CASE NO: 2601147/2017

EMPLOYMENT TRIBUNAL S

Claimant: Dr G Ijomah

Respondent: Nottinghamshire Healthcare NHS Foundation Trust

Heard at: Nottingham
On: 14th March to 1st April 2022

Ex tempore Judgment delivered to the parties on 14th April 2022

Before: Employment Judge R Broughton
Members: Mr C Pittman
Mr J D Hill

Representation
Claimant: Mr Awodele - Counsel
Respondent: Ms Barney - Counsel

JUDGMENT

1. The claims of detriment pursuant to section 47B Employment Rights Act 1996 have been presented out of time. The Tribunal has no jurisdiction to deal with those claims and they are accordingly dismissed.

2. The claim of automatic unfair dismissal pursuant to section 103A Employment Rights Act 1996 is not well founded and is dismissed.

3. The claim of 'ordinary' unfair dismissal brought pursuant to section 94 and 98 ERA is well founded and succeeds. The Claimant is entitled to be compensated for the period of 3 months which is the period it would have taken the Respondent to carry out a disciplinary process in accordance with the respondent's contractual disciplinary policy. Further compensation is subject to the following deductions;

    - A Polkey deduction of 50%
    - A deduction to both the basic award and compensatory award of 20%.

4. The Claimant requests reinstatement.

5. A remedy hearing will be listed to determine the application for reinstatement or otherwise to determine what compensation is to be awarded.

REASONS

The Issues

1. The issues in this case were agreed at the outset and were set out by the parties in an agreed list of issues. The parties adopted the same numbering of the disclosures and detriments as were identified prior to the dismissal and withdrawal of a number of those disclosures and detriments. The Tribunal have adopted the same numbering in this judgment which although it means that the disclosures and detriments do not run in strict numerical order they can more easily be cross referenced to the list of issues and other documents produced during the course of the case management process.

2. Mr Awodele confirmed that in respect of alleged protected disclosure PD6, the Claimant relies upon section 43B (1)(a) and section 43B(1)(d) ERA **only** although there was some confusion as a result of the inclusion of the words *legal obligation,* Mr Awodele confirmed that the Claimant does not seek to rely on section 43B(1)(b) ERA and the criminal offence does not relate to The High Security Psychiatric Services Arrangements for Safety and Security at Ashworth, Broadmoor and Rampton Hospitals Directions 2011 but to fraud and theft only. The agreed issues are as follows:

Ordinary Unfair Dismissal

1. Was the Claimant dismissed by the Respondent?

2. Did the Respondent have a potentially fair reason for dismissal of the Claimant?

3. What was the reason for dismissal?

4. Was the reason for dismissal one falling within Section 98 (1)(b) of the Employment Rights Act 1996?

5. Was dismissal of the Claimant fair having regard to the practice within Section 98 (4) of the Employment Rights Act 1996?

Public Interest Disclosures

6. Did the Claimant make one or more protected disclosures set out below and detailed in the Claimant's further particulars at pages 158 - 173 and ***the clarification information provided by the Claimant for the preliminary hearing on 14 – 16 December 2020 at pages 243 - 253:***

6.1. ***PD2*** *(page 490 - 492) Letter to Dr Mike Harris 29 November 2011 disclosing concerns regarding staff and patient safety. In particular that a risk assessment and plans should have been put in place to protect staff and patient health and safety at work concerning boundaries.* ***To be read alongside the Clarification Information for Preliminary Hearing on 14 December 2020.***

6.2. ***PD4*** *(page 493) Verbally to Dr John Wallace during a job planning meeting on 02 June 2012 disclosing concerns regarding staff and patient safety (evidenced in the notes of the meeting). In particular that a risk assessment and plans should have been put in place to protect staff health and safety at work concerning boundaries.* ***To be read alongside the Clarification Information for Preliminary Hearing on 14***

December 2020.

6.3. ***PD5*** *(page 494 - 496) 245852803 4 Letter to Dr John Wallace 20 December 2012 disclosing concerns regarding staff and patient safety. In particular that a risk assessment and plans should have been put in place to protect staff health and safety at work concerning boundaries.* ***To be read alongside the Clarification Information for Preliminary Hearing on 14 December 2020.***

6.4. ***PD6*** *(Page 497 - 498) Report to Lee Brammer dated 19 February 2013 disclosing concerns regarding staff and patient safety. In particular that a risk assessment and plans should have been put in place to protect staff and patients' health and safety and property at work concerning boundaries.* ***To be read alongside the Clarification Information for Preliminary Hearing on 14 December 2020.***

The Claimant relies upon section 43B (1)(a) and section 43B(1)(d) ERA **only** . The criminal offence relates to fraud and theft only.

6.5. ***PD9*** *(page 499 - 503) Report to Dr John Wallace dated 05 July 2013 disclosing concerns regarding staff and patient safety. In particular that a risk assessment and plans should have been put in place to protect staff and patients' health and safety at work concerning boundaries. 245852803 6 In respect of section 43B (1) (a) the legal obligation failing to be complied with by the Respondent is the failure to adopt and put in place specifically "The High Security Psychiatric Services Arrangements for Safety and Security at Ashworth, Broadmoor and Rampton Hospitals Directions 2011".* ***To be read alongside the Clarification Information for Preliminary Hearing on 14 December 2020.***

6.6. ***PD13*** *(pages –504 - 506) Letter to Peter Parsons dated 05 December 2013 disclosing concerns regarding staff and patient safety. In particular that a risk assessment should have been put in place to protect the health and safety of staff and patients in relation to boundaries.* ***To be read alongside the Clarification Information for Preliminary Hearing on 14 December 2020.***

6.7. ***PD15*** *(page 507 - 543) Letter to Sharon Rosenfield dated 23 April 2014 disclosing concerns regarding staff and patient safety. In particular that a risk assessment and plans should have been put in place to protect staff health and safety at work concerning boundaries and to prevent future breaches.* ***To be read alongside the Clarification Information for Preliminary Hearing on 14 December 2020.***

6.8. ***PD19*** *(page 544 - 557) Letter of grievance to Ruth Hawkins dated 26 October 2016 disclosing concerns regarding staff and patient safety. In particular that a risk assessment should have been put in place to protect the Claimant's health and safety at work.* ***To be read alongside the Clarification Information for Preliminary Hearing on 14 December 2020.***

Detriments .

Did the Respondent subject the Claimant to any of the detriments set out below and detailed in the Claimant's further particulars at pages 174 – 18 and 264 - 273?

7.1. ***Detriment 1*** *Removal of the medical psychotherapy part of the Claimant's position in September 2012 to 2014 by Dr Mike Harris, Dr John Wallace and Dr Gopi Krishner. The Claimant asserts that this detriment started close to the time of raising protected disclosures and that conflicting reasons were given for trying to justify the change.*

The Claimant relies upon all the above protected disclosures in respect of this detriment.

The Claimant asserts that he was the only employee to have part of his role removed and the only employee to have raised repeated protected disclosures.

*7.2. **Detriment 6** Dr Harris blocked the Claimant's grievance submitted on 21 November 2013 regarding proposed changes to his terms of employment. The Claimant asserts that he verbally told Dr Harris that he wished to raise a grievance on 14 October 2013, and that the grievance was lodged with Dr Harris and Dr Wallace on 21 November 2013.*

The Claimant relies upon all the above protected disclosures in respect of this detriment.

The Claimant asserts that he was the only employee to have a grievance unreasonably blocked and the only employee to have raised repeated protected disclosures.

*7.3. **Detriment 8** Unlawful reduction of the Claimant's salary by Dr Steve Geelan in April 2014.*

The Claimant relies upon all the above protected disclosures in respect of this detriment.

The Claimant asserts that he was the only employee to have his salary unlawfully reduced and the only employee to have raised repeated protected disclosures.

*7.4. **Detriment 9** False accusations by Jane Rollinson in August 2014 that the Claimant used an item of Hospital property that then went missing.*

The Claimant relies upon all the above protected disclosures in respect of this detriment.

The Claimant asserts that he was the only employee to be wrongly accused of taking Hospital property and the only employee to have raised repeated protected disclosures.

*7.5. **Detriment 10** Failure to be provided with annual leave and information regarding annual leave by Dr John Wallace in April 2017.*

In his further and better particulars provided on 1 July 2021 the Claimant clarifies that his case is that during September 2014 he "uncovered" that he was not being given the correct entitlement of annual leave (the Claimant says he was entitled to 34 days per annum in line with his NHS contract). Claimant clarifies that the detriment is in relation to not being provided with accurate information regarding his annual entitlement, the start date of the entitlement and the financial arrears due.

The Claimant relies upon all the above protected disclosures in respect of this detriment.

The Claimant asserts that he was the only employee to be refused annual leave and the only employee to have raised repeated protected disclosures.

*7.6. **Detriment 11** Failure to be provided with study leave by Louise Bussell at a return to work meeting on 29 March 2017 to attend a Medical Psychotherapy Annual Conference due to take place on 6 & 7 April 2017.*

The Claimant relies upon all the above protected disclosures in respect of this detriment.

The Claimant asserts that he was the only employee to be refused study leave and the only employee to have raised repeated protected disclosures.

7.7. ***Detriment 12*** *Failure to be provided with annual pay rises by Dr John Wallace (continuing).*

In his further and better particulars provided on 1 July 2021 the Claimant states that he uncovered in September 2014 that he was not being provided with his annual pay progression in line with his contract by Dr John Wallace.

The Claimant relies upon all the above protected disclosures in respect of this detriment.

The Claimant asserts that he was the only employee who did not receive a pay rise and the only employee to have raised repeated protected disclosures.

8. If so, was this done on the ground that the Claimant had made one or more of the protected disclosures?

9. For detriments prior to 21 May 2017 was it reasonably practicable for the Claimant to have brought those claims before 20 August 2017?

Automatic Unfair Dismissal

10. Was the reason, or if more than one the principal reason for the Claimant's dismissal, one which falls within Section 103A of the Employment Rights Act 1996. Specifically, was the reason or principal reason for the dismissal that the Claimant had made a protected disclosure?

Remedy (to be dealt with separately)

11. Is the Claimant entitled to any remedy in relation to the claim of unfair dismissal?

12. What is the Claimant entitled to in relation to a basic award, compensatory award and any adjustments? Included within this issue are the items claimed within the draft Schedule of Loss.

13. Did the Claimant mitigate his losses?

14. Is the Claimant entitled to any remedy in relation to his claim for detriments? Included within this issue are the items claimed within the draft Schedule of Loss.

15. Did the Respondent unreasonably fail to comply with a relevant ACAS Code of Practice. If so, would it be just and equitable in all the circumstances to increase any award and if so at what percentage up to a maximum of 25% pursuant to Section 207A of the Trade Union and Labour Relations Consolidation Act 1992.

16. Did the Claimant unreasonably fail to comply with any relevant ACAS Code of Practice. If so, would it be just and equitable in all the circumstances to decrease any compensatory award and if so, by what percentage, up to a maximum of 25%?

Evidence

3. The Claimant called three witnesses who swore under oath as to the truth and accuracy of their statements but were not cross examined; Mr Joseph who had been employed in 2013 as Team Leader in the Personality Directorate: Dr Markides who had been employed as a Staff Grade Psychiatrist by the Trust at Rampton from 2006 to 2011 and Dr Brabiner, who had been employed by the Trust between April 2003 and November 2021 as a Consultant Forensic Psychiatrist. Mr Brabiner was asked some supplemental questions by the Claimant but was not cross examined.

4. The Respondent called as witnesses; Dr Michael Harris formerly Executive Director of Forensic Services: Anne-Marie Stubbs Head of Medical Workforce; Louise Bussell, formally Deputy Director of Forensics and the dismissing officer; Jane Rollinson, Mental Health Legislation Manager; Peter Wright, Business Development Manager and Dr John Wallace, Clinical Director Rampton Hospital. All those witnesses gave evidence under oath either in person or remotely by CVP and were cross-examined.

Procedural Background

5. There is a long history to this case. The claim was first issued on 20 August 2017.

6. Acas early conciliation took place between 14 July 2017 to 21 July 2017.

7. The first case management hearing was before Employment Judge Britton in October 2017. There was an order that the Claimant produce a Scott Schedule which set out the required details of his claims of 'whistleblowing'.

8. There was a hearing before Employment Judge Evans that lasted for two days; on 18 and 19 June. The main purpose of the hearing was to deal with the Claimant's Scott Schedule, which he had completed and provided on 26 January 2018. Employment Judge Evans directed that the Claimant must provide a further document, a new Scott Schedule, to be presented in the form set out in Appendix 1 of the order. Appendix 1 set out very precisely what details were required. The Claimant it is recorded, was directed that he could refer to earlier events by way of background in his witness statement, should he choose to do so.

9. Following the appeal against a decision striking out the claims pursuant to an Unless Order made by Employment Judge Clark which was upheld in part by the Employment Appeal Tribunal , the Claimant then submitted further particulars of the disclosures to be considered by a fresh Tribunal at a preliminary hearing on 14 to 16 December 2020 [243-253]. Those further particulars are referred to hereafter as the Further Particulars and some of the detail has been adopted and included within the agreed list of issues but further refined within the list of issues such that for example not all sections of 43B(1) ERA referred to in the Further Particulars are now relied upon and set out in the agreed list of issues to be determined by the Tribunal .

10. The witness statement produced by the Claimant for this final hearing and which was exchanged by him in breach of the time prescribed by the case management orders, made a reference to the original Scott Schedule. It is a brief and passing reference to the Scott Schedule at paragraph 187, it refers that document as "tabulating the extent of the disclosures made to the Respondent year after year". An application was made to admit the original Scott Schedule into evidence.

Preliminary Matters

11. The Claimant attended the first day of this final hearing producing an additional supplemental bundle which had not been provided to the Respondent or the Tribunal in advance. Mr Awodele informed the Tribunal that he had meant to file a copy electronically on the Friday before the hearing but had not done so.

12. The Claimant had legal representation to assist him in preparing for the hearing and counsel to represent him at the hearing.

13. In terms of the content of the supplemental bundle, we heard representations from both parties.

14. In the circumstances, we adjourned the hearing to allow the Respondent to consider the additional disclosure and take instructions.

15. The parties were able to reach some agreement; the Respondent taking a pragmatic view while not conceding the relevance of a number of the documents in the supplemental bundle. The Respondent objected however to the inclusion of the 142 page Scott Schedule which had been superseded by Appendix 1. When invited to explain by the Tribunal why the Claimant wanted to include this lengthy previous version of the Scott schedule, which included a number of detriments and disclosures no longer forming part of the pleaded issues, the only reason given by Mr Awodele was that generally "it provided context".

16. In considering the application by the Claimant, we considered the history to this case. The claim was first issued in 2017 and there have been a number of case management hearings. The hearing before Employment Judge Evans itself lasted for two days. It is clear from the record of that hearing that considerable support was provided to the Claimant and guidance on what needed to be included within a revised Scott Schedule. A new Scott Schedule was duly prepared.

17. At the case management hearing, before Employment Judge Broughton on 1 February 2022 Mr Awodele and Miss Glover, solicitor for the Respondent had both confirmed that exchange of documents had taken place and this is set out in the record of that hearing and the directions made reflected that position. Miss Glover present at the hearing confirmed that this had been the agreed position at that preliminary hearing. However Mr Awodele did not accept that this was correct and further complained that the Claimant had not been able "to make any contribution" to the Tribunal bundle. However, the Tribunal did not accept that was the case. Miss Barney referred to the Claimant having written to the Respondent on 27 January 2022 with some additional disclosure for the bundle (the bundle having already been prepared for the previous hearing in this matter). The additional documents were included other than the original Scott Schedule. The Respondent had questioned the relevance of the previous Scott Schedule given that it had been superseded by the second/revised version. Despite being informed by the Claimant's solicitor on 16 February 2022, that they would take instructions and revert back, they did not do so. Mr Awodele did not seek to challenge that this exchange had taken place.

18. Due to delay on the part of the Claimant, witness statements were not exchanged until 7 March, in breach of the case management orders. The witness statement which had been produced by the Claimant at that late stage made a passing reference to the original Scott Schedule.

19. Not only does this first version of the Scott Schedule include a number of alleged disclosures and detriments which had been struck out or withdrawn, it contains allegations which are deficient in terms of particularisation, hence the reason why an Unless Order was made by Employment Judge Clark. It was determined that there was

insufficient information in the first Scott Schedule to enable the Respondent to respond to the allegations.

20. The Respondent complained that on the morning of the first day of this 15 day hearing, the Claimant was attempting to reintroduce allegations which have been struck out or withdrawn 'by the backdoor'. Mr Awodele did not attempt to identify the relevance of any particular information contained in the Schedule, he merely referred in general terms to it providing 'context' but did not explain why that context cannot be established by the other documents contained in the 1690 pages of documents contained in the joint bundle originally before the Tribunal or indeed the Claimant's own witness statement.

21. The Tribunal considered the relative prejudice and hardship of allowing or refusing the application and gave each party the opportunity to make representations. The Respondent submitted that it would have to take considerable instructions on a significant number of other allegations and facts that are set out in the narrative to the Scott Schedule and as that may require further witnesses and supplemental witness statements it may require an adjournment. An adjournment in these circumstances would be of grave concern to this Tribunal . This claim related to events dating back to 2005 . The first alleged protected disclosure was in 2011, some 11 years prior to this hearing. The claim was issued in 2017. A 15 day hearing would be unlikely to be relisted until 2023. To not adjourn in the circumstances may however cause the Respondent considerable prejudice and mean that a fair trial would not be possible. Mr Awodele informed the Tribunal that the Claimant would oppose any application to adjourn the hearing.

22. Taking into account the relative prejudice, the Tribunal determined that it was not in accordance with the overriding objective, to admit into evidence this original version of the Scott Schedule which had been superseded by a revised version produced by the Claimant and the application was refused.

23. The Employment Judge invited Mr Awodele to consider how he was intending to deal with the fact that the Claimant's witness statement failed to deal with a number of the pleaded detriments, in response to which he indicated that he may make an application to ask supplemental questions of the Claimant. He was permitted an opportunity to take instructions however, after doing so he informed the Tribunal that his instructions were not to make that application. As a result, the Claimant did not lead any evidence on any but two of the pleaded detriments; namely the failure to pay a salary increment and not being allowed study leave in 2017. The Claimant had also not addressed time limits in his evidence in chief (and as we shall address in due course), despite the Tribunal raising with Mr Awodele that his written submissions did not address the issue of time limits either and despite being permitted to support those submissions with oral submissions, no submissions about the jurisdiction of the Tribunal were made on behalf of the Claimant. No explanation for that failure was put forward.

Redacted document and anonymity

24. There was also a dispute over a redacted document within the bundle. This document listed the details of a number of people a patient had contacted to obtain memorabilia; celebrities etc and it included the name of a fellow patient. An application was made by the Claimant to include a version without redaction. The application was made and considered with a decision and reasons given orally at the hearing. The document had been redacted by the Respondent to remove names and addresses of those individuals .The Claimant's case is that a patient had committed fraud in contacting them for memorabilia (using another patient's identity) and their details should not be redacted

because it was important to show the scale of the alleged fraud. The Respondent was concerned that it could not confirm whether the addresses were private addresses of the individuals concerned. The Tribunal was not persuaded that it was necessary to show the addresses of the people contacted and those details were redacted along with the identify of the patient shown on that document.

25. The parties had also made attempts to anonymise the names of patients at Rampton referred to in the witness statements and the name of a clinician. The Tribunal did not consider that the anonymisation was sufficient because it still identified them by the use of initials but in any event, the need for anonymisation required proper consideration by the Tribunal . Submissions were made by both parties who were in agreement with anonymisation and an order was made.

26. In making those orders pursuant to Rule 50 preventing the public disclosure of the identities of those specified parties, the Tribunal considered the right to privacy under Article 8 of the European Convention on Human Rights and balanced that against, the competing and equally compelling rights to open justice and freedom of expression enshrined in Article 10: A v B 2010 ICR 849, EAT, and F v G 2012 ICR 246, EAT while always bearing in mind the stipulation in rule 50(2) that 'in considering whether to make an order the Tribunal shall give full weight to the principle of open justice and to the Convention right to freedom of expression'.

27. The relevant patients at Rampton have serious mental health conditions and the Tribunal accept, are vulnerable individuals. They are not witnesses or parties to these proceedings. The relevant evidence relates to incidents of relationships between a number of those patients and the particular clinician as well as involvement in alleged criminal activity. The public disclosure of the identity of the patients the Tribunal accept, may put at risk the mental wellbeing of the patients and given the nature of the allegations involving the clinician, the Tribunal considered on balance an order should be made.

28. An order was made that the identities of the specified persons namely the clinician and the patients, referred to in the proceedings should not be disclosed to the public, by the use of anonymisation in the course of any hearing or in its listing or in any documents entered on the Register or otherwise forming part of the public record pursuant to rule 50(3)(b) . A table identifying the individuals by reference to agreed numbers was produced by the parties.

Reasonable adjustments

29. The Claimant requested breaks as and when required during the course of the hearing as an adjustment. The Claimant complains that he still suffers with Post Traumatic Stress Disorder (PTSD). Those breaks were granted when requested.

Findings of fact – background

30. The Tribunal has considered all the evidence however, it sets out in this judgment only the facts which it considers relevant to its judgment. All findings are based on a balance of probabilities. All references to page numbers in this judgment are to pages in the Tribunal bundle. The findings of fact are set out in a narrative format given the history to this case and the relevance of the sequence of events to the allegations of detrimental treatment.

31. The Claimant was employed by the Respondent from 1 October 2005.His employment

terminated, with a payment in lieu of his contractual notice pay, on 21 April 2017.

Contract of employment

32. The Claimant's contract of employment confirms that he was employed into the role of Consultant in Forensic Psychiatry [p.468] within the DSPD Directorate at Rampton hospital.

33. Forensic Psychiatry is a medical speciality with expertise in the assessment and treatment of persons exhibiting dangerous behaviour as a result of suffering from mental illness.

34. Rampton is one of three high secure hospitals within England. The Dangerous and Severe Personality Disorder Service (DSPD) for men was commissioned in 2001 and the first patients admitted into Rampton in April 2004.

35. The DSPD directorate was therefore still a recently new service when the Claimant joined, and it is not in dispute that the Trust encountered some initial challenges and problems.

36. The DSPD service was a purpose built high secure unit with its own perimeter called the Peaks Unit, inside the perimeter of the main high secure hospital. It originally contained seven wards. At the relevant time there was a separate clinical team for each ward on the Peaks Unit with each ward having a Ward manager.

37. Each patient in the Peaks Unit had a Responsible Clinician (RC), a consultant forensic psychiatrist.

38. There was one close supervision/high dependency ward called Brecon, an admissions ward and four treatment wards, including Malvern Ward where the Claimant was initially based.

The contract of employment [p.466]

39. 29. Clause 3 of the contract of employment provides that ;

"*Whilst it is necessary to set out formal employment arrangements in this contract, we also* recognise *that you are a senior and professional employee who will usually work unsupervised and frequently have the responsibility for making important judgements and decisions. It is essential therefore you and we work in a spirit of trust and confidence . You and we agree to the following mutual obligation in order to achieve the best of patients and to ensure the efficient running of the service;*

- *To carry out our respective obligations in agreeing and operating a job plan."*

40. Clause 5.1: Main duties and programmed activities:

41. "Except in emergencies or where otherwise agreed with your manager, you are responsible for fulfilling the duties and responsibilities and undertaking the Programmed Activities set out in your Job Plan..".

42. Clause 6.1: Job Plan

43. "You and your clinical manager will review the Job Plan annually in line with the provisions in Schedule 3 of the Terms and Conditions…."

44. Clause 17: Disciplinary Matters

45. "In matters of personal conduct you will be subject to the Trust Disciplinary, Dismissal and Appeal processes." Tribunal stress.

MHPS and Disciplinary Policy

46. The Maintaining High Professional Standards in the Modern NHS (MHPS) policy (1700) is an agreement between Nottinghamshire Healthcare NHS Trust and the local negotiating committee outlining the procedure where there are concerns about doctors and dentist's conduct and capability. It implements the framework set out in maintaining high professional standards in the modern NHS issued in the directions of the Secretary of State for Health 11 February 2005.

47. Clause 1.2;"This procedure does not apply to personal conduct issues when at the hearing stage. The Trust's Conduct Policy & Procedure will apply to all medical staff against whom allegations of personal misconduct have been made. …"

48. In submissions the Respondent did not dispute that the MHPS policy has contractual force. Mr Wright who dealt with the appeal confirmed during his evidence in response to a question from the Tribunal , that he understood that the MHPS policy was contractual, no other witnesses contradicted this and nor were we taken to any documents which indicated otherwise. It was not disputed in submissions by the Respondent. We find that the policy is contractual.

49. Where there is an allegation of misconduct, the Trust's separate conduct policy must be followed. If it is a matter of professional conduct, the MHPS must also be followed.

50. The MHPS must also be followed for capability issues and clause 5.8 provides;

> *"At any stage of the handling of the case, consideration should be given to the involvement of NCAS…"*
>
> *"The first task of the case manager is to identify the nature of the problem or concern and to assess the seriousness of the issue on the information available and the likelihood that it can be resolved without resort to formal disciplinary procedures. This is a difficult decision and should not be taken alone but in consultation with the relevant Head of HR, the Medical Director and NCAS, who can provide a sounding board for the case manager's first thoughts. However, NCAS asks that the first approach to them should be made by the Chief Executive or Medical Director…"*

51. In terms of timescales, those are set out in clause 5.18 (p.1706) – and provide that the report of the investigation should give the case manager sufficient information to make a decision whether;

- *"There is a case of misconduct that should be put to a conduct panel…*
- *There are intractable problems and the matter should be put before a capability panel"*

Capability

52. Clause 8.3 of the MHPS policy provides;

"The Trust is strongly advised to involve NCAS in all other cases, particularly those involving professional conduct"

53. Clause 8.4 lists matters which fall under the trust capability procedures include (it is not an exhaustive list):

- *"Inability to communicate effectively with colleagues and/or patients;*
- *Inadequate supervision of delegated clinical tasks;*
- *Ineffective clinical team working skills."*

54. Clause 8.6

"It is inevitable that some cases will cover conduct and capability issues. It is recognised that these cases can be complex and difficult to manage. If a case covers more than one category problem, they should usually be combined under a capability hearing although there may be occasions where it is necessary to pursue a conduct issue separately. It is for the trust to decide upon the most appropriate way forward having consulted NCAS and their own employment law specialist

55. Clause 8.7

"*Prior to instigating these procedures, the employer will consider the scope for resolving the issue through counselling or retraining and will take advice from NCAS***"**

56. The policy then sets out the process to be followed and we have considered the provisions of the policy in their entirety.

Conduct Policy

57. If the professional conduct issue is to be dealt with formally or it is a personal conduct matter, the conduct policy must be followed:

Conduct and disciplinary matters

58. Clause 7.1 MHPS policy provides that;

"Misconduct matters for doctors and dentists, as for all other staff groups, are dealt with under the Trust's Conduct Policy & Procedure. It is advisable, however, where any concerns *about the performance or conduct of a medical practitioner are raised, the Trust will contact the National Clinical Assessment Service for advice before proceeding. (p.1713)*

7.2 W*here the alleged misconduct being investigated under the Trust's Conduct Procedure relates to* matters *of a professional nature, or where an investigation identifies issues of professional conduct, the case investigator must obtain appropriate independent professional advice. Similarly where a case involving issues of professional conduct proceeds to hearing under the Trust's Conduct Procedure, the panel must include a member who is medically or dentally qualified and who is not currently employed by the Trust…*

7.7 it is for the Trust to decide upon the most appropriate way forward having consulted NCAS …"

59. The MHPS gives an example of what may be classed as a conduct matter at clause

7.5 (p.1714);

"Failure to fulfil contractual obligations may also constitute misconduct. For example, regular non-attendance at clinics or ward rounds, or not taking part in clinical governance activities may come into this category"

60. The Conduct Policy then sets out the process that should be followed in the case of conduct:

    a. Paragraph 9 of the policy provides that the employee will be informed of the full nature and extent of the allegation(s) known at the time and the investigation process will be confirmed with the employee in writing within seven calendar days (p 1735).

    b. The policy then provides at paragraph 14 for a case conference and/or discussion involving the relevant Manager initiating the investigation, an HR Adviser/Manager, Investigating Officer and the relevant trade union/professional organisation representative to discuss the arrangements and details of the investigation process (p 1737).

    c. Paragraph 15 then deals with the investigation and provides that the individual whom the allegation is against and key witnesses will be interviewed and notes taken. The employee and witnesses will be given seven calendar days to make amendments to the notes. The importance of complying with this policy is made clear in paragraph 15.1 where it states that all staff will comply fully with the investigation process and failure to do so may in itself be regarded as a conduct issue. (p 1738)

61. Paragraph 15.3 deals with the role of the Investigating Officer which is one of a factfinder. It is not the role of the Investigating Officer to make any recommendations regarding the investigation.

62. Paragraph 18 deals with the disciplinary hearing and provides that the employee and their representative must be informed in writing 14 calendar days in advance that a disciplinary hearing will be held. An authorised manager different to the manager that conducts the investigation will conduct a hearing. It also provides paragraph 18.12;

    "In all instances of either serious or gross misconduct the disciplinary panel should consider the appropriateness of alternative action to dismissal, such as downgrading as part of an agreed rehabilitation programme" (p.1739)

63. The Respondent in submissions does not seek to admit nor deny the contractual status of this policy but accepts and directs the Tribunal to clause 17 of the contract of employment ie the use of the word "will" in the context of the employee being subject to the Respondent's policy. Mr Wright accepted that he understood the policy should be followed. We find on balance of probabilities, it has contractual force.

64. There are various versions of the Whistleblowing policy however, they are not materially different

65. The 2010 policy provides

66. Paragraph 1.8: "If something is troubling you which you think we should know about or look into, please use this procedure…"

a. Paragraph 7.4: “In instances where you suspect fraud to have occurred please contact the Director of Finance . telephone [x] or the Local Counter Fraud Specialist on tel [ ]” [1754]

b. Para 8.3.1: “ Stage 1

c. “i) The employee/volunteer/contractor should in the first instance raise their concerns with their directorate/ department manage who should undertake any necessary investigation and give a verbal response to the employee within 2 workings days. A written response will be provided within 5 working days.”

67. We shall now turn to the key background facts.

Issues at Rampton

Managing Boundary Issues

68. It is common ground between the parties that dealing with patients, especially DPSD patients, is a constant challenge in terms of boundary issues (BI). Such issues are not unusual and form part of the normal business of dealing with patients with these serious personality disorders.

69. Boundary refers to the distinction between a person’s work role and their personal identity. When a staff member alters their usual behaviour in relation to a patient this is described as a boundary change: [p.394]: The Respondent’s Management of Workplace Boundaries Procedure 2013.

70. We heard undisputed evidence from the Claimant that there are three different categories of BIs; boundary violations, boundary shifts and boundary crossings, with boundary violations being the most serious. An example of a boundary violation would include the sexual exploitation of a vulnerable patient which may cause significant harm to the patient. Forensic patients, and in particular those with the sort of personality disorders found within the DSPD unit, give rise to particular challenges as a result of their manipulative behaviours .

71. The Claimant accepted under cross examination that there is a ‘grey zone’ in terms of what circumstances give rise to a BI and this is where reflective practice is important; “to reach a middle ground”.

72. The Claimant under cross examination gave evidence about the safeguards and measures in place to manage BIs and gave undisputed evidence including that since starting work at Rampton, he had held monthly clinical team multi-disciplinary meetings which he would chair. These were like ward rounds and an opportunity to discuss a number of patients and BIs with the team.

73. In addition, there were clinical team development and team building days once a month. These meeting were where BIs were also discussed and the Claimant’s evidence is that the staff were encouraged to talk about their problems.

74. As RC he was able to manage reflective practices within his own practice and management of the clinical team caring for those patients.

75. The Claimant accepted that an important part of the reflective process was collaboration but when it was put to him that if staff do not feel like they are being listened to it can cause splits in the team – his evidence was; “when people feel they

are not being listened to that is a sign there are boundary issues". Although in response to a question from the Tribunal he accepted that it could genuinely be someone who does not feel they are being heard, this view that staff who express a feeling that they are not being listened to about the care of a patient is a BI rather than a legitimate concern, would form part of a pattern of similar concerns raised about the Claimant's management style .

76. There is, which we shall address further in this judgment , evidence to support that there were, we find on balance of probabilities, legitimate reasons why that view was held by a number of individuals about the Claimant, a view the Claimant we find did not accept.

Nursing staff

77. There been an agreement between a number organisations, including the Department of Health and the Home Office, to bring into Rampton from the outset a new cohort of nurses into the new DPSD unit, the idea being that the new nurses should not be affected by previous experience of working with similar patients in other high secure hospitals. It is common between the parties that this proved not to be the right approach

78. It is not in dispute that as a consequence of that decision, for about 18 months i.e. until circa December 2005/beginning of 2006, the DPSD unit was operating with nurses lacking in appropriate experience and that impacted on the provision of care including BIs. We set out the main issues raised during the Claimant's evidence. We recognise that this is a 'snapshot' but the representative nature of the incidents was not challenged;

Security breaches: 2005

79. It is also not in dispute that soon after the Claimant's employment started in October 2005 there was a serious breach of security (p 525) on 7 October 2005 when a patient being treated in the ICU unit was able to breach security and walk around some ward areas. There were also allegations of a relationship between a patient and a member of staff, a serious Boundary Violation (p 524).

2005- 2006: patient 10

80. Between 2005 – 2006 there were also issues in connection with patient 10 and BIs – with concerns that staff were inappropriately trying to influence how long he remained within the Peaks unit before being moved to a lower security placement.

81. An investigation into patient 10 was carried out and a report produced by Dr Shubsachs in February 2011. The report was criticised by the Regulator and the Claimant would comment on this report [p 594]. We shall return to that because it is relevant that by the date of this report, there had been progress in terms of the safeguards in which had been put in place in the intervening period

External inquiry: October 2005

82. On 21 October 2005, Brenda Howard, Director of Policy and Strategy at the Trent Strategic Health Authority, commissioned an independent external enquiry into the Peaks unit in response to the two serious incidents in 2005 referred to above. The concerns were such that the unit was closed to admissions for a period.

83. The external enquiry report was received in January 2006 (522- 536)

84. Within the bundle is an extract from that report. The conclusions of the report in relation to the patient / clinician relationship issue, include comments that; "…More senior staff focused investigation on the personal conduct of this junior member of staff and failed to explore the wider more significant context…The onward reporting of this incident appears tardy and confused. No action plan was produced in response to this incident, consequently no organisational learning or development is evident." [p 528] Tribunal stress

Learnings

85. The report made a number of recommendations, including that Internal Investigations should be given terms of reference which allow a review of the organisational context of an incident as well as the personal conduct of members of staff [p 534]

86. It was also recommended that there should be induction training for all staff working in the Peaks Unit to be regularly and comprehensively monitored and a system should be developed to optimise security intelligence reports.

87. The undisputed evidence of Dr Harris is that learnings were incorporated into practice following this enquiry. The Trust put in place a fully auditable supervision system and induction training for staff.

88. It is not in dispute that after about 18 months, Dr Harris also reversed the recruitment decision about the nursing staff and brought in more experienced nurses. The Claimant under cross examination gave evidence that he considered that to be a "fantastic" decision by Mr Harris.

2006: Assault

89. The Claimant complains that in February 2006 he was assaulted by patient 6 [p.1549]. The Claimant was struck by the patient; he did not have to go to casualty and nor did he take time off work. The patient was charged with the offence and prosecuted.

90. The Claimant alleges that staff had told the patient that the Claimant had stopped a visit and the patient attacked him as a result. He alleges that this was an example of a BI because staff had shared information with a patient which they should not have done.

91. The Claimant alleges that he had been unpopular because certain staff wanted to discharge the patient to a lower security setting and the Claimant did not support that decision. His evidence in cross examination was that he believed that the staff probably thought that he had got his: "just deserts" by being assaulted,

92. The Claimant would much later in his employment complain that he had concerns for his personal safety at work, in part because of this assault which he believed was more to do with the clinical staff and the BIs rather than the patient behaviours

93. The Claimant does not however dispute that he did not raise a grievance at the time. He also does not allege that he raised BIs as a reason behind the assault when reporting the incident.

94. It is not disputed by the Respondent that there was an assault. Dr Harris gave evidence that he had checked the electronic reporting system prior to this hearing and it had a record of it but there was no record of the reason for it being recorded as a BI or that it happened because staff had told the patient the Claimant had stopped a visit. That accords with the Claimant's evidence that he did not raise BIs at the time.

95. In response to questions from the Tribunal , the Claimant gave evidence that he had become aware of what he alleges the staff had told the patient only a couple of weeks after the assault.

96. The Respondent's position is that the Claimant may well have been assaulted but it is not accepted that it stemmed from a BI and there is no record of that being raised at the time. The Claimant confirmed in cross examination that: "I probably didn't want to write that at the time, I wrote subsequently and repeatedly". It was not adequately explained by the Claimant why he did not raise this other than he said it was early in his career.

Riot/hostage taking – March 2006

97. The Claimant also alleges that at around the same time there was a riot and a patient had taken another patient hostage and he asserts the same staff involved in his attack on him had heard the patient discussing the planned riot but had not intervened which he states reaffirmed his concerns about BIs in the Peaks.

98. The Claimant appears to support his claim that there was a riot by reference to an article in a newspaper at the time [1549] which refers to a few incidents and disturbances.

99. Dr Harris gave undisputed evidence that the newspaper article arose from a letter written by a patient. He also have evidence there was an incident but not a riot, if there had been a riot the hospital would have been put into what is termed 'command mode' and the police involved. Dr Harris was not challenged on that evidence and we find that there was no riot as alleged although there was an incident.Dr Harris accepted that had been a hostage situation which was thoroughly investigated at the time.

100. The Claimant was taken to a number of letters where he raised BIs about patients but did not raise the BIs arising from his assault or the alleged riot, including a letter written a year later in November 2007 [pages 559, 563, 564, 565, 567]. Indeed he confirmed that despite all the letters he wrote from 2007 up to 2010, he had not addressed any of the matters set out in paragraphs 16 and 17 of his witness statement (ie the assault and the alleged riot) which he would later allege to be serious BIs which put his health and safety at risk.

2006 - 2008: Patient 1

101. In 2006 – 2008 there was an incident involving patient 1.

102. The Claimant sent a letter to the Clinical Director, Dr Krishnan in November 2007 raising his concerns [p 559]. It related to a theme of concerns being raised about this patient not being appropriately placed at the Peaks i.e. he should be moved to a lower security level environment and these views being raised repeatedly by certain individuals . The Claimant complained that it meant patient 1 was receiving conflicting messages and it was restricting his development and disrupting the team. He mentioned a mental health review Tribunal in April 2007 where a social worker and psychologist who are not members of the clinical team suggested that the patient can be managed in a medium security placement, before the patient was ready. The Claimant refers to plans to discuss the BIs at the clinical team MDT meeting and refers to a possible change of ward being necessary if the situation is not resolved.

103. The Claimant in cross examination could not recall whether there was an MDT meeting to discuss patient 1 however he presumed it had taken place and given that he confirmed in response to a question from the Tribunal that he would have chaired the

MDT monthly team meeting and patient 1 had been under his care, we find, on the balance of probabilities, that there was a meeting where he was able to discuss the patient 1 BIs with the MDT team.

104. [P.1079] The Claimant was the RC in charge of admissions in 2006 and thus influential in deciding that patient 1 was not ready for discharge however as RC of admissions he complains that he was put under pressure to approve the discharge.

105. The Claimant wrote again in January 2008 [p 563] to Dr Kirshnan raising the same issue with patient 1 and what he says is unreasonable behaviour directed at him and those working with him and that it has impacted on his health and safety but he does not set out what those specific behaviours are.

2008: new safeguards

106. The Claimant gave undisputed evidence however that after another patient, patient 10 killed someone after a discharge in 2008, it was recognised that there was a problem. As a result of this incident his undisputed evidence is that Emma Larkin, Associate Medical Director, introduced new guidelines for appearances at Mental Health Review Tribunal s and recognised specifically that it was a BI for a clinical staff member to appear to be supporting discharge when the patient's own clinical team's argument before the Tribunal was that discharge should not be allowed.

107. Despite the introduction of new safeguards the Claimant remained of the view that there had been no review of what had happened with patient 1 and that there should be.

108. In December 2009 he wrote to Dr Harris [p 564], they were due to meet on 10 December and he wanted to discuss patient 1 and he refers to wanting to review and reflect on the case of patient 1 to develop preventative strategies, detect early warning signs and provide for adequate resolution.

109. The Claimant wrote again in July 2010 [p 565] to Dr Krishnan although he could not recall if this related to patient 1 the Claimant accepted that as indicated in this letter, fellow clinicians raised concerns about his own management of his clinical team and the impact on team dynamics. The Claimant saw it as a response to him raising issues.

110. However we note that the Romero review would later interview a number of colleagues who would express similar concerns about his management style. We find that on a balance of probabilities, that given the evidence of Dr Harris about the complaints and the findings of the Romero report, that there were concerns expressed and that it was reasonable to believe that were legitimate grounds for those concerns.

111. The Claimant wrote to Dr Krishnan again on 6 August 2010 and it is clear that this is in response to a letter from Dr Krishnan [p 567]. It appears from the Claimant's response that Dr Krishnan wanted him to clarify what type of review he wanted to carry out , that he was unclear whether the review the Claimant was asking for was about a patient's case or a further organisational review of the Peaks . The Claimant asks for further details of the concerns raised about him so that he can seek appropriate representation. We have not been provided with evidence about what if any further action took place.

112. The Claimant does not however in these letters refer to being assaulted in connection with the patient 1 issue.

113. The Claimant complains that he was given a reassurance that an investigation/review

would happen and there appears we find, to have been some discussion about a review with Dr Krishnan at this time , however he complains that patient 1 was then discharged and no internal review took place.

2011: patient 3

114. In 2011 the Claimant attended a coroner's inquest into the death of a former patient 3 when it was noted that the patient had maintained contact with a therapist after discharge and there appeared to be no records kept of supervision of this contact. This patient had taken his own life while being re-assed for admission back into Rampton. The Claimant was not patient's 3 RC at the time of the contact by letter, he was the RC for the team assessing his re-admission. His undisputed evidence is that even if his former RC, Dr Keitch had authorised contact, he was no longer present at Rampton to oversee it.

115. Dr Harris would later inform the Claimant that contact had been authorised by the clinical team.

2011: patient 1

116. Patient 1 returned to Rampton in 2011 and he would on his return make an allegation of an inappropriate relationship between himself and clinician 2. [1596]. The Claimant was not his RC on his re-admission.

117. The evidence of Dr Harris is that an investigation took place and there were disciplinary proceedings against Clinician 2 but the report because it was a disciplinary matter, was not disclosed to the staff including the Claimant who was not the RC.

118. The Claimant gave evidence that he had not seen the report however he confirmed that everyone was aware of an investigation [1596].

119. Within the bundle is the front page of a 120 page investigation report document about an inappropriate staff/patient relationship [1596] which was submitted on 12 May 2011.

120. We find on balance given the evidence of Dr Harris on this issue and the document in the bundle, that an investigation did take place and disciplinary action taken against clinician 2 . Indeed the Claimant accepted in cross examination that what he continued to be concerned about was mainly the incident concerning BIs around the discharge process in 2006 – 2008.

Peaks in 2011

Patient 1

121. The Claimant continued to write raising concern about no review into patient 1 and the issues from 2006 – 2008. Dr Harris, on 25 February 2011 [p 569] responds to a letter from the Claimant refuting the Claimant's suggestion that there is a recurring pattern where warning signs of BIs are not being detected by the Claimant's line manager, which at the time was Dr Kirshnan and that appropriate action is not taken. Dr Harris refers to the supervision at the hospital and the documented and audited system which allows for the monitoring of the quality of supervision.

122. Dr Harris in this letter displays some obvious frustration and irritation we find, to the suggestion the Claimant is making. He refers to the Claimant not being a qualified psychotherapist while he, Dr Tombs and Dr Krishnan are all on the specialist register as forensic psychiatrists (which the Claimant was not) . It is clear to this Tribunal that

the repeated concerns or the way in which the Claimant wass raising his concerns, were not well received.

123. In April 2011 [p 574] the Claimant refers to being reluctant to sign his appraisal because a review or audit of patient 1 had still not occurred.

124. On 14 April 2011 [p 575] the Claimant responded to Mr Harris's letter of the 25 February 2011 and refers to them both being on the same side and states that they should resist being drawn into conflict. He raises the patient 1 review again. It is noteworthy that in all of this correspondence however we see no mention of an assault on the Claimant related to BIs and this issue with Patient 1.

125. Within this letter the Claimant again raises concern about patient 1 and wanting since 2008 a no blame review. He sets out the progress which has been made managing BIs by their joint efforts over the years; education, oversight of the referral process, development of MHRT guidelines etc.

126. Dr Harris in his reply on 18 April 2011 [p 580] is clearly quite affronted by the Claimant's letter within which he had attached the Peaks Unit BI management guidance which Dr Harris comments he is well aware of and refers to the; "rather arrogant letters that show absolutely no understanding about the services that are already in place within the hospital" [580].

127. Dr Harris also refers to the complaints over the years about the Claimant from staff and patients. Dr Harris was not challenged about those complaints in cross examination and we therefore accept on a balance of probabilities that there were a number of complaints about the Claimant which Dr Harris had had to deal with.

128. Dr Harris in response to a question from the Tribunal directly confirmed that there was a degree of frustration shown in his language, that is evidently the case the Tribunal find, although this was not something which counsel for the Claimant raised with him in cross examination.

129. On 2 August 2011 [p 583] the Claimant writes again to Dr Harris asking again for a review of patient 1 and the events of 2006- 2008 and the BIs and asking for a timeline for the review.

130. There is a letter on 2 September 2011 [p 584] from the Claimant to Dr Harris in response to a letter from Dr Harris of the 16 August 2011 which is not in the bundle. The Claimant expresses delight that Dr Harris had said that an external review will take place. He refers to BIs being dismissed as personality clashes and of feeling scapegoated for issues around MDT working.

131. Dr Harris had responded to further correspondence from the Claimant on this subject on 27 October 2011 (page 586). In this letter Dr Harris states that there had been a full investigation regarding the treatment of patient 3 and patient 1 and that the contact with the patient post-discharge was agreed by the clinical team under the leadership of Dr Keitch. The letter ends by stating;

132. "I think it is interesting to debate whether this is a boundary issue or an issue for the clinical teams to reflect on, and I am not sure it is either for you or me to try and dictate to other teams how they operate clinically"

133. The Claimant confirmed under cross-examination that when the letters were written to patient 3, he was not patient 3's RC. However, he was involved in the decision about

whether the patient should be allowed to return to Rampton (during that period the patient took his own life)

134. If there had been approval for this contact with patient 3 after discharge the Claimant argues that there would be records retained by the Hospital and questions how there could be any investigation in the absence of any such records. However, the Claimant confirmed under cross-examination (document p 586) that Dr Keich, the RC, may have approved that continuing contact: "but I do not know".

135. Dr Harris under cross examination gave evidence that he had checked and that Dr Keitch had given consent for ongoing contact with patient 4 from clinician 2 and later they had investigated the events relating to patient 3 and consent had been given to maintain contact.

136. Under cross-examination the Claimant did not go so far as to assert that what Dr Harris was being untruthful in his evidence. His evidence was that he could not vouch for what Dr Harris was saying because he had not seen the records confirming that the post discharge contact had been authorised (page 590). The records had not been disclosed to the Tribunal . We were informed that after all these years there were problems recovering all the relevant documents although we take on board the Claimant's comments that it was incumbent on the Respondent to take steps to ensure the documents about patient care were stored safely. The absence of these records was not addressed in submissions

137. We accept on a balance of probabilities on the evidence available to us, that it was Dr Harris's understanding however at the time, that consent had been given.

Look back reflective meeting

138. Dr Harris's letter of the 27 October 2011 refers to there being a look back reflective practice meeting arranged with the Claimant with Dr Tombs and Lawrence Jones planned for 31 October . The Claimant did not dispute such a meeting took place though he could not recall it. Had such a meeting been arranged and not taken place, the Tribunal consider that the Claimant would have written to complain and thus find on balance of probabilities it did take place. The Claimant not recalling it, gave no evidence about what had been discussed. However, given his repeated raising of the patient 1 issues, we find on a balance of probabilities, he would have raised those at this 'look back reflective' meeting, When the Claimant was asked what he meant by a review of patient 1, he had made it clear that it was not a specific type of process but an process in which to look back, to reflect and learn from what had taken place. We were not told what outcomes or action plans came out of this meeting.

139. The correspondence from Dr Harris was copied into a number of people holding senior positions in the Hospital including Miller Executive Medical Director, Dr Krishnan, Associate Medical Director, Ms Kruppa , Clinical Director and Associate Director and Louise Bussell, Acting Associate Director or of Nursing.

PID 2 (page 490–492): letter of the 29 November 2011: Health and Safety – section 43B (1)(d) ERA only [490]

140. This first alleged protected disclosure is contained in a letter from the Claimant to Dr Harris on 29 November 2011 in which the Claimant sets out a number of past incidents involving patients 1, 3 , 4 and 5 and BIs with a view he states, to seeking the assistance of Dr Harris in helping others to set, monitor and maintain boundaries and also reflect on how these are managed .

141. This letter was written prior to a decision which would be taken later in May 2013 by the Medical Director, Dr Peter Miller to commission an external review arising from the concerns the Claimant would continue to raise about breaches of interpersonal boundaries at the Peaks and inadequate organisation responses. .

142. The Claimant goes on in this letter of the 29 November 2011 to refer to highlighting how boundary issues could remain hidden, ignored, out of view and not tackled and refers to a number of previous incidents. It is not asserted that these were incidents which Dr Harris, was unaware of. The Claimant refers to what he describes as recurring boundary issues over contact with discharged patients involving clinician 2 and patient 3 (2004 – 2007) and patient 4 (2008).In respect of patient 3 he refers to the boundaries for keeping in contact appearing not to have been clearly defined or thought through.

143. In terms of patient 4 he refers to a letter having been found indicating unauthorised contact, and comments that the clinical team gave no authorisation for contact after discharge as part of the after- care meeting (s117 meeting), and raised related concerns about supervision.

144. He refers to the same boundary issues involving patient 1 in 2011 and clinician 2 having occurred previously with patient 5 (2009 – 2010)). He questions how the same boundary issues could have occurred if adequate action had been taken to address them.

145. The Claimant confirmed in cross examination that what he is referring to within this letter is a theme or pattern of boundary issues in the Peaks Unit . He accepted however under cross examination, that the Trust had since 2011, introduced new practices including a policy on training and reflective practice. There had therefore been significant changes and new safeguards and practices in place since this period in 2011.

146. This letter to Dr Harris does not state that it is a whistleblowing concern or that the Claimant wants the whistleblowing policy to be invoked .

147. The Claimant ended the letter by referring to a culture where individuals feel open to discuss these issues and of the need to encourage red flags to be noticed. It appears to be a general reminder of the issues which have been faced by the Trust and the raising of the risk of BIs not being tackled.

148. At the commencement of the letter however the Claimant refers specifically to Patient 1 (2006- 2008) and that an audit/review had been promised but had never taken place, despite reminders and referring to Dr Harris's support to ensure the review takes place.

149. The Tribunal accept the Respondent's position as put to the Claimant that it was unclear what exactly the Claimant was asking to be done in respect of the wider issues, beyond a review of patient 1 and the events of 2006- 2008.

150. It was put to the Claimant in cross examination that he was not suggesting in this letter that there was any deliberate attempt to conceal matters to which he stated;

"I'm not saying it's deliberate - it is occurring and hiding in plain view - I'm not blaming I'm just wanting people to spot a pattern in a non-threatening way"

151. The Claimant accepted that within the letter, in respect of the recurring boundary issues in content and conduct of therapy and the recommendations of the investigations into

the allegations of patient 1 (2011) and boundary issues involving psychologist 2 [492], the Claimant was quoting from the recommendations of the investigation in 2011. The Claimant confirmed that what he was essentially doing within this letter was setting out purported flaws that had been found from that investigation and that they are the same issues which arose with patient 3 i.e. involving maintaining contact post discharge and whether there were notes and records of patient 3s therapy.

152. In his evidence in chief [para 24] the Claimant states that his concerns were that historic issues regarding patient 1 had not been investigated and that the further boundary issues referred to in this first protected disclosure all linked to the psychologist 2 - in respect of a number of patients and under cross examination he referred to the pattern linking clinician 2 to these patients "hiding in plain view".

153. When the Claimant was asked directly by the Tribunal whether he was alleging that the issues were not picked up on or alternatively were being deliberately hidden, gave evidence that;

"I am left guessing- it was there in plainview- one therapist and three patients - other staff found letters from therapist to patient 4 before 4 made allegations of an inappropriate relationship"

154. It was put to the Claimant that the Romero report which would later be commissioned in 2013, did look that at these issues and tackled head on his proposition that boundary tissues were the cause of splits in the team but found that there was " a robust strategy to manage boundary issues" at the Peaks but reported concerns that there were issues with the Claimant's own management of the clinical team. That there was a generally prevailing view that it was the Claimant's own approach to BIs which undermined the approach of the clinical team [p 815] including that he would wrongly describe as BIs situations where he and other members of the team were in disagreement.

155. The Romero report was critical of the Claimant and it is fair to say that the Claimant made it clear under cross examination that he did not accept those criticisms. However, it is not alleged and we do not find it to be the case, that the Claimant did not genuinely believe when he was raising concerns about BIs here that he did not genuinely believe that there were issues and he was candid enough to accept that not everyone had the same view of BIs as him and that he may see BIs where someone else may not.

156. It was put to the Claimant that an outcome of the Romero report [p 816] was that the Claimant's view of boundary issues was different to those within his team, to which accepted;

157. "I had a different view from anyone in the hospital" (it was clarified that he meant the Peaks Unit)

158. In terms of the criticisms in the Romero report, the Claimant would not allege that those carrying out the report from Broadmoor were subjecting him to detrimental treatment or that his colleagues made the comments which they did, because of protected disclosures.

159. The evidence before the Tribunal about what the Trust had actually done by way of learning review after the issues with patient 1 in 2006- 2008 prior to the external review commissioned in May 2013, was not entirely clear from the evidence. There had been some opportunity for reflection, with the Claimant's own team and with Dr Tombs and Lawrence Jones , however it clearly did not satisfy the Claimant.

160. While Dr Harris gave evidence that there were mechanisms in place to discuss and reflect on BIs we were not taken to any documents setting out what steps had been taken to review the 2006 – 2008 issues with patient 1 prior to the Romero investigation (other than the reference to a reflective practice meeting) and while what the Claimant meant by an audit or review was not clear either – we were not taken to any documents evidencing any sort of internal review, audit or investigation and later the Claimant would be informed that no 'review' had taken place (before the Romero review).

Relevant facts after the PD2 was sent:

161. We have considered what happened immediately after this letter of November 2011 was sent, relevant to the allegation that the Claimant was subject to detriments for having made this alleged disclosure.

162. Dr Harris's responded by letter of the 28 December 2011 [p 590]. He refers to having discussed the Claimant's ideas for improving practice in the management of boundary issues with Miss Kruppa, Dr Krishnan and Ms Bussell. He refers to all three feeling they have in place adequate measures following on the boundary working party, of which the Claimant was a member and do not see the need for additional input in the way described by the Claimant.

163. The Claimant however in cross examination confirmed that he had sent many repetitious letters on the issue of boundary issues and Dr Harris is evidently again irritated by the issues the Claimant has raised or the manner in which he had raised them;

"*I think it is less than helpful that you keep raising this issue in almost a vexatious way. You have raised it a number of times with the senior managers at the hospital. We are well aware of it, take it seriously, it has been thoroughly investigated ways of dealing with it are in place"*

164. There is clearly a difference in opinion whether more was required to be done to reflect on patient 1 – 2006 – 2008.

165. The Claimant would allege that the first detriment was carried out by Dr Harris when he would later remove the medical psychotherapy part of the Claimant's position, almost 1 year later in September 2012. The Claimant does not assert any detriment prior to September 2012.

166. There is then a letter from Dr Tombs, Clinical Director for the Peaks on 3 January 2012 copied into the Claimant [p 591] in which he endorses the view expressed by Dr Harris stating;

167. "My concern is that if boundary issues are the only things focused on that it may give rise to distraction to other equally damaging dynamics that can occur within and between individuals in such a complex environment".

168. In cross-examination the Claimant accepted that Dr Tombs was entitled to have the same opinion as Dr Harris and when put to him whether he accepted that his proposition that his concerns had not been dealt with, was inaccurate, gave evidence that;

"Obviously there's a difference of opinion - I would not say one is right or wrong - it is a difference that needs to be discussed"

169. The Claimant wrote again to Mr Harris on 6 March 2012 [p 592] about an incident in 2008 regarding a former patient receiving communication from clinician 2 and there had been further issues concerning clinician 2 and he was not sure if they had been linked up . There is no evidence of any response from Dr Harris. Dr Harris's undisputed evidence is that the Claimant was raising one of the historical patient cases he had raised before and that it was not the correct process to raise a serious untoward incident report for a matter which had already been reviewed. We find that on balance, Dr Harris did not respond to this letter.

170. In March 2012, Dr Tombs retired and was replaced by Dr Wallace. The following alleged protected disclosure was to Dr Wallace

171. On 24 April 2012, the Claimant wrote to Dr Wallace [p 593] who was new to the Peaks sending him two documents in advance of a meeting planned for 27 April 2012; The management of BIs – an unreported serious untoward incident and a document Deviation in practice on the peaks unit 2005 – 2006 which recorded the Claimant's comments on the report written by Dr Shubsachs [page 594] in 2011 which related to the care of patient 10 back in 2005/2006.

172. The Claimant comments on the established culture and practices on the Peaks unit especially around that period i.e. 2005/2006 - what he referred to as patients tending to have relatively short length of stays on the Peaks units. The Claimant suggested a number of audits or evaluations should take place. He sent a copy of this report to Dr Wallace on 24 April 2012 [p.593]

173. The undisputed evidence of the Claimant in cross examination is that [ET1 page 57] there had been an independent investigation by the NHS regulator into patient 10 and his being discharged too early. He quotes in his ET1 from the regulator's report which criticised the internal report carried out by the Trust including that it took almost two years for the report to be produced by a single individual, that it should have followed a standard procedure and involved a multidisciplinary panel, and it made no recommendations.

174. The Claimant points to this as evidence of a culture in the Trust of not being transparent and honest when it gets things wrong and the lack of a review into patient 1 he cites as a further example of this.

175. The Claimant gave evidence under cross examination that his report at page 597 is basically an acknowledgment of the progress that had been made whilst also wanting there to be an admission about the flaws which Dr Shubsachs in his report had failed to acknowledge. The Claimant, within that report [page 597] claims that progress was being made at the Peaks unit for example reflective practices being promoted, education to counter beliefs about the implications of psychometrics, and the fact that a different patient assessment pathway model was being used.

176. He also refers to the Assessment and Treatment Co-ordination Committee monitoring deviations from the treatment pathway which lead to patients not completing relevant risk reduction treatments.

177. The Claimant confirmed in cross examination that he agreed that by all those safeguards were starting to happen within the Peaks Unit at that time . What his letter at 597 is trying to say, he asserted in cross examination is, come clean with the flaws and look at the progress made

Meeting Dr Wallace – 27 April 2012

178. The Claimant confirmed that a meeting with Dr Wallace did take place on 27 April 2012: "because if it had not, I would have made sure it did". He confirmed he had the opportunity with Dr Wallace to talk through his concerns about boundary issues.

PID 4 (493) : Verbally to Dr Wallace on 2 June 2012: Health and Safety – section 43B (1)(d) ERA only

179. It is not in dispute that the Claimant had a job planning meeting arranged with Dr Wallace, the new Clinical Director and Dr Kirshnan, Clinical Director on 2 June 2012 when he alleges he made a further protected disclosure. The purpose of the meeting was not as the Claimant implies in his statement, to discuss his concerns around BIs but to discuss his job. Job plans are reviewed annually, although the Claimant clearly wanted to discuss BIs

180. The Claimant has produced what he refers to as minutes of this meeting. These are notes which he had personally taken albeit what we have before us is not a complete version of the document (p.493).

181. Dr Wallace could not recall whether he had made any notes of the meeting adding that he would not normally do so but just goes through a job plan template at this sort of meeting. He did not accept that the Claimant's notes were however wholly accurate and had no recollection of receiving the notes at the time.

182. The Claimant alleged in cross examination that he had distributed the notes after the meeting however there is no covering email confirming that they were distributed and a copy sent to Dr Wallace, and the Claimant does not assert this in his evidence in chief. It is now some 10 years since that meeting and thus the recollection of the Claimant and Dr Wallace will be impaired by the passage of time.

183. It is not alleged by the Claimant that Dr Wallace responded when he was allegedly sent the notes either confirming that the notes were accurate or adding his comments to them, which the Tribunal would have expected him to have done had they indeed been provided to him.

184. The Claimant stated under cross examination that after events he would prepare transcripts of what had happened and send them to his union representative – that would be consistent with him preparing his own record and retaining it for his personal use rather than disclosing it to be approved or commented upon. Further, the Claimant, as confirmed in the list of issues, only alleges he made a verbal disclosure in the meeting itself, rather than a verbal disclosure followed by a written disclosure when the notes were sent.

185. On a balance of probabilities, we find that the notes were not sent and therefore not seen and approved by Dr Wallace at the time.

186. Dr Wallace did not dispute however that BIs issues would have been discussed at this meeting, because the Claimant was "very focussed on BIs".

187. The Claimant alleges that he provided at this meeting, a copy of a letter from clinician 2 to patient 4 as evidence to support his disclosure however, this letter was not produced before this Tribunal and nor do the notes record what was stated in the letter – there is merely a reference to a letter being enclosed and distributed at the meeting,

nothing more is said about it.

Passing on of information

188. The note of this meeting records as follows;

"*Dr Tombs had retired at the end of March 2012 and he did* ***not pass on any*** *documents about how he had managed past boundary issue concerns.* ***We*** *noted the clinical governance implications"*

189. The Claimant alleges that Dr Wallace had told him at this meeting that he had no record of the Claimant's historic concerns about the Respondent not adhering to its legal and professional obligations to protect staff and patients because his predecessor, Dr Tombs had not passed on this information to him.

190. The Claimant alleges in his evidence in chief that this gave him further concerns that his disclosures were being concealed as they had not been passed down by Dr Tombs and that he was concerned as patient 1 had recently been readmitted into the Peaks and his case (namely the issues from 2006- 2008) had still not been reviewed.

191. Dr Wallace disputes that Dr Tombs had not passed on information to him. His evidence is that Dr Tombs had provided him with all the information relevant to the DSPD service including directorate monthly clinical and management team meetings and files relevant to his own communications within the service. However he accepted that the Claimant asked him about a report into clinician 2 in 2011 and patient 1 from 2006/2008 and he was not able to find those in the information he had.

192. In terms of clinical governance issues, the Claimant does not allege and nor do his notes record him alleging any deliberate failure to pass on records or intention to conceal information.

193. Dr Wallace was candid in confirming when he could not recall events but despite the passage of time he was robust in his denial that he would have said that he had not been passed any documents about how BIs had been managed in the past.

194. The Tribunal find it unlikely that Dr Wallace would not have been in receipt of any such documents from Mr Tombs and accept his evidence on a balance of probabilities that he had told the Claimant that he had not received the report into clinician 2 relating to events in 2011 and 2006/2008 but not that as the Claimant as alleged, he said he had received no documents.

195. The Claimant under cross examination accepted that in terms of what documents he alleges had not been passed on, he was referring to any records that would be required for any future investigation, not a specific document and he accepted "I don't know what was not passed on", which is not consistent with being allegedly told that no documents at all had been passed on.

Patient 4 – contact

196. The Claimant in the Further Particulars, referred to the information for the purposes of the alleged PD being the reporting that therapist 2 had engaged in unauthorised contact with discharged patient 4 and that the letter he disclosed in this meeting, demonstrated that clinician 2 had kept in touch with patient 4 in breach of guidelines which represented a safeguarding issue. He refers to the seriousness of this given the vulnerability of the patient and the duty owed by clinician 2 and asserts that what he

said in this meeting and recorded in his notes of the meeting, tended to show that the health and safety of the patient had been, was being or was likely to be endangered.

197. The Claimant states that he was the responsible clinician for patient 4 when he was at the Peaks and the clinical team had not authorised continuing contact between therapist 2 and patient 4. Subsequently, a member of the team had discovered a letter showing there was ongoing unauthorised contact with the patient.

198. The Claimant gave evidence under cross examination that he would have expected this issue from 2008 to have filtered into the investigation into patient 2 in 2011 when it is not disputed, clinician 2 was subject to an extensive disciplinary investigation and taken off the ward and supervised for two years.

199. It is not in dispute that that disciplinary investigation and action against clinician 2 involved patient 1. The Claimant conceded that he did not know whether or not the disciplinary investigation had also involved clinician 2's conduct in relation to patient 4 as he stated: "It is not in the bundle so I am left guessing".

200. There had been no application for specific disclosure of the 2011 investigation report and despite the Tribunal raising the absence of certain key documents with the parties , not least the MHPS and conduct policies which were only then produced to the Tribunal , counsel for the Claimant made no application for disclosure of the investigation report and neither did the Respondent produce it.

201. The disclosure that the Claimant relies upon, as confirmed in the list of issues however, relates not to the allegation about documents not being disclosed to Dr Wallace and any allegation of concealment but rather it relates to the Claimant reporting that clinician 2 had engaged in unauthorised contact with a discharged patient which was a health and safety issue because of the vulnerability of the patient.

202. Within the note he records the following;

"A patient 4 has recently made allegations of an inappropriate relationship with therapist 2"

"During the meeting a letter sent by 2 to 4 in 2008 (enclosed) was distributed. At that point in time 4 ..was resident at HMP Frankland, having been discharged from the Peaks Unit .At that time 2 was <u>not</u> authorised by the clinical team to continue contact with a discharged patient".

"We noted that adult safeguarding are exploring 4s allegations"

203. Dr Wallace under cross examination gave evidence that he could not recall, it being 10 years ago, that they had a conversation about the clinician not being authorised to contact patient 4 but he would have expected an SRI to have been submitted if that were the case.

204. However, he also makes the point that even if the contact was not authorised, whether it gave rise to a health and safety matter would depend on what was in the letter that the Claimant alleges he had shown to him. Dr Wallace gave the example of a simple letter saying 'here are your therapy notes' if clinician 2 had forgotten to given them to him. The nature of the content of the letter would be material.

205. The Claimant did not produce the letter to this Tribunal and gave no evidence about what was in it, not even the 'gist' or subject matter or length of it. He did not allege that the content itself, rather than the fact of the contact, was inappropriate .

206. It was put to Dr Wallace in cross examination that the mere fact of contact was an "ethical issue" however the alleged disclosure is not that there was a breach of medical ethics but an endangerment to health and safety. The Claimant in the notes does not refer to endangerment to health and safety or indeed expressly use words that indicated his view of the level of risk or potential harm to the patient was that serious.

Review: patient 1 (2006- 2008)

207. Within the notes the Claimant writes that:

"W*e proposed a learning a review of the management issues concerning patient 1. The aim would be developing a learning/ teaching aid for managers"*

208. Further, the Claimant alleges that Dr Wallace had assured him that a review of patient 1 would be completed .

209. The Claimant alleges that Dr Wallace had commented that if BIs were raised they "would be more suitably managed than in the past".

210. Dr Wallace disputes that he would have commented on how things had been dealt with in the past because he would have been in no position to judge that . The Tribunal accept that it is unlikely that Dr Wallace, new to the role would have made that type of comment. Dr Wallace gave evidence that he had said that he would take BI issues seriously in the future and the Tribunal find what is more likely that this is what he said and that the Claimant interpreted that as an admission that things had not been dealt with as well in the past, but the Tribunal find on a balance of probabilities, that this is not what was said or intended.

211. Despite his notes stated that "we proposed a learning review…" the Claimant confirmed under cross-examination that it was the Claimant himself who was proposing the review into patient 1.

212. In respect of the Claimant proposal for a learning review, in answer to questions from the Tribunal , the Claimant confirmed that he was not referring to a specific type of process but there were: "various forms" of reviews and went on to give evidence that the learning review he was referring to was a discussion about how records could be lost and to find ways of preserving them in terms of recording issues and concerns raised about boundary issues.

213. The Tribunal find that that his answer was quite vague in terms of what it was that he was asking for by way of a review.

Whistleblowing policy

214. The Claimant complains that he did not receive any response to PID 4 as required by the whistleblowing policy. Counsel for the Claimant referred to this in his submissions but did not make submission on what if any inferences the Tribunal is invited to draw from that alleged failure.

215. Dr Wallace gave evidence that some of the issues were historical and had already been looked into although not to the Claimant's satisfaction, and in accordance with hospital procedures a serious incident report would have been raised and the management would have investigated and there would have been lessons learnt, regardless of the whistleblowing policy.

216. Dr Wallace's evidence was that the Claimant was not raising anything 'new' in that

sense.

217. We accept Dr Wallace's unchallenged evidence that these sorts of issues are not unusual;

218. Risk management is what the whole service is about so those are not unusual in a high security hospital, patients are a risk so the teams are always manage risk and there are always health and safety issues that could be BIs or some other security issues and there is always the risk of injury, of harm to staff by aggression or self-harm to patients - they are the business of the hospital, it is routine…"

219. We also accept Dr Wallace's unchallenged evidence that if he thought that there was a suggestion of an inappropriate relationship which had not been reported, he would have escalated it to the head of security or his own line manager however, anyone with concerns is required to report it as an SRI immediately and it is then referred to the security department

220. Dr Wallace's evidence in terms of his understanding that this would have been already actioned, is supported by the comment in para 4) of the Claimant's notes of the meeting [p 493] in which the Claimant records that; "adult safeguarding are exploring 4's allegations".

221. Dr Krishnan was also present at the meeting and likewise did not consider it needed to be escalated through the whistleblowing policy. What the Claimant was relaying was information about what was going on in the hospital rather than raising a new safeguarding issue.

222. Dr Wallace also gave evidence that there is a Boundary Lead for each service and a Boundary Awareness Group where a multidisciplinary team reflect on learnings and keep them under review, look at training, how to encourage staff to mentor each other and look at how to minimise boundary crossings and that would be appropriate forum to reflect on these sorts of issues.

Inference

223. In terms of what inference the Tribunal consider it reasonable to draw from that failure to follow the Whistleblowing policy, firstly the Claimant does not in submissions invite the Tribunal to draw any inference however, nonetheless we have considered it and take into account that BIs are, we are satisfied on the evidence, an ever present risk and issue that needs managing in such an environment, and the letter while raising concerns does not, despite the Claimant being aware of the Whistleblowing policy, refer to the Whistleblowing policy and further does not state that he is invoking it.

224. While we appreciate that whether a disclosure is a whistleblowing or not is, is not determined by whether the worker identifies it as such, we are conscious that; the Claimant appears to be raising this issue in the context of lessons to be learnt and he states that adult safeguarding are already exploring the allegations involving patient 4

225. We do not therefore consider it is reasonable to draw any adverse inference from a failure by the Respondent to treat this disclosure under the Whistleblowing policy, when specific mechanisms for reflective practice and raising safeguarding concerns via the reporting system are in place and been followed.

Public interest and health and safety

226. Dr Wallace under cross examination gave evidence that in his opinion this information disclosed to him in this meeting about clinician 2 and patient 4 was not about a public safety issue but about the safety of the staff and patients in the hospital only.

27 September 2012: Job Role

227. The next significant event was in September 2012 when Dr Harris met with the Claimant on 27 September 2012 advising that from 31 March 2013 the Claimant would not continue with the work and training in Medical Psychotherapy and return to the full time role of Forensic Psychiatrist.

228. The Claimant complains that the removal of this part of his role was a detriment by Dr Harris, Dr Wallace and Dr Krishnan because of all the protected disclosures he had made (which include disclosures that postdate 27 September 2012). He does not therefore link this alleged detriment on the ground of a particular disclosure and nor does the Claimant in his evidence in chief identify any evidence to link the various disclosures to the decision to remove this part of his role but in general terms alleges that it was because he was the only member of staff raising so many disclosures.

229. In terms of the findings in relation to the background facts they are as follows;

230. Dr Harris gave undisputed evidence that when the Claimant joined the Trust, Dr Evans was employed in a part time (0.5 wte : whole time equivalent i.e. part time role) and he was later replaced by Dr Sampson until she retired in July 2008.

231. Dr Harris's evidence is that because of successive annual cost improvement programmes despite medical psychotherapy being a valuable service and dearth of medical psychotherapists , he decided due to cost pressures to remove the role in 2008 following the retirement of Dr Sampson.

232. Dr Harris was not challenged on his evidence that other professionals within Rampton such as psychologists and nursing staff could provide this service as part of their substantive roles.

233. The undisputed evidence of Dr Harris was that as a result of tension between the Claimant and some of his colleagues and a number of patients on the Peaks unit where the Claimant worked, he was offered a development opportunity to complete his medical psychotherapy training using 0.5 wte of his RC time with the remainder of time being spent on Grampian Ward covering 10 patients.

234. The Claimant was working towards a certificate of eligibility for specialist registration in medical psychotherapy in which he held a particular interest.

235. Dr Harris describes this 0.5 wte role as a development opportunity rather than a specific medical psychotherapy post.

236. It is not in dispute that when he started the medical psychotherapy work he was not issued with a new contract of employment. He was issued with a revised job plan [p 485] dated July 2008.

237. The work programme [p 488] includes references to programme activities undertaking training and psychotherapy clinical work.

238. We accept and it is not disputed, that Dr Harris had anticipated it would take 8 to 24 month i.e. by 2011 for the Claimant to complete his medical psychotherapy training to

attain his specialist registration, given the training he had already completed and on that basis he was able to find funding from the forensic division reserves and it was hoped that by the time he finished his training the Trust be able to re-establish an 0.5 wte medical psychotherapy post.

239. The Claimant denies that this was a training and development opportunity but an actual permanent position and he took on the role of medical psychotherapist in addition to his role as consultant forensic psychiatrist.

240. There is some correspondence setting out the arrangements [pages 579 and 1590].

241. It is not in dispute that the Claimant was qualified to carry out medical psychotherapy and it was a service he provided across the hospital. Some of the programme activities as part of his job plan were to be for training, and some providing a psychotherapist service (with one programme activity to support research for DSPD patients: 11 PAs in total).

242. The Claimant disputed under cross examination and we accept his evidence, that the clinical work that he carried out [page 488 for his timetable] was not training but the provision of an actual psychotherapy service with the training activities involving him going to specialist centres. While he accepted to be accredited he would need to show that he had done clinical work and training, we find that while necessary for his accreditation he was also providing a valuable service to the patients and the Trust.

243. 15 July 2008 Dr Larkin, Associate Medical Director wrote to the Claimant [1590] concerning the revised job plan;

"*We have now agreed that you could formally commence taking up a post in psychotherapy which would have with effect from* ***1 June.*** *… Your job plan will allow for five programme activities to cover your clinical duties on Grampian Ward and in the DSPD directorate. The remaining five programme activities of your job plan will be devoted to developing and practising your psychotherapy skills across the hospital. You have one programme activity for research which was agreed on appointment with your clinical director.*

We have agreed in order for you to be able to practice psychotherapy that you will need to undergo further training and development. The aim being that in 18 months to 2 years' time you'll be in a position to submit a portfolio of evidence to the psychotherapy faculty of the Royal College of psychiatrists in order to obtain accreditation as a psychotherapist. I've agreed to meet your training and development needs from the medical psychotherapy budget. It recognised that in the early stages you will not be in a position to provide a significant clinical input to the hospital but that as your training proceeds ***you*** *will be increasingly be able to provide psychotherapy support to clinical teams and patients.."*

244. The letter from Dr Larkin does not make it clear what is to happen after the training is completed in the anticipated 18 months to 2 years.

245. Dr Harris however gave undisputed evidence which on balance of probabilities we accept, that in 2010 the forensic medical staff executive committee were looking at whether there should be any funding available from forensic reserves which could be for medical staff and how it should be spent . The committee were considering establishing another consultant post or a professorial post. The Claimant provided a paper setting out the case for a medical psychotherapist post at Rampton Hospital and

we can see the minutes within the bundle which support Dr Harris's evidence on this [748 – 754]

246. It is not in dispute that the Claimant did not complete the training within 18 months to 2 years.

247. There is evidence supporting Dr Harrison's account that he was concerned that the Claimant's training and development was taking longer than the anticipated 18 months to 2 years. There is a letter from Dr Harris to the Claimant on 15 April 2011 [579]. We take into account that this was during the period when the Claimant and Dr Harris were exchanging letters about BIs and in particular about the review into patient 1, however it predates the first alleged protected disclosure of the 29 November 2011 [PD2].

248. In this letter Dr Harris;

"*The reason I have been given the impression that your training is open-ended is because I have been asking over several years what the actual length of your training is and no one to date has been able to give me a very clear account of when your training will in fact finish and you will be a fully accredited forensic psychotherapist.*
…

Our undertaking when we appointed you to the half-time role as a forensic psychotherapist within the hospital ***was to help you with your training*** *but we understood you had already completed a significant amount of this as a senior trainee before coming to your consultant post.*

Clearly, what hospital needs is not somebody requiring training but a dynamic psychotherapist which would answer the last point in your letter.."

249. The Claimant replied on 3 June 2011 providing a date of September 2015 as a timescale for the completion of his training [p.582]

250. The undisputed evidence of Dr Harris which we accept, is that as a result of the ongoing cost improvement programmes he was required to find an additional 11% cost improvement for the Peaks unit which led to a closure of one of the wards.

251. Dr Harris then met with the Claimant on 27 September 2012 and advised him that from 31 March 2013 the Trust could no longer fund the training and he would return to full-time RC duties. By this stage the Claimant was still according to his estimate, three years away from completing his training. This was almost a year after his 29 November 2011 alleged protected disclosure.

252. The unchallenged evidence of Dr Harris was that the decision was his not Dr Wallace's or Dr Kirshner's.

253. Dr Harris wrote to the Claimant confirming the decision which had been taken, on 28 December 2012 [611].

254. On 23 August 2013 [711] Dr Krishnan wrote to the Claimant with regards to the psychotherapy position repeating that; "as part of the division's cost improvement programme, support for your psychotherapy training would cease as of the new financial year, commencing first of April 2013".

255. When it was put to the Claimant that this was a development opportunity, he responded: "Call it development opportunity but it was not only training".

256. While the Tribunal accept that the documentation in relation to this arrangement is far from clear in that it does not record that this is a only training and development opportunity or a secondment rather than a substantive role and does not confirm that there is no guarantee of a position at the end of it, the Tribunal is satisfied on the undisputed evidence of Dr Harris that he was required to make cost improvement measures, that the position had been offered to the Claimant on the basis that it would take 18 months to 2 years to become accredited with the intention or the hope that he would remain then in post as an accredited psychotherapist but with the training taking much longer than anticipated and with the need for cost savings, by 2012 the decision was taken not to continue that funding.

257. We find that the explanation put forward is credible and supported by the evidence.

Introduction of Policy: BI – 2013

The Respondent's Management of Workplace Boundaries 2013.

258. It is not in dispute that the Respondent put in place a policy specifically for dealing with BIs thus recognising the problem in a specific policy , the challenges and the need to manage them. The Claimant's undisputed evidence is that he was influential in trying to support staff in providing training and tools to reduce BIs, recognised in this policy.

259. We were taken to a policy about managing BIs in 2013 [see page 394].

260. The Claimant did not dispute that the writers who contributed to that policy were a very experienced set of authors who were applying their mind to the management of workplace boundaries.

261. The Claimant [page 406] gave undisputed evidence in cross examination that he was involved in the development of that policy. He accepted that he was able to raise concerns within forums about BIs and how they could be fed into the policy; his contribution is noted at page 399.

262. The Claimant confirmed that he could contribute to the policies and to develop the tools that the staff could use; facilitate discussions about boundary issues and prevent them becoming more serious, 'nipping them in the bud' before they became serious violations.

263. The Claimant was not sure whether the 2013 policy was the first policy of its kind because the problems he stated were "now being recognised and discussed".

264. It is not accepted by the Respondent that the first policy was in 2013 [page 406] because there is reference to "issue 3". In any event, the Claimant confirmed there was a lot of work undertaken by the Trust to formulate boundary management policies and check lists.

265. If there were previous policies, the Tribunal would expect the R to be able to produce them. It was not explained why earlier polices had not been produced. On balance given the conflict of evidence and absence of any earlier policies disclosed, the Tribunal find that this was the first policy ,although there may have been previous iterations in draft.

Reporting system

266. Para 4.4.23 of the policy provides that individual members of staff also have a duty to response and communicate any concerns they have in regard to colleagues adherence

to appropriate boundaries For boundary shifts the staff member should in the first instance , seek clarity about the behaviour from the colleague in question, their line manager or a member of the patient's MDT. If concerns continue, the staff member should inform their own line manager. If there are still concerns, or if the behaviour constitutes a crossing or a violation, local reporting systems including RiO, OR1, SIR and SUI should be completed as quickly as possible, and the line manager or the individual (s) about whom there are concerns should be informed .

267. SR1 is a security incident report, which is a higher level and would be reviewed by the Ward Manager and entail a higher level of investigation. The SUI is a serious untoward incident which involves a person outside the department or a manager who will investigate.

268. The Claimant also confirmed that at the induction stage of recruitment all staff were being trained on BIs and there was a Boundary Lead in place for each service. He agreed that reflective practice was put in place from 2011 and that the aim was to have a reflective practice of 100% for all staff and that it was improving; but was not yet at 100%.

PID 5: 20 December 2012 (494 – 196)

269. [p.494]. It is not in dispute that on the 20 December 2012, the Claimant wrote a letter to Dr Wallace and Dr Krishnan in advance of a meeting planned with them arranged for the 21 December 2012 [p.613]. He relies on the letter as a protected disclosure only, not what was discussed at the meeting itself.

270. The Claimant clarified in the Further Particulars of the claim that this disclosure he alleges related to reporting information that;

a. a Serious boundary issues when they occurred were not reported to higher authorities

b. b A former staff member had an inappropriate relationship with a patient

c. c patient 6 was treated punitively while in prison

271. The letter was in effect setting out an agenda for the meeting and to propose a plan to address BIs and assess the impact on staff who the Claimant believed were being conditioned by patients.

272. The Claimant gave evidence that it was his attempt to put in written form his perception of a review process and that he knew the Francis enquiry was about to come out shortly and he was trying to help and propose a format.

273. Within the letter the Claimant refers to its purpose being to; " highlight the impact on the health and safety of staff working with severe personality disorder" and goes on to say that it will specifically address the impact on staff in terms of physical assault from patients as a consequence of the behaviour of other members of staff, due to undetected boundary issues.

274. The Claimant made a number of statements with this document including that;

"*Serious boundary issues when they occurred were not adequately dealt with and were not reported to higher authorities"*

275. The Claimant also referred to interviews with staff in November and December 2005

which revealed a theme of a staff team that had undergone a series of traumas which included he stated;

"*A former staff member **had** an inappropriate relationship with a patient" and*

"An incident surrounding the treatment of patient 6 while he was in seclusion, made members of staff concerned that he was being treated punitively"

276. The Claimant referred to this letter under cross examination as trying to encourage his managers to have a structure for when things go wrong; that he was looking at prevention.

Concealing information

277. The Claimant does not at any point expressly refer to information being 'concealed' or hidden in this letter

278. It was put to the Claimant that the letter does not describe deliberate concealment of health and safety issues , that there is no hint of deliberate concealing of patient issues, which he conceded in cross examination stating ;

279. "we have already agreed that – this letter is done at the time the Francis enquiry was expected to come out about whistleblowing in the NHS – I was trying to encourage my managers to have a structure for when things go wrong".

280. He went to describe the intention behind the letter which was to look at prevention and;

"let's detect warning signs and nip it in the bud – things done wrong but let's learn lessons".

281. The closest the Claimant comes in this letter to asserting a failure to disclose endangerment to health and safety is his statement that serious BIs when they occur are not adequately dealt with and not reported to higher authorities but he does not assert that the failure to do so was done with the intention or design to conceal or hide what is happening as oppose to a failure to escalate or deal with BIs adequately.

21 December 2012: Dr Wallace

282. The Claimant accepted under cross examination the issues that he had raised at the meeting on 21 December with Dr Wallace and Dr Krishnan were responded to them with actions and outcomes in a letter of 7 January 2013 [613].

283. He accepted that Dr Wallace did investigate and report back to him and that he considered the Claimant's point of view.

284. The Claimant also accepted that a concern was raised by Dr Wallace that the difficulty with boundary issues and staff dynamics seem more prevalent in the Claimant's work and the Claimant in cross examination conceded that this was a legitimate inquiry for Dr Wallace to make.

285. This same concern about the Claimant's management of his team, would be echoed in the external Romero review of March 2014.

286. The Claimant had raised an issue about a colleague and Dr Wallace reported that they had spoken to that colleague and was satisfied that the relevant professional line managers were aware and took appropriate action. They also discussed the concern

about threats had been made to the Claimant by a patient because of what he had been told by members of the team. Dr Wallace had interviewed that patient would said that his conduct toward the Claimant was because the Claimant had misled him in relation to his medication.

287. There is also an issue about another patient which Dr Wallace looked into it and reports that the patient had requested a change in RC. The letter ended by proposing a meeting in January to discuss their findings in more detail.

288. The Claimant does not dispute therefore that the matters he raised were taken seriously and investigated by Dr Wallace.

6 February 2013

289. The Francis enquiry was published on 6 February 2012 [1599]

290. The Francis inquiry report into the causes of the failings in care at Mid Staffordshire NHS Foundation Trust. A copy of the report was not included within the bundle but there is no dispute that it made recommendations including about increased openness and transparency in the health care system

6 February 2013: email from Dr Harris [631]

291. On the 6 February 2013 Dr Harris emailed staff following the Francis report and within this email he referred to the report indicating that there been a lack of basic care in some parts of the service and that the he had no doubt that if they were to examine themselves carefully they may find similar problems nearer to home. He referred to the report challenging "all of us to look at our own practice and reflect on ways in which we could improve. It will also challenge is not to walk five we see poor practice or bad behaviour"

292. The Claimant accepted in cross-examination that on the face of it the sentiments expressed in that letter were authentic and genuine.

PID 6 : 19 Feb 2013 [497- 498]

293. On the 19th of February 2013 the Claimant wrote to Lee Brammer the head of security at Rampton, copying in Dr Wallace and Dr Krishnan. The Claimant had concerns about patient 8.

294. The Claimant did not refer to the whistleblowing policy. The Claimant stated the beginning of the letter that he was writing the letter to highlight some security concerns regarding patient 8. He set out what the aim of the letter was namely to start a review on how this matter came about and how long it has existed.

295. Dr Wallace in cross examination referred to this matter as something which Mr Brammer as head of security would be expected to manage along with the Claimant as patient 8's RC and put in place appropriate measures.

296. It is not in dispute that the Claimant did put in measures to manage the situation including mail monitoring i.e. opening of the patients post.

Personal Property

297. The Claimant referred to his suspicions, that there may have been what he described as "subtle intimidation" and "conditioning" to loosen the boundaries about managing

the patient's property.

298. The Claimant referred to the excessive amount of personal property kept in his green boxes and that the volume of property created a health and safety risk.

299. Dr Wallace in cross examination accepted that excessive personal property can give rises to health and safety risks explaining that it takes longer to carry out a search of personal property kept in the green box if it is excessive but further if there is a lot of personal property it is easier for a patient to hide items that may cause harm either to the patient, staff or someone else such as slivers of glass. The Claimant reported that the monthly checking on his property appears not to be happening.

Mail

300. The Claimant also refers to monitoring the patient's mail which had just started to reveal a pattern of excessive movement in his correspondence.

301. He also referred that mail monitoring having detected the patient 8 is;

302. "Writing letters using the identities of other patients on the ward"

303. He does not state in this letter that the patient has been writing letters using the identities of other patients in order to obtain property by deception.

304. He goes on this letter to talk about telephone intelligence, the patient has been talking about the valuation of his sports memorabilia and suggestions about selling them.

305. The Claimant was concerned that patient 8 was involved in a series of security breaches. The information he had indicated that the patient was obtaining memorabilia from famous people and using the identity of other patients to obtain it and that the Claimant alleges that this was information tending to show the commission of a criminal offence i.e. fraud . In his evidence in chief he refers to concerns that members of staff were being manipulated to undermine and override security arrangements and he hoped the head of security, Mr Brammer would conduct a review into these incidents.

306. He complains that his concerns were not taken seriously and he was undermined and there was no response to his disclosure under the w/blowing policy [641 – 643]

307. However, as find that as the patients RC, the Claimant was responsible for the management of his post and he had the authority to put in place monitoring of it which he did (636)

308. This resulted in a complaint from the patient and an email from a forensic psychologist who treated the patient and who was concerned about the decision to monitor the post. The email was not included within the bundle.

309. When it was put to the Claimant that it was legitimate for that forensic psychologist to raise concerns, he stated that: "It's on the boundary" but then denied in cross examination that at page 498 he was attributing the psychologist's concerns to BIs. However he placed the concern under the heading of; "Dynamics associated with holding boundaries with patient 8". We find that this is what the Claimant was implying despite during this hearing stating that there is a "diversity of views".

310. The Claimant went on to refer to how teams have to work together; that he accepts they can hold diverse views; but his answer appeared to this Tribunal to indicate that he did not consider it helpful for someone to raise an alternative view point.

311. Despite this the Claimant went on to accept that the forensic psychologist had not been present when the decision had been made. She was: ”out of the loop” and may not have understood the reasons and that in that situation he would ask what had gone wrong in terms of communicating with the forensic psychologist.

312. The Claimant confirmed that a reflective practice had taken place with the Claimant and the team with Dr Wallace and Dr Krishna in attendance, on 5 February 2013 (see page 636). We note their observations [637];

313. “We found it very helpful to observe the session in which several team members expressed concern about not being involved in discussing the decision and not being made aware of the rationale for the decision. Moreover the team reflected on the fact that clinical team members did not feel able to provide patient 8 with an explanation or the decision, From our perspective the session would have been enhanced by reflection on your part in the process …” This comment was directed at the Claimant.

314. Again it would appear to this Tribunal that the Claimant was not happy about comments about his own need to reflect

315. The Claimant complains that the Whistleblowing policy was not followed. He does not however complain that this was of itself a detriment.

316. We were not invited to draw an inference adverse to the Respondent from this failure to follow the Whistleblowing policy however, we consider that it is not reasonable to do so in circumstances where BIs are a common issue, it is a matter for the Claimant to address as part of his role as RC and he did address it and he was quite correctly bringing the issues to the attention of the head of security and then steps were put in place to manage the risk and he made no reference to the Whistleblowing policy himself

21 March 2013 meeting

317. There was then a meeting [page 642] on 21 March 2013 between the Claimant, Dr Wallace and Dr Krishnan where there was a discussion about patient 8 wanting to change his RC and that in light of concerns about team functioning and boundary issues, an independent review would be of benefit.

318. The Claimant then wrote to Dr Wallace on 28 March 2013 [642] in which he referred to the meeting on 21 March 2013 and that he was concerned that the patient was having an increasing influence on Dr Wallace via conditioning i.e. that the patient was using the power of his personality to persuade Dr Wallace to act or think another way. He referred to the plan to change the patient’s RC i.e. away from the Claimant and the failure to have followed the correct procedure to affect that change, which he referred to as another boundary breach. This the Tribunal find is evidence of a tendency to identify any differences in opinion with his own, as BIs. It was not disputed that Dr Wallace had only met the patient once, it is certainly not asserted that Dr Wallace had a longstanding interaction with the patient.

Letter to Dr Miller: 26 March 2013

319. The Claimant then wrote to the Medical Director Peter Miller [639] to ask that his concerns over BIs be raised externally with the Strategic Health Authority. He referred to events since 21 March 2013 making him more afraid of been subject to unfair treatment for raising concerns.

320. Mr Miller [645] refers to sharing the Claimant’s letter with the Commissioning Board, potentially the Regional Medical director and the NED with responsibility for

Whistleblowing..

321. The Claimant then met with Dr Miller on 26 April 2013 and wrote on 2 May 2013 [page 650] stating that he found the meeting very encouraging considering and glad to hear that he was at the stage of considering the remit of an external review.

322. A Non-Executive Director, Peter Parsons, was appointed to be available to support the Claimant. The Claimant accepted the Trust had been transparent and had told him that he could contact whoever he wanted to.

323. It is not in dispute that the Claimant was involved in setting the remit of the external review.

324. We were taken, to a copy of the terms of reference at page 725 which he agreed he had helped to prepare but which he accepted was rather vague, but his understanding was that it would include various specific examples of patients but especially patient 1 but also patients 2, 3, 4 and 8. That however was not set out and he had been involved in putting that terms of reference together.

325. The Claimant accepted in cross examination that over many years of raising issues there were at least 9 patients he had raised issues about over the years and what the Tribunal was provided in the evidence during this hearing was not the full picture, it was a 'snapshot'.

Romero investigation

326. The external review was commissioned in May 2013.

Transfer of Patient 8: [669]

327. Dr Krishnan and Dr Wallace wrote to the Claimant on 4 July 2013 [669] concerning patient 8 and his request for a change of his RC from the Claimant. The decision had been taken to change the patient's RC.

328. The very next day on 5 July 2013 the Claimant sends a lengthy five page document headed urgent relational security information which is his next alleged protected disclosure. This was sent to the medical director Dr Miller, Dr Wallace, Dr Krishnan and Dr Harris [675]

PD9: Urgent relational security information: July 2013 [499 – 503]

329. The unchallenged evidence of Dr Wallace is that the day after the decision was made the Claimant had sent in a report recommending that patient 8 go back to prison and he believes that this was prompted by the patient's request to change RC.

330. We were taken to the concerns raised by Dr Wallace at the time in an email dated 5 July at page 1694.

331. Within this email which Dr Krishnan writes to Dr Wallace, Dr Harris and Ian Tennant, Dr Krishnan refers to putting the Claimant's report into context;

"Geoff has raised the issues relating to acquisition of memorabilia/possibly defrauding the shop when patient 8 complained about decision-making regarding mail monitoring. This is therefore not new and I understand that there are care plans to manage these risks.

In recent correspondence around changing RC, the Claimant is commented on patient 8 being "the best has been" or words to that effect

the timing of this missive is curious"

332. The Claimant under cross examination could not remember saying that patient 8 had been the best he had ever been, prior to sending this report but that if he had, he accepted that it would not have been consistent with what he wrote in this report.

333. The Claimant denied under cross examination that his report was an attempt to disrupt the decision to change the RC but when asked why he had written it , he referred to the issues around mail monitoring however, the Tribunal accept that the mail monitoring had taken place since February 2013 and this was not a new issue – this does not therefore the Tribunal provide a credible explanation for sending this report the day before the patient was to change his RC. It is therefore the Tribunal find, not unreasonable for the Respondent to be concerned about the motive behind it giving its timing and the circumstances of the patient changing RC.

334. Dr Harris responded referring to the Claimant's letter as "just malicious". The Tribunal accept on balance that there were reasonable grounds to be concerned about the Claimant's motives behind sending this report. It is not reasonable we find, to draw an adverse inference from the comments therefore made by Dr Harris or his colleagues about the Claimant in connection with this report.

335. The Claimant does not refer to this being a whistleblowing concern or that he considers that whistleblowing policy should be followed , he states that the purpose of the report is to " facilitate executive decision making on the necessary security placement and arrangements to manage the risk of harm to other patients and staff that he presents".

336. We find that the stated purpose is consistent with Dr Wallace's understanding that this report did not give rise to a whistleblowing issue but information passed to the clinician who was to become the new RC and it would then be for the new RC to manage any issues going forward.

337. It is a lengthy report, the Claimant in the Further Particulars of the claim and as set out in the list of issues, alleges that this patient was placing the safety of himself, other patients and staff at serious risk specifically the disclosure was of information that;

a. the patient had traded his morphine patch that led to another patient overdosing on opiates
b. the patient was using the identity of other patients obtain sportsmen memorabilia/autographs
c. patient was stealing from the hospital shop

338. The report refers to a number of documents attached with it [499] on page 1, none of which were included within the bundle. The Claimant gave no evidence on the content of those attachments. The letter also refers to problems in the patient's management being set out in Appendices 1 to 3, those Appendices were not included within the bundle either and similarly we heard no evidence about their content.

a. The patient had traded his morphine patch that led to another patient overdosing

339. The Claimant addresses this under heading ' the series of red flag warnings' [672] ;

"*1) seriously **putting other's lives risk** through deception and subversion of security*

His progress at Rampton Hospital reveals involvement in the overdose on opiates of a peer, the subversion in trading his morphine patch was only detected when the victim was losing consciousness and required to be urgently sent to accident and emergency"

b. The patient was using the identity of other patients obtain sportsmen memorabilia/autographs

340. Within the report he makes references to this issue under the heading; "deception to evade detection of extent of subversion of hospital security measures" [673];

"*it is unclear the extent he had been subverting security through his mail correspondence. Within a few days it was detected **he was falsely using the identities** of other patients to obtain sports memorabilia/autographs. One of the patient identities that was being used had actually been transferred to a medium secure unit. The frequency of his correspondence had gone unchecked…"*

c. Patient was stealing from the hospital shop

341. Under the heading " conditioning and inciting other patients in subversive activity" the Claimant states [673] ;

"Patients were being involved in various scams. This is likely to involve trading in items obtained from the hospital shop. … CCTV footage the behaviour of another peer patient 8 raises concerns that they may be stealing items from hospital shop" (para 6)

342. The above information only raises the possibility that patient 8 and another patient "may" be stealing and has to be read in the context of the following paragraph 7 of the letter.

343. Under the heading "conditioning to avoid detection of security breaches and splitting of staff team " [674], the Claimant states within the letter that ;

"There was conditioning of staff to blind them from detecting breaches in security and override necessary security measures. One of [patient 8s] shopping receipts revealed he had approximately in excess of 25% more items in this possession that he had purchased from the shop (appendix 11). When this was raised with the clinical team as part of his treatment it was agreed he should have restricted access to the hospital shop.

There was a belief that the hospital staff failed to scan items and therefore restricting as access to the shop was viewed as punitive rather than a security measure. The probability that hospital staff could have failed to scan 25% of the patients grocery items is difficult to believe.

Nonetheless the clinical team decision was subverted this decision was overruled outside of the clinical team meeting as access to the hospital shop remained unrestricted."

344. The Claimant complains in his evidence in chief that he did not receive a verbal or written response to protected disclosure 9 as required by the Respondents whistleblowing policy. While counsel at no point in submissions addresses the issue of whether and what inferences should be drawn, we have nonetheless considered it and take into account a number of factors;

a. Firstly the Claimant did not identify within this document that he considered the Whistleblowing policy should be invoked nor does he use the term and the Respondent's response to this information has to be seen in context namely;

b. We accept that managing boundary issues is a day-to-day challenge in this environment and we accept Dr Wallace's unchallenged evidence that this is 'par for the course' in a high secure hospital and these would not have been matters of significant concern.

c. That the Claimant set out the stated purpose of this report which was to facilitate executive decision-making on the necessary security placement and arrangements to manage the risk of harm to other patients and staff. We accept the unchallenged evidence of Dr Wallace that this report was written the day before the responsibility as RC for patient 8 was transferring to Dr Krishnan and it was seen therefore as concerns raised for Dr Krishnan and head of security to be aware of and manage going forward.

d. The issues including the post and issues about theft were not new issues and steps had been put in place to manage them already by the Claimant as RC.

e. There was the Tribunal conclude, some concern about the timing of this report and the motive behind it.

345. The Tribunal do not consider that it is reasonable to draw an inference adverse to the Respondent from the failure to invoke the whistleblowing policy.

Shouting incident: July 2013

346. The Claimant alleges that in July 2013 a Ward Manager was unhappy about the mail monitoring of patient 8 and shouted at the Claimant in front of patients..

347. He did not receive an apology from the Ward Manager, and he felt this put his health and safety at work at risk because it was done in front of patients. He did not raise a grievance however or follow the policy on managing boundary issues.

Romero Review interviews with Claimant 4 and 5 November 2013

348. The Claimant was interviewed on 4 and 5 of November 2013 by the team undertaking the external review - the Romero report. He realised during this interview that they had not been given information about any specific cases to review however the Respondent's position which is not disputed, is that the Claimant was given an opportunity to submit whatever information about specific patients he wanted to submit and indeed he did so and he was involved with and approved the terms of reference for the review.

349. The Tribunal find that the Claimant was not prevented from producing whatever information or raising whatever concerns he wanted to be investigated as part of this review.

Grievances: 21 November 2013

Detriment 6

350. The Claimant alleges that Dr Harris blocked the Claimant's grievance submitted on 21

November 2013 regarding proposed changes to his terms of employment. The Claimant asserts that he verbally told Dr Harris that he wished to raise a grievance on 14 October 2013, and that the grievance was lodged with Dr Harris and Dr Wallace on 21 November 2013.

351. The Claimant submitted a grievance on 21 November 2013 to Dr Harris [page 770] about the removal of the psychotherapy service including that the proper process of consultation had not been followed.

352. He accepts that he did not mention whistleblowing.

353. Dr Harris responded on 2 December 2013 [779] referring to the arrangement having been a secondment and that the organisational change to remove the role had happened some years before, that there had been no contractual variation to his substantive role and that he could raise these as part of the job planning mediation process.

354. It is denied by the Respondent that the Claimant was subjected to the alleged detriment – that his grievance of 21st November 2013 was 'blocked' but rather he was redirected to the most appropriate procedure to deal with his issues via the job planning process, to include mediation and appeal (pages 770-772 and 778).

355. The grievance letter did raise however an issue about whether the proper consultation process had been followed, however the response of Dr Harris was that the process had been carried out when the role was de-established in 2008, several years before .There was no substantive role, the role was a training and development role and he did not consider it to be removal of a role – he referred to in his correspondence as a secondment and we accept that this was his genuine perception of the arrangement, although the documents around the arrangement did not refer to it specifically in those terms.

356. In cross examination Dr Harris accepted that there was nothing in the policy which prevented a grievance being raised but we accept f his evidence that he genuinely considered that as the issues related to job planning, mediation would was the most appropriate route.

357. The evidence of Dr Harris which was unchallenged, is that the mediation process is more advantageous to the Claimant than a grievance because it would involve contact with a non-executive director of the trust, it would give him access to people higher than Dr Harris in the management structure . Further he considered the mediation process to be a more appropriate method of dealing with the job plan dispute and the Claimant did in the event follow the mediation route. The Claimant could have escalated his request for it to be dealt with as a grievance if he was not satisfied, he does not allege he was prevented from taking this step, but did not do so.

358. Dr Harris also pointed out that he could have raised the issue with the Chairman or NED if he was not satisfied with the decision of Dr Harris, but he chose not to do so.

359. Dr Harris denied that he acted as he did on the grounds of any of the PDs, his evidence was that had he been minded to make life difficult for the Claimant he could have found ways to do so believes, that he bent over backwards for him getting the training contract when there was significant financial pressure is within the Peaks and then locating an alternative consultancy post for him on lower risk wards. There was he argues no motivation to remove him and indeed his steps thereafter are concerned with getting the Claimant back to work as quickly as possible to replace a locum.

360. There then followed series of meetings to address the Claimant's job going forward as part of the job mediation process.

PD 13 : Letter of 5 December 2013 to Peter Parsons [504]

361. The Claimant's evidence in chief is that following his interview with the Romero team, he wrote to Mr Peter Parsons a non-executive director and senior independent director employed by the Respondent to elevate his concerns about the lack of specific cases provided to the review team.

362. This letter is headed "raising concerns: management of staff - patient boundaries and staff team dynamics".

363. The Claimant sets out at the beginning of the letter the purpose of this letter which is to; "highlight the occurrence of certain events to you in your governance role as non-executive director senior independent director"

364. Within his evidence in chief the Claimant states that he wanted to document and summarise in writing the background to the external review that he had previously given verbally to Peter Parsons and the external review team. He also wanted to highlight the recent publications about whistleblowing in the NHS which were emanating following the Francis enquiry.

365. Within this letter the Claimant refers to the case of patient 1 (2006 – 2008), the lessons to be learnt from reviewing the case, consequences of not carrying out a learning review and refers to the failure to provide necessary information about patient 1 and 8 to the external review team.

366. With respect to his case that he was disclosing information about the deliberate concealment of malpractice (health and safety and the commission of the criminal offence), the Claimant fails in his evidence in chief to identify particular parts of the letter which he asserts tends to show alleged concealment and this was not addressed in submissions on his behalf either, however, we consider that the following parts of the letter are the most relevant;

"*An internal investigation into the case of patient 1 (2006 – 2008) had been agreed but has not been carried out despite assurances given over several years that it would be"*

"On 4 November 2013 when I first saw the external review team it was a shock that they had not been made aware of the background leading to the need for the external review. The external review team had not been made aware of patient 1 (2006 – 2008), the current boundary issues, including patient 8 and Malvern Ward. This was to the extent that they were initially uncertain if this was within their remit. This was despite the assurances that you and I had given"

367. The Claimant it appears with reference to Dr Harris, goes on to state;

"There seems to be a coincidence in that the person that gave repeated assurances for carrying out the internal review into patient 1 (2006 – 2008) is the same person giving assurances that the external review team would be informed about the current boundary issues of patient 8 and the Malvern Ward."

"Whilst the early warning signs of deviations in practice/boundary issues of patient 8 and Malvern Ward went unrecognised, the conflict in the staff team escalated. The

person raising the boundary issue becomes subject to unfair perceptions, complaints and allegations".

368. The latter statement is clearly a reference to the Claimant himself.

369. In response to questions from the Tribunal when asked who the Claimant believed was deliberately concealing information he stated that he was; "not saying a specific person ".

370. He went on to raise the lack of redactions in the Romero report, which he asserts shows that there was little discussion around the specific patients with the staff who were interviewed. The Claimant confirmed that he had disclosed all the information about specific patients he wanted to disclose to the Romero team and had discussed what he wanted to discuss over 2 days of being interviewed by the team but he had expected them to be briefed specifically about patient 1, beforehand.

371. When asked by the Tribunal however whether he was asserting that the Romero review team had deliberately concealed information, he did not confirm that this is what he was saying, rather that; "somehow the review team was not sent the information ahead of interviewing me" but when asked again who had deliberately not disclosed it , he stated; " not a specific person – I cannot identify a specific person".

372. Further the Claimant does not within this letter make any reference to not being provided with the interview transcripts, this letter is written before the outcome of the Romero report.

Job Planning Mediation Process

373. There then followed a number of meetings regarding the Claimant's new job plan.

374. At a meeting with Dr Harris on 13 January 2014, we find on the evidence including the evidence of Dr Harris and the letter following the meeting [794] that it was agreed that the Claimant would take up a post on the Erskine ward and during the following 6 weeks he would contact Dr Wallace to discuss the move and return to the full time consultant psychiatric role on 1 March 2014.

375. Dr Harris on 14 February 2014 [798] signed off an Employee Changes form to remove a 30% recruitment and retention premium he had been receiving, from 31 March. Dr Harris could not recall the reason for this but believes that it was likely to be in relation to the decision he took to reduce the Claimant's salary by 50% in line with the Claimant only working half of his job plan.

376. There was a further meeting on 25 February 2014 with Dr Harris, it was agreed that from 1 April 2014 the Claimant would undertake a role in Personality Disorder 0.5 wte on Erskine ward and 0.5 wte in mental health on Juniper and Bonnard. Both were lower risk wards than DSPD.

377. There is a letter of 8 March 2014 confirming what had been agreed [807 – 808].

378. The agreed job planning meeting had been arranged for 4 March 2014 but the Claimant asked to delay it to the 21 March 2014. [805].

379. In the intervening period the outcome of the Romero report was received.

Outcome of the Romero Review : 12 March 2014

380. The Claimant had decided to move off the DSPD unit pending the Romero report. –this was intended to be a temporary measures until concerns about his safety was addressed in the Romero report

381. On the 12 March 2014 Dr Romero- Urcelay provided the outcome of the external report [809]

382. The report did not support the Claimant's concerns and indeed the report identified issues with the Claimant either seeing BIs where others did not or in effect, using BIs as a device to stifle contrary views.

"We do not find support for these concerns amongst the staff and indeed found generally prevailing view that it is Dr Ijamoh's own approach to these issues undermined the functioning of the clinical team in which he was RC and has arguably raised risks in the safe and effective operation of the team – Ward. We also heard evidence from Dr Ijomah his view number of boundary violations of been recognised as such by other staff and had been wrongly put down to personality clashes. We probed his account of these issues with other staff who were familiar with them and heard an alternative account (highly consistent among these are the staff) that Dr Ijomah would wrongly describes boundary issues circumstances where he and other members of the team when disagreement"

383. Despite the Claimant's repeated focus and reference to the need to reflect and learn lessons, it seemed to this Tribunal that the Claimant was reluctant or found it difficult to accept that perhaps his behaviours required further reflection in terms of its impact on colleagues and team dynamics.

384. The Claimant did not seek to argue that the summary of the interviews with the various staff attached did not reflect what the external team had been told, even though he was not prepared to accept the criticisms about his management style.

385. In relation to the observations of Dave Brannan (page 82), the Claimant confirmed that this individual had no axe to grind with him and that the Claimant had in fact known him since Mr Brannan was a student nurse at the Queens Medical Centre, for 20 years. Mr Brennan was recorded as stating that the clinical teams are very good at picking up relevant issues and the Peaks is exceptional at reporting but that the Claimant;

i. Does not listen to other people
ii. Pushes staff to agree with him
iii. Alienates them
iv. Has anxiety about people having different opinions

386. The Claimant accepted that if anyone adopting the style that Mr Brennan described as being the Claimant's, that something would be wrong.

387. With regards to Chris Beeston (page 823), the Claimant stated that he would have no axe to grind against the Claimant either and he is recorded as stating that the staff felt undermined and there was poor team management.

388. Alison Tennant [p. 823] is recorded as reporting that staff cannot talk, there is no trust and any difference of opinion was met with an angry expression and the Claimant would interrupt staff who did not agree with him, there was no time for reflection and how in 34 years of experience as nurse she had never encountered similar difficulties.

389. When he was taken to the observations of Lawrence Jones Lead Psychologist (page 824), he referred to the Claimant having a lower trigger point than others in terms of BIs to which the Claimant in cross examination agreed that this : "could be" a fair assessment and he confirmed that he had worked with Lawrence a long time, especially with patient 2.

390. Despite all that feedback, the Claimant maintained that the evidence is poor quality and the methodology was poor and what the report is saying, he accepted, was that he himself and his leadership style was responsible for dynamics at the Peaks Unit.

391. These were damning and serious reports from his team. What is concerning however is that despite the suggestion of a referral to NCAS, this was not done and thus there was no action taken to directly address these performance issues with the Claimant.

392. The Tribunal do however on balance accept that these remarks were made and find on balance, given the consistency of those remarks made by people the Claimant accepted he knew well and had no ulterior motive, that the Claimant did have serious issues with the way he managed and communicated with his team. We also find that given how robustly the Claimant refused to accept the criticisms, that he struggled with reflective practice in terms of his own behaviours. What is also difficult to understand is why the Claimant was not shown even in redacted form, the feedback or even his own interview notes until he made a subject access request a year later. That is not satisfactory but it is not alleged that this of itself was a detriment or that the comments made about him by his colleagues were not made by them.

393. The Claimant does not accept the criticisms about his management style and referred to it being inconsistent with a 360% appraisal- he had not produced a copy of if however which is surprising given his claim that he was subject to scrutiny and criticisms not because of legitimate issues with his management style but because he was raising issues. He also controlled who gave feedback for this appraisal because he had to choose who to invite to give feedback, although he would not see or control the feedback.

394. The Claimant complains that the 'Romero' report also failed to engage with the individual patient concerns he had raised. Indeed the report in the bundle we find does not engage in any detail with the individual patient matters he had raised.

395. However, the Claimant accepts that he did produce numerous documents and he was interviewed over the course of two days and probed about the matters he had raised. The team however conducting the review did consider that he presented in a rather " chaotic fashion" and presented numerous documents in a rather disorganised way . This may explain why their report does not provide the level of detail in specific cases the Claimant had hoped for.

Shouting incident : March 2014

396. There was a second incident where the Claimant was shouted at that took place in March 2014 and involved Steve Geelan a manager. There were no patients present. At the next meeting, the Claimant refused to start the meeting until Mr Geelan apologised, which he did.

397. This had taken place in front of Ms Kruppa and Dr Wallace The Claimant later wrote to Ms Kruppa expressing concern for her that she had witnessed this and witnessed the apology [p.897]. The Claimant would later allege that Ms Kruppa was not an appropriate person (in 2017) to deal with his return to work risk assessment because

she had witnessed this event and done nothing. A criticism that had not made at the time or at any time in the intervening years.

398. The Tribunal is not convinced that the objection he would later raise was reasonable in light of the lack of action or complaint he raised at this time and his expression of concern for her.

399. In answer to a question from the Tribunal he said that this incident had been minimised by the apology and was not as much of a concern as the July 2013 incident with the Ward Manager because it had not been in front of patients.

PID 15: letter of 23 April 2014 to Sharon Rosenfeld (pages 507 – 543)

400. On the 23 April 2014 [507] the Claimant wrote to Sharon Rosenfeld, Compliance Inspector at the CQC . He had received a copy of the 'Romero' report he feared the Respondent would continue to fail in complying with its legal obligations to protect patients and staff and he had reason to believe that his concerns were being deliberately concealed and ignored and therefore he decided to escalate the matter to the CQC.

401. The undisputed evidence of the Claimant is that this written disclosure followed a prior verbal disclosure to the CQC during which had been asked by the CQC to provide further information to them should the external review once completed not address his concerns. He had in January sent them a dossier of 300 documents however in response to a question from the Tribunal the Claimant confirmed that he is not aware of the CQC carrying out any investigation into the Respondent arising from his disclosure or into the way the 'Romero' report was carried out. The Respondent's case is that there was no CQC investigation arising from his disclosure.

402. The Claimant does not rely upon the verbal disclosure to the CQC. He relies only upon the letter of 23 April 2014.

403. Claimant relies only upon section 43B(1)(f) – deliberate concealment of information.

404. The Claimant sets out in the introduction to the letter its purpose namely to provide further information on the concerns that he previously logged with the relevant issues including; barriers to raising concerns about patient safety and delays in investigating concerns, insufficient upwards reporting in the governance chain of serious adverse incidents, loss of organisational memory of recurrent adverse incidents, inadequate investigations of concerns when they are eventually raised and failure to learn lessons from reviews of adverse incidents such that the same events recur

405. The Claimant enclosed with this letter the letters dated 26th of March 2013 to Dr Miller and 5 December 2013 to Mr Parsons. The letter of 26 March 2013 referred to other letters enclosed with it but it is not stated within the 23 April 2014 letter that those enclosures to the 26 of March 2013 were also included. The enclosures are not addressed in the Claimant's evidence in chief and further counsel for the Claimant in his submissions does not refer to any disclosures other than a copy of the Romero review, it does not assert that any of the attachments should be taken into consideration when determining the issue of whether the Claimant had made a protected disclosure and if so which.

406. The letter of 26 March 2013 which was included, itself refers out to enclosing letters of 7 December 2009 [564], second of August 2011 [583] on 29 November 2011 [587]; despite the fact that the Claimant does not in his evidence in chief refer to these three

letters as forming part of the disclosure nor does counsel in his submissions, we have taken into account that the Claimant is not alleging within either of those three letters that there had been deliberate concealment.

407. In the letter of 7 December 2009 the Claimant refers to a meeting with Dr Harris and wanting to specifically review and reflect on the case of patient 1. In the letter of 2 August 2011 [583] the Claimant in this letter is requesting a timeline for the start of the review patient 1 and refers to it being unclear why the governance systems did not trigger this review which earlier.

408. In the letter of 29 November 2011 [587] the Claimant referred to a review having been promised into patient 1 in 2008 but despite reminders never having taken place, he sets out within this letter concerns about boundary issues but does not allege any deliberate concealment of information.

409. Returning to the letter of 23 April 2014, the Claimant refers to the organisation for many years having acknowledged that it requires to carry out a learning review into patient 1 (2006 – 2008) in order to learn lessons about the management of boundary issues and staff dynamics which affect patient care and refers to their having been;

"*long-standing barriers in conducting an internal review, hence the need for an external review"*

410. Claimant goes on to refer to the Broadmoor/Romero review and that when they met with them on the 4 and 5th of November 2013 he was concerned that the review team and not been supplied with important background documents and in addition were not fully aware of it. He refers to receiving their report in March 2014 and being concerned about the brevity of it and there being no root cause analysis of the delays to an internal investigation patient 1 (2006 – 2008).

411. In terms of action required the Claimant's state that he would be grateful; " if you could ascertain the evidence that the learning review of patient 1 (2006 – 2008) has taken place, if so when this learning review occurred and how the lessons learned were disseminated. My consultant colleagues and I are unaware that any learning exercise has occurred, as if it had taken place it would have included the consultant that was involved in his care".

412. Nowhere within this letter does the Claimant refer specifically to deliberate concealment or hiding of information of criminal offences or health and safety issues.

413. The Claimant refers to concerns about the brevity of the 'Romero' report and questions whether a review of patient 1 has ever taken place however he does not refer to information being concealed or otherwise hidden.

414. The Claimant in response to the Tribunal confirmed that it was 'correct' that he had not said in this letter of the 23 April 2014 [507] that there had been deliberate concealment. In cross examination he confirmed that his case was that it is not about deliberate concealment but inadequate investigation ;

"I agree but it is a recurring pattern of missing information to carry out adequate investigation but one cannot say deliberately".

<u>Pay cut</u>

Detriment 8 - *Unlawful reduction of the Claimant's salary by Dr Steve Geelan in April 2014.*

415. The unchallenged evidence of Dr Harris was that it was his decision to reduce the Claimant's salary prior to his retirement. It was not Dr Ghelan's.

416. The letter confirming the decision is dated 2 April 2014 [842] and confirms that his salary will be reduced from 1 April 2014 as a result of his refusal to work a full caseload

417. The decision followed a protracted period in which the Respondent was trying to return the Claimant to full time duties as a Consultant Forensic Psychiatrist and only after Dr Harris had understood that they had reached agreement on a return date and his new duties.

418. The Claimant had been notified in September 2012 that his psychotherapy training and associated duties would cease on 1st April 2013. Notwithstanding many job plan meetings as part of the mediation process, the Claimant did not recommence full time duties as a Consultant Forensic Psychiatrist. The Claimant continued to be paid a full time salary, in the absence of full time work as a Consultant Forensic Psychiatrist for a period of 12 months and during that time, we accept the unchallenged evidence that the Trust were paying a locum in addition to the Claimant out of what are of course, limited public fund.

419. The Claimant had seemingly agreed at mediation to undertake the full time duties to commence on 1st April 2014 (see page 793-794 and 801 - one year after the original date set by Dr Harris).

420. In the event the Claimant did sign the new job plan on 29 September 2014 [1031] and promptly thereafter on 3 October 2014 his pay was reinstated to full time and backdated to 1 April 2014 [1683] .

421. The job plan also at the Claimant's request included additional reassurance if he raised concerns they would be dealt with under the reporting of serious incidents process and that the timetable set out in its policy would be strictly adhered to and any slippage explained in writing. He accepted the R agreed to prioritise any concerns he raised to address his concerns about his safety at work concerns.

422. There is an email from Debbie Turner HR medical staffing adviser on 5 June 2014 [867] stating that his RRP should not have been discontinued and she arrange for it to be reinstated. This was after the retirement of Dr Harris on 31 March 2014.

423. There was no complaint was made by the Claimant at the time of these events that his salary had been 'unlawfully reduced' by reason of any alleged protected disclosure.

Detriment 9 - ***False accusations by*** **Jane** ***Rollinson in August 2014 that the Claimant used an item of Hospital property that then went missing.***

424. We heard evidence from Ms Rollinson, and we find that she did not make the accusation as alleged.

425. There is an email from Ms Rollinson to Ms Kruppa [878] in which Ms Rollinson confirms a telephone conversation which she had with her. In this she refers to a member of her team informing her the Claimant was in the resource room 'using our stamps'. Miss Rollinson reports going into the resource room to find the Claimant and asked him if she could be of assistance. She reports the told her that he was using the hospital stamp.

426. Miss Rollinson asked the Claimant to do her the favour as manager by telling her if he wanted to use the facilities of the Department because she is responsible for the documentation and highly confidential nature of the data held within the resource room.

427. She reports that as the Claimant packed his papers away she noticed there was not a stamp on the table and she did not see one during her conversation with him. She goes on to state that they do not hold an inventory of stamps and therefore cannot say it any were missing.

428. Ms Rollinson goes on within this email to apologise if she prevented the completion of an important task.

429. [877] The Claimant was contacted by Dr John Wallace at the request of Mr Tennant deputy director of forensic services to meet with the Claimant to discuss the incident within this letter . He reports what has been said by Miss Rollinson but does not allege the Claimant had stolen a stamp nor does he state that a hospital stamp had gone missing.

430. Ultimately the Claimant denied at a meeting using the hospital stamp and the matter was cleared up when Mr Hall confirmed that he was asked by Dr Harris to assist the Claimant with stamping documentary psychotherapy evidence for his accreditation.

431. It appears that there was some implication of wrongdoing hence the investigation, however the Tribunal do not accept that Ms Rollinson had asserted that the hospital stamp had gone missing but appears to be doing nothing other than providing an honest account of what had taken place.

432. Ms Rollinson denied any knowledge of any protected disclosures and she was not challenged on this.

433. The Claimant did not lead evidence on this incident and this this detriment, in his evidence in chief.

Job Plan meeting

434. The Claimant signed off his new job plan on 29 September 2014 (see page 1031).

435. Within the bundle (page 1026) is a copy of the job plan/work programme and objectives schedule commencing 1 October 2014 confirming that the Claimant will be working in the Clinical Directive of Men's Personality and Mental Health Disorder and that the Claimant is: "temporarily working 0.5 WTE in the Mental Health Service providing cover while Dr Gahir is on secondment at St Andrew's Hospital. He removed himself from Malvern Ward in July 2013 due to concerns about his safety".

Detriment 12 - *Failure to be provided with annual pay rises by Dr John Wallace (continuing).*

436. In his further and better particulars provided on 1 July 2021 the Claimant states that he uncovered in September 2014 that he was not being provided with his annual pay progression in line with his contract by Dr John Wallace.

437. There is a brief and vague reference to detriment 12 in paragraph 72 of the Claimant's witness statement. No detail is given as to how, when or why it is alleged that the Claimant was 'underpaid'.

438. During the cross examination of Dr Wallace, counsel for the Claimant clarified that his claim related to a failure to award him an increment in 2014 only and his claim was limited to that. (In any event with regards to any complaint about annual pay increments, the Claimant has failed to identify what it is alleged he was not paid).

439. The Claimant's case is that he discovered in September 2014 that he was not receiving his contractual annual pay progression.

2009 pay progression

440. Within the bundle at pages 867 – 868 Dr Wallace refers to the Claimant raising this on 30 May 2014 and this is supported by the documents. The Claimant does not here refer to any particular year when he alleges he should have received pay progression - he queries whether he has received what is due to him.

441. There is an email in the bundle [868] from the Claimant to Deborah Turner on 30 May 2014 '. Within this email the Claimant raises the increment .

442. There is then an email from Ms Turner to Miss Kruppa and John Wallace in which he states;

"*In relation to his pay progression, you will recall, John, that he was on the list of consultants for whom I had received no recent job plans or job plan review form The .last time we communicated about this was in June last year when you copied me into an email to GI asking him to forward his latest job plan to me. To date I still haven't received this, nor have I received a form from you, Gopi or Steve to sign him off for pay progression. Effectively he has missed four years of progression as a salary should have written £84,667-£90,263 in October 2009 . he will then be eligible for a further progression to 95,860 this October."*

443. This email therefore deals with a failure to pay increment in 2009 and confirms that he should be due a further progression that year , i.e. October 2014 - but by this stage that had not yet fallen due

444. As the decision around the 2009 increment predates any of the alleged protected disclosures, counsel for the Claimant confirmed that he was not pursuing any complaint of detrimental treatment in connection with the 2009 increment, he was however pursuing his complaint in relation to the failure to pay an increment in 2014. Nonetheless it appears that action was taken in relation to the 2009 pay progression issue.

445. The response to Ms Turner, Ms Kruppa, Steven Geelan and others, from Dr Wallace on 15 June 2014 [866] ;

"The problem remains that Dr Ijomah has not signed a job plan over a number of years (and possibly since he started). Consequently he had not been able to submit this for pay progression (as you know a completed JP needs to be submitted with a pay progression form). We are still having problems concluding his current JP meeting/discussions."

446. Dr Wallace then on 6 June 2014 asks Deborah Turner to send a letter and sets out what he wants to be contained within it;

"*For the pay progression process to be activated, there needs to be completed and signed JP each year and an associated pay progression form completed. If you can provide me with a completed JP's then I will ask Dr Geelen to review the plans and prepare the appropriate progression forms". [865]*

447. The new job plan was signed on 29 September 2014 [1031].

448. r Wallace's evidence was that Mr Cooper had to sign off the Claimant's pay progression in 2014 and that it was then "out with" the control of Dr Wallace.

449. The evidence of Dr Wallace was that after responding to the issue in June 2014 he heard no more about it.

450. It was not put to the Dr Wallace in cross-examination that his explanation of the process was incorrect or that he had personally any involvement in the completion of the job plan review form in 2014.

451. The evidence of Anne-Marie Stubbs, employed by the trust in the role of head of medical workforce since 23 November 2020 gave undisputed evidence that for consultants appointed on or after 31 October 2003 the National terms and conditions for consultants 2003 apply and schedule 14 provides for eight pay thresholds for which there are specified time intervals before eligibility for incremental pay progression. Consultants on appointment to their first post would start at threshold 1. Threshold 5 is achieved in completing four years as a consultant and thereafter pay progression through the remaining three thresholds occurs at maximum five yearly intervals.

452. Ms Stubbs was not challenged on any of that evidence by way of cross-examination

453. Ms Stubbs went on to give evidence that incremental pay progression is achieved via job plan review which focuses on specific criteria and is then signed off by the executive director.

454. The unchallenged evidence of Ms Stubbs was that with reference to a spreadsheet showing his incremental progression [1689 – 1690] the data shows that the Claimant received incremental pay progression on 1 October 2009 however Miss Stubbs could not see that he had received incremental progression on 1 October 2014.

Pay progression 2014

455. Miss Stubbs was not in a position to say why the Claimant did not receive incremental pay progression on 1 October 2014 however her unchallenged evidence is that normally not receiving incremental pay progression is due to there not being an approved pay progression form and pay progression is not implemented without it. She gave unchallenged evidence that she checked the records available to her department and can confirm that there is no approved pay progression form for the Claimant.

456. Within the bundle [1687] is the job plan review form dated 16 October 2014. It is not disputed by the Claimant that this is a genuine copy of the review that was undertaken by Dr Geelan in October 2014.

457. The form itself asks seven questions which require a yes or no answer. In respect of four of the questions Dr Geelan selected no; they include whether every reasonable effort has been made to meet the time and service requirements of the job plan, whether there has been satisfactory participation in the appraisal process, satisfactory participation in reviewing the job plan and setting objectives and whether the personal

objectives in the job plan have been met.

458. Dr Wallace in his evidence in chief paragraph 52 states that he understands from Diane Clay, head of workforce, that the Claimant incremental pay progression was recently looked into in preparation for the employment Tribunal and the decision taken that back pay for 2014 should be paid on the basis that being an historical matter, it is not possible to be certain that the pay increment was not authorised. However Miss Barney of counsel informed the Tribunal that she understands this is not been paid. Mr Wallace gave evidence that he did not know why not. There is no application by the Claimant to amended claim in light of this evidence.

459. If a decision had been made that the Claimant should receive back pay in those circumstances then the Tribunal would hope regardless of its findings on this issue in the context of this pleaded claim, that the Respondent would make good on that decision.

460. The Tribunal find on the balance of probabilities on the evidence of Ms Stubbs and the document she refers to, that the Claimant was in the event awarded pay progression in 2009 after the matter was looked into but not in 2014 and that on a balance of probabilities, the new job plan review form had not been signed off and that this did not have anything to do with Dr Wallace. .

Dr Hall

461. The Claimant had met with Dr Hall in the week of 24 October 2014 (page 1033). Also present was Dr Clark, Interim Associate Medical Director to discuss the concerns expressed during the job plan appeal process.

462. It is clear that within the letter sent after the meeting on the 24 October 2014, Dr Hall is trying to address a way forward following the concerns the Claimant had raised during the job appeal process, about his concerns about personal safety at work, lessons learnt and residual concerns . She refers to the Claimant having raised with her his experiences at the Peaks Unit in the management of BIs over the last 9 years and that he had described two particular cases and the Claimant confirmed in cross examination that it included patient 1 . She acknowledges that boundary issues remain a challenge and talks about how they had discussed how the Claimant would take forward these concerns should they recur: "We in response collectively agreed an initial approach at ward level, if needed escalation to the Clinical Director and if required to the Associate Medical Director and to myself".

463. She also goes on to state: "We would support a case review approach if required and to involve an external facility if this is indicated. We agreed collectively that this approach would be supported onward to address any new or emerging concerns"

464. Dr Hall also states: "I was pleased to note on your current wards you have no concerns for your safety." The Claimant does not dispute that he had confirmed this was the case.

465. Dr Hall goes on to confirm the Claimant's leave entitlement and the matter of the pay progression is being reviewed and Dr Clark would respond to the Claimant. He had mentioned that he believed these to be detriments and is advised he can raise a grievance in respect to those if he wished.

466. She also refers to the 'Romero' report in November 2013 and that the Claimant did not consider it met his expectations. Dr Hall refers to having indicated to the Claimant that

he is able to write his view on the report and its omissions and that it would be retained as a point of reference with the report onward and that he supply this within ten working days and they could submit it.

467. The Claimant did not challenge the accuracy of her record and confirmed under cross-examination that Dr Hall was trying to reassure him and that he was in agreement with the approach she was suggesting that: "the challenge is to continue and learn from these incidents and grow our knowledge and skills through supervision, reflection and collaborative case reviews is an approach that we all support". However, despite this, the Claimant would write a number of follow up letters to Ms Hall where he continued to raise patient 1 and the absence of a review.

468. The Claimant wrote to Dr Hall after the meeting (page 1036) on 24 October 2014 in which he referred to the meeting as being: "very supportive" and the aim was to: "find a way forward and to ensure that I will be treated fairly, moving forward."

469. Within this letter, however again he states on reflection after the meeting he wanted a copy of the review of patient 1 2006-2008.

470. It was put to the Claimant in cross-examination that by this stage he knew that the review into patient 1 had been subsumed into the Romero report and that was the Trusts position and indeed the Tribunal consider that it had been made clear to him, that they were not prepared to reinvestigate those issues however, the Tribunal find that it was clear that he was not prepared to accept that .

471. In another letter of 30 October 2014 (page 1038) he states that he believes the case review of patient 1 for the years 2006-2008 never occurred: "Hence a report on the patient case 1 2006-2008 does not exist".

472. In a letter of 7 November 2014 (page 1039), the Claimant writes to Dr Hall again talking about the Dr Romero report and sets out his concerns about the inadequacy of that report, particularly in relation to patient 1 and events of 2006 – 2008 and also: "The recurring pattern of how boundary issues are managed - the person who raises a concern about patient safety subsequently becomes identified as the problem …"

473. Dr Hall had on 26 November 2014 (page 1065) makes it clear that the Trust position was that it was not going to look into this again and that it did not accept his view that the Romero report was not thorough enough –Dr Hall states ; "I view the terms of reference and methods of the review as appropriate" [1066]

474. The Claimant's response under cross examination was it is our understanding, not to dispute that this was the case but that he did not accept it:

"*It may be a question of language, the Trust can hold one view of what is a review and what a thorough review is and that may be a different view to that held by others. The Trust is entitled to hold their view and I am entitled to hold mine.*"

475. On the 30 January 2015 [1072] he wrote to the Mental Health Specialised Commissioning at NHS England.

Sickness from 22 April 2015

476. The Claimant was then absent on sick leave due to bereavement and then stress with a later diagnosis of PTSD.

477. During his absence the Claimant had return to work meetings with Dr Clark and Ms

Kruppa and continued to raise concerns about there having been no review of patient 1.

478. The Claimant denied that he had known what the Trust's position was back in November 2014 but was refusing to move on however, the Tribunal find that he must have understood by this stage that rightly or wrongly, the Trust did not accept that there was a need to review any further the circumstances around patient 1 back in 2006 – 2008. The Claimant's position that the review was not thorough enough may well be a reasonable one. However we find on balance that he did not present his concerns in a coherent and accessible way to the Romero team hence the comments they made about how he presented the information in their report. The Trust had however moved on during the intervening years in introducing new safeguards and policies and therefore on the face of it, their position was also arguably equally valid about not spending more time reviewing past issues but focussing on addressing new issues in light of the new safeguards and recognition of BIs. We also note that the CQC was sent a significant dossier of information but appears not to have considered it necessary to take any action. While it was open to the Claimant to raise matters externally at this point if he was not satisfied , the Trust had made its position on where it stood clear and by this stage we find on balance, that it was objectively a reasonable position to take.

27 July 2015: meeting

479. In this meeting, Dr Kruppa (page 1101) talks about a referral to occupational health.

480. The Claimant had said in this meeting that the: "main issue" was a long-standing one about what is done when he raised concerns and: "I want reassurance that these things have not been forgotten about".

481. The Claimant raised five matters: he wanted an update regarding his recent request under the Data Protection Act , he wanted to get answers as to why the BMA have been excluded from one of his meetings, he wanted to know if there had been any learning review carried out to the case of patient 1 , he wanted to be updated as regards to progress that Dr Hall was making in relation to an action plan that had been drawn up , he wanted a full copy of the Romero report.

482. Dr Clark on 7 September 2015 (page 1120) responded to all his points including that the Claimant had the full version of the Romero report.

483. The Claimant, however, gave evidence that he was still not happy about the situation with patient 1 and, although he confirmed by this stage he had the transcripts of the Romero review, he did not feel that what they were saying was clear in terms of what report was available. Dr Clark however had made the position clear, in terms of what the report consisted of.

11 November 2015

484. There is then a meeting with the Claimant and Dr Clark on 11 November 2015 (page 1134).

485. On 4 December 2015 Dr Clark wrote to the Claimant, [1140] he addressed the Claimant's ongoing request for a review into patient 1 and states that there had been no learning review but that the investigation in 2011 into the care of patient 1 was extensive and was the main feature of it and this the view was taken that a further

investigation into that specific area of conduct was not commissioned but the Romero review also incorporated patient 1 issues. The Claimant was provided in this letter with further copy of the Romero report and statements.

486. The Claimant accepted in cross-examination that it was by this stage; "crystal clear no further review will happen [into patient 1] but also crystal clear review never took place and will not be a review into that".

Occupational health report - 22 March 2016

487. The OH health report 26 March 2016 recommends that the Claimant is not well enough to return to work and also states that if there is a way for his concerns to be addressed, this is very likely to assist with both his health and prospects for a successful return.

Sickness review - 5 April 2016 (page 1163)

488. There was then a sickness review on 5 April 216 with Dr Clark and Ms Kruppa. The Claimant accepted that the meeting became a very circular discussion about topics that had already been discussed time and again and the Claimant accepted that the: "dialogues were going round in circles".

Injury allowance

489. The Claimant does not complaint that the failure to be granted injury allowance was a detriment but complains in his evidence in chief that there was no request made about his eligibility however the Claimant confirmed under cross examination that he was told what the steps were for applying for injury allowance and this is set out in a letter dated 21 April 2016 [1177] . He did not dispute when it was put to him that the policy says that he must provide the relevant information (i.e. the medical evidence in his possession and a copy of the accident report and GP records) but he did not provide that information and no application was therefore made.

Absence review meeting June 2016 (1202)

490. There were further sickness review meetings and a further one in June 2016. By this stage, it was 14 months into his absence.

491. The Claimant denied that what he was still wanting was a review of all BIs from 2005 onwards, only a safe environment to return to however, the Tribunal do not consider that the Claimant was being candid about what he was wanting.

492. The meeting notes record him stating (and he does not dispute the notes) at the outset that to support him coming back he wanted an update regarding concerns he had previously raised with Dr Clark and other people and later in the meeting[1209] ;

" Dr Ijomah stated that his only concern was that when he raised a concern it is not dealt with by Trust policy"

July 2016

493. OH produced a report on 19 July 2016 [1322]. The report refers to a letter from consultant psychiatrist Dr Elwood to the Claimant's GP which states that Dr Elwood's advice is that criteria are met for a diagnosis of PTSD. He is receiving counselling through the Trusts' counselling service which he was finding very helpful;.

494. OH at that stage did not consider the Claimant well enough to return even with adjustments to return to work.

495. Ms Hall, and Dr Clark met with the Claimant on 20 October 2016 under stage 2 of the long term sickness absence policy [1302]. The Claimant was advised that the meeting was to discuss his return to work and he was warned that dismissal on the grounds of his health was an outcome open to Ms Hall. Following the meeting the expectation was that the Claimant would return to work in 4 – 6 weeks based on what the Claimant had told them at this meeting [1307]. The letter recording the meeting referred to the Claimant wanting to discuss his ongoing dissatisfaction with past events.

PID 19: letter of grievance - 26 October 2016 (pages 544-557)

496. The Claimant complained that he was afraid that Dr Hall would dismiss him and raised a grievance about how she and Dr Clark were applying the sickness policy on 25 July 2016, by telephone to Ruth Hawkins.

497. On the 26 October 2016 he sent a formal grievance to Ruth Hawkins. He did not identify this as a whistleblowing complaint.

498. The Claimant alleges that this was a protected disclosure and relies upon section 43B(1)(f) i.e. deliberate concealment of information about malpractice as defined by section 43(1).

499. The Claimant wrote to Ruth Hawkins, Chief Executive of the Trust and copied in the CQC and ICO. This was a formal grievance and the header was; " Application of sickness absence management policy".

500. The Claimant's undisputed evidence in chief is that the letter also enclosed [551- 557] the letter of 5 December 2013 to Peter Parsons, letter of 4 December 2015 from Dr Clark , letter of 10 March 2015 from Denise Gezmis Acting Head of Human Resources and , letter from Dr Clark of 31 May 2016, letter from Dr Hall of the 26 November 2014 and extract from the CQC Raising Standards – strategy 2013 – 2016 and the Francis enquiry.

501. The Claimant in his evidence in chief refers to this disclosure as being prompted by his concern that the application of the sickness absence management policy was conducted in manner that sought to expedite the termination of his employment and thus bring to an end his Whistleblowing on concerns of a very serious nature that were being overlooked and concealed by the Respondent .

502. Within this letter he states;

"*My experience has been that when I raise a concern about patient safety my concern is not addressed but instead I am subjected to detriment".*

503. He goes on to assert that as an example of such treatment, after the Francis enquiry in 2013 he informed the then NHS regulator; the strategic Health Authority of his

concerns about patient safety and how these have not been investigated and was subjected to continued and escalating incidents of victimisation. He gives examples of the victimisation .

504. He complains that there has not been an enquiry to clearly understand the causes of his sickness absence.

505. The Claimant complains about obvious procedural and methodological irregularities in the way the review into his concerns was conducted and refers to the Romero team not looking into any of his concerns, of being criticised in the report but not afforded a chance to comment, of having to make an SRA request to obtain the transcripts of interviews including his own but despite this Dr Clark and Dr Hall had concluded that the concerns were adequately reviewed and the methodology of the review was adequate.

506. The attached letter of the 4 December 2015 from Dr Clark states that regarding patient 1;

"*The former Executive Director for Forensic Services [Dr Harris] confirmed that a learning review into patient 1 did* ***not*** *take place. You are aware that there was a thorough HR investigation in relation to the care of that patient and staff conduct. That investigation was extensive and a review of the case of patient 1 was the main feature of the investigation. Therefore a further review of that same patient's case and that specific area of conduct was not commissioned. Your outstanding concerns were subsequently incorporated into the external review undertaken by the team from Broadmoor. Dr Hall had reviewed both these investigations and will not be commissioning a further review of the care of patient"*

507. The attached letter of the 10 March 2015 from Ms Gezmis to the Claimant headed "subject access request" and refers to including documentation requested and;

"I am informed that the learning review into patient 1 2006 – 2008 did ***not*** *take place and was subsequently incorporated into the external review undertaken by the team from Broadmoor.*

I have been informed that you have previously had a copy of the report by Dr Romero but have not had copies of the appendices s the staff members and to be written to, to agree their release. These statements are now enclosed.."

508. The Claimant also refers to raising a serious incident report/ security incident report that his concerns are being "covered up" but this has also not been investigated by Dr Hall. He also refers to a concern that an "adequate investigation is being deliberately avoided and prevented from taking place in order to maintain the perception that ' nothing is wrong' and a as result of this there will be no investigation into how I have been victimised for raising concerns."

509. The Claimant states; " I am concerned that Dr Clark and Dr Hall are knowingly or unknowingly working together to avoid recognising the stresses in my place of work which include difficulty over many years in getting my w/blowing /protected disclosure concerns, adequately reviewed. I am concerned this is occurring in order to perpetuate the false impression to others that my protected disclosure/w/blowing concerns have been adequately addressed."

510. The Claimant does not in his evidence in chief nor in submissions direct us to which parts of the lengthy letter he is relying upon.

511. In cross examination on being taken to this letter/ PD 19 when it was put to the Claimant that he was not complaining of deliberate concealment in this disclosure but complaining of woeful investigation into his concerns, the Claimant referred to only two parts in the letter and was not taken back to the letter in re-examination. He refers to the top of page 546 and what Denise Gezmis had said about their having been no review into patient 1 (2006 – 2008) contradicted what had been said previously by Ms Gezmis and Dr Harris;

"*Dr Hall states that a review into patient 1 2006- 2008 was not commissioned but this contradicts earlier accounts by Denise Gezmis and Dr Harris's and there needs to be clarify as to which if any of these accounts are true"*

512. When was put to the Claimant that within this letter he was not complaining about deliberate concealment his evidence was: "I would not want to use words as strongly as deliberate".

513. The Claimant under cross-examination gave evidence that he was hinting for someone to investigate: "" I am hinting, for someone to investigate, I have suspicions

514. This is the last alleged protected disclosure.

515. The grievance would be passed to Simon Crowther, Executive Finance Director to deal with at stage 2. The Claimant does not allege that the way the grievance was dealt with was a detriment.

516. Mr Crowther met with the Claimant on 14 December 2016 and the Claimant raised again the assault and being shouted at [p.1361].

517. Mr Brabiner attended this meeting as the Claimant's companion and [1362] suggests that what the Claimant needs is the risk assessment around his return to work to acknowledge that his stressors are related to how he feels he had been treated in the past. Mr Brabiner by way of supplemental question by counsel for the Claimant and gave evidence that the meeting was recorded by dictaphone at the Claimant's request , that Mr Crowther appeared quite compassionate and that it was quite an open meeting.

518. Asa result of the grievance, Ms Hall no longer dealt with the sickness absence process, it was passed to Ms Bussell [1241]

519. Ms Bussell then became involved in dealing with the Claimant's sickness absence process from 6 September 2016 [1246].

Termination of his Employment

520. Ms Bussell met with the Claimant on 20 October 2016 [1261].

521. At this meeting the Claimant accepted that he did not express any lack of understanding about the job was he was going back to, he never mentioned not knowing which wards he was going to work on or which patients he would be responsible for. He confirmed that he was; "okay with working on the MH/PD directorate" . Although he mentioned that this had been a temporary job plan.

522. The Claimant however accepted in cross examination that at this meeting they ended up going around in circles because in his opinion, the Respondent would not

acknowledge what had happened to him i.e. since 2005 – the recorded comments included;

"Dr Ijomah pointed out that for 3 years they had not looked at his concerns regarding his physical safety"

" Dr Ijomah stated he had been assaulted and nothing had been done"

523. What the Claimant stated he wanted under cross examination was a 'history', a record of what had happened to him and how he had been treated . He mentioned victimisation but he had not raised a Whistleblowing complaint.

524. OH confirmed on 8 November 2016 that the Claimant would be fit to return to work in January 2017 [1311] on a phased return basis.

525. The report refers to a phased increase in hours over a 4 week period. It did not set out any further details, those were left to be agreed. OH advisor states that he does not envisage the need for any additional adjustments.

526. What the phased return looked like however was never further defined.

527. Ms Bussell wrote to the Claimant in 11 November 2016 [1326] to arrange a stage 2 sickness meeting which she arranged for the 29 November 2016. She confirmed that the Claimant was saying he was well and ready to return to work. She refers to the Claimant mentioning unresolved issues and confirms that her aim is to get him back to work and not revisit previous concerns. She referred to setting up a mediation with Dr Wallace and carrying out a risk assessment to support his return.

528. On the 28 November 2016 [1329] the Claimant emailed Ms Bussell, he attached a copy of the grievance he had submitted on 26 October 2016 [PD19] so she was aware of the background. The Claimant referred to Ms Kruppa and Dr Wallace having witnessed the Claimant being shouted out by Dr Geelan in March 2014, and states that it is important that Ms Bussell asks Ms Kruppa about this prior to their meeting

529. The Claimant states that the risk assessment must not be a superficial tick box exercise " which avoids looking at incidents that I experienced, as a means of covering up the acts and omissions of your predecessors"

530. The Claimant sets out list of what the risk assessment must cover to obtain what he refers to as "truth and reconciliation" including; " documentation on a look back exercise and a /learning review so there is organisation learning when my managers avoid reflecting on how they handled incidents that led to my work related illness"

531. Ms Bussell responds [1330] repeating that his grievance will be heard outside of this process with her, which is about getting him back to work [1330].

29 November 2016 sickness review meeting

532. The Claimant attended a sickness review meeting with Ms Bussell on 29 November 2016 [1345].

533. The Claimant's representative Dr Brabiner, referred in his evidence in chief (w/s 13) to trying to help support the Claimant facilitate a way forwards for both sides in what

appeared to be a “stalemate”.

534. The Claimant in this meeting refers to having raised concerns for over 3 years and complains that the Trust was rushing the risk assessment to complete in a month and “queried why they would not be undertaking a look back exercise to learn lessons from the past”.

535. The Claimant referred to being assaulted and that he needed documentation regarding what actions had been taken. He is told by Ms Bussell that this would be part of the work Ms Kruppa would do on the risk assessment and that Ms Kruppa had started the risk assessment but would work with the Claimant to complete it.

536. The Claimant referred to having raised concern for the last 3 years however Ms Bussell informs him again that she would not be investigating past issues but looking forward.

537. It was clearly anticipated that the risk assessment would be completed before his return to work.

538. The Claimant referred to being victimised for Whistleblowing and that he considered a look back exercise was needed in order to prevent his happening again, that the Hospital was aware these things had happened but no one had been held to account. The reference to someone being “held to account” would be repeated by the Claimant in other meetings and s despite during cross examination denying that this was what he wanted before he was prepared to go back to work, this was clearly we find, what he was wanted.

539. The Claimant referred to being victimised as a whistle-blower and Ms Bussell agreed to raise this with her direct line manager, Peter Wright. The evidence of Peter Wright in cross examination is that he sought advice from the senior team in the division and security and that he was reassured that the issues the Claimant had raised were historic and had been investigated. He took no further action. The Claimant had not raised a formal grievance/complaint and the Claimant does not allege that the way Mr Wright dealt with this situation amounted to a detriment because he had made a protected disclosure.

540. The Claimant stated in this meeting; [1349]

“*thinking about the root causes, these all stemmed from the incident when he was assaulted and the actions of staff at the time. Dr Ijomah suggested by not looking at them it would be difficult to prevent it happening again”.*

541. The risk assessment is then delayed due to Ms Kruppa’s sickness before Christmas.

542. 5 December 2016 [1354] - Ms Bussell writes to confirm his return to work on 9 January 2017 to start the induction and that he intends to take a period of annual leave before commencing his phased return to work and if the risk assessment is not completed before his return in January, it will be finalised during his phased return to work.

543. The Claimant then returned to work from 9 January 2017.

544. The Claimant spent most of January completing an induction programme [p.1624 – 1628]. There was no expectation that he would start the phased return back to his clinical duties during this period in January 2017

545. The risk assessment had not been carried out by this stage.

Ms Kruppa – 18 January 2017 meeting[1385]

546. Ms Kruppa then met with the Claimant on 18 January 2017 to discuss the risk assessment. Ms Kruppa had taken notes of the meeting [1385] which the Claimant we accept, had not been sent after the meeting and there are elements of them he disagreed with

547. Ms Kruppa produced a stress risk assessment form to work through with him. The Claimant complains that the form which she had was blank and was not the form it had been agreed would be used.

548. It was put to the Claimant that the risk assessment form at pages 342- 344 was the part of the risk assessment policy Ms Kruppa was trying to complete with him, but he disputed this and in the absence of any evidence from Ms Kruppa and any identification in her notes of the form she was trying to complete with him, we accept his evidence.

549. The form at 342 was the document the Claimant had wanted her to complete but Ms Kruppa had brought with her a different form which appears at page 158. The Claimant was not prepared to complete the form she had brought, with her.

550. The Claimant accepted however under cross examination that he could have started to complete the risk assessment form himself, indicating what the stressors for him were (e.g. being bullied) and what the action plan may be (e.g. to invoke the bullying and harassment policy).

551. The form the Claimant wanted to use [p.342] included a scale to indicate the severity of the stressor, which is why he says he wanted that form to be used. However, he considered it should be done with his manager to capture the risk. He explained in answer to a question from the Tribunal that he wanted someone i.e. his manager, to confirm in the form that he was at high risk and sign the form off acknowledging that so that if he complained of the same problems again e.g. being shouted at/bullied, it would be taken more seriously and escalated.

552. It is correct that the form at page 1586 does not have the same scale in terms of the risk factors and often they arise however the Tribunal find that there was room in the form to include that additional information. The was otherwise nothing materially different between the two types of forms.

553. The Claimant did not request that Mr Kruppa geta copy of the form he wanted to use during the meeting so that they could make progress completing it.

554. The Claimant denies that he was not prepared to complete a risk assessment form because what he really wanted was a review of all the incidents since 2005. However, we take into account his behaviour in repeatedly raising those past issues. Further, he accepted in cross examination that he 'could' have said in the meeting with Ms Kruppa what is recorded in her notes, namely that he wanted; "a review of all the issues about how I have been treated". We find that this is what the Claimant really wanted and that this was the real stumbling block to him returning to work and not whether a particular kind of risk assessment form was being used.

555. The Claimant denies under cross examination that he had told Ms Kruppa that the risk assessment must be completed before he started doing clinical work. According to his own evidence therefore, he did not need this to be completed before he was able to

return.

556. The Claimant agreed to take away the risk assessment form away at the meeting but he does not assert that he made any attempt to work on it..

557. Ms Kruppa asks as recorded in the notes, whether he sees himself returning in a split MH/PD role and the Claimant remarks that he questions whether the risk assessment may raise whether he should be working at Rampton at all.

558. Ms Kruppa informs him that the sickness policy states that there is an expectation that accrued annual leave is used for a phased return. [p.1386]

559. The Claimant also raises with Ms Kruppa whether she is an appropriate to deal with the risk assessment. He raised because she had been present when the Claimant had been shouted out in 2013. That we find in the circumstances was not a reasonable objection and we find on balance it was a spurious reason intended to delay the process and his return to work.

560. Ms Kruppa then contacted the Claimant on 23 January 2017 to try and arrange a follow up meeting [p.1402] . The Claimant did not respond to her. However, on the 26 January 2017 despite not responding to Ms Kruppa's efforts to meet with him again, he complained that no risk assessment was in place through the freedom to Speak up Policy [p.1391].

561. [P.1391] In his later to Mr Crowther on 28 January 2017, the Claimant complains that the risk assessment was; " being managed by the same two managers who witnessed me being mistreated and yet did not speak up to protect me.

562. The Claimant then took annual leave from 1 February 2017 to 17 February 2017 [1545]

22 February 2017

563. Ms Bussell wrote to the Claimant on 22 February 2017 [1404] to set up a meeting to discuss his hours and days of work during the phased return.

Outcome of grievance : 1 March 2017 [1407]

564. The Claimant was provided with the outcome of the grievance by Mr Crowther on 1 March 2017 which was to dismiss it [p.1407] and he also concludes that Ms Kruppa is best placed to carry out the risk assessment.

565. The Claimant submitted an appeal on 19 March 2017 [1410]. The appeal was on the grounds the process was flawed and that new evidence had come to light. He was asked to provide further details of those grounds of appeal but did not do so and the appeal therefore was not actioned. He does no alleges that this was detriment.

566. The Claimant does not complain that he made any further protected disclosures during the grievance process or suffered any detriments in connection with it nor did counsel in submissions invite the Tribunal to draw any adverse inference from the way in which the grievance process was carried out.

14 March 2017 [1415]

567. The Claimant confirmed at this meeting on the 14 March 2017 that he had not yet completed his induction. He had actually only missed one non-mandatory module on the induction programme due to sickness and was due to carry it out in March 2017, otherwise he had completed the induction including all the mandatory elements of it.

568. There was discussion about the risk assessment .Ms Bussell informed him that she had spoken with HR, Ms Kruppa and Peter Wright, she had completed the risk assessment and would write to him setting out the detail . The Claimant did not voice objection to the assessment having been completed without his input but wanted to see the content before he was prepared to discuss the timescales for returning to clinical work ; "he wanted to ensure he felt safe after having been assaulted and shouted at and wanted to ensure this was noted"

569. Despite denying that he had said to Mr Kruppa he could not return to work before the risk assessment was done, the notes which he does not dispute, record him saying exactly that to Ms Bussell.

570. Ms Bussell repeated that it was not the plan to look at past events and the risks were the same for him as anyone else in terms of how to escalate issues, giving feedback etc.

571. There is no discussion about involving OH in what may be included in the risk assessment.

572. The Claimant in cross examination referred to this meeting becoming circular, going round in circles and getting more and more confused.

573. The Claimant is still referring to past events in this meeting; he referred to the assault and being shouted at and that they are still in his mind as; "current issues" [1416] because there was no documentation about these events.

Study leave

574. The Claimant mentioned in the meeting of the 14 March 2017 [1420] that there was a conference on psychotherapy that he was attending and that he was forewarning them that he would be making a study leave request. He then said that the risk assessment might want to look at this and that he wanted to ensure " he was not denied" the study leave. In the event he was and claims this was a detriment for having made a protected disclosure.

575. He also stated [1421] that he may go back to his real role when they looked into the bullying and harassment regarding the removal of that role.

576. There was still no agreed date for the start of the phased return back to clinical duties.

17 March 2017 letter [1422]

577. Ms Bussell following the meeting wrote on 17 March 2017 [1422] setting out details of the risk assessment. This was not set out in the normal format but we accept that it was an attempt to address his very specific concerns, albeit the Claimant had not been involved in a discussion by this stage about the content .

578. The risk assessment as set out was really capturing the concerns about exposure to

physical or verbal abuse, arrangements around communication with management and the arrangements for reporting bullying and harassment and referred out to the Rs policies and procedures that are in place.

579. The letter itself referred to taking into account the Claimant's belief that he had not been well treated in the past and put in an unsafe position but it did not concede that there had in fact been bullying and harassment (which is what we find the Claimant wanted the Respondent to record).

580. The Claimant is informed that has he had remained at home since his return from annual leave on 17 February 2017, and will now be classed as on unauthorised leave and Ms Bussell questions whether it is his intention to return to work at all.

581. Ms Bussell refers to being concerned that the Claimant has not returned to his duties and refers to arranging a meeting on 29 March 2017 when the Claimant is warned his employment may be terminated.

582. The Claimant under cross examination gave evidence that it remained unclear to him what role he would be going back to however we do not accept that this was a genuine concern. It had been made clear in the meeting on 4 Feb 2016 with Dr Clark and Ms Kruppa [p.1155] that it was a ½ MD and ½ PD post. However, the Claimant gave evidence that it was not clear what role he would be returning to. The Tribunal find that this was another spurious reason for not returning to his clinical duties and that it was perfectly clear what the role would be, even if that was a temporary job plan.

29 March 2017 : return to work meeting

583. There is a further return to work meeting with Ms Bussell on 29 March 2017 [1426]

584. The Claimant expressed concern that the risk assessment did not involve him, did not comply with Trust Policy and does not ask him about the impact on his sickness of the bullying and harassment he complains about.

585. While the Claimant denied before this Tribunal that he was not prepared to move forward if people were not held accountable for events which had taken place in the past , the notes which are not disputed, clearly reflect that this was his position ;

"…*no one is held accountable. I find that very difficult so if no one has been held accountable in the past or present and even if we are moving forward you know someone has to be made accountable to how I am treated. " [1426/1427]*

586. The Claimant was asked by the Tribunal why he did not explain , if indeed this is what he wanted, that he simply needed the risk assessment to record that he felt he had been bullied and harassed in the past but did not want a review/ investigation into all those past events. The Claimant gave evidence that; "it is so obvious". However, it was the Tribunal find far from obvious that this would have satisfied him rather than an investigation of all the issues in the past he believed had not been resolved satisfactorily in the past with someone held to account

587. Either the Claimant was not being candid with the Tribunal about what he had wanted at the time or his communication was so confused, it was not made clear to Ms Bussell. We find on balance given the language he was using in the meetings, that it was the former.

588. The Claimant confirms at this meeting that he has not been doing clinical work but he

has been attending courses and " doing stuff for the hospital like raising my concerns with the regulator and using the w/blowing policy". He goes on to state that he needs time free of harassment to continue to escalate his concerns however, in cross examination he stated that he was not saying he was unable to return to clinical duties because he was pursuing these complaints. He gave evidence that he was fit, ready and available to work and he could fit this in around his duties .

589. In terms of study leave, he is informed that Ms Bussell will not be comfortable with him going to a conference on the Trust's time until he is back doing clinical work.

590. There is no commitment from the Claimant about a date when he will return to clinical duties.

591. On the 29 March 2017 [1440] the Claimant wrote to Peter wright and Helen Auld the freedom to speak up guardian asking for his grievance about the way the risk assessment was carried out to be escalated to the Trust Chair, Mr Flowers.

592. The Claimant does not rely on this as a protected disclosure, however. His last pleaded disclosure is to Ruth Hawkins on 26 October 2016.

3 April 2017 [1433]

593. Ms Bussell [1433] wrote to confirm that the Claimant was taking annual leave from 30 March to 18 April 2017 and that they will meet again on 21 April 2017.

594. She refers to the Claimant during the meeting on 29 March having submitted a study leave request which she will forward to Ms Kruppa but confirms that she will not be supporting it. She refers to hoping he has a restful period of annual leave.

595. Ms Kruppa on 6 April 2019 [1435] refused the study leave request , the stated priority being to ensure his return to clinical practice and informs him that any further requests will be considered on his return to work.

Detriment 11 - *Failure to be provided with study leave by Louise Bussell at a return to work meeting on 29* March *2017 to attend a Medical Psychotherapy Annual Conference due to take place on 6 & 7 April 2017*

596. The Claimant complains that there was a failure to be provided with study leave by Louise Bussell at the return to work meeting on 26 March 2017 to attend a medical psychotherapy annual conference on 6 and 7 April 2017.

597. The Claimant confirmed that Louise Bussell had no involvement in the protected disclosures on which he relies. The Claimant also confirmed that Louise Bussell had no involvement with the Romero report

598. It is not in dispute that the reason that Louise Bussell gave for not authorising the study leave to attend this annual conference was because she wanted to focus on him getting back to work clinically.

599. The Claimant confirmed that it had been agreed as part of his job plan appeal that the role he was to undertake on his return was that of a forensic psychiatrist therefore he did not need to attend a medical psychotherapy conference. In response, the Claimant alleged that he wanted to attend was to maintain his skills for reflective practice in

mental disorders and did not accept that the focus at this point should be on getting back to work.

600. He gave evidence under cross examination about the importance of improving skills in order to care for patients; and being unsafe without those skills. He went on to give evidence under cross examination that the CPD value of the course would go to his re-evaluation that takes place every 5 years to retain his licence to practice and that CPD is important to that validation process. He confirmed in response to a question from the Tribunal that he had not, or was not sure whether he had, in fact raised anything about CPD in that meeting with Miss Bussell. The Tribunal are satisfied he had not, this is not recorded in the notes, in any communication and the Tribunal are confident the Claimant would have documented this if he had.

601. The Tribunal asked the Claimant whether he had raised with Miss Bussell the need to attend this conference because of any concern about him being unsafe to care for patients - his evidence was that it was "not that I am unsafe to practice, no I raised that I felt unsafe in terms of my personal safety".

602. He did not in cross-examination, and nor does he in his evidence-in-chief, identify any specific reason why he alleges this refusal of study leave had anything to do with the protected disclosures that he had made. Further, given he confirmed Miss Bussell had not had any direct involvement in relation to any of the protected disclosures, he does not identify why any of them may have motivated her or influenced her decision to refuse the study leave.

603. We are satisfied that Ms Bussell refused this request because she considered that he should first be back doing his clinical duties and that this was a perfectly understandable position.

604. This was not something he needed to do such as the induction programme which he had spent most of January completing.

Detriment 10 - *Failure to be provided with annual leave and information regarding annual leave by Dr John Wallace in April 2017.*

605. It has been acknowledged by Dr John Wallace in his evidence before the Tribunal and at the time of these events that an error had been made in respect of information provided to the Claimant regarding his holiday entitlement between July 2014 to September 2014.

606. Dr John Wallace apologised to the Claimant at the time for the miscalculations and the Tribunal found that Dr Wallace was a credible witness and is account of the steps taken to try and rectify this issue and establish what annual leave was due, was supported by the documents within the bundle.

607. It is highly debatable whether a detriment in fact arises but in any event the Claimant did not advance any evidence about any connection between the alleged protected disclosures and the provision of inaccurate holiday pay information. We are satisfied on the evidence that these were genuine errors and Mr Wallace took reasonable steps to resolve the situation for the Claimant.

21 April 2017

608. On the Claimant's return from leave on 20 April 2017 [1535] he had a further meeting

with Ms Bussell.

609. The Claimant in cross examination did not dispute that this meeting was again circular, that he found it stressful and he accepted all participants were likely to have found it stressful.

610. At the outset the Claimant refers in this meeting to his lack of engagement in the stress risk assessment and the Respondent not using the correct form, that he had not been able to discuss the bullying and harassment he alleges he was subjected to. During this hearing, the Claimant did not identify what further or additional actions or controls he considered should have been put in place other than a recognition that he had been bullied and harassed.

611. The Claimant again raised that he felt Ms Kruppa had not been the appropriate person to do the risk assessment, however in the event it had been carried out by Ms Bussell, so it remains unclear to this Tribunal why the Claimant kept raising this same point, unless it was to create more confusion and obfuscation.

612. When asked if he was going to return to work the following week, the notes record that the Claimant stated; "he was available for work but the issues regarding bullying and harassment remained. He indicated his role had been in medical psychotherapy and research, roles which had been taken away from him without following appropriate policy and this did not appear to be being recognised"

613. However, regardless of whether there had been consultation in line with Trust policy the Claimant had we find been informed in writing that the post had been removed due to a funding issue. He knew that. He may not have liked it but he knew that was the reason and he had agreed a revised job plan

614. He does not allege in this meeting that the post of medical psychotherapist was vacant and available . It may be that his motive in pursuing these complaints and resisting a return to work was to persuade the Trust to re- establish the role.

615. In response to questions from the Tribunal about what was the main stumbling block to his return to work at this stage, because it was difficult to understand what was preventing his return, he gave evidence that the primary reason was that he did not have information about which patients he was now responsible for, which teams he would be working with etc and his job role was not clear. However, when asked why if that was the genuine reason, he did not simply explain that to Ms Bussell, his explanation to the Tribunal was; "I can't put it into words" . He went on to admit that he was struggling to give an explanation.

616. However in response to a question from the Tribunal the Claimant confirmed that he never said to the Respondent that he was not seeing any patients because he did not know which patients and wards he was responsible for.

617. The Tribunal do not accept the Claimant's evidence on this issue. It is simply not credible and at variance with what he was saying in the meetings with Ms Bussell and Ms Kruppa. His evidence about what was stopping him from carrying out his clinical duties, simply makes no sense.

618. Ms Bussell then states that the Claimant had been back at work since January;

"*but had not actually been doing the job. This was not acceptable anymore and he had fundamentally been in breach of his contract for the last 4 months He was saying he was back at work, but he was not doing what he should be "* [1442]

619. Ms Bussell stated that she felt the discussions were not progressing and that she would have to dismiss him with 3 months' pay in lieu of notice.

620. Ms Bussell confirmed there was no involvement by NCAS and she was unsure whether NCAS would have given guidance on the appropriate policy to follow. She confirmed if it had been a conduct issue she could not have dealt with the investigation but that she was " rusty" on the conduct policy.

621. In terms of how relevant the period of time was when the Claimant was not carrying out clinical duties her evidence was that that the extended period when he was not doing clinical duties; "was significant" and what was also significant was that they had not made progress about his return work . The extended period she defined as from 17 February 2017 when he returned from annual leave.

622. In cross examination specific the specific protected disclosures were not put to Ms Bussell. It was put to her only that she was aware the Claimant had made a number of protected disclosures to the Respondent and CQC, to which her unchallenged evidence was that she had no details of those disclosures and viewed that separately from the work she was doing to get him back to work. It was put to Ms Bussell generally that she dismissed the Claimant because he had made the protected disclosures but it was not put to her which of those it was being alleged was the sole or principal reason separately or together and indeed why it was being alleged she had been motivated by any of the disclosures.

Termination letter 24 April 2017 [1444]

623. Ms Bussell confirmed her decision in writing. She referred to the Claimant "refusing to return to work".

624. Ms Bussell referred to the past events he had complained about and that she felt it was his refusal to accept any closure which kept them alive.

625. She referred to the objection to the risk assessment and that there is nothing which put the Claimant at any different risk to any other member of staff and that his objections to it were a ; " red herring" and that this was an " unnecessary reason not to attend work".

626. Ms Bussell also states that the Claimant had fundamentally breached the contract as he had been fit to work for 4 months, been paid to undertake clinical work but refusing without any good reason.

Appeal [1449]

627. The Claimant submitted his appeal to Peter Wright on the 5 May 2017 [1449]

628. The Trust policy [381] refers to the membership of the panel being in accordance with the scheme of delegation for HR policies. We were not taken to this policy by either party. It was not put to Mr Wright however that the panel did not accord with this separate policy.

629. The Claimant complains in his grounds of appeal that the procedure was unfair, the process being flawed and new evidence had come to light. He does not elaborate on those grounds in the letter of appeal.

630. The Claimant is invited to an appeal hearing on 20 July 2017 and is invited to send in any further information in support of his appeal by 6 July 2017.

Hearing; 20 July 2017 [1467]

631. Ms Bussell then submitted her statement of case [1461] dated 20 July 2017. Responding to the Claimants grounds of appeal.

632. The Claimant's expanded on his grounds appeal a written document produced at this hearing [1457] which in summary were that;

- *The dismissal was because of his conduct.*
- *Failure to identify which policy was used and what stage was reached*
- *The MHPS, conduct and capability policies should have been followed.*
- *The policy refers to a decision by panel which had not happened.*
- *It is not accurate that he had been in breach of contract for 4 months*
- *The risk assessment did not take into account past events, there was little tailoring of it and there was no refence to a stress risk assessment.*
- *The risk assessment was not completed with the Claimant*
- *Additional support could have been obtained to assist with the risk assessment such a NCAS or external mediator and re-deployment opportunities discussed.*
- *At the time of his dismissal he and sought a meeting with Mr Fathers and refers to this dismissal as a further act of detriment because of the protected disclosures he had made.*

633. The meeting was reconvened to allow Ms Bussell a chance to respond to the specific grounds.

634. On the 23 August 2017 [1489] the Claimant wrote to the HR Manager , Catherine Duncan complaining about a number of matters including in summary;

1. That the appeal panel was too small : The panel consists of only Mr Wright and Clare Teeny in a dual role as panel member and HR advisor and both have had significant involvement in his case.

2. The need for a medical processional on the panel for medical profession specific matters and a representative from an outside organisation to provide a degree of scrutiny.

3. Questions the impartiality of the panel.

The appeal hearing was reconvened to 10 October 2017

635. Ms Bussell sent in a response to the grounds of appeal [1500].

636. She claimed it had become reasonable to conclude that the Claimant was never going

to agree to a return date [para 4.3 – 1503)

637. She confirmed that the R did not follow a specific policy because termination was for SOSR, on the grounds that the Claimant was dismissed because of his fundamental breach of his contract.; " essentially his refusal to undertake the work for which he was employer".

638. The reference to him fundamentally breaching his contract for 4 month reflects a " general picture" and the later absence were only treated as authorised because he stated he was not prepared to return to work. The implication the Tribunal find, being that although the leave was granted and approved, it was nonetheless taken into account as part of the decision making process as a period in which he was refusing or not willing to return to clinical duties.

639. That mediation was not deemed appropriate because his issues concerned the trust as a whole and not a specific person.

640. At the appeal the Claimant was represented by his BMA rep who was permitted to question Ms Bussell at length and the grounds of appeal were discussed.

641. What is not raised by the Claimant or his representative in the meeting is any evidence or reason linking the decision to dismiss to the alleged protected disclosure. The Claimant conceded in cross examination that he produced no evidence before the appeal panel to support his proposition that he was dismissed because he had arranged a meeting with Mr Fathers to discuss the protected disclosures. The communication with Mr Fathers is not a pleaded protected disclosure.

642. Mr Wright then set out his decision in a letter of the 17 October 2017 [1536]

643. Mr Wright stated that he found no fault in the process followed, that there are cases which do not fall neatly into conduct , capability or sickness but the Claimant had a hearing and an appeal. He referred to that by April 2017;

"management considered that you were simply unreasonably refusing to come to work and that this constituted a fundamental breach of your contract"

644. Mr Wright stated that he did not consider the statement that the Claimant had been in breach for 4 months was inaccurate or misleading presumably because as he states, the Claimant had done no work as a consultant psychiatrist in that 4 month period however, he neglects to explain how he can reasonably be considered to be in breach of the obligation to do such work while he is on induction or on annual leave .

645. It referred to the only alternative being to wait for some undefined time for him to return but that; " you were fit and able to work but you simply chose not to".

646. Under cross examination Mr wright gave evidence that it appeared to him that that in light of what he "had done" dismissal was a proportionate outcome

647. Mr Wright had not raised the issue of whether NCAS could have been involved and although generally aware of their role in response to a question from the Tribunal, could not explain in any detail their role and what assistance they may provide to help resolve these types of situations.

648. Mr Wright in response to a question from the Tribunal, gave evidence that if the case was not 'complex' , where a consultant was not carrying out his ward rounds Mr Wright

would take advice on which policy to apply. He also gave evidence that the 4 month period, formed part of his decision making process that the dismissal was fair.

649. Further Mr Wright stated that it was relevant to his decision that the Claimant was refusing to do the job and that he was holding an unreasonable position.

650. Mr Wright upheld the decision to dismiss.

Knowledge

651. Mr Wright in cross examination recalled receiving copies of emails that the Claimant had passed to Ms Bussell which related to the Claimant's suggestion that he had been victimised as a Whistle blower but he could not recall what the emails were but as there was no link established between the decision to dismiss and the alleged whistleblowing, he did not consider Whistleblowing to be a relevant issue

652. The Claimant did not lead evidence on what emails Mr Wright would have received, Mr Wright could not recall and had not retained copies. Mr Wright in cross examination was not challenged with reference to each of the protected disclosures that he had known about them at the time. He was not taken to each disclosure and it was not put to him which ones in particular he had known about and how he would have known about them. It was merely put to him in cross examination in general terms that he had knowledge of the Claimant having been a Whistle-blower. The email Mr Wright sent to Ms Bussell after the meeting with the Claimant on 12 March 2017 [p.1412] only records basic details, including that none of the patient cases had been looked at, but it does not detail which patient cases and what information the Claimant had disclosed about them.

653. The Tribunal therefore find that there is not sufficient evidence to make a finding that Mr Wright had knowledge of any specific pleaded protected disclosure, this was simply not addressed in cross examination in that detail and nor did counsel address in his submissions what knowledge we should conclude Mr Wright had and of which alleged protected disclosures.

Submissions

654. We have considered in full the written and oral submissions of counsel and address those in our conclusions and analysis.

Legal Principles : Public Interest Disclosures

655. The relevant statutory provisions are as follows;

Section 43A ERA : Meaning of "protected disclosure".

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.

Section 43 B ERA Disclosures qualifying for protection.

(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.

…

Disclosure of information: section 43B ERA

656. The disclosure must be of information. This requires conveying of facts rather than the mere making of allegations: Cavendish Munro Professional Risks Management Ltd v Geduld [2010] ICR 325 EAT

Reasonable belief in the wrongdoing

657. ***Soh v Imperial College of Science, Technology and Medicine EAT 0350/14*** **:**The EAT observed as long as the worker reasonably believes that the information tends to show a state of affairs identified in S.43B(1), the disclosure will be a qualifying disclosure for the purposes of that provision even if the information does not in the end stand up to scrutiny.

658. When considering whether a worker has a reasonable belief, Tribunal s ***should take into account the worker's personality and individual circumstances.*** The focus is on what the worker in question believed rather than on what a hypothetical reasonable worker might have believed in the same circumstances. ***Korashi v Abertawe Bro Morgannwg University Local Health Board 2012 IRLR 4, EAT*****.**

Likelihood of occurrence

659. **Kraus v Penna plc and anor 2004 IRLR 260, EAT** : In the EAT's view, 'likely' should be construed as '***requiring more than a possibility, or a risk, that an employer (or other*** person***) might fail to comply with a relevant legal obligation'***. Instead, 'the information disclosed should, in the reasonable belief of the worker at the time it is disclosed, tend to show that it is *probable or more probable* than not that the employer will fail to comply with the relevant legal obligation'

Public Interest

660. The worker must have a reasonable belief that the disclosure is in the public interest but that does not have to be the worker's predominant motive for making the disclosures. We have taken into account the guidance of Lord Justice Underhill's and his comments **Chesterton Global Ltd. v Nurmohamed [2018] ICR** 731 CA including at paragraphs 27 to 30 and reminded ourselves that; *"All that matters is that the Tribunal finds that one of the six relevant failures has occurred, is occurring, or is likely to occur and should be careful not to substitute its own view of whether the disclosure was in the public interest for that of the worker. That does not mean that it is illegitimate for the Tribunal to form its own view on that question, as part of its thinking – that is indeed often difficult to avoid - but only that that view is not as such determinative.."*

661. In ***Chesterton*** the EAT stressed that the test of reasonable belief remains that set down by the Court of Appeal in ***Babula v Waltham Forest College 2007 ICR 1026, CA*** and we have reminded ourselves of the findings and guidance in that case also namely that the definition has ***both*** a subjective and an objective element. The subjective element is that the worker must believe that the information disclosed tends to show one of the six matters listed in sub-section and the objective element is that that belief must be reasonable and, a belief may be reasonable even if it is wrong.

662. When considering the public interest the Court of Appeal in Chesterton made the following observations of Lord Justice Underhill;

*35. …..It is in my view clear that the question whether a disclosure is in the public interest depends on the **character of the interest served** by it rather than simply on the numbers of people sharing that interest. …*

Public interest: Criminal offence

663. We have ***considered*** the comments of Lord Justice Morris's in ***Ellis v Home Office 1953 2 QB 135, CA***, on the public interest in *justice being seen to be done*.

664. We now ***turn*** to each of the disclosures.

Conclusion and analysis - the alleged protected disclosures

PID 2 [p. 490 – 492]: 29 November 2011

Did the Claimant make a qualifying disclosure to the Respondent?

665. There is no dispute that the letter of the 29 November 2011 was sent to Dr Harris from the Claimant and that it qualifies as a disclosure to the Claimant's employer for the purposes of **43C ERA.**

Was that a disclosure of information?

666. It is accepted by the Respondent in its submissions, that PID 2 qualifies as a protected disclosure pursuant to section 43B(1)(d) namely, *that in the reasonable belief of the Claimant this was a disclosure of information that the health and safety of any individual has been, is being or is likely to be endangered and the disclosure was in the public interest*

667. That *this* was a protected disclosure is therefore no longer an issue for determination by the Tribunal.

Conclusion on PID 2

In conclusion, PID 2 does meet the test under section 43A ERA.

PID 4 [p.493] : Verbally to Dr Wallace on 2 June 2012: Health and Safety – section 43B (1)(d) ERA only

Did the Claimant make a qualifying disclosure to the Respondent?

668. it is not in dispute that the Claimant had a job planning meeting with Dr Wallace and Dr Krishnan on 2 June 2012.

669. There is no dispute that the disclosure was made to the Claimant's employer for the purposes of **43C ERA.**

Was there a disclosure of information?

670. The Respondent does not concede that this disclosure qualifies as a protected disclosure.

671. The Claimant in the list of issues identified this as a disclosure that; "*a risk assessment and plans should have been put in place to protect staff health and safety at work concerning boundaries"* and as set out in the Clarification Information for Preliminary Hearing on 14 December 2020 document (Clarification Document) ;

"*That information can be described as the Claimant reporting information that a therapist/*psychologist *[2] had engaged in unauthorised contact with the discharged patient 4 .* Specifically*, he distributed a letter passing between 2 and 4 which demonstrated that 2 had kept in contact with 4 in breach of guidelines which represented a safeguarding issue."*

672. The disclosure the Claimant relies upon relates to the issue about patient 4 and clinician 2 specifically, rather than the reference to Dr Tombs not passing on past boundary issue concerns or that there had been no review in relation to patient 1. Although he refers to his concerns about disclosures being concealed as a result of information not passed on by Dr Tombs, in the list of issues and further particulars of his claim set out in the Clarification Document, he confirms that he is relying in relation to this disclosure, on section **43B (1)(d) only** i.e. not on deliberate concealment of information but on endangerment to health and safety.

673. The Claimant we are satisfied disclosed information, he was not making mere allegations or asking questions, he was providing information, whether it was already known or not, that patient 4 had made allegations of an inappropriate relationship with clinician 2 .

Reasonable belief – health and safety

674. Despite Dr Wallace's evidence under cross examination that the issues raised were historic and if they were not, an SRI should have been raised and that issues such as those raised in the letter are "*routine"* for high secure hospitals such as Rampton, that does not detract from the issue of whether the information disclosed tended to show that the health and safety of a patient or member of staff **had been**, was being or was likely to be endangered.

675. The issue of whether such issues were the "*business of the hospital*" is relevant potentially to the question of why they were not escalated and to the issue of whether they resulted in detriment, not to whether the disclosure tends to show the requisite malpractice.

Allegation of relationship

676. The Tribunal conclude that information that a patient had made an ***allegation*** of an inappropriate relationship however does **not** however meet the required threshold of endangerment being "*likely".*

677. Whether the information disclosed is that the malpractice is "*likely",* requires more than a mere *allegation*: applying the **Kraus v Penna** guidance. Without more to support the *likelihood*, it does not we consider amount to disclosing information that tends to show that endangerment to health and safety is *probable or more probable* in terms of whether it has happened, is happening or will happen. We conclude that it would not be reasonable for the Claimant objectively to hold such a belief.

678. In any event, as confirmed in the list of issues, the disclosure relied upon is the contact with patient 4 rather than the allegation of a relationship.

Unauthorised contact

679. With respect to the disclosure about contact with the patient 4 without authorisation; according to the notes of the meeting, the Claimant is not 'alleging' there was unauthorised contact, he is stating that there was no authorisation as a matter of fact.

680. There are two further issues to consider however, the first is the point explored in cross examination that this belief could not have been held by the Claimant because he was not the patient's RC at the time and could not have known therefore whether authority had been given or not and thus his stated belief was not reasonably held

681. Further, the requisite test is not whether there was a health and safety risk but whether the health and safety of an individual was or was likely to be; "***endangered"***

682. Did the information the Claimant disclosed at this meeting about the contact tend to show in his reasonable belief that there was a likelihood of ***endangerment*** to health and safety?

683. Endangerment is not defined in the legislation however the Oxford English dictionary defines it as **harm or damage**.

684. The Tribunal conclude that even if the belief that there had been unauthorised contact did not stand up to scrutiny, the Tribunal accept that in the absence of having seen the supervision records, the information which he disclosed in the letter tended to show a reasonable belief that unauthorised contact had taken place, taking into account the context, i.e. the allegation of a relationship.

685. The Tribunal is not persuaded however on the evidence, that it was objectively reasonable for the Claimant, taking into account his experience, to hold a belief that the information disclosed tended to show that the contact was likely to or to had harmed or damaged patient 4. We take into account the failure by the Claimant to produce before this Tribunal any evidence of what was actually in the letter that was sent to patient 4 .

686. The Claimant did not explain even what the 'gist' of the letter was. He gave no evidence about its content and no reference to its content is in the notes he himself made of that meeting.

687. The letter of itself may have been perfunctory and professional. It may have been in itself, harmless. The Claimant did not comment on what it stated and counsel for the Claimant never put to Dr Wallace or indeed any of the witnesses, what it contained or even the nature of it.

688. The mere fact of contact *may* have been outside of the applicable guidelines and that *may* have meant that clinician 2 was acting in breach of a legal obligation the clinician and/ or the Respondent were required to comply with and/or the clinician's ethical obligations, but that is distinct from a likelihood that the patient's health was likely to be (was or had been) **endangered by** that letter**.**

689. A perfunctory, short letter for example attaching only medical notes (an example of what it could have been put forward by Dr Wallace in cross examination), could not reasonably be viewed as giving rise to a probable risk of endangerment, harm or damage.

690. It seemed to be the Claimant's case that the mere existence of a letter was sufficient and while the Tribunal accept it may have of itself given rise to a BI, whether a crossing or violation, this would depend on the content and context, for example whether clinician 2 had also been found to be having a relationship with patient 4, (which was itself a mere allegation).

Reasonable belief public interest

691. The BIs the Claimant was raising in this meeting, the Tribunal accept, may only relate as Dr Wallace said in his evidence, to the safety of the patients and the staff at the hospital. Dr Wallace seemed to be of the belief that this cannot therefore be a matter of public interest.

692. The Tribunal however are mindful that it is not just a question of the mere number of people who may be impacted by the malpractice disclosed, it is the character of the interest served by it: **Chesterton**

693. It is also not for this Tribunal to substitute its view for the Claimant's, albeit of course we must apply an objective test when considering reasonableness.

694. We find little difficulty however, in coming to the conclusion that to ensure that patients who pose such a significant risk to the public are not exposed to BIs where this may impair their treatment and mental welfare (and indeed the welfare and safety of staff) , is a matter of public interest. Those who work at the hospital hold an important role in society to manage and treat these patients who are vulnerable, and abuse of that position is a public interest matter.

695. The Tribunal conclude that the Claimant did believe that this information was in the public interest. There is no allegation that he was making false claims or that he was not honest in his view of the seriousness of the issues he was raising. We conclude that objectively, taking into account his personal circumstances, it was reasonable for him to hold that view.

Conclusion on PID 4

696. In conclusion PID 4 does **not** meet the test under section 43A ERA on the basis that the Claimant did not have a reasonable belief that there had been malpractice as defined by section 43B (1)(d).

697. We have nonetheless gone on to address the issue of causation considering what we would have found had we held this to be a protected disclosure.

PID 5 : [p.494 – 496] Letter of 20 December 2012

Health and Safety section 43B(1)(d) and that information tending to show malpractice likely to be deliberately concealed.

698. We are concerned with the document at p. 494 only and counsel for the Claimant did not invite the Tribunal in submissions, to take into account any other document by way of context.

Conclusion on PID 5 (493)

Did the Claimant make a qualifying disclosure to the Respondent?

699. There is no dispute that the disclosure was to the Claimant's employer for the purposes of **43C ERA.**

Disclosure of information?

700. This letter does not contain a bare allegation but facts, namely that there had been interviews with the staff team and that the team had undergone a series of traumas which the Claimant then identified in the Clarification Document as being *; (a) serious boundary issues when they occurred were not reported to higher authorities (b) a former staff member had an inappropriate relationship with a patient (c) a patient (6) was being treated punitively whilst in seclusion.*

701. This does not just amount to an allegation that the staff team had undergone trauma but sets out the factual basis for that assertion. It is therefore a disclosure of information.

Reasonable belief: malpractice – health and safety? : section 43 (1)(d)

702. In submissions the Respondent concedes that this disclosure was a disclosure in the reasonable belief of the Claimant was tending to show that the health and safety of a person has been, is being or is likely to be endangered and was in the public interest. The Respondent does not dispute therefore that this is a disclosure for the purposes of section 43B(1)(d).

Reasonable belief : malpractice – concealment? : section 43B (1)(f)

703. The Respondent disputes that the information within this letter tends to show that in the reasonable belief of the Claimant, malpractice for the purposes of section 43 (1)(f) ERA i.e. that this was a disclosure in the reasonable belief of the Claimant that information tending to show a matter failing within one of the preceding paragraph ***has been***, or is likely to be deliberately concealed. . Specifically, that the health and safety of patients was being endangered was being concealed.

704. The Claimant accepted under cross examination that there was no *"hint"* of deliberate concealment within the letter.

705. The Respondent submits that what the Claimant is complaining about is an inadequate

investigation and the Tribunal is satisfied that this was the Claimant's belief at the time he sent this information and not that it tended to show an attempt to deliberately conceal information. What the Claimant was complaining about was a failure to pick up on what he considered was hidden in plain sight. He was complaining about and thus disclosing, information about an inadequate reporting process.

706. Counsel for the Claimant did **not** in his submissions, address the concessions made by the Claimant in cross examination with respect to his belief in what he was disclosing when making this disclosure and how those concessions should be treated by the Tribunal in its findings. Counsel for the Claimant did not seek to argue in his submissions that despite the concessions made by the Claimant, the disclosure was in his reasonable belief about deliberate concealment.

707. The Tribunal conclude that the Claimant did not believe and nor would it have been reasonable to believe, that the information he disclosed showed malpractice for the purposes of section 43B (1)(f).

In conclusion PID 4 does <u>not</u> meet the test under section 43A ERA for the purposes of section 43 B(1)(f) but <u>does</u> for section 43B(1)(d).

<u>PID 6: [p.497 – 498] : Report to Lee Brammer 19 Feb 2013.</u>

708. The Claimant clarifies in the Clarification Document and list of issues, that his disclosure was that a patient's property was not being properly managed and this posed a risk to patients, the staff and the hospital and specifically as set out in the Clarification Document, that;

a. *monthly mandatory checking of a specific patient's property was not taking place*
b. *a specific patient was using the identify of other patients to send and receive post (which is an act of fraud)*

Did the Claimant make a qualifying disclosure to the Respondent?

709. There is no dispute that the disclosure was to the Claimant's employer for the purposes of 43C ERA.

710. The Claimant relies upon section **43B(1) (a)** and **(d)**

Reasonable belief: malpractice – health and safety? : section 43 (1)(d)

711. The Respondent concedes that this disclosure qualifies as a protected disclosures pursuant to section **43B(1)(d)** which in the reasonable belief of the Claimant tends to show that the health and safety of any individual has been, is being or is likely to be endangered and that this was in a reasonable belief of the Claimant disclosure which was in the public interest. This is therefore not an issue the Tribunal has to determine.

Reasonable belief : malpractice - criminal offence : section 43 B (1)(a)

712. The Respondent does **not** concede that it is a disclosure for the purposes of section **43B(1)(a)**

713. In terms of whether objectively in the reasonable belief of the Claimant, the information contained in this letter tends to show that a criminal offence has been, is being or is

likely to be committed the Tribunal is not satisfied that objectively it was reasonable for the Claimant to hold that belief.

714. It is not accepted that the letter conveys sufficient information to show, in the reasonable belief of the Claimant, the commission of a criminal offence.

715. The mere contacting of people using someone's else's identify is not the Tribunal considers a criminal offence and the Tribunal do not consider that objectively it would be reasonable to consider that it was.

716. Objectively the Tribunal is not satisfied, taking into account the Claimant's experience and that he is an educated and intelligent individual, that it was reasonable for him to believe that the mere use of another person's identity gives rise to a criminal act. The Claimant does not even assert in this disclosure that patient 8 has used other identities *without their consent*. The Claimant merely refers to the patient writing letters using the identities of the patients. He does not set out in this letter the purpose of doing so.

717. The letter itself does not refer to the patient using another patient's identify to obtain goods by deception or even allude to it.

718. It was not submitted by counsel for the Claimant that we should see this letter in the context of any other alleged verbal or written communication.

719. The Claimant does not rely upon any surrounding discussions with Lee Brammer but relies solely on the contents of this specific letter of 19 February 2013 to establish a protected disclosure.

720. There was some confusion which arose from the wording contained in the list of issues in relation to PD6 and PD9 , in that the list of issues referred to section 43B(1)(a) but then goes on to refer to a *legal obligation* under the High Security Psychiatric Services Arrangements for Safety and Security Ashworth, Broadmoor Rampton Hospitals Directions 2011. Counsel for the Claimant confirmed however in submissions that the Claimant is only relying upon a *criminal* offence (not breach of a legal obligation) and the only criminal offence relied upon is that of ***fraud /theft*** and it is not being alleged by the Claimant that a breach of the 2011 Directions gives rise to any criminal liability.

Public interest

721. The Tribunal is satisfied applying the same reasoning as we applied to PD 4, that the disclosure in relation to the *health and safety concerns* was in the reasonable belief of the Claimant in the public interest, applying an objective test and the guidance in ***Chesterton***

In conclusion PID 6 does meet the test under section 43A ERA for the purposes of section 43 B(1)(d) but not for section 43B(1)(a)

PID 9: urgent relational security information [p. 499-503].

722. The Claimant relies upon section 43B(1) (a) and (d)

Did the Claimant make a qualifying disclosure to the Respondent?

723. There is no dispute that the disclosure was to the Claimant's employer for the purposes of 43C ERA.

Information?

724. The disclosure does not contain a bare allegation but sets out facts and the Tribunal is satisfied that it is a disclosure of *information.*

Reasonable belief: malpractice – health and safety : section 43 (1)(d)

725. The Claimant disclosed that a patient 8 had traded his morphine patch and that led to another patient overdoing on opiates: section 43(1)(d).

726. The Respondent concedes that this disclosure qualified as a protected disclosures pursuant to section **43B(1)(d)** namely that in the reasonable belief of the Claimant the health and safety of any individual has been, is being or is likely to be endangered and the disclosure is in the public interest.

727. This is therefore not an issue that the Tribunal is now required to determine.

Reasonable belief : malpractice - criminal offence : section 43 B (1)(a)

728. Counsel for the Claimant confirmed that there was an error in the list of issues (the same error as with PD 6) and although there is a reference to the 2011 Directions and breach of a legal obligation, the Claimant relies on section 43B(1)(a) and the criminal offence of theft/fraud.

a) Using the identity of other patients to obtain sports memorabilia

729. The Claimant refers in the report to the patient; "**falsely** using the identities**"** of other patients to obtain sports memorabilia/autographs. It is not expressed as a suspicion but he refers to this activity as having been '*detected*' . It is not a mere allegation but includes some factual context. The information we conclude, clearly indicated deception and obtaining of goods by these means.

730. Dr Wallace in cross examination confirmed that in his opinion this activity as described may amount to a criminal offence. In considering objective reasonableness, it is relevant to consider matters such as the individual's experience and therefore it is relevant to consider therefore whether a colleague working in the same environment with similar experience would have held such a belief.

731. We conclude that that the Claimant did believe and that objectively it was reasonable for him to believe that the information in this report, tended to show that the patient had obtained *goods by deception* and that this was a criminal act.

b) Patient stealing from the hospital shop

732. The disclosure is that the patient had; "*approximately in excess of 25% more items in this* possession *that he had purchased from the shop however, there is reference to staff believing that the staff had failed to scan them all which the Claimant views has "difficult to believe"* . Further, within the letter the Claimant also refers to CCTV footage which raises concerns patient 8 may be stealing.

733. Reading the information together, we conclude that the Claimant reasonably believed that what he was disclosing was information that a criminal offence had been, was being or was likely to be committed. While he is not categoric, he expressed the clear view that the explanation that the goods had not been scanned was difficult to believe (i.e. not credible) and in doing so therefore any reasonable interpretation of the information is that he is alleging that the most credible /likely explanation is that there

has been theft.

We find that this is a disclosure of information pursuant to section 43B (1)(a) ERA .

Public interest

Health and safety

734. Applying the same reasoning as we have applied in the previous disclosures, we conclude that the Claimant had a reasonable belief that the disclosure about the health and safety issues was in the public interest ,applying ***Chesterton.***

Fraud/Theft

735. We find that the Claimant had a belief and we find that it was on balance objectively reasonable to believe, that there was a public interest in preventing a criminal act taking place regardless of the number of potential victims, including both the obtaining of goods by deception /fraud and the theft as individual acts.

736. We accept Dr Wallace's unchallenged evidence however that such activities is '*par for the course'* in a high secure hospital and would not have been a matter which was of significant concern. However, we consider that it is reasonable for the Claimant to have considered that there is a public interest in disclosing the commission of a crime, regardless of whether that is minor theft or something more serious. It would be we find be contrary to the spirit of the legislation not to protect those who disclose commission of criminal act only if that criminal behaviour meets a certain threshold.

737. We also have regard to ***Ellis v Home Office*** and that there is a public interest in justice being seen to be done and as a society upholding the rule of law.

In conclusion PID 9 does meet the test under section 43A ERA for the purposes of section 43 B(1)(a) and section 43B(1)(d).

PID 13 : letter to Mr Parsons - [p. 504- 506]: section 43B (1)(f).

738. Within the list of issues and the further particulars of the claim, the Claimant refers to the information disclosed in this letter as the Claimant disclosing information that information has been concealed, specifically he was anxious that the very numerous health and safety and criminal offence issues he had raised with regard to name patients 1 and 8 had not been elevated for an external review.

739. The Claimant **only** relies upon section **43B (1)(f).**

Did the Claimant make a qualifying disclosure to the Respondent?

740. There is no dispute that the disclosure the Claimant's employer for the purposes of **43C ERA.**

Information?

741. The disclosure does not contain a bare allegation but sets out facts and the Tribunal is satisfied is a disclosure of information.

Is it a disclosure of information tending to show any matter falling within any of the preceding paragraphs in section 43B(1) ERA has been or is likely to be deliberately concealed?

742. The Claimant is clearly raising concern about an internal investigation into patient 1 not having been carried out and of the external Romero review team not having been given details of patient 1 and 8. The implication is that Dr Harris had given assurances that they would be given that detail but had not done so. The Claimant refers to the omission by Dr Harris as a '*coincidence*'. He appears to be insinuating that it may not actually be a coincidence but he is does not make an explicit statement to that effect. He is '*sowing'* the seeds of an idea that Dr Harris's behaviour may be intentional in terms of not escalating or addressing the concerns around patient 1 and 8.

743. The Claimant does not refer to concealment of information expressly but does refer to the failure to address the concerns by an internal investigation and the failure to pass details on to the external review team.

744. The Claimant does not we conclude in this information, disclose information which in his reasonable belief, amounts to a disclosure that information ***was*** being ***deliberately concealed*** rather he is raising concerns about inadequate measures that have been taken to address the specific concerns about patient 1 and 8.

745. The Claimant was not able he said in response to questions from the Tribunal, to identify a specific person who had concealed information deliberately and from his answers, he was not alleging that the Romero review team had concealed information, rather that they had not been sent information.

746. While the letter raises questions and refers to failings; to carry out an internal investigation and to inform the external review team of particular BIs, we conclude that it would not be reasonable objectively to believe that what he was disclosing was information tending to show that information was being concealed deliberately, that this had happened or was likely to happen.

747. While the Claimant insinuates that Dr Harris may not have wanted to address the issues around patient 1 and thus not carried out an investigation and not passed on information to the Romero team, he does not go as far as to set out information that tends to show that Dr Harris ***"had"*** concealed the information i.e. that he had hidden the information. That this was not what he considered himself to be doing in this letter is supported we find by his evidence in response to questions from the Tribunal when he stated that he was not able to and was not saying a specific person had been concealing information.

748. Counsel for the Claimant in his written submissions refers to the Claimant asserting that his transcripts had been deliberately concealed, however the letter of 5 December 2013 is prior to the outcome of the Romero report and there is no reference to the concealing of the Claimant's transcripts or interview notes.

In conclusion, we find that PID13 does <u>not</u> meet the test under section 43A ERA for the purposes of section 43 B(1)(f)

<u>PID 15: letter of 23 April 2014 to Sharon Rosenfeld [p.507 – 543]</u>

Did the Claimant make a qualifying disclosure to the Respondent?

749. There is no dispute that the letter was sent to Sharon Rosenfeld of the CQC on 23 April 2014 and the Commissioners of NHS England Midlands and the East. The CQC is a prescribed person within the public interest disclosure (described persons) order 2014 and thus this letter would qualify as a disclosure to a prescribed person section 43F ERA.

750. Counsel for the Claimant however in his written submissions does not rely upon section 43 F but submits that the Claimant is relying on section **43 C (2) ERA;** *"a worker who, **in accordance with a procedure** whose use by him is authorised by his employer, makes a qualifying disclosure to a person other than his employer, is to be treated for the purpose of this part is making the qualifying disclosure to the employer"*

751. The Respondent did not dispute that the disclosure fell within section 43C (2) nor concede the point.

752. Claimant's counsel did not refer us to any specific provision or procedure, however the whistleblowing policy [p.1748] does we find provide at paragraph 14 that the Respondent recognises its accountability within the NHS and in light of this provides that workers may want to contact the CQC and provides at paragraph 14.4 that in these cases there is no requirement to raise the matter internally.

753. The Tribunal is therefore satisfied that despite the Claimant not expressly taking us to this provision of the Whistleblowing policy in evidence or his counsel addressing this fully in his submissions, that the Claimant had made a disclosure to an appropriate body pursuant to section **43C ERA.**

Disclosure of Information

754. The disclosure does not contain a bare allegation but sets out facts and the Tribunal is satisfied is a disclosure of information.

Is it a disclosure of information tending to show any matter falling within any of the preceding paragraphs in section 43B(1) ERA has been or is likely to be deliberately concealed? The Claimant relied only upon section 43B(1)(f) ERA.

755. The Claimant only relies upon section **43B(1)(f)** in relation to this disclosure, i.e. 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**. The malpractice being deliberately concealed relates to the endangerment to health and safety along with criminal acts being committed.

756. While within this letter the Claimant complains about the information that the review team had not been supplied with, what he describes as, important background documents, he does not allege that this had been deliberately withheld from them.

757. Under cross-examination it was put to the Claimant that nowhere within this letter (which was written after the Romero review) does he allege "*deliberate concealment"* of information. The Claimant gave evidence that he had by this stage logged his concerns with the CQC and his concern that the Romero report, or those conducting the Romero report rather, may not have been given the necessary information to adequately investigate but accepted in cross examination that at this stage he did not have the necessary information to say that there had been concealment which was "*deliberate*" but that; "*I can only suspect*".

758. When asked by the Tribunal to clarify his position on this disclosure, the Claimant stated

that with respect to this disclosure; "*I am **not** saying there had been deliberate concealment*" (page 507).

759. Further, under cross-examination the Claimant agreed with Counsel for the Respondent that in broad terms his case is not about deliberate concealment but, at best, his view that there had not been an adequate investigation and **not** that there had been some sort of conspiratorial concealment. He gave evidence that: "*I agree, but it is reoccurring pattern of missing information to carry out adequate investigation but one cannot say **deliberately***".

760. Counsel for the Claimant did not engage with this admission in his submissions and did not address us at all on the relevance of it to our findings.

Conclusion on PID 15

761. The Claimant conceded in cross examination that he had not been saying in this disclosure that the Respondent had been, was being or likely to have deliberately concealed information tending to show that the health and safety of any individual had been, was being or likely to be endangered or information about the commission of a criminal offence. Further and in any event, the Tribunal do not conclude that objectively it would be reasonable for the Claimant to hold a belief that this letter tended to show that there had been deliberate concealment of such information.

In conclusion PID13 does <u>not</u> meet the test under section 43A ERA for the purposes of section 43 B(1)(f)

<u>PID 19: letter of grievance - 26 October 2016 [p.544-557]</u>

762. The Claimant relies upon section 43B(1) (f) only: deliberate concealment.

Did the Claimant make a qualifying disclosure to the Respondent?

763. There is no dispute that the disclosure was to Ruth Hawkins, Chief Executive of the Trust and thus to the Claimant's employer for the purposes of **43C ERA.** He had also copied in the CQC and ICO.

Information?

764. The disclosure does not contain a bare allegation but sets out facts and the Tribunal is satisfied is a disclosure of information.

Is it a disclosure of information tending to show any matter falling within any of the preceding paragraphs in section 43B(1) ERA has been or is likely to be deliberately concealed? The Claimant relied only upon section 43B(1)(f) ERA.

765. The Claimant states in his Clarification Document and within the list of issues that he was disclosing information that in his view information was being concealed and that specifically *he was anxious that the very numerous health and safety and criminal offence issues he had raised with regard to named patients 1 and 8 had not been elevated for external review.* And that this was a disclosure of information that the health and safety of individuals was being endangered and that criminal offences had been committed and that this information was being **concealed**.

766. At no point did the Claimant make an application to amend his claim and the list of issues make it clear that the Claimant is relying **only** upon section **43B (1)(f) ERA**.

Conclusion on PID 19

767. The Claimant conceded in cross examination that he was not disclosing that there had been deliberate concealment rather that he was "*hinting at it*" and taking into account that concession, we conclude that the Claimant did not hold a reasonable belief that the information he was disclosing tended to show that deliberate concealment had taken place or that he was " likely" to do so. His own belief as he conceded, was that what he was disclosing was no more than a suspicion and a 'hinting' at such concealment and to say that it was disclosing deliberate concealing would be; " *putting it too strongly".*

In conclusion PID13 does not meet the test under section 43A ERA for the purposes of section 43 B(1)(f).

Detriments: section 47B ERA

legal principles

768. *The* statutory *provision is set out at Section 47B ERA:*

(1)A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to **act***, by his employer done on the ground that the worker has made a protected disclosure.*

Detrimental Treatment

769. ***Ministry of Defence v Jeremiah 1980 ICR 13, CA*****,** Lord Justice Brandon said that 'detriment' meant simply 'putting under a disadvantage'.

770. House of Lords in ***Shamoon v Chief Constable of the Royal Ulster Constabulary 2003 ICR 337, HL*****.** Lord Justice Brightman stated that a detriment 'exists if a reasonable worker would or might take the view that [the action of the employer] was in all the circumstances to his detriment'. It is not necessary for there to be physical or economic consequences to the employer's act or inaction for it to amount to a detriment.

Causation

771. In order for liability under section47B to be established, the worker must show that the detriment arises from the act or deliberate failure to act by the employer: ***Abertawe Bro Morgannwg University Health Board v Ferguson 2013 ICR 1108, EAT*****.**

Burden of Proof

772. Section 48(2) of the Act provides: "*(2) On a complaint under subsection (1), (1ZA), (1A) or (1B) it is for the employer to show the ground on which any act, or deliberate failure to act, was done.*

773. **Court of Appeal in NHS Manchester v Fecitt [2012] IRLR 64,** the Tribunal must determine whether the protected disclosure in question materially influenced (in the sense of being more than a trivial influence) the employer's treatment of the whistle-

blower

774. The EAT summarised the approach of drawing inferences in a detriment claim in ***International Petroleum Ltd and ors v Osipov and ors EAT 0058/17*:** the burden of proof lies on a Claimant to show that a ground or reason (that is more than trivial) for detrimental treatment to which he or she is subjected is a protected disclosure that he or she made, the employer (or worker or agent) must be prepared to then show why the detrimental treatment was done otherwise inferences may be drawn against the employer.

Detriment: conclusion and analysis

775. Regardless of concluding that the Claimant only made the following protected disclosures: PIDS ; 2 , 5 , 6 and 9, we have nonetheless gone on to consider whether any of the alleged detriments were done on the ground of any of the alleged protected disclosures.

Detriments

776. The Claimant failed to lead any evidence on alleged detriments 1, 6, 8, 9, 10.

777. Brief reference is made in the Claimant's witness statement to detriments 11 and 12.

778. No evidence at all has been lead/or explanation provided in submissions as to any causal connection between the alleged detriments and the alleged protected disclosures other than the Claimant refers to the fact that he had raised so many alleged protected disclosures and there had been so many things which had happened to him. The Tribunal is in effect, being asked to a draw an inference from those facts, although counsel for the Claimant did not put it as directly as that.

Detriment 1

779. *Removal of the medical psychotherapy part of the Claimant's position in September 2012 to 2014 by Dr Mike Harris, Dr John Wallace and Dr Gopi Krishner. The Claimant asserts that this detriment* started *close to the time of raising protected disclosures and that conflicting reasons were given for trying to justify the change.*

780. The Claimant relies he says upon all the alleged protected disclosure however, the only alleged disclosure he made direct to Mr Harris was **PD 2 [490 – 492] on 20 November 2011** . The communication of the decision to remove the psychotherapy training and development funding was made to the Claimant almost a year later, on **27 September 2012** which was before any of the other alleged protected disclosures were made (other than the PD4 which was made to Dr Wallace).

781. We have considered the proximity in time to the decision communicated to the Claimant to cease the funding for the psychotherapy position, to, in particular PD 1.

782. We have also considered the **PID 2 [29 November 2011]** letter in the context of the exchange of correspondence leading up to it (although counsel for the Claimant did not in his submissions specifically address that or invite us to draw any inferences from those background communications) nevertheless, we have done so and taken into consideration the fuller context in which the letter was sent. We have set that background out in some detail in our findings of facts.

783. The letter of the 29 November 2011/PD2 followed previous letters to Dr Harris. There is an acceleration of correspondence it appears from the documents at least supplied

in the bundle, during February 2011 through to October 2011 [p.569] in which there had been exchanges between them where the Claimant had raised concerns over BIs . In response Dr Harris sends some rather terse responses, as addressed in our findings

784. The response to **PD2** [p.587] is a letter of the 29 November 2011 which reveals further frustration [p.590]. Dr Harris writes on the 28 December 2011 making the *'vexatious'* comment.

Conclusion on detriment 1 :

Was it a detriment at all?

785. The Respondent argues that the Claimant's training and development opportunity had run well over the anticipated 18 months to 2 years. The Claimant had in fact been given a significantly extended period of time in which to acquire his accreditation. Accordingly, it is not admitted that the Claimant was subjected to a detriment when the funding for his training ceased, albeit it is acknowledged by Dr Mike Harris that the Claimant was '*understandably…not happy about this*' when informed in September 2012.

786. The Respondent had funded the training past the original two years and the Claimant had not been told that the funding would cease thereafter at any particular point before he had completed his training . This we conclude did give rise to a possible expectation (or at best a hope) on the Claimant's part that he would continue to be supported until the training had completed. Regardless there was a decision to cease the funding and as the Respondent concedes, the Claimant was not happy about that.

787. The Claimant was disadvantaged by the decision to end the funding for the psychotherapy work because it was a role he clearly enjoyed or in any event, wanted to continue in and that is sufficient we consider to amount to a disadvantage.

Causation?

788. The Claimant relies upon all the above protected disclosures in respect of this detriment.

789. The Claimant asserts *that* he was the only employee to have part of his role removed and the only employee to have raised repeated protected disclosures. The Claimant did not refer to any other consultant in a similar training role. He does not allege that anyone took over the psychotherapy role and it would seem remarkable for a trust to disband a valuable service because of concerns raised about BIs, not least we accept, given the evidence of Dr Harris, (supported by the Romero review) that he considered that these BIs had been adequately dealt with.

790. We accept the unchallenged evidence of Dr Harris about the need for cost reduction and that it was his decision which was taken in September 2012. We also take into account that this was some time after the 29 November 2011 letter, almost a year later and follows the Claimant informing Dr Harris that his training would be completed in September 2015 (some 4 years away and 7 years in total [p. 582]. Dr Harris had raised concerns about how long the training would be completed prior to the PD to him. .

791. We do not consider that the fact that the Claimant had secretarial support to carry out the psychotherapy work is supportive of an argument that this was considered by Dr Harris to be a substantive role. It is not disputed that he carried out psychotherapy work

and needed this support to do so.

792. The Claimant conceded in cross-examination that it could be called a '*development* opportunity' in relation to psychotherapy.

793. We found Dr Harris a credible witness. He admitted to feeling some frustration with the Claimant however, the Romero report was commissioned and the Claimant was permitted to put forward whatever information he wanted to . Further, the Claimant was able to put forward a paper setting out a case for a Medical Forensic Psychotherapist post at Rampton to the Forensic Medical Staff Committee. The preferred vote of the Committee was not that of a Medical Forensic Psychotherapist [p.748-753].

794. The evidence of Dr Mike Harris which was not challenged, was that the Forensic Service budget was subject to a cost improvement programme year on year (equivalent to £5 million pounds). In addition, Dr Mike Harris had been tasked with finding an additional 11% cost improvement specifically for the Peaks Unit. To meet these cost savings extreme measures such as ward closure(s) had been implemented.

795. We find on a balance of probabilities, that the removal of the training and development role was in no sense whatsoever connected to any alleged protected disclosures. There is no evidence to suggest otherwise. We do not consider that a reasonable display of some frustration over repeated issues being raised on matters which Dr Harris felt had been resolved and in circumstances where he felt the Claimant was informing him of steps taken to deal with BIs which Dr Harris was well aware of, should give rise to an inference that he was influenced by this when he took the step to ceasing funding for the psychotherapy work. Nor do we find that we should draw any inference adverse to the Respondent by the fact that the Claimant would go on over the next few years to make other alleged protected disclosures and be subject to other alleged detriments by various other people.

796. As the Respondent rightly points out in its submissions, whilst the Claimant submitted a grievance on **21 November 2013** (which predates **PD13, PD 15 , PD19**) against the alleged removal of the medical psychotherapy part of his position, he did not claim that it was related to him having made an alleged protected disclosure(s) [p. 770-772]. Nor was the need to make cost savings challenged during cross examination of Dr Harris.

797. There has been no evidence advanced to demonstrate that the alleged protected disclosures and in particular the two alleged protected disclosures which predate the communication of the decision to the Claimant, had any material influence on the decision.

798. Counsel for the Claimant submits that the dearth of psychotherapists nationally is undermining of the Respondent's position however, we simply do not accept that. Whether there is a shortage or not does not mean that there is funding available and specifically not funding within the Respondent for this service to be provided, bearing in mind the unchallenged evidence of Dr Harris that other staff could provide psychotherapy and he does not seek to diminish it has a valuable service . It is the funding and not availability of such specialists which we accept was the issue and his evidence around the funding was not challenged by counsel for the Claimant in his cross examination of Dr Harris.

799. The complaint that the Claimant was subject to tis alleged detriment on the ground that had made a protected disclosure ***is not well founded*** .

Detriment 6

800. *Dr Harris blocked the Claimant's grievance submitted on 21 November 2013 regarding* proposed *changes to his terms of employment. The Claimant asserts that he verbally told Dr Harris that he wished* to *raise a grievance on 14 October 2013, and that the grievance was lodged with Dr Harris and Dr Wallace on 21 November 2013.*

801. The Claimant relies upon all the above protected disclosures in respect of this detriment.

Analysis and conclusion on detriment 6:

Detriment?

802. On balance we accept that the Claimant had wanted to issue a grievance to explore whether the proper consultation process had been followed when the removal of the psychotherapy service was removed in September 2012.

803. While Dr Harris we accept considered that the role had been removed in 2008, the documents are open to a level of interpretation in terms of what had been agreed and it was reasonable for him we find, to consider that being told that the grievance process was not an appropriate forum for his complaint was a disadvantage. To deny a different route of redress, may reasonably be considered a disadvantage.

Causation?

804. The Claimant had not raised in his grievance in November 2013 a whistle-blowing complaint. He did not link at the time this decision to any alleged protected disclosure.

805. The Claimant has not put forward any evidence to suggest that the decision was influenced by any of the protected disclosures. He relies on a 'scatter gun' approach, in that he seeks to rely on all of the alleged protected disclosures regardless of who they were made to and whether they were even made before the detriment took place (i.e. he relies on disclosures made after the detriment in April 2014).

806. We accept the evidence of Dr Harris which we considered to be credible. We accept that he considered that the mediation process was simply the most appropriate forum to resolve this type of issue. We also take into account that it is not disputed that the Claimant could have escalated the matter above Dr Harris if he was not happy with the response from Dr Harris, it was open to him to do so, but he did not, which may well have been because he accepted mediation was the proper avenue to follow.

807. The complaint that the Claimant was subject to the alleged detriment on the ground that had made a protected disclosure ***is not well founded***

Detriment 8

808. Unlawful *reduction of the Claimant's salary by Dr Steve Geelan in April 2014.*

809. *The Claimant relies upon all the above protected disclosures in respect of this detriment.*

Conclusion and analysis on detriment 8:

Detriment ?

810. The Respondent submits that the Claimant's salary was reinstated following the Job Plan Appeal decision and requirement to resume full time duties as a Forensic Consultant Psychiatrist in September 2014 [p.1021-1023] and that as the pay was reinstated, there was no actual detriment.

811. We conclude that it was a disadvantage for the Claimant to suffer a pay cut even thought this was later reinstated. The Claimant referred during cross examination to being out at a financial disadvantage during the period when the pay cut was effective, which was not challenged.

812. We find that the pay cut was a detriment.

Causation?

813. There is no direct evidence advanced by the Claimant to establish the necessary causal connection between any alleged protected disclosure and the decision to reduce his pay. Counsel for the Claimant made no submissions to the contrary other than to refer to the Claimant being the only one to have his pay cut and the only employee to have raised repeated protected disclosures. However, the Claimant does not identify someone in his position who had been treated differently (i.e. someone who had not agreed a return to full time duties and was continuing to be paid full pay while duties the Respondent wanted him to return to were being covered by a locum). There is no requirement for a comparator but if he is comparing his situation, his unique situation is not reliable evidence of itself in these circumstances.

814. We accept as credible Dr Harris's evidence that it was likely that he instructed the RRP to be reduced to the extent that it related to the 50% of the role the Claimant was not performing.

815. Dr Harris was a credible witness and he put forward a cogent explanation. Whether the policy permitted the reduction of his pay or not (and we were not taken to any document which it is alleged authorised this), the Tribunal consider that it was understandable that Dr Harris felt a degree of frustration that having understood a return to work date had been agreed, the Claimant did not return to full time duties. The Claimant was a highly paid consultant and the Respondent was compelled to continue to pay a substantial sum in locum costs to cover the work they wanted him to perform.

816. The Tribunal find that there is no evidence to link to any of the alleged protected disclosures to the decision Dr Harris made.

817. Again a 'scatter gun approach' is employed by the Claimant in relying on all the alleged protected disclosures even where they clearly postdate this alleged detriment. For example in the list of issues the Claimant specifically refers to the unlawful reduction taking place in April 2014 and yet relies upon a grievance to Ms Hawkins in October 2016 [PD 19] as having influenced the decision by Dr Harris to cut his pay two years earlier. The Claimant had the benefit of legal advice and counsel throughout this hearing however there was no attempt to revisit the list of issues and how the claim is put. This approach in our view undermines the Claimant's case that he genuinely believed that any particular alleged protected disclosures made before the alleged detriment, influenced the decisions.

818. The Claimant had not identified these disclosures as whistleblowing disclosure at the time, although he was familiar with the policy.

819. The Tribunal conclude that the Respondent's explanation was credible and provides a satisfactory explanation for the action taken. The evidence does not support a finding that any of the alleged protected disclosures influenced this decision materially or at all.

820. We conclude that the protected disclosures played no part in the reduction in the Claimant's salary.

821. The claim the Claimant was subject to the alleged detriment on the ground that had made a protected disclosure is **not well founded**

Detriment 9

822. *False* accusations *by Jane Rollinson in August 2014 that the Claimant used an item of Hospital property that then went missing.*

823. The Claimant relies upon all the above protected disclosures in respect of this detriment.

Detriment

824. In the circumstances, the mere provision of the email itself setting out the events which had taken place, we do not consider amounts to a detriment.

825. In his submissions, counsel for the Claimant submits that; "*Ms Rollinson had not directly accused the Claimant of any wrongdoing but that the situation was handled rather poorly".*

826. However, counsel did not go on to deal with who it is alleged was responsible for the alleged poor handling of the matter and in what specific respects it was handled poorly . The allegation of detriment however is not about someone's poor handling of the situation, but an alleged false accusation by Ms Rollinson.

827. There was no application to amend this part of the claim. It remains an allegation that this Ms Rollinson had made a false accusation albeit counsel in his submissions appeared to accept that it was not a false allegation at all.

828. A false allegation of theft would be a detriment but no such allegation was made by Ms Rollinson.

Knowledge

829. Ms Rollinson provided a witness statement in which she denied having been copied into the alleged protected disclosures and of having any knowledge about them.

830. Ms Rollinson under cross examination was asked when she got to know about the alleged protected disclosures and gave evidence that it was only during the course of these proceedings. She was not challenged on that evidence.

831. The Tribunal find that it is has not been established by the Claimant that Ms Rollinson had any knowledge about the alleged protected disclosures. The Claimant has failed to establish on a balance of probabilities in any event, that the behaviour of Ms Rollinson was ***done on the ground*** the Claimant made any of the alleged disclosures. We conclude that the alleged protected disclosures played no part whatsoever in the

information supplied by Ms Rollinson, which was not in any event, a false allegation.

832. This claim the Claimant was subject to the alleged detriment on the ground that had made a protected disclosure is **not well founded**.

Detriment 10

833. *Failure to be* provided *with annual leave and information regarding annual leave by Dr John Wallace in April 2017.*

834. In his further and better particulars provided on 1 July 2021 the Claimant clarifies that his case is that during September 2014 he "*uncovered*" that he was not being given the correct entitlement to annual leave (the Claimant says he was entitled to 34 days per annum in line with his NHS contract). The Claimant clarifies that the detriment is in relation to not being provided with accurate information regarding his annual entitlement, the start date of the entitlement and the financial arrears due.

835. The Claimant relies upon all the above protected disclosures in respect of this detriment.

836. The Claimant asserts that he was the only employee to be refused annual leave and the only employee to have raised repeated protected disclosures.

Conclusions and analysis

Detriment?

837. There was a period when it was unclear to the Claimant what his annual leave entitlement was and we conclude that this amounted to a disadvantage, even if the consequence of it was only to cause the Claimant some feelings of anxiety about whether his entitlement was being incorrectly calculated and about the delay in resolving this issue .The Claimant has however failed to give evidence on what, if any annual leave remained outstanding. We must therefore conclude that there was no outstanding annual leave as at April 2017 when his employment terminated.

Causation

838. It was not addressed with Dr Wallace in cross examination whether he had knowledge of all the alleged protected disclosures. He was not taken through those in cross examination . Although some of the disclosures namely PD4 and PD 9 were made to him directly, that was on the 20 December 2012 and 5 July 2013, a number of years prior to the date of this detriment.

839. The last alleged disclosure PD 19, which was made to Ms Hawkins on 26 October 201, was several months before this alleged detriment. In his evidence in chief (w/s 11) the unchallenged evidence of Dr Wallace was that he could not recall whether he had seen that letter and suspects that they were processed at a level above him. He gave the same evidence in relation to PD 15 (23 April 2014), PD13 (5 December 2013) ,and PD2 (29 November 2011) but accepted that he had seen the document PD9 [p.499]. This evidence about not seeing those alleged disclosures was not unchallenged.

840. Dr Wallace was taken to PD4 which had taken place 5 years before the alleged detriment. Dr Wallace gave evidence that these BI events raised by the Claimant had

been before his time and he did not consider them to be whistleblowing disclosures or otherwise require escalation. The Claimant had not raised that he considered they should be dealt with under the whistleblowing policy but further some of them were historical matters already looked into but otherwise he would have expected any other issues to be raised through the normal reporting procedures.

841. PD5 he accepted he had seen. However, this was again 5 years before the detriment on 20 December 2012. These were again historical issues but his evidence was that the Claimant was raising some good ideas for discussion at the boundary awareness group and he did not see those issues as presenting imminent risk. He did not treat that as a whistleblowing complaint and explained the reasons why not every issue that is raised about risk is dealt with under the Whistleblowing process i.e. patients in a high security environment such as Rampton present as high risk and such issues are ever present, it is 'part and parcel' of the environment in which they work.

842. PD 6 [p.497] is a report dated 19 February 2013, Dr Wallace was copied into this letter but could not recall it. Dr Wallace explained the risk presented by what was contained within this disclosure was a matter that would not to be addressed by the security department and the clinical team, it was for them to come up with a strategy and indeed that is what happened. The Claimant put in place the monitoring of patient 8's post.

843. Dr Wallace accepted under cross examination that he had seen PD9. This was a report dated 5 July 2013 which concerned patient 8. He did not see this as the Claimant raising serious security concerns. In any event, Patient 8 had requested a change of clinician from the Claimant and transferred on 8 July into the care of Dr Krishnan and Dr Wallace considered that it was a matter for Dr Krishnan as the new RC to deal with. That Dr Wallace considered that this was a matter for Dr Krishnan to deal with, was not challenged in cross-examination.

844. In terms of the annual leave, Dr Wallace gave undisputed evidence that he does not have the expertise to work out the holiday calculations and entitlements and thus involved Carol Dook medical services coordinator and Karen Waters head of HR.

845. We have reviewed all the exchanges of documentation and consider that there was genuine confusion with regards to the annual leave and that the Dr Wallace was attempting to resolve that with the assistance of others. We do not find that any incorrect information that was provided by Dr Wallace with regards to annual leave was deliberate.

846. Again, the Claimant employs a scattergun approach by relying upon all the protected disclosures.

847. There is reference to the Claimant in an exchange of emails [p.898/905] as 'OMC'. Dr Wallace was copied into those emails. Counsel for the Claimant submits that Dr Wallace feigned ignorance about what OMC meant during cross examination and that OMC is a 'codename' for the Claimant, the implication being that it was derogatory.

848. Counsel for the Claimant did not suggest however what OMC may be an abbreviation for and Dr Wallace in his evidence under cross-examination could provide no explanation other than at the time he had assumed that it must be some reference to 'medical consultant' but could not explain the addition of the letter 'O'.

849. The Tribunal found Dr Wallace to be a credible witness who admitted if he could not recall or did not know the answers to questions put to him. We found it credible that he

had assumed that 'OMC' was a reference to the Claimant's role as a medical consultant and we accept that he had not enquired further.

850. Taking all the evidence into account we do not consider there is evidence that supports a finding that Dr Wallace had subjected the Claimant to a detriment in relation to his annual leave entitlement on the ground that the Claimant had made any of the alleged protected disclosures. We accept the evidence of Dr Wallace, that he was not aware of a number of the alleged disclosures.

851. We conclude that none of the alleged protected disclosures materially influenced or indeed, played any part whatsoever in any failure to be provided with annual leave and information regarding annual leave by Dr John Wallace in April 2017.

852. This claim that the Claimant was subject to the alleged detriment on the ground that had made a protected disclosure **is not well founded** .

Detriment 11

853. *Failure to be provided with study leave by Louise Bussell at a return to work meeting on 29 March 2017 to attend a* Medical *Psychotherapy Annual Conference due to take place on 6 & 7 April 2017.*

854. The Claimant relies upon all the above protected disclosures in respect of this detriment.

855. The Claimant asserts that he was the only employee to be refused study leave and the only employee to have raised repeated protected disclosures.

Conclusion and analysis

Detriment

856. Counsel for the Respondent argues that it is debatable given the medical psychotherapy annual conference did not relate to the Claimant's post of consultant forensic psychiatrist, or any direct service need, that this amounts to a detriment.

857. We consider that it was reasonable for the Claimant to consider that to refuse to grant him study leave to enable him to attend a conference, which even if not directly related to the job may have been helpful for his future career or as a minimum related to a clinical field which he was interested in, was a detriment

Causation

858. We accept the submissions of counsel for the Respondent however, that Ms Bussell understandably explained that she felt that the Claimant's request for study leave was '*avoidant*' and she was '*struggling to get anything towards*' a return to clinical duties.

859. We find that Ms Bussell gave a credible and satisfactory explanation why study leave was not granted in these circumstances, namely that she wanted the Claimant to get back into his role before he took time off, particularly as this course was not directly relevant to the job he was to return to. The Tribunal accept the evidence of Ms Bussell that the Claimant's alleged protected disclosures played no part whatsoever in the decision to decline the study leave.

860. This claim the Claimant was subject to the alleged detriment on the ground that had

made a protected disclosure **is not** well **founded**.

Detriment 12

861. *Failure to be provided with* annual *pay rises by Dr John Wallace (continuing).*

862. In his further and better particulars provided on 1 July 2021 the Claimant states that he uncovered in September 2014 that he was not being provided with his annual pay progression in line with his contract by Dr John Wallace.

863. The Claimant relies upon all the above protected disclosures in respect of this detriment.

864. The Claimant asserts that he was the only employee who did not receive a pay rise and the only employee to have raised repeated protected disclosures.

Conclusion and analysis

Detriment

865. The Claimant confirmed that he was complaining about the 2014 increment and we find that it was not awarded to him in 2014 . We find that if this was a payment he was entitled to, to not have it awarded to him put him to a financial disadvantage.

Causation

866. Counsel for the Respondent submits that as Dr John Wallace explains in his evidence in chief, having reviewed the Job Plan form at page 168, it is likely that the Claimant was not awarded a pay progression increment by reason of his assessed failure to meet the eligibility criteria.

867. Given the history of difficulties in agreeing a job plan with the Claimant and failure of the Claimant to return to the full time duties of a Consultant Forensic Psychiatrist (and the consequences of this on Locum costs), it is not we conclude, unsurprising that the Claimant did not satisfy the eligibility criteria.

868. The review form was not completed by Dr Wallace, that is not disputed by the Claimant. The Claimant has not lead any evidence nor was it put to Dr Wallace that he had any involvement in the decision not to award an increment in 2014.

869. The Tribunal is satisfied on the evidence that Dr Wallace was not involved in the completion of the job plan review or in any discussions or decisions about whether an increment in 2014 should be paid. He had looked into the reasons for the non-payment of the 2009 increment in 2014 and communicated those to the Claimant. We find on balance that the 2009 increment was then paid and the situation rectified but are satisfied that Dr Wallace had no further involvement in the matter. Further, on a balance of probabilities, we find that the reason why it was not paid was because the form was not completed and that none of the alleged protected influenced materially that decision or at all.

870. This claim the Claimant was subject to the alleged detriment on the ground that had made a protected disclosure **is not well founded** .

Time Limits - detriments

871. The claim was filed on 20 August 2017.

872. The Acas early conciliation period was from 14 July to 21 July 2017.

873. We have addressed whether the claims of detriment are well founded. We turn now to the issue of time limits and the jurisdiction of the Tribunal.

Fact find - time limits

874. It is not in dispute that the Claimant is a member of the BMA and Medical and Dental Defence Union of Scotland (MDDUS).

875. The Claimant confirmed that he had the benefit of Union membership. The first time he had contacted the BMA was in 2008 when he requested assistance from them.

876. He confirmed that when he raised matters in March 2013, he was in receipt of support from his defence union and the BMA and in receipt of advice from them.

877. The Claimant also confirmed [p. 1612] that by July 2014 he was seeking legal advice about alleged whistleblowing complaints.

878. The Claimant confirmed that he has sought advice about whistleblowing and received advice about unlawful deduction of wages from his Union and Solicitors in connection with the issues around job planning and the 50% reduction in his wages. When all that was going on he was getting advice while he was still going through the mediation process and submitting appeals against the disciplinary hearing. He confirmed he had a lot of support at that time as he was "*fighting on a lot of fronts".*

879. The Claimant also confirmed that in 2014 he was aware that there were time limits to bring claims. He referred in cross-examination to a 3 month time limit and believing that there was a deadline. However, he refers to having made the decision on the advice of his Union representative to pursue mediation rather than issue proceedings in the Employment Tribunal . He was, as he put it, "*trying to re-form relationships*" so he thought it was best to pursue internal resolution.

880. He confirmed that during the disciplinary and appeal process, he remained able to access advice from his Union if he wished, including access to legal advice.

Time Limits - detriments

Section 48(3)(a) ERA provides that;

> ***48 Complaints to employment Tribunal s.***
>
> *(3)An employment Tribunal shall not consider a complaint under this section unless it is presented—*
>
> *(a)before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them, or*
>
> *(b)within such further period as the Tribunal considers reasonable in a case where*

it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

(4)For the purposes of subsection (3)—

(a)where an act extends over a period, the "date of the act" means the last day of that period, and

(b)a deliberate failure to act shall be treated as done when it was decided on;

and, in the absence of evidence establishing the contrary, an employer shall be taken to decide on a failure to act when he does an act inconsistent with doing the failed act or, if he has done no such inconsistent act, when the period expires within which he might reasonably have been expected to do the failed act if it was to be done

881. ***Barclays Bank plc v Kapur and ors 1991 ICR 208, HL***: Their Lordships drew a distinction between a continuing act and an act that has continuing consequences. They held that where an employer operates a discriminatory regime, rule, practice or principle, then such a practice will amount to an act extending over a period. Where, however, there is no such regime, rule, practice or principle in operation, an act that affects an employee will not be treated as continuing, even though that act has ramifications which extend over a period of time.

882. In ***Commissioner of Police of the Metropolis v Hendricks 2003 ICR 530, CA***: The concepts of 'policy, rule, scheme, regime or practice' are merely examples of when an act extends over a period and should not be treated as a complete and constricting statement of the indicia of 'an act extending over a period'.

883. Court of Appeal in ***Aziz v FDA 2010 EWCA Civ 304, CA*** :'one relevant but not conclusive factor is whether the same or different individuals were involved in those incidents'.

884. We have also considered the EAT decision in ***Hale v Brighton and Sussex University Hospitals NHS Trust EAT 0342/16***.

Submissions

Respondent submission

885. The Respondent submits that all the detriment claims relied on are significantly out of time, ranging from just short of 5 months (detriment 11) to over 4 years (detriment 1: April 2013) and refers to the Union support and legal advice available to the Claimant.

886. It is submitted that the Claimant actively chose not to submit a claim at the material times, wishing to seek alternative means of address. In those circumstances, the Claimant cannot and has not claimed in his witness statement that it was not reasonably practicable for him, to have submitted his claims in time. Consequently, the Tribunal has no jurisdiction to entertain those complaints.

887. It is submitted that it is clear that the delay in the Claimant submitting his claim within the requisite 3 month time limit has given rise to forensic evidential prejudice. Both the Claimant and Respondent have struggled to locate material documents and both Dr

Mike Harris and Dr John Wallace inevitably had significant difficulties in remembering the detail of events of roughly 10 years ago (if not longer).

888. It is submitted that it is noteworthy that no connection has been made by the Claimant in his witness statement between the alleged detriments and the act of dismissal. The dismissal in fact came several years later and the decision to dismiss was taken by an individual independent of the earlier alleged protected disclosures.

Claimants submissions

889. The Claimant had not addressed time limits in his evidence in chief. The Claimant's counsel indicated that he may ask for leave to ask supplemental questions however, he did not do so..

890. Counsel for the Claimant made no oral submissions on time limits and his written submissions were silent on the issue of time limits although this formed part of the agreed list of issues.

891. The Respondent addressed time limits in it written submissions which were exchanged with counsel for the Claimant on the morning of the day submissions were presented to the Tribunal . Despite counsel for the Claimant having an opportunity to support his written submissions with oral submissions and despite the Tribunal judge pointing out before oral submissions were delivered, that counsel for the Claimant had not dealt with the issue of time limits in his written submissions, nonetheless counsel still did not address time limits at any stage in his oral submissions.

Conclusions on time limits

892. *Are his* detriments *out of time, was it reasonably practicable to bring them in time?*

893. All the following detriments are outside the primary 3 month time limit being acts of alleged detriment which took place before 21 May 2017:

> **Detriment 1:** removal of the psychotherapy part of the Claimant's position in September 2012 to 2014 which we find was a decision taken by Dr Harris
>
> **Detriment 6**: the allegation that Dr Harris block the Claimant's grievance on 21 November 2013**.**
>
> **Detriment 8**: unlawful reduction of the Claimant salary in April 2014.
>
> **Detriment 9:** false accusations by Jane Rollinson in August 2014.
>
> **Detriment 10:** the allegation clarified in the Further Particulars was that during September 2014 he uncovered that he was not being given the correct holiday entitlement. He does not set out what as at April 2017 had not been paid and was still owing to him and have concluded that no leave was outstanding..
>
> **Detriment 11:** decision by Ms Bussell at a meeting on 29 March 2017 to refuse study leave.

894. The only detriment potentially within the 3 month time limit is Detriment 12. During the course of the hearing however it was confirmed this claim relates only to failure to award a pay increment in 2014.

Detriment 12:

895. The decision or omission, to award the increment took place in or around October 2014.

896. There was either a deliberate decision not to award the pay increment or a failure to make a decision i.e. a failure to act which in the absence *of evidence establishing the contrary, an employer shall be taken to decide on a failure to act when he does an act inconsistent with doing the failed act* ***or****, if he has done no such inconsistent act, when the period expires within which he might reasonably have been expected to do the failed act if it was to be done.*

897. As the increment was due in October 2014, pursuant to section 48 (4)(b) ERA the act or failure to act we conclude, was October 2014.

898. Was it however for the purposes of section 48 *(3)(a) ERA* an act which extends over a period such that the end of the period is the last salary payment paid to the Claimant following the termination of his employment in April 2017 such to bring the claim in time? The difficulty is that the Claimant had not advanced this argument either in his claim, his evidence or despite counsel being alerted to the absence of submissions on time limits, in submissions. The closest the Claimant comes to addressing this was a mention in the list of issues that it is "continuing" however that is with respect to the annual pay rise and not the 2014 increment.

899. It is not alleged or argued in submissions by the Claimant that there was a discriminatory regime, rule, practice or principle in place.

900. The Tribunal conclude that the decision (or failure to act to award the pay progression) occurred in 2014 for time limit purposes (although that act had *continuing consequences* which extended up to the date the Claimant was last paid his salary).

Detriments :1, 6, 8, 9 , 10 and 11 : are these part of a series of act ?

901. The Claimant does not deal in his statement and counsel did not deal in his submissions with whether it is being argued by the Claimant that these events formed part of a series of acts. In any event, even if they were, unless linked to an act which is in time, they would still have been brought out of time.

902. Even if detriment 12 were in time, the Tribunal find that these acts were not part of a 'policy, rule, scheme, regime or practice' or otherwise 'an act extending over a period'.

903. Different individuals were involved in the alleged detriments, there were significant gaps in time between the events and they were very different in nature.

904. The Claimant gave no evidence linking these events other than a general allegation that they were all motivated by his alleged protected disclosures. He did not identify which disclosures motivated which individuals. He continued to present his case on the basis that all the alleged disclosures motivated the various detriments, regardless of whether or not some of the disclosures predated some of the detriments.

905. With respect to Ms Bussell, the Claimant accepted that she had no prior involvement in the events which took place prior to her managing the sickness absence process.

906. The Tribunal concludes that these alleged detriments were **not** acts extending over a period but were one off events to be considered in isolation in terms of time limit : ***Aziz***

v FDA 2010 EWCA Civ 304, CA

Reasonable practicable : was it not reasonably practice to bring the claims in time?

907. The Claimant is an intelligent man, able to research and avail himself of information. He was in receipt of a significant amount of support including legal advice. He knew what the time limits were to issue a claim but he made a deliberate choice on the advice of his Union.

908. He appears on dismissal to have decided to resurrect a number of matters which at the time he was prepared to and decided actively not to litigate.

909. He does not claim he was too unwell to bring a claim within time. He does not claim he was ill advised. He does not seek to argue that he had not understood his legal rights. He made a choice and it was perfectly reasonable for him to decide on a different course of action, he was after all still employed by the Respondent and keen to "*re-form"* relationships. While this decision was no doubt sensible, the Claimant must appreciate that there are good reasons for having in place time limits. It is important that there is finality of litigation and there are serious consequence of a failure to issue proceedings in a 'timely manner'; recollections fade and evidence is lost. This case has suffered from both.

910. **The claims we find are out of time and that the Tribunal has no jurisdiction to deal with them. However, even if we had, as set out above, we conclude that the claims of detriment under section 47B ERA are not well founded and they would therefore in any event have been dismissed.**

<u>Automatic unfair dismissal : section 103 A</u>

911. Was the reason, or if more than one the principal reason for the Claimant's dismissal, one which falls within Section 103A of the Employment Rights Act 1996. Specifically, was the reason or principal reason for the dismissal that the Claimant had made a protected disclosure?

Legal Principles

The starting point is the statutory wording: Section 103 A ERA:

912. *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.*

913. By referring to 'the reason (or, if more than one, the principal reason) for the dismissal', section 103A ERA indicates that there may be more than one reason for a dismissal.

914. If the fact that the employee made a protected disclosure was merely a subsidiary reason to the main reason for dismissal, then the employee's claim under section 103A ERA will not be made out.

915. As Lord Justice Elias confirmed in ***Fecitt and ors v NHS Manchester (Public Concern at Work*** intervening***) 2012 ICR 372, CA***, S.103A requires the disclosure to be the primary motivation for a dismissal. Two cases that illustrate the relatively high bar set by the 'reason or principal reason' test:

916. We have considered the decision of the EAT in ***Mallik v London Borough of***

Hounslow and ors ET Case No.2201199/15.

Causation

917. Whistle-blower protection is analogous to the victimisation provisions in anti-discrimination legislation, in that both seek to prohibit action taken on the ground of a protected act. In ***Chief Constable of West Yorkshire Police v Khan 2001 ICR 1065, HL*** : A Tribunal should ask: 'Why did the alleged discriminator act as he did? What, consciously or unconsciously, was his reason?' This approach was expressly approved in the context of S.103A by the EAT in *Trustees of Mama East African Women's Group v Dobson EAT 0220/05*.

Burden of Proof

918. The burden is on the employer to show the reason for dismissal. Where the employee who argues that the real reason for dismissal was an automatically unfair reason, the employee acquires an evidential burden to show, without having to prove, that there is an issue which warrants investigation and which is capable of establishing the automatically unfair reason advanced. Once the employee satisfies the Tribunal that there is such an issue, the burden reverts to the employer, which must prove, on the balance of probabilities, which of the competing reasons was the principal reason for dismissal: ***Maund v Penwith District Council 1984 ICR 143, CA*.**

919. The burden of proof under section 103A ERA was considered by the Court of Appeal in *K**uzel v Roche*** Products ***Ltd 2008 ICR 799,*** *CA* where Lord Justice Mummery set out essentially a three-stage approach to be applied to section 103A claims. We have considered that guidance.

Drawing inferences.

920. ***Kuzel v Roche Products Ltd*** Mummery LJ: a Tribunal assessing the reason for dismissal can draw 'reasonable *inferences from primary facts established by the evidence or not contested in the evidence*'.

921. In the words of Lord Justice Mummery in ***ALM Medical Services Ltd v Bladon 2002 ICR 1444, CA:*** '[T]he alleged unfairness of aspects of [the employee's] dismissal, which would be central to a claim for "ordinary" unfair dismissal, are of less importance in a protected disclosure case. The critical issue is not substantive or procedural unfairness, but whether all the requirements of the protected disclosure provisions have been satisfied on the evidence.

Submissions

The Respondent

922. The Tribunal is invited by Respondent to accept the categoric evidence of Ms Bussell that the Claimant's alleged protected disclosures had no bearing whatsoever on her decision to dismiss. She responded in cross-examination to the proposition that there had been a concerted effort to dismiss because of the alleged protected disclosures as follows: *'Absolutely not. I had no intention of dismissal, I wanted to return him to work, I had got him back on the books so to speak and was hopeful that it would progress from there but it didn't"*

923. During the meeting on 29 March 2017 Ms Bussell expressly accepted that there '*is nothing wrong*' with the Claimant raising any whistle-blowing concerns that he wished, she simply wanted him to return to clinical practice [p.1427]. The Claimant was in fact granted annual leave following this meeting in order for the Claimant to '*escalate*' his concerns. A pragmatic response to the Claimant's inflexible position on his ability to return to work (see pages 1428-1431).

The Claimant

924. In his submissions counsel for the Claimant did not identify any direct evidence to support a causal connection between the dismissal and the disclosures. He did not address directly the point about what evidence exists to support the allegation that the sole or principal reason was in light of the factual background. He submits that the Claimant is an honest witness with '*no axe'* to grind and the '*whistle-blowers swim against the tide of persistent denials'* and are often scapegoated.

Conclusion

925. The Claimant accepted that Ms Bussell had not been involved in previous matters or disclosures and none of the disclosures related to her personally or involved any criticism of her personally.

926. It is also the case that the last alleged disclosure had taken place back in October 2016 in a grievance letter to Ms Hawkins, prior to that the last disclosure been in April 2014 and prior to that December 2013. It cannot therefore be said that in the couple of years prior to Ms Bussell's involvement, as far as the protected disclosures placed before this Tribunal are concerned, there had been repeated disclosures.

927. Although it was put to Ms Bussell that she had made the decision to dismiss because of the whistleblowing disclosures, she was not cross-examined with reference to any specific protected disclosures. No evidence was put to her which it was alleged by counsel in cross examination undermined the credibility of her denial . She simply denied that this was the reason and she was not challenged further in cross-examination.

928. What we do have however is a clear record of meetings which the Claimant himself accepted were stressful, not only for himself but everyone involved. The discussions in those meetings with him were evidently circular and it is clear that Ms Bussell's focus was on trying to get the Claimant to return to seeing patients again.

929. The Claimant was granted authorised leave and Ms Bussell then took it upon herself to try and map out the terms of a risk assessment that would satisfy the Claimant in an attempt to move the situation forward.

930. We accept Ms Bussell's evidence that she was taking HR advice about how to conduct the termination process and that she was told that it was appropriate to use SOSR as the reason for dismissal. Despite the issues that we shall come to later in our judgment about the fairness of dismissal, we accept that distinguishing between SOSR, conduct and capability can be difficult. We do not consider it appropriate to draw any adverse inferences from the issues the Tribunal find a(s set out later in this judgment), with the general unfairness of the dismissal.

931. We are satisfied that the sole or principal reason for dismissal was the Claimant's failure to return to work and the length of time he had not been back at work but not carrying out his clinical duties.

932. The Claimant when it was put to him that the reason for dismissal was that he had not returned to his clinical duties, in cross examination, stated; *" I cannot say – there was no clear rationale"*. Even on the Claimant's own evidence under cross examination, he is not clear in his own mind, that the reason had anything to do with the alleged protected disclosures.

933. The claim under section 103A ERA is not well founded and **is dismissed.**

Unfair dismissal : section 98 (2) ERA

Legal principles

The Reason for Dismissal – section 98 (1) and (2) ERA

934. It is up to the employer to show the reason for dismissal and that it was a potentially fair one namely that it falls within the scope of section 98 (1) and (2) of the Employment Rights Act1996 (ERA) and was capable of justifying the dismissal of the employee.

935. As Cairns LJ said in **Abernethy v Mott Hay and Anderson [1974] IRLR 213, [1974] ICR 323** *"A* reason *for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee'.'*

Categorisation of the reason

936. In certain cases, SOSR may be the appropriate reason even where the employee's conduct is directly causative of the dismissal.

The Tribunal have taken into the cases of ***Perkin v St George's Healthcare NHS Trust 2006 ICR 617, CA*** and ***Shillito v The Disabilities Trust ET Case No.2602102/19*****.**

Reasonableness - section 98 (4) ERA

937. Once an employer has shown a potentially fair reason for dismissal within the meaning of section 98 (1) ERA, the Tribunal must go on to decide whether the dismissal for that reason was fair or unfair in accordance with section 98 (4) ERA which provides that the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer); *depends on whether in the circumstances (including the size and administrative rescores of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and shall be determined in accordance with equity and the substantial merits of the case.*

938. A Tribunal must decide not what it would have done but whether the employer acted reasonably.

939. In terms of procedural fairness, the House of Lords in **Polkey v AE Dayton Services Ltd 1988 ICR** 142 **HL** established that if there is a failure to carry out a fair procedure, the dismissal will not be rendered fair because it did not affect the ultimate outcome; however, any compensation may be reduced.

940. Where the employer relies on conduct as the fair reason for dismissal, it is for the employer to show that misconduct was the reason for dismissal. According to the EAT in **British Home Stores v Burchell 1980 ICR 303** the employer must show that it

believed the employee guilty of misconduct, that it had in mind reasonable grounds upon which to sustain that belief and at the stage at which that belief was formed on those grounds it had carried out as much investigation into the matter as was reasonable in the circumstances.

941. **A v B [2003] IRLR 405**:"*"In determining whether an employer carried out such investigation as was* reasonable *in all the circumstances, the relevant circumstances include the gravity of the charges and their potential effect upon the employee".*

Acas Code

942. The reasonableness of an employee's dismissal will normally be assessed by reference to the Acas Code of Practice on Disciplinary and Grievance Procedures.

943. The Acas Code includes that in misconduct cases, where practicable, different people should carry out the investigation and disciplinary hearing.

Respondent submissions

944. The Respondent asserts that the reason for *dismissal* was a fundamental breach of contract. and it is submitted by the Respondent that it is clear from the evidence of Louise Bussell and Peter Wright that the fundamental breach of contract stemmed from i. the Claimant's failure to undertake clinical duties for which he had been paid and ii. the lack of any prospect of the Claimant realistically returning to clinical duties. Thereby, resulting in a '*fundamental breakdown in the relationship*' (page 1443).

945. Under s 98(1)(b) a dismissal may be for a fair reason if the employer can show that it is '*for some other substantial reason of a kind such as to justify the dismissal of an employee holding* the *position which the employee held*'. Provided the reason is not whimsical or capricious (**Harper v National Coal Board [1980] IRLR 260**), it is capable of being substantial and, if, on the face of it, the reason could justify the dismissal then it will pass as a substantial reason (**Kent County Council v Gilham [1985] IRLR 18, CA**).

946. It is submitted that the reason for dismissal was the Claimant's failure to undertake any clinical work on his return to work and the lack of progress in which was being made, and that those reasons are neither capricious nor whimsical, are self-evidently substantial and the reason for dismissal falls within SOSR.

Claimant's submissions

947. In oral submissions it was submitted by counsel for the Claimant that the MHPS policy should have been applied and that the refusal to come back to work and refusal to perform clinical duties was an alleged failure to carry out contractual obligations which falls under the regime of the MHPS policy. Counsel submits that there is a solution provided for in the MHPS policy where there is a situation which could be both conduct and capability, namely the provision set out in paragraph 8.6. This paragraph provides that where the case covers more than one category, it should usually be combined under the capability process.

948. Counsel was asked by the Tribunal whether, if the reason is found by the Tribunal to be a conduct issue, it should be labelled professional or personal conduct. Professional conduct matters are dealt with under the MHPS policy and personal conduct matters under the MHPS and the separate conduct policy. Counsel for the Claimant did not engage with that question despite it being asked more than once. He also did not

address the Tribunal on the ***Skidmore*** case although invited to do so.

What was the reason for dismissal : section 98 (2) ERA ?

949. **If the Claimant was not automatically unfairly dismissed contrary to Section 103A ERA 1996 — what was the reason or principal reason for dismissal and was it a potentially fair reason?**

950. **The proper** categorisation **of the dismissal is in dispute in this case**

951. The Claimant asserts that it should have been categorised and dealt with as a capability or conduct issue or both and the Respondent maintains that it was properly dealt with as an SOSR.

Real reason for dismissal

952. When identifying whether the reason for dismissal related to conduct or capability or SOSR, a Tribunal should first make findings as to the employer's own reasons for dismissal, and then assess how those reasons should be characterised in terms of section 98.

953. A Tribunal is not bound by the label the employer puts on its reasons, but we have reminded ourselves that are our task is to seek to ***characterise the employer's reasons*** rather than make findings of our own and then consider reasonableness in light of those reasons.

Findings as to the employer's own reasons?

954. The evidence of Ms Bussell, before this Tribunal was that the Claimant's behaviour was *not wilful*. She gave evidence that she thought that he considered himself to be back at work and doing his job even though he was not seeing patients.

955. In submissions, the Respondent referred to the Claimant's own witness Dr Brabiner who confirmed that the parties had in effect reached a '*stalemate'* and that there is no dispute that the meetings and discussions about a return to work had become unbelievably circular and were not progressing.

956. Ms Barney submits that "*the reality was that the Claimant was unable to move on from the past and* repeated *many themes and perceived barriers to his return to clinical duties up to and including the final meeting on 21 April 2017"*

957. We have however considered the evidence from the meetings and the letter of termination and the reason given at the time. The emboldened words are the Tribunal 's own stress;

958. In the letter of the 17 March 207 [1422] Ms Bussell comments as follows;

"*… Although you have reported that you are fit for work, you're yet to undertake any duties since your annual leave ended on the 17th of favourite 2017 and have instead remained at home, without attending the Rampton Hospital site. You have given no reason* ***for this behaviour"***

*"…I would question whether you i****ntend*** *to return to work at all particularly as you seem to* ***raise unnecessary barriers*** *to returning* ***and have failed*** *to engage the return to*

work process in a meaningful way"

959. ***At the meeting on 21 April 2017 [1442]***

*",,,**he*** had *fundamentally been breaching the contract the last four months. He was saying is back at work, **but was not doing what he should be**"*

960. ***Letter of 24*** April ***2017 : confirming termination [1444]***

*"Purpose of the meeting was, as you aware to discuss the plans regarding your return to clinical duties which would previously discussed, most recently at our meeting on 29th of March 2017, and that, **if you again refuse to return to work** consider terminating your employment"*

"these issues are what you were referring to in respect of your meeting with the chairman, but in context these *issues had been dealt with some considerable time ago and it seems to be **your refusal to accept any closure** which keeps them alive"*

961. With reference to the risk assessment *; "… The fact that you are not personally involved is a complete **red herring** because there is nothing particular to you which puts you at a different risk to any* other *member of staff start reality this seems to amount to an* unnecessary *reason not to attend for work…"*

962. *"I concluded* that ***your refusal to come to work*** *as a fundamental breach of contract".*

963. **Ms Bussell set out a management statement of case for the purposes of the appeal [1461].** She made the *following* comment;

*"after **over four months** of being back from a lengthy period of sickness absence Dr Ijomah was still not able to commit to returning to work in clinical practice"*

*"… He had been back at work since January 2017, but are not actually been undertaking any duties associated with a substantive role. I further informed him that this was not acceptable and he had fundamentally been breaching its contract **for the last four months** …"*

964. **In the 17th October 2017 letter of appeal Mr Wright puts the reasons for the decision to dismiss as follows [1536];**

*"… By April 2017 management considered that you are **simply unreasonably refusing** to come to work and that this constituted a **fundamental breach of your** contract of employment"*

*"you were fit and able to work but **you simply chose not to"***

*"in the face of **your refusal** to work there was no reasonable alternative dismissal"*

Capability

965. Capability is defined in S.98(3)(a) ERA as '*capability assessed by reference to skill, aptitude, health or any other physical or **mental quality'***.

966. Examples of employees who have been held to be lacking in capability include: an inflexible and unadaptable worker ***— Abernethy v Mott, Hay and Anderson 1974 ICR 323, CA*****.** A case referred to by counsel for the Respondent in her submissions.

967. We consider that the Claimant's attitude towards the 'past' and his inability to move forward may be **covered** by the 'aptitude' or 'mental quality' part of the statutory definition in section98(3)(a).

968. What **distinguishes** conduct from capability in such a situation is in respect of an assessment of the employee's contribution to the dismissal

969. If a **change** in attitude over which he or she has some measure of control, it may be that the reason for dismissal would be better categorised as being 'conduct' or 'some other substantial reason justifying dismissal' rather than capability.

What was the Claimant's contribution to the dismissal ?

970. If the employer concludes that the employee is *refusing by choice* to perform we consider that the **reason** for any resulting dismissal, would relate to 'conduct i.e. he was able to perform the work but was deliberately refusing to do so i.e. he has *control over the situation* – it is a choice he is making.

971. If the Claimant was not refusing to perform the work but it was his intractable and inflexible **approach** to resolving the barriers to his return which he was struggling to overcome, this may be more properly categorised as a mental aptitude issue i.e. capability which has created an intractable problem.

972. If it is not the Claimant's behaviour or conduct but the **fact** of the breakdown and situation which is **the** reason for dismissal, that may properly be treated as an SOSR.

SOSR

973. We have reminded ourselves of the distinction between a SOSR dismissal arising from a breakdown in the employment breakdown and a conduct dismissal which is about the employee being at fault in causing that breakdown. We invited the parties to address us specifically on the EAT case of ***Ezsias v North Glamorgan NHS Trust*****.** A case where the EAT observed that a Tribunal should be on the lookout in such cases to see whether an employer is using the rubric of SOSR as a pretext to conceal the real reason for the employee's dismissal.

974. The EAT noted the concern that, where there is a detailed contractual disciplinary procedure that applies to conduct issues, the employer should not be able to avoid that protection by invoking SOSR as a reason for dismissal instead. The EAT noted out that contractual disciplinary **terms** only apply however when the employee's conduct or competence is the ***real reason*** for the action against him or her. They do not apply if the ***employee's role*** in the events leading up to a breakdown in working relations is **not in scope.**

975. Ms Barney in her written and oral submissions, taking into account Ezsias, directed us however to the case of ***Perkin v St George's Healthcare NHS Trust 2006 ICR 617, CA***. The Employment tribunal had held that the dismissal of a senior executive was for 'conduct [or] some **other** substantial reason'. On appeal, the Court of Appeal held that the tribunal had not erred even though, in the Court's view, it would have been preferable if the tribunal had analysed the dismissal as being for SOSR rather than for conduct.

976. The claimant in ***Perkin*** worked for an NHS Trust as its finance director. His responsibilities included managing a team of employees, liaising with senior colleagues

and establishing working relationships with people outside the Trust. Members of staff raised concerns about his **personality** and management style. At a disciplinary hearing, the Trust chairman concluded that the claimants management style had led to a breakdown of confidence in his ability to fulfil his role among the executive team. He had also failed to establish the necessary relationships with stakeholders and external advisers and his 'personal attacks' on colleagues, 'extending on occasions to abuse', had made it impossible for him to resume his previous role and re-establish an effective working relationship with them.

977. Lord Justice Wall in delivering the judgment considered the approach to identifying the reason for dismissal in this case, observing;

"*Although capability might have been an appropriate statutory category for their findings, it was not the only one. Before the proceedings were initiated, Mr. Perkin had conducted himself unacceptably towards colleagues and others**. I accept that if all that was at issue was his aggressive reaction to the proceedings, the decision might be unsustainable**. But the reaction amounted to corroboration of the accusation that he had already shown himself near-impossible to work with (rather than for).*

*For my part, however, I would think this was an "other substantial reason" case: an employee in a senior position **who could not or would not work harmoniously with*** colleagues *and outsiders with whom a harmonious relationship was essential" Tribunal stress*

978. Counsel for the claimant did not address us on the Court of Appeal's finding in ***Perkin*** in his submissions.

979. Counsel for the Respondent also referred us to the case of ***Hawkes v Ausin Group (UK) Ltd*** UKEAT***/0070/18****.* Without consulting his employer first, the claimant in this case signed up for a seven-week overseas call-up .The employer took the view that it could not be without his work for this period and dismissed him summarily. When he claimed unfair dismissal, the employer defended on the basis that the dismissal was for SOSR. The Tribunal agreed and held it fair in all the circumstances, one factor being that the parties had in effect come to a deadlock and that a more extensive procedure (warning or earlier meeting to put charges) could not have altered anything. We note that the Tribunal had found that;

"The main issue was not whether the Claimant had behaved improperly, but whether the Respondent could continue to employ someone in the Claimant's role at his salary if he was going to be absent from seven weeks at a crucial time for the business".

So how should it have been categorised in this case?

980. It is not asserted by the Respondent that they went down the route of SOSR in order to spare the Claimant the indignity and the career implications of being dismissed by reason of misconduct or capability.

981. The Tribunal have considered carefully whether this was a capability issue rather than an SOSR. Whether the Claimant's mental aptitude was such that he was unable to move on from past events and engage with the process and whether therefore the situation should have been dealt with under the Capability Policy. However, we have reminded ourselves that what we are concerned with is the *reason the employer*

dismissed when it did and not what reason it could or should have been concerned with.

Conclusion

982. Applying the evidence around the reason the employer dismissed, we conclude that Ms Bussell and later Mr Wright, were of the opinion that the Claimant was entirely at fault, that he was capable of returning to work **but did not want to**, that he was stalling his return and providing spurious reasons for not doing. We conclude that it was his deliberate behaviour, his conduct, in what was seen as a refusal to carry out work with patients, which was the main reason and the length of time this refusal had continued for.

983. Ms Bussell gave evidence before this Tribunal that she did not consider his behaviour to be 'wilful' however, we do not accept her evidence on this issue. It is not we find credible. It is not consistent with the language she uses in the meetings and in the termination letter to describe the reason and his behaviour. It is also not consistent with Mr Wright's understanding of her reason and view of his behaviour.

984. We conclude that at the time of dismissal Ms Bussell considered that the Claimant was being deliberately obstructive, hence the reference to his objections to how the risk assessment had been carried out as a "*red herring*" . In terms of what was operating on Ms Bussell's mind at the time, we conclude that it was not that there was a breakdown in the working relationship, it was that the Claimant (who she wanted to return to his clinical duties and continue the employment relationship), was back at work but was not seeing his patient's. He was the one responsible. He was the one breaching the contract of employment. He was as Mr Wright put it, simply 'refusing' to return to work and had chosen not to do his clinical duties and not comply in full with the terms of his contract.

985. We have considered the Court of Appeal's approach to identifying the appropriate categorisation of the reason for dismissal in ***Perkin***. However, there is a material difference in that case and the one before us. Ms Bussell's reason for dismissing the Claimant, was not simply about how the Claimant was behaving during the meetings with Ms Bussell and Ms Kruppa and their working relationship, it was his conduct, his deliberate and unreasonable refusal to comply with the terms of his contract of employment. It was his refusal to do the clinical duties he was employed to do amounting to his breach of the employment contract. The attempts to get him back to work were frustrating and not progressing but it was not his behaviour in those meetings which was main reason for dismissal, it was his refusal over a period of 4 months to perform a key part of his duties and because his refusal was 'unreasonable' and continuing.

986. We heard that Ms Bussell considered that the situation had gone on for an extended period of time and that locum covered had to be been arranged. We heard little however about the impact on the service and why the decision had to be taken at that stage .

987. It is the Claimant's ***conduct*** which we find was the real reason he was dismissed and how long that conduct had gone on for. We conclude that had the Claimant been engaging more actively in arrangements for his return to work, Ms Bussell would not have felt the need to terminate the contract when they did. Those were the reasons we find operating on the mind of the dismissing officer.

988. We also have regard to the contractual MHPS policy which provides at paragraph 7.5

that the failure to fulfil contractual obligations may constitute misconduct, with an example provided of regular non-attendance on clinic or ward rounds.

Personal or professional?

989. We invited the parties to address us on the case of **Skidmore v Dartford and Gravesham NHS Trust** 2003 **UKHL** in order to assist us in determining whether the conduct in this case should be treated as a professional or personal conduct issue .

990. We were not directed to any relevant guidance or other documents.

991. Although the ***Skidmore*** case did not concern the MHPS policy, nonetheless the observations of the House of Lords are of some assistance, they commented that;

"*the line drawn between professional conduct and personal conduct is conduct arising from the exercise of medical or dental skills and other conduct."* This definition was with reference to the applicable definition within the disciplinary code in play in that case.

992. We note that pursuant to the MHPS policy paragraph 7.2 provides that where a case involves issues of professional conduct and proceeds to a hearing under the Conduct Policy, the panel must include a member who is medically or dentistry qualified.

993. Where it involves conduct, the Conduct Policy applies, subject to the additional safeguards/ provisions set out in the MHPS policy.

994. The Conduct Policy sets out expected standards of conduct which include that all employees are expected to attend regularly and punctually and are not to absent themselves from duty [p.1743]

995. We conclude that the refusal to carry out clinical duties falls within the definition of personal rather than professional conduct. It does not require to any degree, medical experience or expertise to determine whether the alleged conduct has taken place.

We find that the proper categorisation of the reason the Respondent dismissed the Claimant, was because of his personal conduct in not performing a fundamental part of his role which was unreasonable and not SOSR.

996. The real reason for dismissal is very relevant in this case. In not identifying the correct reason for dismissal, there was a failure to carry out a process which complied with all consistent with the Respondent's contractual policy and procedures, which include important safeguards for the employee.

Was dismissal for that reason fair and reasonable in all the circumstances, having regard to the Trust's size and administrative resources ?

997. The same test of fairness applies in section 98(4) ERA 1996, whether the dismissal is for SOSR, conduct or capability.

998. Counsel for the Respondent reminds us that it is not for the Tribunal to substitute its own view of the fairness of the procedure or the decision to dismiss. We have reminded ourselves of the guidance in **I*celand Frozen Foods v Jones [1982] IRLR 439*.**

999. A question we have to determine is whether at the stage at which the belief in the reason for dismissal was formed, had the Respondent carried out as much

investigation into the matter as was reasonable in the circumstances.

1000. Where the Tribunal finds that the employer failed to adopt a fair procedure at the time of the dismissal, whether as set out in the Acas Code or elsewhere then, save in wholly exceptional cases, the dismissal will not be rendered fair simply because the unfairness did not affect the end result :***Polkey v AE Dayton Services Ltd***

1001. There were a number of meetings between the Claimant and Ms Bussell where his concerns were discussed and attempts made to resolve them. We set out in detail in our findings of fact, the lack of progress which was made in those meetings and the continued reference back to what the Claimant saw as the need to reflect on past events and hold someone accountable. We set out the unreasonable raising of issues to stall his return to clinical duties, such as the unsuitability of Mr Kruppa to assist with the completion of a risk assessment.

1002. There was by 21 April 2017, still no real progress towards resolving his unwillingness to return to clinical duties. There was however a failure to implement the correct contractual process.

1003. Whether the employer's contractual policy is followed is relevant when considering reasonableness under section 98 (4) ERA.

1004. The contractual process to be followed in conduct cases such as this, which involve issues of personal conduct, is set out in the MHPS and the Conduct Policy. The policies set out important steps which must be taken and procedural safeguards which must be in place for the employee. Those steps were not followed and the Claimant did not have the benefit of the relevant safeguards.

1005. It was concerning that neither Ms Bussell nor Mr Wright, tasked with undertaking the disciplinary and appeal process, appeared to understood what the role of NCAS is. Neither of them involved NCAS or gave any consideration to whether NCAS may be able to provide some guidance or support.

1006. The procedure which the Respondent followed did not comply with its contractual policies in material respects which include the following;

- *There was no appointment of a case manager*
- *There was no consideration given to involving NCAS*
- *There was no appointment of an investigating officer*
- *There were no interviews with witnesses, for example the Claimant's line manager Ms Kruppa to ascertain whether and what recent attempts she had made to engage with the Claimant, to discuss a handover/ his role etc and to what extent he had been engaged with those*
- *Crucially, there was no separation between the role of investigating officer and disciplining officer. Ms Bussell conducted the whole process up to the appeal stage.*
- *There was no formal disciplinary hearing with the Claimant having the right to call witnesses*

- *There was no consideration of alternatives for example downgrading, a final written warning, counselling etc*

1007. There were meetings with the Claimant and attempts to resolve his concerns. He was warned prior to the meeting on 21 April that his employment may be terminated. He had the right to have a companion attend the meeting with him. However, the process was not compliant with the Respondent's policies in material and fundamental respects

1008. The Tribunal find that it was outside the band of reasonable responses for the Respondent not to follow its own contractual policies. The only reason the policies were not followed was because the Respondent failed to identify that conduct was the correct reason for dismissal under section 98 ERA.

Decision – reasonable belief and proportionate response?

1009. We have reviewed the events immediately leading up to the Claimant's dismissal. Elements of the risk assessment were discussed with the Claimant at the meeting on 14 March 2017. The further details of the risk assessment was set out in Ms Bussell's letter of the 17 March 2017 [p.1422] which was discussed with him at the 29 March 2017 meeting. It was then agreed that the Claimant would be able to take annual leave from 30 March until 18 April 2017. In the letter of 3 April 2017 [p.1433] Ms Bussell grants holiday leave and when doing so she does not warn the Claimant that taking this annual leave will be problematic for the Respondent. Ms Bussell does not warn the Claimant that this period of annual leave will be taken into account and counted as time when he is not carrying out his clinical duties. At the meeting on 29 March 2017, Ms Bussell is recorded as telling the Claimant that;

1010. *"**I have not got an issue with you taking annual leave at all.** I just have concerns that we need to get you back in your substantive job" Tribunal stress*

There is then an agreement to meet on his return from leave on 21 April 2017.

1011. In the letter of 3 April 2017 [p.1434] Ms Bussell states that she hopes the Claimant will have a restful period of annual leave and looks forward to welcoming him back into his clinical duties which will be finalised at the next meeting.

1012. He was warned however, on 10 April 2017 that a possible outcome of the meeting on 21 April may be dismissal.

1013. At the meeting on 21 April 2017 the decision was made to terminate the Claimant's dismissal, when it appears no real progress has been made about his return to clinical duties. As set out in the dismissal letter, Ms Bussell's reason for dismissing him at that point is because he is alleged to have fundamentally breached his contract because he had been fit to work for **four months** but had not been working.

1014. The four-month period was clearly an important reason why she decided to dismiss when she did.

1015. However, Ms Bussell accepted in response to a question from the Tribunal that she did not expect the Claimant to be carrying out clinical duties during the induction throughout January 2017. Ms Bussell had also told him that she had no difficulty with him taking annual leave. If those periods of induction, annual leave and the periods when he was absent on sick leave are discounted, the time when he was available to carry out its clinical duties, following his return to work January 2017 up until 21 April 2017, is considerably less than four months, it was about 33 working days or 6.6

weeks.

1016. We are mindful that Ms Bussell was concerned that the Claimant was not engaging in the return to work process, however Ms Bussell considered the period of four months to be material to the decision that she made to terminate his employment as at 21 April 2017. It was however, outside the band of reasonable responses to treat the whole period of that 4 months since his return to work, as a period during which he had been in breach of his contract by failing to return to clinical duties.

1017. The Tribunal conclude that the Respondent did not have in mind reasonable grounds upon which to sustain the belief that the Claimant had been in breach of his clinical duties for a period of 4 months, and the time in which he had not performing his duties was a material consideration, for both Ms Bussell and Mr Wright on appeal.

Appeal process

1018. The Claimant submitted an appeal which set out 4 main grounds, as set out in our findings of fact [p.1458].

Appeal outcome

Ground one: did not follow its own procedure

1019. Mr Wright concluded that "*by April 2017 management considered that you are simply **unreasonably refusing** to come to work this constituted a fundamental breach of your contract of employment". Tribunal stress.*

1020. Mr Wright during the appeal however, failed to address whether the contractual Conduct Policy should have been followed. He did not, we conclude meaningfully engage with that ground of appeal. The evidence does not suggest that he really applied his mind at the time, to whether the reason for dismissal was in fact conduct.

Ground 2: inaccurate assertions in the dismissal letter

1021. Mr Wright found that the Claimant had done no work from January to April 2017 and therefore decided that the dismissal letter was not inaccurate or misleading in referring to the period of 4 months.

1022. Mr Wright completely failed to address the Claimant's legitimate argument that it was unreasonable to consider him to have been in breach of contract by not performing clinical work during a period which included time on authorised holiday.

1023. Mr Wright gave no reasonable explanation in the outcome letter, for a finding that the statement about the 4 month period of breach, was not inaccurate or unfair. We conclude that he failed to meaningfully engage with that ground of appeal.

Ground 3: alternatives to dismissal not considered and dismissal not proportionate

1024. Mr Wright concluded that the Claimant was fit and able to work but that he had "*simply chose not to*" and in the face of his refusal there was no reasonable alternative to dismissal. However, there was a failure by Ms Bussell and then Mr Wright at this stage, to consider and explore alternatives such as whether a final written warning should have been issued, setting a specific date for a return, failing which his employment will be terminated, given that he had not in fact been in breach yet for 4 months.

1025. There was also a failure to consider whether mediation or counselling may help address the barriers to his return. According to Ms Bussell's evidence before the Tribunal, she had not considered his behaviour to be 'wilful'. Ms Bussell gave evidence that the Claimant did not seem to appreciate that he was not doing his contractual role. Despite this alleged perception of the situation, there was no consideration given we conclude, to whether mediation, counselling or the involvement of NCAS may assist to address the alleged perceived misguided nature of the Claimant's perception of the situation (albeit we do not accept that Ms Bussell did genuinely consider that his conduct was not wilful). .

Ground 4: PD

1026. Mr Wright referred to there being no evidence presented at the appeal, of any connection existing between the decision to dismiss and any alleged protected disclosures. The Claimant conceded under cross examination that this is correct, no evidence was put forward. It was reasonable for Mr wright therefore to reject that challenge to the fairness of the dismissal.

Appeal decision

1027. We conclude that the decision to uphold the dismissal was outside the band of reasonable responses. There was no reasonable attempt to engage with most of the grounds of appeal.

1028. The flaws we find in the process carried out by Ms Bussell were not rectified by the appeal. Mr Wright could have reheard the case he accepted, as a conduct case and followed the Conduct Policy, however he elected not to do so. He proceeded to deal with the reason for dismissal as SOSR and in doing so deprived the Claimant of the protection of the Respondent's contractual procedures.

1029. Mr Wright did not consider, or on his evidence even aware of the role of NCAS and nor does he allege he took any steps to inform himself about their role.

1030. The appeal did not remedy any of the defects of the dismissal process and was itself, conducted in a manner which was outside the band of reasonable responses..

The Claimant's claim or unfair dismissal pursuant to section 98 ERA is well founded and succeeds.

1031. We now turn to a consideration of whether there should be any reduction in the compensation to be awarded, addressing the relevant legal principles first;

Legal Principles

Polkey

1032. The question of whether procedural irregularities rendering a dismissal unfair, made any difference to the outcome is to be taken into account when assessing compensation and not when determining whether the dismissal fair or unfair: **In Polkey v Dayton Services Ltd 1988 ICR 142 HL**.

Contributory fault

1033. We have considered the three factors to be satisfied, as set out by the Court of Appeal in: **Nelson v BBC (No.2) 1980 ICR 110, CA**;

1034. With regards to the basic award, the relevant statutory provision is section 122 (2) ERA;

> "*Where the Tribunal considers that **any conduct** of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be **just and equitable** to reduce or further reduce the amount of the basic award to any extent, the Tribunal shall reduce or further reduce that amount accordingly." Tribunal stress*

1035. The equivalent provision in respect of the compensatory award is section 123 (6) ERA;

> "*Where the Tribunal finds that **the dismissal was to any extent caused or contributed** to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding." Tribunal stress.*

The principles when applying both;

1036. The legal bases for making a ***Polkey*** reduction under S.123(1) ERA and reductions on account of employees' **contributory** conduct under S.123(6) ERA are very different. In particular, the evidence that is germane to whether or not an employee has 'caused or contributed' to his or her dismissal may not be the same as that relevant to assessing what is 'just and equitable' to award the complainant having regard to the loss sustained in consequence of the unfair dismissal.

1037. ***Rao v Civil Aviation Authority 1994 ICR 495, CA*****,** the Court of Appeal rejected the contention that the making of both deductions would amount to a double penalty for the employee. The Court held that the proper approach in these circumstances is first to assess the loss sustained by the employee in accordance with S.123(1), which will include the percentage deduction to reflect the chance that he or she would have been dismissed in any event, and then to make the deduction for **contributory fault**. However, in deciding the extent of the employee's **contributory** conduct and the amount by which it would be just and equitable to reduce the award for that reason under S.123(6), the Court in *Rao* made it clear that the Tribunal should bear in mind that there has already been a deduction under S.123(1).

1038. We have however also considered the guidance of Mr Justice Langstaff of the EAT in **Granchester *Construction (Eastern) Ltd v Attrill EAT 0327/12*** and of the EAT in ***Dee v Suffolk County Council EAT 0180/18*****.**.

Polkey

1039. We conclude that had the matter been dealt with through the correct contractual disciplinary policy, we estimate that it would have taken about 3 months to complete and that it would be just and equitable for the Claimant to be compensated for that period. The parties in *submissions* suggested that the process may take about 2 months however, we consider that estimate be on the optimistic side. We take into account the various steps and safeguards which form part of the requirements under the contractual policy.

1040. We have concluded that the dismissal was substantively unfair. It was unfair to treat the 4 month period as a period during which the Claimant was in breach of contract . There were also serious procedural *failings* rendering the dismissal therefore both procedurally and substantively unfair. .

1041. We have considered ***Gover and ors v Propertycare Ltd 2006 ICR 1073, CA*** where

Lord Justice Buxton in the Court of Appeal Lord set out a detailed obiter view that Polkey is not restricted to cases where the employer has a valid reason for dismissal but has acted unfair in its mode of reliance on that reason and the hypothesised future and fair dismissal would have been for that same reason.

1042. We have considered therefore whether, given the intractable nature of the discussions between the Claimant and Respondent over his return to work, the Claimant would have been dismissed in any event, following completion of a fair disciplinary process (which we speculate would *have* taken a further 3 months) . We have considered how likely it is that the Claimant's conduct would have altered and the prospects that he would have remained resistant at the end of that process to carrying out his clinical duties and whether if he had, he would have been dismissed fairly at that stage.

1043. We conclude that we are in this case, concerned in applying section 123(1) ERA with a situation where the real dismissal and the hypothesised dismissal (the hypothesised dismissal being based on what would have occurred had the proper contractual process been followed) both entail a refusal by the Claimant to return to clinical duties. The reason for dismissal being therefore, in both scenarios, essentially the same. It is therefore we conclude, just and equitable to consider what would have happened if the contractual policy had been followed after the meeting on the 21 April 2017.

1044. We have reminded ourselves of the conduct of the Claimant at the last meeting on 21 April 2017, the *circularity* of the discussions and the lack of any real progress towards the Claimant's return to clinical duties;

[1441] " *Di Ijomah stated he was available to work,* ***but the issues regarding bullying and harassment remained"*** *Tribunal stress*

1045. However, it was not just the bullying issues; *" He indicated his role had been in medical* psychotherapy *and research , roles which had been taken away from him without following appropriate policy and this didn't appear to be recognised"*

1046. The Claimant had of course already been through a long job plan mediation process and there was no psychotherapy role available for him to return to;

" Ms Bussell clarified that she was offering what had been discussed when he first indicated he could return to his post and that was the split MD/ PD post and she asked if he would be available to start on site doing this role from next week "

" Dr Ijomah acknowledged what Ms Bussell was saying ***but felt the issue was the word 'agreed' ".*** *Tribunal stress*

1047. The Claimant was being paid a significant salary but was quite frankly not cooperating with the Respondent. If he wanted a different job plan, he could have addressed that when he was back at work. He was entitled to an annual job plan review (see clause 6.1 of the contract of employment as set out above in the findings of fact).

1048. The Claimant told this Tribunal that the only real stumbling block to him returning to clinical duties was the alleged lack of clarify around the job he was meant to return to. As we have already made clear, we simply do not accept his evidence that this was the genuine reason but we do find that his attempt to position this as the reason, indicates that the Claimant has an awareness that the real reasons were not reasonable.

1049. Taking into account how intractable the position remained as at the meeting on the 21

April 2017, and the history in the many months leading up this hearing, during which the Claimant had repeatedly revisited past issues and continued referring to the need to bring people to account, we find that there is a 50 % chance that, even after completion of a contractual disciplinary procedure, the position would have remained intractable. The Claimant would have remained unwilling to commit to a date when he would return to his full contractual duties, continued to deliberately breach his contract of employment and his employment would have as a consequence, been terminated.

1050. The Claimant did not maintain that he was not fit enough to return to work or that the job he was to return to was not safe. Before this Tribunal he likened his position as at 21 April 2017, as a '*footballer who was on the bench waiting to be told where to play'*. However, that is simply not a reasonable or accurate description of what was happening. He had been told '*where to play'* but was receiving a significant salary from the Respondent while refusing to '*play'*.

1051. We consider that there is the possibility that at some stage during the contractual disciplinary process, the Claimant may have retreated from his intractable position and adopted a more cooperative position. He may have had time for more reflection. The involvement of NCAS may have offered up other ways to resolve the impasse. We have taken into account that possibility in our assessment of the prospects of a hypothesised' dismissal and that is reflected in the 50% reduction.

Contributory fault

1052. We consider that it is right that the Claimant must bear some responsibility for the situation. He was fit to return to work and his refusal to see patients or start a process of a phased return to clinical duties, was deliberate and unreasonable.

1053. On his own case, if the true stumbling block had been the lack of clarity about the job he was meant to return to, even during the course of this hearing he was not in a position to provide any explanation for his failure to explain that to the Respondent. To have not done so, given in particular, how articulate and intelligent the Claimant is, is a failing for which he is responsible.

1054. The Claimant's actions undoubtedly contributed to his dismissal and those actions were blameworthy. We are mindful that the contractual disciplinary policy however was not complied with by the Respondent and it may well have been that with the advice and support of NCAS, with some counselling or mediation, or simply a further period of time during the contractual process, for reflection, his behaviour may have changed. The Respondent is responsible for the failure to comply with its own contractual policies and make use of the guidance and support that was available to support that process.

1055. We have 'stood back' and looked at the matter as a whole in order to ensure that the final result is overall just and equitable. The Claimant's refusal to return to his clinal duties was blameworthy, he was fit to return and we do not accept that he did not understand what his job was and further find that he had not engaged positively with Ms Kruppa about a return to work. While we accept that it is unclear exactly what steps Ms Kruppa had taken at the latter stages and when, he was a consultant and there was an obligation on him personally to take active steps to arrange his return to clinical duties. His conduct did contribute to the dismissal and it was blameworthy.

1056. We conclude that it is just and equitable to reduce both the basic and compensatory awards by a further 20%. This is in addition to the Polkey reduction to the compensatory award of 50%.

1057. These reductions (Polkey and contributory fault) are to be applied to any period of compensation to be awarded following on from the 3 month period which it would have taken the Respondent to complete the contractual disciplinary process.

Acas Uplift – compensatory award

1058. There was a hearing and the Claimant was offered the right of appeal however there was a failure follow in full the contractual disciplinary for cases of personal conduct. There was no separate investigation and disciplinary stage and no separation of the roles of those conducting those stages in the process.

1059. The parties have not addressed the Tribunal on an Acas uplift. They will be given an opportunity to do so at the remedy hearing.

1060. The Claimant has indicated that he seeks reinstatement.

Employment Judge R Broughton

13 May 2022