*** **1804981/2020.** Counsel submits that the Tribunal should not really depart from the decision of a Tribunal of co-ordinate jurisdiction without a powerful reason for doing so. Moreover, it would be appropriate to follow the earlier approach to ensure that like places are treated alike particularly given that the claimant is himself involved in both cases.

253. Counsel submits that throughout this time the respondent and the claimant was engaged in providing NHS prescriptions and the respondent accepted that it had arrangements with the NHS to provide these prescriptions. Public policy evidently favours protecting whistle-blowers in Health Care Settings : see ***Keppel*** paragraph 18.

254. The claimants case against Bookachemist came before the Leeds Employment Tribunal on 26 February 2021 when it determined that the claimant was a worker within the meaning of section 43K ERA. The respondent in that case operated a number of chemists in Yorkshire and had a contract to supply NHS pharmacy services with its local CGC. It refers to Click Health Ltd and that the claimant was formerly a director from 20212 until 26 July 2019 and a sole shareholder. The Tribunal made findings that the claimant controlled Click Health Limited and that this service company invoiced for his services and he was paid dividends from the company . The claimant applied for a full time role with the respondent and was made an offer of employment. He provided work prior to starting employment, via Click Health Limited acting as his agency. The offer of employment was withdrawn before it commenced. The respondent accepted that the claimant could send a substitute.

255. It is submitted he was a worker at all material times within the meaning of section 43K ERA.

Conclusions and Analysis - Employment status

Worker under ERA 1996 and employee under the extended definition in the EqA

256. We have first considered whether the claimant was a worker within the meaning of section 230 ERA and/or the extended definition an employee under section 83 (2) of the EqA.

A contract to perform or undertake to do work or services

257. The Tribunal concludes that based on its findings of act; that there was a contract as between the claimant and the respondent to perform or undertake to do work or services.

258. The terms of that contract is set out in the Agreement . Both parties agreed to accept its terms and conditions when offering and accepting the assignments, some of

which were for single shifts and as the respondent accepted, on other occasions a number of shifts.

259. We are not persuaded that the Locumbay Agreement was a contract only between the claimant and Sharief Limited; it stipulated that; *Upon the Employer awarding a project to a Locum and the Locum's acceptance of a project on the Website, the Employer agrees to purchase, and the Locum agrees to deliver the services in accordance with the following agreements".* The Employer being the respondent. As Counsel had put it to the claimant during cross emanation, Locumbay was a platform to introduce users and he had asserted that the parties to the Agreement (p.82) was the Website, the locum and the employer,

260. Neither the claimant nor the respondent's witnesses sought to argue that they were not aware of and were not bound by the terms of this Agreement .

261. Further, there were additional terms which formed part of the agreement between the parties ; those terms were set out in the job advertisement and formed part of the key terms; namely the hours of work, the pay and the location. That was we find the understanding of the parties and what happened in practice. There was no suggestion by the respondent that the claimant was not entitled to be paid for the work he performed in accordance with the terms set out in the Agreement and in accordance with the terms set out on the Locumbay website when the role was advertised.

262. The claimant was obliged once he accepted the work whether he accepted a shift or more than one, to carry it out subject to giving notice that he was cancelling and if sick had to phone in an notify them in line with how employees are required to notify absence. Mr Sharief accepted that at the point when the offer of work was made and accepted there was an '*agreement in place'*, which we find was an agreement for the claimant to provide the work and the respondent to provide the work and pay for it; that would we find give rise to an agreement which covered all shifts which had been offered and accepted and created in effect an overarching agreement which applied to all the shifts which the claimant had agreed to work and the respondent had agreed to provide and pay for and continued to apply to those agreed shifts, subject to the claimant cancelling in accordance with the agreed terms . This gave rise we find to mutuality of obligation.

263. The work for services to be performed was that of an RP.

264. The facts of this are distinguishable from the ***Mr Ekakitie v Bookachemist Recruitment limited 1804981/2020*** in that, the Tribunal in that case found as a fact that there was no direct contractual relationship between the claimant and the respondent, the relationship was between the respondent and Click Health Limited, there was no personal responsibility to accept work. He could send a substitute and the respondent had given evidence that any qualified pharmacist would suffice (due to the Covid pandemic and need to keep the pharmacy open). He was working through his own business and could accept or refuse work. It distinguished the case from Gilham v Ministry of Justice 2019 UKSC 44 SC on the basis that Ms Gilham had to provide her services personally and could not send a substitute. The respondent did not make any submission on the earlier case brought by the claimant.

An obligation by that individual to do the work personally

265. It is clear that the obligation was on the claimant to do the work personally. He personally held a licence to practice and it was his qualification and licence to practice which enabled him to act as RP. He agreed to the terms of the Agreement personally and not via his Limited Company. Although the fees were paid to his company, the invoices for the fees due were sent out in his name; the liability was to pay him personally regardless of what mechanism or bank account he asked for the payments to be paid into. There was never any suggestion from the respondent that they understood they were contracting with anyone other than the claimant individually, other than PPR UK.

266. We also conclude that the obligation was on the claimant to do the work personally. Whether the respondent would have been able to find a replacement at short notice is not an answer to that. The contractual terms do not record any right of substitution and we do not conclude when considering the evidence about what happened in practice; that there was ever any expectation and nor did it ever happen, that the claimant sent a substitute in his place.

267. Even if the respondent had been prepared to consider a proposed substitute, Mr Sharief made it clear that it would be subject to his unfettered approval and a right to substitute only where the individual is unable to perform the work, or subject to the consent of someone with absolute and unqualified discretion to withhold consent would subject to exceptional facts, be consistent with personal performance. ***Pimlico Plumbers.***

268. Further, we conclude that the reference to the claimant being an 'independent contractor' is not of any significant weight when deciding what the parties intended; in that as Mr Sharief accepted it is common in the industry for this term to be used and in fact is a term used to describe the employment status of Mr Nath who is an Area Manager of longstanding with the respondent who also describes himself as both an independent contractor and as an employee in his statement of evidence.

The other party must not be a client or customer of a business run by the individual (i.e. the individual is not in business on their own account)

269. We have considered that the claimant was free to accept assignments and he worked as RP at various locations and thus he was able to market himself to the world as an independent person however, we conclude on the basis of our findings of fact, that once he accepted an assignment, he became an integral part of the respondent's business during the period of the project/assignments he accepted, whether that was over a number of days or for a single shift.

270. Mr Sharief accepted hat the RP is 'key' and while the claimant may be able to be replaced, while performing the service or works, he played an important part in the business.

271. As RP the claimant was in charge of the effective and safe running of the pharmacy, however he was subject to a level of supervision or interference; Mr Nath sought to restrict his use of his mobile telephone during the day, he spoke to him about his performance and the speed with which he carried out his work and he was spoken to about his punctuality and lateness when he failed to attend the pharmacy at Trentham on time. There was an element of subjugation.

272. The claimant bore no financial risk, he was paid an hourly rate and his pay was not contingent on the profits for the respondent his work generated and whether they were paid for the prescriptions he checked before dispatching to patients.

273. If he made an error, there was no suggestion that he was liable to compensate the respondent. Although unhappy about his performance, there was no suggestion that they had the right to reduce what was paid to him or had a right to be compensated. He bore no finical risk from the work he performed.

274. The claimant was responsible for his own tax and was not entitled to holiday or sick leave. He did however have to contact the respondent in line with how employees were expected to report, when he was too sick to come in for work.

275. The claimant invoiced for the work personally. He applied for work as an individual and not through a service company. The respondent covered the cost of his public liability insurance.

276. **In conclusion the claimant was a worker as defined under section 230 (3)(b) Employment Rights Act 1996 and employee under the extended definition under section 83 (2) of the Equality Act 2010.**

Section 43K (1)(a) ERA

277. In determining whether section 43K(1)(a) ERA applies we have considered the guidance in ***McTigue v University Hospital Bristol NHS Foundation Trust*** 2016 ICR 1155 EAT

For whom does or did the individual work?

278. The claimant was introduced through PPR UK. The claimant was not paid via PPR UK. There is no dispute that the role of PPK UK was only as an introducer for which they were paid a fee by the respondent the claimant worked for the respondent, not the PPR UK.

Is the individual a worker as defined by S.230(3) ERA in relation to a person or persons for whom the individual works or worked? If so, there is no need to rely on S.43K in relation to that person.

279. We have concluded that the claimant was a worker for the purposes of section 230 (3) ERA but have nonetheless, if we are wrong on that, gone on to consider section 43k(1)(a).

If the individual is not a S.230(3) worker in relation to the respondent for whom the individual works or worked, was the individual introduced/supplied to do the work by a third person, and if so, by whom?

280. The claimant was introduced by PPR UK.

if not a worker for the purposes of section 230 (3) Are the terms on which the individual was engaged to do the work determined by the individual? We conclude that they were not and have gone on to consider whether the terms substantially determined (i) by the person for whom the individual works or worked, (ii) by a third person, or (iii) by both of them? If any of these are satisfied, Simler P held that the individual is a worker for the purposes of the subsection.

281. The terms on which the claimant was engaged to do the work were in practice substantially determined not by him but we find the respondent, in that it was the respondent who set the pay, who determined the hours, who prescribed the location and who provided the SOP's which the claimant had to comply with and work to. Those are the substantial terms. The work, location pay and hours were set out in the job offer which the claimant accepted, and formed we conclude part of the agreed contractual terms in practice. The additional terms set out in the Agreement, were we find in practice set by the respondent and incorporated into the Agreement via the website portal. Sharief Limited who owns Locumbay in practice forms part of the same group of companies, and thus are terms which the respondent had we conclude substantial control over in practice. The website was a platform to facilitate and organise the engagement of locum staff for the respondent.

282. Even if we had concluded, which we have not, that the claimant was operating through his own service company, the terms were still substantially determined by the respondent and thus the existence of a service company would not of itself avoid the applicability of section 43K: ***Croke v Hydro Aluminium Worcester Ltd 2007 ICR 1303, EAT*** . Similarly in the case before this Tribunal, the respondent was looking for Locums to perform pharmacy work and the claimant was introduced as a licensed pharmacist who could carry out this work and he was specific person who was introduced for this type of work and thus we finds in any event, he would fall within section 43k (1)(A)ERA :**In *Keppel Seghers UK Ltd v Hinds 2014 ICR 1105, EAT*,**

283. The Court of Appeal in ***Day v Lewisham and Greenwich NHS Trust and anor (Public Concern at Work intervening) 2017 ICR 917, CA*,:** S.43K(1)(a)(ii) envisaged that both the person for whom an individual worked and the person who introduced or supplied him or her could substantially determine the terms on which he or she was engaged, either jointly or to different extents. Since the individual could, therefore, in principle be employed by both, there was no rationale for a provision which provided that, if he or she was a S.230(3) 'worker' in respect of one, he/she could not rely on the extended definitions in S.43K(1) and (2) against the other. Accordingly, the words 'who is not a worker as defined by S.230(3)' in S.43K(1) should be read as meaning that the provision was only engaged where an individual was not a worker within S.230(3) *in relation to the particular respondent* in question. That said, the claim is not pursued against PPR UK, that does not form part of the agreed issues for determination and no submissions have been made on the point and thus we made no determination on the potential status of PPR UK.

In conclusion the claimant was a worker as defined by section 43K (1)(a) ERA

Section 43K(1)(c) ERA

284. This section relates to an individual who works or worked as a person providing services in accordance with arrangements made by the National Health Service Commissioning Board, Local Health Board, Primary Care Trust or Health Authority.

285. Counsel for the claimant reminds us of the principle that, although not bound to do so, a court would follow a decision of a judge of equal jurisdiction unless the decision appeared to be clearly wrong: ***Regina v Greater Manchester Coroner ex parted Tal [1985] 1 QB 67*** and invites us therefore not to depart from the Employment Tribunal's decision in . ***Mr Ekakite v Bookachemist Recruitment Limited*** **1804981/2020** that the claimant was a worker while working for the respondent, pursuant to section 43k (1) (c)

286. Section 43k (1)(c) provides additional protection for those who are delivering NHS services, it allows them to make disclosures to the NHS and to benefit from the protections under the legislation.

287. Counsel for the respondent did not make submissions on this point. He stated that he was 'neutral'. He did not seek to argue that section 43k (1)(c) did not apply or that the decision of the Tribunal in ***Mr Ekakite v Bookachemist Recruitment Limited*** **1804981/2020** was plainly wrong or any other reason why that decision should not be followed.

288. We find that the claimant was also a worker within the definition in section 43k(1)(c) ERA.

In conclusion a claim brought on the grounds that the claimant was a worker as defined by section 43K (1)(C) ERA is well founded and succeeds.

Findings of fact – substantive claims

289. We have dealt with the preliminary issues with respect to employment status and whether the claimant is disabled and now move on to the facts relating to the incidents of alleged detriments for 'whistleblowing' and harassment related to the claimant's disability. All findings are based on a balance of probabilities. All the evidence has been considered but we deal only with the evidence which we have considered relevant to our determination of the issues. **Acklam Road Pharmacy**

290. The claimant first worked at Acklam pharmacy/store (Acklam) on 1 August 2019. He accepted this assignment via Locumbay and worked as the RP.

Near misses

291. The respondent's SOP describes a 'near miss' as a "*dispensing error that is identified prior to or during the final accuracy check i.e. the error does not reach the patient"* (p.177). This would cover a situation where a Dispenser prepares a prescription and attaches a label with incorrect information about the dosage. If not identified before, the RP who is responsible for the final accuracy check, should then identify the error before signing off the prescription and rectifying it. The practice of the respondent and we understood most if not all pharmacies, is to record these *near misses*. One important reason for doing so is to identify the training needs of the Dispensers or performance issues.

292. The SOP for dealing with near misses and errors (page 177) provides that the purpose of the SOP is to ;*To ensure that near misses and dispensing errors are reviewed critically and there is a drive to change practice to improve patient safety."*

The SOP (p.178) also provides that ; "*All incidents must be reviewed on a regular basis (at least weekly) with a view to identifying weaknesses in process and changes that need to be made..."*

293. There were Dispensers and Counter Assistants working at Acklam. There were 4 Dispensers, two of whom had NVQs and two including Luca Cara, who were working towards their NVQ.

1 **August 2019**

294. 1 August 2019 was the claimant's first day at Acklam. Mr Nath, the Area Manager and Pharmacy Manager for Acklam was not present. He and his wife, who is a Pharmacist for the respondent at another branch, sent an email to Ms Bryony Gleave of HR who is based at head office (page 194 AM). This email complains about the claimant's work following comments and photographs Mr Nath had received from the staff at Acklam;

"Both Sanjay and I are at Fairfield today and have been sent these pictures from the team over there with a comment that this locum is diabolical , which is not far wrong.

We had had him in Fairfield and as you can see, he gets a chair and sits down all day and does next to nothing, we are worried as he is there tomorrow and has some more shifts booked in. Again if [sic] not fair as Sanjay will end up working late on Saturday to catch up.

Can we start to fill September now so that we're not having to use last minute locums who turn out to useless?

Also every bench has baskets so how is he checking properly?"

295. Mrs Vicky Nath had, according to the evidence of Mr Nath been emailing Ms Gleave about the quality of locums more generally. The Tribunal heard no specific evidence from the respondent about the claimant's performance at Fairfield and it is not suggested by the respondent that Vicky Nath had raised concerns about the claimant previously.

Near misses

296. Mr Nath had been involved in the sending of the email and the reference to '*diabolical*' is a word Mr Nath used and not, he accepted, a description of the claimant by the Acklam staff.

297. The claimant gave evidence that the staff at Acklam were unhappy with him from day one, because he noticed that staff were not writing down their near misses and he was telling them to record them; *"I told them to write down near misses and they refused- they said they don't have a near miss record – I said put it in electronic record but asked to see it and they didn't have it. This branch was not capturing the near misses*."

298. In response to a question from the Tribunal the claimant's language was somewhat different, he explained that the staff had told him "*not to worry"* and they would enter the near misses, but he was suspicious that they were not doing it because of their dismissive attitude. He gave evidence, which appears not to be in dispute, that near misses are common and happen 'daily'. His undisputed evidence is that he would normally leave the dispensers to enter their near misses, he would not normally *"micromanage"* them but just check the record at the end of the week however he was suspicious because of their response.

299. The claimant under cross examination was unclear about when he raised these concerns with Mr Nath, he gave evidence that; *"on 2nd day I am taking photographs of near misses - …so early on must have concerns about the place …from 1 August I have seen anomalies going on …I said start entering the errors".*

300. The claimant later in cross examination suggested he had raised this issue with Mr Nath on 1 August although Mr Nath was not present in the pharmacy; "..*day one I had said no record of near misses – can see Nath's reply – he was panicking about it , I had told Nath near miss record does not exist*.."

301. That the claimant had informed Mr Nath prior on 1 August 2019 that near misses were not being recorded is denied by Mr Nath. The claimant did not refer to reporting this to Mr Nath in his email of the 6 August 2019 (p.195). The claimant had also not mentioned this in his witness statement, in fact in his statement he makes no mention of raising concerns until 6 August 2019 and states (w/s para 13);

" *On 6 August 2019 I notice a few controlled drug registers were not legally kept… I also noted that drug errors were not being reported as required for patient safety. This was a safety concern* ***which I then*** *reported to the agency and to management..."*

302. The above evidence suggests that the claimant only raised these issues with management in his email of the 6 August 2019.

303. The claimant did not seek to elaborate on how he had communicated any problem with the near miss record to Mr Nath on the 1 August. He does not refer to any email exchange or telephone call.

304. The claimant only elaborated on these events and alleged that he had informed Mr Nath on 1 August, during cross examination. Given how important this issue of communicating his concerns prior to 6 August is, (not least because as originally pleaded his claim was that he was victimised by the removal of his chair on the 6 August 2019), it is surprising that he had not mentioned communicating these concerns on the first day to Mr Nath, in his evidence in chief.

305. The claimant had a tendency when giving his evidence under cross examination to elaborate and add significant detail and new allegations, claiming that he had remembered information during cross examination or that it had not been possible to remember to put everything in his statement. We will address that as and when we make reference to the relevant instances however, in cross examination when it was put to him that Mr Nath was not aware of his disclosure of the 6 August until the 28 the August, the claimant gave evidence robustly that he believes Ms Gleave would have told Mr Nath and further he now alleged that;

"..*I made it to him myself – on* ***2 August and 6 August*** *and told him near misses not recorded"*

306. The claimant was questioned under cross examination about why he did not mention the alleged disclosure direct to Mr Nath on 2 August 2019 in his witness statement or in the email of the 6 August 2019 (the first alleged protected disclosure), to which his response was:

"I didn't send 6th August email with a plan to bring an tribunal claim – so not looking at tiny detail – I sent most important content..."

307. We are satisfied on the evidence, that this email of the 1 August 2019 was sent by Mr Nath and his wife, because they believed from what they had been told by staff at Acklam, that the claimant was not performing well.

308. The evidence does not support a finding that Mr Nath by 1 August, had been contacted by the claimant (or the staff) and told that the claimant was raising concerns that the near miss register was not being completed.

309. The claimant worked at Acklam on 1 and 2 August, he would not then return until 6 August 2019 (p.194A)

Photographs of the claimant

310. It is alleged by the respondent that the claimant did not perform to a satisfactory standard as RP at Acklam, that he spent a long time on his mobile phone and worked slowly at checking the prescriptions, keeping patients waiting. The claimant denies this.

311. The photographs which staff had taken at Acklam of the claimant's work-station on the 1 August 2019 were disclosed by the respondent during the course of the hearing (pages 162 to 165 inclusive). It is alleged that these show the extent of the number of prescriptions waiting to be checked by the claimant. The claimant was not aware that these photographs had been taken.

312. The time stamp on the photographs is 4.20 pm. Mr Nath confirmed that they were sent to him on 1 August 2019 however he accepted that he was unable to confirm from the metadata whether the time stamp shows the time they were taken or sent to him.

313. The claimant does not deny that the photographs are of Acklam and his workstation there however, he states that these photographs were likely to have been taken at lunchtime when he was away from his desk and when prescriptions had 'built up' before he returned to deal with them. However, he also gave evidence under cross examination, which was not challenged, that the photographs showed no more than 30 or 40 baskets of prescriptions, (which the Tribunal accepts appears to be correct) which would equate to no more, he asserts of about 20 minutes of work. This does not appear to be disputed.

314. Mr Nath gave evidence that the dispensers at Acklam would on average fill 5 or 6 baskets with prescriptions in a 30 minute period. Over a lunch hour that would equate to about 10 or 12 baskets each and for two Dispensers, that would be circa 20 to 24 baskets. However, the tribunal find that the photographs are unlikely to have all been taken at lunchtime because two of the photographs are of the same workstation (and have the same apparent time stamp) and show the same area of the workstation (p.164 and 165) with what appears to be a different stack of prescription baskets. If these photographs were not taken at lunchtime, and on a balance of probabilities, we find that at least one of them was not, then it would seem to indicate (given the claimant's explanation for that number of baskets was that it would have been lunchtime) that there were more baskets than normal.

315. The Tribunal also consider it reasonable to draw an inference that the staff (whatever their motivation) who had taken and sent the photographs had done so because they believed that what the photographs showed was supportive of their complaint.

1 August

316. The claimant's case is that he told the staff at Acklam on 1 August 2019 that he had a disability.

317. We have heard no evidence from the staff who worked with the claimant at Acklam to rebut the claimant's evidence. The evidence of Mr Cara was withdrawn and Mr Nath was not present in the pharmacy at the times when the claimant worked there.

318. Further, it is not in dispute that the claimant was sitting on a chair to do his work. Mr and Mrs Nath complained in the email of the 1 August that they had been told that he was sitting. It is not in dispute that it is not usual for a RP to sit when checking prescriptions. Sitting would then have been unusual and the Tribunal find that if

someone asks for and uses a chair, in a job which the respondent's witnesses accept was usually done standing, it may well indicate to the staff working with them, that it may be because they have a need to sit. Further, within Acklam there was another employee, who has epilepsy who would sit to carry out her work. The Tribunal accept that the presence of another person who is disabled and needs a chair may indicate to staff that the claimant may also have a medical reason for needing a chair/stool.

319. In his email to Mr Dattani (his contact at PPR UK) on 6 August 2019, the claimant states that he had remind the staff that "*if people with back conditions want to sit it is perfectly reasonable".*

320. We find on a balance of probabilities, that the claimant mentioned to staff at Acklam that he needed to sit because of a *'back condition'*, (as he reported to Mr Dattani) not that he explicitly stated that he had a 'disability', and that he had mentioned this to them on 1 August 2019.

2nd August 2019

321. On 2 August 2019, the claimant was working at Acklam again and took a photograph of what he describes as a '*near miss' (*page 169). It is not in dispute that this constitutes a '*near miss'*. The claimant did not disclose this photograph however to the respondent prior to these Tribunal proceedings.

322. It is not in dispute that Acklam had an electronic register where staff would record near misses. It is not in dispute that the claimant did not have the log-in details to access the register. The claimant accepts therefore that he could not actually check to confirm whether or not that near miss, or any near misses, had been registered by the dispensers. He believed or rather suspected (he refers to both terms in evidence) that the staff were not recording them because he alleges that when he asked to see the electric register they told him they would enter it later. What he describes as their dismissive attitude, "*raised my suspicion*". The claimant only saw the near miss register which confirmed his suspicions during the course of these Tribunal proceedings.

323. The claimant does not identify by name the individual Dispensers he spoke to about each of the near misses however, he gave evidence that Mr Luca Cara in particular was making a lot of errors. Mr Cara did not give evidence ultimately to rebut this claim.

324. The claimant gave evidence that near misses were 'common' and that he would expect to see; "*between 6 to 10 errors a day in the register" .*That near misses are common is not in dispute although that figure is.

325. The claimant's evidence is that while he identified other near misses which he believes were not entered, he had only taken a photograph of one.

326. Mr Nath had created a list of near misses which he sent on to the GPhC inspector following its inspection in February 2020.(p.214). His evidence is that he extracted the data for that spreadsheet from raw data from the monthly summary sheet to show the inspector the actual near misses. This information was sent following a concern raised with the GPhC by the claimant in September 2019. Mr Nath's evidence is that the entries are made on the day and contemporaneously within 10 minutes to half an hour of when the error happened. In terms of the photograph the claimant took of the near miss (p.169) on 2 August 2019, it is not in dispute that the 2 August near-miss does not appear on this spreadsheet. Mr Nath's evidence during supplemental questions, was that it may not have been entered either because it

was not flagged up to the Dispenser at the time or the Dispenser did not enter it perhaps because they were exceptionally busy on the day.

327. The record also appears to add in near misses on the 12 and 13th August, which are other dates the claimant worked at Acklam, however they appear on the list after near misses which were entered on later date i.e. not in chronological order. The claimant alleges that the dates can only have put in after the claimant had made his alleged protected disclosures on the 19 and 23 August 2019 about further near misses at Acklam. Mr Nath gave evidence that he had grouped together the near misses recorded on the dates the claimant worked however, the fact that at least one other near miss the claimant identified (page 169) was not entered on the near register supports the claimant's belief that not all near misses were being recorded and thus we accept, that there were occasions when near misses were not recorded by the dispensing team when the claimant worked as RP there. Further, we are not convinced by Mr Nath's explanation for why the 12 and 13 August near misses appeared out of date order, even if grouped together for the reason he gave, that would not we find explain why they appeared in the list after the earlier group of near misses.

328. On a balance of probabilities we find that the 12 and 13 August near misses were not recorded on the day the errors were made and were put on at some point after the 27 August 2019, which would tie in with when Mr Nath alleges he first become aware of the emails forwarded to him on the 28 August 2019, in which the claimant had continued to complain of near misses not being recorded at Acklam.

329. None of the respondent's witnesses were in a position to rebut the claimant's evidence on what he described as the dismissive attitude of the team when he asked them to write down their near misses and his evidence that he had genuine concerns about this issue is consistent with his email which he sent to Mr Dattani of PPR UK on 6 August 2019 (page 195);

"I had a harassing experience today at Acklam Pharmacy... I think the staff members are doing this because I told them last week to write down their drug near misses, a safety procedure which they were not doing. They didn't like the fact that I asked them to write their drug errors down.

330. We therefore accept the claimant's account that he was instructing the Dispensers to record their errors and that he believed at this time, they were not doing so. That belief would appear to be given credence by the absence of at least the one error he noted on 2 August 2019, in the data Mr Nath produced to the GPhC and we find, the later addition to the near miss record of the entries relating to near misses on the 12 and 13 August 2019.

331. The Tribunal consider that a reason why the Dispenser may not have been recording all their errors may well have been the fear of some sanction, need for further training or performance management.

Work rate

332. We accept that staff at Acklam as early as the claimant's first day in role as RP, were reporting concerns to Mr Nath about his work output and were reporting that he was sitting down to work.

333. The claimant refutes that there were issues with his performance. However, the Tribunal are satisfied on the evidence, that there were grounds for the staff and Mr Nath to have formed a negative view of the claimant's work ethic.

334. The claimant was at various times when giving his evidence, very forceful and robust about his authority as RP to determine the work rate; *"how fast is left to my professional judgment, if it is a 5 or 10 minute wait- it is decided by me."*

335. The Tribunal unanimously formed a clear impression of the claimant throughout the course of cross examination that he did not consider when he was in the role as RP that he was accountable to the respondent's management for the speed at which he worked and that he had the power alone to dictate how quickly the work was done . As he repeatedly stated, as RP he was in charge of the *safe and effective running of the pharmacy* and if that meant patients were left waiting, that was for him to determine;

" ..*how much waiting time to decide, if waiting time is 15 minutes or more- my professional judgment – if want it to be 30 minutes if there are so many prescriptions, cannot question it – it is legal – it is me to set waiting time – for me to decide how effective pharmacy will be – according to the law" . And;*

"on that day I believe it can't be 15 minutes but if I set 15 minutes according to SOP I chose that time – they are lying – it is my chosen time"

"…15 minutes is ok – 30 minutes is ok – 1 hour to call back is ok – depends on the RP"

336. The claimant appeared to consider that it was acceptable for patients (some of whom no doubt may have been elderly or unwell) to wait for 30 minutes or more for their prescriptions, where he considered the safe and effective running of the pharmacy required it. While the Tribunal are satisfied that the RP's role is to do just that, and he did, under the Regulations, have ultimate say over the safe and effective running of the pharmacy, we were not convinced by the claimant's response to questions in cross examination, that the needs of the patients and the stress waiting time for the patients may put on the front line staff, were matters he concerned himself very much with, if at all. He at no point expressed concern or an appreciation for the impact on staff or for the patients but his repeated focus was very much on his authority as RP, with no acknowledgement of the RP's accountability to the respondent generally or to the branch's Superintendent specifically.

337. The priority he said that he gave the 'effective' running of the pharmacy, would have been more compelling but for the fact that the claimant accepted that he had asked staff who were working, to take time away from their duties to take photographs of him sat at his workstation while at Acklam during his shift. This request for staff to photograph him was clearly not something which the claimant considered unusual or inappropriate. His evidence was that he asked the staff, who he did not know well (and his evidence is, he felt were unhappy with him for asking them to record their errors from the first day he worked with them), to take photographs of him on his mobile phone, rather than attend to their work and patients because he considered he '*looked good'* and he accepted that this had happened on;" *at least one occasion".* He accepted there was no particular reason for this and does not assert that it was relevant to the work he was being paid to perform;

"*if look good at work, may take a photograph to show how good it looks ..."*

" just wanted to take photo at work"

338. The claimant made a comment indicating that he had taken more photographs himself;

"Lots of photos I took myself"

339. Although the claimant evidently did not consider this unusual, the Tribunal unanimously did, particularly in the circumstances, namely where he was a locum working with new colleagues and being paid an hourly rate to perform important and responsible work. A photograph of him at his workstation which had been taken by staff appears in the bundle (p.170).

340. The Tribunal also viewed a short video taken covertly of the claimant while at his workstation by staff. The claimant is seen sat at his workstation looking at this mobile telephone rather than working. The claimant refers to this being a very short video of only 20 seconds or so and while that is correct, on viewing this video It appears to this Tribunal that the claimant became aware that someone was behind him and at that point puts down his telephone.

341. The claimant gave evidence that he would have been looking at his phone to see whether he had been contacted to carry out any urgent NHS locum work however the Tribunal do not find that explanation convincing. It is unlikely we find that the claimant would be able to recall what he was looking at this particular time so long after the event. However, regardless, he was being paid by the respondent to carry out an important job and could have checked his phone during his break or lunch time. He does not allege he was on a break when this video was taken.

342. We find on balance of probabilities that on his own evidence, the evidence of Mr Nath of the reports he was receiving, and the photographs from his work station and the video evidence, that on a balance of probabilities it would be reasonable for those working with him to have formed an impression that the claimant was not necessarily focussing at all times on his work and giving it sufficient priority during the working day. Albeit the issue of him taking photographs would not be reported until the 2 August 2019 and the video taken subsequently, the Tribunal consider it reasonable to draw an inference from this evidence that this was how the claimant generally conducted himself in the workplace. While the fact he was sitting may have added to this impression, we find that this was not the main reason.

343. We find on a balance of probabilities however, that there were errors being made by the Dispensers, that the claimant was instructing them to report them, which as RP he was entitled to do, and they were not always doing so. The Tribunal find that instructing the staff to report their errors may well have created some further discontent among the team. Mr Nath himself accepted in cross examination that this may have rankled the dispensers;"

"*Yes, if he raised near misses, they won't be thrilled"*

344. The team must have felt unusually strongly however about the claimant to have taken covert photographs (and later video recordings) and this would appear disproportionate to concerns that he was not working quickly enough particularly when they took the photographs on the very first day he was working with them.

345. The Tribunal find on a balance of probabilities, that being asked to record their errors while they considered that he was not working as hard as they considered he should be, was no doubt a factor in the way they responded to him and the reporting to Mr Nath of their concerns about his work.

346. We do not however find that there is evidence to support the allegation that the claimant informed Mr Nath at this point about the near misses or that the staff had informed him. The claimant alleges that Mr Nath had inserted after the event, the near misses on 12 and 13 August in the spreadsheet he sent to the GPhC because he had become aware of these after he had seen his complaints in the later email. Had the claimant raised with him on the 2 August that there had been near misses, it would make more sense for Mr Nath to have also included those.

347. Therefore we find that the impression Mr Nath had formed of the claimant as set out in the 1 August 2019 email to Ms Gleave, was not influenced by the claimant reporting to him that staff were not recording their near misses, but was based on the complaints he was receiving from staff and the impression he formed on the days he worked at Acklam after the claimant had worked there.

Telephone call 2 August

348. Mr Nath then telephoned the claimant on 2 August to ask him to work quicker following the reports he had received from staff. In answer to a question from the Tribunal the claimant gave evidence that he told Mr Nath that he had a disability on 2 August when Mr Nath called him and told him; "*I hear you are sitting"*

349. We find that the claimant was aware that staff had complained about his performance to Mr Nath by 2 August 2019.

350. Mr Nath initially in cross examination denied that the claimant raised with him during this call, that he had a disability but later appeared to accept that it could have been mentioned on 2 or 6 August 2019. He was equivocal stating;

" I don't think disability was mentioned until later… could be in that one but I think it was later – if he mentioned disability it would have stood out"

351. The Tribunal find that it is more likely than not, that if Mr Nath was raising with the claimant his concerns about his work and the claimant sitting to do his work was mentioned, that in those circumstances, the claimant would have explained why he needed to sit.

352. We find that on balance or probabilities, that Mr Nath was not told by the staff that the claimant had told them he had a back condition or disability, that is not reflected in the email of the 1 August to Ms Gleave. However, we find that he was told the claimant was sitting to do his work directly by the claimant.

353. The claimant would later mention his disability in the 6 August email, he was not therefore reluctant to disclose his condition to the respondent.

354. Later on 2 August 2019, there is an exchange of text messages between Mr Nath and a Dispenser, James. James is reporting back on how the claimant has performed that day. Mr Nath makes some quip about expecting the prescription baskets to be full the next day, to which James replies (p.202A);

*"Hahah he's actually getting through them a bit better this afternoon, but you'll still be very busy – he's just asked me to take some pictures of him sat down on the chair [emoji of a person with their arms in the air**]** he's a bit of a clown as I'm sure you've heard"*

355. The Tribunal was struck by the disrespectful way in which Mr Nath was permitting this Dispenser to talk about the claimant, a fellow professional Pharmacist, and the

'clubby' nature of the exchange between the Dispenser and Mr Nath, who was his line manager and Area Manager. This would appear to be (given the content of other text messages to and from Mr Nath and the Acklam staff), normal.

6th August 2019

356. The claimant returned to work at Acklam on 6 August 2019. The day prior to this, Mr Nath instructed staff at Acklam to put up a notice on the desk used by the claimant which reads (page 167D);

> "*Mobile 'phones are not to be used in the dispensary. A locker is available for valuables and electronics. …. There is no reason to be using your personal mobile 'phone while working in this pharmacy. The dispensary team will report unprofessional conduct to the Pharmacy Manager."*

357. The Tribunal consider that this was poor communication on the part of Mr Nath and undermining of the claimant's position as the RP. That direction could have been issued direct by Mr Nath to the claimant but in any event stating that the dispensary team will effectively report him if he uses his phone, is not encouraging a collegiate working environment.

358. According to Mr Nath, it was reported back to him later that morning by Mr Cara that the claimant had 'torn' down the notice about the mobile phone (page 167D). The claimant denies that he had done so, his evidence is that he was not happy that this notice had been put on his desk but that he did not tear it down.

359. There is no evidence from Mr Cara to substantiate this allegation against the claimant. In the absence of any evidence to rebut the claimant's account of what happened however, we do take into account the claimant's evidence before this Tribunal about how he felt about the notice. He was vociferous in his evidence, that the respondent had he believed no authority to proscribe his mobile phone use. The claimant gave evidence that it was not a "*sweat shop"* and he repeated during this evidence, that there was nothing in the procedures that prevented him using his mobile phone and he needed the phone to check whether he was required to provide emergency cover.

360. While we do not find on a balance of probabilities that the claimant 'tore' it down, given his reaction to it before this Tribunal and his admission that he did not follow the instruction, we find on balance of probabilities, that he removed it from his workstation. Mr Nath would later describe the claimant as having *'taken the notice down*' and that his team had to stick it back up (p.255). Mr Nath exhibits the Tribunal find, a tendency to exaggerate, as he later would when commenting about the claimant to the GPhC inspector. We find however that he had been told the claimant had taken it down and he was annoyed that he had done so.

361. The Tribunal accept there was a concern by Mr Nath about the claimant's use of the mobile telephone. This is evidenced by the exchange of text messages between Mr Nath and Luca Cara on the morning of the 6 August 2019 (page 202B).This starts with Mr Nath at 9:17 am texting Mr Cara and telling him that he asked Abdul (a reference to Mr Sharief), a director based at from Head Office to call the claimant and asks whether the claimant had got his '*phone out again*. The exchange continues as follows:

- 9:20 am from Mr Cara to Mr Nath: "*Thank you and he's currently at the toilet so I imagine he has got it with him"*.

- Response from Mr Nath: "*I thought it would be more effective if one of the Company Directors calls him. Can you let everyone know if you see that phone – even just once – let me know. Thanks*"

- Mr Cara: *"Yeah definitely and yey of course I'll let everyone know, cheers*".

362. Mr Sharief's evidence confirms that he was contacted early by Mr Nath that morning on 6 August 2019 and that Mr Nath described the claimant as performing poorly and complained about the use of his mobile phone, that he had torn down a notice and about his work rate. He accepted in cross examination that he may have told Mr Nath that he would speak to the claimant but stated that he did not do so because he probably did not consider it serious enough to warrant his intervention. He gave evidence that it was up to Mr Nath how he managed his branches but he believes he may have suggested that Mr Nath be patient because they did not have a lot of Locum cover but it would have been for Mr Nath to decide what to do. Mr Sharief very much gave the impression that he considered this sort of management issue to be something which he should not need to be bothered with.

Removal of chair – 6 August

363. The Tribunal find on a balance of probabilities, that when Mr Nath had been contacted by Mr Cara on the 6 August 2019 about the mobile phone notice being taken down, during that same telephone call Mr Nath then informed Mr Cara to remove the chair and that he communicated that to Mr Cara before Mr Nath contacted Head Office.

364. It is likely that being told that the claimant had torn down the notice had been the catalyst, hence taking the step of asking for someone with more authority, to intervene in what was we accept, would normally be a matter for him as the Pharmacy Manager to manage.

365. We have taken into consideration how unsympathetic Mr Nath would later present himself, in terms of the claimant's need to use a chair, when considering the likelihood that he was aware at this stage that the claimant was disabled but nonetheless was prepared to instruct staff to take away the chair. Later when providing his comments on complaints raised by the claimant, in an email dated 28 August 2019, he went on to make the following comments (p.255);

. *"He's an exceptionally lazy person and ' his' chair encourages laziness. He decided to spend an entire afternoon checking baskets from the staff break room . Obviously he's not in a position to intervene in sales while he's not in the dispensary"..*

"Again I hid the bloody chair because he's a lazy swine."

366. As Mr Nath said in his evidence, someone can still be disabled and lazy and we accept on balance, that he had formed this view of the claimant. The act of instructing staff to hide his chair is a hostile act and shows quite a serious deterioration in their working relationship.

367. The claimant gave evidence under cross examination that on 6 August Mr Cara removed the chair and said;

"He said I was complaining too much, I was too slow, sitting on a chair" and *" I told him I had a disability".*

368. The allegation about what it is alleged Mr Nath had said of course implies that the removal of the chair was linked to the claimant complaining about the near misses. However, the claimant had not made this allegation about what Mr Nath had allegedly said was the reason for the removing the chair, in the email he sent later that same day, on the 6 August 2019 complaining about the removal of the chair (p.195). In that email he alleged that he '*believed*' the chair had been removed because he was telling the staff to write down their drug near misses, but neglects on the very day it happened, to record in this email the alleged comment by Mr Cara. However, almost 2 years later during this Tribunal hearing, the claimant claimed during cross examination, to have recalled these words being said. In his witness statement, he alleges that Mr Cara; "*told me his manager said I was no longer allowed to sit to do my work"*

369. The Tribunal do not consider the claimant's evidence introduced during cross examination about Mr Cara referring to the claimant *'complaining too much'*, is credible or reliable. We are satisfied that this comment was not made and that the claimant (as he would on other occasions when giving his evidence) sought to embellish his evidence during cross examination.

370. The removal of the chair happened before the claimant sent the email of the 6 August 2019 to Ms Gleave (p.195) i.e. before he made the first alleged protected disclosure. By this stage relations were we find, clearly already very strained between the claimant and Mr Nath.

The first alleged protected disclosure : 6 August 2019 (3.1 list of issues)

371. The first alleged protected disclosure is an email dated 6 August 2019 to Mr Dattani which was sent to him at 9:19 am that morning (p.202G).

"I had a harassing experience today at Acklam Pharmacy . I had a chair I used last week in sitting to do my *clinical checking. I need to sit doing my work because of my back disability. This morning I left for the bathroom and one of the technical staff members removed my chair and hid it. I had to ask him to recover the chair, reminding him that if people with back conditions want to sit it is perfectly reasonable .I think the staff members are doing this* ***because I told them last week to write down their drug near misses, a safety procedure which they were not doing****. They didn't like the fact that I asked them to write their drug errors down.*

Please inform the member that I need a chair to do my professional work."
[Tribunal stress]

372. At 9:24 am, Mr Dattani responds to the claimant informing him that he will contact the manager and let the manager know the feedback (page 199).

373. It is clear (p.273) that Mr Dattani forwarded the full email on to Ms Gleave, of HR.

374. There is then an email from Ms Gleave on 6 August at 10:19 am responding to Mr Dattani stating (page 273):

"*Thank you for amending the rates. I am sorry to hear that Efe had a difficult time in* Acklam *Pharmacy, I will ring up pharmacy today and speak to the staff and make them aware that Efe is allowed to use the chair if he wishes.*"

Was Mr Sharief aware of the alleged disclosures?

375. The evidence of Mr Sharief is that Ms Gleave works in the same building as him and that he talks to her regularly. His evidence was that he could only recall her raising with him the issue of the chair and the claimant's disability though he accepted that he was reliant on his memory and that this was as much as he could *"recollect".* His evidence was that he had instructed Ms Gleave to ensure that the chair was provided to the claimant at the branch but the rest of what was communicated, (ie about the reporting of drug near misses) was "*below his pay grade*" and therefore would not have been something that would have concerned him. His evidence was that it would have been something he would have expected Ms Gleave to have raised directly with Mr Nath, as the Pharmacy Manager.

376. We heard no evidence from Ms Gleave. There appears to have been a distinct lack of record keeping by her according to the disclosed documents. There is no record of Ms Gleave raising this issue with Mr Sharief or Mr Nath or of her informing the pharmacy's Superintendent.

377. The Tribunal consider, however that the content of the email of 6 August would, to anyone with even basic HR experience, 'jump off page' as a potential whistleblowing complaint. It would therefore make sense we find for Ms Gleave to mention this to Mr Sharief, and indeed to have then raised this with Mr Nath as the manager. The respondent does not allege that Mr Gleave was deficient in her role.

378. The Tribunal also struggle to accept that providing a chair to the claimant was something Ms Gleave would feel was within Mr Sharief's 'pay grade' and thus would raise this with him and yet a potential allegation of whistleblowing and failure to comply with a safety procedure, she would not even mention.

379. On the balance of probabilities we therefore find that it is more likely than not that Ms Gleave did raise with Mr Sharief both the issue about the chair and the issue about the non-recording of the near misses and that she is likely to have explained to him the entirety of the message in what is a short one paragraph email. However, the Tribunal also accept on a balance of probabilities that Mr Sharief did not pay much attention to what the claimant was saying about the recording of near misses. There is no evidence that he took any steps to deal with it himself and in his evidence, he did not regard the failure to record some near misses as particularly serious, or at least not an issue that required his attention, rather than Mr Nath's. Mr Sharief was we found a credible but not consistently a reliable witness, he was candid about what he could and could not recall and was prepared to accept certain things may have happened although he could not recall them, even where this was not necessarily helpful to the respondent's case.

380. In terms of what was communicated to Mr Nath on 6 August, we take into account that Mr Sharief's evidence was that the issue raised about non-recording of near misses would usually have been something that Mr Nath would deal with and he would have expected Ms Gleave then to have dealt with it direct with him.

381. The evidence of Mr Nath is that he did speak to Ms Gleave on 6 August. By this date Mr Nath accepts that he was told by Ms Gleave that the claimant had said that he had a disability and needed a chair. Mr Nath could not recall however any discussion about near misses.

382. The evidence of Mr Nath is that he believes that following the discussion with Ms Gleave, he asked Mr High, a dispenser at the Acklam Pharmacy, to provide the chair to the claimant. It is not in dispute that the claimant was given a chair /stool on 6 August.

383. Mr Cara had been on duty on 6 August. The documents show that Mr Cara had been in contact with Mr Nath by text message that day. However, Mr Nath believes his instruction was to Mr High, although he was not certain.

384. Although not in his witness statement, the claimant gave evidence that Mr Cara had been the member of staff who had returned the chair to him. On a balance of probabilities then, we accept the oral evidence of the claimant that it was in fact Mr Cara who had returned the chair to him. We believe that is also supported by the fact that Mr Cara had been the one who had been texting Mr Nath about the claimant and who Mr Nath had been giving instructions to about the claimant. However, even if the chair had not been returned by Mr Cara, we find on the balance of probabilities, taking into consideration how the staff were communicating with Mr Nath about the claimant, that he would have been told about the instruction to return a chair to the claimant.

385. This was a small group of people who worked together at the Acklam branch and who were gossiping about the claimant, it is reasonable to infer from that behaviour, that this information would have been shared by whomever had been instructed to do it.

The alleged disclosure: 6 August 2019

Legal obligation

386. The 6 August 2019 alleged disclosure, did not refer to errors in the CD register, only to near misses not being recorded.

387. The Standard Operating Procedures ensure best practice. The purpose of the respondent's SOP's is set out in a standard version of the SOP's at page 16a namely: -

- *To provide quality assurance in the dispensing process.*
- *To ensure that any labelling errors are identified and corrected.*
- *To ensure that any errors in product selection are identified and corrected.*
- *To ensure that the correct quantity has been dispensed.*
- *To ensure the product supplied are not out of date.*
- *To ensure customer confidence and satisfaction with the dispensing service.*
- *To ensure compliance with falsified medicines directive.*

388. Item 17 of the SOP (page 161b) states "*if any of the above steps reveal an error, refer to the SOP dealing with near misses and errors and* ***make a record in the near miss log".*** [Tribunal stress]

Near miss log – legal requirement

389. It is not in dispute between the parties that to have SOP's in place is a legal requirement. Counsel for the claimant sets out in her submissions that it is accepted that the near miss record is not itself, a legal requirement however, it is a legal requirement to have SOP's and those in turn cover near misses.

390. Mr Nath gave evidence that the near miss log is "*more under the heading of good and safe practice rather than a legal requirement".*

391. Mr Sharief's evidence was that near misses are not a breach of the Regulations and are common however, if they occur too often they can indicate a training need or that the Dispenser is not fit to perform that role. We find on a balance of probabilities, that the requirement in the respondent's SOP's is a sensible safety and risk assessment process. To not have in place this process does not amount to a breach of the Regulations we find, however having that risk assessment process in place assists in preventing a breach of the Regulations. The claimant referred in his email to this being a '*safety procedure'*. This description is to be compared to the third alleged disclosure about the CD register, and his observation that as a result of not checking it before making new entries "*As a result, the records are not legal."*

Was the alleged disclosure made to the employer ?

392. The claimant made the alleged protected disclosure on 6 August to PPK UK. He did not make a disclosure on 6 August direct to the respondent.

393. In the email the claimant does not specifically state that he wants Mr Dattani to communicate the disclosure about the drug near misses to the respondent. The only instruction he gives Mr Dattani in terms of what he wants to be disclosed or rather what action he wants the respondent to take, is in respect of the chair; "*Please inform the manager that I need the chair to do my professional work*" (page 195).

394. However, we find on a balance of probabilities, that it is objectively apparent that the reason why the claimant is raising what are serious issues, is so that PPK UK acting on his behalf, will communicate these concerns with the respondent. Although he only specifically asks for action in relation to the chair, the Tribunal consider that what action he is asking for has to reasonably be seen in the context of the full email. That last sentence cannot be carved out of the rest of the email, otherwise there would be no context in terms of why he requires the chair and why he believes the intervention of HR is required.

395. We find on the balance of probabilities that this email of the 6 August was a disclosure intended to be made to the respondent albeit via the agency communicating it on his behalf. That is clearly what the agency understood their role to be because they forwarded the email onto Ms Gleave in its entirety. There is no email communication following this from the claimant expressing his concern that the agency had disclosed the whole of the email and that was not his intention.

Was Mr Nath aware of the alleged protected disclosure of the 6 August ?

396. With respect to whether Mr Nath was aware of the allegation that the staff were not reporting near misses, the evidence of Mr Sharief is that Mr Nath would have been the person who would have dealt with it and his expectation of what "usually" would be done would be that Ms Gleave would contact Mr Nath and that she had "*probably spoken to Sanjay*" as the pharmacist in charge.

397. Mr Nath was away on annual leave from 10 to 17 August and his evidence is that he did not know anything about this complaint until 28 August. His evidence is that he "*could not recall*" Ms Gleave telling him about the near misses on the 6th and explained what he would have done if he had been told, namely that he would have checked the register but would not necessarily have told the staff in detail what had been said.

398. We find it difficult to accept an HR person would not inform a manager of complaints that the claimant had been harassed by his team because he was requiring them to complete near misses. We also take into account that Mr Nath was not certain of

his recollection of that discussion with Ms Gleave; his evidence is that he cannot recall if he was told and that he "*may not have told staff*" in those circumstances.

399. On the balance of probabilities, the Tribunal find that Ms Gleave did explain to Mr Nath not only that the claimant required a chair and that he had said he had a disability, but also told him what the claimant had said about how the staff were treating him and why he was alleging the chair had been removed.

7 August – cancellation of shift

400. On 7 August 2019 PPR UK contacted Ms Gleave cancelling the claimant's shift at short notice at 7.45am (p.278)

" *Efe has just called me he has gone to see the GP regarding his back pain and won't be able to work today I am so sorry"*

401. There is a follow on email exchange on 7 August 2019 between Mr Nath and Ms Gleave during that afternoon (page 200A):

Mr Nath: [12:40]

" Matt is on good form today, working really hard no problems at all.

Do you think we will have problems with Efe next week ?"

Ms Gleave: [5:05]

"I have contacted the agency and they have said that Efe will be fine for next week shifts but if you want me to remove some of those shifts and replace them with Matt just let me know! But can I have a week's notice so that I can give it to the agency please so we don't get charged."

Mr Nath: [15:28]

"Yes please that will be great. I hope never to see or hear about Efe again. Is Matt available next Thursday/Friday/Saturday?"

402. We find taking the comment in the context of the last minute cancellation of the shift of the 7 August, that the enquiry about whether there will be problems with the claimant the following week, is a reference to his back pain and the last minute cancellation of his shift.

403. The following Thursday was 15th August, Friday was the 16 August and Saturday is the 17 August 2019. The claimant's shift on the 15th August was cancelled but not the other shifts (p.269).

404. Mr Nath's evidence is that he had complained to Ms Gleave about the claimant's 'phone use, about him 'tearing' down the notice and not keeping up with the baskets and that had prompted the email message from Ms Gleave on 7 August about cancelling the claimant's shifts. There is no evidence to refute Mr Nath's evidence about what he had relayed to Ms Gleave as the reasons why he wanted to cancel the claimant's shifts and we accept his evidence on the balance of probabilities that those were the reasons that he gave to Ms Gleave.

405. The claimant complains that he was subject to a detriment when his shifts were cancelled on the 30 August 2020 at Acklam.

406. During the cross examination of the claimant, he accepted that a document produced by the respondent which is a computer generated list of the shifts he worked, is correct. He worked 36 shifts in total with the respondent between 30 May 2019 and 18 January 2020, a period of 8 months (page 194a). The shifts over the period we are concerned with are in summary; August 2019: 2,6,8,9,10,12,13,16,17,22 (10 days over that month), September 2019: 2,3,6,21,14 (5 days), October 2019: 15, 16., November 2019;16, 23, December 2019: 13, 21,23,28,30 and January 2020; 3, 6, 7,10,11,18.

407. It is clear that he worked more regularly during the holiday period in August 2019, but otherwise the number of shifts varied from month to month. Mr Nath gave undisputed evidence that August is a particularly busy time when they need locum cover due to holidays.

408. Within the bundle at page 269 is an email from Mr Dhattani to Ms Gleave on 7 August 2019 confirming that the respondent had cancelled the claimant shifts on **15 August** and **27 August 2019** because the resident pharmacist was going to cover those days but it goes on to state "*all other dates remain confirmed*". Those two dates of course, predate the alleged date of the pleaded act of detriment, which is alleged to be the 30 August 2019. The claimant however worked again at the Acklam Pharmacy on 3 September but due to sickness he cancelled his shift at Acklam Pharmacy on 4 September himself. Within the bundle is an exchange of text messages between him and the PPK UK (page 183) where the claimant refers to having issues with his back and asking the agency to get cover for the following day.

409. The claimant alleges that he received a text message from PPR UK stating that the respondent did not want to use him anymore however a copy of that text has not been disclosed.

410. The claimant's evidence (paragraph 30 of his witness statement) is that on 30 August all shifts were cancelled however this cannot be the case because he worked on 3 September and he cancelled his shift on 4 September.

411. There is an exchange of text messages in the bundle (202CA) between Mr Nath and Mr Brian High, Dispenser on 3 September, where Mr High responds to an enquiry from Mr Nath about whether the claimant had been unwell that day, stating that he had not been unwell just "*very lazy*" and Mr Nath states; "*stupid lazy git has just cancelled tomorrow*".

412. Mr High also complains about how long people are waiting for their prescriptions;

    "…He's ridiculous 15 minutes onwards for a waiter."

413. The claimant failed to give evidence regarding which shifts he had been booked on to or otherwise had an expectation of working, and which had been cancelled on 30 August. His evidence (paragraph 30 of the witness statement) is not consistent with the document on page 203.

414. The evidence of Mr Nath as confirmed by the email exchange with Ms Gleave, is that he had communicated his decision not to use the claimant again on 7 August 2019. Despite this document showing the date that instruction was given, there was no application to amend the pleadings with respect to the date of the alleged detriment.

415. It remains unclear to this Tribunal what if any shifts were in the event cancelled. While Mr Nath did not want the claimant to continue working at Acklam, there are

records in the bundle showing that he continued to do so, perhaps because it was not possible to find a replacement (page 194A/194AN/2101) on; 10, 12 and 13, 16 and 17, 22, 30 August 2019 and 3 and 4 September 2019.

416. Under cross examination, it was put to the claimant that according to the invoices in the bundle, over a period of eight months he earned £255 per day for 38 shifts in total he earned £8,100. His average earnings therefore over that period were £1,000 per month. The claimant however alleged in cross examination that from; "*1st August I was working nearly every day"* and that he had the impression the respondent would *" give me lots of shifts".* The claimant alleges that normally a pharmacist would work 20 shifts per month as a locum and that ; " *it was not just Acklam, the respondent had 40 branches, agency told me had a lot of shifts booked and coming"* and " *if this disclosure did not happen and didn't cancel in August – I would expect to work 20 shifts over 40 branches*" He alleged that he was told this by PPR UK however there were no documents and no evidence from his contacts at PPR UK to confirm what they had been told by the respondent. Later in cross examination he gave evidence that; " …*after 6th August they cancelled* ***a few***"…

417. The claimant decided to register directly with Locumbay from early late August/September 2019 rather than via PPR UK. This is supportive of the claimant's case that he had been told by this stage that Acklam were not wanting to continue to offer him shifts. However, his evidence is that on registering direct;

" *I salvaged it myself … I thought it may be agency taking it unprofessionally- decide and went to Locumbay and registered and worked from September*".

418. The claimant then worked at other branches of the respondent on 6 September 2019 and 7 September 2019. His evidence that he 'salvaged' the situation implies that he was no worse off as a result of taking steps to register directly with Locumbay rather than rely on PPR UK.

419. The claimant's does not allege that the cancellation of the shifts by Mr Nath therefore impacted on the number of shifts he worked from September, because he had *'salvaged'* the situation and beyond the 7 and 15th August, he does not identify any further shifts which he was due to work.

420. We find on a balance of probabilities, that as a result of the cancellation of the shifts by Mr Nath, the claimant lost no more than 2 shifts in August 2019.

Why did Mr Nath cancel the shifts?

421. Mr Nath under cross examination conceded that he believes it would "*rankle"* with staff if the claimant had raised near misses with them, and the Tribunal find on the balance of probabilities that it would have *'rankled'* with Mr Nath that the Claimant would have complained about his treatment at the branch and the performance of the team, particularly in circumstances where Mr Nath and the team viewed his performance as so unsatisfactory. We also take into account that we find as a fact that the staff we not recording all their near misses and that Mr Nath would later to the GPhC, seek to amend the record of near misses to present a more favourable picture of reporting of near misses at Acklam (see below). We consider that it is reasonable to infer form this, that Mr Nath was uncomfortable with having the failure to report near misses at Acklam made known.

422. We have also taken into account the proximity in time between the email of the 6 August and the decision to cancel his shifts on 7 August and what inferences we may draw from that. However, there was an intervening event, namely the

cancellation at short notice of the shift on the 7 August. We find that the instruction to try and replace the claimant was prompted by the late cancellation of the shift and the view that Mr Nath had formed of the claimant as being 'lazy'.

423. We find that the relationship was already strained due to the perception Mr Nath had formed about the claimant's work ethic and the cancellation at short notice was in effect the final straw. After explaining that Matt was working hard, we note that Mr Nath did not immediately ask Ms Gleave to cancel the claimant's shifts but raised a concern about whether the claimant was going to be available the following week.

424. We do not find that the complaint that staff were not recording near misses was a significant part of the reason, that was the claimant's performance and the instruction to provide him with a chair, no doubt aggravated Mr Nath (hence the comment he would make later about the chair encouraging his laziness) followed by the late cancellation of the shift. However, given his concession that a complaint about near misses would have 'rankled' his staff and he would later attempt to present a better picture of the near miss record of his staff at Acklam, his failure to comply with the SOP regarding the regularity of checking the CD balance and his unconvincing evidence that the GPhC's report was not accurate about this (see below), we find on a balance of probabilities that a reason operating on Mr Nath's mind, not the main reason but more than a minor or trivial reason, was the complaint raised on the 6 August. .

425. However, given Mr Nath's view of the claimant's work ethic which we find was the issue which concerned Mr Nath the most, and the late cancellation of the shift on the 7 August, that the decision to cancel the claimant's shifts would on a balance of probabilities, have been taken in any event, regardless of the email of the 6 August 2019.

16 August

426. The claimant was (p.194am) present at Acklam again on 10, 12 and 13 August.

427. The claimant's case is that the first alleged detriment took place on 16 August 2019, when he complains that his chair was taken away from him again and he complains that the reason why this was done was because of the email of 6 August 2019 to Ms Bryony Gleave (page 195).

428. The claimant's evidence is that he had not worked with Mr Cara again after 6 August when the chair was returned, until 16 August.

429. The claimant complains that on 16 August, the claimant asked Mr Cara where his chair was because it had been removed, or at least it was not there. The claimant's evidence is that Mr Cara told him that he did not know where the chair was.

430. By this stage, the Tribunal find that the staff at Acklam knew that the claimant was to have a chair and he had used a chair between 6 and 16 August. The Tribunal would expect that given the instruction the team had received to make a chair available to him, some effort would have been made to try and locate a chair or stool unless they had received an instruction not to allow him to have it.

431. Mr Nath denies instructing any of the staff to remove the chair however, on the 28 August 2019 he would add comment on the various complaints raised by the claimant and immediately after an entry in an email from the claimants complaining about the removal of the chair "on a second occasion", Mr Nath adds his comments (p.255); **"*Again* I *hid* *the bloody chair because he's a lazy swine. ..*"**

432. Mr Nath does not allege that he took any action once he became aware that staff had acted in breach of his direct instruction to provide the chair to the claimant on 6 August and he did not seek to explain why he had failed to take any action. This was a serious instruction, to provide an auxiliary aid to a potentially disabled worker and yet staff were alleged to have hidden it and Mr Nath did not allege that he had carried out any investigation.

433. We have also considered Mr Nath's quite unprofessional, hostile and derogatory language about the claimant. The animosity toward the claimant is palpable from his email comments of the 28 August 2019.

434. The claimant would a few days later on 19 August 2019, report what had happened to PPK UK and his account of what he had been told was;

"*On 16 August when I returned to work at this Pharmacy, I discovered the chair I was using to carry out my clinical checking procedure had been completely removed from the Pharmacy.* ***I was told the Manager Sanjay*** *asked them to remove the Chair as he said I am not allowed to sit while working. This is after I clearly told the team I have a spinal disability that affected my back and required me to sit while carrying out safety clinical procedures.* ***When I requested to speak with the Manager I was told he is on holiday but Lucas was able to speak with him on his mobile".***

435. When Mr Nath later saw this email of the 16 August from the claimant when asked for his comments, the Tribunal have taken into account that he did not deny that he had given the instruction to remove the chair on the 16 August. Had Mr Cara not been telling the claimant the truth about Mr Nath telling him to remove the chair on this occasion, the Tribunal would have expected Mr Nath to have explicitly said so. The Tribunal consider it reasonable to infer that Mr Nath did not deny telling Mr Cara to do this because it was true.

436. Mr Nath comments in the 28 August email, which follow after the extract complaining about the removal of the chair on a second occasion, states that he '*hid*' it. We infer from the use of this word hide, that Mr Nath knew the chair should be provided, hence the need to conceal its location.

437. There is no alleged detriment which took place after 6 when the chair was provided, and before 16 August when it was, we find, deliberately removed or 'hidden'.

438. The claimant did not make any further alleged protected disclosures before the 16th to prompt the decision to remove the chair again. Mr Nath was himself on leave from 10 to 17 August 2019 and he does not assert that anything happened during that period that he was aware of at the time but he alleges that on his return it was reported to him that while he was away;

- the claimant was processing baskets from the break room at the back of the pharmacy and thus was had not been in a position to intervene in over the counter medicine sales or advice which Mr Nath alleges to be breach of the Medicines, Ethics and Practice guide
- that he had asked James and Mr Cara to bring the baskets to him,
- that the claimant had not seen to a patient when he needed to because he insisted on continuing with a private call, what he describes as a 'serious issues' for patient care.

- that he has been seen using an e- cigarette indoors (which he states lead to a customer complaining it smelt like marijuana).

439. All the above it is not in dispute, was information fed back to Mr Nath from the team.

440. The claimant denies that he was in breach of the medicines, Ethics and Practice guide (Guide) in that the break room was part of the dispensary and his undisputed evidence is that he could still be called upon to give advice if required. The Tribunal find on a balance of probabilities, that the claimant was not acting in breach if the Guide (although we were not provided with a copy) however, we also find that usually a Pharmacist would be working alongside the Dispensers and physically more available and visible. We find that it would have been unusual for a Pharmacist to choose to work in the break room/back of the dispensary. Given the reporting of this to Mr Nath, we infer from this (and how unusual it was) that this would have annoyed the staff at Acklam. Although the claimant needed to use a chair, he does not allege that he was not able to sit with the Dispensers and in doing so be more accessible to them and to the patients. While again the claimant referred to his right as RP to decide what was required to ensure the safe and effective running of the pharmacy, he did not explain why he needed to place himself away at the back of the dispensary, he showed no appreciation or concern for how this may have come across to the team or the impact on customers, as he could not see them waiting.

441. Mr Nath accepted under cross examination that he could be contacted while he was on annual leave during this period (page 202f).

442. Mr Nath denies however being contacted about the claimant during his absence and that he had thus given the instruction to remove the chair. However, we find that he was. We make that findings from the fact that he would exchange informal messages with the Dispensers about the claimant, they would keep him informed of how the claimant was performing and the matters he alleges he was only aware of when he returned, were not insignificant.

443. The claimant under cross examination, gave evidence that it was Mr Cara who had returned the chair to him on 6 August and thus he would have known that he was required to have a chair and must therefore have been given a further instruction after the 6 August to remove it again. There is no mention in his witness statement that Mr Cara had *returned* the chair to him on 6 August rather than Mr High. support of this new evidence he went on to allege that he had actually had a discussion with Mr Cara on 16 August and asked him why the chair had been taken when he knew the instruction had been to provide him with a chair. This conversation is not included in the claimant's witness statement and he only mentioned it when it was put to him in cross examination why he had not said this to Mr Cara. The claimant stated that in; " *hindsight I remember it".* The Tribunal do not find it credible that the claimant was again able to recall a conversation almost 2 years after the event, which he had not recalled when preparing his witness statement or when raising his complaints at the time. The Tribunal find that this was another example of the claimant embellishing his evidence under cross examination and that such a conversation did not take place.

444. We find on a balance of probabilities however, that Mr Nath gave instructions to *hide* the chair from the claimant on 16 August 2019.

445. In Mr Nath's comment in the email of the 28 August 2019, when responding to the complaints by the claimant, does not refute that staff had been harassing the claimant but explains the reason for their conduct;

"*Because they have a queue of angry, impatient northerners wanting prescriptions and if he is sending pictures of himself on WhatsApp instead of working*"

446. Within that same later email of 28 August Mr Nath attached the video footage of the claimant at his workstation using his mobile telephone stating; "*And the best bit, here is some footage of the **lazy swine in action**". [Tribunal stress].* The strength of feeling is clear from the language and tone of his comments.

447. Having found that on a balance of probabilities Mr Nath had been contacted during his absence about the claimant's conduct, we find on the evidence, that the reason why Mr Nath gave the instruction for the chair to be removed again was because he believed that the claimant was continuing to be, in his perception; "*lazy*" and he was angry about the reports he had received from staff.

448. We find that the reason for removing the chair, which Mr Nath knew was required for the claimant's back condition, was **not** influenced by the alleged protected disclosure. We make that finding based on the reports which we find were made to Mr Nath during his absence about the claimant's behaviour in the branch and we take into account the gap between the alleged protected disclosure on the 6 August and the removal of the chair on the 16 August. The claimant does not allege he was subject to any other detriment after the 6 and before the 16 August. Even if this was part of the reason, by the 16 August, this was not more than minor or trivial by this stage.

Impact on the claimant?

449. It is not in dispute that the claimant then located a chair that was upstairs in the building and had to carry it himself down to his workstation on 16 August. A photograph of the chair has been provided within the bundle. It is clearly quite a substantial chair, much more substantial than a stool.

450. The Tribunal accept the claimant's evidence that he felt that the removal of the chair and having himself to carry a chair from upstairs to his workstation, created a hostile environment, which he felt violated his dignity at work and the Tribunal find it would be reasonable objectively for it to have that effect in circumstances where he had disclosed he had a disability and required the chair and it had been hidden from him.

Second disclosure : 19 August alleged protected disclosure : to the Head Office (3.2 list of issues)

451. The claimant alleges he made a further protected disclosure on 19 August 2019 to the respondent's Head Office. The claimant alleges that on the grounds of this disclosure his shifts were then cancelled on 30 August and on 18 January 2020.

452. This alleged protected disclosure was made on 19 August 2019. It was raised to Mr Dattani (page 202f). This complaint is concerned not with the controlled drugs register but only with the recording of near misses.

453. The disclosure included the following; -

"*I am raising concerns about Acklam Pharmacy where I have worked a few shifts in the last few weeks. You remember I informed you on 6 August about the concerns that the staff members were not recording their drugs dispensing error near misses and after inviting them to do so, I was harassed by a member of staff who took my chair away as I earlier informed you*.

*I discovered after the incidents the dispensers had **failed to record most of the drug errors,** I discovered during my clinical checking procedures. This is a **patient safety issue** [sic] I need you to forward to superintendent office ASAP as it is causing me further harassment.*

*On 16 August when I returned to work at this Pharmacy, **I discovered the chair I was using to carry out my clinical checking procedure had been completely removed from** the Pharmacy. **I was told the Manager Sanjay** asked them to remove the Chair as he said I am not allowed to sit while working. This is after I clearly told the team I have a spinal disability that affected my back and required me to sit while carrying out safety clinical procedures. When I requested to speak with the Manager I was told he is on holiday but Lucas was able to speak with him on his mobile.*

This is a serious safety concern to take away a Pharmacist chair… I feel harassed and belittled…

*It is clear I am being treated badly because I raised concerns regarding the staff **failures to record drug errors in the near miss records**. Otherwise why would a junior treat me with such harassing behaviour ?*

Kindly forward this to the Superintendent office and send me their email contact""

454. The claimant did not receive a reply but there is a follow up email on 21 August 2019 to PPK UK, following a conversation he had with another member of staff, Manni at PPK UK on 20 August 2019 (page 202E);

" I know Manni spoke with me yesterday that the issues I raised has been dealt with by management but I need it in writing that I will not be harassed anymore by the staff members involved."

455. There is an email of the 20 August 2019 from Mr Dattani to Ms Gleave on 20 August at 1:02pm, in which he appears not to have forwarded the claimant's email but asks her [p.271/272];

"Please can you advise that the locum has a chair in the branches he is working in due to having back pains."

456. Ms Gleave replies that same day [p.271] stating;

"We will make the Pharmacies aware of the situation but can [sic] see documentation to support this for the Director please"

457. This reply does not comment on anything but the request for a chair and we consider it is reasonable to infer from this, that it is because Ms Gleave was not aware of anything else the claimant had raised in his email of 19 August to PPK UK.

458. There is no evidence that the claimant was informed of this request or provided the information.

459. The claimant would later forward the 19 August 2019 email on to Ms Gleave of the respondent, on the **23 August 2019** (p.252).

460. We find on a balance of probabilities that the email of the 19 August 2019 was not forwarded to the respondent until the 23 August 2019, all that Mr Dattani had done

was raised the issue about the chair. PPK UK are not alleged to be the claimant's employer for the purposes of the section 47B claim.

461. The claimant within this disclosure alleges that "*most*" of the drug errors he had discovered had not been recorded and it was an issue of patient safety.

462. In terms of whether not recording the near misses was likely to endanger patients, it is the RP's responsibility to check the prescriptions before they are sent out. The RP provides the final accuracy check. If there any errors, it is the RP's role to identify them and prevent them resulting in any harm to the patient.

463. There is an important distinction between reporting that an accuracy has occurred which has led to a patient receiving an incorrect prescription, and a failure to report that an inaccuracy has been identified and rectified. The latter is important to identify possible training needs. The former gives rise to a real risk to the health of a patient.

464. Mr Sharief gave evidence that with respect to dispenser;

"*it they are making mistakes and not recording near misses, I would not be comfortable and ask them to stop dispensing – if 1 on a busy day that's common- if regular I would be concerned . Writing down errors is important but bigger issue should be whether they should be working as a dispenser if making that many mistakes "*

465. Mr Sharief gave evidence that how serious the issue is depends on the type of mistake, an error may involve giving out the wrong dressing which would not be a serious mistake or one which involves the wrong quantity of controlled drugs, which would be.

466. The error the claimant had identified and photographed on the 2 August 2019 involved a controlled drug and would therefore according to Mr Sharief, be a serious error. The claimant's evidence which is supported by the absence of this entry on the report provided by Mr Nath, is that this error was not only made, it was not reported but he did not disclose this in the 6 or 19 August email.

467. Within his email of 19 August, however, the claimant states that he needs these emails to be forwarded to the Superintendent. The claimant does not allege that prior to 19 August (despite alleging that he was aware that near misses were being recorded), he had escalated those concerns before to the Superintendent and in this email states that he needs the safety issues to be forwarded to the Superintendent.

" …*as it is causing me further harassment".*

468. The claimant is not alleging in the email of 19 August that there had been a failure to identify and rectify by him any of the near misses that he believes had not been recorded.

469. Within the email of 19 August, the Claimant does not address the level of risk that he believes this failure of recording gives rise to.

470. We have taken into consideration that given his role and responsibilities as RP, to ensure the pharmacy was being run safely, the claimant could have written down the near misses himself and provided those to Mr Nath or the Superintendent, if he considered the failure to record gave rise to a serious health and safety issue or that it was likely to give rise to an endangerment to health and safety. He had the physical

evidence in the form of the photograph on the 1 August, but never disclosed this to the respondent.

471. The claimant asserts that the failure to record feeds more into issues of training and failure to identify training needs.

472. The Tribunal have regard to what was said by the inspector following the inspection on 6 February 2020 about the importance of recording near misses.

"*The Pharmacist highlighted near miss errors made by the team in dispensing. There was an electronic system recording near misses. And each member of the pharmacy team recorded their own as soon as the error was pointed out by the Pharmacist*." (page 220)

473. What the claimant was disclosing was a failure to do what the inspector would later report was being done which would appear to be a reference to the correct or what an acceptable procedure looks like.

Third alleged protected disclosure: 23 August 2019 (3.3. list of issues)

474. On 22 August Mr Cara sent a text to Mr Nath reporting that the claimant has asked a dispenser, Haana to; *"take photos of him again in the dispensary".* There is a reply from Mr Nath ; " *I've had a chat . Keep me posted if it's still going on"* (p.202B).

475. The claimant did not deny in cross examination that he may have asked the Dispenser to photograph him but could not recall Mr Nath speaking to him that day and telling him to focus on his work. The claimant gave evidence that he could not recall another conversation after the 'second chair incident' and that he would have considered if "*rude"* of Mr Nath had told him to focus on his work for taking one photograph. However, this had not been the first time Mr Nath had been told that the claimant was asking staff to take his photograph (p.202A)

476. We find on a balance of probabilities, that Mr Nath had spoken to the claimant on the 22 August about asking staff to photograph him and to focus on his work and that the claimant had been annoyed that he had been spoken to and annoyed that staff had reported his behaviour.

477. On 23 August the claimant sent an email to Ms Gleave at Head Office. It is headed "*Safety Concerns at Acklam Pharmacy*". In this email the claimant states as follows (p.202D) :

"I tried calling your office this morning but was told you were busy. Can you forward my concerns below to the Superintendent Pharmacist for actions

I am a locum Pharmacist working with yourselves and I have a few concerns about Acklam Pharmacy where I worked a few shifts lately. I think some of the concerns are serious and better raised with the Superintendent Office for patient safety reasons.

Below are some concerns I have raised earlier through my agency but yesterday's shifts I noticed more concerns which I think should be dealt with by the Superintendent Office.

The ***control drugs records*** *at Acklam Pharmacy are currently not being managed properly. Non Pharmacist and new Pharmacy staff members with barely any training*

all get involved in receiving and recording controlled drugs. ***This is a serious safety issue they do not have the skill set needed to ensure correct legal entry of controlled drugs in the register. I noticed for example that three records including; Oxynorm 10 mg/ml solution, Morphine, MST tablets 10mg and 30mg records where [SIC] short and way out of balance. No balance had been done for some weeks.*** *I tried to investigate why these records were so short of DCs but of course had to focus on my patients coming through the door first . I think the SOP should be specific on what level of skills staff should be handling and recording controlled drugs.*

They do not understand CD balance have to be checked before making new entries*, so they keep writing in new records without counting the actual controlled drugs in the cabinet.* ***As a result, the records are not legal****. I have left messages for the local Pharmacy manager to do balance check and investigate the discrepancies. But of most concern is that the controlled drug entries should not be carried out by these untrained staff members".*

[Tribunal stress]

478. The claimant complains that he made the disclosure on 23 August to the respondent's Head Office and that (w/s para 22) he was then harassed on 23 August, following the concerns raised. He does not in his witness statement identify who harassed him or in what way. In cross examination he then accepted that he did not work on 23 August therefore he must have been referring to conduct toward him on 22 August and only then did he allege that he must have been referring to the call from Mr Nath on 22 August when he called him about the photographs, a conversation the claimant had denied at first during cross examination had taken place; "

"*..details I cannot remember – he could have called and told me off and I called and complained that he was harassing me"*

479. An error identified on 22 August 2019 is an error in the Oxynorm CD registry (p.167A) where the claimant had written in the registry that a balance check was required (without initialling this or identifying what the error was) however we find that the error had been rectified on 22 August 2019 by Mr Cara. The claimant gave evidence that this would not have been the only error he identified; however he did not provide details of what the other errors were.

480. The alleged disclosure was made direct to the respondent at its Head Office. However, Mr Nath denies being aware of this third disclosure until 28 August 2019. There is no direct evidence that it was disclosed to him. That it was not disclosed to him until 28 August 2019 is supported by the email attaching it and sending it to him on that date, by Ms Hickey of HR. Her wording implies however that Mr Nath may have not seen the email before but the brevity of the message infers that there had been some discussion about this email before it was sent (p.202D); "*These are the complaints he keeps sending over. Let me know what you think"*.

481. In answer to a question from the Tribunal, Mr Nath confirmed that he was aware that the claimant had raised errors in the CD registers before 28 August but not the specifics, and he accepts he had not done a balance check for about 5 weeks. He also accepted that Ms Hickey may have spoken to him shortly before the email of the 28 August was sent across to him.

482. Mr Sharief gave evidence that Ms Gleave spoke to him about the email of the 23 August (p.206) but he could not recall if the email was actually forwarded on to him

or not and that it was 'quite likely' that these matters were delegated to Mr Nath to deal with hence the email from Lisa Hickey, HR manager to Mr Nath sending him the emails and asking him to let her know what he thought. He accepted that it was possible that someone had been in touch with Mr Nath before the email was sent to him on 28 August 2019 but he did not know when.

483. On a balance of probabilities, we find that the email of the 23 August was not sent to Mr Nath until the 28 August but that it had been mentioned to him prior to this, that the claimant was complaining about errors on the CD register, possibly during a conversation on the morning of the 28 August, hence the email being sent later that day. The email from Ms Gleave forwarding on the email to either Ms Hickey and/or Mr Sharief (p.202D) was sent at 3:36pm on a Friday afternoon, hence it's likely that this was picked up and discussed on with Mr Nath the following working week.

484. The Misuse of Drugs Regulations 2001 provides as follows; -

Record-keeping requirements in respect of drugs in Schedules 1 and 2

19.*(1) Subject to paragraph (3) and regulation 21, every person authorised by or under regulation 5 or 8* to *supply any drug specified in Schedule 1 or 2 shall comply with the following requirements, that is to say—*

(a) he shall, in accordance with the provisions of this regulation and of regulation 20, keep a register and shall enter therein in chronological sequence in the form specified in Part I or Part II of Schedule 6, as the case may require, ***particulars of every quantity*** *of a drug specified in Schedule 1 or* ***2 <u>obtained by him</u> and of every quantity of such a drug <u>supplied (whether by way of administration or otherwise) by him</u>*** *whether to persons within or outside Great Britain;*

……..

Requirements ***as to registers***

20. *Any person required to keep a register under regulation 19 shall comply with the following* requirements*, that is to say—*

(a) the class of drugs to which the entries on any page of any such register relate shall be specified at the head of that page;

(b) ***every entry required to be made under regulation 19 in such a register shall be made on the day*** *on which the drug is obtained or, as the case may be, on which the transaction in respect of the supply of the drug by the person required to make the entry takes place or, if that is not reasonably practicable, on the day next following that day;*

(c) no cancellation, obliteration or alteration of any such entry shall be made, ***and a correction of such an entry shall be made only by way of marginal note or footnote which shall specify the date on which the correction is made;***

……/

[Tribunal stress]

485. Regulation 19 (a) requires that the particulars of every quantity of controlled drugs obtained and supplied shall be entered. The Regulations do not (at least this was not alleged by the claimant) regulate how often the CD register must be checked.

Balance checks – CD register

486. It was put to the claimant in cross examination that it was not a legal requirement for stock to be checked every time an entry is made to which he stated;

" *legal requirement must enter it in and out – it is* ***advisable*** *to check the quantity first"*

487. However the claimant went on to allege that not following the SOPs was breaching the Regulations indirectly and he disputed that the SOPs were only advisory; " *only the RP or Superintendent can change the SOP - regulations provide you must operate under procedures – if you decide the SOP you must adhere to the*m " but;

" *my complaint- my primary complaint is not entering drugs in the record …what are they doing wrong? Not following SOP which indirectly implements the law. My case is you have missed the drug entries not being made – the breach is not entering it in the records. "*

488. The Tribunal note that the SOP's refer in terms of any legal requirement, (page 161a) to the need to ensure compliance with the falsified medicines directive however, we were not taken to that directive and the claimant did not mention it nor was it mentioned in submissions.

489. Mr Nath gave evidence under cross examination that if the balance in the CD register is not correct; *"technically it is against the Misuse of Drugs Act but happens a lot in practice."* Mr Nath was taken to a number of CD registers for Acklam and confirmed that they showed more than a few errors, " *not a small number r but not vastly high for a pharmacy either – it was a particularly busy time of the year".* When Mr Nath was asked whether the it would be reasonable for the claimant to believe that the Regulation had been breached on these circumstances, he gave evidence that ; "*yes of course Regulations breached- obviously Regulations have been breached" .* Mr Nath accepted that it would be reasonable to think there are safety implications but not to; "*leap to assume if CD not correct someone may come to harm*…". His evidence was that errors happen all the time, it is only if they are investigated and it is still not possible to make the CD balance and it appears drugs are missing would it then be a problem and need escalating.

490. This view that an error in the CD registry does not give rise to a real risk of harm until there has been an investigation, was common between the respondent's witnesses who gave evidence. Their evidence was consistent on this point, that often the drugs are in the pharmacy and it is a simple mathematical error when calculating the balance.

491. Ms Akbar who previously worked for the respondent as a Pharmacy Manager, gave evidence that an incorrect balance on the CD register would not suggest noncompliance with the Regulations ; " *No, not before an investigation".* And that she did not consider that it would be reasonable to assume that this gave rise to a public safety concern; "*No , not immediately".*

492. Mr Nath also gave evidence that it was " *quite a leap to assume because CD register incorrect them someone at risk of harm"* but that it is problem where it is investigated and cannot be balanced.

493. Mr Sharief however, is the Clinical Lead with overall responsibility for the CD registers and his evidence under cross examination is that if the entries in the CD register are missed or inaccurate that *would* be a breach of the Regulations. The reason, however, could be that drugs are missing or it could be due to a simple miscounting in the register or of stock. He also gave evidence that;

"*I probably get 1 of these per month – I don't call the police or panic – It is investigated and deal with it* ".

494. Mr Sharief's evidence was that there may be an occasion when a patient has been given a couple of extra tables but this is *"rare"* and this had happened twice in his career. He has been qualified for 14 years.

495. Mr Sharief gave evidence that the SOPs were a legal requirement, to prevent things going ' wrong'.

496. The claimant mentioned on a number of occasions during cross examination that there was risk of controlled drugs getting on to the streets and while theoretically we find that is a risk, we find on the evidence that it would be overstating the position to imply that this was probable every time there was an error in the register or incorrect balance in the register. If it was then this would not be consistent with the claimant leaving a note for the next RP to investigate rather than immediately escalating this to the Local Manager or Superintendent.

Balance checks

497. The Regulations do not legislate for how often a pharmacy should do a balance check of its CD register.

498. The respondent in its SOP 9(161AO) provides that;

"*Physical stock levels should be reconciled with the running balance on a* ***weekly basis*** *, This should be done more frequently if :*

- *High volumes of CDs are dispensed from the pharmacy*
- *Multiple pharmacist have worked in the pharmacy*
- *Discrepancies have been previous identified.*

499. Mr Sharief under cross examination gave evidence that the CD registers are "*checked weekly or even daily basis* " and that although not a legal requirement , it is "*good practice*" and went on to state that there may be occasions when a locum is in , it may not get checked in 2 weeks. ; *"2 weeks is not unusual, it happens, some weeks may not be practicable due to volume of work ".* He mentioned being RP during the Covid pandemic and not being able to check a balance for 4 weeks . His evidence was that the CD registers need to contain certain mandatory information but that the column for the balance is good practice but if there was not balance column or the balance column is wrong but the entries correct, it would still meet the legal test.

500. Mr Nath in his evidence in check (para 22) however, stated that it was the case that before the claimant had started at Acklam a balance check had not been done for a month, since June 2019 and he was aware of it and;

"*They should be checked each month*"

501. Mr Nath's understanding of how often the balance checks should be done as a matter of good practice, is not consistent with Mr Sharief's understanding of good practice or indeed the SOP's ,albeit Mr Sharief on being taken to Mr Nath's evidence stated it was at his discretion not to do them weekly if the practice is busy or short staffed.

502. The inspectors comments in terms of its report in February 2020 (page 220);

"***The Pharmacy keeps the records it must have by law. But a regular CD balance check is not always done****. So, if there is a discrepancy this cannot be dealt with in a timely manner"; and*

"The manager acknowledged that previously CD balances were only checked a few times a year. Now he intends to do a fill balance check of all the pharmacy's CDs monthly.""".(page 220/221)

503. The regulator despite the respondent only doing balance checks a few times a year, found the respondent to have met the Governance requirements.

504. Mr Nath denied the inspectors report was accurate but he had not raised this inaccuracy with her after receiving the report, despite having written to her afterwards about the claimant. Although a fairly brief report, the comment appears in one paragraph headed "*summary findings*" under Governance which Mr Nath unconvincingly claims not to have noticed . The Tribunal do not accept that it is credible that Mr Nath had not noticed this comment. We also find on a balance of probabilities, that he saw this comment and did not challenge it because it was correct.

505. When taken to this in the report, Mr Sharif expressed his confidence in Mr Nath . However, he conceded when it was put to him, that SOPs are in place to assist with the safety of patients and if they are not followed, this raises safety concerns.

506. Its common between parties that the reason for the introduction of the Regulations was to protect patients and also the public.

507. The Tribunal find that not checking the CD balance is not as a fact a breach of the Regulations, We were not taken to anything in the Regulations which stated this. Further, the Regulator held the respondent to be compliant even though it was not checking its balance as regularly as its SOPs require. The Regulator recommended a monthly check whereas the SOP's are more stringent, prescribing a weekly check.

Writing in the CD register

508. The claimant also refers to the reaction he experienced to writing in the CD register and that Mr Nath; " *he was so angry I had written in the register – has to be in register according to SOP. Angers them to show not doing the work correctly – not appropriate to put on a sticky note."*

509. However, the SOP provides as follows (p.161AL);

"corrections must be made using a dated marginal note or footnote"

510. The above reflects regulation 20 of the Regulations;

c)no cancellation, obliteration or alteration of any such entry shall be made, and a correction of such an entry shall be made only by way of ***marginal note or footnote*** *which shall specify the date on which the correction is made.*

511. Mr. Nath gave evidence that he had never known another locum write in the actual CD register, normally a note is left for someone to check. The claimant was not making entries, he was leaving notes but his evidence was that; *" if he wanted to do it – it was within procedures – its fine but unusual"*

512. That Mr Nath was so accepting of the claimant writing in the CD register is not consistent we find with his comments in the email of the 28 August 2019 (p.253)

"*Efe has scrawled a note in the CD register where he feels the balance in incorrect . Note: he hasn't stick a note to them or left a letter .He's actually WRITTEN IN THE REGISTER. He also hasn't dated or initialled his scrawled note"* (p.253)

513. The Tribunal accept that what the claimant was doing was unusual. The Regulations provide that even here a correction needs to be made, it is to be made only as a marginal note or footnote. What the claimant was doing was not making an alteration, he was merely identifying an apparent error which required investigation before it could be determined whether there needed to be a correction and yet rather than make a note in the margin or as a footnote, or leave a separate note, he was writing across the register, taking up a while row in the book. This is not we find what the SOP or Regulations require and we find from the evidence of the claimant and the respondent's witnesses, that this was something which they were unhappy about, not that he was asking for the apparent error to be checked but the way in which he was recording it. If that type of entry was made every time there was a possible error, the Tribunal can see from its own observations, that the register, which is a legal document, would become untidy and 'cluttered'. Despite apparently being aware that Mr. Nath did not like the way he recorded the errors, the claimant nonetheless continued to write the same way in the CD registers when working at other branches. We find that making a tidier footnote or a marginal note would have been compliant with the SOP and with the Regulations.

514. Mr Sharief when questioned under cross examination about what Mr Nath had said about the claimant writing in the register in the email of the 28 August, became very animated and visibly annoyed;

"*I can't give his emotions [*referring to how Mr Nath would have felt*] , but if pharmacy scrawls a note in CD register – make me feel a lot of emotions – he has made a mockery of the register he is there to protect – anger is not an unreasonable emotion – he is a professional – expect professionalism"*

515. Mr Sharief gave evidence that the claimant should have annotated the register with an Asterix ; " *He made a mess of the register in an illegal way"* and that this was the sort of thing a qualified Pharmacist should know.

516. We find based on the what the Regulations require, the wording of the SOP, and the evidence of the respondent's witnesses and what we have observed from how neatly the registers are kept, that it would have irritated and upset the Pharmacy Managers to have the claimant write across the CD registers in the manner which he did.

Public interest

517. The claimant deals in his evidence in chief with why he believed the disclosures about controlled drugs were in the public interest;

"Seeing that Pharmacists have illegally sold controlled drugs to the public in the past two years resulting in prison sentences. I decided it was in the interests of public safety to inform management and the regulators about the missing controlled drugs and failure to records drugs legally" (w/s para 33)

"*Recently a Pharmacist was caught selling controlled drugs illegally in the street and this went on unnoticed for years. So it is important for professional pharmacists to raise concerns when controlled drugs records are incorrect like I did. The regulators expect us to protect the public from such safety issues so I was only raising concerns it in [sic] good faith*" (w/s para 21)

30 August 2019

518. The claimant complains that he was subject to a detriment on 30 August 2019 when his shifts at Acklam Pharmacy were cancelled. He alleges that this was done on the grounds that he had made the disclosures of the emails of 6 August, 19 August and 23 August 2019. We have addressed this above in our findings.

Fourth alleged protected disclosure 16 September 2019 : (3.4 list of issues)

519. The claimant complains that he made a protected disclosure to the GPhC on 16 September. In his evidence in chief he states that;

" *I raised concerns regarding controlled drugs failure* *to the regulatory body of GPhC as required from me by law, This was regarding failure at Acklam Pharmacy …I did not this via on online form so do not have a copy of this compliant". (w/s para 31)*

520. The claimant in cross examination did not set out what he had written in his alleged protected disclosure to the GPhC other than; "*went to regulator because seen concerns and believed they had harassed me , because they were trying to hide it – kicked me out of Acklam so could not follow up criminal things happening – regulator asked me to raise concerns"*

521. There is no copy of the communication/disclosure that the claimant made to the GPhC and the claimant failed within his evidence in chief to set out in any detail what he had stated in the online form to the regulators.

522. Mr Nath does not dispute that the regulator's inspector, who he referred to knowing well, when she came to inspect Acklam in February 2020 had made it known to him that the inspection was in response to a complaint raised by the claimant, however as we set out below in our findings, we find that the respondent was not given advance notice of this inspection and was not aware of the claimant's alleged disclosures to the GPhC until the February inspection (which post-dates all of the pleaded detriments). .

523. It is not in dispute that the GPhC is a prescribed person for the purposes of section 43F ERA.

524. The Tribunal finds that the claimant had raised concerns to GPhC regarding controlled drugs failures however, in the absence of any further evidence, the Tribunal simply does not know what 'failure' the claimant identified, whether this was a general concern that they were not complying with the Regulations, a failure to carry out balance checks, issue about training or whether he had identified specific errors in the CD registers and if so which.

The Respondent's Knowledge of the disclosure

525. The inspection took place on 6 February 2020 (page 218). The evidence of Mr Nath and Mr Sharief is that they received no prior notice of it. The claimant produced no evidence to support his assertion that they were given advance notice of the inspection.

526. The respondent's witness evidence is that the GPhC do not give notice of inspections and they referred to this being stated on the GPhC website. Neither paper produced a screenshot of the website.

527. The claimant does not allege that he made the respondent aware directly that he had made a disclosure to GPhC.

528. The claimant could have confirmed with GPhC prior to these proceedings, what if any notice had been given to the respondent or produced evidence of their practice more generally however, he has not done so.

529. On a balance of probabilities, the Tribunal find that no notice was given of the inspection and the respondent was not aware that the inspection was a result of a disclosure by the respondent until the Inspectors attended the premises on 6 February 2019.

Fifth and Eighth alleged disclosures: 16 November 2019 Disclosure and 11 January 2020 (3.5 and 3.8 of the list of issues)

530. The claimant alleges that he made protected disclosures while working at the Trentham Pharmacy when he worked there as Locum RP.

531. We heard evidence from Ms Salma Akbar who had been employed by the respondent as the Pharmacy Manager, at Trentham. She left the respondent's employment in December 2020. Ms Akbar is a Registered Pharmacy Technician.

532. The evidence of Ms Akbar is that she was a Pharmacy Manager as at November 2019 and that the claimant did not report any shortage of any controlled drugs to her and that while she was the Pharmacy Manager for the period the Claimant worked there the CD registers where always correct, they were balanced on a weekly basis, by a Technician or Pharmacist, and she would only normally investigate any discrepancies. a weekly basis by a Technician or a Pharmacist.

11 January 2020.

533. On 13 September 2019 (not relied upon as a protected disclosure), the claimant noted in the Morphine CD register at Trentham that despite an entry for 220, there was; "***only 164 in stock. Please do balance stock check and investigate****."*

534. It is does not appear to be in dispute that Ms Akbar did not work with the claimant until his shift on the 21 September 2019.

535. Ms Akbar gave evidence that after his first shift; she received reports from two dispensers that the claimant was; lazy, arrived late for work and did not perform the duties expected of him. Ms Akbar did not accept in cross examination that staff at Trentham would have felt '*rankled'* to have the issues with the CD register raised with them and gave evidence that the dispensers would not mention a discrepancy in the CD register to her because that sort of issue would normally be for the Pharmacist to deal with.

536. It is not in dispute that the first time Ms Akbar worked with the claimant was on the 21 September 2019 when the claimant was late arriving for work. The claimant gave evidence that he had called her when he was running later because of traffic. Ms Akbar did not deny this although she could not recall whether he had done so. We find on balance he had called her to let her know he would be late.

537. The claimant denies that Ms Akbar spoke with him as she alleges about his punctuality however on a balance of probabilities we prefer the evidence of Ms Akbar on this issue. The claimant gave evidence that it would not be for her to speak to him about being late because RPs have a two hour window under the Regulations to be away from the pharmacy where they are working however, the claimant had gone to the effort of taking a photograph of the traffic to evidence reason why he was late " *if anyone asks*" and to show the "*genuine reason*". That he disputed that a Pharmacy Manager would speak to an RP about his lateness was at odds with the efforts he went to in order to evidence the reason for his lateness.

538. Ms Akbar gave evidence that staff had informed her that the claimant had been late on regular occasions' albeit Ms Akbar appeared willing to accept that he may have only been late twice". However, later in cross examination she stated that she believed he was late on 4 or 5 shifts.

539. On the 21 September 2019 (p.188) the claimant made an entry in the Morphine CD register; "*Stock incorrect – zero CDs in the cabinet manager to investigate 21/9/19"*

540. Ms Akbar's undisputed evidence was that she did not work on Monday's, if he left a note on Saturday 21 September, it would have been picked up by the Pharmacist the following Monday and was not something which she would have dealt with.

541. The claimant does not rely upon either of those entries as protected disclosures.

542. Ms Akbar gave evidence that the claimant had not been aware that Trentham has 3 CD cabinets. She was not aware that he had left a note in the CD register and he did not check with her about the number of CD cabinets.

543. Ms Akbar gave evidence that there were occasions when the claimant refused to check the prescriptions and she recalled specifically one shift when she worked with him when he refused to check baskets because he considered these were the responsibility of the previous Pharmacist who had been on duty.

544. Ms Akbar did not accept that the claimant informed her that he had a back disability but accepted that he sat for 90 % of the time when working which was unusual but she did not ask why and there was a stool available in the dispensary for him to use.

. **16 November 2019 – disclosure**

545. The claimant's evidence in relation to this disclosure is set out in his second witness statement

546. His case is that while working at the Trentham Pharmacy on 16 November he noticed there were only 340 capsules of Zomorph (10ml capsules), which is a controlled drug, instead of 446 which was the last entry for this drug in the CD register signed by the regular Pharmacist. Within the bundle is a copy of the page from the register (p. 190) which shows a handwritten note by the claimant alongside the entry for the 16 November 2019;

"***Wrong CD Levels.*** *Only 340 seen in stock please RP to* ***verify and investigate***".

[*Tribunal stress*]

547. The claimant's evidence is that; "*I informed the lady dispenser in charge of this Pharmacy of this anomaly and I left a note in the register herein to the pharmacy manager to investigate this concern* (page 190*) this was just only one of the few poor legal records that I had observed*" (w/s para 3).

548. The claimant claims that he was; "*on alert as a Pharmacist Manager had illegally sold controlled drugs worth nearly a million pounds on the street to the public resulting in regulators investigating the matter. So, it was in the interest of the British public that I raised concerns whenever I saw such shortage of controlled drugs in the legal register*….".

549. The claimant alleges that he was later told by the Pharmacy Dispenser who does not name in his statement; "*that the Manager was angry that I had raised these concerns and that I should not have written down things in his pharmacy and should have just told him to fix it instead. I told her it was normal practice for Pharmacists to leave notes if there were concerns during their shifts so they could be investigated and rectified" (w/s para 6)*

550. Ms Akbar denied that the claimant had raised this issue with the CD register with her although she could not recall whether she worked with him on that shift or not.

551. His pleaded alleged disclosure as confirmed in the list of issues, is an alleged disclosure on 16 November to the Local Manager. Ms Akbar was the local manager. Under cross examination the claimant alleged that he raised this issue with Ms Akbar who was dispensing and that she was the one who told him that the "*Manager was angry"* . He then appears to give evidence that she was referring to herself being angry;

" *yes – told me why did I put it in the register – why not put a friendly* ***note for me****"*

552. Later under cross examination he then alleged that Ms Akbar had passed the message on to the regular Pharmacist who had said to use a sticky note and Ms Akbar had also said to him he could not leave a note in the register.

553. We find on the balance of probabilities, based on his oral evidence and the entry he made in the CD register (page 167) that he had mentioned this issue to a Dispenser, not to Ms Akbar. Ms Akbar denies as the Local Manager that it was reported to her and the claimant has no evidence that it was her. He identified the 'angry' manager as a male; " *he was angry*". However in cross examination he alleged that it was the dispenser who was angry;

"*from first to last day problems with CD register – when I noticed control drugs not correct, I will speak to dispenser- this type of enquiry angers dispensers…""*

554. The claimant had not only not identified Ms Akbar as the person he had spoken to in his statement, Ms Akbar was not only someone who dispensed the medicines, she was the Pharmacy Manager and he would have known who she was. His evidence is that he called her to let her know when he was late for work. He would not have called and reported into a dispenser.

555. We find on a balance of probabilities, that the claimant wrote in the CD register and mentioned it to a dispenser but that this was not Ms Akbar and we accept her evidence, that she was not aware of this until these Tribunal proceedings and that

it is not something she would have been made aware of by the next Pharmacist on duty.

556. In cross examination when it was put to the claimant that as the RP on shift who had identified the error, he should have been the one to investigate, his response was;

"*I observed the offence and I entered the observation in the register – I had done my job of putting it into the register"*

557. The claimant referred to having tried to find the drugs but "*but it is the person who committed the offence who should find it" .* Given how on the one hand he speaks of the serious risk of drugs ending up on the street, he appeared to the Tribunal indifferent to the risk during this line of questioning.

CD register – notes

558. Ms Akbar gave evidence that during the 23 years she had worked for the respondent she had never seen anyone leave a note about an error in the register, in the register itself. Her evidence was that a separate note would be left for the next Pharmacist to check. The CD register itself is an official document and it should not be used as a '*notebook'.*

11 January 2020

559. The claimant's evidence is that on 11 January he noticed a further issue with the CD register while working at Trentham and raised this ***verbally*** with the Local Manager. There is a page from a CD register for Morphine (page 167) with an entry dated the 11 January 2020 where it is not disputed that the claimant has written;

"*zero stock seen in the cabinet* ***Responsible manager to investigate please****".*

[Tribunal stress]

560. The previous entry in the register on the 10 January 2020, had recorded that there was 120mg of Morphine.

561. There is a further entry at the foot of the page which it is not disputed was made by the claimant's, where he has written ;

300 balance correct - "Ignore line as staff said this is in another cabinet sorted 11/1/20"

562. Ms Akbar denied in her evidence in chief that the claimant had reported either the issue on the 16 November or 11 January to her personally and that she had only found out about them after the claimant had issued these Tribunal proceedings. However, with respect to the 11 January entry,, she was less than definitive under cross examination when she gave evidence that she '*could not recall'* the claimant raising this with her verbally.

563. Ms Akbar accepted that if there was in fact 'zero stock' of Morphine in the Pharmacy, then the CD register would have been incorrect, however she did not accept that this would suggest that the Regulations had been breached or that this gave rise to a public concern. It was also her opinion, that this view could not be taken until an investigation had been carried out.

564. The additional comment underneath the entry confirms that the claimant had gone on to locate the drugs, within another cabinet, hence the CD register was in fact correct. Her evidence was that she would expect the pharmacist to investigate before making assumptions;

"when I do discrepancy I do not assume immediately it is a risk to patient safety ... depends on discrepancy – normally get an indication where an error lies – if a plus it suggests error on prescription, if minus suggests invoice not entered – I would not think automatically it is missing and a risk to patient safety"

565. Ms Akbar appeared to accept under cross examination that she could have been the person who was on shift with him that day on 11 January and had told him about the existence of another drugs cabinet where he had located the Morphine stock. Ms Akbar accepted that this was possibly the first time the claimant had been made aware that there was another drugs cabinet in that Pharmacy. However, the claimant does not allege that he asked staff if there was another cabinet before making this entry.

566. We find on a balance of probabilities, that the claimant had not checked with the staff before making this entry in the drugs register. He was informed about the other drugs cabinet on the same day .

567. As RP we find that it would have been reasonable for the claimant to have made at least some provisional enquiries with staff about the storage facilities for drugs. He was an experienced RP and Locum and he does not allege that it is unusual to have more than one drugs cabinet. He does not allege that he was given false information about the absence of any other cabinets.

568. We find on a balance of probabilities, that the claimant had raised this issue with the CD register directly with Ms Akbar and that she had shown him the other cabinet and that he would on a balance of probabilities, have mentioned that there was zero stock in the cabinet.

569. The claimant worked 6 shifts at Trentham; 14 and 21 September 2019, 16 and 23 November 2019 and 11 and 18 January 2020.During that period he raised 4 concerns with the register. Ms Akbar's evidence was that on investigation on each occasion when he indicated balances were incorrect, these were mistakes in counting and documenting which he had made and the stock was present. Ms Akbar was not challenged on that evidence and therefore we find that the stock was on each occasion located however, with regards to the incorrect entry on 11 January she did not seek to criticise the claimant, her evidence was that;

"*there was in fact 300 in stock – the balance was correct so he made the mistake initially* ***which can easily happen****".*

Other issues at Trentham

570. Ms Akbar alleges that on one shift which was either in September or November 2019, she asked the Claimant to check some prescriptions which had been assembled from the previous day and that he initially refused to check them and said that it was the job of the Pharmacist who had worked the previous shift. She described being frustrated by his response and that she instructed him to check the prescriptions which he subsequently did. The claimant denies this and accuses Ms Akbar of lying.

571. Mr Sharief gave evidence that he received a complaint on 28 October 2019 (p.204A) from a Ms Brindly, a dispenser at another branch where the claimant worked. The claimant does not raise any complaints in his evidence in chief about Ms Brindly . She reports to Ms Gleave;

"I just wanted to give you some feedback on the locum from Friday (Eke Ekakitie) and ask that if at all possible he isn't booked for a shift here .He was late by around 20 to 30 minutes and when I told him that we only do 3000ish items a month he seems to decide that this meant he didn't need to do any work. It was constant work to get him to check and when he did check it was complete chaos with items from different prescriptions baskets falling into each other because he was so messy, The driver ended up working an hour over because we were so late sending prescriptions out with him despite the majority of dispensing being completed by 11am.."

572. The same issues of punctuality and work ethic are raised at this other branch. When this email was put to the claimant in cross examination, he accused Ms Brindly of 'l*ying'*, that her allegation made no sense because he could finish 3000 items in a few hours and that;

"she may hate me, hate me for my colour or something."

573. The claimant did attempt to explain why he would assert that Ms Brindly may have made this complaint because of his colour. He gave no explanation, let alone any evidence, for making such a serious allegation. It was not convincing. The Tribunal is satisfied that there is no substance to his allegation against Ms Brindly and that it was said as an ill thought out attempt to deflect the criticisms about his behaviour. The claimant did not seek to allege that he had suffered any treatment while working with Ms Brindly which would justify this accusation against her.

574. The complaint by Ms Brindly, adds we find to the pattern of complaints about the claimant's work ethic.

575. It is common between the parties that an incident occurred in January 2020 when the keys to the CD safe were put in a bag with a patient's prescription. Ms Akbar accepted in cross examination, that this was likely to have occurred on 11 or 18 January 2020.

576. There is a dispute between Ms Akbar and the claimant over the details of what happened. Ms Akbar alleges that she had handed the CD keys to him in a prescription bag marked CD keys, telling him " *here are the CD keys"*. The bag was sealed and signed for. There are 3 drugs cabinets with 2 locks , therefore there were 6 keys on a keyring. The bag is also marked with a triangle with letters CD inside. She denies that she put the bag into a basket with the patient's prescription but handed it to him. It is not alleged by the claimant that on other shifts the CD keys were given to him in any other manner. We find on a balance of probabilities therefore that this was the normal process and he would have had previous experience of this while working at the pharmacy.

577. Later when checking the prescription for a patient the claimant accepts that he mistakenly put the bag with the keys in the patient's prescription bag. It was circa 30 to 40 minutes later when Ms Akbar asserts she asked the claimant for the keys and they worked out what must have happened. The patient had already noticed the keys and was coming back into the Pharmacy with them. It is not disputed that there were no spare keys to access the drugs cabinet. We do not consider the detail about who contacted the patient to be relevant to the issues.

578. Ms Akbar reported this incident to head office, she believes she spoke with Lisa Hickey.

579. Ms Akbar's evidence is this was a serious matter and she wanted to report it to Lisa Hickey, Human Resources Manager and that had he been a permanent employee would have resulted in disciplinary proceedings and had the keys not been recovered at all then the GPhC could potentially have become involved. Ms Akbar denies while speaking to Ms Hickey that she raised with her that the claimant was raising concerns about the CD register because; " *I was not aware he had raised any concerns".* There is no HR record of what was discussed and we heard no evidence from Ms Hickey.

580. There is no evidence that HR spoke to the claimant and we have not seen any records made by HR, which the Tribunal considers unusual given the alleged seriousness of the incident.

581. Ms Akbar could not recall when she made the call but believed it may have been on a Tuesday shift.

582. Ms Akbar's evidence is that she could have asked Head Office not to book the claimant again, but she did not and in any event ultimately it would be up to HO whether they acceded to her request. Ms Akbar does not allege however that she asked for his shifts to be cancelled and in response to a question from the Tribunal explained that this was because;

"*It was a genuine mistake and it was rectified and no harm was done. We spoke about it and he accepted he had made a mistake – mistakes happen."*

583. If the incident happened on the 11 January, then the claimant was back working at Trentham on the 18 January 2020, which would indicate that Ms Akbar did not consider the mistake so serious that she did not want him to continue working at Trentham.

Knowledge of Mr Sharief

584. Mr Sharief's evidence is consistent with Ms Akbar's in that he gave evidence that he was told by Ms Hickey in January 2020 that Ms Akbar had called head office to report this incident. His evidence is that he was told that Ms Akbar had resolved this issue internally by speaking with the claimant, however he remained unhappy. His evidence in chief is that the incident compromised the ability of the Trentham Pharmacy to hold the controlled drugs safely and could have delayed giving patients *'life threatening medication'*. His evidence was to the effect that taking care of controlled drugs cabinet keys was essential to limit the risk of theft of controlled drugs.

Sixth alleged disclosures: 28 December 2019 Disclosure (3.6 of the list of issues)

585. The claimant alleges that he made a further disclosure on 28 December to the local Manager at Hawtonville Pharmacy, namely a shortage of a controlled drug and that he did this verbally and via a note left in the CD register .There is a copy of the relevant page of CD register in the bundle (p.191). This record states;

"*Stock incorrect as only 48 sighted in cabinet. RP* ***manager to please investigate".***

[Tribunal stress]

586. The claimant's evidence is that he left the concern with the local Manager and that the Pharmacist replied the next week with a picture of a small bottle of controlled drug which the claimant's alleges he ; *"had unusually removed from the original packet and blisters 169- 194 . It was the balance I could not find whilst doing the drug balance checks in my shift. I could not find it in the original container nor in the cabinet. Other staff members could not find it as well hence I raised the concern in good faith." (w/s para 35)*

587. It is not in dispute that the correct drugs were in the Pharmacy and thus the CD register was correct. However, it also appears not to be in dispute that what Mr Rahim had done was to remove tablets from their original packet and put them in a bottle and put it in the CD cabinet. The claimant's evidence is that he asked the team how many they could see and they could not find them either.

588. The claimant on this occasion, sets out in his evidence what steps he had taken to check for the drugs, including the search by other staff. No such detail was provided in respect of other alleged disclosures.

589. The evidence of Mr Sharief is that this matter was brought to his attention by the Local Manager who was upset because he considered that the claimant was calling into question his competency. Mr Sharief's undisputed evidence is that he also works as a RP at Hawtonville and Mr Rahim may have been concerned that Mr Sharief may see the entry the next time he was working at the branch. Mr Sharief's evidence is that although unsure of the date he had been made aware by Ms Gleave that Mr Rahim had called Head Office and spoken to her. He had been told that the claimant had miscounted the stock because extra tablets were in a bottle . Mr Rahim had sent across a photograph to confirm that the record in the CD register was correct.

Alleged Protected Disclosure 7: 7th January 2020 disclosure to Local Manager at Queensway Pharmacy (3.7 on the list of issues)

590. The claimant worked at the Queensway Pharmacy on; 29 June, 5 July, 9 August, 2 September, 26 October, 21 December 2019 and 7 January 2020. This equates to about one shift every month (p.194A).

December 2019

591. Ms Hazel Smith was employed by the respondent to work at the Queensway Pharmacy. Ms Smith had left the respondent's employment in November 2020. In her statement she complains that the claimant was slow at checking prescriptions, constantly on his phone and a few times he had to ask him to start checking the baskets which were piling up. Her evidence is that she contacted Head Office and complained about him in December 2019. She asked Head Office not to book him anymore and referred to patients complaining about food he was heating up for his lunch. The shop is small and the patients were complaining about the smell.

592. Ms Smith was not prepared to attend the hearing to give her evidence under oath. The Tribunal were told that she was nervous. No application for a witness order was made. We have therefore considered the weight to attach to her statement in those circumstances. However, her evidence that she had called head Office is supported by Mr Sharief's evidence in chief that he was told this by Mr Hampson, Locum Coordinator, albeit he recalled he was told this in January 2020. His evidence is that her complaints were about him sitting down excessively, not processing baskets and being on his phone and that she had queried whether the claimant could use a

chair due to a disability and that he told her he could as long as he was doing his work.

593. We therefore find that Ms Smith did contact Head Office to complain about the claimant and the matters set out in her statement and this was likely to be either after his shift on 21 December 2019 or after his shift on 7 January 2020. On a balance of probabilities, we find that Ms Smith had contacted Head Office to ask them not to book him again after his shift on 7 January 2020; that is consistent with Mr Sharief's recollection of when he was told, it is also consistent with the claimant finding how that his shifts had been cancelled on the 13 January 2020.

594. The claimant alleges that Ms Smith was lying about his work performance and that it would not have been for her to tell him to check prescriptions because; " *I am the RP".* He accepted that the Pharmacy has no lunchroom and the microwave is in the Pharmacy itself and that he prepared rice in the "*African way*" but denied that she complained that it was smelly. He did not seek to dispute that Ms Smith complained about him to Head Office .

January 2020 – disclosure

595. The claimants case is that on 7 January 2020 whilst working on the last occasion, at Queensway Pharmacy, he noticed further controlled drugs were missing from the record and he left a written note setting out the concern with the local Manager to investigate and (w/s para 36)

".. ***ensure the records are legal*** *and were in line with the regulations*"

[Tribunal stress]

596. The claimant alleges he left a written note and passed it to Hazel Smith, a Pharmacy Supervisor, to forward to the local Manager and that the manager responded to him via a telephone call. The claimant relies not on his discussion with Ms Smith about the error, but the note he left for the Pharmacy Manager.

597. He does not complain about the Pharmacist 's response. He does not assert that the Pharmacist was upset or angry that he had raised this issue. The claimant does not give evidence about what he actually wrote in the note other than in general terms as set out above. However, Ms Smith in her statement accepts that the claimant mentioned there being a discrepancy and that she could not resolve it and mentioned it to the Manager and they found the discrepancy.

598. The claimant complains that there were regular issues at this branch;" *every week shortages and misuse of Drugs breaches" And ""consistently poor management I picked up on …over the weeks I raised the discrepancies".* If that were the case, that would mean that the claimant was presumably identifying breaches since July 2019.

599. The claimant complains about how he was then treated by Ms Smith and that his shifts at Queensway were cancelled on 13 January 2020 and he believes that this was because of the alleged protected disclosure on the 7 January. However, under cross examination, his evidence was that;*" Hazel was very apologetic – she would apologise – say how can we resolve it – not aggressive and threatening like others who said why not put it on a sticky note"*

600. He also later when asked why he had not referred Queensway to the GPhC as he had Acklam, if there were so many errors as he alleged, he stated that it because

Queensway ; "*was more professional – when said drugs are missing, Hazel would look for it – no need to formalise to GPhC – at time she was apologetic – she would get involve and check prescriptions – that was common sense*" .

601. This description of her response is consistent with how she describes her response when he raised the issue on the 7 January 2020: "*in respect of there being a discrepancy, I tried to go through this with him but I could not resolve the issue through the CD register or the computer system. I said I would mention the point to the manager which I did when he returned to our pharmacy. The manager and I went through this and found the discrepancy as a shortage of CDs and it then got sorted".*

602. When it was put to the claimant that this description of Ms Smith was at odds with his description in his evidence in chief of her as; "***obnoxious"*** his evidence under cross examination was that when he told about her issues with the CD register she said she would resolve it but on the 7 January 2020 she took his chair away and told him that; " ***you are complaining too much***" and put it outside in the rain. The claimant alleges that Ms Smith was aware that he needed the chair for his spinal condition and that he had been using it for a number of months and thus he described her behaviour then as obnoxious.

603. Ms Smith denies knowing that he had disability until she removed the chair and that she removed it to make more room in the pharmacy as it is small. She refers to knowing that the claimant used the chair. In her statement, she refers to this happening; "*on his next shift at the pharmacy*" (w/s para 5) after a new manager started in December 2019.This timing is consistent with the date confirmed by the claimant in cross examination ie 7 January 2020.

604. Ms Smith in her statement denies telling the claimant not to sit down to work but accepts that she had said that they had a lot to do and asked could they clear the checking area as medications were overflowing.

605. As the chair was removed on 7 January 2020 when he arrived for his shift, this cannot have been removed because of any disclosure he made on 7 January and indeed that complaint was withdrawn (see above preliminary issues)

606. The claimant also complains however that his shifts were cancelled on 13 January 2020. He alleges that this was because of the 7 January 2020 disclosure.

Disability – harassment – 7 January 2020

607. The claimant alleges that he informed Ms Smith that he needed the chair for his disability and that he had a spinal problem prior to the 7 January, however Ms Smith denies that he mentioned to her that he had a disability.

608. The claimant complains that on 13 January 2020, he contacted Alex Hampson, Locum coordinator and was told that Ms Smith at the Queensway branch had cancelled his shift there because she did not like working with him as he complained too much. He complains that he then wrote to Head Office to complain about the cancellation of his shifts.

609. There is within the bundle at (p.205) an email dated 13 January 2020 from the claimant to Ms Gleave (this is not an alleged protected disclosure);

"I *will like to inform you of a current situation at Queensway Pharmacy which is an unacceptable practice. Last week I worked at Queensway and informed the dispensing staff*

members to inform their Manager the need to correct control drug discrepancies. I had my chair removed by a dispenser. ***She was already aware that I have a back disability and I use a chair to support my back****. On this occasion she took the chair away. I had to use a lower chair instead which was very uncomfortable,* ***and she was angry all day that I was sitting to work even when I informed her that I had disability****.* ***It appears she is harassing me for pointing out control drug issues which is a part of my professional responsibility.*** *I had previously used a chair without issues in the past.* ***Today 13 January I discovered she had cancelled all my shifts at the Pharmacy without informing me. I contacted Locumbay and Alex informed me my shifts were cancelled by her without reasons given****.* ***I then called the new Pharmacy Manager at Queensway Pharmacy who told me the dispenser informed him that I was sitting at work and I had complained too much about the CD register,*** *so she doesn't like to work with me anymore and therefore cancelled my shifts going forward…...". [Tribunal stress]*

610. There is no response to this email.

611. We take into account the evidence of Ms Smith however she was not prepared to attend the hearing to swear to her evidence under oath or have it tested and her reasons for not doing so are not compelling. The claimant for reasons set out in this judgment, has a tendency to embellish his evidence and we are mindful of this when assessing his credibility. However, we also take into account that had communicated his spinal condition to HR and to the team at Acklam and to Mr Nath and thus was prepared to let people know why he required to sit. We also take into account that a few days after learning that his shifts had been cancelled, he had mentioned to Mr Hampson that he had told Ms Smith he was disabled. There is no response indicating that there had been a discussion with Ms Smith about his complaints where she had denied this. Ms Smith in her witness statement refers to the claimant disclosing only after she had removed the chair that he had a disability, however she does not allege that she had then returned the chair at that point and we infer from this a rather unsympathetic attitude toward his disability.

612. We find that it reasonable to infer from the surrounding facts, that on a balance of probabilities, the claimant had mentioned to Ms Smith that he needed a chair because of a spinal problem or a disability.

613. We find on a balance of probabilities, that Ms Smith knew the claimant had a spinal condition, that she knew he used a chair for that reason and that she removed it. We do not find it convincing that despite knowing he used the chair and that he had done on a number of shifts at Queensway, that she removed the chair simply to make more room. We infer from the criticism she made about the claimant including that he slow at doing his work that she did this because she felt that if he could not sit, he may work faster. We accept the claimant's evidence that the chair was put outside and that he was upset about this, hence his email to HO on 13 January and that he felt that it violated his dignity and created a hostile working environment. However, in terms of the impact, he waited several days to complain and only did so when his shifts were channelled and further he was prepared to continue working at the Queensway store and does not allege that he had raised this issue with the Pharmacy Manager and indeed anyone, prior to learning that his shifts had been cancelled.

614. We find that the evidence supports the claimant's allegation that shifts were cancelled. Ms Smith confirms she had made this request to Head Office and the claimant had emailed on 13 January 2020 when he allegedly had found out that the shifts had been cancelled without an explanation.

615. The claimant alleged that Mr Hampson had told him that Ms Smith had said that the claimant was 'complaining too' much however, in his email to the 13 January he

alleges that Mr Hampson had said that no reasons had been given by Ms Smith. However, the claimant does allege in that email, that the Pharmacy Manager had told him that Ms Smith had said that he was complaining too much about the CD register and sitting down at work. The respondents were aware of this allegation but did not produce any evidence to rebut this from the Pharmacy Manager of Queensway and did not seek explain the failure to call him to give evidence and we find that it is reasonable to draw an adverse inference from their failure to do so . On a balance of probabilities, we therefore find that the claimant was told that a reason for removing his shifts was that he was complaining too much about the CD register but this was probably by the Pharmacy Manager and not Mr Hampson and that Mr Hampson had, in accordance with his email written at the time, told him that he had not been given any reason (hence why the claimant would have made further enquiries)..

616. We therefore find that, taking into account the claimant's evidence about what he had been told was the reason for the termination of his shifts, that the decision to terminate the shifts was due to the issues with his work but that also materially influenced (ie to more than a trivial extent) by the alleged disclosure he made on the 7 January 2020 (and previous concerns raised about the CD register).

617. The claimant has not identified however in his evidence which shifts had been cancelled or which dates he had expected to work which he was not booked for. While we are satisfied on the evidence that a decision was taken to cancel shifts, the claimant has failed to set out the numbers of shifts which were cancelled and whether he was in fact therefore, subject to any detriment and if so, what.

Detriment 4: Cancellation of the shifts on 18 January 2020

618. Mr Sharief on 18 January 2020 cancelled the claimant's shifts. His evidence is that he took this decision after speaking with Alex Hampson.

619. The claimant alleges that he was influenced by one or more of the 8 alleged protected disclosures and the main reason he believes this, he stated in response to a question from the Tribunal, was because Mr Sharief did not call him to discuss the concerns before terminating the shifts. Mr Sharief's evidence is that he would not do this for someone who was not an employee. The claimant has not sought to identify any other Locums who have been consulted about any issues with their work prior to shifts being cancelled by the respondent nor to any policy or guidance which may apply . We accept on a balance of probabilities, that there is no such policy or practice in place.

620. Mr Sharief evidence is that he took into account the issues raised by Ms Akbar about the CD keys accidentally being put by the claimant into a patients prescription which he accepted had probably occurred on 11 January 2019 and that if the keys was an isolated event, he would have not acted as he had but that it was;

"*an accumulation of issues, writing on the CD register, being on Facebook, when became issue of patient risk . I had to consider patient safety."*

621. Mr Sharief's evidence is that he knew about the claimant writing in the CD registers but did not know when and how it came to his attention, that Ms Akbar could have mentioned it to Ms Hickey but he was not sure. We find on a balance of probabilities, that as Ms Akbar we find was not aware of the alleged disclosure on the 16 November 2019, Mr Sharief was informed not about that alleged disclosure but the one on the 11 January 2020 which Ms Akbar was we find, aware of.

622. Mr Sharief denied that a Locum raising concerns about the CD register would irritate staff;

"no – it's part of their day job , complaining about the CD register would not upset them – what would upset staff is they work for minimum wage and working to get medication out and he turns up not doing his job on 3 times their salary and 30 minutes late."

623. Mr Sharief also stated that he was aware of the issue raised at Hawtonville pharmacy but he was not sure if this was direct or second hand. He denied that it was unusual to do what Mr Rahim had done and put tablets into a different bottle ;*we do it in pharmacy all the time* ". He stated however that the claimant had done it in the right way by contacting the Pharmacist directly and then it was investigated and the error turned out to be as he saw it, that the claimant had counted the stock incorrectly. He believed that Mr Rahim would have made him aware of it because Mr Sharief works at that pharmacy as an RP and he would have been worried about Mr Sharief seeing the error in the CD register and that Mr Rahim had been upset because the fault lie with the claimant who had not counted the stock correctly. Mr Sharief gave evidence under cross examination that he believed from the reports he had received, that he claimant was " *lazy and incompetent"* and this error would not have been made if he had turned up on time, read the SOPs, familiarised himself with the staff and environment. Mr sheriff referred to a;

" repeated pattern from him showing laziness and incompetence"

624. Mr Sharief also gave evidence that he was aware that Hazel Smith had complained about the claimant and that his recollection was that the claimant was complaining about doing his work.

625. Mr Sharief also gave evidence that he was aware of the email from the claimant on the 13 January (page 205) and aware that the claimant thought that his shifts had been cancelled because he was raising errors in in the CD register. However his evidence was that the CD register is not the responsibility of the staff, they are not accountable for the CD register, it is the RP and he viewed it not as claimant "*attacking the pharmacy , just telling us to investigate it and that was part of his role*". He also gave evidence under cross examination that he would not have been concerned about a regulatory investigation because if they found a 'rogue Pharmacist' it would do the respondent a "*huge favour, it would fix the branch".*

626. He could also not be sure whether or not he was aware of the email from Ms Brindley before or after he had decided to terminate the claimant shifts, although he 'guessed' that it was before.

627. In his witness statement he stated that on 18 January 2020 he had spoken to Alex Hampson who told him he had received contact from one of the branches and " *had been critical of their criticism of the claimant*" and it was after that they could not use the claimant again. Mr Sharief could recall who complained or what about and he was unsure what this sentence in his statement actually meant, whether he was referring to Mr Hampson being critical of that persons criticism of the claimant or that the person who contacted them was critical of the claimant;

" *I would have made decision at that point not to use the claimant – not on that days complaints but complaints before that. I cannot recall exactly the reason for dismissing him – it was an accumulation of things – it was many things"*

628. Mr Sharief's evidences was that he was not aware of the GPhC inspection until the Tribunal proceedings. There is no evidence that he was aware that there was to be

an inspection or that the claimant had complained to the GPhC prior to the 18 January 2020 and we find that he was not aware.

629. The Tribunal conclude that on the balance of probabilities Mr Sharief had heard ongoing complaints about the claimant. He viewed the complaint from Mr Rahim as a complaint about the claimant's competence. He was also concerned about his competence in terms of the missing keys to the CD cabinet which we find is not a common occurrence and we accept he was concerned about that incident. He had previously heard about significant complaints from Mr Nath including what he viewed as the claimant's laziness and he had been contacted back in August about the claimant's phone use and asked to intervene.

630. We are persuaded that Mr Sharief was not concerned that the claimant had raised errors in the CD register, although the writing in the register itself he was evidently angered by and this was something Mr Nath had mentioned in the email of the 28 August 2019.

631. Mr Sharief stated in his evidence in chief that he had made the decision to cancel the claimant's shifts after discussion with the board of directors however, under cross examination he gave evidence that he could not confirm how exactly it came about. He confirmed that Mr Nath may have been spoken to but would not have been involved in the decision but would have informed the company of his comments. Mr Nath's evidence was that he had a discussion with one of the directors but he could not recall which, and that he had mentioned about the claimant's work, not completing baskets and his general demeanour but that he had no authority to make the decision whether the respondent stopped using the claimant's services.

632. Mr Sharief gave evidence under cross examination that the complaint's made by Mr Nath were serious and formed a substantial part of his decision making. He believed that he was aware at the time he made the decision that the claimant had raised concerns about the CD registers and the failure of Acklam staff to record near misses He was however robust and convincing in his denial that his decision had anything to do with the claimant raising errors with the CD register and that this was part of his responsibilities.

633. Mr Sharief's unchallenged evidence under cross examination is that 99% of the time when there is an issue with the CD register, it is a *common error* and he did not consider it reasonable to consider that it gave rise to a patient safety issues until there had been an investigation to determine if stock was in the pharmacy and whether it was a simple miscalculation or miscounting. He did not see issues raised about the CD register as whistleblowing but part of the RP's role.

634. Mr Sharief also gave evidence under cross examination, that complaints did not create much work for him, it was when a Locum turned up late or refused to check;

"I get a lot of Locums who don't get on with dispensers and complain about issues between people, I expect that, company has 250 staff 40 branches, we could use 5 to 20 locums a day – no one would be blocked for complaining about the CD registers" but "*what irritated me was him making a mockery of the CD register, whenever I see it angers me, and video of him on Facebook – it was Sanjay, Selma, Hazel, doesn't make sense for 1 pharmacist to cause so much damage*".

635. It was not put to Mr Sharief and the claimant did not identify in his evidence, the number of shifts which had been cancelled.

636. Mr Sharief's evidence was in material respects uncertain, however the Tribunal do not consider that he was being deliberately vague but he presented as a witness who was unable to recall some of the detail and was candid when he could not recall or was recalling to the best of his ability or was prepared to accept if something probably happened, regardless on occasion, whether those concessions were helpful to the claimant's case.

637. When asked by the Tribunal whether the claimant believed that Mr Sharief was victimising him for making the protected disclosure or but acting on the complaints, he had received from those whom the claimant believed were victimising him, the claimant's first response was that it was the latter. We find based on his immediate response to that question, that this is what he genuinely believed.

638. We find that Mr Sharief had not met the claimant. He was basing his decision on what he had heard. We find that Mr Sharief formed the clear impression that the claimant was incompetent and lazy. He was angered that he was writing in the CD register, not in footnotes but across the page. We do not find that Mr Sharief was concerned that the claimant was raising concerns that staff at Acklam were not reporting near misses at Acklam. It was clear from this evidence that he considered the reports from his permanent staff to be more reliable than what he saw as an ' incompetent locum'. We find on a balance of probabilities, that he did not consider that there were genuine issues with Acklam. He was not aware we accept according to his evidence, that Mr Nath was not carrying of regular checks of the CD register.

639. We find that on the balance of probabilities, Mr Sharief made a decision due to the accumulation of negative reports about the claimant, not to use him anymore but that he was not concerned about the claimant's raising issues with the CD register or near misses, it was the issues about his competence and work ethic which was the reason for his decision.

GPhC inspection

640. On the 6 February 2020 there was then an inspection by the GPhC. Mr Nath was aware that this arose from a complaint from the claimant. Mr Nath sent an email to the inspector afterwards in which he was highly critical of the claimant accepted that some of the comments were exaggerated. It was an unprofessional and unnecessarily aggressive attack on the claimant's professionalism and his character and indicated an ability on the part of Mr Nath to be vindictive.

Time limit – findings of fact

641. The claimant gave evidence under oath he had looked on the government website and he understood that the time limit to issue a claim in the Tribunal ran from the last incident of discrimination and that he had three months to go to ACAS. ACAS spent about a month engaging with the respondent and then issued a certificate and informed him that he had thirty days to apply to the Tribunal and he issued a claim within that 30 day period.

642. The claimant received no legal advice at that time. At the preliminary hearing on 20 August 2020 when he was still representing himself, Employment Judge Britton mentioned to him that he may be able to get legal advice through legal expenses insurance and that is what he did.

643. The claimant was also clearly someone aware of his rights, this is apparent in the way he communicated his complaints; he uses the terms harassment, and hostile environment and he refers to his back condition as a disability.

644. The claimant is clearly a well-educated and articulate individual. He does not assert that he could not afford to obtain legal advice, he does not assert that he was too unwell to do so. He indeed had the benefit of legal support under his insurance policy but had not taken the sensible step of checking it. He had found information on the government website and had contacted ACAS; he clearly had the resources to seek advice in terms of access to the internet etc and he understood where to find it.

645. The claimant does not allege that he made any effort to check what the time limits were before January 2020, which he says was the last detrimental act. He would, of course, not have known as at 16 August 2019 or any time before January 2020 that there was going to be another incident of alleged harassment or victimisation and yet he had made no effort, according to his evidence, before January 2020 to check what the time limits were.

646. The claimant had taken pictures as evidence, he had not disclosed these to the respondent but to acquire evidence of what he believed to be some form of malpractice. He was at that stage it would appear, mindful of a potential future dispute.

Legal Principles : Whistleblowing

Disclosures qualifying for protection

647. The term "protected disclosure" is defined in sections 43A-43H of the 1996 Act. The basic structure of those provisions is as follows:

(1) Section 43A defines a protected disclosure as a "qualifying disclosure" which is made by a worker in accordance with any of sections 43C to 43H .

(2) Section 43B defines a 'qualifying disclosure' essentially by reference to the subject-matter of the disclosure

(3) Sections 43C to 43H prescribe six kinds of circumstances in which a qualifying disclosure will be protected, essentially by reference to the class of person to whom the disclosure is made.

648. The opening words of section 43B of ERA provide that:

"(1*) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure is made in the public interest and tends to show one or more of the following –*."

Section 43B then lists of six categories of wrongdoing. The categories relevant relied upon by the Claimant are those set out within section 43B(1)(a)(b) and (d);

(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject

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

.**section 43C Disclosure to employer or other responsible person.**

(1)A qualifying disclosure 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.

(2)A worker who, in accordance with a procedure whose use by him is authorised by his employer, makes a qualifying disclosure to a person other than his employer, is to be treated for the purposes of this Part as making the qualifying disclosure to his employer

. section 43F Disclosure to prescribed person.

(1)A qualifying disclosure is made in accordance with this section if the worker—

(a)makes the disclosure ... 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****.*

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

Disclosure of information: section 43B ERA

649. The disclosure must be of *information*. This conveying of facts rather than the mere making of allegations: ***Cavendish Munro Professional Risks Management Ltd v Geduld [2010] ICR 325 EAT.***

650. The word 'disclosure' does not require that the information was formerly unknown; section 43L(3).

Reasonable belief

651. Section 43B (1) requires that, in order for any disclosure to qualify for protection, the disclosure must, in the *'reasonable belief'* of the worker be made in the public interest, and tends to show one or more of the types of malpractice set out in (a) to (f) has been is being or is ***likely*** to take place.

Public Interest

652. The worker must have a reasonable belief that the disclosure is in the public interest but that does not have to be the worker's predominant motive for making the disclosures; see Lord Justice Underhill's comments **Chesterton Global Ltd. v Nurmohamed [2018] ICR** 731 CA. We have considered the guidance specifically at paragraphs 27 to 30

653. **In Chesterton** the EAT rejected the suggestion that a tribunal should consider for itself whether a disclosure was in the public interest and stressed that the test of reasonable belief remains that set down by the Court of Appeal in ***Babula v Waltham Forest College 2007 ICR 1026, CA*****.** On appeal, the Court of Appeal

agreed that the test as set out in *Babula* remains relevant and **made the point that tribunals should be careful not to substitute their own view of whether the disclosure was in the public interest for that of the worker**

654. When considering the public interest the Court of Appeal in Chesterton made the following observations;

"35. … It is in my view clear that the question whether a disclosure is in the public interest **depends *on the character of the interest served by it*** *rather than simply on the numbers of people sharing that interest. That is in my view the ordinary sense of the phrase "in the public interest"/*

Reasonable belief in the wrongdoing

655. To qualify for protection the disclosure, the whistle-blower must also have had a reasonable belief that the information disclosed tended to show that the alleged wrongdoing had been/was being/was likely to be, committed. It is not relevant however whether or not it turned out to be wrong, the same principles as to reasonableness apply to the wrongdoing as to the public interest requirement.

656. As the EAT put it in ***Soh v Imperial College of Science, Technology and Medicine EAT 0350/14*****,** there is a distinction between saying, 'I believe X is true' and 'I believe that this information tends to show X is true'. The EAT observed that the disclosure will be a qualifying disclosure for the purposes of that provision even if the information does not in the end stand up to scrutiny.

657. When considering whether a worker has a reasonable belief, tribunals should take into account the worker's personality and individual circumstances. The focus is on what the worker in question believed rather than on what a hypothetical reasonable worker might have believed in the same circumstances. However, this is not to say that the test is entirely subjective section 43B (1) requires a *reasonable* belief of the worker making the disclosure, not a genuine belief :EAT in ***Korashi v Abertawe Bro Morgannwg University Local Health Board 2012 IRLR 4, EAT***

Endangerment of health and safety

658. 'Health and safety' is a well understood phrase and so it will usually be obvious whether the subject matter of the disclosure has the potential to fall within section 43B(1)(d).

Identifying legal obligation

659. In ***Fincham v HM Prison Service EAT 0925/01*** **:** Mr Justice Elias observed that there must be 'some disclosure which actually identifies, albeit not in strict legal language, the breach of legal obligation on which the [worker] is relying'. However, in ***Bolton School v Evans 2006 IRLR 500, EAT*** held that, although the employee 'did not in terms identify any specific legal obligation', nonetheless it would have been obvious that his concern was that private information, and sensitive information about pupils, could get into the wrong hands. The EAT was therefore satisfied that it was appreciated that this could give rise to a potential legal liability

Likelihood of occurrence

660. The EAT considered the meaning of 'likely' in this context in **Kraus v Penna plc and anor 2004 IRLR 260, EAT** : In the EAT's view, 'likely' should be construed as

'*requiring more than a possibility, or a risk, that an employer (or other person) might fail to comply with a relevant legal obligation'*. Instead, '*the information disclosed should, in the reasonable belief of the worker at the time it is disclosed, tend to show that it is probable or more probable than not that the employer will fail to comply* '

Reason – causation

661. Court of Appeal decision in **Co-Operative Group Ltd v Baddeley 2014 EWCA *Civ 658, CA*** .In the course of giving the only judgment of a unanimous Court, Lord Justice Underhill accepted that in such a case (Iago situation) the motivation of the manipulator could in principle be attributed to the employer, at least where he was a manager with some responsibility for the investigation

662. Court of Appeal in **Royal Mail Group Ltd v Jhuti 2020 ICR 731, SC.** On appeal, to the Court of Appeal - Underhill LJ referred to **Orr v Milton Keynes Council 2011 ICR 704, CA** If a person in the *hierarchy of responsibility* above the employee determines that, for reason A, the employee should be dismissed but that reason A should be hidden behind an invented reason B which the decision-maker adopts, it is the court's duty to penetrate through the invention rather than to allow it also to infect its own determination. Lord Wilson reasoned that if this is limited to a person placed by the employer in the hierarchy of responsibility above the employee, there is no conceptual difficulty about attributing to the employer that person's state of mind rather than that of the deceived decision-maker.

663. When Jhuti was before the Court of Appeal, Underhill LJ considered four different circumstances in which it might be argued that the unlawful motivation of a 'manipulator' should be imputed to an innocent decision-maker**.**

664. ***University Hospital North Tees and Hartlepool NHS Foundation Trust v Fairhall EAT 0150/20*** the EAT emphasised that *Jhuti* only applies where an innocent decision-maker is manipulated into dismissing a whistleblower for an apparently fair reason and is 'unaware of the machinations of those motivated by the prohibited reason'.

665. ***Malik v Centos Securities plc EAT 0100/17*** Mr. Justice Choudhury considered that it was impermissible to import the knowledge and motivation of another party to the decision-maker for the purpose of establishing liability under S.47B. He referred to the Court of Appeal's decision in ***Reynolds v CLFIS (UK) Ltd and ors 2015 ICR 1010, CA***.

666. In ***Aspinall v MSI Mech Forge Ltd EAT 891/01*** 'on the ground that' in S.47B require a causal nexus between the fact of making a protected disclosure and the decision of the employer to subject the worker to the detriment.

667. House of Lords in ***Chief Constable of West Yorkshire Police v Khan 2001 ICR 1065, HL*.** Their Lordships ruled that the proper approach was not to ask whether 'but for' the protected act having taken place the treatment would have occurred, but rather what, consciously or unconsciously, was the employer's reason or motive.

668. EAT in ***London Borough of Harrow v Knight 2003 IRLR 140, EAT*.** The EAT ruled that the tribunal's use of the phrase 'related to' imported a different and much looser test than that required by the statute, which necessitated a determination of whether the act or omission complained of was '***on the ground that'*** the worker had made a protected disclosure. The phrase 'related to' merely connoted some connection (not necessarily causative) between the act done and the disclosure. It did not answer the question of whether the protected disclosure ***formed part of the***

***motivation (conscious or unconscious*)** of the employer in subjecting the employee to the detriment.

669. The correct approach to the words 'on the ground that' in S.47B was considered by the Court of Appeal in ***Fecitt and ors v NHS Manchester (Public Concern at Work intervening) 2012 ICR 372, CA***, Lord Justice Elias agreed with the employer that ***Igen Ltd (formerly Leeds Careers Guidance) and ors v Wong and ors 2005 ICR 931, CA****,* was not strictly applicable and expressed the view that S.47B will be infringed if the protected disclosure materially (in the sense of more than trivially) influences the employer's treatment of the whistle-blower.

670. ***Martin v Devonshires Solicitors 2011 ICR 352, EAT*****,** there can be cases where some feature of the disclosure which could properly be treated as separable, such as the manner in which the complaint was made.

Burden of Proof

671. In any detriment claim under section 43B, it is for the employer to show the ground on which any act, or deliberate failure to act, was done section 48 (2) ERA;

672. If an employment tribunal can find no evidence to indicate the ground on which a respondent subjected a claimant to a detriment, it does not follow that the claim succeeds by default — ***Ibekwe v Sussex Partnership NHS Foundation Trust EAT 0072/14*****.**

Drawing inferences.

673. Given the need to establish a sufficient causal link between the making of the protected disclosure and the act of dismissal, a Tribunal may draw inferences as to the real reason for the employer's action on the basis of its principal findings of fact. In ***Kuzel v Roche Products Ltd*** Mummery LJ that a Tribunal assessing the reason for dismissal can draw '*reasonable inferences from primary facts established by the evidence or not contested in the evidence*'.

674. In ***Bennett v Mitac Europe Ltd EAT 0185/20*** The fact that a decision-maker is not called to give evidence does not necessarily mean that cogent evidence cannot be provided. There may be compelling documentary evidence, or others may be able to give convincing evidence of the reason why the decision was taken. It will usually be necessary to consider why a decision-maker was not called to give evidence. **Remedy**

675. Where an employment tribunal finds a detriment complaint under S.48 ERA well founded, it *must* make a declaration to that effect S.49(1)(a). In addition, the tribunal may make an award of compensation S.49(1)(b).

676. Any such award will be the amount the tribunal considers '*just and equitable in all the* circumstances' *of the case,* having regard to: the infringement to which the complaint relates — S.49(2)(a), and any loss which is attributable to the act or failure to act which infringed the complainant's right not to be subjected to a detriment — S.49(2)(b).The term 'loss' in the context of S.49(2)(b) is not limited to financial loss. Tribunals can also compensate for injury to feelings and personal injury.

677. In ***Roberts v Wilsons Solicitors LLP and ors 2018 ICR 1092, CA*****,** 'it *is a* question *of fact and judgment in every case for the tribunal whether a particular consequence or loss is attributable to a particular unlawful act or infringement or to something else or both and if so, to what extent*.' On appeal, the Court of Appeal agreed with the

respondent that the EAT was wrong to reject the 'but for' test in this context. The EAT had confused two different questions:

*59. In my respectful opinion, Simler J confused two different concepts in para. 26 of her judgment. First, there is the question of what "attributable to" means. The second – but different – question is what is the overall function of the ET when it considers an award of compensation under section 49? Simler J was right to observe that the answer to the second question is that the ET has a discretion to determine what is just and equitable in all the circumstances. But that does not answer the first question. One of the things that the ET is required by the legislation to have regard to is what loss is attributable to the act, or failure to act, complained of. That raises the first question, the meaning of "attributable to". **In my view, that phrase does import the common law concept of "but for" causation.***

678. When ascertaining the loss, a tribunal should apply the same rule concerning the duty of a person to mitigate his or her loss as applies to damages recoverable under the common law of England and Wales or Scotland : section 49 (4)

Contributory conduct.

679. A tribunal may reduce the amount of any award by so much as appears just and equitable if it finds that the complainant has caused or contributed to the employer's act or failure to act about which the complaint was made — S.49(5).

Legal Principles - Disability – harassment

680. Section 26 of the EqA provides as follows: Harassment

(1)A person (A) harasses another (B) if—

(a)A engages in unwanted conduct related to a relevant protected characteristic, and

(b)the conduct has the purpose or effect of—

(i)violating B's dignity, or

(ii)creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(4)In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

(a)the perception of B;

(b)the other circumstances of the case;

(c)whether it is reasonable for the conduct to have that effect..

681. There are three essential elements of a harassment claim under S.26(1):

- *unwanted conduct*
- *that has the proscribed purpose or effect, and*
- *which relates to a relevant protected characteristic.*

682. Mr Justice Underhill, then President of the EAT, expressed the view that it would be a 'healthy discipline' for a tribunal in any claim alleging unlawful harassment specifically to address in its reasons each of these three elements — ***Richmond Pharmacology v Dhaliwal 2009 ICR 724, EAT***

Unwanted conduct

683. The Equality and Human Rights Commission's Code of Practice on Employment ('the EHRC Employment Code') notes that unwanted conduct can include 'acts affecting a person's surroundings or other physical behaviour' — para 7.7.

684. The unilateral removal of various adjustments that had evolved to accommodate an employee's disability was held to be harassment: ***Williams v North Wales Police ET Case No.2902135/08***

Purpose or effect

685. A single incident can amount to unwanted conduct and found a complaint of harassment if 'serious': para 7.8 EHRC Employment Code, although it would, have to have the purpose or effect proscribed by S.26(1)(b).

686. ***Insitu Cleaning Co Ltd v Heads 1995 IRLR 4, EAT*****,** whether a single act of unwanted conduct is sufficiently serious to found a complaint of harassment is a question of fact and degree.

Related to

687. Section 26(1)(a) EqA requires that the conduct in question be *related to* a relevant protected characteristic. Conduct will therefore be covered regardless of the reason for it, provided it has some connection with a protected characteristic.

688. The EHRC Employment Code, states that the necessary connection with a protected characteristic can arise where 'the unwanted conduct is related to the protected characteristic but does not take place because of the protected characteristic'— para 7.10.

689. ***Hartley v*** Foreign ***and Commonwealth Office Services 2016 ICR D17, EAT*****. E**AT held that the alleged harasser's knowledge or perception of the victim's protected characteristic is relevant but should not be viewed as in any way conclusive.

Submissions

690. We have considered counsels submissions on the section 43B ERA and section 26 EqA claims and on the application of time limits, both written and oral and referred to these where appropriate within the judgment. We have not set out in detail their submissions however no disrespect is intended. We shall however confirm which case authorities were referred to.

Respondent's submissions

691. The respondent's counsel has referred us to the following authorities;

692. ***Arthur v London Eastern Railway Limited [2007] ICR 193,CA, Flynn v Warrior Square Recoveries Limited [2014] EWCA CIv 68 CA, Royal Mail Group Ltd v Jhuti [2018] UKEAT 0020/16 EAT, Commission of Police of the Metropolis v Hendricks [2003] ICR 530 CA, Aziz v FDA [2010] EWCA CIv 304 CA, South Western*** Ambulance ***Service NHS Foundation Trust v King [2020] IRLR 168 EAT, Robertson v Bexley Community Centre[2003] IRLR434 CA, Esk and Wear Valleys NHS Foundation Trust v Aslam [2020] IRLR 495 EAT, Cavendish Munro Professional Risks Management Limited v Geduld [2010] ICR 325, Chesterton Global Ltd v Nurmohamed [2017] IRLR 837 CA, Fecitt v NHS***

Manchester [2012] ICR 372 C, London Borough of Harrow v Knight [2002] EAT 0790/2001

693. *The* claimant's *counsel referred us to the following authorities;*

694. ***Rathakrishnan v Pizza Express (Restaurants) Ltd [2016] IRLR 278,Arthur v London Eastern Rly ltd(t/a One Stanstead Express) [2006] EWCA 1358 [2007] ICR 193,Royal Mail Group Ltd v Jhuti UKEAT/0020/16, Efobi v Royal Mail Group [2019] EWCA Civ 18 [2019] ICR 750,Hartley v Foreign and Commonwealth Office Services UKEAT/0033/15/LA, Peninsula Business Service Ltd v Baker [2017] IRLR, Millbank Financial Services Ltd Crawford [2014] IRLR, Kilraine v London Borough of Wandsworth [2018] IRLR, Simpson v Cantor Fitzgerald Europe [2021] ICR 695, Ibrahim v HCA International Ltd [2020] IRLR 224, Chesterton Global Ltd V Nurmohamed [2017] IRLR 837 CA.***

695. Counsel were both invited by the Employment Tribunal to address it on ***Malik v Centos Securities plc EAT 0100/17***

Time Limits – conclusions and analysis

696. The acts pursuant to section 47B ERA complained of occurred between 16 August 2019 and 18 January 2020. If they formed a series of similar acts, then the last act was **18 January 2020**.

697. The acts of alleged harassment pursuant to section 26 EqA occurred on 16 August 2019 and **7 January 2020**.

698. The ACAS Certificate is dated **7 April** to 29 April 2020. The Claim Form was issued on 25 May 2020.Therefore any cause of action which arose on or before 7 January 2020 is outside the primary time limit.

699. Both the section 26 EqA harassment complaints, are therefore outside the primary time limit.

700. The detriments under the section 43B ERA claims, other than 5.3 and 5.4 complaints are outside the primary time limit unless they form part of a series of acts.

701. We have heard all the evidence and shall therefore take into account the merits of the claim first before turning to a determination of the time limitation issues. The below findings are therefore subject to a determination of jurisdiction.

702. We shall set out our analysis of the complaints however, our conclusions are subject to our findings on whether the Tribunal ultimately has jurisdiction to make final determination on whether the claims succeed or are dismissed.

703. Where the last act of a series of similar acts is dismissed as unfounded on the facts or because it was not done on the ground of a protected disclosure, it cannot extend time for earlier, proven, acts that are out of time This does not mean that a claimant must succeed in establishing as actionable each and every act relied on as part of a series, so long as there is at least one in-time proven act: ***Royal Mail Group Ltd v Jhuti EAT 0020/16*.**

Conclusions and Analysis - Section 47B ERA claims

First alleged Protected Disclosure - 6 August 2019

704. We have found, as set out above in our findings, that Mr Nath and Mr Sharief were both aware of the content of the email on the 6 August 2019. It had been brought to their attention by Ms Gleave.

Information

705. The claimant set out facts in this email. He was not just making a bare allegation that staff were not complying with a safety procedure or breaching the Regulations. He disclosed facts, namely that staff members were not writing down their drug near misses, a safety procedure they were not doing.

706. We find that this amounted to a disclosure of information, of facts and an allegation.

Was it a disclosure to his employer?

707. As set out in our findings, we consider that the claimant intended PPR UK to communicate this disclosure on his behalf and that this was also their understanding.

708. Section 43C ERA does not state that a disclosure cannot be made to an employer via a third party acting on their behalf and indeed it has been held that a disclosure via a solicitor, can qualify as a protected disclosure: ***Cavendish Munro Professional Risks Management Ltd v Geduld 2010 ICR 325, EAT*.**

709. This is not a situation where the claimant did not, we find, want PPR UK to forward this information onto his employer.

Reasonable belief in the malpractice

710. In terms of whether the 6 August disclosure of information amounted to a protected disclosure, Counsel for the claimant in her oral submissions, submits that the claimant's primary position in terms of this first disclosure is that the disclosure tends to show that the health or safety of any individual has been, is being or is ***likely*** to be endangered, rather than a disclosure of a breach of a legal obligation (although both are relied upon).

711. As set out in our findings, the Dispensers at Acklam had failed to record all their near misses and that the claimant, although he did not 'know' that they had failed to do so by the 6 August (because he could not access the register), he had photographed a near miss and given the dismissive attitude of the Dispensers, he suspected or believed (he used both descriptions) that they were not recording them. It would as we have set out in our findings, later be shown (following disclosure for the purposes of this hearing), that the claimant's suspicions/belief, was correct.

712. A mere suspicion cannot amount to a belief however, in his actual disclosure the claimant is more definitive than that, he states that it was a safety procedure; "*they were **not** doing".*

713. The claimant asserts he reasonably believed that the failure to record near misses was a failure to comply with a legal obligation under the Regulations because it is required by the SOP's.

714. We have found that not recording near misses does not amount to a breach of the Regulations. Although the respondent was required to have SOP's in place, to ensure compliance with the Regulations, it is for the pharmacy to decide what to put in their SOP's to ensure good practice and to avoid a breach. That does not mean however, that not complying with an SOP means that there *will* be a breach of the Regulations. A near-miss by definition means that a patient has not been given the incorrect prescription. Registering near-misses is we conclude a *risk assessment tool*, to enable a pharmacy principally, to identify where further training *may* be required.

Legal obligation

715. It is not pleaded in the claimant's Particulars of Claim that staff had a legal obligation to comply with the near-miss record/register. The claimant in his Particulars of Claim by comparison, explicitly refers however to the legal requirements of the *controlled drugs* records .

716. Although the claimant does not identify the Regulations or in more general terms the regulations relating to controlled drugs in his disclosure, he is not strictly required to***: Bolton School v Evans*** . However, we are not satisfied that in referring to the near-miss register, it was obvious to the respondent that the claimant was referring to a legal obligation whether under the Regulations or otherwise and that it was appreciated that what he was alleging could give rise to a legal liability. The claimant does not allude to a breach (or any legal liability) and as a fact, we have found that not recording near-misses does not give rise to such a breach.

717. Further, even if we are wrong on that, when considering his belief, the claimant was able to and did during the course of the hearing, recite parts of the Regulations however, in the 6 August email, he did not refer expressly to the Regulations but rather referred to the near-miss register not as a breach of a legal obligation, but "***a safety procedure"*** .

718. In the claimant's witness statement he refers to the legal requirement to have a Controlled Drugs (CD) Register but he does not assert anywhere within his evidence in chief, that he believed that there is a legal requirement to keep a near-miss register and to record near misses.

719. The claimant is a trained, qualified and licensed Pharmacist who was able to refer the Tribunal to relevant provisions of the Regulations . We conclude that even if the claimant did hold this belief (which we conclude he did not) namely that his disclosure showed a breach or likely breach of a legal obligation, we further conclude that taking into account his individual circumstances and holding him to a professional standard when determining the reasonableness of that belief, that it was **not** reasonable for him to have believed that his disclosure of information tended to show that the respondent; *"has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject";* namely a failure to comply with the Regulations or the more generally the regulations concerning controlled drugs.

Health and safety

720. Any disclosure which, in the reasonable belief of the worker, is made in the public interest and tends to show that the health or safety of any individual has been, is being or is ***likely*** to be *endangered* is a qualifying disclosure: section 43B (1)(d) ERA.

721. 'Endanger' to give it its natural meaning, is to put in danger or peril. Danger in turn means according to the Collins English Dictionary ' *the state of being vulnerable to injury or loss.'.*

722. Likely means *more than a possibility or a risk:* ***Kraus v Penna Plc***.

723. The claimant does not allege that a patient had been harmed by the failure to record near-misses and he does not allege that the information was tending to disclose that there had been harm.

724. We conclude that even if the claimant was asserting that his disclosure tended to show that a patient or patients' health had been put in danger or peril, by the failure to record near-misses, that it would not be reasonable for him to have that belief that this is what the information tended to show. The information refers to a failure to record near -misses, he does not allege expressly that a patients or patients were put at risk.

725. We then turn to whether it was reasonable for the claimant to believe that the information tended to show that it was '*Likely' ie more than a possibility, or a risk* to the endangerment of the health and safety of patients.

726. We conclude based on our findings, that a failure to record near-misses is not uncommon. If the pharmacy is busy, they can be missed. The recording of near-misses is a tool to manage and assess risk and to prevent it and that a failure to comply with this safety procedure therefore gives rise to a *risk* that the competence or training needs of a Dispenser may not be identified or identified promptly. The RP is the person tasked with checking the prescriptions before they go out, providing an important level of safeguarding.

727. The claimant was not disclosing in this email information that a patient had been given the wrong medication (whether or not that had caused them actual harm) or that a Dispenser was not competent. We do accept that what the claimant was disclosing was that this safety procedure was not being carried out. Although the claimant did not expressly state as much, we find that he did believe and it would be reasonable for him to believe, that this created a safety *risk*. We do not conclude however that by disclosing information that near-misses were not being recorded , that the health and safety of a patient was *likely* to be actually endangered.

728. Had the claimant believed that patients were endangered by this practice, he did not report it to the GPhC, he did not make his own notes of what errors he thought had not been recorded, he took a photograph of one near-miss but never shared it with Mr Nath so he could follow it up. The failure to take those steps, is not consistent with a belief that patients were in any danger or likely to be. The claimant only escalated this concern when his chair was taken away. His alleged disclosure is then principally concerned with the treatment he had received from the staff for raising this issue, rather than concern for the consequences of their failure to comply with the safety procedure. He does not refer anywhere within that disclosure to a belief that patients were vulnerable to harm or injury by this practice.

729. We conclude that the claimant did **not** believe and if he did it was not reasonable to believe, that this disclosure tended to show that at the time he made the disclosure, that the health and safety of any individual *has been, is being or is likely to be endangered.*

Reasonable belief in the public interest

730. Counsel for the respondent submits that there must be some likelihood of harm to the public for the disclosure to be in the reasonable belief of the claimant made in the public interest, otherwise every disclosure about safety practices, even where there is no reasonable belief in harm to the public, would meet the public interest test.

731. The issue of whether health and safety was likely to be endangered is separate from the public interest requirement. The Tribunal consider that something may be unlikely to happen but it may still be in the public interest to report or disclose it.

732. As directed in ***Chesterton***, if the claimant cannot give credible reasons for why he thought at the time the disclosure was in the public interest, that may cast doubt on whether he really thought so. It is not for this Tribunal to substitute its view for his.

733. Within the claim form and Particulars of Claim (p. 13) the claimant complains about disclosure about controlled drugs being missing and not near misses. His references to the public interest relates to what he describes as the risk of controlled drugs being sold illegally to the public: (p.13): " *Recently, a Pharmacist was caught selling drugs illegally in the start ..is was therefore important in the interests of public safety for all other ethical Pharmacists to raise concerns when controlled drugs records are incorrect..*" His concern is clearly therefore more about the CD registers than the near-miss register.

734. We take into account that the claimant does refer to this as a safety procedure in his disclosure and the respondent's witnesses do not dispute the importance of recording near-misses to ensure the competence of Dispensers. In terms of the character of the interest to be served by the disclosure, Counsel for the respondent does not seek to submit that it is not public in nature, which clearly it is. It potentially involves the safety of all the patients who use that pharmacy, a significant number we conclude, of the public.

735. We conclude that regardless of the degree of risk, and the likelihood of harm, the claimant believed at the time he made the disclosure and it was reasonable for him to believe (although a different view may reasonably be taken) that the disclosure which was concerned with compliance with a safety procedure relevant to all the patients who use that pharmacy potentially, (and which if not followed give rise to a *risk* to their health and safety), is regardless of the level of risk, in the public interest.

The Tribunal conclude that the claimant's claim that he made a protected disclosure on 6 August 2019 is <u>not</u> well founded and is dismissed.

736. Regardless of concluding that the 6 August disclosure was not a protected disclosure, we have nonetheless gone on to consider the allegations that the claimant suffered detriments done on the ground of that disclosure.

Detriments

(1) Removal of the chair : 16 August 2019

Detriment

737. The Tribunal have found that this incident occurred and the Tribunal accept, that this amounted to a detriment. The claimant was upset by the removal of the chair and he was required then to locate and carry his own chair, in circumstances where we have found, he had disability.

Causal link

738. The chair was hidden from the claimant at Acklam by Mr High or Mr Cara, on the instruction of Mr Nath.

739. As set out in our findings, the email of the 6 August 2019 was not more than a minor or trivial influence for the treatment, namely the removal the chair and thus we conclude this detriment was not done on the ground of the email of the 6 August 2019.

(2) Cancellation of his shifts at Acklam Pharmacy on 30 August

Detriment

740. As set out in our findings, the disclosure of the 6 August was more than a minor or trivial influence for the decision that was actually taken on the 7 August 2019, to cancel the claimant's shifts.

741. However, the claimant's complaint is that his shifts were cancelled on 30 August 2019. We have found that his shifts were cancelled on 15 and 27 August 2019 but as set out in the list of issues, he complains that the detriment took place on 30 August.

742. The claimant has failed to establish what if any shifts were cancelled after 30 August and further his evidence is that he registered directly with Locumbay and '*salvaged'* the situation.

743. We conclude that the claimant did not suffer the pleaded detriment. For the reasons set out in our findings of fact, we do not find that the claimant has established on a balance of probabilities, that shifts he was booked on to or had a reasonable expectation of being booked for, were cancelled on 30 August 2019.

744. We conclude therefore that the claimant has not on a balance of probabilities established that he suffered this detriment.

745. Further, as set out in our findings, this decision would have been taken regardless of the disclosure of the 6 August 2019 and therefore any loss he suffered, he would have suffered in any event.

(3) Cancellation of his shifts with the respondent on 18 January 2020.

Detriment

746. The claimant's shifts were cancelled. However, the claimant has failed to identify which shifts were cancelled and therefore what detriment he suffered.

Causal link

747. Although we have found that Mr Sharief was aware of the disclosure of the 6 August setting out the claimant's concerns, we have found that this was something which he paid little attention to because it was '*below his pay grade'*. He had no involvement in the decision to cancel the claimant's shifts on the 7 August 2019 after the email of the 6 August had been sent.

748. Mr Sharief was aware of the 6 August email when deciding to cancel the shifts on the 18 January 2020. His response at the time the August email was received, was

to instruct Ms Gleave to provide the chair the claimant wanted. He had no other interest we accept. in the alleged disclosure.

749. While Mr Nath's feedback of the claimant may have been influenced by the alleged disclosure, what influenced Mr Sharief we find, was the reports (which had substance), about the claimant's work ethic and his performance including the incident over the CD keys and he formed we find a genuine view, that the claimant's performance had become a patient safety issue.

750. This is not a **Jhuti** type situation. Mr Sharief was fully aware of the alleged disclosures the claimant had made: **University Hospital North Tees**. Further this is a detriment claim, the claimant could have issued a claim against Mr Nath personally had he considered that Mr Nath was responsible and thus liable for this act, but he elected not to do so: ***Malik v Centos Securities plc.*** The claimant's immediate response when asked by the Tribunal, who he felt had victimised him, stated that he did not believe it was Mr Sharief but that others had victimised him and influenced Mr Sharief.

751. We conclude that Mr Sharief cancelled the shifts not because of anything to do with the complaints raised in the 6 August 2019 email. That alleged disclosure was not we find a material influence on his decision.

Second Alleged Protected Disclosure – 19 August 2019

Information

752. The claimant was setting out facts in this email, he was not simply making a bare allegation. The pertinent facts were that staff members were failing to record most of their drug errors. They were not carrying out this safety procedure.

753. This email amounted to a disclosure of information, of both facts and allegations.

Was it a disclosure to his employer?

754. The claimant expressly instructed PPK UK to forward this on to the respondent's Superintendent's office. We find this was not done.

755. The claimant relies on the disclosure he made to the respondent under section 43C ERA.

756. The claimant's representative made a number of amendment applications but did not seek to amend this claim or the list of issues during the course of the hearing or even during submissions. The pleaded case and issue identified for the Tribunal, is whether the claimant made a disclosure on 19 August 2019 to the respondent's Head Office.

757. The Tribunal find that the concerns raised in the 19 August 2019 email were not disclosed to the respondent until 23 August 2019 and not via PPR UK but direct by the claimant. Therefore the claimant has not established that he made the disclosure on the 19 August 2019.

758. We have however gone on for completeness, to consider whether in any event, this alleged disclosure would amount to a protected disclosure.

Reasonable belief in the malpractice?

Legal obligation

759. The same reasoning applies as above in relation to protected disclosure 1 to this disclose. We conclude based on the same reasoning, that the claimant even if the claimant did hold a belief that this disclosure showed a breach or likely breach of a legal obligation (which we conclude he did not), taking into account his individual circumstances and holding him to a professional standard when determining reasonableness, it was not *reasonable* for him *to* believe that this disclosure tended to show that the respondent; "*has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject*"; namely a failure to comply with the Regulations or the generally the regulations concerning controlled drugs.

Health and Safety

760. We conclude based on the same reasoning as applied with the disclosure 1 above, that the claimant did not believe and if he did it was not reasonable for him to believe, that this disclosure tended to show that at the time he made it, that the health and safety of any individual *has been, is being or is likely to be endangered*.

Reasonable belief in the public interest?

761. Based on the same reasoning as we applied with disclosure 1; that regardless of the degree of risk, and the likelihood of harm, the claimant believed when he made the disclosure and it was reasonable we conclude for him to believe (although a different view may reasonably be taken) that the disclosure which was concerned with compliance with a safety procedure relevant to all the patients potentially who use that pharmacy, was regardless of the level of risk, in the public interest.

The Tribunal conclude that the claimant's claim that he made a protected disclosure on 19 August 2019 is not well founded.

762. Regardless of our findings that it was not a protected disclosure for the purposes of section 43A ERA we have gone on to consider nonetheless, in the event we are wrong about that, whether in any event, the alleged detriments were done on the ground that the claimant had made the alleged protected disclosure.

Alleged detriments

(1) On 30th August 2019 his shifts at Acklam Pharmacy were cancelled

Detriment

763. As set out in our findings of fact, the decision to cancel the claimant's shifts was made on the 7 August, prior to the alleged disclosure on the 19 August 2019 (which we find was actually made on the 23 August 2019) and therefore we do not find that the decision taken by Mr Nath on the 7 August, was influenced in any way, by the alleged disclosure on the 19 August 2019 (or the actual disclosure on the 23 August 2019).

Causal connection

764. Further, as set out above, the claimant has failed to establish what if any shifts were in fact cancelled on 30 August. Further, as the claimant's evidence is that he *'salvaged'* the situation, we conclude that he did not suffer any quantifiable detriment/financial loss.

(2) On 18th January 2020 his shifts were cancelled

765. Applying the same reasoning, as set out in connection with alleged disclosure 1, we conclude that the decision to cancel the claimant's shifts by Mr Sharief on 18 January 2020 was not influenced in any way by the alleged protected disclosure set out in the 19 August 2019 email, sent to the respondent on 23 August 2019.

766. Mr Sharief concedes that he would have seen that email but that email was sent 5 months before he took the decision to cancel the shifts and we conclude that this did not materially influence his decision on the 18 January 2020.

767. Even had the claimant established on a balance of probabilities that he had made a protected disclosure on the 23 August 2019, the decision to cancel the shifts at Acklam and the shifts on 18 January 2020, was not done we conclude, on the ground of that alleged protected disclosure

Third alleged protected disclosure : 23 August 2019

Information

768. The claimant was setting out facts in this email, he was not just making a bare allegation. The pertinent facts were that staff members were not writing down their drug near misses and further that the controlled drugs register (CD) was '***not legal'*** in that, the staff were not checking what drugs were in the cabinet before making new entries and they were not qualified to ensure correct legal entries were being made.

769. We conclude that this amounted to a disclosure of information, of both facts and allegation.

Was it a disclosure to his employer?

770. This was a disclosure to the respondent's Head Office and thus to the claimant's employer under section 43C ERA..

Reasonable belief in the malpractice?

Legal obligation

771. Counsel for the respondent in his oral submissions concedes that the Regulations impose a legal obligation to keep an accurate CD register. He argues that mistakes happen and that what the claimant had disclosed was what he described as a *'technical breach'*.

772. We conclude that the failure to keep an *accurate account* of CDs is a breach of the Regulations. Section 43B (1)(b) refers to a breach of '*any legal obligation'* and does not distinguish between the seriousness of the infringement.

773. With regards to the training requirements for staff to complete the CD register; the legal requirement relied upon by the claimant is the Regulations or other regulations concerned more generally with controlled drugs. The claimant did not identify within those regulations any breach by the respondent in terms of staff training requirements.

774. The Tribunal conclude that the carrying out however of a check of the CD balance was not a legal requirement for the reasons set out in its findings but good practice.

775. With respect to the requirement to check the CD balance and that staff should have a certain level of training to enter amounts in the CD register, we conclude that the claimant has not established that there was any legal obligation set out under the Regulations or other regulations concerned with controlled drugs. The Tribunal was not taken to any provisions which dealt with these issues in the relevant regulations relied upon.

776. The claimant is a trained, qualified and licenced Pharmacist who was familiar with the Regulations (and was required to be). We conclude that even if the claimant did hold a belief (which we conclude he did not) that this disclosure showed a breach or likely breach of a legal obligation which was not being complied with; we conclude that taking into account his individual circumstances and holding him to a professional standard when determining reasonableness, that he would **not** have *reasonably* believed that this disclosure tended to show such wrongdoing.

777. We however conclude that the claimant did genuinely believe and it was reasonable for him to believe, that actual incorrect entries made in the CD register gives rise to a breach of the Regulations. He refers to the records ***not being legal*** in the email of the 23 August 2019 and the respondent's witnesses concede that a failure to record drugs received or supplied accurately in the register, is indeed a breach of the Regulations.

Health and Safety

778. The alleged belief that this disclosure disclosed a *likely/probable* endangerment to health and safety relates not only to the inaccurate record keeping but the alleged inexperience and lack of training of staff who were completing the CD register.

779. The disclosure was not only that mistakes in the CD register were being made (a breach of the Regulations) but;

- *Staff with barely any training are getting involved in completing the CD register*
- *They do not have the skills to ensure correct legal entries*
- ***No balance checks had been done for weeks.***
- *They 'keep' writing in records without counting the actual controlled drugs*

780. Determination of the factual accuracy of the worker's allegations will, in many cases, be an important tool in helping to determine whether the worker held the reasonable belief that the disclosure in question tended to show a relevant failure EAT in ***Darnton v University of Surrey*****.** We have found that the claimant was correct that errors were being made and he was correct that balance checks had not been done for weeks, which was outside recommended good practice and the respondent's own SOP's.

781. The Tribunal have made findings, that the claimant could have minimised the risk created by any discrepancy in the register by carrying out further checks, if he had genuinely considered that those discrepancies meant that it was it "*likely"* that the health and safety of patient's was endangered.

782. The claimant's evidence is that he tried to investigate why these records were so short of DCs but had to focus on patients coming through the door first; however the claimant emphasised throughout the hearing that as RP he was in charge of the safe and effective running of the pharmacy and he could dictate the flow of work even if that meant keeping patients waiting. We conclude therefore that had he considered that these errors in the CD register gave rise to a risk which was 'likely' to cause harm, he would, could and should have prioritised that further investigation, but he did not.

783. While errors with the CD register may be commonplace, there was more to the claimant's disclosure than CD errors, he was disclosing a lack of training and that balance checks had not been done for weeks.

784. We find that his belief about the absence of balance checks was reasonably held and indeed it was correct that they were not being carried out for weeks. The importance of those checks is supported by the SOPs, the Regulators report and the evidence of Mr Sharief.

785. While the respondent refutes that adequate training was not provided, we accept that the claimant was concerned that the staff did not have the necessary skills or experience and were making errors .

786. Taking a common-sense view, errors in the CD register, combined with concerns over training and balance cheeks, would seem convincingly on an objective basis, to give rise to the sort of situation the legislation was intended to deal with. However, we have reached the conclusion that had the claimant taken steps to establish that these apparent errors were not a mere counting errors and satisfied himself that it was something other than that, only then would it elevate the situation to beyond mere '*risk'*. He did not to do that. He does not state that he believes the errors are not a counting error, he states he had not had time to look into it.

787. The statutory language is cast in terms of 'the *reasonable* belief of *the worker making the disclosure*', not 'the belief of a reasonable worker' which involves (as we have addressed above) applying an objective standard to the personal circumstances of the discloser, and that those with professional or 'insider' knowledge will be held to a different standard than laypersons in respect of what it is 'reasonable' for them to believe.

788. We are not satisfied, that if the claimant believed that the health and safety of any individual/s was endangered, had been or was *'likely'* to be*,* otherwise had he genuinely believed that, we conclude that he would have prioritised that in circumstances where he robustly defended his right as RP to do what he considered he needed to do to ensure the safe running of the pharmacy, whether that meant patients were kept waiting or not.

789. We conclude that the claimant did not believe and if he did, it was not reasonable for him to believe, that the requirements of section 43B (1)(d) had been met.

Public interest

790. The respondent Counsel argues that errors in the CD register happen all the time . He argues the '*public interest'* is engaged when the pharmacist is unable to rectify the discrepancy' and not before.

791. As he put it in his oral submissions, there is no real interest to the public in a technical breach of the Regulations. Whether it gives rise to a public interest depends on seriousness *and risk*, he argues.

792. Counsel for the claimant argues that it cannot be correct that there is an additional burden on a whistle-blower when disclosing breach of a statutory/legal obligation to also show a '*likelihood*' of harm. Whether any harm is '*likely*' she argues is not part of the public policy test under section 43 B ERA. What is ' *likely'* is relevant only to the malpractice, whether the breach is likely or the endangerment to health and safety, and not to the public interest test.

793. Counsel for the claimant submits that just because something does not happen often does not mean the public do not have an interest in it, they have an interest in healthcare professionals being free and able to raise concerns and it creates a second *' likelihood*' hurdle.

794. The Tribunal conclude that there is a public interest in having these Regulations in place and that does not appear to be a matter in contention. The Regulations were introduced to protect the public unregulated or misuse by practitioners.

795. The claimant gave evidence that it was in the public interest to prevent drugs getting *'on to the streets'* to ensure compliance with the Regulations. While that is a worst case scenario, there is we a conclude, a public interest in having the Regulations and in those Regulations being complied with.

796. The claimant when he noticed errors in the register, did not express alarm, he did not immediately contact the manager or Superintendent if he did not have the time himself to investigate, rather he left a message from which we have inferred that he did not consider that a risk to public safety was likely.

797. However, we conclude that just because the public may not have an interest in every error in a CD register does not mean that a disclosure to an employer when errors occur, is not in the public interest. The CD register is an important tool to safeguard public safety but only if that register is treated with sufficient importance, hence the safeguarding of the accuracy of that record by the Regulations.

798. If morphine is not properly regulated and secured and goes missing from the Pharmacy , this (the respondent's witnesses accept) would be a matter of public safety. In that situation, we are not concerned with a defined number or group. The nature of the interests affected, the respondent accepts, are serious. The Regulations are in place to secure drugs which could be harmful and adherence to the Regulations, protects the public at large, from misuse of serious substances. The Pharmacists carry an important responsibility to maintain those standards and safeguard the interests of the public at large and not keeping accurate records is a breach: applying the factors identified as relevant in ***Chesterton Global Ltd***

799. The 'whistleblowing' legislation provides for responsible whistleblowing. The lowest threshold is preserved for disclosures to an employer ; encouraging and protecting those who disclose inaccurate record keeping serves an important public interest. While the seriousness of the failure is not high in terms of probability of actual misuse, it is important to ensure that the errors are identified and action taken promptly.

800. While we accept that some workers may conclude that without further investigation, there is no public interest in disclosing what is likely to give rise to no more than a technical breach of the Regulations, we conclude that the claimant believed at the

time what he was disclosing to the employer, was in the public interest and that it was reasonable for him objectively to hold that belief, although others may not reasonably share that view.

801. It is reasonable to believe that disclosing what the Tribunal accept, is likely to amount to no more than a technical breach, to the employer, of laws which are there to protect public health, is in the public interest .

We conclude that this would qualify as a protected disclosure pursuant to section 43B (1)(b) ERA

Detriments

(1) On 30th August 2019 his shifts at Acklam Pharmacy were cancelled

Detriment

802. As set out above in respect of alleged protected disclosure 2, the decision to cancel the claimant's shifts was made on the 7 August, prior to the alleged disclosure on the 23 August 2019 and therefore we do not find that the decision taken by Mr Nath on the 7 August, was influenced at all by the alleged disclosure on the 23 August 2019.

Casual connection

803. Further, as set out above, the claimant has failed to establish what if any shifts were in fact cancelled and as the claimant's evidence is that he 'salvaged' i.e. rescued the situation, we conclude that he did not suffer any detriment/financial loss.

(2) On 18th January 2020 his shifts were cancelled

821. Applying the same reasoning, as set out in connection with alleged disclosure 2 and based on our findings of fact, we conclude that the decision to cancel the claimant's shifts by Mr Sharief on 18 January 2020 was not influenced in any way by the alleged protected disclosure set out in the 23 August 2019 email.

Fourth alleged protected disclosure 16 September 2019 – disclosure to GPhC

Information

804. For reasons set out in our findings of fact, the claimant had failed to provide evidence on what he wrote on the on-line form to GPhC, or at least detail as best he could, what he disclosed. We accept the respondent's submissions that if the claimant had complained in general terms about a failure to comply with controlled drugs, this would amount to an allegation not a disclosure of information.

805. We also accept the respondent's submissions that the burden of proof is on the claimant to establish he made a disclosure of information and the claimant has failed to provide sufficient evidence about what he stated to the GPhC to enable the Tribunal to make any assessment of whether this was a protected disclosure.

806. Further, as this disclosure was to a prescribed person, pursuant to section 43F the claimant is required to establish that the information disclosed and any allegation in in it are ***substantially true,*** which is therefore an even higher burden for the claimant to satisfy.

807. We conclude that the claimant has not established that he made a disclosure which meets the requirements of section 43F ERA.

808. In any event, the Tribunal have found that the respondent were not aware until the inspection on 6 February 2020 that the claimant had made a complaint and thus there is no casual connection between that disclosure and any alleged detriments.

We conclude that the claimant's complaint that he made a protected disclosure on 16 September 2019 is not well founded.

Fifth and Eight alleged protected disclosure 16 November 2019 and 11 January 2020 : Trentham Branch (list of issues 3.5)

16 November 2019 alleged disclosure

Information

809. The claimant reported wrong CD levels within the CD registry ; "*Wrong CD Levels. Only 340 seen in stock please RP to* ***verify and investigate*****".**

810. The claimant is not only reporting wrong CD levels, he is providing further factual details of what is missing (or rather what he has been able to locate/see).

811. We find that this amounted to a disclosure of facts and thus; a disclosure we conclude of information rather than a bare allegation.

Was it a disclosure to his employer?

812. We conclude that the next Pharmacist on shift would have seen the entry and that it was therefore a disclosure to the employer for the purposes of section 43C ERA. We have found that Ms Akbar however was not personally aware of this disclosure.

Reasonable belief in the malpractice?

Legal obligation

813. The claimant asserts that he reasonably believed that this disclosure, amounted to a breach of a legal obligation.

814. Counsel for the claimant in her written submissions refers to this as a disclosure of information about an *"anomaly* " in respect of the record verbally and via a note.

815. The Regulations require that the '*particulars of every quantity of drug'* is recorded.

816. If the wrong quantities have been recorded this is a breach albeit as the respondent's Counsel submits, only a technical breach potentially.

817. The claimant observed that the register recorded "*wrong CD levels*". That would tend to show a breach of the Regulations. However, he did not on this occasion state in his disclosure, that the CD register was 'not legal' and his comments about the *wrong CD levels* have to be seen in the context of the follow up words; " …*please RP to verify and investigate"*

818. To verify means *to make sure* or demonstrate that something is true, accurate, or justified.

819. Mr. Sharief's undisputed evidence is that 99% of the time, incorrect recordings in the register are due to common errors such as miscounting, and the drugs are present in the premises.

820. The disclosure we conclude, taken it in its full context, is not that there is a breach of the Regulations or that the CD register is ' not legal' but that there *may* be a breach and that the next RP needs to make sure, to check/verify whether there is or there is not.

821. The claimant does not explicitly within this note, allege a breach of the Regulations and although he had previously raised serious concerns with the Superintendent in August 2019 about Acklam, he does not send any emails or raise any concerns in relation to this incident to the Superintendent. He does not identify in the note that it is a serious issue.

822. The reasonable belief requirement was included in the statute to achieve a fair balance between the interests of a worker who suspects there to be wrongdoing and the employer, whose business could be damaged by allegations which turn out to be unfounded or irresponsible allegations.

823. We conclude that when making this disclosure, with the information which the claimant had, he did not genuinely believed or if he did, taking into account his individual circumstances and experience, it was not reasonable for him to believe, that a breach of the Regulations had been or was being committed.

824. We have however considered whether the claimant believed at this point that it was *'likely'* that the respondent would fail to comply i.e. that it was probable or more probable than not.

825. Whether the claimant reasonably believed that the CD register balance was wrong is not the issue, it is whether he reasonably believed that the information disclosed tended to show a breach.

826. In establishing what the claimant's belief was at the relevant time, we have considered the evidence of whether the worker's belief in the implications raised by the disclosure were genuine. He gave evidence that he was on alert because a Pharmacist had sold controlled drugs to the public, however he did not immediately on the 16 November, call the Pharmacy Manager or Superintendent but left a note and a message. This indicates that he did not believe that drugs had left the premises only that this was a *risk* at this stage.

827. Further, the reasonableness test clearly requires the belief to be based on some objective grounds. We consider that at this stage, without an investigation and verification of the drugs in the pharmacy (and the claimants does not assert that he carried out all reasonable checks, he left that to the next Pharmacist on duty), then while there was a risk that the quantities recorded on the CD register were incorrect an drugs were indeed missing, we find that it was no more than a risk, it was not probable and it was not *'likely'* – it was we conclude on the evidence we have heard, actually very unlikely.

828. We therefore do **not** find that the disclosure tended to show a breach of a legal obligation

Health and Safety

829. The claimant alleges that the disclosure tended to show that the health and safety of an individual had been or was being endangered or was likely to be endangered.

However, applying the same reasoning as we have applied in respect of the disclosures above, we do **not** conclude that the claimant reasonably believed that what he was disclosing tended to show that the health and safety of an individual/s had been endangered was being or was likely; at the time he made the disclosure .Nor do we find that such a belief in any event would have been reasonable taking into account his individual circumstances and his experience.

830. If he felt that a patient/s safety was at likely to be at risk, then it would be reasonable to expect the claimant to have taken more immediate action given his responsibilities as RP on duty.

831. We therefore do **not** find that the disclosure tended to show that that the health and safety of any individual/s has been was being or was likely to be endangered.

Public interest

832. While we accept that some workers may conclude that without further investigation, there is no public interest in disclosing what is likely to give rise to no more than a technical breach of the Regulations or no breach at all (because the drugs may be on the premises), we conclude that the claimant believed at the time what he was disclosing to the employer, was in the public interest and that it was reasonable for him objectively to hold that belief.

833. It is reasonable to believe that disclosing what is likely to amount to no more than a technical or where they may be no breach at all, ***to the employer***, is still in the public interest where it concerns safeguards around public health, even where the risk is not significant or even 'likely'. There is a public interest in alerting the employer to the 'anomaly' to prompt an investigation.

We conclude that the claimant's complaint that he made a protected disclosure on 16 November 2019 is not well founded.

834. Although we have found that the 16 November 2019 note and message did not amount to a protected disclosure, we have nonetheless gone on to consider whether there was any causal connection with the decision to cancel his shifts on the 18 January 2020, the pleaded detriment.

Detriments – cancellation of shifts on 18 January 2020

835. The claimant alleges that Mr Sharief cancelled his shifts on the 18 January 2019 and he was influenced in doing so on the grounds of this disclosure on 16 November 2019.

836. On the same reasoning, as set out in connection with alleged disclosure 1, 2 and 3, we conclude that the decision to cancel the claimant's shifts by Mr Sharief on 18 January 2020 was not influenced materially, by the alleged protected disclosure of the 16 November 2019.

837. Mr Sharief was candid and conceded that he knew about the claimant writing in the CD register but did not know how it came to his attention and was not sure whether he was aware of this before deciding to cancel the shifts or not. We have as set out in our findings, accepted his evidence that the claimant identifying errors in the CD register was not something he was concerned about, he considered it the claimant's job as RP to do that.

838. However, as set out in our findings, Ms Akbar although aware of the disclosure on the 11 January 2020, she was not aware of this disclosure and therefore did not report this to HR. Mr Sharief was not aware of this disclosure either, at the time he made the decision to cancel the shifts.

839. Mr Sharief's own evidence in any event, which we have accepted, was that he was angry, not that the claimant was identifying errors in the CD register, but that the claimant was writing his notes in the CD register itself, not as a footnote or in the margin but *scrawled'* across the register. We have found, as set out in our findings, that this is not in accordance with the Regulations or SOPs and that it was an unusual practice. We conclude that Mr Sharief's obvious upset about this practice of writing in the register itself, is separable we consider, from the act of disclosing an error. What we conclude Mr Sharief was upset about and which did influence him, was the manner in which the claimant was recording the errors. We have found that this was not an appropriate way to do so.

840. We conclude that Mr Sharief was not aware of this disclosure and therefore the claimant has established no casual connection between this alleged disclosure and the decision taken by Mr Sharief.

Disclosure 11 January 2020

Information

841. The claimant's case is that he made a disclosure to the local manager on 11 January 2020 . He does not actually set out in his evidence in chief what he said but refers to a note he also left which refers to "*zero stock in the cabinet Respondent Manager to* ***investigate please".***

842. We have found on a balance of probabilities, that the claimant would have said nothing other than what he notes in the register. He is disclosing facts ie zero stock in the cabinet and we conclude this was a disclosure of information ie of facts and not a mere allegation.

Was it a disclosure to his employer?

843. We conclude based on our findings of fact, that this disclosure was made to Ms Akbar and thus to the claimant's employer.

Reasonable belief in the malpractice?

Legal obligation

844. Counsel for the claimant in her written submissions refers to this as a disclosure about controlled drugs being missing and submits that the reasonableness of his belief cannot be undermined because he was not aware of the second drugs cabinet in circumstances where the respondent did not take steps to provide him with the necessary information.

845. We have found however that the claimant was not reasonably diligent in carrying out some provisional investigation before making this entry in the drugs register and indeed, when pointed out to him where the other drugs cabinet was, he noted on the same day that his disclosure was to be ignored.

846. The claimant observed that the register recorded "*zero stock seen"* . That would we conclude, tend to show a breach of the Regulations i.e. drugs have gone out which have not been recorded. However, that has to be seen in the context of the follow up words; " …*Responsible Manager to investigate please".* Based on the same reasoning set out in respect of the alleged disclosure on the 16 November 2019, we conclude that at the time he made the disclosure, without any further investigation, while there was a risk that the quantities recorded on the CD register were incorrect and that the Regulations had been breached, we conclude that it was no more than a risk, it was not probable and it was not *'likely''.*

847. We therefore do **not** find that the disclosure tended to show a breach of a legal obligation

Health and Safety

848. The claimant alleges that the disclosure tended to show that the health and safety of an individual had been, was being or was likely to be endangered, however applying the same reasoning as we have applied with respect to the disclosure on 16 November 2019 above, we do not find that the claimant reasonably believed that this had happened, was happening or was '*likely',* at the time he made the disclosure and nor do we find that such a belief in any event would have been reasonable.

849. We do **not** find that the disclosure tended to show that that the health and safety of any individual/s has been was being or was likely to be endangered

Public interest

850. Applying the same reasoning that we have applied with respect to the 16 November disclosure, we accept that some workers may believe that without further investigation, there is no public interest in disclosing what is likely to give rise to no more than a technical breach of the Regulations or no breach at all (as it turned out to be the case) however, we conclude that the claimant believed at the time that what he was disclosing to the employer, was in the public interest and that it was reasonable for him to hold that belief.

We conclude that the claimant's complaint that he made a protected disclosure on 11 January 2020 is not well founded.

851. Although we have found that the 11 January 2020 disclosure did not amount to a protected disclosure, we have nonetheless gone on to consider whether there was any causal connection with the decision to cancel his shifts on the 18 January 2020, the pleaded detriment.

Detriment

852. The claimant alleges that Mr Sharief cancelled his shifts on the 18 January 2019 and that this decision was influenced by the disclosure on 11 January 2020.

Causal connection

853. We conclude that the decision on 18 January 2021 to cancel the claimant's shifts, was not a response to this alleged protected disclosure on 11 January 2020 but what motivated Mr Sharief's decision, was his view of the claimant's competence and approach to his work and included within that, was the manner in which the claimant was writing in the register. As we have already set out above, we conclude that this is separable from the disclosure itself: ***Martin v Devonshires Solicitor***

854. Given how angry Mr Sharief was about the claimant '*making a mockery'* as he saw of it, of the CD register by making notes in the main body of the register, we conclude that this materially influenced his decision but was not the main reason. The main reason was we conclude, was the feedback Mr Sharief had received from so many managers about the claimant's work ethic, his use of the mobile phone and the loss of the CD keys – a combination of factors which he considered gave rise to a patient safety issues.

855. We conclude therefore that this disclosure on the 11 January 2020, was did not materially influence the decision by Mr Sharief to cancel his shifts.

Sixth alleged protected disclosure: 28 December 2019 (3.6 list of issues) : Hawtonville Branch

Information

856. The claimant reported '*incorrect stock'* in the CD register itself and left a verbal message with the staff. The note in the CD register stated; "*Stock incorrect as only 48 sighted in cabinet. RP* ***manager to please investigate".***

857. It is not alleged that the verbal message added any more detail to the note in the register .

858. The information we conclude is not a bare allegation, it sets out facts as the claimant understood them to be, namely that the stock was 'incorrect' and goes on to identify why ie how much stock of Zomorth he could see/ locate on the premises

859. We find that this amounted to a disclosure of facts and thus; a disclosure we conclude of information.

Was it a disclosure to his employer?

860. This was a disclosure to a member of staff on 28 December 2019 , which it is not in dispute was passed on to the Pharmacy Manager. We conclude that this was a disclosure to the employer pursuant to section 43C ERA..

Reasonable belief in the malpractice?

Legal obligation

861. We do not consider it necessary to repeat our reasoning as set out above in respect of disclosure 16 November 2019 (above), which applies equally to this disclosure. Although the claimant alleges he carried out some investigation, his disclosure includes a request that the RP investigate. The claimant does not allege a breach of the Regulations in his disclosure and although he had previously raised serious concerns with the Superintendent in August 2019 about Acklam branch, he does not send any emails or raise any concerns in relation to this incident.

862. We conclude that at this stage, without further investigation and verification of the drugs in the pharmacy (and the claimant does not assert that he carried out all reasonable investigation, hence the request that the next RP investigate), while there was a risk that drugs were missing, we find that it was no more than a risk, it was not probable and it was not *'likely'.*

863. We therefore do **not** find that the disclosure tended to show a breach of a legal obligation

Health and Safety

864. Based the same reasoning we have applied in respect of the disclosure on 16 November 2019 (above), we do not find that the claimant believed and if he did, based on his experience and qualifications, it was not reasonable to believe that this disclosure tended to show that the health and safety of any individual/s had been, was being or was ' likely', to be endangred.at the time he made the disclosure and nor do we find that such a belief in any event would have been objectively reasonable.

865. We do **not** find that the disclosure tended to show that that the health and safety of any individual/s has been was being or was likely to be endangered

Public interest

866. Applying the same reasoning that we have applied with respect to the 16 November disclosure, we conclude that the claimant believed at the time that what he was disclosing to the employer, was in the public interest and that it was reasonable for him to hold that belief.

We conclude that the claimant's complaint that he made a protected disclosure on 28 December 2019 is not well founded.

867. Although we have found that the 28 December 2019 disclosure did not amount to a protected disclosure, we have nonetheless gone on to consider whether there was any causal connection with the decision to cancel his shifts on the 18 January 2020, the pleaded detriment.

Detriments

868. The claimant alleges that Mr Sharief cancelled his shifts on the 18 January 2019 and he was influenced in doing so by this disclosure. Mr Sharief accepts that he decided not to use the claimant's services again. However, the claimant has failed to identity what shifts were cancelled and what if any financial loss he suffered. We conclude that he has not actually therefore established that he suffered a quantifiable financial detriment.

Casual connection

869. We conclude that the decision on 18 January to cancel the claimant's shifts, was not a response to this alleged protected disclosure on 28 December 2019. Based on our findings of fact, we conclude that when Mr Sharief was informed by Mr Rahim of this disclosure, this added to his opinion that the claimant was incompetent. He was not annoyed that he had raised an issue with the CD registry but we have found that Mr Sharief considered that the claimant had failed to count stock properly.

870. We conclude for the reasons set out in our findings, that Mr Sharief, cancelled the claimant's shifts because of an accumulation of concerns with his performance such that he considered it had become a patient safety issues.

871. We are mindful that Mr Sharief could not recall the last discussion he had with Mr Hampson and whether it was a complaint about the claimant and if so what however,

we are satisfied on the evidence that Mr Sharief, on the feedback he had received, believed that the claimant had a poor work ethic and was not competent as an RP.

872. We are satisfied that regardless of whether anyone reporting concerns to Mr Sharief was upset that the claimant had raised issues with the CD registers, Mr Sharief was not influenced by the disclosures which the claimant had made about CD errors or drug near misses but his decision was based on the genuine opinion he had formed about the claimant's competence. He could have cancelled the claimant's shifts after receiving the email of the 23 August, but he did not.

873. We conclude that even if part of Mr Sharief's decision had been influenced by this disclosure rather than the manner of it and what he felt it meant about the claimant's competence (which we do not conclude was the case), we conclude that it would have made no difference to the outcome . This, however, would be relevant only to remedy and not to causation.

Seventh alleged protected disclosure: 7 January 2020 (3.7 list of issues) : Queensway Branch

Information

874. We find that the note the claimant left did not in itself amount to a disclosure of information however, taking alongside the fact that he had mentioned verbally that controlled drugs were missing (confirmed by the evidence of Ms Smith), we conclude that the claimant had made a disclosure of information, namely he had disclosed facts ie that he had noticed controlled drugs were missing from the record, and that this amounted to a disclosure of information.

Was it a disclosure to his employer?

875. This was a disclosure of the note to the Pharmacy Manager and the verbal message to the Manager via Ms Smith. It was a disclosure we conclude therefore to the employer.

Reasonable belief in the malpractice?

Legal obligation

876. The claimant asserts that he reasonably believed that this disclosure, amounted to a breach of a legal obligation. The claimant did not however state in his note or allege that he mentioned verbally, that the records were in breach of the Regulations. The concern he communicated in the note was for the manager to " *ensure*" i.e. to check that they were compliant.

877. We do not consider it necessary to repeat our reasoning as set out above in respect of disclosure 16 November 2019 (above), which applies equally to this disclosure. Although the claimant carried out some investigation, his disclosure includes a request that the Manager investigate to ensure ie check that the records are legal.

878. We conclude that at this stage, without further investigation, while there was a risk that the quantities recorded on the CD register were incorrect and drugs were missing, we find that it was no more than a risk, it was not probable and it was not *'likely'.*

879. We therefore do **not** find that the disclosure tended to show a breach of a legal obligation

Health and Safety

880. Applying the same reasoning we have applied in respect of the disclosure on 16 November 2019 (above), we do not find that the claimant believed and if he did, based on his experience and qualifications, it was not reasonable to believe that this disclosure tended to show that the health and safety of any individual/s had been, was being or was 'likely', to be endangeredd.at the time he made the disclosure and nor do we find that such a belief in any event would have been reasonable.

881. We do **not** find that the disclosure tended to show that that the health and safety of any individual/s has been was being or was likely to be endangered.

Public interest

882. Applying the same reasoning that we have applied with respect to the 16 November disclosure, we conclude that the claimant believed at the time that what he was disclosing to the employer, was in the public interest and that it was reasonable for him to hold that belief even though it was unlikely that any drugs would actually be missing.

883. **We conclude that the claimant's complaint that he made a protected disclosure on 7 January 2020 is not well founded.**

884. Although we have found that the 7 January 2020 disclosure did not amount to a protected disclosure, we have nonetheless gone on to consider whether there was any causal connection with the decision to cancel his shifts on 13 and the 18 January 2020.

Detriment

(1) Cancellation of the shifts are Queensway on 13 January 2020

885. As set out in our findings, the claimant's shifts were cancelled on the 13 January 2020 by Ms Smith, however the claimant has failed to give evidence in connection with which shifts were cancelled or when he had expected to work at Queensway again. He had only worked at this branch about one shift every month and therefore based on that information, he would on a balance of probabilities, not work at this branch again until February 2020, by which time Mr Sharief would decide not to use his services again in any branches.

Causation

886. We conclude that a more than minor or trivial influence on the decision to cancel his shifts at Queensway by Ms Smith, was the alleged disclosure about the CD register on the 7 January 2020. However, in terms of any losses attributable to this decision, the decision was taken by Mr Sharief not to retain the claimant's services and on a balance of probabilities, the claimant would not have expected to work at Queensway again until after this decision had been implemented by Mr Sharief and thus suffered no financial loss as a consequence was suffered by the claimant.

(2) Cancellation of shifts on 18 January 2020

887. Mr Sharief accepts that he decided not to use the claimant's services however as addressed above, the claimant has not established what if any shifts, he would have worked but for this decision and thus not established what detriment he actually suffered.

888. We conclude in any event, that the decision on 18 January to cancel the claimant's shifts, was not materially influenced by the alleged protected disclosure of the 7 January 2020.

889. We conclude for the reasons set out in our findings, that Mr Sharief cancelled the claimant's shifts because of an accumulation of concerns with his performance about his competence and work ethic and belief that it had become a patient safety issues. That was his motive and what was operating on his mind at the time.

890. There had been a number of concern's raised about the claimant's work ethic, about his use of the mobile phone, about the loss of the CD cabinet keys and we conclude that even if his decision had been influenced in more than a trivial way by the alleged disclosure of the 7 January 2020 about the CD register (which we do not find is the case), we conclude that it would have made no difference to the outcome, which would be relevant only to remedy however, and not to causation.

Conclusions and Analysis - Harassment claims : section 26 EqA

First Allegation: Taking away the chair on the 16 August 2019.

Was it unwanted conduct ?

891. By the 6 August 2019, we find that the respondent had knowledge (actual or constructive), that the claimant had a disability. Mr Nath was certainly aware that the claimant had a spinal/back problem and that he was using a chair to help relieve the effects of the impairment.

892. Mr Nath gave instructions to remove the chair on the 16 August 2019 and he did so knowing that this was not with the agreement of the claimant ie it was unwanted conduct, hence why it was to be 'hidden'

Did it have the prescribed purpose or effect ?

893. Mr Nath knew about the claimant's need for the chair, and while he may not have intended to violate the claimant's dignity at work, he was not we find sympathetic to his condition and his conduct had that effect .

894. In circumstances where the claimant was the most senior person in the pharmacy, he had communicated his need for what was in effect an auxiliary aid and had expressly raised the provision of a chair with HR, to have the chair hidden by staff and have to hunt for another and then carry it down stairs himself to his work station, unaided, we found it was reasonable for that conduct to have the effect of violating his dignity at work.

Was it related to a relevant protected characteristic?

895. Mr Nath knew why the needed the chair and he instructed it be hidden, it was related to his disability. He gave the instruction to remove the chair which he believed he the claimant required regardless of what the impact would be, whether his motivation was to force the claimant to work faster because he believed that he was lazy, the

removal of the chair was related to the claimant's disability and this claim therefore would subject to the issue of jurisdiction, is well founded

Second Allegation : Taking away the chair on the 7 January 2020

Was it unwanted conduct ?

896. As set out in our findings, Ms Smith was aware that the claimant was disabled or at least had a problem with his back and that is why he would use a chair.

897. Ms Smith removed the chair without the claimant's consent and put it outside. That conduct was unwanted.

Did it have the prescribed purpose or effect ?

898. Ms Smith we have found, knew about the claimant's need for the chair, and while she may not have intended to violate the claimant's dignity at work, her conduct was unsympathetic and her conduct had that effect and the claimant felt belittled. This was a one off incident by Ms Smith. There is no link between her conduct and that of Mr Nath. The claimant complained about the removal of the chair however he does not allege that he was not prepared to work with Ms Smith and at the Queensway branch again.

Was it related to a relevant protected characteristic?

899. Ms Smith knew why the claimant needed the chair and that this was related to his disability. The removal of the chair was related to the claimant's disability and this claim therefore is, subject to the issue of jurisdiction, well founded.

Application of time limits.

Was the conduct extending over a period of time and thus to be treated as done at the end of that period under section 123 (3) (a) EqA?

900. The respondent Counsel submits that both acts are out of time and thus any continuing act argument 'hardly avails the claimant'. The claimant does not dispute that the acts are outside the primary time limit but it remains relevant to consider the extent of the delay and thus to what extent they fall outside the time limit.

901. The first alleged act of harassment was carried out by Mr Cara on the instruction of Mr Nath on 16 August 2019 at the Acklam branch. The claimant complains that his chair was again removed, almost 5 months later, this time at another branch by another employee of the respondent, Ms Smith

902. Applying the guidance in ***Hendricks*** and ***Aziz*** to the facts of this case, although not a decisive factor, different individuals were involved in the alleged acts and the claimant does not assert that there was any climate or culture of discrimination or that this formed some generalised policy of discrimination. Indeed Mr Sharief had given instructions to HR to inform the manager, Mr Nath to provide a chair and Ms Smith was told to do so . Mr Sharief himself uses a chair because of a foot problem and another member of staff at Acklam uses a chair because of a disability.

903. On the facts, the Tribunal do not find that these two acts, carried out at local level by two different individuals, in different positions, a number of months apart in

circumstances where they had been told to provide the chair, amounts to conduct extending over that period.

904. The Tribunal find that the claims are separate acts .

16 August 2019 incident

905. There is no presumption of extending the time limit: **Robertson v Bexley**.

The length of and explanation for any delay

906. The claimant does not allege that he made any effort to check what the time limits were before January 2018. He would, of course, not have known as at 16 August 2019 that there was going to be other potential acts of alleged harassment and yet he had made no effort, according to his evidence, as at 16 August 2019 and before January 2020 to check what the time limits were and to take any steps to issue a claim.

The extent of any prejudice

907. In terms of the prejudice to the claimant, the claims have merit (as set out in our analysis above) however the remedy in respect of each separate act would be limited to injury to feelings and would not be particularly significant.

908. The claimant argues that there is no prejudice to the respondent by the delay, however in terms of the 16 August 2019 claim, Mr Cara was a material witness to what took place however he was unwilling to attend to give evidence or prepared to submit a witness statement, necessitating the discharge of the witness order. The reason the respondent has given, is that he was concerned about his recollection of events.

909. Ms Bryony Gleave who passed on the instruction of Mr Sharief to Mr Nath, is no longer employed by the respondent.

910. The passage of time has we find, on a balance of probabilities, had an impact on the evidence the respondent has been able to produce and there is an absence of written records including by HR to assist the respondent .

911. The claimant was we find vociferous in defending his rights and his position during his work with the respondent. It was a one off incident on 16 August and while we do not trivialise what took place, the claimant continued to work for many more months for the respondent and was prepared to work at Acklam branch after this event.

912. The claim was not issued until 9 months after the incident on the 16 August 2019.

913. The burden is on the claimant to convince this Tribunal that it is just and equitable to extend time. We are not convinced.

914. The claimant we find had an appreciation of his rights, he had the resources and intellect to find out what his rights were and made an informed choice about whether he wanted to pursue any action. He chose to do so in a timely manner, not until his working relationship with the respondent was brought to an end and even then he waited several months to contact Acas.

915. Despite the merit in the claim, that is of course based on the evidence the respondent has been in a position to present, which we find on balance, has been impaired by the passage of time.

916. Considering the relative prejudice to the parties and the absence of any good reason for what is a significant delay, we are not satisfied that it would be just and equitable to extend time.

The claim is therefore dismissed as being out of time.

7 January 2019

The length of and explanation for any delay

917. In terms of the incident of the 7 January 2020, it was issued approximately 7 weeks out of time, that is also not an insignificant period and there is no good reason for the delay.

Prejudice

918. There is prejudice to the respondent in that Hazel Smith has left the employment of the respondent and is a reluctant witness who was not prepared to attend to give oral evidence. There are no records of the discussion with Ms Smith and her Manager or with Mr Hampson.

919. The allegation of the removal of his chair is not an insignificant act, however it was a one off incident and the claimant continued to work for the respondent and was prepared to continue to work with Ms Smith, who prior to this incident he had clearly found to be cooperative and helpful. The award for injury to feelings is therefore not likely to attract a significant amount by way of compensation.

920. We have however considered that Ms Smith remained employed until November 2020 and was willing to provide a witness statement. Her witness statement did not provide a very detailed account of events however, the respondent had ample time to prepare a fuller account of events.

921. On balance we consider that given the length of the delay, the relative prejudice and the merits of the claim, we consider that it is just and equitable to extend time to allow the claimant to bring this claim.

Conclusion

922. **The Tribunal has <u>not</u> exercised its discretion to extend time in respect to the harassment claimant related to the claimant's disability and the removal of the claimant's chair on the 16 August 2019. That claim is struck out as being out of time.**

923. **The Tribunal has exercised its discretion to extend time in respect to the harassment claimant related to the claimant's disability and the removal of the claimant's chair on the 7 January 2020. That claim is well founded and succeeds.**

Conclusion – time limits - section 47B ERA claims

924. The acts of detrimental treatment pursuant to section 47B ERA complained of occurred between 16 August 2019 and 18 January 2020. If they formed a series of similar acts, then the last act was 18 January 2020.

Were the acts part of a series of similar acts of failure to act to which the complaint relates under section 48 (3) (a) ERA?

925. The claimant alleges that all of the acts were done on the ground that the claimant made protected disclosures with the final act of the 18 January 2020 brought in time.

926. We have considered pursuant to ***Arthur v London Eastern Railway Limited*** what evidence there is to link the 13 January 2020 and 18 January 2020 acts (which are within time) with the earlier acts including who committed them, what connection there was between the alleged perpetrators, including whether their actions were organised in some way and why were they done, i.e. were they done on the grounds of a protected disclosure.

927. There is a significant time lapse between the acts committed in August 2019 and the acts in January 2020. The acts in August were carried out by Mr Nath, he had the authority to make decisions which affected his own branches and he did so. Although he sought the assistance of Mr Sharief in August 2019, Mr Sharief was not prepared to assist him, considering it was not a matter he needed to get involved with. As set out in our findings, Mr Sharief did not play any part in the decision to carry out the detriments complained of in August 2019 which were committed by Mr Nath.

928. As set out in our findings, Ms Smith then in January 2020 made a decision to cancel the claimant's shifts and there is no finding that this involved Mr Sharief.

929. The actors were making decisions independently of each other. There is no evidence that Mr Sharief was involved in the earlier alleged acts of detrimental treatment prior to his direct involvement in the decision he took on 18 January 2020.

930. The acts also related to different alleged protected disclosures, although the allegation is that Mr Sharief took on board feedback from the various Managers to whom the alleged protected disclosures were made, as we have found, his decision was not influenced by any of the alleged protected disclosures.

931. We do not find that on the facts of this case, the detriments in August 2019 form a "*series of similar acts"* with the events of January 2020.

Was it <u>reasonably practicable</u> to bring the claims before the end of the period of three months being with the date of the act or failure to act to which the complaint relates or, where that act is part of a series of similar acts or failures, the last of them under section 48(3)(b)?

932. The claimant complained to his regulatory body in September 2019 while he was still working for the respondent. He was also raising complaints internally. He was therefore not reluctant to raise complaints whilst still working for the respondent internally and externally. Even if the Claimant had not wanted to upset his relationship with the respondent at that time, the Tribunal find he could have presented the claim on or soon after the 18 January 2020 however, he waited until May 2020.

933. The claimant is an intelligent, highly qualified individual with the capacity to understand legislation. He took no steps to seek legal advice expeditiously, even

though it is clear in the concerns he raises, that he has an understanding of what constitutes harassment and disability discrimination.

934. The claimant we conclude made a choice not to pursue these claims. This is not a claimant who he did not have the intellect or resources to find out how to pursue a claim, if he was minded to do so.

935. It was *reasonably practicable* to bring the claims in time but for whatever reason, we conclude that the claimant chose not to do so.

936. The complaints about the detriments which took place on the 16 and 30 August 2019 must be struck out as they were brought out of time and it was reasonably practicable for the claimant to bring the claims in time. The claims which are in time, are however, for the reasons set out above, not well founded and are dismissed.

Remedy

937. The only claim which succeeds is the claim of harassment in respect of the incident on the 7 January 2020. Orders in relation to remedy will be sent out to the parties.

Employment Judge Broughton

Date: 28 November 2021

JUDGMENT & REASONS SENT TO THE PARTIES ON

10 December 2021

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FOR THE TRIBUNAL OFFICE

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