Case Number: 2302594/2019

THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH**

BEFORE: **EMPLOYMENT JUDGE MORTON**
Ms L Hawkins
Mr N Shanks

BETWEEN:

Dr A Pande **Claimant**

AND

Maidstone and Tunbridge Wells NHS Trust **Respondents**

ON: **On 24 May and 11 – 15 October 2021**

Appearances:

For the Claimant: **In person**

For the Respondents: **Mr G Burke, Counsel**

JUDGMENT

It is the unanimous judgment of the Tribunal that the Claimant's claims of:

1. Automatic unfair dismissal (dismissed for making protected disclosures – Employment Rights Act 1996 ("ERA"), s. 103A);

2. Automatic unfair dismissal (dismissed on grounds related to trade union activities - Trade Union and Labour Relations (Consolidation) Act 1992 ("TULRCA"), s. 152);

3. Unfair dismissal under ERA sections 94 and 98;

4. Subjection to a detriment on the ground that the Claimant has made a protected disclosure (ERA s. 47B); and

5. Subjection to detriment for the main or sole purpose of penalising the Claimant for taking part in the activities of an independent trade union (TULRCA s. 146).

are not well founded and are dismissed.

Written reasons pursuant to a request by the Claimant

Introduction

1. By a claim form presented on 5 May 2017 the Claimant presented claims of:

   (1) Automatic unfair dismissal (dismissed for making protected disclosures – ERA s.103A);

   (2) Automatic unfair dismissal (dismissed on grounds related to trade union activities - TULRCA s.152);

   (3) "Ordinary" unfair dismissal (ERA s. 98);

   (4) Subjection to a detriment on the ground that the Claimant has made a protected disclosure (ERA s. 47B); and

   (5) Subjection to detriment for the main or sole purpose of penalising the Claimant for taking part in the activities of an independent trade union (TULRCA s. 146).

   His claims were resisted by the Respondents. Following a case management hearing on 2 December 2019 before Judge Corrigan the Claimant filed further particulars of his claim on 12 March 2020.

2. There was second case management hearing on 16 July 2020 before Judge Jones QC at which the issues in the case were identified. There was then unfortunately a considerable delay before the full hearing of the claims could take place, which was compounded by, but not wholly attributable to, the Covid-19 pandemic. Judge Corrigan had listed the case for hearing from 24-28 May 2021 and on 1 June 2021, but on the first day of that hearing, before this Tribunal, Dr Pande was unwell and the hearing was adjourned following the receipt of medical evidence that indicated that Dr Pande's health might be at risk if the hearing proceeded at that time. Case management orders were made accordingly by this Tribunal and the case was relisted for the above dates.

3. At the commencement of that hearing the Tribunal dealt with an application by the Respondent for its witnesses to give evidence remotely. Having heard the basis of the application, including the fact that two of the witnesses had close family members with Covid-19 infections and one, Dr Sigston, was giving evidence from overseas, the Tribunal took the view that it was proportionate and in accordance with the overriding objective, particularly the requirement to avoid further delay, to continue the hearing on that basis. Dr Pande had voiced strong objections and wished to have the opportunity to cross examine the Respondent's witnesses face to face. The Tribunal agreed that in an ideal world, hearings would take place face to face, with witnesses attending remotely as an exception. However, in the midst of the pandemic the circumstances were neither usual nor ideal and a further postponement would not be in the interests of having the case dealt with justly. The Tribunal non-legal members were themselves attending remotely. The nature of the hybrid hearing changed from day to day after that, with Dr Pande and Mr Burke present with the judge for the first two days, Mr Burke present with the judge on the third day and all parties save the judge attending remotely on the fourth day. On the fifth day the tribunal met remotely to consider its decision, which was delivered orally by CVP as set out below, at the end of that day. Given the problems of the pandemic at the time this was overall a reasonable manner in which to conduct the hearing, even though Dr Pande was not entirely satisfied with the arrangements. The witnesses all gave evidence clearly and could be seen and heard by all parties. The Tribunal was satisfied that each witness was giving evidence on their own account and there is no question that their evidence was interfered with in any way in the course of giving evidence.

4. The Respondents' evidence was given by Dr Paul Sigston, Dr Sarah Mumford, Steve Orpin, Lynn Gray and Dr Peter Maskell. The Claimant gave evidence on his own behalf and called no other witnesses. All of the witnesses had provided written statements which we had read at the start of the adjourned hearing on 24 May, together with the key documents from the electronic bundle of documents which consisted of 926 pages. References to page numbers in this bundle are references to page numbers in that bundle.

Relevant law

5. Mr Burke had very helpfully summarised the case law on which we relied in reaching our decision in his closing submissions. We make reference to some of the principles as needed in our conclusions. The cases we took into particular consideration were (as regards protected disclosures) Kilraine v London Borough of Wandsworth [2018] IRLR 846, NHS Manchester v Fecitt and others [2012] IRLR 64 and Chesterton Global Ltd v Nurmohamed 2017 EWCA Civ 979, and (as regards the meaning of 'detriment') Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285.

6. As regards the claim of unfair dismissal under s 98 ERA, we took into consideration the well-known authorities of British Home Stores v Burchell [1978] IRLR 379 (on the test for a fair misconduct dismissal), Post Office v Foley [2000] IRLR 827, and Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR

23 (on the standard required for a reasonable investigation). As regards the requirement on the Tribunal not substitute its own view, but to consider whether the Respondent's view of the misconduct relied on fell within the band of responses open to a reasonable employer, we took into consideration the decision in Iceland Frozen Foods v Jones [1982] IRLR 439.

7. We set out the relevant statutory provisions as follows.

Trade Union Activities

8. Section 146 TULRCA provides that a worker has the right not to be subjected to any detriment as an individual by any act, or any deliberate failure to act, by his employer if the act or failure takes place for the sole or main purpose of—

   (a) preventing or deterring him from being or seeking to become a member of an independent trade union, or penalising him for doing so,

   (b) preventing or deterring him from taking part in the activities of an independent trade union at an appropriate time, or penalising him for doing so.

9. Section 152 TULRCA provides that for purposes of Part X of the Employment Rights Act 1996 (unfair dismissal) the dismissal of an employee shall be regarded as unfair if the reason for it (or, if more than one, the principal reason) was that the employee—

   (a) was, or proposed to become, a member of an independent trade union,

   (b) had taken part, or proposed to take part, in the activities of an independent trade union at an appropriate time.

Protected disclosures

10. Section 43A ERA provides that a "protected disclosure" means a qualifying disclosure (as defined by section 43B ERA) which is made by a worker in accordance with any of sections 43C to 43H ERA.

11. Section 43B(1) ERA 1996 provides:

    (1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—
    (a) that a criminal offence has been committed, is being committed or is likely to be committed,
    (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,
    (c) that a miscarriage of justice has occurred, is occurring or is likely to occur,
    (d) that the health or safety of any individual has been, is being or is likely to be endangered,
    (e) that the environment has been, is being or is likely to be damaged, or

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

12. Section 47B (1) ERA provides that a worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.

13. Section 103A ERA 1996 provides that an employee who is dismissed shall be regarded 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.

Unfair dismissal

14. Section 98 ERA provides as follows:

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—
(a) the reason (or, if more than one, the principal reason) for the dismissal, and

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

(2) A reason falls within this subsection if it—

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) relates to the conduct of the employee,

(c) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(3) …
(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

The agreed issues

15. The Claimant made a series of allegations against the Respondent which are set out in the list of issues attached as the Appendix to this judgment. The Tribunal has made findings that are relevant to those issues based on the evidence that it heard and the documents in the bundle. It has not therefore addressed all of the matters that came to its attention during the evidence and has focused on those that are relevant to the agreed issues.

16. It was mindful of the importance of not adhering slavishly to a list of issues when hearing a case if it is in the interests of justice to depart from the list, but saw no reason in this case to depart from what the parties had agreed following case management, particularly as the Claimant was a highly intelligent and articulate professional employee who had no difficulty understanding the complex issues arising in the case.

Findings of fact

17. The Claimant was employed by the Respondent from 6 October 2006 as a speciality doctor in paediatrics. He was dismissed from his employment on 1 April 2019 after a disciplinary process. His appeal against his dismissal was unsuccessful. He was not a consultant and operated as a middle grade doctor. However, he had a great deal of experience and was highly regarded for his clinical skills.

18. His working relationships with his colleagues were however problematic and were the cause of complaints raised by consultants within the paediatrics department. The first complaint referred to in the evidence before the Tribunal was sent by Dr Rohit Gowda, consultant paediatrician, to the clinical director Dr Hamudi Kisat, on 29 January 2016 (page 180). This was a complaint about a number of situations in which the Claimant had been reluctant to comply with requests for assistance or had been slow in doing so. It was the Claimant's case that on that date he had raised concerns with Dr Kisat about lack of consultant support within the department. This is the matter the Claimant relies on as protected disclosures 3 in the list of issues. The Tribunal however saw no evidence that that was the case. The Claimant was unable to give any specific details of what he had said or point to any relevant documents. We find as a fact that if any such disclosure was made there was no causal connection between it and Dr Gowda's complaint.

19. A further complaint was set out by Dr Rajesh Gupta on 4 February 2016 (page 175), who wrote to Dr Sigston 'with some concerns about one of our speciality doctors'. He went on to outline those concerns about the Claimant's attitude, communication style and propensity to be argumentative. The email painted a picture of an individual with a negative impact on the working environment. It went on to note that five recently appointed consultants had all had difficulties with the Claimant's conduct and attitude towards them.

20. Dr Sigston did not act on these emails at the time although there were two further complaints about Dr Pande in March 2016 from Drs Kumar and Pathy (page 182).

21. In May Dr Sigston met with the Claimant about his job plan, which had been the subject of discussion earlier in the year. There were two letters following that meeting, the first recording that the job plan issues had been resolved after mediation and mentioning a referral to Occupational Health about the Claimant's working hours. The second letter referred to a discussion about how Dr Pande was perceived within the Trust. It said that there had been an animated discussion between the Claimant, Dr Sigston, Dr Kisat and a Ms O'Neil, HR Business Partner. The Tribunal considered that to have been an effort by Dr Sigston to resolve informally the issues that had been raised with him about Dr Pande's conduct and attitude, by bringing these to Dr Pande's attention and asking him to reflect.

22. He then received a further email on 23 November 2016 from Dr Kisat, forwarding further complaints from Dr Gupta. Dr Gupta outlined four separate incidents in which Dr Pande's conduct and attitude had been problematic. He concluded (page194) 'Dr Pande's character and behaviour is now influencing training opportunities for juniors and negatively impacting on all staff including junior doctors and consultants and nurses'. Dr Sigston decided at that point that he would have to act.

23. It was the Claimant's case that in October 2016 he complained to Dr Sigston about Dr Gupta, indicating that he was incompetent and unsafe. He produced no evidence to support this contention and was unable to give clear details. The Tribunal thought it more likely than not that he was referring to the remarks he made once he had been shown the complaint, which he recognised at once as having come from Dr Gupta.

24. On 24 November there was a JMCC meeting at which the Claimant raised job plans as an agenda item (page 197). The minutes record 'Issues with SAS job planning were also discussed'. The Tribunal was prepared to accept that in attending the JMCC meetings Dr Pande was carrying out trade union activities, even though the evidence that that was the case was relatively sparse. It was also prepared to accept that this was the trade union activity referred to by the Claimant in paragraph 9(1) of the list of issues.

25. Dr Sigston met with the Claimant on 9 December 2016 to discuss Dr Gupta's complaint. He showed him the email without identifying the author. It was the Claimant's evidence that he had very little time to read the content of the complaint (he said he had about 30 seconds) but that he was able to identify that the complaint had come from Dr Gupta. The Tribunal was perplexed that Dr Sigston was unwilling to show the Claimant the complaint, a decision that was not adequately explained, and is likely to have made the Claimant mistrustful of the process from the outset.

26. The Claimant made it clear in his evidence at the hearing that in response to seeing the complaint he made two statements that he relies on as protected disclosures, namely that Dr Gupta was incompetent and dangerous and that consultants had been leaving their shifts earlier than their scheduled time. What he told the Tribunal was that he had mentioned an occasion on which what he regarded as an error of judgment by Dr Gupta almost led to a patient's dying and that the paediatric department consultants were putting patients at risk and defrauding the NHS by leaving their shifts early. He provided no documents in support of this contention and did not fully particularise what he had said. Dr Sigston confirmed however that the Claimant had mentioned both matters at their meeting on 9 December in response to his comments about the Claimant's behaviour. These are the matters the Claimant relies on as protected disclosures 1 and 2 in the list of issues.

27. Dr Sigston had decided by this point that the issues with Dr Pande need to be formally investigated and he set about deciding how to structure the investigation. We find that Dr Pande's reaction at the meeting on 9 December had convinced him that an informal resolution would not be feasible and that he would have to embark on a formal process. We find as a fact that the decision to do so was a result of the nature of the complaints themselves and the nature and strength of the Claimant's reaction when he had become aware of them and that neither any disclosures made by the Claimant or his participation in the JMCC meeting on 24 November 2016 (which as noted at paragraph 14 we are prepared to accept was a trade union activity) had any influence on the decision. The Tribunal also rejects the Claimant's assertion that Dr Sigston started the campaign against him purely as a vendetta or that 'His intention was clearly to bully me so that I was not as vocal in subsequent [JMCC] meetings' as the Claimant asserts in paragraph 1 of the list of detriments.

28. This finding is supported by the letter Dr Sigston then wrote to Angie Collison, HR business partner (page 199). The letter stated:

> **I met with Dr Pande last week, where I mentioned to him that there were some complaints about him form one of his consultants. I showed him the body of the email, without revealing the source. He was quite animated and disagreed that there should be any concern with his behaviour towards his consultants and in fact suggested that many consultants seek his opinion on clinical issues.**
>
> **Given this response from him I think that it is necessary to commence a formal conduct investigation under MHPS. It appears that there are no clinical concerns at all. My suggestion regarding the ToR is: " interaction and working relationships with the consultant paediatricians in the department".**
>
> **As yet, I do not know of a suitable case investigator (all the names I have thought of have had previous involvement), but I should be the case manager.**
>
> **Would you be able to formulate an appropriate letter that encompasses this and has TBC as the case investigator?**

29. The Claimant was informed by letter on 19 December that a formal investigation would be launched (page 200). Ms Collison had drafted the latter to the Claimant and confirmed to Dr Sigston that an external investigator could be appointed. We had heard from Ms Gray that there was nothing untoward about a Medical Director choosing to use an external investigator. It was also in accordance with the Trust's policy at page 835 that Dr Sigston would be the case manager (page 840).

30. Dr Sigston identified the external investigator he wished to work with, Marcus Adams, and established that his services could be supplied through Capsticks, the law firm the Trust instructed on other matters. Dr Sigston was reassured by this connection because in his view it would underscore the professionalism of the investigation. The Claimant was told of Mr Adams appointment on 10 January by letter from Dr Sigston (page 215).

31. It was Dr Pande's case that the investigation was manipulated by Dr Sigston, who was pursuing a vendetta against him and that it became a witch hunt. He set out his concerns in paragraph 2 and the first 9 sub-paragraphs of paragraph 3 of the detriments identified in the list of issues. The Tribunal did not accept the Claimant's characterisation of the investigation for the following reasons:

    a. Paragraph 2: we did not accept that no action was taken on the Claimant's complaints. We accepted Dr Maskell's evidence that the issues raised by the Claimant were ongoing issues that were not susceptible to rapid improvement. Some of them derived from matters that were outside the Respondent's control such as the national shortage of doctors at mid-level. We heard detailed evidence of Dr Maskell's commitment to addressing matters of concern, including the decline in the performance of the department as a whole. It was not the case that no action was taken. We also reject the characterisation of the investigation as an 'enlisting' of consultants. We have already found that it was the consultants in the department who themselves raised the issues that caused Dr Sigston to conclude, after some evident hesitation and attempts at an alternative approach, that an investigation was necessary. There was no evidence that staff were encouraged to complain, or that any complaints were 'fast tracked' to Dr Sigston. Dr Sigston was in any event the Trust's Medical Director and responsible for the issue that were being raised. We do not accept that there were 'blatant lies' involved, or that any of the action taken was retaliatory or an example of 'institutional or corporate bullying' as Dr Pande alleges.

    b. Paragraph 3.1. We did not find it remarkable that there was no prior warning for the Claimant of the purpose of his initial meeting with Dr Sigston. It was a preliminary discussion and no particular procedural safeguards were needed.

    c. 3.2 It is not the case that the Claimant was not given copies of the complaints – they were included in the terms of reference, a copy of

which he was sent before the investigator met with him. It was not a requirement of the procedure that the clinical director or his education supervisor should be involved before a formal investigation could be launched. The other points raised in this paragraph we have already addressed above.

d. 3.3 we have already addressed in these reasons Dr Sigston's attempt to address the issues with the Claimant informally and his reasons for abandoning that approach. We find no procedural defect in the process in that respect.

e. 3.4 The Tribunal was satisfied that the Claimant received the investigation terms of reference from Mr Adams by letter of 31 January 2017 (233). The letter itself set out the complaints which he had been asked to investigate in reasonable detail and listed the areas of concern in Dr Pande's working relationships that would also form part of his remit. Dr Pande was therefore well aware of what was under investigation and it is disingenuous of him to suggest that he was not supplied with any documents relating to the allegations – these were not matters that would be likely to be documented in detail given the nature of the work undertaken by the department. Dr Pande wrote to Dr Sigston on 13 February 2017 (247) seeking copies of the complaints and making various other requests for information. Whilst it is a normal response on the part of a person being investigated in respect of their conduct and relationships at work to want to know in detail what is being said about them, Mr Adams was in the process of conducting his interviews at this stage and in the Tribunal's view there was nothing untoward in the level of information provided to Dr Pande at this stage of the process. The terms of reference were sent to the Claimant again on 9 March 2017 with an invitation to attend an investigation interview (278).

f. 3.5 Mr Adams spoke to a range of individuals in different roles and with different working relationships with the Claimant. Having conducted interviews with Dr Kisat and Dr Urs (another of the consultant paediatricians) he sought from HR, at their suggestion, a sample of other members of staff to interview. At page 217 Mr Adams wrote to Angie Collison seeking her advice on who to approach. The Tribunal finds that this was a reasonable approach to an investigation of this nature and does not connote any attempt to deliberately seek out individuals or encourage them to speak out against the Claimant.

g. 3.6 Here the Claimant makes a number of unsubstantiated allegations about the independence and professionalism of Mr Adams. The Tribunal reviewed the documentary evidence of the investigation and considered that it was undertaken in the proper way and that Mr Adams went to some lengths to obtain a range of views and reflect them fairly in his report. The Claimant repeatedly alleged that there were numerous colleagues who would have given positive reports about him. The Tribunal did not doubt that that was the case. We saw

the questionnaires that Dr Pande had obtained in which many such positive views were expressed and we did no doubt the sincerity of those. However on this issue Dr Pande demonstrated a fundamental misunderstanding about the nature and purpose of a misconduct investigation, seeming to posit the view that his various positive contributions would neutralise the impact of his conduct and demeanour on his colleagues. His demeanour and conduct during the tribunal hearing gave the Tribunal first-hand evidence of how Dr Pande conducted himself when he was contradicted or challenged. The Respondent was entitled to take issue with conduct of this nature, when the was evidence that it was having a corrosive effect on a whole department. There was no evidence of any bias in the selection of witnesses in the investigation.

h. 3.7 The Claimant did not show to the Tribunal's satisfaction that any of the persons interviewed had been unaware of the content of what they said to Mr Adams or that they had not approved it, as the Claimant alleges.

i. 3.8 we have addressed this issue above. Dr Pande's approach again demonstrates a misunderstanding of a misconduct investigation, which is not an evaluation of an employee's character, but an examination of specific ways in which their conduct at work has fallen short of the required standards.

j. 3.9 The hyperbolic terms in which Dr Pande expresses himself in this paragraph were typical of his overall approach to the presentation of his case in which he repeatedly made unsubstantiated allegations about the integrity of the process and those involved in it. He produced no evidence to show that anyone involved had lied or was intent on ingratiating themselves with the senior staff of the Respondent. Nor did he demonstrate that the Respondent's policies had not been followed. The investigation did become protracted and a second investigation (by a separate investigator, Mr Fitzgerald) was instigated in August 2017, but properly so in the light of the allegations to which the second investigation related, which were of a very serious nature. The Tribunal did not consider that any of the matters put to the Claimant were trivial in nature.

32. On 4 June 2017, four months after Dr Maskell joined the Respondent as medical director, replacing Dr Sigston (who stepped down to Deputy Medical Director), an SAS development day took place. It was the Claimant's case that he made the fourth of his disclosures at that meeting by raising with Dr Maskell the issue of the rota applicable to SAS doctors, whose interests he was representing at the time. The Tribunal finds that the Claimant did raise the issue, but did so in a way that was received as belligerent and hostile by those participating. There were accounts of the meeting at pages 455 (Dr Maskell) and Dr Bajracharya (457). The Tribunal also heard directly from Dr Maskell that he had found the encounter extremely unpleasant and had left the meeting physically shaking.

33. As a result of the Claimant's conduct at that meeting and a number of other issues that had arisen in the same month, the Claimant received a notification dated 25 August 2017 of a second investigation (page 419). The investigator was David Fitzgerald, Associate Director of Cancer and Clinical Support Services and Dr Sigston was the case manager.

34. The Claimant participated in a JMCC meeting on 4 December 2017. Again, we accept that in doing so he was engaging in trade union activities. The minutes of that meeting (502) record: 'It was raised that Paediatric consultants are supporting junior doctors in the A&E departments and that consultant cover doesn't appear to the available for junior doctors within that area. PM will look at this concern raised regarding the department. Action: PM to check level of consultant support for junior doctors in A&E departments.' It is not clear from the minutes that it was the Claimant who raised this issue and he provided no other evidence that he had done so. He relied on this as the evidence that he had made the third of the disclosures that he alleged were protected disclosures, and we return to that point in our conclusions.

35. The Claimant said that he made the same disclosure (disclosure 3) again on 18 April 2018 at a further JMCC meeting and that at that same meeting he made the fourth disclosure concerning rotas and working patterns. The relevant section of the minutes of that meeting was at page 527 and records:

    'AP raised an issue that rotas are not allowing doctors to take a two week leave break. PM advised that he has written to all Clinical Directors asking for them to have a robust plan to cover leave for the full year.

    PM is keen to implement much of the SAS Doctors Charter but it is not expected that the Trust will implement the additional leave day the charter suggests. RB'd will circulate details of other trusts who have implemented this locally.

    PM will arrange to meet with the SAS Trust Lead to discuss the charter further and suggested that a sub-group may be set up to help move any issues raised forward.'

    It is clear that the Claimant did raise the issues that he relies on as disclosures 3 and 4 at that meeting.

36. The Claimant also asserted that he had raised two other matters as trade union activities (matters 4 and 5). Although he had not specified when these activities took place and did not show the Tribunal any evidence in support of this aspect of his claim, it did emerge from the evidence of Dr Maskell that the Claimant raised the hybrid consultant issue with him and he went on to defend the decision to engage hybrid consultants as a pragmatic solution to a chronic staff shortage. There is no evidence however that the Claimant raised an issue about hospital standards generally and Dr Maskell, whom we found to be a wholly credible witness, had no recollection of his doing so.

37. The next specific matter of which the Claimant complains is the decision by Dr Mumford not to postpone the disciplinary hearing which was scheduled to take place on 14 February 2019. By this stage both investigations had been

completed but due to a combination of delaying factors (in respect of which the Claimant raised no specific complaints) no disciplinary hearing had yet taken place. It was in fact the Claimant who had requested a stay of the disciplinary hearing in relation to the first investigation, which had originally been scheduled to take place on 11 September 2017, by which time the second investigation had been launched. The Claimant had been invited to a disciplinary hearing to deal with the issues arising in both investigations at a meeting originally scheduled for 4 January 2019 (page 649 letter from Dr Sigston), but the meeting was postponed at the request of Mark Briggs, his BMA representative. The revised invitation letter, dated 4 January 2019 (page 655) detailed the allegations, which were as follows:

> **The details of the allegations are outlined below:**
>
> **First investigation**
> **1. Your interaction and working relationships, particularly with Consultant Paediatricians in the department.**
> **2. Your alleged verbal aggression and intimidating behaviour towards colleagues.**
> **3. Your alleged refusal to carry out reasonable requests or instructions from a consultant colleague.**
> **4. Your alleged poor attitude which set a poor example to junior colleagues in particular and which potentially undermined the consultant in charge.**
> **5. Your alleged challenging and disruptive behaviour in department meetings.**
> **Further concerns raised during the investigation from February/March, 2017 are set out on page 3 of Marcus Adams Investigation report (appendix A):**
>
> **Second Investigation**
> **Your behaviour towards work colleagues on Woodlands on 12 June 2017**
> **Your behaviour at an SAS development afternoon held on 14 June 2017.**
> **Your attitude and behaviour towards a work colleague on Woodlands on 30 June 2017**
> **An incident on 5 September 2017 at Riverbank Children's Unit where you failed to attend to a baby requiring assistance and your behaviour to the nursing staff.**
>
> **Allegation 1 and 3 (second investigation) will not be considered as the investigation has not identified sufficient evidence to support these complaints.**

38. At page 660 was a letter to the Claimant from Ruth Bailey, Head of Employee Relations for the Respondent, acknowledging that the Claimant did not want to attend the hearing because of a problem with toothache, but declining to rearrange the hearing again, for reasons that were set out in the letter, including the participation of Mr Adams, who was travelling from Cornwall for the purpose. This was clearly far from ideal, but the Respondent offered various adjustments to enable the Claimant either to attend with breaks, or participate via his representative or written submissions, but he decided not to avail himself of those and the hearing went ahead in his absence. The Tribunal notes that the Claimant did not provide evidence that he had in fact faced a dental emergency on that occasion.

39. The Claimant also complained that the letter dated 1 March 2019 (page 685-699) was detrimental in the following respects:

> **After my complaint about this to Mr Scott, Dr Mumford informed me that the hearing would be reconvened. However, she did not answer any of my queries**

> **about how the hearing would be conducted. She informed that she had found me guilty of all charges and was considering termination of my services as a penalty. She had already made up her mind before hearing what I had to say. There is no provision in the Trust policy for the panel to reach a verdict of guilty in the middle of the hearing, and before hearing the defence. Also, I was not given an opportunity to cross examine the witnesses. A decision was thus taken, based on unsubstantiated evidence and blatant lies, by a biased panel. Although she said the hearing was being reconvened, there were no witnesses for me to cross examine. This made the whole hearing and my subsequent dismissal a farce.**

40. He set out his concerns at the time in a letter to Dr Mumford at page 703. The Tribunal finds that Dr Mumford was indicating that she had heard sufficient evidence about the Claimant's conduct to make dismissal for gross misconduct a serious possibility. She was however conscious of the seriousness of this step and was therefore offering the Claimant the opportunity to attend a reconvened hearing before she reached a final decision. She made it clear in the letter that he could call witnesses and as he had BMA representation at the time, there is no reason why he could not have sought to have one or more of the Respondent's management witnesses recalled so that he could question them. The Claimant's assertions that the evidence was unsubstantiated because he had not cross examined the witnesses is plainly incorrect and he again questions the integrity of those give in evidence by referring to 'blatant lies' and the panel being biased. The Tribunal on the contrary thought that Dr Mumford had gone to great pains to set out in detail the evidence on which she had relied and was giving the Claimant a clear chance to be heard before she reached a final decision. Her position was therefore the very opposite of pre-determined or biased. It is not the case that were no witnesses at the reconvened hearing. Dr Pande called several witnesses of his own. He wrote to Dr Mumford on 7 March 2019 (page 703) saying that he assumed that the management witnesses would be at the reconvened hearing to be cross examined. In fact they were not, and the Claimant did not raise the issue at the start of the hearing. He did question Dr Sigston, who was present moreover. The Tribunal notes furthermore that it is not an absolute requirement of a fair disciplinary procedure that all management witnesses are cross examined by the employee.

41. The disciplinary hearing, which took place on 15 March 2019, was thorough and the Claimant was given ample opportunity to put his side of the case in a hearing that lasted all day. The outcome letter was at page 742-764 and gives a detailed account of the panel's findings. Not all of the allegations were upheld but the panel had reached a decision that there was one incident of gross misconduct when the Claimant had failed to respond when asked by a consultant paediatrician, Dr Halpin, to attend a baby who had arrived in the unit cyanosed and the Claimant had not done so until he had finished a personal telephone call. It also found that there was an accumulation of instances of less serious misconduct, but that these were so numerous (and largely consisted of incidents in which the Claimant's manner towards his colleagues had been the cause of concern) that dismissal would be an appropriate sanction.

42. Nevertheless the Claimant was offered an alternative to dismissal in the way of an undertaking to adhere to certain standards of behaviour. He agreed in his evidence to the Tribunal that these were standards any doctor should adhere to. However, he was also required to give an apology to Dr Halpin, Nurse Nicola Davies, Dr Maskell and Dr Kisat and this he refused to do. Consequently, his dismissal took effect. He appealed and Mr Orpin heard the appeal but rejected it.

43. The Claimant also raised the issue of lack of audio recording at the reconvened hearing as a detriment. The Tribunal finds that the written policy (page 848) did not stipulate that meetings should be recorded (paragraph 5.2.4) and that they could be noted instead. The notes of the meeting were in fact clear and detailed and provided a comprehensive account of what had taken place.

44. The final issue raised by the Claimant in relation to his assertion that his treatment was attributable to protected disclosures or trade union activity was the issue of his participation in a grievance panel relating to two SAS doctors who had asked him to be involved. He cited this as an example of trade union activity. The Tribunal finds that he was involved in the process, despite the fact that his employment terminated on 1 April 2019 and the process in question extended beyond that date. We were not shown any evidence of any other treatment that could have been regarded as detrimental in relation to this issue.

Submissions

45. The Tribunal heard detailed and helpful submissions from Mr Burke and the Claimant at the end of the hearing and was grateful for the assistance the submissions, particularly those of Mr Burke provided during its deliberations.

Conclusions

Did the Claimant make protected disclosures?

46. Taking the alleged protected disclosures in turn, the Tribunal was not satisfied that in mentioning to Dr Sigston that consultants were leaving the ward early the Claimant was making a protected disclosure. He did not provide evidence of the specific information he had given – it appears that he made no more than a generalised assertion to Dr Sigston, who gave unchallenged evidence that the Claimant had said that this was what he 'felt'. The Claimant furthermore did not make the statement because he reasonably believed that it was in the public interest for him to do so, he did so, on his own evidence to the Tribunal 'as a consequence' of Dr Sigston saying that there had been complaints about him.

47. The same analysis can be applied to his statements about Dr Gupta. He made them orally to Dr Sigston after he realised that Dr Gupta was complaining about him. He did not reasonably believe that it was in the public

interest for him to do so, because the public interest was not on his mind at the time. He did not furthermore particularise what he had said and has not therefore provided the evidence from which the Tribunal could conclude that he made a disclosure of information.

48. As regards the third and fourth disclosures, whilst there was a lack of detailed evidence about what precisely the Claimant said in JMCC meetings, the Tribunal was prepared to accept that in representing his colleagues at those meetings and/or speaking on their behalf, he is likely to have been giving information of a reasonably detailed nature about the difficulties caused by the amount of support provided to junior staff by consultants and the problems caused by rotas and working patterns. We also accept that the Claimant made the fourth disclosure at the SAS development afternoon on 4 June 2017. We were also prepared to accept that when acting in this capacity the Claimant would have held a reasonable belief that he was acting in the public interest in the meaning set out in *Chesterton Global v Nurmohamed [2017] EWCA Civ 979*. We were satisfied that issues of this nature would tend to show that potentially the health and safety of staff and patients were implicated. The disclosures were made to the employer as required by s43C. We therefore concluded that these disclosures were protected disclosures within the meaning of s43A.

49. However, the Claimant did not persuade the Tribunal that any of the disclosures had any impact on the Respondent's decision to investigate his conduct and ultimately to dismiss him. For the reasons set out in our findings of fact, we were wholly persuaded that it was the Claimant's manner in raising issues and communicating with his colleagues that was the problem and not the substance of what he said or the fact that he was saying it. Dr Maskell's evidence was particularly persuasive on this issue – there were plainly ongoing issues at the Trust, but he was very clear that he welcomed issues being brought to him and was committed to resolving them. Furthermore, the chronology is against the Claimant. He raised protected disclosures 3 and 4 in June and December 2017 and April 2018, long after the investigation into his conduct had commenced. He adduced no evidence to suggest that any aspect of the investigation or disciplinary process was affected by his having made the disclosures that we have found to have been protected. His claim of automatic unfair dismissal under s103A ERA therefore fails.

50. For essentially the same reasons we find that his claim for automatic unfair dismissal for participating in trade union activity also fails. We have accepted that he was participating in trade union activities from time to time throughout the period to which the facts of this case relate. However, the evidence showed no causal link between that participation and the decisions taken to investigate his conduct and ultimately to dismiss him.

PID Detriment

51. The Tribunal has not accepted the characterisation of the investigation set out in detriments 1 and 2 and it follows that we find that the Claimant was not subjected to the detriments he describes there. The action take was

furthermore not caused by the Claimant making the disclosures we have found to be protected. Chronologically they cannot have affected the decision to instigate the investigation. We also found no evidence to suggest that later stages of the investigated were influenced in any measure by either of the protected disclosures. It was the Claimant's conduct and manner that was the sole cause of the disciplinary processes taken in respect of him.

52. As regards the matters set out at paragraph 3 of the detriments, the Claimant has either failed to establish in relation to the matters relied on that they happened in the manner he alleged (detriments 3.2, and 3.4 to 3.8) or he has failed to show as a matter of causation that the protected disclosures he did make could have influenced the conduct he describes as detrimental (detriment 3.1 and 3.3) either because the chronology is against him, or because it is clear that the person he is accusing of treating him detrimentally was acting for entirely different reasons wholly uninfluenced by the disclosures (such as detriment 3.8).

53. As regards detriment for participating in trade union activity, it cannot be said that the chronology defeats the Claimant's claims in the same way, but the detriments relied upon again are either not established on the facts or describe actions such as that of Mr Adams, that were on the evidence wholly uninfluenced by the participation in trade union activities.

54. The claim of detriment related to protected disclosures under s47B ERA therefore fails and is dismissed.

Ordinary Unfair Dismissal

55. The Respondent has shown that the reason for the Claimant's dismissal was his conduct, which was a potentially fair reason under s 98 ERA. It has also shown that it had a reasonable belief in the Claimant's misconduct. The investigations undertaken were very thorough and the evidence was tested at length in two separate disciplinary hearings in the latter of which the Claimant had ample opportunity to state his case.

56. We were satisfied that the Respondent acted reasonably in treating the reasons relied on as reasons to dismiss. The Claimant raised a concern in his evidence that the manager conducting the second investigation had considered that there was insufficient evidence of the 'Riverbank' incident to proceed to a disciplinary hearing at all. Ultimately that was the incident that led to his dismissal for gross misconduct, the Tribunal considered this point carefully and noted that the Respondent did not explain why a different view was taken after the investigator had reported. We accept however that in a complex organisation such as a hospital, there may be different views as to the seriousness to be attached to matters such as those that unfolded during the Riverbank incident. The Tribunal was satisfied that the Respondent acted reasonably in deciding to take this matter forward to a disciplinary hearing and that it could not be said that no reasonable employer would have dismissed on the evidence that was before Dr Mumford of what in effect amounted to serious insubordination on the Claimant's part.

57. We are also satisfied that on a balance of probabilities this part of the incident – the Claimant's failure to attend the baby when called by Dr Halpin to attend the baby 'now', did occur as described. There was therefore on the facts sufficient evidence of the misconduct alleged to justify a finding that the Claimant had been guilty of gross misconduct. It was reasonable in all the circumstances for the Respondent to characterise the Claimant's decision to complete his personal phone call before attending to the baby as grossly insubordinate in all the circumstances. Hence dismissal without notice was justified on the facts of the case.

58. The Claimant's claim of ordinary unfair dismissal therefore fails and is dismissed.

59. Given our conclusions it is not necessary for the Tribunal to deal in any detail with matters of remedy. However, if we are wrong on any of our conclusions as to the fairness of the Claimants' dismissal, any compensation payable to the Claimant would be subject to very substantial reductions on two grounds. The first is our finding that the Claimant had on the facts been grossly insubordinate. This means that he made a very substantial contribution to his own dismissal and a corresponding reduction would need to be made to any hypothetical award of compensation. Secondly the Claimant could have remained in his job had he been prepared to make an apology to certain of his colleagues. He was in effect given the opportunity to mitigate his loss. We did not hear evidence or submissions as to whether the Claimant's decision not to give an apology was reasonable in all the circumstances and therefore reached no firm conclusion on this point, but plainly it is of relevance to any hypothetical award of compensation in this case and would have the likely consequence of limiting any such award.

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Employment Judge Morton
Date: 23 December 2021

Appendix – List of Issues

(1) Automatic Unfair Dismissal (PID)

Did the Claimant make the following disclosures:

(1) In October 2016, the Claimant disclosed to Dr Paul Sigston that consultants were leaving the ward early and were, in consequence, being paid for work they were not doing;

(2) In October 2016, the Claimant disclosed to Dr Paul Sigston that Dr Rajesh Gupta was incompetent and unsafe and that he had placed the life of a patient in danger;

(3) On a date to be confirmed by the Claimant, he disclosed to Dr Kisat (the Clinical Director) and Dr Peter Marshall (the Medical Director) that there was a lack of consultant support; and

(4) On a date to be confirmed by the Claimant, he disclosed to Dr Maskell that rota and working patterns were causing stress to those working them?

6. If the Claimant made any of the disclosures set out above, were they qualifying disclosures within the meaning of ERA 1996, s. 43B? More specifically:

(1) Did the Claimant reasonably believe that the relevant disclosure was made in the public interest; and

(2) Did the Claimant reasonably believe that the information disclosed tended to show one or more of the matters set out in ERA 1996, s. 43B(1)(a) to (f)?

7. Was the making of any of the relevant disclosures the reason or principal reason for the Claimant's dismissal (ERA 1996 s 103A)?

(2) Automatic Unfair Dismissal (TU Activities)

8. The Claimant was SAS representative on behalf of the BMA. It does not appear to be contented that the BMA is not an independent trade union for the purposes of TULR(C)A 1992, s. 152.

9. Did the Claimant take part in the following activities ("the Activities"):

(1) In October 2016 the Claimant attended a Joint Medical Committee meeting in his capacity as SAS representative and raised concerns on behalf of those he represented about SAS doctors not being given job plans;

(2) On a date to be confirmed by the Claimant, seeking to act as the representative of 2 SAS doctors at a panel hearing;

(3) On a date to be confirmed by the Claimant, attending JNC and JMCC meetings in his capacity as SAS representative and raising concerns on behalf of those he represented about matters including the operation of the Paediatric department;

(4) On a date to be confirmed by the Claimant, attending a JMCC meeting in his capacity as SAS representative and raising concerns on behalf of those he represented about matters the way money was potentially being wasted by engaging hybrid consultants; and

(5) On a date to be confirmed by the Claimant attending JNC and JMCC meetings in his capacity as SAS representative and raising concerns on behalf of those he represented about matters including the maintenance of hospital standards?

10. By carrying out any such activity dd the Claimant thereby take part in the activities on an independent trade union at an appropriate time?

11. If he did, was the reason or principal reason for the Claimant's dismissal that he had done so?

(3) Ordinary Unfair Dismissal

12. Was the reason or principal reason for dismissal a reason relating to conduct within the meaning of ERA 1996, s. 98(2)(b)?

13. In the circumstances, did the Respondent act reasonably in treating it as a sufficient reason for dismissal? More specifically:

(1) Did the Respondent have reasonable ground for its belief that the Claimant had misconducted himself;

(2) Did the Respondent carry out such investigation as was reasonable in all the circumstances; and

(3) Was dismissal within the range of reasonable responses?

(4) PID Detriment

14. Did the Claimant make any protected disclosures?

15. Was the Claimant subjected to any of the following detriments ("the Detriments") which are extracted verbatim from the Claimant's further and better particulars:

"1. Dr Sigston started the investigation against me purely as a vendetta. I had raised the issue of lack of Job Plans for SAS doctors in the JMCC Meeting in late 2016. Dr Sigston was quite unhappy about this. Within a week of the meeting I was summoned by Dr Sigston and told there were complaints against me. I offered him explanations to the complaints and also offered to resolve any pending issues by discussion. He refused my offer and said he had decided to have a formal investigation. No reasons were given. His intention was clearly to bully me so that I was not as vocal in subsequent meetings.

2. No action was taken on the concerns that I had expressed. This information was passed on to some consultants who were then enlisted to give statements against me. Subsequently I was informed that I would be investigated for not getting along well with the consultants. A "witch hunt" was thus started against me. Staffs were encouraged to complain against me and these complaints were fast tracked to Dr Sigston. These complaints were not subject to any scrutiny to see if they were worthy of investigation. In fact, some of them were blatant lies. I was being victimised for Whistle blowing and a campaign of institutional or corporate bullying initiated. On the basis of these lies I was subjected to a Disciplinary Hearing.

3. The investigation itself was very biased against me and there were many procedural deficiencies:

• I was not informed beforehand about the purpose of the first meeting with Dr Sigston in spite of repeated requests. This meant I could not prepare myself or seek the advice of the BMA prior to the meeting.

• I was not given copies of the complaints or asked for an explanation. My Educational Supervisor did not know about the complaints and neither did the Clinical Director speak to me about them. These were not complaints that would normally go directly to the Medical Director, unless he had specifically asked for them. This shows that everything was planned by Dr Sigston. He also made himself the Case Manager so that he could oversee the whole operation.

• According to ACAS every attempt should be made to sort out the problem informally. Dr Sigston refused to do this and decided to have a formal investigation. Any attempt at informal resolution should be documented and reasons given for the decision to have a formal investigation. There is no record or evidence of any such attempt at informal resolution being made, as claimed by Dr Sigston.

• The BMA and I repeatedly asked Dr Sigston for copies of all documents relating to complaints, as per Trust policy. These were not provided or perhaps did not exist. Before the investigation, no documents were supplied relating to allegations from other consultants or colleagues.

• Staff were informed about the investigation and encouraged to give statements against me. The investigation was supposed to be confidential but there is evidence that people knew about it.

• The investigation by Mr Marcus Adams was biased. He was hired to do a particular job, and that job was to get me. Why would he bite the hand that was feeding him by saying against the management? His investigation was directed at getting evidence against me. He accumulated statements from some consultants who had been asked to give statements against me. Some of them later said they did so reluctantly. Others refused. Some senior consultants who had worked with me for a long period were not informed about the investigation, nor were they asked to give a statement about me.

• At least one consultant said he was not aware that his conversation with Mr Adams had been presented as a statement to me. He said he was not aware of what the content of the statement was, and he had not approved it.

• Mr Adam informed me that he was given the list of consultants by Dr Sigston who denied having done so. I asked Mr Adams to summon the same consultants so that I could present them also as my witnesses. He refused my request.

• I showed Mr Adam a questionnaire about me, filled in by about 20 members of staff. These were doctors, nurses and administrative staff who were working with me and were selected randomly 2 days prior to the meeting with Mr Adams. Most of them had written strongly in my favour. These questionnaires had their names, signatures and designation. I told him he could call any or all of them as my witnesses or if he had any doubts about the questionnaires. Mr Adam did not speak to any of them.

• During the investigations, anything concerning me e.g. statements, feedback or the most trivial complaint was immediately added to the list of investigations against me. No attempt was made to follow Trust policy regarding these matters. Staff members, eager to ingratiate themselves with the Clinical Director and the Medical Director, did not hesitate to supply them even lies which were happily and gratefully accepted.

• This Trust has a policy of having an audio recording of all meetings and investigations. My experience has been that this has been done regularly in the past. During the second investigation against me, Mr Fitzgerald had spoken rudely to me and kept interrupting when I spoke. I complained about this. Since there was an audio recording of this, the Trust management perhaps, found it embarrassing. When the meeting was reconvened a few weeks later, Mr Simon Hart had taken a decision not to have audio recordings of any further meetings. The Trust policy had not changed, so what he was doing was against Trust policy.

• The absence of an audio recording was also a license for Dr Mumford to misbehave the way she did, comfortable in the knowledge that there would be no evidence against her. What a pathetic way to run the Trust.

• The Trust policy on disciplinary hearings is based on guidance by ACAS. This clearly states that if a postponement is requested for up to 5 days, and if there are reasonable grounds for the request, then this should be granted. My request to postpone the hearing on the 14th February for only 2 working days because of a severe toothache was ignored. In fact, suggestions were given about how I should deal with it. Occupational Health was of the opinion that at the very least, it could affect my judgement. I arranged an emergency appointment with the dentist and the tooth had to be extracted.

• After my complaint about this to Mr Scott, Dr Mumford informed me that the hearing would be reconvened. However, she did not answer any of my queries about how the hearing would be conducted. She informed that she had found me guilty of all charges and was considering termination of my services as a penalty. She had already made up her mind before hearing what I had to say. There is no provision in the Trust policy for the panel to reach a verdict of guilty in the middle of the hearing, and before hearing the defence. Also, I was not given an opportunity to cross examine the witnesses. A decision was thus taken, based on unsubstantiated evidence and blatant lies, by a biased panel. Although she said the hearing was being reconvened, there were no witnesses for me to cross examine. This made the whole hearing and my subsequent dismissal a farce."

16. If the Claimant was subjected to any of the alleged detriments was it on the ground that he had made a protected disclosure?

(5) TU Activities Detriment

17. Did the Claimant take part in any of the Activities?

18. If he did, was he subjected to nay of the Detriments?

19. If he was, was it for the main or sole purpose of penalising him for taking part in the activities?

(6) Time Limits

20. Which, if any, of the complaints about detriment were commenced timeously? (The Claimant alleges they were part of conduct continuing over a period).

21. Should time be extended in relation to any claim which was not made timeously?

(7) Remedy

22. If the Claimant was unfairly dismissed and the remedy is compensation:

(1) if the dismissal was procedurally unfair, what adjustment, if any, should be made to any compensatory award to reflect the possibility that the claimant would still have been dismissed had a fair and reasonable procedure been followed / have been dismissed in time anyway? See: Polkey v AE Dayton Services Ltd [1987] UKHL 8; paragraph 54 of Software 2000 Ltd v Andrews [2007] ICR 825; W Devis & Sons Ltd v Atkins [1977] 3 All ER 40; Crédit Agricole Corporate and Investment Bank v Wardle [2011] IRLR 604;

(2) would it be just and equitable to reduce the amount of the claimant's basic award because of any blameworthy or culpable conduct before the dismissal, pursuant to ERA section 122(2); and if so to what extent?

(3) did the claimant, by blameworthy or culpable actions, cause or contribute to dismissal to any extent; and if so, by what proportion, if at all, would it be just and equitable to reduce the amount of any compensatory award, pursuant to ERA section 123(6)?

23. If the Claimant was subjected to any unlawful detriment, what compensation would it be just and equitable to award?