EMPLOYMENT TRIBUNALS

Claimant:	**Dr N Bhatt**
Respondent:	**University Hospitals Bristol and Weston NHS Foundation Trust**
Heard at:	**Bristol**
On:	13 September 2021 (reading), 14, 15, 16, 17 and 20, 21, 22 September (evidence), and 28 October 2021 (submissions). 6 December 2021, 19 January 2022 (Deliberation and writing), 4, 7 and 10 February 2022 (writing).
Before:	Employment Judge Midgley

Representation

Claimant:	Mr S Butler, Counsel
Respondent:	Miss E Misra, Counsel

RESERVED JUDGMENT

1. The claimant's dismissal was procedurally unfair and the claim of unfair dismissal contrary to s.111 ERA 1996 is well founded and succeeds.

2. The claim that the claimant's dismissal was a detriment contrary to s.47B ERA 1996 is well founded and succeeds.

3. The claimant was subjected to a detriment contrary to s.47B ERA 1996 through the presentation of a collective grievance against him (on the limited basis detailed in the reasons) but the claim was brought outside of the statutory time limit, the Tribunal does not have jurisdiction to hear it and it is dismissed.

4. The claim that the claimant's dismissal was contrary to s.103A ERA 1996 is not well founded and is dismissed.

5. The claim that the claimant was dismissed contrary to s.27 EQA 2010 (on the limited basis detailed in the reasons) is well founded and succeeds.

6. The claims of direct race discrimination, and all other claims under s.47B ERA 1996 and s.27 EQA 2010 are not well founded and are dismissed.

7. The remedy to which the claimant is entitled, including determination of any reduction to the award of compensation pursuant to sections 49(6A), 122(6),

and 123(6) ERA 1996, will be determined at a one-day remedy hearing, notice of which will be sent to the parties.

REASONS

Claims and Parties

1. By a claim form presented on 11 December 2019, the claimant brought claims of unfair dismissal; automatically unfair dismissal and detriment on the grounds of having made a protected disclosure; direct race discrimination, and victimisation (relying on the protected characteristic of race). The proceedings included other claims, but they have since been withdrawn or settled and so dismissed.

2. The claimant was employed by the Western Area Health Trust as a Consultant in Breast Imaging within the Radiology department. Following the closure and merger of Weston Hospital the correct respondent is now University Hospitals Bristol and Weston NHS Foundation Trust. Following a disciplinary hearing which was held on 9 August 2019 the claimant was summarily dismissed for gross misconduct on 16 August 2019.

Procedure, Hearing and Evidence

3. The parties had agreed a bundle (referred to as the "Core Bundle") of 1827 pages. In addition, the claimant had prepared a supplementary bundle of approximately 3000 pages.

4. The claimant had prepared a 32-page statement and gave evidence by affirmation.

5. The respondent had prepared statements from the following, all of whom (with the exception of Miss Taylor) gave evidence:

    5.1. Jackie Smith

    5.2. Dr William Hicks

    5.3. Dr Peter Collins

    5.4. Harvey Dymond

    5.5. David Major

    5.6. Phil Walmsley

    5.7. Matthew Joint

    5.8. Kirsty Taylor.

6. Miss Misra invited me to read Miss Taylor's statement and afford it the weight I deemed fit given she was not called to give evidence.

7. In addition, I was assisted by the following documents which had been prepared by Counsel in accordance with the case management orders: a chronology, cast list, and list of abbreviations, and a reading list of key

documents.

8. The hearing was conducted in person. It had initially been listed for 15 days, but due to ACAS misinforming the Tribunal that the case had settled, it was necessary to relist it, and only 10 days could be offered. In the event, evidence was heard over 7 days, and submissions on a further day in October 2021.

9. The first day was used as a reading day. The parties were told that I would only have time to read the pleadings, the statements, and the documents on the core reading list, and accordingly, they should refer to any document upon which they relied in cross-examination or in supplementary questions with their own witnesses. It was not possible in the time allocated to read all the documents referred to in the statements: by way of example, the investigation report produced by David Major consisted of a 100-page report to which there were appendices (including transcripts of interviews with the witnesses and the claimant) which exceeded 2000 pages in total.

10. In consequence I required counsel to undertake the following tasks to assist me: jointly to produce a statement of agreed facts; the claimant's counsel had to identify any document or witness evidence from which it was argued I should draw an inference of discrimination, and the respondent's counsel had to identify in respect of each alleged act of misconduct levelled at the claimant the specific reference or document in bundle which Mr Walmsley relied upon in reaching his decision to dismiss, but identifying the most serious examples, rather than every example. I was greatly assisted by both counsel in that manner and commend them both for effort they clearly put in to assist the Tribunal in that regard and in other, unrequested, ways, for example by agreeing approaches out of court. Their written submissions were comprehensive, detailed, and helpful.

11. I regret that despite all of that assistance, given the sheer volume of information to be read and carefully considered, this Judgment has been so long in its promulgation. In addition, it was delayed in November when I was unwell and self-isolating for long periods. I recognise that the delay will have caused anxiety to the parties and apologise for it.

The Issues

12. The Issues were identified in the Case Management Orders of EJ Roper on 28 July 2020. Given their length, they are not repeated here but rather are attached to the Judgment as Schedule 1.

Factual Background

13. I do not propose to set out a full chronological background of events to the claims, but only those matters which are pertinent to the allegations and/or which the claimant argued entitled me to draw an inference in support of his claims of discrimination or unlawful protected disclosure detriment or dismissal.

<u>The Radiology Department</u>

14. On 14 July 2014 the claimant commenced employment as a general

Consultant Radiologist at the Western General Hospital. There is no dispute that he was the only radiologist specialising in breast imaging within the Radiology Department ("the Department"). Initially he was employed on a full-time basis. The claimant is of Indian heritage.

15. The Department was at the material time a very small department consisting of five substantive Consultants, including at varying times the claimant, Dr William Hicks, Dr Gupta, Dr King, Dr O'Brien, and Dr Christopher Cook (who was a Specialist Interventionist Radiologist), headed by a Clinical Lead. There were three other substantive Consultants, one of whom only worked part-time on the hospital site.

16. Ms Sue Sanderson was the Radiography Service Manager; and Jane Baker her deputy.

17. Mrs Jackie Smith became the Diagnostic Imaging Manager in May 2015, with clinical specialities in ultrasound and mammography. She had responsibility for ensuring that all Radiographers, Radiographic Assistants, and clerical staff were competent, and that the Department met quality standards. Initially she worked with the claimant conducting mammography imaging.

18. Mrs Sarah Venn Adams was a Senior Radiographer and Lead Mammographer and, in August 2018 was appointed as the MRI Lead and Specialist Radiographer. In that role she was responsible for leading the mammography service, overseeing approximately seven members of staff (including Kirstie Taylor, a Radiology Assistant), ensuring protocols were followed, and ensuring that the department was meeting reporting requirements.

'Never Events' in 2014.

19. On 22 September 2014 a female patient attended the claimant's clinic following a discussion of her condition at a Multi-Discipline Team Meeting ("MDT") when she was referred for an ultrasound and a biopsy. At the time she was unaware of the Trusts' suspicion of cancer. The clinic was very busy, and the form which had been attached to the patient's notes and which recorded the procedure that was to be conducted was missing. The claimant did not believe it was appropriate to make the patient wait while he rechecked the referral and so performed a wire localisation in preparation for surgery. The patient had not provided informed consent for the procedure as she was unaware of the cancer. When the error was discovered both the claimant and the radiologist were open and honest with the patient and offered her a full apology. She was expedited for surgery the following day. The patient was content with the outcome.

20. On 7 October 2014 a further Never Event occurred. A patient was admitted to the claimant's clinic following an MDT referral for the insertion of a guide wire prior to surgery. The patient's hospital and Avon Breast Screening ("ABS") notes were, in accordance with the practice at the time, not provided to the clinic in readiness for that appointment. The exact location of the detected lesion was not identified on the breast diagram on the request card, and the precise location for the wire was difficult to ascertain from the ABS mammogram and ultrasound images. In the event the claimant placed the

wire in the wrong area, and in consequence when the patient attended the surgery the wire had to be removed and a further wire inserted following a further mammogram. The senior breast surgeon spoke to the claimant after the incident and felt that he demonstrated a lack of remorse for that incident.

21. At the hearing, the claimant accepted that he placed the wire in the wrong position but argued that there were 20 people involved but he was the only individual who was subject to a Never Event investigation, which both he and the respondent regarded as debatable (in the sense of being an unjust categorisation), a view that was shared at least by Dr Gavin Stoddard, the Lead Clinician (as detailed in the meeting notes of the 12 February 2016, see below).

22. The consequence of the two Never Events was that the General Medical Council ("GMC") conducted a fitness to practice investigation of the claimant, and the claimant was subjected to an interim order which placed restrictions on his ability to practice. The order lasted for two years whilst the GMC investigation was conducted. It concluded that there was no case to answer in relation to his fitness to practice, and all restrictions were lifted in 2016.

23. The claimant reduced his hours, ceasing his work at the North Bristol Trust, to work four days a week, Monday to Thursday, on an 8 Programmed Activity ("PA") basis; each PA being 4 hours. Dr Hicks did not work Mondays, and as the claimant left the department by 10am on Tuesday as he had 1.5 SPA study time allocation, his primary personal interactions with Dr Hicks were on Wednesdays.

24. The GMC investigation and restrictions had a number of profound effects on the claimant. First, it significantly affected his mental health; his reduction in hours was partly a response to that, and partly to enable him to pursue his legal studies (see below). Secondly, it led him to develop a deep sense of grievance and distrust of his colleagues. Thirdly, it led him to perceive that those that he worked with (both clinicians and managers) were racist in the sense that they would use Asian consultants as a scapegoat in any clinical incident. That mindset arose because the claimant believed that the two Never Events had been caused by the pressure that was placed upon him by his managers to ensure that patients on his clinical list were seen and their procedures performed, irrespective of whether there was sufficient information or sufficient time for him to do so safely or appropriately. In essence he felt that the balance between reducing waiting times and safe clinical practice had been unsafely skewed in favour of the former. In particular, the claimant was concerned by the practice of double booking his clinical lists by transferring patients who could not be seen by others. Furthermore, during the process of collecting information through clinical discrepancy meetings for the purposes of the GMC investigation, the claimant noted that he had the lowest error rate in the Department. That further fuelled his perception that there was a different approach taken by the Trust in respect of white consultants, on the basis that the claimant's colleagues who had a high error rate had never been referred to the GMC to his knowledge.

25. The consequences of those matters were particularly far-reaching and have a significant impact upon the events that form the subject of these claims.

26. Firstly, the claimant's GMC supervisor advised the claimant that if he believed that any practice was unsafe or exposed a patient to clinical risk, he should refuse to participate in it and advise his managers accordingly. In order to better understand his potential liabilities in that context and more widely, the claimant undertook a law degree on a part-time basis between 2016 and 2018, and then commenced the legal practice course on a part-time basis in 2018.

The 2016 agreement and PD 7.1 Datix 30 September 2015

27. Secondly, the claimant was particularly sensitive in circumstances where he perceived that his clinic was overbooked, or he was pressurised to see patients when there was insufficient time for the procedure for which they have been referred. That led him to be both truculent and short, at times to the point of aggression, with the administrative staff who were responsible for the clinical lists.

28. In consequence, by way of example, on 30 September 2015 the claimant raised a Datix in relation to the practice of double booking patients for ultrasound, and, on 5 October 2015, the claimant emailed Laura Beardshaw, the (Radiology) Clerical Services Manager, stating that he would "decide how I run my clinic" not Mo Swinscoe, the General Manager Clinical Support, that under no circumstances should any clinical list be double booked or "the person booking it will have to do it," and that if the matter were repeated he would escalate it to the Care Quality Commission ("CQC"). The respondent accepts that was a protected disclosure. Mrs Smith was aware of it.

29. In December 2015 the claimant emailed the CQC raising concerns that the respondent had failed appropriately to respond to the Datix he had completed in relation to the overbooking of his clinics.

30. In consequence of his email to Mrs Beardshaw, on 12 February 2016, the claimant attended a meeting with Dr Gavin Stoddard, the Lead Clinician, Laura Beardshaw, and Jane Baker, the acting Radiology Manager. The purpose of the meeting was to discuss how the communication between the claimant and the radiology staff (and in consequence their working relationship) could be improved and supported.

31. Dr Stoddard accepted at the outset of the meeting that the claimant's four PAs were "insufficient to cover the workload", and that the claimant was regarded "most of the time" as being "very caring and helpful with patients and staff," but said that on occasion he could be perceived, particularly by the junior radiographers and clerical staff, as being "uncommunicative or intimidating." Two incidents giving rise to those views were discussed. It was agreed that breast CT and MRI cases would be outsourced to reduce the claimant's workload; secondly that the claimant would raise any concerns with issues regarding his clinical lists, appointments, urgent cases or bookings with Mrs Beardshaw, and that he would not approach other clinical staff in the first instance; and that the claimant was to raise any incidents of poor practice by the junior staff with Mrs Beardshaw, Mrs Baker or Dr Stoddard, rather than raising it directly with those involved. Thirdly, the Trust would look at sourcing a locum consultant to cover the claimant's workload when he was on leave or absent with sickness, so as to avoid the situation where the claimant returned

from leave to an excessive workload. Lastly, the claimant was to be referred to occupational health to support his mental recovery. The meeting and the steps proposed were reasonable and supportive.

Protected Disclosure 7.2 report to the CQC 15 February 2016

32. On 15th February 2016 the claimant made a telephone referral to the CQC in which he complained that the respondent had an unsafe practice of double-booking clinics. On the same day at 8:25am, the claimant emailed Dr Stoddard informing him that he had taken that action because the practice of double booking had continued, and the staff involved had stated "it had to be done". For the reasons set out in the conclusions below, this was a protected disclosure in accordance with section 43F(1)(ii) ERA 1996.

33. The claimant continued to struggle with persistent anxiety, both because of the work-related matters, and as a consequence of the pressures of his home life (he was the carer for his wife who was also ill) and was referred to a counsellor by his GP. The counsellor suggested that to avoid conflict and to avoid being placed under pressure whilst at work, the claimant should simply leave the workplace once he completed his existing workload. The claimant adopted that approach thereafter. However, the consequence of that practice was a perception amongst the radiography department that the claimant was "working to rule," and was not available to provide advice and support to the junior members of the radiography team.

Breast Seroma Drainage

34. In or about the summer of 2016, the claimant developed a practice of using Pigtail catheters to drain fluids from seromas which had occurred following breast surgery. That was a practice that had been used in respect of abscesses in other parts of the body, but not previously in relation to the breast. The claimant discussed the practice with Rachel Ainsworth, and Nick Gallegos, a consultant breast surgeon at the Trust.

35. In approximately August 2016, Mr Swinscoe, the General Manager - Clinical Support, instructed Jackie Smith, the Diagnostic Imaging Manager, to investigate the practice to understand the clinical pathway that it would affect, and the relevant governance and budgetary issues which arose. Mrs Smith approached the claimant during a clinic and instructed him to stop performing the pigtail catheters drainage procedure, stating that it was unsafe, and required him to provide evidence of its safety. The claimant regarded Mrs Smith's interruption of his clinic as a thoroughly improper, discourteous, and unprofessional act, and her enquiries as an illegitimate and unlawful imposition on his clinical practice. The exchange therefore rapidly became heated: the claimant responding angrily, shouting at Mrs Smith that she should never interrupt his clinic; Mrs Smith declaring that the procedure was unsafe, and it was merely a matter of chance that there had been no patient complaints about it to that point. She demanded that the procedure should be subject to a peer review by other radiologists.

36. Mrs Smith accepted that she had been wrong to interrupt the claimant's clinic and emailed him to that effect on 27 October 2016. Her email was on the face of it conciliatory but sought to cast a slightly different light on the stance

that she had adopted during the discussion, and to distance herself from the suggestion that she had made that the practice was unsafe.

37. That led to a series of emails passing between the claimant, Dr Goddard, Dr Isabel Baker, the Clinical Director Clinical Support Directorate, Mr Gallegos, Sue Sanderson, Amanda Bessant, and others, which the claimant occasionally but not always copied to Mrs Smith. The claimant's initial stance was "I shall perform this procedure". However, as the range of those involved in the discussion expanded, the focus of the email exchanges turned to how the procedure was to be treated from a budgeting and clinical pathways perspective, and the governance that was in place in relation to it.

38. In a general sense Mrs Baker was supportive of the proposed procedure. Mr Gallegos's was certainly supportive. The claimant's stance was that the procedure was simply the transport of an old technique used by numerous other departments to a new anatomical site, and had been approved by the MDT, and therefore there was little or no issue with its adoption by the radiology department; Mrs Smith's that there should be clear governance procedures in place before the practice could be adopted and until then it should not occur.

39. The claimant was asked if he would complete the necessary paperwork in respect of the practice which would be used for governance purposes, but he did not engage with that suggestion as he regarded it as unnecessary and believed that the necessary review could be conducted by Miss Amanda Bessant, who was working with the claimant on the use of the pigtail catheters and conducting a reflective review for the purposes of an MSc which she was undertaking. In addition, he sought to have Mrs Smith removed from the MDT circulation list; that was unnecessary from a patient safety perspective and was derived from the claimant's antagonism and disdain for her. The claimant was told that Mr Swinscoe had directed that the practice should stop until the necessary governance and standard operating practice ("SOP") were in place but continued to perform the procedure notwithstanding that clear instruction.

40. The claimant's approach towards Mrs Smith, particularly in relation to the circulation of MDT minutes, was unnecessarily didactic and dismissive. The positions of the claimant and, to a lesser extent, Mrs Smith became needlessly polarised and charged. The consequence was the breakdown in the working relationship between the two individuals, each taking deliberate steps to avoid contact with the other except where it was clinically necessary and unavoidable.

41. Part of Mrs Smith's complaint (which she articulated in her witness statement) was that the claimant would avoid speaking to her directly but would only talk to Jane Baker. She regarded that as a deliberate attempt to undermine her, and it caused her anxiety. The respondent had not made Mrs Smith aware of the agreement that had been reached with the claimant in February 2016, which provided precisely for the claimant to use Mrs Baker as his primary point of contact. That was despite the fact that Mrs Baker and Mrs Smith shared an office. However, Mrs Smith was right that the claimant deliberately excluded her from emails in relation to the subject. At best that demonstrated a lack of professional courtesy; if the claimant chose to exclude Mrs Smith

from the emails he sent because of the 2016 agreement, he made no reference to it and there was nothing to suggest that he had raised his concerns that Mrs Smith's conduct was breaching the agreement with Mrs Baker, Dr Goddard, or Mrs Beardshaw, and in any event he was prepared to send Mrs Smith emails when it suited his purposes.

42. Similarly, Mrs Smith sought to avoid contact with the claimant or communication which she perceived might lead to an exacerbation of the deteriorating relationship. Thus, in an email of 24 November 2016 to Miss Bessant she asked her not to copy any response to the email to the claimant.

2017

43. In early March 2017, concerns were raised by Mrs Smith in relation to the claimant's practice of attending on a Friday to undertake clinical list work and charging overtime for doing so. Underlying that concern was her belief that the claimant operated far more slowly than other consultants. The respondent concluded that the appropriate course was to employ a locum consultant to assist with the workload, rather than to pay overtime.

44. The claimant was therefore instructed by Dr Stoddard that he should cease that practice and on 14 March the claimant was emailed a job plan which did not include on-call duties. The claimant regarded that as a fundamental change to his Job plan and therefore his contract, reported the matter to Mrs Baker and complained about it, although he did not raise a formal grievance. He raised it during his Appraisal which occurred on 31 March 2017, proposing that he should work Sundays 'to avoid the need for a locum'; that proposal was not accepted. As a consequence, he subsequently refused to agree any job plan that was presented to him.

45. On 17 March 2017, the claimant intended to perform a seroma drainage for a patient who had had a bilateral vasectomy. A health care assistant ("HCA"), Joanne Pursey, reported that intent to Mrs Smith, because she understood that it was not permitted. Mrs Smith instructed her that she should let the claimant "get on with it and then raise a Datix afterwards." A Datix was subsequently submitted in relation to the claimant's use of pigtail catheters to drain seromas, which recorded that the claimant had performed the procedure without wearing gloves. Thereafter the claimant refused to work with Ms Pursey.

46. On 20 March 2016, Mrs Smith emailed the claimant to request that he discussed the incident with her for the purpose of the Datix investigation. She stated that as there was no policy, protocol, or SOP in place for the procedure, the procedure should have stopped but the claimant had continued to conduct it. The claimant's view was that Mrs Smith had procured the Datix, which in a very limited sense was right but ignored the fact that it was produced because of his actions, and he was dismissive of it, stating in a reply on 20 March "I have forwarded your email to the core members of the breast team and the breast MDT lead shall respond to you." He provided no further response to the circumstances which had been the subject of the Datix itself.

PD 7.3 Datix 28 March 2017

47. On 28 March 2017, the claimant submitted a Datix in which he complained about the incident that had occurred on 30 August 2016 as follows:

> *Constant obstructive attitude of our service manager Jaqui Smith has resulted in hospital admission for some of our breast cancer patients with sepsis. Jaqui insisted on not allowing timely drainage of post surgical collection (seroma) which got infected and they got admitted via A&E with sepsis with nearly fatal consequences.*
>
> *I have gathered from HCA's that they have been briefed that percutaneous seroma drainage is an "illegal procedure" but not asked to stop being a chaperone for these.*

And in respect of the action taken at the time of the incident:

> *I ignored the advise [sic] of service manager and performed the percutaneous drains which allowed these patients to be managed as outpatients and saved their ITU admission with death being one likely outcome. For one of these patients … with associated lung cancer surgical drainage was not even an option but Jaqui would not allow it to be performed.*
>
> *Others admitted with sepsis due to Jaqui Smith are [two patients named]*
>
> *She has instructed that these are illegal so should done in my time and would not be booked via booking office.*
>
> *I shall stop performing these as advised.*

48. The respondent accepts that this was a protected disclosure, and that the claimant had a genuine belief that there were issues of clinical safety which he was raising through the Datix system. The two clinical issues the claimant articulated in evidence were the risk of death from sepsis due to the high level of mortality connected with the condition and a general risk to patient's health caused by the interruption of his clinical list. However, it is equally clear that the reason the claimant chose to submit the Datix at the time he did was because of Mrs Smith's investigation of the Datix relating to the pigtail catheters use, which he regarded as an unnecessary interference with what he believed to be his legitimate clinical procedure.

49. In accordance with the respondent's system, the Datix was sent to Mr Swinscoe and Mrs Baker, and allocated to Mr Swinscoe as the handler. Given the previous history Dr Hicks and Mrs Smith became aware of the Datix. Mr Swinscoe recorded that the procedure constituted inappropriate treatment but that no obvious harm had been caused to the patients, and noted that,

> "*the practice has been stopped until such time as all governance issues relating to new procedures has [sic] been completed….*
>
> *[Lessons learned:] the inputter of the Datix should learn to use Datix for the purposes at hand and not complain about staff (incorrectly)*
>
> *[Root cause of the incident:] Failure to comply with instructions given to the inputter of this Datix."*

50. In so far as Mr Swinscoe believed that the claimant had misused the Datix to complain about staff, he did not raise concern that with the claimant or cause anyone else to do so.

51. At the end of March 2017, the claimant's appraisal was conducted for the period 1 April 2016 to 31 March 2017. It noted that the claimant "works collaboratively with his colleagues to improve patient care" and "maintains good working relations with his colleagues and patients as referenced in his previous appraisal via 360° feedback." The claimant recorded his practice of raising Datix to highlight unsafe working practices such as double booking and squeezing interventional procedures into his clinical list; it noted that at that stage he had issued 8 Datix. The appraiser, Mr Radford, did not raise any concern about the appropriateness or number of those Datix.

52. In April 2017 Dr Peter Collins became the Medical Director, replacing Dr Stoddard.

53. The relationship between the claimant, Mrs Smith, and other admin staff and HCAs continued to deteriorate. The claimant refused to work with Miss Pursey or Sandra Hocking because of the Datix raised in respect of the pigtail catheters. The claimant's distrust of senior management continued to grow because of the removal of the on-call and overtime elements of his work.

PD 7.4 Email 25 October 2017 to Dr Hicks

54. On 25 October 2017, the claimant emailed Dr Hicks making proposals in relation to an audit of discrepancies (where cancers were missed or misdiagnosed) across oncology CT, acute CT, and routine CT, and codings to assist future audits. The claimant's evidence was that part of the motivation for his proposed audit mechanism was to demonstrate that other consultants were missing a significant number of cancers, but because of the manner in which such discrepancies reported they were not transparently identified in the audit. The respondent accepts that this was a protected disclosure. Dr Hicks replied that day suggesting that the two men should discuss the claimant's proposals when the claimant returned from annual leave.

55. On 20 November 2017, Gillian Hoskins, the respondent's Freedom to Speak Up Guardian emailed Peter Collins and Sheridan Flavin to notify them of concerns that Mrs Smith had been discussing with her over the previous two weeks; those focused on the claimant's use of pigtail catheters, what she regarded as delays in the claimant's reports and that the claimant was a lone worker and that no-one could challenge his opinion or review it (that last concern was misplaced, given that the Trust could have sent the claimant's reports to another Trust for a quality and assurance review if they wished). Mrs Hoskins proposed that Mrs Smith should meet with the two men to discuss her concerns. Whatever the nature of the concerns or the discussions, no action was taken to raise the concerns with the claimant at or about that time.

56. In December 2017, Dr Hicks became the Clinical Lead for Radiology.

PD 7.5 Datix 15 January 2018

57. On 15 January 2018 the claimant submitted a further Datix in relation to the

removal of a workstation PC from the Radiology department. The PC was used for the Breast one-stop clinic and was connected to the high-resolution screen dedicated to breast work. Whilst the PC was returned, the need to reinstall key software packages meant that it could not be used until approximately midday. That delayed the clinical list for the day. In his evidence the claimant insisted that Mrs Venn Adams had instructed or permitted the IT team to remove the workstation knowing it was a day when the claimant would work and therefore intending that it would cause him the maximum possible disruption. That was not the reason, but it demonstrates the extent to which the claimant was willing to believe the worst of his colleagues. The Datix system notified Mrs Smith, Mrs Baker, Mrs Hoskins, and Mr Swinscoe of the Datix. Mrs Venn Adams knew of it because she was interviewed as part of the Datix's investigation.

58. On 19 March 2018, Dr Hicks asked the claimant to confirm what examinations he was sitting during the leave which he had booked for the period 30 May until 4 June 2018 (which had been previously approved by Dr Stoddard) and mooted the possibility of the leave being cancelled when the claimant refused to explain it or to meet to discuss it. The claimant demanded the right to be accompanied to such a meeting by a representative and implied that the request was discriminatory (as it was not made of all consultants regardless of their race) and that it was harassment. Thereafter, the claimant only regarded Dr Hicks with suspicion and antipathy and refused to agree any proposal in relation to his job planning that Dr Hicks put forward.

59. In the event, the claimant did not attend a meeting and did not provide an explanation, but his leave was not cancelled.

PD 7.6 Datix 19 March 2018

60. On 19 March 2018 the claimant submitted a further Datix. In the Datix he detailed an incident that occurred that day when a patient attended the claimant's clinical list for a wire localisation prior to surgery for her cancer. The patient had two abnormal areas, one of which was benign, and the other was cancerous. There were no medical notes available to the claimant nor had the notes been scanned onto the respondent's system. The claimant was unwilling to undertake the procedure until the claimant's notes were located; in an exchange which rapidly became heated, he rudely demanded that Mrs Venn Adams should locate the notes; and she suggested that he should do one-stop patients whilst waiting. Eventually she located the notes slammed them onto the claimant's desk and slammed the door. She immediately reported her behaviour to the Departmental Manager.

61. The claimant reported the incident details in the Datix, at the prompting of Dr Cook. The Datix system notified Mrs Baker, Mrs Hoskins, and Mr Swinscoe of the Datix. Mrs Smith was required to investigate it, and concluded that staff should treat each other with respect, and no action was taken against Mrs Venn Adams in relation to her conduct. Mrs Venn Adams was made aware of the Datix given the allegation against her.

62. Later that day, Mrs Smith emailed Mr Swinscoe and Isabel Baker. The email was simply entitled 'Dr Bhatt.' In it, Mrs Smith complained that the claimant had caused chaos and entered a Datix complaining of the behaviour of one

member of staff (Mrs Venn Adams). She suggested that that was indicative of the daily problems faced by those in the department because of the manner in which he delivered his clinics, the delays that arose from his approach and his practice of belittling and speaking rudely to staff. She complained that despite raising issues, it appeared that her complaints were falling on deaf ears; suggesting that both she and Mrs Venn Adams, the Lead Mammographer, were at the point of considering resignation, before writing,

> *"I feel we are just about reaching a point where it might be appropriate to take a group grievance out about his behaviours."*

63. On 20 March 2018 Mr Swinscoe emailed Peter Collins and Alexandra Nestor. He wrote,

> *'The radiographers are no longer able to work with Dr Bhatt and I believe their threats to leave are genuine and should be considered as such. I have tried to talk to Naveen and placate and support him as much as I can but he still refuses to agree to the Job plan we originally agreed in December. He is unable to work with his consultant colleagues and his clinical leader is now at a point where he feels powerless to act.*
>
> *I cannot describe in this email the amount of times I have had complaints about Naveen's attitude and refusal to support the breast service and the department as a whole. I cannot get anybody externally to support the breast team because they will not work with Naveen and I feel this is now becoming a patient safety issue for those women waiting for breast scans, wires and surgery.'*

64. On 31 March the claimant's annual appraisal was conducted. The claimant noted that a Datix had been raised against him in relation to the practice of seratoma drainage, but the outcome of the government's enquiry had not been disclosed to him. The appraiser noted that,

> *'Dr Bhatt has undertaken multisource feedback which has demonstrated good relationships with patients and most staff. He has reflected on the less favourable comments which he received and has understood the need to take on board these comments and to try to identify ways to improve the particular interpersonal relationship difficulties which have arisen. We discussed the responsibility of individuals to act in a professional manner on both sides, and for individuals to take responsibility for their actions.'*

65. It does not appear therefore that either Mrs Smith's or Mr Swinscoe's concerns had been shared with the claimant or with his appraiser.

The appointment of Dr Suri

66. By April 2018 the Trust had recruited a locum consultant breast radiologist, Dr Amit Suri. On 10 April 2018 Dr Hicks emailed the claimant advising him that Dr Suri had asked if he could attend the press department and observe the claimant's practice to ensure that he was familiar with workflows, and how the machines and equipment operated prior to starting. The claimant replied by email the same day, stating that whilst induction was normal practice, the supervision of one consultant by another was not; that he had no

responsibility for the appointment of the locum, and that Mrs Venn Adams could explain the workings of the machines in her role as Lead Mammographer. He offered to speak to Dr Suri if there were specific matters Dr Suri needed to discuss with him.

67. During the consequent email exchange, the claimant suggested the Mrs Baker could provide Mr Suri with the SOP of breast work but stated that he would not be willing to speak to Dr Suri until he had seen the confidentiality agreement which Dr Suri signed on his appointment. That approach clearly exasperated Dr Hicks, who wrote,

> *"I, your clinical lead am asking you to talk to him…. I hope that you can see that this is a simple conversation with a fellow consultant breast radiologist to help him feel familiar with the environment and processes that you and your team are used to."*

68. It is clear to me that the claimant was being deliberately obstructive in relation to Dr Suri because of his frustration that Dr Suri had been appointed by the Trust rather than it permitting the claimant to do on-call work on Fridays or agreeing to provide the claimant with a PA for Sunday to enable him to undertake the work which Dr Suri was appointed to undertake. That approach and viewpoint was unnecessarily hostile and stemmed from a degree of myopia on the claimant's part: part of the reason for Dr Suri's appointment was to ensure that there was cover when the claimant took annual leave (and thereby to remove the resulting work pressure from the claimant when he returned for such leave).

69. Dr Suri's first day of work was on 16 April 2018. He attended and was inducted and was keen to meet with the claimant. Mrs Smith introduced Dr Suri to the claimant at approximately 8.20, but the claimant was due to start the MDT at 8.30 and so was unwilling to meet with Dr Suri at that point. Furthermore, he objected to Dr Suri observing his clinics and demanded that Mrs Baker moved him from the reporting room, saying that if that did not happen then he would have to leave the site. Following the intervention of Mrs Baker, the claimant agreed that Dr Suri could return at 1:30pm, however, the claimant was not on site; he alleged that he had been locked out of the ultrasound room and so he was forced to leave the site. The reality was that he had persuaded Dr Suri to cover his list so he could undertake 'other work.' In the event, Dr Suri completed the clinical list. Mrs Venn Adams raised a Datix in relation to the claimant's conduct of leaving the Department.

<u>PD 7.7: 17 April 2018 discussion with Dr Hicks.</u>

70. The claimant alleges that on 17 April 2018 he raised concerns with Dr Hicks that a locum consultant (Dr Suri) had incorrectly identified two cancers in a patient who was subsequently found to be cancer free. I reject the claimant's evidence in that regard: the discussion did not occur. The claimant did not make any record of the report contemporaneously but relied upon emails sent nearly a year later, on 4 February 2019, in which he asked what action had been taken. Neither he, nor Dr Hicks, in the consequent email exchange make any reference to a prior conversation a year before. Given the tangible hostility with which the claimant regarded Dr Suri and Dr Hicks in 2018, he would undoubtedly have sent an email at the time specifying precisely what

had happened: in that context it is noticeable that on 8 May 2018 the claimant *did* submit a Datix in relation to an event on 17 April 2018, but did not make any reference to the alleged discussion with Dr Hicks.

PDs 7.8 and 7.9 Datix of 1 May 2018

71. On 7 May 2018 the claimant submitted a further Datix. The Datix concerned two matters: first, an incident in which a patient was discharged by Mrs Venn Adams before the claimant had received the necessary mammogram to ensure that the wire he had inserted was placed in the correct position: it was not, and the patient needed to be recalled for a second wire to be inserted. Secondly, the claimant complained about the manner in which the Datix which he had raised were closed without investigation, stating.

> *"Every time I report a clinical incident (double bookings/overbookings) within my department they are closed as "communication issue" and contact the person for further clarification so I do not see things improving for our patients."*

72. The latter complaint was one directed at Mrs Smith, given her conclusion in relation to the claimant's Datix of 19 March 2018. The respondent accepts that each of those disclosures was a protected disclosure, relating to genuine clinical concerns. The Datix system sent a copy of the Datix to Mrs Smith, Mrs Baker and Mr Swinscoe. Mrs Venn Adams became aware of the Datix during the consequent investigation.

PDs 7.10 and 7.11: Datix 8 May 2018.

73. Shortly thereafter, on 8 May 2018, the claimant submitted a further Datix relating to an incident on 17 April 2018 during which he alleged that an 'obvious' cancer was missed on an ultrasound image by Dr Suri. Secondly the claimant raised a concern that the likely cause of the failure was either unsafe working practice (due to an overbooking of his clinical list, or uninformed booking within the list), and/or negligence on the part of the imaging team to which the work had been outsourced (if that were the case). Lastly, the claimant repeated the view that the practice of closing the Datix he raised, without investigation, would create a likelihood of further harm in the future.

74. The Datix system again sent the Datix to Mrs Baker, Mr Swinscoe and Mrs Smith. That resulted in a roundtable meeting which occurred on 11 May 2018 which was attended by Mr Swinscoe, Mrs Baker, Mrs Smith, and Dr Hicks (amongst others). The claimant complains that as the only clinician attending the meeting was Dr Hicks, who was not a breast specialist, the Trust should have referred the matter to an external specialist to review

Detriment 1: Mrs Smiths' written record of events of 16 April 2018 produced on 10 May 2018

75. On the previous day, 10 May 2018, Mrs Smith produced a written record of her recollection of the events of the 16 April 2018 when Dr Suri had first attended the Trusts' premises. The question of whether the claimant's prior Datix were more than a material influence on her decision is addressed in the 'Discussion and Conclusions' below.

The incident of 11 and 12 June 2018

76. In June 2018 the Radiology department adopted a new procedure for referrals to the Pathology department for analysis of biopsies by which a consultant had to check and sign for each biopsy referral request in a book maintained in the Radiology Department. That practice was adopted during a period of the claimant's annual leave with the consequence that he was unaware of it on his return.

77. On 11 June 2018, Miss Taylor, a Radiology Assistant working with the claimant required Pathology to analyse a biopsy which had been taken that day. She was unable to send the sample for analysis because at the point she remembered that she needed the claimant to sign the referral book, he had left work for the day. She spoke to Mrs Venn Adams who directed her to leave the sample and the referral book on the claimant's desk to await his return the following morning. Mrs Venn Adams notified the claimant that there was a referral which needed signing for and that he needed to sign the referral book for it, as he had not the previous day before leaving for work.

78. When Miss Taylor attended work the following day, 12 June 2018, the claimant asked to see her and berated her for involving Mrs Venn Adams, telling her that 'everything is between us,' and she should not involve third parties. The claimant then approached Mrs Venn Adams and began shouting at her; Mrs Venn Adams was not cowed and stood her ground, arguing firmly and robustly: the effect on Miss Taylor who could hear the confrontation from a different room was to cause her to shake. The claimant's anger did not dissipate during the procedures he conducted, and he repeated his criticism of Miss Taylor when they were completed.

79. The following day, 13 June, the claimant was again working with Miss Taylor. He accused Mrs Venn Adams of being a nasty person and was incensed when Miss Taylor suggested that she had only raised the issue of the book with her because she was her manager, aggressively stating that she was not her manager at all. He stated he had no manager, that no one could tell him what to do and that claimant must choose whose side she was on. He said if the claimant did not choose, he would lie and put in a Datix including an allegation of racism against her.

80. Miss Taylor began to produce an account of the incident on 13 June 2018 in the form of a handwritten note, she then stopped writing to consider what she would do, and spoke to a union representative, before completing the document on approximately 14 or 15 June 2018. That account is, I find, an accurate account of the events in so far as it relates to the manner in which the claimant acted towards Miss Taylor. Prior to the incident the relationship between Miss Taylor and the claimant was not strained or broken in the way in which the claimant's relationship with Ms Smith, Mrs Venn Adams, or Dr Stoddard, Dr Hicks and others was; it may have had difficult moments, but it was functional and largely respectful. Miss Taylor had no axe to grind with the claimant.

81. In my judgment the claimant was triggered on 12 June 2018 by his belief that Miss Taylor had somehow betrayed him by 'involving' Mrs Venn Adams and was, if not in cahoots with her and Mrs Smith, then certainly no longer on his

side. That led him to deliver a threatening and aggressive tirade at Miss Taylor, who was a junior female employee.

PD 7.12: Datix 12 June 2018

82. On 12 June 2018 two wire insertions were booked into a 30-minute slot (when each insertion required a 30-minute appointment given that one was an ultrasound procedure) in the claimant's clinical list, and a further clinical procedure in a 15-minute slot. That had occurred because at some stage the claimant had taken over responsibility for vetting all patients and booking appointments for them to ensure that sufficient time was booked. However, he had been on annual leave and in consequence Mrs Venn Adams had consulted with Dr Suri and booked the appointments without reference to his system for appointment length; it is unclear whether she knew of it or not.

83. The claimant sought out Mrs Venn Adams to challenge her; he did so in the presence of other members of staff. It was this discussion that led to the confrontation overheard by Miss Taylor. The claimant suggested that a Datix needed to be submitted in relation to the overbooking; he interrupted Mrs Venn Adams when she tried to respond. Mrs Venn Adams for her part argued it was only one extra patient to see and Dr Suri had been content with that approach so she could not understand the claimant's anger. The exchange, which had begun testily in an aggressive and confrontational way, rapidly descended into a full-blown argument in which both parties were shouting, and which could be overheard by patients and other staff.

84. In consequence at 11:36 the claimant filed a Datix complaining that Mrs Venn Adams had not allocated sufficient time for the procedures and had therefore placed patients at risk. The system sent a copy of the Datix to Mrs Baker, Mo Swinscoe, Isabel Baker, and Mrs Smith, who investigated it. Dr Hicks and Mrs Venn Adams became aware as consequence of the resulting investigation. The investigation concluded that the incident had occurred because the claimant had taken over responsibility for the vetting of patients but had not put a system in place for periods when he was absent; it directed the claimant to provide written instructions to the administrative teams. Mrs Smith directed the claimant and Mrs Venn Adams to treat each other with professional 'request' (sic: respect) and courtesy. The respondent accepts that the Datix was a protected disclosure.

Detriment 2: The Datix of 12 June 2018 reported by Mrs Venn Adams

85. That afternoon at 15:21 Mrs Venn Adams filed a Datix in which she reported her version of events, recording the claimant's aggressive, vitriolic, and confrontational attitude and approach when he challenged her. She complained it was not the first aggressive outburst from the claimant, but it was the first time she had raised a Datix in respect of it. She complained that his approach was making it difficult for her to lead the Mammography service and was making her consider her position given the need to work with the claimant. The reason that she presented the Datix was because the shouting match that had occurred that day represented the lowest point of her relationship with the claimant. The question of whether the claimant's prior Datix were more than a trivial influence on her decision is addressed in the 'Discussion and Conclusions' below.

86. Mrs Smith and Mrs Venn Adams told Miss Taylor that she should submit a Datix in relation to the manner in which the claimant had removed the wires from a patient: the accusation made by Miss Taylor was that he had simply pulled them out, rather than ensuring that they were sheathed (to cover the hook on the end) and removed surgically.

87. On 22 June 2018 Rebecca Dunn, the Deputy Director for Planning and Performance, sent the claimant a grievance outcome letter in respect of his grievances against Dr Stoddard. Amongst the grievances which had been raised by the claimant were allegations that (a) the claimant had had to raise 8 Datix since 2016 in relation to the overbooking of his clinical lists, (b) the respondent's response to the claimant's Datix had been to dismiss them as communication issues, and (c) Datix had been issued against the claimant in order to harass him (relating to the Pigtail catheters). Ms Dunn found (a) that the Associate Medical Director for Clinical Support Services had taken appropriate action to prevent the claimant's lists being overbooked, (b) that the claimant had used the Datix

> *"to raise patient safety issues… [but] often in response to interpersonal issues, or in order to "defend" or "protect" himself against an incident already identified elsewhere in the hospital"*

88. Ms Dunn noted:

> *"It is apparent that over the past 9-12 months the relationship between yourself and Dr Stoddard has deteriorated significantly. This was most likely triggered by the incidents that led to you coming off the on call rota and was not helped by a lack of process surrounding this reasonably significant management decision, which was made by Dr Stoddard. I believe that Dr Stoddard has worked hard to support you as a valued colleague and member of the radiology department since the time of his appointment and that Dr Stoddard offered a level protection to you regarding communication issues identified elsewhere in the hospital prior to the breakdown of their relationship. Since the relationship has deteriorated, it is possible that Dr Stoddard has ceased to provide this "buffer" that a managerial relationship provides, and it is my belief that issues that might have been more appropriately handled via such a clinical managerial relationship are now playing out on Datix and through other Trust systems."*
>
> (Emphasis added)

89. Lastly (c) the claimant still failed to appreciate and understand that he had failed to follow the relevant and necessary processes to introduce a new practice, and in those circumstances the escalation of the issue to the medical director had been correct.

90. Ms Dunn did not however suggest that the claimant's use of Datix had been regarded by others or by her as a disciplinary issue, or that the claimant had been warned of that.

91. Between the 25 June and 26 June 2018, Dr Hicks and the claimant exchanged emails relating to Dr Hicks' desire to speak to the claimant about the Datix of 12 June 2018. The claimant refused to meet to discuss the issue,

requiring Dr Hicks to put the enquiry in writing and he would respond in writing, He wrote:

> *From my experience of the conversation with you, it is best dealt with in writing. I do not know what the Datix is about and if it does not concern me then I should stay clear of it. If it is done by me then you can close it by stating "communication issues" as is done for patient safety Datix in this place. You are actually not required to have any sensible explanation for any patient safety issues.*

92. Dr Hicks was exasperated by that approach, stating that he was the claimant's clinical lead and that if the claimant refused to meet to discuss it, he would be forced to address the claimant's insubordination. At that stage the relationship between the two men had broken down entirely from a personal and a governance perspective.

The first grievance

93. On 6 July 2018, Miss Taylor handed the document she had produced between the 13 and 15 June to Mrs Smith who passed it to Dr Hicks. Dr Hicks spoke to Miss Taylor and advised her that it would be referred outside of the Department for investigation.

The first protected act

94. On 18 July 2018 the claimant emailed Peter Collins concerning Dr Hicks' request to meet to discuss Mrs Venn Adams' Datix. In the email he wrote

> *This attitude towards Asian consultants is the culture in our department (some call it communication interpersonal issue) and is a contributory factor in my reluctance for a verbal chat when he is expected to get worse (as is my experience of verbal interactions with him when he obstructed my clinics with the job planning). I would like to think that I have a right to avoid in civilised conversation (which the so-called neutral third party in the meeting would find perfect the gentleman like).*
>
> *I am very happy to aid in any investigation, be it racially motivated or otherwise but I cannot answer, if I do not know the questions."*

95. The respondent accepts that this was a protected act.

96. On 25 July 2018 Dr Hicks wrote to the claimant informing him that a grievance had been raised against him and would be investigated by Harvey Dymond, setting out in general terms the nature of the allegations made by Miss Taylor but with sufficient particularity to enable the claimant to understand what was being alleged, and who had raised the complaint. The claimant was told of his right to representation and advised that if the matter led to a disciplinary hearing he could be dismissed.

The investigation of Miss Taylor's grievance (Detriment 4: SVA and JS)

97. In August 2018 Mr Harvey Dymond conducted the following interviews: on 13 August (and subsequently on 8 October 2018) Kirsty Taylor; on 15 August, Jane Baker and Tom O'Dowd, her union representative; and on 21 August,

Mrs Smith, and Mrs Venn-Adams. The claimant complains that the accounts given by Mrs Smith and Mrs Venn Adams were detriments influenced by his protected disclosures. That allegation is addressed in the 'Discussion and Conclusions' section below.

98. Mr Dymond invited the claimant to an investigation meeting in a letter dated 4 September 2018, but the claimant declined to attend unless he was provided with written questions which he could respond to by email and any in-person meeting was voice recorded, opting to prepare a written statement. In the written statement the claimant suggested that Miss Taylor had knowingly produced a false allegation on the instruction of Mrs Smith (or so it is implied) under threat that if she did not do so she would lose her weekend work. He did not otherwise engage with any of the factual allegations in the grievance.

99. Consequently, on 8 October 2018 Mr Dymond met with Mr Taylor to enable her to comment upon those allegations. She denied them but was insistent that the decision to submit the grievance was hers and hers alone.

PD 7.13 and Protected Act 2: Datix 3 September 2018

100. On 3 September 2018 the claimant was asked to leave an MDT meeting to return to a clinical list. He submitted a Datix complaining about those matters in which he wrote,

> *"Booked patients have to wait an hour longer than what it should be and the backlog would keep on piling all day making me rush and make clinical errors.*
>
> *Now booked one stop patients have to suffer a double booking and delays while the racial harassment and interference with breast work continues. MDT is non quorate due to interference and again this would be closed down as "communication issue/ behavioural issue/team working issue."*

101. The respondent accepts that this was a protected act and a protected disclosure. The claimant and the respondent understood that the reference to double booking was a reference to Mrs Venn Adams' decision on 3 September 2018. By implication therefore, the Datix suggested that that conduct constituted racial harassment. The claimant's Datix was forwarded by the respondent system to Mrs Baker, Mr Walmsley, and Dr Hicks. Mrs Venn Adams was made aware as a result of the consequent investigation and informed Mrs Smith.

102. There followed an email exchange between the claimant, Mrs Venn-Adams, Jane Baker in relation to Mrs Venn Adam's vetting of the patients for the claimant's clinical list and the practice that should be adopted. Mrs Baker's stance was that Mrs Venn Adams was not aware of the time allocations the claimant required for procedures, and so did not view Mrs Venn Adams' conduct as a deliberate attempt at overbooking the claimant's lists.

103. Mrs Smith had a period of annual leave at that time. As she was returning from abroad, she suffered a mild panic attack as she thought of having to return to work with the claimant. Her concerns were twofold: firstly, having to manage his prevalent hostility towards her and refusal to communicate with

her, secondly the pressure she experienced as the individual responsible for managing the Department in circumstances where she had significant concerns about the claimant's conduct, the effect of that conduct on the effective and safe running of the Department and her view that Dr Stoddard, and Mr Collins were unwilling to take action against the claimant to remedy it. She spoke to Mrs Baker and the pair agreed that she should raise a grievance, and that Mrs Baker would support it. Mrs Baker's decision was in no way influenced by Mrs Smith, but rather was a direct result of her own experience of working with the claimant both when managing the Department and in her individual capacity within it. Her evidence to Mr Major during the disciplinary investigation was, I find, a candid and truthful account of her motivation for participating in the grievance.

The collective grievance (Detriment 3)

104. Mrs Smith, Mrs Baker, Laura Beardshaw and Mrs Venn-Adams submitted a collective grievance complaining about the claimant's conduct. They had consulted a union representative before doing so. The thrust of the collective grievance was that over the period of past five years, particularly in the last six months, the claimant had failed to engage with the radiology service management and was disruptive. Amongst the specifics of the concerns raised were:

104.1. the refusal to speak to key members of staff;

104.2. sending defamatory emails copying in unnecessary staff outside of the radiology department,

104.3. making accusations of racism,

104.4. shouting at staff in the corridors;

104.5. using the Datix inappropriately;

104.6. undermining senior staff to more junior staff;

104.7. poor behaviour towards locum radiologist; and

104.8. failing to give clear guidance means of examinations and failure to involve himself in patient quality and safety improvement, in particular in relation to LocSSIPS, failsafe procedures for biopsy samples, and failure to adequately engage in practices to cover long periods of leave in the department.

105. The signatories complained that that conduct exposed the respondent to reputational risk and constituted bullying.

The first grievance outcome

106. On 24 October 2018 Mr Dymond produced his report in respect of Miss Taylor's grievance. He upheld the grievance in the following respects, finding:

106.1. The claimant had threatened Miss Taylor and suggested that he would put in a Datix alleging racism against Miss Taylor if she did not side

with him;

106.2. The conduct above was bullying in breach of the respondent's policy;

106.3. The claimant spoke in a derogatory way in relation to his colleagues in the department;

106.4. The claimant had asked junior members of staff to undertake duties outside of their job description, including the completion of documentation, which was the claimant's responsibility.

106.5. The claimant had pre-signed LocSSIPs forms, before leaving for the day, with the result of junior staff were left with responsibility for the forms and any actions arising from them.

107. Mr Dymond did not uphold the grievance in relation to the allegation that the claimant failed to follow an agreed protocol in relation to the completion of the sample book on 11 June, finding that the claimant had been on leave when the agreement in respect of the practice was agreed and did not know of it at the time of his return from leave.

108. He recommended that the case should be considered by the General Manager of the Surgical Division to decide the appropriate action. Finally, he noted that other serious allegations had been made against the claimant during the course of his investigation but fell outside its remit.

PD 7.14 Datix 1 November 2018

109. On 30 November 2018 Mrs Smith performed a number of mammograms. The claimant alleges that she performed the mammograms in respect of the wrong areas of the patient's breast and failed to consult with him to review the patient's notes before undertaking that procedure. He alleged that in consequence it was necessary for him to conduct an ultrasound to find the abnormal area and perform the necessary biopsy.

110. On 1 November 2018 the claimant submitted a Datix in respect of those events. In addition, he reported a prior occasion when he alleged that Mrs Smith had assisted in the intervention while lacking the necessary experience, causing the needle to become stuck in a patient's breast and bent as a consequence of its incorrect positioning. He wrote

> *Similar competency issues which she always blames on personal interaction than professional incompetency. No one dares to check how she maintains her professional competency to assist in intervention or mammography?*
>
> *We should support her to maintain her mammography skills with proper supervision in our regional centre.*

111. The claimant suggested that Mrs Smith's competency a radiographer should be subject to formal assessment. He ended by stating,

> *Any patient safety issue is always closed down as "communication*

issue" especially when it involves a senior manager and substandard working practices continue.

112. The respondent accepts that this was a protected disclosure. The Datix was forwarded by the respondent's system to Mrs Baker, Mrs Smith, Mr Walmsley, and Dr Hicks.

PD 7.14 1 November 2018 the claimant complaints to Dr Hicks about Mrs Venn Adams

113. In the period between 24 October and 1 November 2018, the claimant exchanged a series of emails with Mrs Venn Adams and Mrs Baker in relation to the protocols of practice adopted for specific patients and reports, which were copied to Dr Hicks, amongst others. The respondent accepts that on or about 1 November 2018, the claimant raised concerns that Mrs Venn Adams had overturned his clinical judgement about the scans that certain patient required, and that that amounted to a protected disclosure.

Protected Act 3: 12 November 2018

114. The issue of the claimant's study leave had previously arisen in March 2018, as detailed above. In November the claimant sought retrospective approval of a period of leave as study leave where he had attended a course. On 9 November 2018, Dr Hicks requested a copy of the attendance certificate which the claimant had received, as the evidence he had submitted in respect of it was a link to the course evaluation form, and not the certificate itself. In addition, he asked, in relation to study leave the claimant had booked for 'an exam', what the exam was.

115. On 12 November 2018 the claimant replied to Dr Hicks, stating:

"Do you seek this information from everyone….Exam is as per my PDP and you have objected to this many time previously even when it was preapproved (by Gavin Stoddard), I would strongly advise you to think very carefully on which of your actions could be construed as racial harassment (under different pretext) or I should be forced to raise it at a higher platform in the trust and outside, if need be, starting with, email to all the consultants in the trust meeting." [sic]

116. The claimant ended by suggesting that Dr Hicks's time would better spent preparing for a CQC inspection and signed off, sarcastically, "Have a nice day." The respondent accepts that this was a protected act.

117. Dr Hicks replied on 13 November 2018. The email is a paradigm of managerial restraint. Dr Hicks did not engage with the allegations of discrimination directly but calmly set out the circumstances which showed that his approach was common across all consultants. He asked the claimant to meet him to discuss a Datix which he had recently received. However, he was deeply shaken by the allegation of racism and notified Dr Collins that it had occurred and offered to be subject to a formal investigation, offering to step down from his leadership post if any part of it were upheld. He sought advice from his Union as to what his obligations were and how he should act given the allegation. Lastly, at the next

consultants meeting he informed the other consultants anonymously of the allegation of race discrimination, and that he had invited an investigation.

Protected Act 4: 14 November 2018

118. The claimant replied by email on 14 November 2018. His email was again accusatory, aggressive, and threatening. He wrote,

> *"The list of your questionable integrity and flexible application policy is unlimited but I shall save it for another platform.*
>
> *I will not delve into the details of the list of your racist behaviour at present, the fact that department is very keen to spend study leaves and study funding for courses of questionable utility (to put it mildly) when you apply for it but would deny entitled study leave for an approved PDP when an Asian consultant is spending their own time and money on it… is further evidence of departmental racism. The instance of Dr Meena is another example of racism unless you have sought the same from a local consultant or rejected their leaves or enquired what they have learned from the course, in which case I shall offer my apologies, have you?*
>
> *… I would not wish to be associated with someone with your attitude, where I could avoid it…. The evidence has been provided to the general manager, separately, as I do not encourage a racist questioning my integrity at every opportunity.*
>
> *My preference for non-verbal communication applies to all racist, more so from my experience of previous interactions with you.*
>
> *… I have repeatedly advised you and not engaging a racist conduct (including reference to law) but you have chosen otherwise so maybe it is for me to understand that this is how you and deal with matters differently from now on…..*
>
> *Please note all the time spent in fake investigations and racial harassment related admin work comes at the cost of clinical work since you have limited my admin to one hour/week and this has been notified to the medical director.*
>
> *BW and take care."*

119. The respondent accepts that this was a protected act. It is also clear that the relationship between the claimant and Dr Hicks had broken down to the point that the claimant called Dr Hicks a racist, but had indicated that he was not willing to be associated with him (whatever that connoted) during a CQC inspection, and was not willing to discuss Datix with him, unless Dr Hicks put his questions in writing in which case the claimant would respond when he had time, 'based on [his] list of priorities.' That could not be a sensible, practical, or appropriate way to resolve clinical issues or matters of patient safety that were raised in Datix. The claimant was, it seems to me, openly taunting and simultaneously threatening Dr Hicks, and that in doing so he lost sight or knowingly disregarded the purpose and importance of the Datix system itself.

The disciplinary investigation (Detriment 5 and direct race discrimination)

120. On 20 November 2018, Mr Collins instructed David Major, a director of Ibex Gale Ltd (an organisation that specialises in conducting and managing workplace investigations) and a qualified non-practising solicitor, to conduct an investigation in relation to concerns about the conduct of the claimant.

121. The scope of the investigation included the grievance lodged by Miss Taylor on 6 July, the findings of Mr Dymond in respect of the grievance investigation conducted between August and September 2018, and the concerns raised in the collective grievance of 26 September 2018.

122. During the course of the investigation Mr Major interviewed Mr Dymond, Miss Taylor, Mrs Smith, Mrs Baker, Mrs Venn Adams Mrs Beardshaw, Dr Hicks, Dr Gallegos and eight other witnesses, including Mr O'Dowd. During his interview on the 7 December, Dr Hicks explained that he had notified his line manager, Dr Collins of the allegations of racism (although he did not name the accuser) and offered to undergo an investigation, an offer he repeated at a subsequent consultant meeting as detailed above. The claimant alleges that the accounts given by Dr Hicks, Mrs Smith, Mrs Venn Adams, and Miss Taylor were detriments caused by his protected disclosure and/or constituted less favourable treatment on the grounds of his race.

123. On 27 November 2018 Dr Hicks requested a meeting with the claimant to discuss an allegation that he was refusing to see a patient that he had already consulted with and biopsied. On 28 November 2018, the claimant replied and accused Dr Hicks of racial harassment.

124. Having identified the concerns raised in respect of the claimant through the course of the investigation interviews, Mr Major conducted an interview with the claimant which took place on 20 December 2018 and continued on 17 January 2019. The claimant was accompanied at both meetings by Gillian Hoskins, the Respondent's Board Secretary and Freedom to Speak Guardian. The minutes of those meetings were recorded, and transcripts were produced that occupy 193 pages. It is not proposed to set out in any great detail what account the claimant gave, as it is not proportionate to do so.

125. The claimant had been provided by Mr Collins with the terms of reference, the collective grievance, and the investigation report of Mr Dymond. Prior to his first meeting with Mr Major, he requested a written and complete list of all the questions that he would be asked in advance of the meeting. Mr Major refused that request on the grounds that it was unreasonable and unnecessary. Consequently, at the outset of the first meeting the claimant provided Mr Major with a written statement setting out his response to the allegations and indicated that once it had been read, he would be willing to ask questions. In the written statement the claimant:

125.1. Suggested that Miss Taylor's allegations were unsubstantiated and hearsay; sought to discredit her on the basis of events that had occurred in excess of two years prior to those about which complaint

was made, and argued that Mr Dymond had provided no explanation for accepting her account over his, insinuating that the reason was that Mr Dymond had adopted discriminatory mindset and interpreted the balance of probabilities against foreign workers.

125.2. Suggested that the reason he did not communicate with colleagues was because he had been advised to minimise his interactions with them by a therapist;

125.3. Insinuated that he may be perceived as rude because of 'cultural differences' although he did not articulate what they were or how they affected his behaviour or conduct towards others;

125.4. Ascribed long delays to the failure to recruit staff and/or the nature of the work involving cross sectional films and ultrasound; and the decision not to permit him to undertake weekend work.

125.5. Argued that the allegation that he took annual leave without ensuring his reports were up to date evidenced direct race discrimination since the same charge and same expectation was not levelled at or required of non-Asian consultants; and argued that his therapist had advised him to leave the premises once he had completed his work to avoid allegations of rudeness or improper pressure to perform work unsafely due to a lack of time;

125.6. Suggested that the allegation of 'unpredictable behaviour' belied a failure to comprehend that his behaviours were a product of his race, although once again he did not identify what behaviours he argued were a product of such matters;

125.7. Suggested that his refusal to speak to key members of staff was a result of his preference for all matters to be in writing to enable him to respond when he had time, and so as to avoid interruptions to his clinics which could lead to clinical errors.

125.8. Suggested that in so far as he ignored staff that was as a consequence of his therapist's advice not to limit his interactions with them to reduce the opportunities for complaints of rudeness; and that as he had no management time allocated in his PAs, had no time to chat with staff.

125.9. Generally suggested that he could not respond to allegations of derogatory emails (and/or unnecessarily copying them to third parties), failure to respond to emails, or nonsensical emails as he was not provided with the specific emails.

125.10. Suggested that the allegation of shouting at staff in corridors was not specific, and was contradictory of the allegation that he did not speak to staff; but did not respond to the allegations in respect of 11 or 12 June 2018;

125.11. Suggested that he could not understand the allegation of making allegations of race discrimination without the context, which was disingenuous given that the claimant had consistently raised such allegations in November 2018, but said that he was a 'testimony to

racism,'

125.12. Suggested that his use of Datix was entirely appropriate as he had raised patient safety issues, which was appropriate;

125.13. Suggested that in so far as he criticised breast radiologists from a neighbouring organisation, he was right and entitled to do so as he was better trained and better qualified and was required to identify errors, whereas Mrs Smith was unqualified and unable to comment on his competency but had done so because of her racist attitude.

125.14. Lastly, suggested that the entire investigation was born out of racial harassment against foreign workers because of his refusal to engage in unsafe practices. He indicated that the consequence of that harassment was the deterioration of his mental health since 2016.

The claimant's grievance against Mrs Smith

126. On 21 December 2018 the claimant raised a grievance complaining of race discrimination, bullying and harassment against Mrs Smith. The allegations were largely counter allegations against Mrs Smith, adopting the allegations that were identified in Mr Dymond's report and adding others. The claimant did not raise a similar complaint of race discrimination against Dr Hicks, Mrs Venn Adams, or Jane Baker, nor did he specifically allege in the grievance that Mrs Smith had been motivated by his race or protected disclosures when she raised the collective grievance, although he did refer to her "personal vexatious allegations against foreign workers." Similarly, he did not allege that Mrs Venn Adams or Miss Taylor was motivated by his race or protected disclosures in participating in the collective grievance or giving evidence in the subsequent investigations. Mr Collins tasked Mr Major with investigating those allegations in conjunction with the allegations against the claimant.

127. Mr Major was unable to meet with the claimant until May 2019 to discuss the allegations, at which time the claimant again presented him with a written statement expanding on the allegations. Within that document he suggested that he avoided Mrs Smith as "in my culture it is offensive to harbour ill feelings and pretending [sic] to be friends" but largely levelled allegations that Mrs Smith had put patient's lives at risk through various actions which he had raised in part in Datix and in other ways. In addition, the claimant suggested that Mrs Smith had incited Mrs Beardshaw, Mrs Baker and Mrs Venn-Adams to participate in the collective grievance by using the leverage of references or promotional opportunity to do so.

The investigation report.

128. In June 2019 Mr Major completed his report. The report itself is 100 pages long, the appendices to it (which consist of emails, transcripts of the interviews and documents obtained during the investigation) occupy nearly 3000 pages. All were included within the bundle or supplementary bundle, but it was not possible or proportionate in the time allocated to the hearing to read all of them, but only those that I was referred to in detail, whether in cross-examination or in submissions. To read all of the report and appendices would have taken between 25 and 50 hours (reading at

between 30 seconds to minute a page) and so between 5 and 10 days depending on reading speed: the hearing was listed for 10 days to include reading, evidence, deliberation, and Judgment. The essence of the report is as follows:

128.1. Mr Major upheld the allegations in respect of the claimant's conduct towards Miss Taylor and found that his conduct breached the respondent's standards of behaviour, and those of the GMC, and constituted bullying within the meaning of the respondent's bullying and harassment policy.

128.2. In respect of the allegations in the collective grievance Mr Major concluded there to be a general perception amongst staff that the claimant was difficult and unpleasant to interact with and that any form of disagreement with him would result in hostile behaviour from him. The claimant seemed reluctant to accept any form of managerial oversight of him or his work and as a result, it appeared that relations, particularly with Ms Smith, Ms Venn Adams and Dr Hicks, had broken down almost entirely to the extent that, in the case of Ms Smith and Ms Venn Adams, it was having a significant impact on their ability to carry out clinical work that involved interaction with the claimant and fulfil their managerial responsibilities in relation to issues involving him. He concluded that the concerns that were raised appeared genuine and were not motivated by anything other than a desire to work together constructively as a department.

128.3. He further concluded that the claimant had taken an unnecessarily hostile and accusatory approach to issues raised by his colleagues.

128.4. He concluded that there were not reasonable grounds for the claimant's allegations of race discrimination.

128.5. In respect of the allegations of inappropriate use of the Datix system he concluded that instead of using Datix to highlight patient safety issues in an open and a collaborative manner, the claimant had adopted an approach of referring to and pointedly criticising specific individuals and making comments designed to denigrate, undermine, and embarrass the individual concerned.

128.6. He found the allegations of making derogatory comments about other staff members and his hostile and unhelpful attitude to Dr Suri were proved.

128.7. He found the allegations in respect of clinical practice relating to LocSSIPs forms, and pigtail catheters proved, but rejected the other allegations.

128.8. He rejected the claimant's grievance against Mrs Smith.

128.9. He concluded that the claimant's working relationships with a number of key work colleagues within the Radiology Department had broken down either completely or to a very significant extent. The evidence indicated that this was having a fundamental impact on the ability of these key work colleagues to interact and communicate effectively with

the Claimant in relation to critical work-related issues, and on the ability of the breast imaging service to function effectively and efficiently.

128.10. In relation to the claimant's conduct generally he concluded that the claimant:

128.10.1. Had displayed a pattern of unhelpful, unprofessional, hostile, critical and accusatory behaviour in both verbal and written communications and interaction with work colleagues;

128.10.2. had made derogatory comments about senior staff to more junior staff;

128.10.3. had tended to unreasonably interpret the actions of colleagues as malicious and has made accusations of racial harassment and discrimination against colleagues which appear to have no compelling evidential basis to support them;

128.10.4. had failed to engage and work collaboratively and constructively with colleagues and tends to react in an aggressively defensive manner to questioning of his actions, practice, or decisions;

128.10.5. appeared to display little, if any, ability to reflect upon, or have insight into, the impact that his behaviour has on others;

128.10.6. had used the Trust's incident reporting mechanism (Datix) as a means to criticise, denigrate and undermine colleagues; and

128.10.7. had failed to provide sound clinical leadership within the breast imaging service, for example by failing to complete LocSSIPs forms, failing to work collaboratively with the locum breast radiologist, failing to engage in any attempt to put in place alternative arrangements for vetting in his absence, and failing to engage with efforts to put in place a governance process in relation to the Seroma drainage procedure that he had adopted.

129. Those conclusions were based on the evidence before Mr Major, untainted by discrimination or the claimant's protected acts or by any protected disclosure, and were reasonable conclusions open to a reasonable investigator.

<u>The disciplinary hearing</u>

130. By letter dated 15 July 2019 the claimant was invited to a disciplinary hearing on 9 August 2019. The letter identified the allegations as follows:

130.1. The claimant had acted in a manner that amounted to bullying and harassment of Miss Taylor by

130.1.1. Threatening to file a Datix against Miss Taylor if she did not take sides, and would allege that it involved racism;

130.1.2. Speaking in an inappropriate way to which was perceived as aggressive bullying in nature to the extent that Miss Taylor was scared

of him;

130.1.3. Speaking in a derogatory way about other colleagues in the department;

130.1.4. Suggesting to Miss Taylor that a senior manager had called her a troublemaker;

130.2. The claimant had failed to engage and work collaboratively constructively with colleagues, in particular:

130.2.1. the claimant's conduct had caused working relationships with Mrs Smith and Mrs Venn Adams to have broken down almost entirely;

130.2.2. the claimant had unreasonably refused to recognise Dr Hicks as having any managerial responsibility for him, and adopted a hostile and accusatory approach towards him, including accusing Dr Hicks, without any justification, of being racist.

130.3. The claimant had made unjustified accusations of racist behaviour against staff:

130.3.1. 3 September 2018 (Jane Baker), 3 September 2018 (Datix), 18 July 2018 (email to Peter Collins) and 11 and 14 November 2018 (emails to Dr Hicks);

130.3.2. using Datix deliberately and for inappropriate purposes, namely, to raise criticisms of colleagues' competence unreasonably on 1 November 2018 and 12 June 2018.

130.4. The claimant had adopted a hostile and dismissive attitude towards Dr Suri on 16th April 2018.

130.5. The claimant had failed to provide sound clinical leadership by failing to complete LocSIPP forms, failing to work collaboratively with the locum breast radiologist, failing to engage in any attempt to put in place alternative arrangements for vetting in the claimant's absence, and failing to engage with efforts to put in place a governance process in relation to the seroma drainage procedure.

131. The claimant was sent a copy of the report and appendices under cover of the invitation letter.

132. On 25 July 2019 Mr Collins referred the claimant to the respondent's occupational health Department for a report seeking to identify whether there was any additional support which could be provided to the claimant in his role and requesting a prognosis of the claimant's health.

133. The disciplinary hearing was conducted on 9 August 2019, it commenced at approximately 9:30, broke for lunch between approximately 12 and 12:30 and concluded at approximately 4pm. It was chaired by Mr Phil Walmsley, the Director of Operations, who sat with Dorothy Goddard a Specialist representative from the Royal United Oscars NHS Foundation Trust; he was supported by Zoe Wood, Head of Employee Relations, University Hospitals

Bristol NHS Foundation Trust. Mr Walmsley is an experienced chair of disciplinary and appeal hearings, having conducted between 30 and 40, and has at different stages in his career held (or still holds) the following roles: the executive lead for the Women's Council in Northwest Anglia NHS Foundation Trust, and a council member of the BAME council at Great Ormond Street Hospital. He has received equality and diversity training.

134. The claimant attended and was accompanied by his wife.

135. The panel had received Mr Major's report and its appendices, which included the report of Mr Dymond, and had read it in preparation for the hearing. Mr Major presented his report. The claimant was able to ask Mr Major questions in relation to the evidence he had obtained and conclusions of his report. He did so. He was then given and took the opportunity to make his case.

136. The essence of the argument he then presented was that the allegations in respect of Miss Taylor should be dismissed because they turned upon a dispute of evidence between himself and Miss Taylor, and in consequence it was 'hearsay' and could not be sufficient to satisfy Mr Walmsley on the balance of probabilities. He denied that he had acted as Miss Taylor alleged, suggesting that the vocabulary he was alleged to have used was not his, as he was not a native English speaker.

137. In relation to the events on the 12 June, the claimant accepted that he had challenged Miss Taylor asking why she had gone to Mrs Venn Adams rather than emailing or leaving a note for him, and he accepted that she had said 'because she is my manager' to which he replied she was not. He denied that he had acted inappropriately or made any threat. In relation to the claimant's general conduct towards his colleagues, the claimant argued that no concerns had been raised previously, notwithstanding two 360 feedback exercises, including one in which he had been asked to obtain feedback from those who had raised concerns about his clinical practice.

138. The claimant argued that the manner in which his clinics were booked put him under pressure to decide whether to perform suboptimal work because of the time pressures, or to resist the double listing and inadequate bookings so that he could comply with his duties in the Hippocratic oath. A further consequence was that he did not have time to have discussions with his colleagues or to respond to emails. The claimant argued that he may have been perceived as rude because he simply told his colleagues he did not have time to speak to them, rather than providing a longer, 'dithery' and more diplomatic answer, and that that tendency to be direct was a characteristic of Indians.

139. He argued that he did not attend consultant's meetings not because he was being difficult but because they were scheduled on days when he had clinical lists and so did not have time to attend.

140. In relation to the allegations concerning his conduct towards Dr Suri, the claimant argued that it was his duty to identify failings in performance or standards or where patients were exposed to a risk of harm, but he had shown him around during a break in his clinical work.

141. In relation to the allegation that he had conducted a procedure when instructed not to, the claimant argued that he had provided the information requested in relation to the Standard Operation Procedure and had liaised to identify the appropriate coding for the procedure, and believed, in the absence of a response to an email he had sent asking what else was needed, that he could proceed.

142. The claimant argued that Mrs Smith's criticisms of his productivity were inaccurate and misinformed and merely demonstrated her bias towards him; and in any event no provision had been made by her or any other manager to cover his work when he was absent. The claimant argued for the first time that he had been victimised by Mrs Smith for using Datix to raise patient safety issues. In addition, he complained that Mrs Venn Adam's cancellation of his MDT and the practice of double-booking or changes to clinics never happened for a white consultant, Mr Cook. His wife did not argue that they were racist, but rather that was the claimant's perception of events given the lack of explanation for them.

143. In relation to the completion of LocSIPP, the claimant said it was a national policy, but there was a different department policy to produce an electronic record, and in any event the LocSIPP process was too onerous for him to comply with as no time had been allocated to enable the claimant to complete the forms (the reality was that it had been agreed at a consultant's meeting that consultants should complete the forms within each appointment as it was largely a tick box form).

144. The claimant was asked whether he had been offered mediation; he said that it had not, that he would not want to see someone face to face but he was happy to agree a plan as to his clinical work would operate, identifying who was accountable and responsibility for the component elements.

145. The claimant accepted that he had limited communication with Mrs Smith and Dr Hicks to email, the former because she had accused him of harassment, the latter because he had questioned the claimant's motives in an email, when he could have raised any concerns verbally but chose not to. He denied that he had difficult relationships with the HCAs and other staff but said he did not believe that there was really a dedicated breast imaging team as there were no specialist mammographers, and he felt his ability to lead the team as a consultant was constantly undermined. He said that having read the interviews of his team members he accepted that he needed to do things differently, but if he spoke to people directly, he would be regarded as confrontational.

146. When asked how he perceived Dr Hicks' role in the department, the claimant accepted that he was the clinical lead but objected to him making decision in respect of the Breast Radiology protocols for which the claimant was responsible because he lacked the necessary specialism.

The disciplinary decision

147. After the hearing Mr Walmsley and the panel considered the evidence that they had heard. The panel concluded that the allegation of misconduct in respect of Miss Taylor was proved and, because it amounted to bullying and

abusive behaviour (specifically the threat to submit a Datix with a racial complaint against Miss Taylor), it constituted gross misconduct. Secondly, it concluded that the claimant had refused to communicate face to face, was reluctant to speak with managers in relation to anything other than clinical issues and had publicly criticised individuals in Datix and unjustifiably accused them of racism. Lastly, it concluded that that conduct had caused the relationship between the claimant and others in the Department to have broken down irretrievably. It did not accept that the conduct which it found had occurred was explained or caused by the claimant's Indian heritage or culture, which would only provide an explanation for direct or abrupt responses.

148. The panel believed the claimant's allegations of race discrimination were unjustified because he had no reasonable grounds to make the allegations as he was unable to produce any evidence to corroborate them.

149. In relation to the Datix which the panel felt had been used inappropriately, the panel accepted that the claimant genuinely believed that Mrs Smith was not competent in her role, and that that raised patient safety concerns, but concluded that that was an unfounded and unreasonable perception to have and that whilst the claimant was permitted to raise such patient safety concerns through Datix (in relation to the event which gave rise to the perception of incompetence), the allegation of incompetence should have been referred to her line manager so as to permit the concern to be properly investigated. The panel concluded that the claimant had maliciously presented the Datix intending to undermine Mrs Smith.

150. Mr Walmsley considered whether the claimant should be offered mediation but concluded that it would not bring about an effective resolution so as to overcome the breakdown in relationship as the claimant did not appear to accept that any criticism of him was legitimate and so would not change his approach. Furthermore, he concluded that as the relationship with six individuals had broken down, there were too many people with whom such mediation would have to have worked in order to be effective.

151. The panel considered a whether a final written warning was an appropriate but concluded that it was not and so elected to summarily dismiss the claimant.

<u>The dismissal letter (detriment 5; direct race discrimination; and victimisation)</u>

152. On 16 August 2019 Mr Walmsley wrote to the claimant on behalf the disciplinary panel setting out the panel's conclusions above.

153. The letter recorded that the panel found all the allegations proven, and that the claimant had breached the Trust's Disciplinary policy because he had been found to have behaved abusively, deliberately to have failed to comply work procedures (LocSIPP) and to have persistently failed to follow a reasonable instruction (pigtail catheters). In addition, the panel concluded that the claimant's conduct contravened the Trust Bullying and harassment policy, and breached the General Medical Practice guidance to work, collaborative with colleagues and to treat them fairly and with respect.

154. The panel dismissed the claimant's complaints of bullying, harassment,

and racial discrimination against Mr Smith.

155. The letter then set the panel's conclusions in respect of the findings that it had made as follows;

> *… we went on to consider whether the misconduct proved amounted to gross misconduct. We believe that some of the allegations taken alone could be considered sufficient to amount to gross misconduct. However on balance we find that the instances taken individually amount, at the very least, to serious misconduct but their cumulative effect is such as demonstrates a pattern of misconduct which is so serious that it has undermined the relationship of trust and confidence between the Trust as your employer and you. As a result, having taken into consideration mitigation you have put forward, we have reached the decision that you will be summarily dismissed on the grounds of gross misconduct and your employment will therefore be terminated with immediate effect from the date of this letter.*
>
> *Regardless of the finding of wilful misconduct on your part which we have made, having looked at all the evidence and heard from you, we believe that in any event relationships between you and your colleagues, including the clinical leadership, has irretrievably broken down to the extent that your continued employment at the Trust is no longer practicable.*

156. The claimant was notified of his right of appeal.

The Appeal

157. He appealed in an email dated 29 August 2019. Amongst the many grounds of appeal, the claimant complained that the panel had concluded that he was solely responsible for the irretrievable breakdown in relationships, but had failed to take into account:

157.1. the stress he was placed under as a consequence of work pressure;

157.2. the extent to which his colleagues had potentially worsened the working relationship by failing to acknowledge patient safety issues;

157.3. the advice from his counsellor to avoid stressful situations;

157.4. the advice of his previous clinical lead to limit his interactions with his colleagues to avoid allegations of rude behaviour; and

157.5. no attempt had been made to mediate the relationship issues.

158. Secondly, the claimant alleged that dismissing him for complaining of discrimination was victimisation and/or that he had been dismissed for raising patient safety concerns.

159. On 12 September 2019 the respondent received an occupational health report in respect of the claimant. The report identified that the claimant was suffering from work-related stress, but noted that there was no fundamental medical issue, and there was no prospect of a sustained return for the claimant in his current work situation, recording that the claimant was keen to

work remotely as far as possible, believing that to be the only solution to the allegations that have been made against.

160. On 8 November 2019 the claimant's appeal hearing took place. It was heard by a panel consisting of Dr Jane Locker, consultant Radiologist at University Hospitals Bristol, Christine Dominy, the Managing Director of the respondent who chaired the appeal, and Mr Matthew Joint, who was then the respondent's Director of People. The claimant elected not to attend the appeal. The appeal was conducted as a review of the panel's decision which had been chaired by Mr Walmsley. Mr Walmsley attended to present the Management Appeal Statement of Case.

161. The panel reviewed the claimant's grounds of appeal, permitted Mr Walmsley to present the management statement of case, and considered the grounds of appeal against the evidence presented.

162. On 5 December 2019 Mr Joint wrote to the claimant rejecting his appeal in a detailed letter addressing each of the grounds of appeal. The appeal panel concluded insofar as is relevant that:

162.1. there was evidence to support the disciplinary panel's conclusion that the relationship between the claimant and members of his department had irretrievably broken down;

162.2. the disciplinary panel's conclusion that the claimant had bullied Ms Taylor was one open to it on the balance of probabilities given the evidence before it;

162.3. the disciplinary panel's conclusion that some of the allegations found to be proved amounted to gross misconduct, but in any event cumulatively there was so serious as to undermine trust and confidence between the claimant and the Respondent was an appropriate finding, and summary dismissal was the correct sanction in circumstances.

163. The claimant's last day of service was 16 August 2019. On 30 September 2019 the claimant began early conciliation through ACAS, and a certificate was issued on 13 November 2019. The claimant presented his claim to the Tribunal on 11 December 2020.

The Relevant Law

Protected Disclosures

164. The concept of "protected disclosure" is defined by section 43A of the 1996 Act:

> "In this Act a "protected disclosure" means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H."

165. A qualifying disclosure is in turn defined by section 43B:

> "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—

(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 or safety of any individual has been, is being or is likely to be endangered,

(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed."

166. Since the dispute between the parties in relation to PDs 7.2 and 7.7 is simply whether the claimant made the disclosures alleged, and it is conceded that if made they were qualifying and protected disclosure, I have not set out the law relating to the necessary substance of protected disclosures here. The respondent's argument is whether the claimant made the disclosures in good faith. That is a matter to be determined at the remedy hearing and I will address the law relevant to that issue then.

Distinguishing between the content and manner of disclosures/protected acts

167. "Depending on the circumstances, it may be permissible to distinguish between the disclosure of the information and the manner or way in which it was disclosed. …" (see Panayiotou v Chief Constable of Hampshire Police [2014] IRLR 500 per Mr Justice Lewis at paragraph 49). However, the following principles apply:

167.1. The tribunal "should be slow to recognise a distinction between the complaint and the way in which it is made, save in clear cases" (Martin v Devonshires, per Underhill P at 1122); and "a tribunal should look with care at arguments that say that the dismissal was because of acts related to the disclosure rather than because of the disclosure itself" per Lewis J at 1150, in the context of protected disclosure detriments, citing Bolton School v Evans [2007] ICR 641, per Buxton U at ¶18).

167.2. intemperate language or inaccurate statements in a complaint are not sufficient to distinguish between a complaint and the manner of its making and "An employer who purports to object to 'ordinary' unreasonable behaviour of that kind should be treated as objecting to the complaint itself" (Martin v Devonshires, per Underhill P at para 22).

167.3. "The employment tribunal will ... need to ensure that the factors relied upon are genuinely separable from the fact of making the protected disclosure and are in fact the reasons why the employer acted as it did" (Panayiotou, per Lewis J at para 52).

167.4. Where "a material part of the reason" for detrimental conduct is the employer's "objection to the substance of the disclosures themselves" then a claim is "in principle meritorious", subject to issues of limitation, etc (Kong v Gulf International Bank (UK) Limited EA-2020-00035740J (unrep. 10.09.21), per Auerbach J at 1187, in the context of protected disclosure detriment claims; see also Panayiotou, per Lewis J at ¶49 in the same

context).

167.5. Where an employer asserts that there has been "a loss of confidence and trust" which is based upon, or arises out of "the fact that the [employee] had made complaints of... discrimination", the breakdown of trust and confidence will not be "properly separable" from the doing of the protected acts (Panayiotou, per Lewis J at para 53, citing Woodhouse v West Northwest Homes Leeds Ltd [2013] IRLR 773).

Detriment

168. In order to bring a claim under section 47B, the worker must have suffered a detriment. It is now well established that the concept of detriment is very broad and must be judged from the viewpoint of the worker. There is a detriment if a reasonable employee might consider the relevant treatment to constitute a detriment. The concept is well established in discrimination law, and it has the same meaning in whistle-blowing cases. In Derbyshire v St. Helens MBC [2007] UKHL 16; [2007] ICR 841 paras. 67-68 Lord Neuberger described the position thus:

> "67. … In that connection, Brightman LJ said in Ministry of Defence v Jeremiah [1980] ICR 13 at 31A that "a detriment exists if a reasonable worker would or might take the view that the [treatment] was in all the circumstances to his detriment".
>
> 68. That observation was cited with apparent approval by Lord Hoffmann in Khan [2001] ICR 1065, para 53. More recently it has been cited with approved in your Lordships' House in Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337. At para 35, my noble and learned friend, Lord Hope of Craighead, after referring to the observation and describing the test as being one of "materiality", also said that an "unjustified sense of grievance cannot amount to 'detriment'". In the same case, at para 105, Lord Scott of Foscote, after quoting Brightman LJ's observation, added: "If the victim's opinion that the treatment was to his or her detriment is a reasonable one to hold, that ought, in my opinion, to suffice"."

169. Some workers may not consider that particular treatment amounts to a detriment; they may be unconcerned about it and not consider themselves to be prejudiced or disadvantaged in any way. But if a reasonable worker might do so, and the claimant genuinely does so, that is enough to amount to a detriment. The test is not, therefore, wholly subjective.

"On the ground that"

170. There must be a link between the protected disclosure or disclosures and the act, or failure to act, which results in the detriment. Section 47B requires that the act should be "on the ground that" the worker has made the protected disclosure. The leading authority is the decision of the Court of Appeal in Manchester NHS Trust v Fecitt [2011] EWCA 1190; [2012] ICR 372 where the meaning of this phrase was considered by Elias LJ (a tpara.45):

> "In my judgment, the better view is that section 47B will be infringed if the protected disclosure materially influences (in the sense of being more than

a trivial influence) the employer's treatment of the whistle-blower."

171. As Lord Nicholls pointed out in Chief Constable of West Yorkshire v Khan [2001] UKHL 48; [2001] ICR 1065 para.28, in the similar context of discrimination on racial grounds, this is not strictly a causation test within the usual meaning of that term; it can more aptly be described as a "reason why" test:

> "Contrary to views sometimes stated, the third ingredient ('by reason that') does not raise a question of causation as that expression is usually understood. Causation is a slippery word, but normally it is used to describe a legal exercise. From the many events leading up to the crucial happening, the court selects one or more of them which the law regards as causative of the happening. Sometimes the court may look for the 'operative' cause, or the 'effective' cause. Sometimes it may apply a 'but for' approach. For the reasons I sought to explain in Nagarajan v London Regional Transport [2001] 1 AC 502, 510-512, a causation exercise of this type is not required either by section 1(1)(a) or section 2. The phrases 'on racial grounds' and 'by reason that' denote a different exercise: why did the alleged discriminator act as he did? What, consciously or unconsciously, was his reason? Unlike causation, this is a subjective test. Causation is a legal conclusion. The reason why a person acted as he did is a question of fact."

172. Liability is not, therefore, established by the claimant showing that but for the protected disclosure, the employer would not have committed the relevant act which gives rise to a detriment. If the employer can show that the reason he took the action which caused the detriment had nothing to do with the making of the protected disclosures, or that this was only a trivial factor in his reasoning, he will not be liable under section 47B.

S.103A ERA 1996

173. Section 103A provides:

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

174. This creates "an anomaly with the situation in unfair dismissal where the protected disclosure must be the sole or principal reason before the dismissal is deemed to be automatically unfair" see Kuzel v Roche Products Ltd [2008] ICR 799 per Elias J at para 44.

175. The principal reason for the dismissal is "a set of facts known to the employer, or it may be beliefs held by him, which cause him to dismiss the employee" (see Abernethy v Mott, Hay and Anderson [1974] ICR 323).

176. The focus must be on the knowledge, or state of mind, of the person who actually took the decision to dismiss, as, "by S.103A, Parliament clearly intended to provide that, where the real reason for dismissal was whistleblowing, the automatic consequence should be a finding of unfair dismissal. In searching for the reason for a dismissal, courts need generally

look no further than at the reasons given by the appointed decision-maker. …[however] 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." Royal Mail Group Ltd v Jhuti 2019 UKSC 55, SC.

Discrimination

177. The claimant brings two claims under the Equality Act 2010. The first for direct discrimination (s.13 Equality Act 2010 ("EQA")), the second that the respondent victimised him (contrary to section 27 EQA 2010).

178. The relevant law is contained in sections 39 and 13, 27 and 136 EQA 2010 which provide respectively (in so far as is relevant) as follows:

39 – Employees and applicants

(2) An employer (A) must not discriminate against an employee of A's (B)—
(a) as to B's terms of employment;
(d) by subjecting B to any other detriment.

13. Direct discrimination

(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

27. Victimisation

(1) A person (A) victimises another person (B) if A subjects B to a detriment because—
(a) B does a protected act, or
(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act—
(a) bringing proceedings under this Act;
(b) giving evidence or information in connection with proceedings under this Act;
(c) doing any other thing for the purposes of or in connection with this Act;
(d) making an allegation (whether or not express) that A or another person has contravened this Act.

(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

Section 13

179. The basic question in every direct discrimination case is why the

complainant was subjected to less favourable treatment (Amnesty International v Ahmed [2009] IRLR 884, per Underhill P, para. 32).

180. Once it is established that the treatment is because of a protected characteristic, unlawful discrimination is established, and the respondent's motive or intention is irrelevant (Nagarajan v London Regional Transport [1999] IRLR 572 HL).

181. The protected characteristic does not need to be the only reason for the less favourable treatment, or even the main reason, so long as it was an 'effective cause' of the treatment: O'Neill v Governors of St Thomas More Roman Catholic Voluntarily Aided Upper School and anor [1996] IRLR 372, EAT.

The reverse burden of proof

182. The statutory tests are subject to the reverse burden of proof in section 136 EQA 2010 which provides:

> (2) If there are facts on which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision.

183. The correct approach to the reverse burden of proof provisions in discrimination claims has been the subject of extensive judicial consideration. In every case the Tribunal has to determine the "reason why" the claimant was treated as he was (per Lord Nicholls in Nagarajan v London Regional Transport [1999] IRLR 572 HL). This is "the crucial question."

184. It is for the claimant to prove the facts from which the Tribunal could conclude that there has been an unlawful act of discrimination (Igen Ltd and Ors v Wong [2005] IRLR 258 CA), i.e., that the alleged discriminator has treated the claimant less favourably or unfavourably and that the reason why it did so was on the grounds of the protected characteristic. That requires the Tribunal to consider the mental processes of the alleged discriminator (Advance Security UK Ltd v Musa [2008] UKEAT/0611/07).

185. In Igen the court proposed a two-stage approach to the burden of proof provisions. The first stage requires the claimant to prove primary facts from which a Tribunal properly directing itself could reasonably conclude that the reason for the treatment complained of was the protected characteristic. The claimant may do so both by their own evidence and by reliance on the evidence of the respondent.

186. If the claimant does so, the second stage requires the respondent to demonstrate that the protected characteristic was in no sense whatsoever connected to the treatment in question. That requires the Tribunal to assess not merely whether the respondent has proven an explanation, but that it is adequate to discharge the burden of proof on the balance of probabilities that the protected characteristic was not a ground for the treatment in question. If it cannot do so, then the claim succeeds. However, if the respondent shows that the unfavourable or less favourable treatment did not occur or that the

reason for the treatment was not the protected characteristic the claim will fail.

187. The explanation for the less favourable treatment advanced by the respondent does not have to be a 'reasonable' one; it may be that the employer has treated the claimant unreasonably. The mere fact that the claimant is treated unreasonably does not suffice to justify an inference of unlawful discrimination to satisfy stage one (London Borough of Islington v Ladele [2009] IRLR 154).

188. Furthermore, it is not sufficient for the claimant simply to prove that there was a difference in status i.e., that the comparator did not share the protected characteristic relied upon by the claimant) and a difference in treatment. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an act of discrimination (see Madarassy v Nomura International Plc [2007] ICR 867 CA; Hewage v Grampian Health Board [2012] IRLR 870 SC and Royal Mail Group Ltd v Efobi [2019] EWCA Civ 18.)

189. The Tribunal does not have slavishly to follow the two-stage process in every case - in Laing v Manchester City Council and anor [2006] ICR 1519, EAT, Mr Justice Elias identified that 'it might be sensible for a tribunal to go straight to the second stage… where the employee is seeking to compare his treatment with a hypothetical employee. In such cases the question whether there is such a comparator — whether there is a prima facie case — is in practice often inextricably linked to the issue of what is the explanation for the treatment." That approach was endorsed by the Court of Appeal in Stockton on Tees Borough Council v Aylott [2010] ICR 1278.

190. It is for the claimant to show that the hypothetical comparator in the same situation as the claimant would have been treated more favourably. It is still a matter for the claimant to ensure that the Tribunal is given the primary evidence from which the necessary inferences may be drawn (Balamoody v UK Central Council for Nursing Midwifery and Health Visiting [2002] IRLR 288).

Detriment and unfavourable treatment (s.15)

191. The test of a detriment within the meaning of section 39 EQA 2010 is whether the treatment is "of such a kind that a reasonable worker would or might take the view that in all the circumstances it was to his detriment?" (Per Lord Hope in Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11; [2003] ICR 337, para 35).

Discussion and Conclusions

Protected disclosure: s47B and 103A ERA 1996

PD 7:2

192. The issue for me is whether on 15th February 2016 the claimant made a

telephone referral to the CQC in which he complained that the respondent had an unsafe practice of double-booking clinics, and, if so, whether he reasonably believed that it was substantially true. The claimant was in effect put to proof of that allegation. As it was a telephone report, the claimant retains no contemporaneous evidence of it. It was open to him to seek to obtain a record from the CQC, but I am persuaded on balance that he did make the referral given the contemporaneous record of his email to Dr Stoddard alleging that he had, and the claimant's deep wounds and anxiety relating to the Never Events and his belief that they were caused by double-booked clinics. For the same reason, I am persuaded that on balance he believed that it was substantially true.

PD 7.7

193. I do not find that the disclosure was made for the reasons set out in the background above at paragraph 70.

Detriments

194. The respondent accepts that the detriments occurred as a matter of fact and does not through its submissions suggest that they were not detriments. In my view, they are all plainly capable of constituting a detriment given that a reasonable worker would and could reasonably regard them as being to their detriment.

Causation

195. Plainly the detriments cannot have been caused by the protected disclosures which predated them. I address each in turn

Mrs Smith's written account of the events of 16.4.18 produced on 10 May 2018.

196. Mrs Smith was aware of PDs 7.1, 3, 4, 5, 6, 8, 9, 10 and 11 prior to producing her account. Of those, only PDs 7.3, 7.9, 7.10 and 7.11 directly concerned Mrs Smith. The first of those was made on 1 May 2016, two years prior. There was no evidence to demonstrate that that influenced Mrs Smith's decision in any way at all. I accept Mrs Smith's evidence that her relationship with the claimant had broken down in 2016 as a consequence of the dispute as to the use of pigtail catheters. However, Mrs Smith took no action against the claimant beyond properly conveying messages that he should cease to use the procedure and requiring him to clarify the SOP which he had followed in performing it. It was suggested in cross-examination that the protected disclosure annoyed and aggravated Mrs Smith because it suggested that her actions had risked sepsis in two patients; she accepted that she was angry and disappointed as she was not the medic treating them and the allegation was therefore unfair. I accept her evidence in that regard and find on balance that her actions were therefore entirely appropriate and in no way whatsoever influenced by PD 7.3.

197. The criticism that the claimant made of Mrs Smith in the Datix of 1 and 8 May 2018 was in relation to the manner in which she investigated and concluded the complaints he made in the Datix. That was a less serious complaint than the allegation in PD 7.3 and, in any event, at the stage Mrs

Smith had the protection, if that is the right term, of the fact that senior managers, such as Dr Hicks and Mr Collins, were aware of the claimant's repeated Datix and the fracturing relationships in the Department which were their cause and were supportive of her (albeit she felt that they were not taking enough action to support her by addressing the claimant's conduct). The Datix of 8 May 2018 had led to a round table meeting to discuss it.

198. In my judgment, Mrs Smith produced her account of the events of 16 April 2018 because her frustration that no substantive action was being taken to resolve the claimant's conduct had reached crisis point (a frustration which she addressed in emails long before the Datix and reiterated during her interviews by Mr Major), given the serious allegation the claimant had made against Dr Suri, and so produced the account to reflect the extent to which the claimant's complaints were borne out of his utter and complete hostility to Dr Suri. The protected disclosures of 1 and 8 May 2018 were in no more than a trivial influence on her decision to do so.

Mrs Smith's decision to raise a collective grievance and her evidence in the disciplinary investigation

199. Mrs Misra sought to argue that I could and should properly distinguish between the protected disclosures and the manner in which they were made. In the context of this case, I reject that argument. In my judgment, this case, in so far as it relates to Mrs Smith's reasons for acting, cannot be treated as possessing a feature which is properly severable from the manner of the complaint (as envisaged by Underhill J in Martin at para 22): Mrs Smith objected to the allegations which formed the subject of the Datix more than she objected to the intemperate language and inaccurate statements in which they were expressed. That was true of the Datix in which the claimant alleged that she simply wrote off his clinical concerns as communication issues, but particularly of PD 7.14 in which he named her and implied that she was incompetent.

200. Mr Butler put the claimant's claim on this point directly to Mrs Smith as follows:

> *Q: The claimant's claim is that various things you did were influenced by Datix he raised against you, that includes the collective grievance and the evidence you gave, I am suggesting that in doing those things you were at least a little bit influenced by the fact that he had raised those grievances against you?*
>
> *A: yes*

201. I cannot ignore that evidence; I found Mrs Smith to be an honest and truthful witness. Whilst it is very clear from Mrs Smith's accounts to Mr Major that the main and predominant reasons for her decision to raise the collective grievance were her exasperation with the claimant's aggression and rudeness to members of the Department and to Dr Suri, his refusal to engage with or support other members of the Team, the delay in his reports and his refusal to see patients where she believed it was necessary (causing delays) and the fact that she believed given the lack of oversight that he was potentially failing the patients and putting the reputation of the service and her reputation

particularly (as its manager) at risk, it is equally clear through her answer to Mr Butler that the Datix naming her were more than a trivial influence on her decision to issue the collective grievance. In that limited sense the claim is well founded.

202. However, I accept Mrs Smith's evidence that the panic attack which she suffered on her return from annual leave, when she thought of having to return to work with claimant, was the trigger for the decision that she needed to do something and to write a grievance. There is no allegation that Mrs Baker or Mrs Beardshaw were influenced by the Datix in their decision to join the collective grievance and I reject the claimant's allegation that Mrs Smith sought to or persuaded them to do so. I accept the account that Mrs Baker and Mrs Beardshaw gave in their interviews with Mr Major for their decisions to sign the collective grievance as being both accurate and genuine.

203. For the avoidance of doubt, I reject any suggestion that the accounts that Mrs Smith gave in the interviews to Mr Major were untruthful or exaggerated. Once she had set the ball rolling by lodging the collective grievance, she simply told Mr Major what had happened, what she honestly believed were the reasons, and what she and others did.

204. Limitation: The collective grievance was presented on 26 September 2018. ACAS early conciliation began on 30 September 2019 and a certificate was issued on 13 November 2019. The claim was presented on 11 December 2020. In my judgment that collective grievance was not part of a series of similar acts or failures ending with the claimant's dismissal for the purpose of s.48(3) ERA 1996 as Mrs Smith played no part in the decision to dismiss the claimant: Mr Major investigated the disciplinary allegations, produced a report which concluded that they had been established, and Mr Walmsley chaired a panel which considered the report and the claimant's arguments and explanations, and determined that there had been gross misconduct and that the appropriate sanction was summary dismissal. Mrs Smith's decision was made on 26 June 2018, Mr Walmsley's on 16 August 2019, some 14 months later. The claim was therefore presented in excess of 26 months out of time.

205. The claimant led no evidence as to why it was not reasonably practicable to present the claim in time (as he was required to do - see Porter v Bandridge Ltd [1978] ICR 943, CA). Accordingly, as he failed to argue that it was not reasonably practicable to present the claim in time and has therefore failed to discharge the burden on him to demonstrate that that was the case, I must inevitably find that it was reasonably practicable for the claim to have been presented in time (applying Sterling v United Learning Trust EAT 0439/14).

206. The Tribunal therefore has no jurisdiction to hear the claim and it is dismissed.

Mrs Smith's account to Mr Dymond

207. Similarly, I am not persuaded that Mrs Smith's account to Mr Dymond was in any way influenced by the protected disclosures. Whilst Mrs Smith made reference to the fact of the Datix in her interview, it was only as a passing

remark that the claimant was "never happy with my response," and subsequently, that because of a Datix in 2016 she ensured that was "never alone with him." The majority of the interview is occupied with her describing how the claimant treated Mrs Venn Adams and others, and her frustration at the lack of support for her from senior management in her efforts to manage him. There is nothing therefore which directly or expressly connects her account to the protected disclosures and, as I accept her evidence that the reason she answered the questions as she did was because it was the truth, I decline to draw an inference that the protected disclosure were in any way an influence upon her - her answers evidence her obvious frustration with the claimant's conduct and attitude, not with his use of Datix.

Mrs Venn Adams and Mr Hicks

208. I reject the claimant's argument that Mrs Venn Adams or Mr Hicks were influenced in their actions in any way by the protected disclosures. I found Mrs Venn Adams and Dr Hicks to be honest and truthful witnesses and accept the explanations that they gave for their actions. It was notable that the claimant did not allege either in his written statement that he provided to Mr Dymond, or in his interview with Mr Major, that Mrs Venn Adams or Mr Hicks were in any way motivated by the fact that he had made protected disclosures. It formed no part of his allegations at all.

209. Mrs Venn-Adam's evidence to Mr Dymond made a passing reference to the Datix "he is keen to point out other people's mistakes, he has filed a Datix about me but I'm not sure if he raised other things" but also stated "I'm moving on, I have a new job… I'm strong and in my position can walk away." The evidence of Mrs Smith and, to a lesser extent Mrs Baker, was that Mrs Venn Adams was not cowed by or afraid of the claimant but stood up to him. Thus, her reaction to his raising Datix about her was largely to ignore it and occasionally to submit a Datix about the claimant's actions.

210. Mrs Venn Adams did not submit a Datix on 12 June 2018 because the claimant had submitted a Datix; I have rejected the claimant's suggestion that the account contained within it was knowingly false because the events did not happen (as he alleges). Mrs Venn Adams' evidence in her statement was that she had submitted the Datix because she "was not prepared to be treated in this way anymore." To suggest, as Mr Butler argues by implication that the words "this way" should be limited to the submission of Datix by the claimant is to torture the language and structure of the paragraph to such an extent that it loses all sense and reason. Mrs Venn Adam stated,

> *"reviewing all these incidents has been quite upsetting and I had forgotten what a difficult time it was in my professional capacity being the lead of a service that was so disjointed…. There were other incidents when he was unprofessional towards me in his manner but I did not log them formally."*

211. It is clear to me that the reference to being treated 'in this way' was not a reference to the claimant's actions in completing Datix, but rather his unprofessional conduct towards Mrs Venn Adams. Certainly, her evidence during the investigations of Mr Dymond and Mr Major was not consistent with her being in any way troubled by the fact that he had raised a Datix against her or others, but rather indicated that she was concerned about the manner

in which he behaved towards her and others and so explained that in her accounts. Thus, despite protected disclosures numbers one, five, six, eight, nine, 10 and 11 referencing Mrs Venn Adams, she took no action against the claimant, which suggests that the fact that the claimant raised a Datix referencing her was not a cause of her actions. She gave her account to Mr Dymond because she was a witness to the events of the 11 and 12 June 2018 and had a heated exchange with the claimant.

212. I am satisfied therefore that the reason she presented the Datix was because she could not tolerate that unprofessional conduct any longer after the tirade she suffered from the claimant on 12 June 2018 and was not in any way influenced by the protected disclosures.

213. Similarly, the reason that Mrs Venn Adams put her name to the collective grievance was nothing whatsoever to do with the claimant's protected disclosures, but rather, as she suggested, because Mrs Smith asked her to, and she agreed to do so. The test of causation is not a 'but for' one, but (given the parallels between whistleblowing detriment and discrimination) following Chief Constable of West Yorkshire Police v Khan [2001] ICR 1065, HL one that requires the tribunal to consider the conscious or unconscious motive for the alleged perpetrator's conduct. It is not enough, therefore, as Mr Butler argued that Mrs Smith's decision to pursue the collective grievance was more than trivially influenced by the protected disclosures, and she influenced Mrs Venn Adams to participate in that course; Mrs Venn Adam's decision must itself have been consciously or unconsciously influenced by the disclosures: it is her mindset that must be considered (Advance Security UK Ltd v Musa). It was not: her decision to participate arose out of the request and Mrs Venn Adam's frustration with the continuation of the claimant's conduct towards her and others (not the submissions of Datix), in the circumstances (which as Mrs Dunn noted in her grievance report), was felt more directly by those he worked with after the claimant's relationship with Dr Stoddard had broken down and Dr Stoddard was no longer acting as a filter for the claimant's complaints and language.

214. In so far as Mr Hicks is concerned, I accept his evidence that the Datix in no way whatsoever influenced the evidence that he gave to Mr Major. The trigger and the primary reason for Dr Hicks' later actions was the claimant's refusal to engage in his investigation of the Datix raised by Mrs Venn Adams 12 June. Furthermore, I found his evidence in relation to the impact of the claimant's allegations of race discrimination upon him, and his subsequent actions in disclosing that to his senior manager, in consultants meetings and to his union to be credible and truthful. Insofar as the claimant's protected disclosures had any influence on Dr Hicks' actions, that was the extent of it. When he gave evidence to Mr Major during the investigation, I accept that his actions were limited to describing what he had experienced and providing copies of the relevant documents. His account reveals his frustrations with the claimant's approach to him and does not make any reference to the Datix beyond that detailed above.

215. The claimant's claims that Mrs Venn Adams and Mr Hicks were in any way influenced by the claimant's protected disclosures are therefore not well founded and are dismissed.

The claimant's dismissal (section 47B ERA 1996)

216. Miss Misra argued that the respondent was not able to pursue a claim of detriment contrary to s.47B(1B) in relation to his dismissal as such a claim was dependent upon a finding that Mr Walmsley had subjected the claimant to a detriment by dismissing him and the claimant had not sought to amend his claim to include Mr Walmsley as a respondent. That stance was, I suspect, initially influenced by a remark that I had made that Mr Walmsley was not a respondent and might need to be if such a claim were pursued. It led counsel to address the point at length in their submissions.

217. It is, in short, a bad point, and I accept responsibility for its genesis, if not for its pursuit. It is a bad point for the following reasons: s.47(1A) ERA 1996 confers the right not to be subjected to any detriment by any act, or any deliberate failure to act, done by another worker of [the claimants]' employer in the course of that other worker's employment"; and s.47B(1B) provides that "Where a worker is subjected to detriment by anything done as mentioned in subsection (1A), that thing is treated as also done by the worker's employer". That is the provision which creates vicarious liability upon the respondent for the actions of Mr Walmsley. In Timis v Osipov [2018] EWCA Civ 2321 (per Underhill LJ at paras 74, 75 and 78) the Court of Appeal held, as Miss Misra accepts, that a detriment claim pursuant to section 47(1A) and (1B) can be brought in relation to the act of dismissal, notwithstanding the content of s.47B(2) ERA 1996.

218. Miss Misra, however, argues that the claimant cannot claim against the respondent on the grounds of vicarious liability in s.47B(1B) unless he has first brought a claim against the individual whose conduct he asserts breaches the right in S.47B(1A), arguing that nothing within the Osipov decision suggests expressly or implicitly that such a course is not necessary. She prays in aid the prejudice to Mr Walmsley and the potential conflict of interest that might result between him and the respondent.

219. I reject that argument. There are equivalent provisions which impose vicarious liability upon an employer for the acts of its employees within the Equality Act 2010: ss.109 and 110. There is no requirement in those provisions, nor identified in any authority to which Miss Misra could point in respect of the provisions in section 47B ERA 1996, which establishes that a claimant is required to pursue a concurrent claim against the employee's whose actions are subject of the complaint: the claimant can bring a claim in respect of the detriment of his dismissal by Mr Walmsley against the Trust.

220. I turn then to consider whether the protected disclosures were more than a trivial influence upon Mr Walmsley's decision to dismiss the claimant. The starting point is necessarily the dismissal letter. The letter identifies the Datix (and hence the protected disclosures) amongst the disciplinary allegations:

> "*You have made unjustified accusations of racist behaviour against staff: (a) 3 September (to Jane Baker), 3 September 2018 (Datix submitted) [PD7.13], …*
>
> *(b) You used Datixes deliberately for inappropriate purposes, namely to raise criticisms of colleagues and question competence unreasonably on 1*

November 2018 [PD7.14] and 12 June 2018 [PD7.12].”

(References in square brackets added)

221. The letter then specifically references the Datix amongst the reasons for dismissal: in addressing the findings in respect of those allegations, Mr Walmsley wrote,

> *“The panel heard evidence that you have made numerous accusations of racist behaviour against colleagues, and could find no justification to support these assertions. When these were explored at the hearing you were unable to provide evidence as to how people’s actions were racially motivated or how you have been treated differently due to your ethnicity. Your assertion that a clinic had been double booked and that this did not occur to colleagues of a white / British background was not evidenced and the panel believed that the instance in question was a genuine human error. You appear to have used Datix as a “weapon” and the panel have seen numerous instances where this has been used, not as a constructive tool to address safety issues in a collaborative manner, but to raise accusations against colleagues.”*

222. The respondent accepts that the claimant had a reasonable belief that the matters he reported in the Datix submitted on 12 June 2018 (PD7.12 relating to Mrs Venn Adam’s allocation of time for procedures), 3 September 2018 (PD7.13 relating to Mrs Venn Adams’ decision to call him away from an MDT meeting) and 1 November 2018 (PD7.14- relating to Mrs Smith’s competence) raised genuine concerns regarding the health and safety of patients and were therefore protected disclosures. That Mr Walmsley concluded that the claimant’s primary purpose in submitting the Datix was to raise accusations, rather than to identify matters which posed a clinical risk, does not alter the position that their content amounted to protected disclosures. It was the content that he objected to: Mr Walmsley articulated his objection in this way – the Datix alleged incompetence against a background event, rather than merely identifying the background event and the clinical concern, so as to permit an investigation to determine whether the cause was a failure in a system or an individual failure which might amount to incompetence. Certainly, the claimant used intemperate language on occasion in raising his concerns, and the conclusions he drew of incompetence may have been inaccurate but applying Martin those are not matters which are properly severable from the disclosures themselves. In so far as the ‘weaponization’ of Datix caused Mr Walmsley to lose trust and confidence in the claimant, that is, again, not properly separable from the disclosure (see Panayioutou at para 49).

223. Whilst the predominant reason for which Mr Walmsley dismissed the claimant was what he concluded was an irretrievable breakdown in the working relationship between the claimant and many in the Department (Mrs Smith, Mrs Venn Adams, and Mrs Baker foremost amongst them), it is inescapable that the Datix (and thus the protected disclosures) were more than a trivial element in that conclusion and were more than a trivial influence on his decision to dismiss. That is not to say, however, that Mr Walmsley’s motive was to punish the claim by dismissing him because he raised protected disclosures.

224. The claim that the claimant was subjected to the detriment of dismissal contrary to section 47B(1A) ERA 1996 is therefore well founded.

S.103A ERA 1996 Dismissal

225. The test under s.103A is, of course, different, namely whether the reason or principal reason for the claimant's dismissal was any of the protected disclosures. As the claimant was employed for in excess of two years, I must ask whether the claimant has produced sufficient evidence to raise the question of whether the reason was any of the protected disclosures. If so, I must ask whether the respondent has proved its reason for dismissal; here misconduct or the breakdown in relationships caused by that conduct.

226. For the reasons set out above in relation to the claim under s.47B I am satisfied that the claimant has produced sufficient evidence to raise the question. In consequence, I must determine whether the reason or principal reason for Mr Walmsley's decision was any of the protected disclosures or whether it was misconduct or a breakdown in relationships unconnected to them. I am satisfied that whilst the protected disclosures were a reason for the decision, they were not the principal reason. That is because I accept Mr Walmsley's evidence that the reason for which he dismissed the claimant was because he (and the panel) concluded, having read the investigation report, that the relationship between the claimant and the Department had irretrievably broken down as a result of the claimant's conduct. That reason is recorded in the dismissal letter on the third page and is again referred to in the conclusion where Mr Walmsley notes that the "*cumulative effect [of the misconduct] is such as demonstrates a pattern of misconduct which is so serious that it has undermined the relationship of trust and confidence between the Trust as your employer and you.*"

227. Thus, Mr Walmsley concluded that the claimant's conduct had caused his relationship both with his immediate peers and colleagues to breakdown, and that with the Trust as his employer to do so. He repeated that position under cross-examination. I found him to be an honest and credible witness. I therefore accept the reason advanced by the respondent for the dismissal. Since it was not any of the protected disclosures, the claim under s.103A is not well founded and is dismissed.

Race Discrimination

Victimisation

228. The respondent accepts that the claimant did four protected acts: the Datix dated 3 September 2018, the claimant's emails to Dr Collins dated 18 July 2018, 12 November 2018, and the 14 November 2018.

229. As detailed in the discussion of the claim under section 47B above, the dismissal letter referenced each of those protected acts as allegations of misconduct, categorising them as "unjustified accusations of racist behaviour against staff." When Mr Walmsley addressed his findings in respect of those allegations, he concluded that,

> *"The panel heard evidence that you have made numerous accusations of racist behaviour against colleagues, and could find no justification to*

support these assertions. When these were explored at the hearing you were unable to provide evidence as to how people's actions were racially motivated or how you have been treated differently due to your ethnicity."

230. Mr Walmsley suggested during his cross-examination that he categorised the accusations as "unjustified" on the basis that they were uncorroborated and unsupported by other evidence. He accepted, however, that the claimant was reporting genuine concerns that he had been the victim of discrimination on grounds of his race and that he had provided examples of what he believed to be discriminatory behaviour. He did not conclude that the claimant had acted maliciously or dishonestly in submitting the Datix or sending the emails, or that it was inherently wrong to raise such allegations using the Datix system (in the event only one of the allegations was made in that way). Rather, his objection was the fact that the claimant had leapt to the conclusion of racism in circumstances where there was no evidence to support that conclusion. The conduct was a significant cause of Mr Walmsley's finding that the claimant's relationship with his colleagues had irretrievably broken down.

231. In my judgement those matters are more than sufficient to transfer the burden of proof to the respondent to demonstrate the protected acts were in no way whatsoever a cause of his dismissal. The respondent seeks to argue that it was the manner of the protected disclosure and not the content which was the cause of the claimant's dismissal. Such a distinction seems to me to fall squarely into the category of intemperate language and inaccurate statements considered in Martin. As the panel's finding makes clear, it was the act of making "numerous accusations of racist behaviour" which the panel found to be objectionable in circumstances where it could find no justification to support the assertions. However, the allegation of race discrimination cannot in my view be properly separated from the manner in which it was made. The distinction between the protected act and the evidence to support it is not one which can be reconciled with the purposive nature of the s.27 EQA 2010. If an employer could seek to distinguish an allegation of racism which it found to be substantiated from such allegations which it concluded were not substantiated, so as to argue that the fact of making an unsubstantiated or unjustifiable allegation of discrimination was properly severable from the act of raising the complaint itself, it would negate the protection of the section altogether.

232. Consequently, the respondent has not therefore demonstrated that the protected acts were not more than a trivial influence on the decision to dismiss. The claim pursuant to s.27 EQA 2010 is therefore well founded and succeeds. For the avoidance of doubt, it forms no part of my finding on this issue that Mr Walmsley sought to punish the claimant because he complained of racism; the allegation formed part of conduct which he concluded had caused the breakdown in the working relationships in the Department.

Direct Race discrimination.

(a) Dismissal

233. I have found that the reason for the claimant's dismissal was Mr Walmsley's conclusion that the relationship between the claimant and his

peers had irretrievably broken down because of his conduct and that, in consequence, the claimant no longer enjoyed the trust and confidence of the respondent. Was the claimant treated less favourably than a hypothetical comparator would have been in materially the same circumstances? In my judgment, he was not: had such a comparator, whether white, Black or from any other racial group made complaints of racism in the same way as the claimant did (in circumstances where Mr Walmsley believed the allegations were unsubstantiated) and behaved towards his colleagues as Mr Walmsley found the claimant to have behaved, in my judgment Mr Walmsley would inevitably have dismissed them. The basis for that conclusion is that I have found Mr Walmsley to be a credible and honest witness, and I have accepted his explanation of the rationale for his decision to dismiss, and that that rationale was one he genuinely held. He would have adopted the same thought process for the comparator. The claim therefore fails.

234. For the sake of completeness, Mr Walmsley's decision had nothing whatsoever to do with race and is not one which is itself inherently discriminatory, such that I should draw an inference that it was in anyway influenced by the claimant's race. To the extent that I have concluded that the claimant's complaints of race discrimination were more than a trivial influence upon the decision to dismiss and were themselves part of the conclusion that the relationship had broken down, that of itself is not sufficient to establish that the claimant was treated less favourably than a hypothetical non-Indian national comparator, nor is it sufficient to demonstrate that the claimant's race or nationality, as opposed to his complaints of race discrimination, were in any way the cause of his dismissal. The two factors are separate and distinct.

235. Furthermore, I do not accept that claimant's arguments that I should draw an inference from the matters identified in Mr Butler's skeleton at paragraph 69. The vast majority are complaints about how individual's other than Mr Walmsley acted, and it was not suggested to Mr Walmsley that he adopted, or was pressured to adopt, a discriminatory mindset which the claimant alleged was present in the respondent's employees. Whilst the claimant alleged that formal disciplinary action had never been taken against a white consultant, and that evidence was not directly challenged, there was no evidence to suggest that any white consultant had acted in a manner similar to that which Mr Walmsley found the claimant had acted, or that Mr Walmsley had been involved in those decisions. Consequently, it would not be appropriate to draw an inference from the bare (albeit unchallenged) allegation.

236. The claim of direct discrimination in respect of the claimant's dismissal is, therefore, not well founded and is dismissed.

<u>The actions of Mrs Smith, Mrs Venn Adams, Dr Hicks, and Miss Taylor in making allegations against the claimant and giving evidence to the disciplinary panel</u>

237. The claimant suggests that Miss Taylor's complaint relating to the incident of 11 June 2018 was motivated or influenced by his race on the grounds, he argues, that his Indian nationality leads him to speak to people abruptly or shortly. It is clear to me that the claimant's nationality had nothing whatsoever to do with manner in which the claimant spoke to Miss Taylor on

12 June 2018 or the manner in which he spoke or wrote to other colleagues and members of the radiology department. Rather, the claimant could be collegiate, generous, compassionate and kind when he wished (as reflected in his appraisals and feedback), but when he was triggered by what he regarded as improper or unsafe pressure in relation to clinical lists, his contractual duties, or challenges to his medical knowledge or professionalism, he could and would rapidly switch to become extremely aggressive, hostile, and rude, and (to some, particularly, more junior employees) intimidating. The claimant's race and nationality certainly had nothing whatsoever to do with his state of rage on 12 and 13 June 2018 or his insistence that Miss Taylor had to choose a side and if she did not side with him, he would put in Datix falsely accusing her of race discrimination.

238. I reject Mr Butler's argument that because Miss Taylor did not give evidence, I must find that the respondent has offered no explanation for what the claimant alleges constitutes direct discrimination. Firstly, I do not accept that the burden has transferred to the respondent to demonstrate the Miss Taylor's actions were in no way whatsoever influenced by the claimant's race: the claimant must first demonstrate less favourably treatment. He must adduce at least some evidence to show that Miss Taylor would have acted more favourably had a white consultant treated her as the claimant did. The claimant had not pointed to any fat from which I could draw such an inference. Secondly, it is possible for me to make positive findings as to why Miss Taylor acted as she did from the grievance itself and from her accounts during the grievance and disciplinary investigation process. I am satisfied from those accounts that the reason she presented the grievance, and subsequently gave the accounts she did to Mr Dymond and Mr Major, was because of the claimant's conduct which she described and her desire to tell the truth about those events, and nothing whatsoever to do with the claimant's race – that had no influence upon her decision at all. Further, the claimant did not adduce sufficient evidence to transfer the burden to the respondent to show that race was not any part of the reason for her conduct. That she did not attend therefore is of no assistance to the claimant.

239. In so far as the claimant complains of direct discrimination against Mrs Smith, Mrs Venn Adams, and Dr Hicks, I have made positive findings as to the reasons why they respectively (a) produced the account of 16 April 2020, (b) participated in the collective grievance, (c) gave evidence in the form they did to Mr Dymond and (d) gave evidence in the form they did to Mr Major. Those findings are set out at paragraphs 199, 201 and 207 of this Judgment for Mrs Smith, 211, 212 and 213 from Mrs Venn Adams and 215 for Dr Hicks. Those are positive findings of fact by which I concluded that the reasons for their actions were (with the exception of the collective grievance) in no way whatsoever influenced by the protected disclosures. For the same reasons, I find that their actions were in no way whatsoever influenced by the claimant's race. The reason for their actions was the claimant's conduct towards them and others, and their desire to report those matters truthfully in the various documents and interviews they attended.

240. For the sake of completeness, I reject the claimant's argument that the conduct with which they took issue was a manifestation of a cultural practice of being direct and blunt. That did not form any part of their complaints about his conduct, and certainly not any substantial part.

241. Similarly, I reject the claimant's argument that I should draw an inference of discriminatory motivation from any of the matters detailed in paragraph 69 of Mr Butler's skeleton argument. None of the allegations relate directly to Mrs Smith; in so far as she was in any way responsible for the system by which a consultant's annual leave was covered, efforts were made with the claimant to agree a system, but he frustrated them by refusing to allow others to vet patients and by his obduracy in working with or speaking to Dr Suri. I did not find that Mrs Venn Adams regularly made derogatory comments about foreign workers (she denied this) or that in referring to the claimant as "silly" in a disciplinary investigation interview she was manifesting a negative mindset towards him because of his race. Her views that he was silly and that a medical view he expressed was probably untrue derived from her experience of working with him, and a view that he did not always tell the truth; it had nothing to do with his race. Dr Hicks did threaten to refuse the claimant's request for study leave, but that was because the claimant would not explain what the exam was that he was taking, not because of the claimant's race. His distrust arose out of the disagreement in relation to the claimant's job plan, which he believed had been agreed with Doctor Stoddard, but which the claimant had subsequently denied and refused to accept. It was Dr Stoddard who had preauthorised the study leave. Whilst Dr Hicks accused the claimant of insubordination, he did so because of the claimant's refusal to meet with him to discuss the Datix of 12 June 2018, not because of the claimant's race. Where general allegations of the less favourable treatment of Asian consultant's concern were made, there was no evidence to demonstrate the individuals against whom the claimant levels these allegations were involved in any of the decisions.

Unfair dismissal

242. The first issue is the reason for the dismissal. The claimant alleges it was his protected disclosures or his protected acts, alternatively his race. I have found that the reason or principal reason was none of those things but was Mr Walmsley's conclusion that the claimant's conduct had caused his relationship with his peers irretrievably to have broken down and that, in consequence, the claimant no longer enjoyed the trust and confidence of the respondent. That was the set of beliefs or facts which led him to dismiss. When asked, Mr Walmsley clarified that the predominant reason for his decision to dismiss was the claimant's conduct, and the consequence of that conduct was the breakdown in working relationships.

243. It was within the band of reasonable responses, given the evidence contained in the interviews of Mrs Smith, Mrs Venn Adam, Dr Hicks, Dr Baker, Miss Taylor, and others, for Mr Walmsley to conclude that the disciplinary allegations were proved. The claimant argues that the decision to dismiss him for that conduct was outside the band and was unfair.

244. The claimant's first argument is that the dismissal letter demonstrates that none of the disciplinary allegations was regarded as sufficient to constitute gross misconduct and therefore it was unfair to dismiss him in consequence. I reject that argument for two reasons. First, Mr Walmsley had found that the allegation relating to Miss Taylor was proved and breached the Trust's Bullying & Harassment policy and Disciplinary policy. Mr Walmsley confirmed in his evidence that he regarded the claimant's conduct as "abuse" within the

meaning of that policy. Harassment is categorised as serious or gross misconduct with the respondent's disciplinary policy: which categorises "all forms of bullying and harassment" and "Abuse of position or power" as examples of serious misconduct", and "Abusive or violent behaviour to another person, including colleagues… whilst on duty or on Trusts Premises" as examples of gross misconduct. Mr Walmsley's evidence was that the panel found that the claimant's treatment of Miss Taylor was gross misconduct. I accept that evidence; Mr Walmsley's evidence as to the reasons for his decision was candid and genuine. It was well within the bands of reasonable responses for him to reach that conclusion on the facts of this case.

245. Secondly, the wording of the dismissal letter does not support the restrictive interpretation which Mr Butler sought to apply to it. It provides as follows,

> "*We believe that some of the allegations taken alone could be considered sufficient to amount to gross misconduct. However on balance we find that the instances taken individually amount, at the very least, to serious misconduct but their cumulative effect is such as demonstrates a pattern of misconduct which is so serious that it has undermined the relationship of trust and confidence between the Trust as your employer and you."*

246. The letter clearly indicates that the panel concluded that some of the allegations in insolation could constitute gross misconduct. Mr Walmsley's evidence was that the allegation in question was that relating to Miss Taylor. The consequence of the second sentence is that panel took an overarching view, and having reviewed all of the conduct, which at the very least amounted to serious misconduct (and so by implication some of which could be gross misconduct) found that cumulative effect was to destroy trust and confidence in the claimant, warranting his dismissal. The second sentence cannot reasonably be read so as to strike out the conclusion expressed in the first. In any event, I have found that Mr Walmsley did conclude that the abuse was gross misconduct and the clumsiness of the wording of the letter is insufficient to persuade me to reject that evidence.

247. As stated above, it was well within a band of reasonable responses open to a reasonable employer to conclude that a senior employee, a consultant, who directed an invective tirade at a junior employee to the point that she became frightened for her safety and who threatened to make a very serious allegation using Datix against her unless she took his side in a workplace dispute, committed 'abuse' amounting to gross misconduct. There was no mitigation in the claimant's response to that incident, only aggravation of its seriousness. The claimant suggested that Miss Taylor had lied and made up the account in order to preserve her weekend work, which he alleged (untruthfully) Mrs Smith had threatened to remove unless, by implication, Miss Taylor agreed to provide a false account against the claimant.

248. Where conduct is categorised as potentially gross misconduct within a disciplinary policy it is a high hurdle indeed for a claimant to clear to demonstrate that a decision that the appropriate sanction was summary dismissal is outside the band of reasonable responses. In the circumstances of this case, when the allegation was considered in the context of the other

conduct and its effect, and the claimant's lack of insight and contrition into his behaviour, it was well the band of reasonable responses to dismiss. The claimant argues that he was not warned that his behaviour was unacceptable. That is a poor argument. The claimant was aware of the disciplinary policy, the MHPS, and the Bullying and Harassment policy. In relation to his conduct towards Miss Taylor, he was aware of the potential manner in which his behaviour could be viewed and the severity of the outcome. There is more force in the argument that he was not warned that the other matters could be regarded as gross misconduct; in particular he was not warned in respect of the respondent's concerns about his use of the Datix or his allegations of race discrimination, nor was he warned that his practice in respect of the use of pigtail catheters or LocSIPP forms was regarded so seriously at the time of the events or thereafter. I address the consequence of those matters in the section 'Procedural Fairness' below.

249. In reaching that conclusion I have had regard to the claimant's arguments that the respondent should have considered that the claimant was not supported by the respondent, that it did not have regard to the impact of his mental health upon his behaviour or the advice of his therapist and GMC to remove himself from conflict or practices which he believed were unsafe, and that it gave insufficient thought to the prospect of mediation as alternative to dismissal. The respondent did not act outside the band of reasonable responses in the manner in which it weighed those matters: the claimant did not accept the conduct and suggest that it was a consequence of stress or ill health as mitigation, rather he denied it, and suggested that the Never Events and discrimination had caused him to suffer poor mental health which he had sought and received treatment for. He did not suggest that his judgment was in any way clouded by poor mental health. Furthermore, his position was that he had knowingly distanced himself from those in the department at the advice of his counsellor, that it was unnecessary for him to be more involved in the department than he was, and that he was right in the criticisms he made of Mrs Smith, Mrs Venn Adams, the junior members of the Team and Dr Hicks. They, he alleged, had discriminated against him (although his wife was to suggest at the disciplinary hearing that that was a question of the claimant's perception rather than assertion of fact).

250. Whilst it is true that the dismissal letter made no mention of the possibility of mediation, and that Mrs Smith and the other employees with whom the claimant's relationship had broken down were not asked whether they would be prepared to mediate with the claimant, I accept Mr Walmsley's evidence that he did consider mediation but rejected it for the reasons recorded in the findings above. Whilst another employer may have taken the view that it would have been worth the effort of trailing mediation in the hope it might succeed given the claimant's clinical prowess and the positive feedback he had received from patients, it was not outside the band of reasonable responses for Mr Walmsley to reject that approach, or for Mr Joint to uphold that decision on appeal. There was a reasonable basis for him to conclude that the claimant's stance towards mediation was simply to agree processes and identify who was ultimately responsible or accountable under it but not to accept any responsibility or express any contrition for his prior behaviour. That was manifest from the claimant's comments during the disciplinary hearing. It was also evident from his proposal that he should be permitted to work remotely and therefore to have nothing to do with his colleagues.

Clearly, that would not remedy the concerns about his failure to lead the Department or to work constructively with colleagues. Lastly, given the claimant's stance in relation to Miss Taylor's allegations, it is difficult to understand how mediation could have breached the void.

Procedural fairness

251. As indicated in paragraph 248 above, the claimant was not warned at the time of the events or prior to the disciplinary allegations being raised that his conduct was regarded as misconduct, and certainly not that it was seen as potential gross misconduct. The criticisms of the claimant's use of the Datix were particularly unfair in the circumstances where the respondent was unable to identify any policy which stipulated how and in what manner they should and should not be used, and where the answers given by the respondent's witnesses on that point were as varied as they were contradictory, and where the claimant had received no training in relation to their use. Moreso, where one of the criticisms levelled at the claimant by Mrs Smith about his use of Datix was that it was wrong to name individuals and/or to make allegations about disputes with colleagues, in circumstances where Mrs Venn Adams had done just that without censure on 12 June 2018.

252. A critical aspect of Mr Walmsley decision to dismiss was the consequence of the claimant's conduct which had caused his relationship with his peers to break down irretrievably, and in consequence the respondent lost trust and confidence in him. That allegation was not part of the disciplinary allegations which the claimant faced, and despite forming an essential pillar of his reasons for dismissing the claimant, Mr Walmsley did not raise it with the claimant, or invite him to address it in his closing argument or at all. Given its connection to the prospect of mediation as an alternative to dismissal, that was a particularly egregious failure and one that was outside the band of reasonable responses. The error was not remedied on appeal, because Mr Joint did not address the point, merely upholding Mr Walmsley's finding. The dismissal was therefore procedurally unfair.

253. If the claimant had not been found to have harassed Miss Taylor as alleged, these matters may well have been sufficient to render the dismissal substantively unfair. As it is, however, for the reasons above, that allegation alone provided a basis for summary dismissal and the dismissal was substantively fair.

Disposal

254. The matter will be listed for a remedy hearing to address the appropriate level of compensation, having regard to sections 49(6A), 122(6), and 122(6) ERA 1996.

Employment Judge Midgley
Date: 11 February 2022

Judgment & reasons sent to parties: 14 February 2022

FOR THE TRIBUNAL OFFICE