EMPLOYMENT TRIBUNALS

Claimant: Mr M Gavin

Respondent: Nottinghamshire Healthcare NHS Foundation Trust

Heard: in Nottingham, as a hybrid hearing with the respondent's witnesses attending via CVP

On: 19, 20, 21 and 22 April 2022 and, in chambers, on 25 April 2022

Before: Employment Judge Ayre, sitting with members
Ms R Wills
Mrs C Hatcliff

Representatives:
Claimant: Mr L Mann, solicitor
Respondent: Mr T Sheppard, counsel

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that the claimant was not subjected to a detriment contrary to section 47B of the Employment Rights Act 1996. The claim therefore fails and is dismissed.

REASONS

Background

1. The claimant is employed by the respondent, an NHS Trust, as a Healthcare Assistant. On 10 July 2019, following a period of Early Conciliation that started on 28 May 2019 and ended on 28 June 2019, the claimant presented a claim in the Employment Tribunal. His claim is that he was subjected to a detriment contrary to section 47B of the Employment Rights Act 1996 on the ground that he made protected disclosures. The respondent denies all of the allegations made by the claimant.

2. The claim relates to events that occurred during the period between August 2018 and July 2019 during which the claimant was employed as a Band 3 Healthcare Assistant on the Lister Ward at the Wells' Road Centre. In early July 2019, following a successful application, the claimant transferred to a new Band 3 role as a Community Rehabilitation Assistant at Retford Hospital. The claimant remains employed in that role.

3. There have been two preliminary hearings in the claim. The first took place before Employment Judge Hutchinson on 28 November 2019 and at that hearing the issues in the claim were identified and agreed. Those issues are set out below. At the second preliminary hearing on 6 July 2020 Employment Judge Adkinson made Case Management Orders to prepare the case for final hearing.

The Proceedings

4. The hearing took place, at the request of the respondent, as a hybrid hearing. The respondent's witnesses attended via CVP and all other parties attended in person, save on the second day of the hearing when Ms Wills attended via CVP.

5. The Tribunal heard evidence from the claimant and, on behalf of the respondent, from:

    a. Andrew Latham, General Manager of the respondent's Adult Mental Health Directorate;
    b. Lorraine Lockley, Matron of the Wells Road Centre;
    c. Susan Alsop, Bank Caseworker Investigator;
    d. Richard Fuller, General Manager of Wathwood Hospital; and
    e. Peter Wright, former Executive Director for Forensic Services.

6. There was an agreed bundle of documents running to 690 pages. At the start of the hearing the claimant applied to introduce into evidence a report published by the Care Quality Commission ("**CQC**") on 31st March 2021 following an inspection of Seacole Ward at Wells Road Hospital on 30th and 31st January 2021.

7. We invited both parties to make submissions on the admissibility of this document. Mr Mann submitted on behalf of the claimant that the report relates to a ward at the Wells Road Centre where the claimant worked. He accepted that the report had not been disclosed previously and said that was because the claimant had only become aware of its existence recently. He argued that the report is directly relevant to the issues in this case because it relates to the same hospital and that both wards (the Seacole ward and the Lister ward where the claimant worked) have the same management, the same staff work on both wards and similar issues were raised in the whistleblowing report that predated the CQC report. It would in his submission be in accordance with the overriding objective to admit the report into evidence.

8. Mr Sheppard objected to the introduction of the report. He submitted that the report does not relate to the protected disclosures made by the claimant, and was produced many months after the claimant last worked on Lister ward in December 2018. The report covers an entirely different time period and a different ward, with different management. The report is, he says, not relevant. In addition, it has been disclosed very late in the proceedings, despite having been published in March 2021. He acknowledged however that the respondent did have witnesses attending the hearing who could give evidence in relation to the report.

9. Having adjourned briefly to consider the position, the Tribunal decided unanimously that the CQC report should be admitted into evidence. Although we had concerns that the report had been disclosed so late, and our preliminary view was that it was likely to be of marginal relevance at best, we could not say it was of no relevance without hearing evidence about the report. We were satisfied that there would be no prejudice to the respondent by admitting the report, which had been in the public domain for over 12 months, as the respondent's witnesses are able to give evidence on it.

10. The parties submitted an agreed List of Issues and Chronology at the start of the proceedings, for which the Tribunal is grateful. Mr Sheppard also submitted a written skeleton argument.

11. Having concluded evidence and submissions on day four of the hearing, the parties were offered the choice of returning to the Tribunal on the fifth day to receive the judgment orally, or for judgment to be reserved. Mr Sheppard asked for judgment to be reserved, to save the parties the time and expense of attending the fifth day of the hearing, and Mr Mann did not object.

12. The Tribunal therefore reserved its judgment and met again in chambers on 25th April 2022 to make its decision.

The Issues

13. The issues to be determined at the hearing had been identified at the preliminary hearing on 28 November 2019 and incorporated into the agreed List of Issues submitted in advance of the final hearing. They are as follows:

a. Did the claimant made protected disclosures falling within sections 43A and 43B(1)(b) and (d) of the Employment Rights Act 1996:

i. On 6 August 2018 in an email to the Ward Manager, Vicki Watson?
ii. In a meeting with Vicki Watson in a coffee shop on 9 October 2018?
iii. On 12 December 2018 in a report to two band 6 Healthcare Assistants?

iv. On 10 January 2019 in a grievance meeting with Lorraine Lockley?
v. On 8 May 2019 in emails to the Chief Executive of the respondent and to the Care Quality Commission and NHS England?

b. Were the alleged disclosures made, in the reasonable belief of the claimant, in the public interest?

c. Did the claimant suffer the following detriments on the ground that he made protected disclosures:

i. Did the respondent's management fail to properly investigate the claimant's complaints made in August 2018 and December 2018;
ii. Questioning the reason for the claimant's sickness after his complaints to the Chief Executive, CQC and NHS England, i.e. suggesting that it was not work related and that he would have to pursue compensation via legal means; and
iii. Informing the claimant of inappropriate roles at the Trust which upset him?

d. What compensation, if any, should the claimant be awarded?

e. Were the disclosures made in good faith? If the claimant is entitled to compensation, is it just and equitable to reduce any damages by up to 25%?

Findings of Fact

14. We make the following findings of fact unanimously.

Background

15. The claimant is employed by the respondent as a Band 3 Healthcare Assistant. His employment with the respondent started on 1 November 2007 and is ongoing. The claimant was initially employed on Band 2 but was subsequently promoted to Band 3.

16. The claimant worked at the respondent's Wells Road Centre, which is a low secure inpatient facility for adults which has 83 beds. It has 5 wards, one of which is the Lister ward. Patients at the Centre have been detained for treatment under the Mental Health Act. The Lister ward has 16 beds, most of which are occupied at any one time. It houses patients with intellectual disabilities including learning disabilities and autism.

17. There is a clinical team on Lister ward comprising a Ward Manager, 3.6 Team Leaders, 9.6 nurses and 13.42 Healthcare Assistants. This core team is supported by bank staff who are brought in as and when required, and by other professionals such as psychologists, social workers and speech and language therapists. Staff at the Wells Road

Centre are sometimes moved between wards and can be required to help out on other wards on a temporary basis.

Policies and procedures

18. The respondent has a number of employment policies which applied to the claimant and other members of staff. The relevant ones are:

    a. A Grievance policy and procedure which includes three stages: (1) an informal stage, (2) a formal stage and (3) an appeal.
    b. A Speaking Up policy and procedure which was previously known as the 'Raising Concerns Whistleblowing' policy, the aim of which is to identify how concerns about anything that staff think may be harming patients, staff or the respondent's service can be raised, to whom, and how the respondent will respond; and
    c. A work-related injuries and NHS Injury Allowance Policy, supplemented by Management Procedural guidance.

19. The Injury Allowance Policy is contained in the respondent's Employee Handbook and, under the heading "*Eligibility"* states that:

    "*22.3 Eligible employees who have injuries, diseases or other health conditions that are wholly or mainly attributable to their NHS employment, will be entitled to an injury allowance, subject to the conditions set out in this section. The injury, disease, or other health condition must have been sustained or contracted in the discharge of the employee's duties of employment or an injury that is not sustained on duty but is connected with or arising from the employee's employment…*

    22.7 The following circumstances will not qualify for consideration of injury allowance…

    - *Sickness absence as a result of disputes relating to employment matters, conduct or job applications…"*

20. The Management Procedural guidance provides that:

    "*…Injury allowance is a top up payment and tops up sick pay, or reduced earnings when on a phased return to work…to 85% of pay…*

    Applications for injury allowance should be made in writing by the member of staff to their line manager providing all relevant information available. This will include medical evidence which is in their possession or that can be reasonably obtained…

    Examples of circumstances where NHS Injury Allowance cannot be considered:

    …

    - *Where the employee is on sickness absence as a result of disputes relating to employment matters such as investigations*

or disciplinary action, or as a result of a failed application for promotion, secondment or transfer…"

Events from August 2018 onwards

21. On 6 August 2018 the claimant sent an email to the then Ward Manager, Vicki Watson, copying in the Deputy Modern Matron Gregg Murray. The email was headed "*Lack of patient interaction and low quality care*". In the email the claimant asked Ms Watson for an informal meeting to discuss what he described as a lack of professional standards by some bank staff which he said continued to affect patient care on Lister ward.

22. The claimant set out in the email examples of the types of behaviour he was concerned about, which included staff being constantly late for hourly observations, sleeping at work, refusing to talk to patients, demonstrating a poor attitude towards patients, sitting on a 'zonal chair' reciting bible classes, and using phones to order food. He wrote that he was "*very upset by the level of abuse from (liz) I feel I have to talk too yourself and start a grievance process but my main concern is the patients and their concerns and my own."* He also referred in the email to a discussion he'd had the previous week with Ms Watson about the possibility of moving to another ward. The claimant made it clear that he did not want to move.

23. The claimant sent a further email to Ms Watson the next day, asking to be referred to occupational health as soon as possible and repeating his request for an informal meeting. Ms Watson replied the same day explaining that as she was on annual leave Gregg Murray would be happy to meet with the claimant later in the week to discuss his concerns. She suggested that the claimant contact Mr Murray directly to arrange a convenient time. She also asked the claimant what he wanted to see occupational health for, so that she could make the referral.

24. The planned meeting between the claimant and Mr Murray did not take place because on 9 August 2018 the claimant was off sick. He remained off work due to stress and anxiety from 9 August until 16 October 2018.

25. On 10th October the claimant and Ms Watson met in a coffee shop. The meeting took place there because the coffee shop was a neutral venue away from the workplace. The purpose of the meeting was to discuss the claimant's return to work and what could be done to support him. It was agreed that the claimant would return to work on a phased return and that a number of adjustments would be made to support his return, including a maximum of 2 shifts in a row where possible, no long days, no work on Ward 6 and referrals to both occupational health and the staff counselling service.

26. The claimant said, in his witness statement, that the meeting with Vicki Watson took place on 9th October, that the purpose of the meeting was to discuss his concerns about work, and that during the meeting he

had "*explained the situation at work was unbearable with the clique of staff running the ward and bullying new members of staff and patients."* In his oral evidence to the Tribunal the claimant was unclear whether the meeting had taken place on 9th or 10th October, at one point suggested that there may have been two meetings, and he could not recall the detail of the meeting.

27. The only contemporaneous evidence of the meeting between the claimant and Ms Watson was an email sent by Ms Watson to the claimant on 11th October which she began "*It was good to meet with you yesterday*". The email appears to summarise what had been discussed and agreed the previous day. There is no mention in the email of any concerns raised by the claimant.

28. We find on balance that there was only one meeting between Ms Watson and the claimant, which took place on 10th October 2018 in a coffee shop. We also find that the claimant did not raise any concerns during that meeting about the situation at work being unbearable, or about a clique of staff running the ward and bullying new members of staff and patients. The reasons we make these findings are:

    a. There is no mention of them in the email sent by Ms Watson the day after the meeting took place, and there is no reason for her not to have mentioned the claimant's concerns if he had raised them. Earlier email correspondence from August showed that she had responded promptly in writing to concerns raised by the claimant, offering a meeting to discuss them;

    b. The claimant agreed at that meeting to return to work on Lister ward the following week. We find it difficult to believe that he would have agreed to that had he found the situation 'unbearable' as he now says. He clearly felt confident enough to say to Ms Watson that he did not want to work on Ward 6. He appeared to want to return to work on Lister ward, and that is not consistent with the situation on the ward being 'unbearable'; and

    c. The claimant's recollection of the meeting was poor, understandably due to the passage of time since the meeting took place, and was inconsistent with the only contemporaneous evidence of what was discussed.

29. The claimant returned to work on or around 22nd October 2018 and remained at work on the Lister ward until 21 December when he began another period of sickness absence.

30. On the morning of 12th December 2018 there was an incident on Lister ward involving the claimant and a colleague. That colleague, Healthcare Assistant Angela Beardmore, had been dealing with a patient, Patient X, who was angry because his leave had been suspended the previous day due to suspected drug taking. Patient X became abusive and started swearing at Ms Beardmore. A staff nurse approached Patient X and Ms Beardmore to provide support, and

described Ms Beardmore as asking Patient X to calm down in a "*firm and assertive way yet calm and supportive".*

31. Ms Beardmore warned the patient that if he did not calm down she would need to use her alarm, and when he continued to be abusive and angry towards her, pulled the alarm. Patient X was then taken into a quiet room by Ms Beardmore and a colleague where he continued to be aggressive and rude towards Ms Beardmore. Ms Beardmore left the room and colleagues, including the claimant, came into the room to try and diffuse the situation. Patient X said that he would only speak to the claimant, and the claimant successfully calmed him down.

32. Shortly afterwards, Ms Beardmore was in the ward office when the claimant walked in. He told Ms Beardmore that the patient had done nothing wrong, as he did not believe that the patient had been taking drugs. There followed an argument between Ms Beardmore and the claimant during which both became heated and swore at the other. In a statement provided after the event, Ms Beardmore described the claimant as being "*relentless and pressing and I felt he was being confrontational pressing and attempting to coerce me in to sharing his opinions*", as moving close to her, bending forward and waving his finger at her face. She also said that the claimant had been aggressive towards her, and that she felt trapped and threatened. She admitted that she swore at him repeatedly, and said that he had repeatedly told her that she was 'nothing' and that he had also made a comment about getting rid of her.

33. The claimant said that Ms Beardmore had repeatedly sworn at him and said that Patient X was a drug user. The claimant does not believe that Patient X had been using drugs. He described Ms Beardmore as 'completing losing the plot' and said that he was distressed by the incident.

34. Immediately after the incident Angela Beardmore reported it. She went to see Stephen Davidson, Team Leader on Lister Ward, who was at the time in the Ward Managers' Office. She told Mr Davidson that the claimant had been verbally abusive towards her and spat in her face. Angela accepted that she had told the claimant to 'fuck off' because she was upset and felt intimidated by him, but immediately accepted that she was wrong to say this.

35. The claimant then entered the office and began to argue with Ms Beardmore again. Mr Davidson asked the claimant to leave the office and go for a walk to calm down. After a brief period, the claimant returned to the ward and Mr Davidson asked him for his view of what had happened. The claimant told Mr Davidson that Ms Beardmore had been aggressive towards him, and that she had spat at him whilst speaking. The claimant also told Mr Davidson that no one had ever spoken to him like that, and that he wanted Ms Beardmore to be removed from the ward.

36. The claimant demanded that Mr Davidson tell the Ward Manager what had happened.

37. The claimant said in his witness statement to the Tribunal that after the incident on 12 December he spoke to the nurse in charge and went to see two Healthcare Assistants to report Ms Beardmores's alleged abuse of the patient. He did not however identify the Healthcare Assistants that he allegedly spoke to that day or provide any more detail about the alleged disclosures that he made to them. There was no written record or other documentary evidence of his alleged conversation with the band 6 Healthcare Assistants.

38. We find that the claimant did speak to Katy Simmonds, a nurse, on 12th December. He told Ms Simmonds that Patient X had 'done nothing wrong' and asked how Ms Beardmore knew that the patient had been doing drugs. Ms Simmonds asked the claimant to speak to Steve Davidson. There was no contemporaneous evidence before us regarding the alleged disclosure on 12th December.

39. The following day the claimant sent an email to the Ward manager Vicki Watson headed "*Unacceptable behaviour from a member of staff*". In the email he said that he had been to senior members of staff following the incident (although there was no evidence before us as to who those members of staff were) and that he had been given no support. He told Ms Watson that he wanted to make a formal complaint of bullying and victimisation.

40. The claimant sent a further email to Vicki Watson on 21 December in which he told her that due to what he described as 'ongoing bullying and harassment on the ward' and incorrect wages being paid, and being 'continually ignored' he would not be coming into work because he was suffering from stress and severe anxiety.

41. The claimant did not attend work due to ill health from 21 December 2018 until July 2019 when he returned to work in a different role.

42. Vicki Watson replied to the claimant's email of 21st December 2018 on the same day apologising for not being in touch sooner, and explaining that she had not been around much. She said that she wanted to try and resolve matters as soon as possible and for the claimant to return to work with the support he needed, and to that end she would call him the following Monday morning. She also suggested mediation as a way of resolving the allegations of bullying and harassment, and asked for his views on this.

43. Ms Watson tried to call the claimant the following Monday (24th December) but was unable to reach him. She sent him an email explaining that she would be in contact the following week after Christmas.

Grievance investigation

44. Lorraine Lockley was asked to investigate the complaint that had been raised by the claimant and dealt with it under the respondent's grievance procedure. On 2 January 2019 she telephoned the claimant to make contact, and on 3rd January she sent him an email inviting him to a meeting on 10th January to discuss his concerns. She explained

that he had the right to bring someone with him to the meeting and suggested that he provide a written account of his concerns about HCA Beardsmore. Ms Lockley followed up her email with a letter confirming the appointment on 10th January and enclosing a copy of the respondent's Grievance and Sickness policies.

45. The claimant provided Ms Lockley with a written account of what he said had happened on 12th December and also wrote a three page document listing a number of concerns about patient care on Lister Ward. The claimant's complaint about Ms Beardmore was dealt with under the respondent's grievance procedure by Ms Lockley. The concerns he raised about patient care were investigated separately by Lynne Alsop.

46. The claimant met with Ms Lockley on 10th January 2019 and was accompanied by a personal friend. At the start of the meeting Ms Lockley asked about the claimant's health. He told her that he had been to see his doctor and had been diagnosed with anxiety and stress. Ms Lockley asked the claimant if he was aware of the staff counselling service and the claimant said that he was. It was agreed that the claimant would be referred to occupational health.

47. The claimant was then asked in some detail about the incident on 12th December. He described Angela Beardmore variously as being unprofessional, as 'screaming' at him, telling him to 'fuck off' and spitting at him as she spoke. He accepted that the incident with Ms Beardmore was an isolated one but described it as the 'cherry on the cake'. He told Ms Lockley that he wanted to be back at work and that he wanted to stay working on Lister Ward. He also said that he wanted Angela Beardmore to be disciplined and for the issues he had raised about patient care to be looked into.

48. There was a discussion about staffing levels on Lister Ward, which were being affected at the time by the fact that in September 2018, a very vulnerable patient had transferred to Ward 6, another ward at Wells Road Hospital. That patient was at high risk of self-harm and suicide and required four members of staff to care for him at all times.

49. At the end of the grievance meeting on 10th January there was a discussion about the arrangements for contact with the claimant whilst he was off sick. The claimant said he was happy with Vicki Watson remaining as the point of contact. The claimant's friend raised the issue of the claimant going onto half pay if he remained off sick. He was told by HR that he could write to the General Manager setting out his reasons why he believed his absence was work related, with a view to claiming additional sick pay toping him up to 85% of normal pay, and that the process would be started by him writing to Andy Latham.

50. It was agreed that Ms Lockley would call the claimant the following week. Ms Lockley also provided the claimant with information about the respondent's Freedom to Speak Up policy.

51. After the grievance meeting Ms Lockley wrote to the claimant summarising what had been discussed. She confirmed that she would

be investigating the complaint of bullying and harassment against Angela Beardmore under Stage 2 of the respondent's grievance procedure, and that the concerns about patient care would be dealt with separately as a whistleblowing concern. She also reminded the claimant of the process to follow should he wish his current sickness absence to be recorded as work related.

52. On 14th January 2019 Ms Lockley wrote to Angela Beardmore inviting her to an investigation meeting the following day. Ms Lockley also obtained statements from Stephen Davidson, Team leader on Lister Ward, Louise Stout, Staff Nurse, Stephen Petch, Wellbeing Facilitator and Katy Simmonds, Staff Nurse. She met with Angela Beardmore on 16 January and viewed the CCTV footage from Lister ward on the day of the incident. She also checked the relevant RiO (patient electronic records) entries for Patient X.

53. She kept the claimant up to date on the progress of her investigation and wrote to him on 1st February 2019 updating him and responding to a query he'd raised about his pay.

54. Ms Lockley also referred the claimant to occupational health, and he met with an occupational health specialist on 28th January. Following that meeting occupational health prepared a report in which they commented:

"*Mark has raised a number of concerns regarding his ward environment and management, whilst these concerns are being looked into another ward can be an option to facilitate his return should this be supportive…*

Mr Gavin describes experiencing symptoms characteristic of stress which he states are attributed to work related factors. He is currently under the care of his GP with fit note cover. A return to work date has not yet been identified…

We discussed the option, as a temporary measure, of returning to work in another area. Mr Gavin enjoys the clinical work activity in his usual work environment. It is his preference to return to this area at some point in the future..."

55. Having concluded the grievance investigation, Ms Lockley invited the claimant to a meeting to tell him of her findings and conclusion. That meeting was postponed at the claimant's request and took place on 18th February 2019. Ms Lockley wrote to the claimant after that meeting confirming her decision in writing.

56. Ms Lockley concluded, in summary, that there had been a verbal argument between the claimant and Ms Beardmore on 12 December which both found distressing. The argument related to a patient, Patient X, about whose behaviour and care they held different opinions. The CCTV footage showed the patient approaching Ms Beardmore in an aggressive manner and also behaving aggressively towards her in the quiet room.

57. It was Ms Lockley's view that both the claimant and Ms Beardmore had a responsibility to work towards resolving issues and she suggested a facilitative process to do that. Both Ms Beardmore and the claimant appeared to accept that the incident was a 'one off' and Ms Beardmore told Ms Lockley that the two of them had worked professionally together since the incident. Ms Lockley suggested a meeting to discuss an appropriate resolution plan when the claimant came back to work and told the claimant that he had the right of appeal against her decision, and that any appeal should be sent to Andy Latham.

58. After the incident Ms Beardmore recognised that her behaviour was inappropriate and apologised for it. In contrast however, the claimant showed no remorse, was not willing to accept that he had behaved inappropriately at all towards Ms Beardmore and did not apologise.

Grievance appeal

59. On 7 March the claimant appealed against the grievance outcome in an email sent to Andy Latham, General Manager. The grounds of appeal set out in his email were that Ms Lockley had "*missed valuable opportunities during her inapt short investigation and was completely one sided both in her investigation techniques and opinions but she did however condescend that I was verbally ABUSED this alone in my view is something I would strongly ask yourself to impartially investigate."*

60. Mr Latham acknowledged the claimant's appeal on 8th March, and on 26th March he wrote to the claimant inviting him to an appeal hearing on 26th April 2019. He reminded the claimant of his right to be accompanied at the appeal hearing and explained that Lorraine Lockley would be present at the hearing to present the management case. He summarised the claimant's grounds of appeal and invited the claimant to submit any specific information for consideration at the appeal by 5th April. He also asked the claimant to identify any witnesses that he wished to call.

61. On 8th April the claimant sent an email to Mr Latham's PA identifying the following information that he wanted and people that he wished to call as witnesses at his appeal hearing:

    a. Patient X
    b. Angela Beardmore
    c. Lorraine Lockley
    d. Steve Petch
    e. Stephen Davidson
    f. CCTV recordings on the morning of the incident and 'zonal' camera footage from outside the main office on Lister Ward
    g. Rio notes and incident forms related to the incident involving Patient X
    h. Statements on Rio, notes and any statements made by staff on duty on the day of the incident and subsequently in the grievance investigation; and
    i. A copy of Lorraine Lockley's full findings and original grievance notes.

62. Mr Latham replied to the claimant in detail setting out his response to each of the above requests. He explained that he would ask Gregg Murray, deputy Modern Matron on Lister Ward, to approach Angela Beardmore and the other individuals identified, and ask them to attend the appeal hearing. He also told the claimant that the CCTV footage would be viewed at the appeal hearing. He explained that he was not planning on asking Patient X to attend the appeal hearing as he had been interviewed as part of the recent whistleblowing investigation, but that if the claimant had any specific questions he wanted to put to him, he would review them and decide whether to approach Patient X again.

63. The claimant did not provide Mr Latham with any specific questions for Patient X. On 24 April Mr Latham wrote to the claimant again giving an update and explaining that Angela Beardmore had declined the request to attend. He reiterated that CCTV footage would be shown at the appeal. All of the other requests made by the claimant for the appeal hearing were agreed to.

64. The claimant replied to Mr Latham the same day. Despite all of the steps taken by Mr Latham to facilitate the claimant's requests for the appeal hearing, the claimant began his email by writing: "*I'm somewhat bemused and astonished by lack of effort and consideration into my appeal*". He complained about Angela Beardmore not attending the appeal hearing, and commented that : "*I am currently taken legal advice regarding this situation as if I needed any more proof today you now inform me the main aggressor in this, ie (AB) will not even be attending this makes this a complete farce and wasted of my time. So I will not be attending or be a part of this farce but I will as above intend to seek legal advice on both how my grievance investigation was handled by LL and how now my appeal which the main protagonist of the investigation won't event attend…"*

65. Mr Latham replied, expressing his sorrow that the claimant felt this way. He explained to the claimant that witnesses were not compelled to attend appeal hearings, that the purpose of calling witnesses was for the claimant to ask them to provide information which supported his appeal, and that it would not be appropriate to cross examine witnesses about perceived professional misconduct during the appeal hearing. Again, he reiterated that the CCTV footage would be viewed at the appeal hearing.

66. He asked the claimant to reconsider his decision not to attend the appeal hearing and told him that he had not yet stood down the appeal panel. The claimant replied to Mr Latham stating that he would not be attending the appeal hearing and intended to seek legal advice on a way forward instead. In light of this Mr Latham stood down the panel and wrote to the claimant explaining that he would consider his appeal closed and that the original findings of the grievance would therefore stand.

67. The claimant complained in his evidence to the Tribunal that he had not seen the CCTV footage from the ward on the 12th December 2018.

We find that the respondent would have shown the claimant the CCTV footage at the appeal hearing had he attended.

Whistleblowing investigation

68. On 10th January 2019 the claimant sent a list of concerns about patient care to Lorraine Lockley. These included concerns about:

    a. There being no staff on the ward;
    b. Patients being bullied by staff, not listened to, ignored and spoken to in a disrespectful manner;
    c. Patients not getting access to basic hygiene products or clean bedding and being denied leave;
    d. Patients not being given food;
    e. Bank staff not talking to patients, being late for shifts and ordering food on night shifts;
    f. A clique and low morale, with favouritism towards members of the clique;
    g. A lack of professionalism by staff;
    h. Lack of support from management;
    i. Lack of supervision;
    j. Risks to health and safety with staff being injured all the time;
    k. Lack of activities on the ward for patients;
    l. Patients being told 'there's no point going to tribunal as they are never getting out'; and
    m. ASCOM security alarms not working.

69. Andrew Latham contacted a former colleague Lynne Alsop and asked her to carry out a whistleblowing investigation into the concerns raised by the claimant. Ms Alsop was one of a bank of independent investigators employed by the respondent and was available to carry out the investigation immediately. She had previously worked for the respondent before retiring and Mr Latham trusted her experience, independence and integrity. From his knowledge of working with her previously, Mr Latham was reassured that if there were any issues with patient care on the ward, them Ms Alsop would unearth them, and that she would not hesitate to disclose any concerns she found. He therefore considered her to be an appropriate person to carry out the investigation.

70. Mr Latham sent an email to Ms Alsop about the investigation on 14 January in which he commented that "*We don't think there's much in it but one HCA is saying there are a range of issues*" and "*Will buy you breakfast if that tempts ya".* The claimant suggested that the contents of this email indicate that Ms Alsop was not independent and that the outcome of the investigation was predetermined. Having heard the evidence of both Mr Latham and Ms Alsop on this issue, we are satisfied that there is no truth in this allegation.

71. We find that Ms Alsop was independent in the way in which she carried out the investigation and that her conclusions were not predetermined or influenced in any way by Mr Latham. Mr Latham's evidence, which we accept, was that the comments in this email were based upon his

knowledge of Lister ward and were not designed in any way to influence the outcome of the investigation.

72. In the event, no restrictions were placed upon Ms Alsop in conducting the investigation, and she was free to carry it out as she saw fit. A number of criticisms that the claimant made were upheld, which indicates that she was not attempting in any way to brush matters under the carpet.

73. As Mr Latham was the 'commissioning manager' for the whistleblowing investigation, he drew up draft Terms of Reference for the investigation, which he sent to Ms Alsop to review and comment on. The Terms of Reference set out briefly the background to the investigation and stated that the investigation should be carried out under both the whistleblowing policy (now known as Speaking UP) and the Safeguarding Adults at Risk policy. They stated that the investigating officer had been asked to interview the claimant, patients, a range of staff across professional groups and bandings, and to "*pursue any other key lines of enquiry"* that were identified in the course of the investigation. The investigating officer was asked to "*summarise the facts, identify best practice and lessons that can be learned in an investigation report and present these in a report to the General Manager.*" The Terms of Reference also state that the investigating officer would have access to all resources which might reasonably be required for the investigation.

74. The respondent also informed the local authority, Nottingham City Council, about the allegations made by the claimant (which included potential safeguarding issues in relation to vulnerable adults) and the proposed investigation. The council appointed a safeguarding lead, Laura Elderfield, who confirmed to Mr Latham that the council were happy for the respondent to proceed with the investigation as planned.

75. Ms Alsop began her investigation by meeting with the claimant on 22nd January 2019. She took handwritten notes of the meeting which were typed up afterwards. The day after the meeting with the claimant Ms Alsop sent him the notes for him to review and comment on. There was no evidence before us of the claimant having asked for any changes to be made to Ms Alsop's notes.

76. During the meeting on 22nd January the claimant had the opportunity to talk through his concerns at length. He gave examples to back up the concerns that he had raised. He told Ms Alsop that he wanted the issues he had raised to be thoroughly investigated and for care of patients to improve as a result.

77. Ms Alsop found the claimant to be credible during her meeting with him and told Mr Latham as such after the meeting. Ms Alsop told us that she took the claimant's concerns very seriously and had reassured him of this during the meeting. We accept her evidence on this issue.

78. On 31 January Mr Latham wrote to the claimant confirming that Ms Alsop had been appointed to investigate his concerns, that Mr Latham had prepared draft terms of reference and that he hoped the

investigation would be concluded within 4 weeks. Ms Alsop also telephoned the claimant on 31 January to confirm that he was happy with the content of the typed notes of his meeting with her, and the following day the claimant emailed her to confirm his agreement to their contents. In that email the claimant thanked Ms Alsop for her understanding and said that he was happy for her to proceed with the investigation. He raised no concerns at that stage about either Ms Alsop carrying out the investigation or the way in which the investigation into his concerns was being conducted.

79. On 6th February a letter was sent to all members of staff working on Lister ward to explain that an investigation into anonymous whistleblowing concerns was being carried out. The letter explained that Ms Alsop would be arranging to speak to many of the members of staff and urged them to view the investigation positively, as it provided the opportunity for the respondent to flag best practice, review the care it provides and learn from any findings to improve the quality of care.

80. Ms Alsop then interviewed 17 members of staff. These included a cross section of staff on Lister ward from a range of different roles and salary bandings, but also other members of staff who were not part of the management structure of the ward. These included a psychologist who was not a member of Lister staff, a social worker, an independent patient advocate and a speech and language specialist. She interviewed all of the members of staff identified by the claimant as being able to give relevant evidence.

81. The claimant told us that she had failed to interview two male colleagues who he told the Tribunal were also excluded from the alleged 'clique' on Lister ward, namely Benjamin Madden and 'Anthony'. Ms Alsop could not recall the claimant mentioning these individuals and, in contrast to other staff who were referred to in her report, there was no mention of them in her record of her conversation with the claimant. Ms Alsop also arranged two open drop-in sessions for staff to come and speak to her if they wished to. Neither Mr Madden nor Anthony, or indeed anyone else, attended those sessions. We find on balance that the claimant did not ask Ms Alsop to speak to either Benjamin Madden or Anthony.

82. Ms Alsop also tried to interview six patients on Lister ward. One of those patients was too unwell to participate in the investigation, but five were interviewed. Interviewing a patient is a serious and time consuming matter. Patients on the ward are very vulnerable and some have communication difficulties. Before interviewing each patient, Ms Alsop asked speech and language therapists (who are independent of Lister ward) for support in converting and translating questions into a format that the patients could understand and respond to. Melvin Houghton, Patient Advocate, and a Speech and Language Therapist were present at every patient interview.

83. As well as interviewing staff and patients, Ms Alsop also obtained and reviewed a large amount of supporting information including:

a. Safeguarding, complaints and serious incidents data for Lister ward;
b. Staff turnover rates;
c. Staff sickness rates;
d. Supervision data;
e. Independent statements from patient family members and an independent clinician;
f. Care Quality Commission initial feedback from an inspection in February 2019;
g. Incident report, fact finding summary and CTR reports.

84. Ms Alsop also asked for information from exit interviews of staff who had left Lister ward. Unfortunately, the exit interview information she obtained was not helpful in her investigation because the respondent amalgamates exit interview feedback, so the information related to the Trust as a whole, rather than specifically to Lister ward.

85. The claimant complained to the Tribunal that more staff and patients should have been interviewed. We find that the approach taken by Ms Alsop was thorough, proportionate and reasonable in the circumstances. Ms Alsop had originally been asked to complete her investigation within a month. She requested additional time however to allow her to conclude the investigation as thoroughly as she wanted to. Mr Latham agreed to the extension of time and on 21 February 2019 he wrote to the claimant explaining that he had agreed to extend the investigation period by one month.

86. Ms Alsop completed her draft report on 14th March 2019, just two months after she had first been asked to carry out the investigation. She sent the report to Mr Latham in draft.

87. The report produced by Ms Alsop into the claimant's whistleblowing concerns is extremely detailed and thorough, running to some 246 pages.

88. Ms Alsop concluded, in summary that:

a. There was no evidence of bullying of patients by staff on Lister ward;
b. Although there were some issues with the behaviour of a few members of staff, which had been highlighted by patients, in general staff are respectful towards patients;
c. There was no real evidence of restrictive practices towards patients or of an abuse of power by staff, and no evidence of use of disrespectful language;
d. The admission of the patient requiring four-to-one care to another ward at Wells Road Centre had a very significant impact on Lister ward, resulting in the use of more and different bank staff than usual;
e. Some of the patients reported concerns about some of the bank staff;
f. There was no evidence of a clique on the ward, with staff describing themselves as being very happy and included at work and low sickness and turnover rates;

g. Staff felt there is strong leadership on the ward;

89. Ms Alsop did however identify a number of areas of concern and make recommendations for improvement, including:

a. Improving the induction of bank staff on Lister ward;
b. Insufficient supervision on the ward which needed to improve, including for bank staff;
c. Following up on the comment by one patient that he felt there were 'blanket restrictions' and that patients are not treated as individuals, that one of the Healthcare Assistants was 'overly rigid' and that one unnamed member of staff was not altogether professional; and
d. On one occasion there had been a fault with the ASCOM alarm system which had led to a member of staff being injured.

90. Between September 2018 and March 2019 staffing on Lister ward was particularly affected by a patient on Ward 6 who was at high risk of suicide and self harm, and needed a four to one staffing ratio to keep him safe. Staff from Lister were pulled onto Ward 6 to help with this patient regularly during this period. In addition, the patient was violent towards staff causing them injuries and sickness absence. This was recognised as causing particular staffing challenges, both by Ms Alsop in her report, and by the Care Quality Commission when it visited the Wells Road Centre in February 2019.

91. During this period as a result of permanent staff being pulled onto Ward 6 to help care for this patient, there was a particularly high reliance on bank staff, which meant that there were more faces on Lister ward that were unfamiliar to the patients.

92. Ms Alsop's review of staffing levels on Lister ward however concluded that staffing levels were safe and sufficient. As a result of her detailed analysis of the interviews she carried out and of the supporting information, Ms Alsop concluded that the majority of the claimant's allegations were not substantiated. There had not been any formal complaints from Lister ward from April 2018 onwards. Ms Alsop was concerned that this could mean that patients were being discouraged from bringing complaints and discussed the issue with the independent patient advocate who worked with patients on the ward. His view was that formal patient complaints were not being suppressed, and that complaints which patients did raise were dealt with and resolved quickly, avoiding the need for formal processes.

93. After receiving the report, Mr Latham shared it with Laura Elderfield at Nottingham City Council for her comments. He also sent it to some senior colleagues within the Trust.

94. On 26 March he wrote to the claimant informing him that Lynne Alsop had completed her investigation and inviting him to a meeting on 3rd April to discuss the findings and actions that would be taken. Mr Latham subsequently postponed the meeting by a day as he had not yet received the response from the council's safeguarding lead to the draft report as she had been unwell.

95. It was decided not to provide a full copy of the report to the claimant, in line with the respondent's normal procedure, but instead to provide him with a summary. There was, in our view, nothing untoward in this. The report is very long and detailed and contains a significant amount of sensitive and confidential information. It was appropriate for the respondent to provide the claimant with a summary.

96. Mr Latham met with the claimant on 4th April to tell him the conclusions of the investigation in some detail. The meeting lasted two hours and Mr Latham went through each of the findings individually. After the meeting Mr Latham wrote to the claimant setting out the conclusions of the investigation. The letter ended with Mr Latham thanking the claimant for sharing his concerns and for helping the respondent to appraise the treatment and care it offered and to improve patient experience. Mr Latham wrote that although many of the claimant's concerns had not been substantiated, "*key issues regarding staffing, supervision and induction have been identified; plus a further line of clinical enquiry following the statement of one patient, and an associated plan to improve upon these areas will be followed through."*

97. Mr Latham offered to update the claimant on planned improvements over the following months, and also reminded him that if he continued to have specific concerns or was unhappy with the process or feedback, he could raise these with David Mason, Associate Director of Nursing for the Forensic Division. He also reiterated that the claimant could take his concerns externally if he wished.

98. The respondent took a number of steps as a result of the conclusions of the whistleblowing allegations. These included:

    a. Monitoring staffing and supervision levels on the ward;
    b. Improving the induction and clinical supervision of bank staff;
    c. Exploring further the comments made by two patients that the ward felt like 'jail and that one member of staff could be 'arsey';
    d. Writing to all members of staff on Lister ward providing feedback on the investigation; and
    e. Ms Alsop visiting the ward to hold a debriefing session for staff and give them the opportunity to ask questions and raise any concerns they may have.

99. After receiving the outcome of the report the claimant contacted the CQC and NHS England to report his concerns about patient care on Lister Ward. There was no evidence before us of the content of the claimant's reports to either the CQC or NHS England.

100. On 8th May the claimant sent an email to the respondent's Chief Executive, Mr John Brewin. In the email the claimant wrote that he had "*huge concerns about the standard of care towards patients*" at Wells Road Centre, and that Ms Alsop's investigation into his concerns was flawed on many levels. He suggested that management were turning a blind eye to wrong doing and poor care, and covering it up. He asked the Chief Executive to carry out a 'full and impartial review' of care towards patient.

101. Mr Brewin asked Peter Wright to complete a review of the whistleblowing investigation that had been carried out. Mr Wright was at the time the Executive Director for Forensic Services at the Trust and, it appeared to us from his evidence to the Tribunal, an appropriate person to carry out a review. He clearly understood the importance of treating whistleblowing seriously within the NHS.

102. Mr Wright was sent a copy of Ms Alsop's report, and a number of other documents relevant to the investigation, which he reviewed. He saw his role as being to consider whether or not an appropriate process had been followed, and to review matters impartially.

103. He formed the view that the issues raised by the claimant had been comprehensively investigated. He was struck by how the investigation had involved listening to patients' accounts of their experiences on the ward, which gave him reassurance about the quality of patients' experiences. There were a few areas in the report which he considered were areas for improvement, but overall he formed the view that the conclusions of the report were reasonable, that a thorough investigation had been carried out and that the conclusions reached by Ms Alsop were appropriate based upon the evidence.

104. He recognised that Lister ward had been through a difficult time due to the complex needs of a patient on another ward but concluded that overall patients were well treated and respected by staff. He was also reassured that there were mechanisms in place enabling people to speak up about patient safety matters. The respondent had a Freedom to Speak Up Guardian who reported to a member of the Board and who anyone could get in touch with.

105. On 7 July Mr Wright sent an email to HR with his views on the investigation. He told HR that he believed the issues raised by the claimant had been thoroughly investigated, although he had some minor concerns about the way the report was presented. He suggested that he meet with the new General Manager to discuss leadership lessons from the report.

106. He also referred in the email to a recent Panorama programme about Whorlton Hall, in which an undercover journalist found that patients with learning disabilities were being abused, despite the fact that Whorlton Hall had a good CQC rating. This caused Mr Wright to be alive to the fact that even if a service appeared to be performing well, it was important to look behind that. He considered whether there were any warning signs of abuse on the ward, and concluded that there were not. He did however suggest that a possible weakness of the report was that there had not been any interviews with 'invisible observers' such as cleaners and contractors.

107. Mr Wright had visited Lister Ward regularly during the course of performing his duties, and during these visits he would speak with 'invisible observers' such as cleaners. His visits were more regular during the period from September 2018 because he was aware of the additional demand on staff due to the patient on Ward 6.

108. We are satisfied that Mr Wright carried out an independent review of the whistleblowing investigation, understood the importance of whistleblowing within the NHS (and of investigating it properly), and would not have hesitated to raise any issues. This was demonstrated by the fact that he was alive to the issues at Whorlton Hall and that patient care issues are not always brought forward, and that he identified things that could have been done better during the investigation.

Injury Allowance

109. The claimant remained off work due to illness from 21 December 2018 until July 2019. On 5th February 2019 a letter was sent to the claimant warning him that his sick pay would be reduced from full pay to half pay on 16th March 2019.

110. On 8th March the claimant sent an email to Andy Latham asking for his pay to be kept at 80%. In the email he wrote that HR had confirmed that his sickness was work related and that this had been recognised by Occupational Health. That statement was not correct. At no point did either HR or Occupational Health tell the claimant that they considered his sickness to be work related.

111. The only Occupational Health report that was before us in evidence was one dated 28 January 2019 in which it was noted that the claimant "stated" his illness was attributed to work related factors. Occupational Health merely reported the comment made by the claimant. They did not express any opinion on this statement or on the cause of the claimant's sickness absence.

112. None of the claimant's fit notes stated that his absence was work related. The reasons given for his absence between December 2018 and July 2019 were stress, anxiety and low mood.

113. On 26th March Mr Latham wrote to the claimant responding to his email and apologising for the delay in doing so, which he explained was due to him being on leave. He also explained that he had asked another General Manager to review the level of the claimant's sick pay.

114. Richard Fuller was asked by Mr Latham to deal with what was effectively an application for injury allowance under the respondent's policy. Mr Fuller did not know the claimant and had had no previous dealings with him.

115. Lorraine Lockley sent a number of documents to Mr Fuller including her grievance outcome letter and documents relating to his sickness absence and sickness absence management. Mr Fuller reviewed these documents together with the Trust's policy and management guidance on injury allowance. He also spoke to Lorraine Lockley to get a better understanding of the claimant's grievance and the grievance outcome.

116. Mr Fuller did not meet with the claimant and his consideration of the claimant's application for NHS Injury Allowance was based on the papers he reviewed and conversations he had with Lorraine Lockley and Andy Latham. There was no evidence before us to suggest that either Ms Lockley or Mr Latham had influenced Mr Fuller's decision in any way.

117. By the time of Mr Fuller's review, which took place in May 2019, the claimant had been off sick continuously for almost five months. He had also been absent from work between August and October the previous year. Mr Fuller took into account the reasons for the claimant's absence which was recorded as being due to stress and anxiety, but there was also reference in the documents before him to the claimant having physical health problems including a 'cancer like sickness' and a brain infection. He also took account of the fact that the claimant's grievance had been investigated and not upheld by Ms Lockley.

118. Mr Fuller concluded that the claimant did not qualify for Injury Allowance because his absence fell within the exception for "*stress related sickness absence as a result of disputes relating to employment matters such as investigations or disciplinary action…*"

119. He formed the view that the claimant's absence was connected to an employment related dispute and the related grievance about Angela Beardmore. Mr Fuller was aware that the claimant had raised a whistleblowing concern as well as a grievance but did not know the details of the whistleblowing complaint. Nor did he know about the claimant's complaints to the Chief Executive, NHS England or the CQC.

120. Mr Fuller's decision was therefore based upon the grievance that the claimant had raised. That grievance related to a dispute that had occurred between the claimant and Ms Beardmore on 12 December 2018 at work, which was in essence a personal dispute about treatment of a patient.

121. We find that Mr Fuller based his decision on the dispute between the claimant and Ms Beardmore and not upon the patient concerns that the claimant had also raised. He concluded that the claimant did not qualify for payment of injury allowance and on 24 May he wrote to the claimant to inform him of his decision. In the letter he wrote:

"*… I must decline your request as I do not consider that your absence meets the criteria for being classed as work-related in line with Trust guidance…*

You have the right to appeal against this decision….

Should you have any queries, please do not hesitate to contact me…"

122. The claimant appealed against the decision not to award him injury allowance in an email to Mr Fuller dated 3rd June 2019. In that appeal the claimant told Mr Fuller "*you are both inaccurate and incorrect and furthermore mr fuller as you clearly don't even know who my ward*

manager is I will not only appeal against your stupid decision I will be making a complaint about you and your totally unprofessional behaviour. This is totally unacceptable that you have not looked that there was incident of me being verbally abused and unacceptable poor patient care I then go off sick are all connected and backed up by medical view of both my GP and occupational health I will be making a formal complaint at the earliest opportunity about you and have taken legal advice on this…"

123. The claimant also sent an email the same day to Peter Wright in which he set out the grounds for his appeal against Mr Fuller's decision. These included that Mr Fuller had not, in the claimant's view, considered all of the facts and that Occupational Health had said 'point blank' that there was an ongoing work stress issue.

124. Mr Wright sought advice from HR on the process to follow in relation to an appeal against a decision not to award Injury Allowance. Following this advice, he dealt with the claimant's appeal as a grievance appeal. He wrote to the claimant inviting him to an appeal hearing which took place on 3 July 2019. During the appeal hearing the claimant told Mr Wright that "*this started because this incident happened in December so how can it not be directly related to work*". Mr Wright specifically asked the claimant if he accepted that his work-related stress arose from (1) the dispute with the colleague who allegedly swore at him and (2) the HR process which arose from that. The claimant said that he did accept that his stress arose from those two things.

125. Mr Wright assured the claimant during the appeal hearing that he agreed that the claimant's absence was work related and explained that the issue was whether it was linked to an employment dispute or not.

126. At the conclusion of the appeal Mr Wright formed the same view as Mr Fuller and he did not uphold the claimant's appeal. He concluded that the issues leading to the claimant's absence started on 12 December 2018 with the "*exchange of words*" between the claimant and Ms Beardmore, and that the absence was as a result of a dispute relating to an employment matter. As such, the claimant's absence fell within one of the exclusions set out in the Injury Allowance policy and he did not qualify for payments.

127. One of the allegations made by the claimant to the Tribunal was that, following the complaints to the Chief Executive, CQC and NHS England, the reason for his sickness was questioned (ie that it was not work related and that he would have to pursue compensation via legal means). We find that neither Mr Fuller nor Mr Wright questioned the reasons for the claimant's sickness or suggested that it was not work related. They did however find that his absence fell within the exclusions from the Injury Allowance policy. Neither of them told the claimant that he would have to pursue a claim for injury allowance through legal means.

128. The claimant said in his witness statement that in a meeting with Andy Latham on 3rd July 2019 Mr Latham told him that no one was questioning whether his sickness was caused by the working environment, and that he would have to fight with the Trust's lawyers for compensation including 80% pay for work related ill health.

129. Mr Latham was adamant in his evidence that he had not made these comments to the claimant. We prefer his evidence on that issue. There was no meeting between the claimant and Mr Latham on 3rd July, and Mr Latham had moved on to another role by that time and was no longer involved in managing the claimant. In any event, he had deliberately recused himself from any involvement in the decision about the claimant's application for injury allowance because of his involvement in the grievance appeal and in commissioning and feeding back on the whistleblowing investigation.

Redeployment

130. Prior to the events which are the subject of this claim, the claimant had worked on Lister ward for years. Initially when he went off sick in December 2018, he indicated that he wanted to return to work at Lister when he was well enough to do so. On 28th January 2019 the claimant met with Occupational Health and told them that he enjoyed the clinical work activity in his usual work environment. He also said that it was his preference to return to his usual place of work in the future.

131. Over time however the claimant changed his mind about returning to work on Lister ward. During a sickness absence review meeting on 2nd May 2019 he asked for redeployment for the first time. Up until that point he had consistently told the respondent that he wished to return to Lister ward when he was well enough to do so. It was therefore only after he had received the outcome of both his grievance and the whistleblowing investigation that the claimant's position changed, and he told the respondent he wanted redeployment.

132. A meeting took place on 11th June 2019 between the claimant, Andy Latham, Eleanor Bills (who had by then replaced Vicki Watson as Ward Manager) and Muhammad Saqib (Workforce Advisor). The meeting was held under the respondent's Sickness Absence Management Policy. During the meeting the claimant shared with the respondent an occupational health report dated 16 May 2019. That report was not in evidence before us.

133. Mr Latham wrote to the claimant after the meeting summarising what had been discussed. The letter, dated 17 June stated, amongst other things, that:

"*…During the meeting you shared your Occupational Health report dated 16/05/2019. Although the copy of Occupational Health report states it is a draft, you confirmed that you fully agree with the contents of the report and will accept it as a final version. We discussed that the occupational health report does not specifically recommend*

redeployment in order to support your mental health and wellbeing and return to work…

You were not happy as to why you have not been redeployed to other roles as you have been asking for this since January 2019…

You expressed your dissatisfaction regarding the outcomes of internal processes; you stated that due to this you have made the decision to move outside the service. You confirmed that no adjustments/interventions or mediation would change this decision…considering your request that you do not feel able to return to Wells Road Centre and to support your return to work, I agreed to consider redeployment outside the service. We discussed that your substantive role in Lister Ward is not at risk and you are voluntarily putting yourself at risk. You were informed that you will not be entitled to any pay protection or excess travel; you confirmed that you fully understand the implications…"

134. During the meeting on 11 June the claimant said that he had received a new fit note until 1 July 2019 and also that he had been requesting redeployment since January 2019. There was no evidence before us to support the suggestion that the claimant had been asking for redeployment since January 2019. On the contrary, the evidence was that the claimant wanted to return to Lister ward until 2nd May 2019. The occupational health report in January 2019 stated that the claimant's preference was to return to Lister ward.

135. As the claimant did not want to return to Lister ward, Mr Latham agreed that the respondent would try and redeploy him. Mr Latham explained to the claimant during the meeting on 11th June what that would entail, and the consequences of it, including that the claimant would not be entitled to pay protection or mileage costs, and that he was putting himself at risk by seeking redeployment, as his role on Lister ward still existed. The only reason Mr Latham mentioned this to the claimant was because he wanted the claimant to be fully aware of the potential consequences of seeking redeployment, so he could make an informed decision.

136. It was agreed during the meeting on 11th June, that Mr Saqib would set up an 'at risk' account on the NHS jobs website and send the claimant a list of Band 3 vacancies weekly. The claimant was encouraged to regularly check the respondent's website for vacancies, and to contact Mr Saqib if he was interested in any roles.

137. The day after the meeting at which redeployment had been agreed, Mr Saqib sent the claimant a list of the current Band 3 vacancies within the Trust. He also asked the claimant to let him know if he (the claimant) also wanted to see Band 2 vacancies as well. The claimant replied that he was only interested in Band 3 opportunities.

138. At no point during the redeployment process were details of any Band 2 roles sent to the claimant.

139. Mr Saqib sent a further email to the claimant on 17 June highlighting a vacancy as a Band 3 Healthcare Assistant at another hospital, which he thought may be of interest to the claimant. The claimant replied thanking him for his email and saying that he had applied for a vacancy at Retford.

140. On 19 June an email was sent to the claimant by NHS Jobs Vacancy Service enclosing details of two Band 3 / 4 roles, both as secretaries. This email was automatically generated. After receiving it the claimant forwarded the email to Andy Latham and to the Chief Executive of the Trust with the comment that the roles were "*totally inappropriate"* and asking Mr Saqib to "*please work harder otherwise we are in danger are getting nowhere*".

141. On 24 June Mr Saqib contacted the recruiting manager for the Retford role by email. He asked her to assess the claimant's application based on minimum essential criteria, so that if he met the minimum essential criteria, he would have a formal chat. Mr Saqib did this with a view to helping the claimant to secure the role.

142. The claimant attended an interview for the Retford role on 26 June and was offered the position with a start date of 8 July 2019. There was an initial four week period during which the claimant was shadowing another member of staff, which the claimant completed successfully, and the claimant has been working in the role ever since.

143. Within two weeks of starting the redeployment process the claimant had been offered an alternative role. References were subsequently sought for the claimant in relation to the new position, but this was part of the respondent's standard process.

144. On 26 June the claimant sent an email to Mr Saqib after his interview for the role. He told him that the interview had gone well and he'd been offered and accepted the role. He made no complaint at the time about the support provided to him by Mr Saqib and Mr Latham during the redeployment process.

The Law

145. Section 43A of the Employment Rights Act 1996 ("**the ERA**") defines a protected disclosure as "*a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H."*

146. Section 43B of the ERA ("*Disclosures qualifying for protection*") provides as follows:

"*(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 environment has been, is being or is likely to be damaged, or
(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…"

147. Under section 43C of the ERA ("*Disclosure to employer or other responsible person"*):

"*(1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure*
(a) To his employer…

(2) A worker who, in accordance with a procedure whose use by him is authorised by his employer, makes a qualifying disclosure to a person other than his employer, is to be treated for the purposes of this Part as making the qualifying disclosure to his employer."

148. Section 43F provides for qualifying disclosures to be made to "*a person prescribed by an order made by the Secretary of State"* where the worker reasonably believes *"(i) that the relevant failure falls within any description of matters in respect of which that person is so prescribed, and (ii) that the information disclosed, and any allegation contained in it, are substantially true*".

149. A full list of prescribed persons is set out in Schedule 1 to the Public Interest Disclosure (Prescribed Persons) Order 2014 and includes, in relation to healthcare, the Care Quality Commission.

150. Section 47B of the ERA states that:

"*(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…"*

151. Section 48 of the ERA gives workers the right to bring claims that they have been subjected to a detriment in contravention of section 47B to an Employment Tribunal and provides that:

"*(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.

(4A) Section 207B (extension of time limits to facilitate conciliation before institution of proceedings) applies for the purposes of subsection (3)(a)…"

152. The burden of proof in detriment claims is set out in section 48(2) of the ERA: "*On a complaint under subsection (1) … it is for the employer to show the ground on which any act, or deliberate failure to act, was done.*

153. In ***Cavendish Munro Professional Risks Management Ltd v Geduld [2010] ICR 325*** the EAT considered what amounts to a 'disclosure of information' and held that there is a distinction between disclosing information, which means 'conveying facts' and making allegations or expressing dissatisfaction. It gave, as an example of disclosure of information, a hospital employee saying 'wards have not been cleaned for two weeks' or 'sharps were left lying around'. In contrast, the EAT held, a statement that 'you are not complying with health and safety obligations' is a mere allegation.

154. The Court of Appeal, in ***Kilraine v London Borough of Wandsworth [2018] ICR 1850***, established that 'information' and 'allegation' are not mutually exclusive. There must, however, be sufficient factual content tending to show one of the matters in subsection 43B(1) of the ERA in order for there to be a qualifying disclosure.

155. The information disclosed by the worker does not have to be true, but rather, the worker must reasonably believe that it tends to show one of the matters falling withing section 43(B)(1). The employee must also reasonably believe that the disclosure is in the public interest. When deciding whether the worker had the relevant 'reasonable belief' the test to be applied is both subjective (ie did the individual worker have the reasonable belief) and objective (ie was it objectively reasonable for the worker to hold that belief). See ***Korashi v Abertawe Bro Morgannwg University Local Health Board [2012] IRLR 4***, which was endorsed in ***Phoenix House Ltd v Stockman [2017] ICR 84***, in which the EAT held that, on the facts believed to

exist by an employee, a judgment must be made, first, as to whether the worker held the belief and, secondly, as to whether objectively, on the basis of the facts, there was a reasonable belief in the truth of the complaints.

156. When considering whether a disclosure is in the public interest, the Tribunal must decide what the worker considered to be in the public interest, whether the worker believed that the disclosure served that interest and whether that belief was held reasonably. In ***Chesterton Global Ltd (t/a Chestertons) and anor v Murmohammed (Public Concern at Work intervening) [2018] ICR 731*** the EAT held that it is not for the Tribunal to consider for itself whether a disclosure was in the public interest, but rather the questions are (1) whether the worker making the disclosure in fact believes it to be in the public interest and (2) whether that belief was reasonable. Tribunals should be careful not to substitute their views of whether disclosures are in the public interest for that of the worker.

157. Mr Mann submitted that, following ***Chesteron***, there are four questions for the Tribunal to consider when deciding whether a disclosure is made in the public interest:

a. the numbers in the group whose interests the disclosure served;
b. the nature of the interests affected and the extent to which they are affected by the matters disclosed;
c. The nature of the wrongdoing disclosed, and in particular whether it was deliberate or inadvertent; and
d. The identity of the employer.

158. In ***McInally and anor v City of York Council ET case no. 1800630/16*** the Tribunal held that a care home worker who complained to a care home manager about understaffing in the care home had a reasonable belief that the disclosure was in the public interest as it was about the welfare of the residents of the care home.

159. The EAT issued guidance in ***London Borough of Harrow v Knight [2003] IRLR 140***, on what is required for a successful detriment claim under s47B of the ERA:

a. The claimant must have made a protected disclosure;
b. He must have suffered some identifiable detriment;
c. The employer must have subjected the claimant to that detriment by some act or deliberate failure to act; and
d. The act or deliberate failure to act must have been done on the ground that the claimant made a protected disclosure.

160. The concept of 'detriment' is very wide, and a detriment can exist if a reasonable worker would or might take the view that the action of the employer was, in all the circumstances, to his detriment – ***Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337, HL***. 'Detriment' can include general unfavourable treatment and there is no test of severity.

161. There must, however, be a causal link between the detriment and the fact that the worker made a protected disclosure. The provisions of section 48(2) of the ERA mean that, once a claimant shows that there was a protected disclosure, and a detriment which the respondent subjected the claimant to, the burden shifts to the respondent to show that the worker was not subjected to the detriment on the ground that he made the protected disclosure.

162. Tribunals can draw inferences as to the motivation of the person subjecting the worker to a detriment, and the EAT has given guidance on the approach to doing so – ***International petroleum Ltd and ors v Osipov and ors EAT 0058/17*** **:**

a. The burden of showing that the protected disclosure is the reason for the detrimental treatment lies with the claimant;
b. The employer must be prepared to show why the detrimental treatment took place (section 48(2) ERA) and, if it does not do so, inferences may be drawn against it; and
c. Any inferences drawn must be justified by findings of fact.

Conclusions

Protected disclosures

First alleged disclosure: 6 August 2018

163. We find that the email sent by the claimant on 6 August 2018 to Vicki Watson did contain a disclosure of information. In particular, it disclosed factual information about patient care and the behaviour of bank staff. It referred to bank staff being constantly late for hourly observations, sleeping on observations, refusing to talk to patients, about their attitude, and being verbally hostile. It contained specific examples of behaviour and was not just a general allegation.

164. We find that this disclosure, and in particular the disclosure of failings in relation to the observations of patients, is a disclosure tending to show that there was a risk to the health or safety of patients on the Lister ward, as there could well be adverse consequences for patient safety if proper observations are not carried out. This is particularly so given the nature of the patient group on Lister ward, who are particularly vulnerable.

165. The information disclosed also tends to show that the respondent has failed to comply with a legal obligation, including its duty of care towards patients. Mr Mann referred in his submissions to pieces of legislation which he said the disclosures tended to show had been breached. Mr Sheppard pointed out that none of these had been referred to at any point prior to submissions, but accepted that there was no obligation on the claimant to identify in a disclosure the legal obligation that it relates to. We do not make any findings as to whether the information disclosed on 6 August tends to show a breach of any of the particular pieces of legislation referred to by Mr Mann. It is not necessary for us to do so, as we find that the information tends to show

that the respondent was failing to comply with the duty of care imposed upon it under the law of tort.

166. We therefore find that the information disclosed by the claimant on 6 August 2018 falls within subsections 43(b)(1)(b) and (d) of the ERA.

167. We accept that the claimant reasonably believed the information that he disclosed to be true, and that it tended to show that the respondent was not complying with its legal obligations and that the health and safety of patients were at risk. It is clear to us that the claimant has very strong views about the concerns disclosed both on 6 August 2018 and on other occasions. These are views from which he has not departed, despite the findings of the grievance and whistleblowing investigations. Whilst the strength of a belief is not, without more, sufficient to make it either a genuine or a reasonable belief, in this case the claimant had first hand knowledge of the matters about which he complained, as he worked on Lister ward, and he gave specific examples of the behaviour he was complaining about.

168. We also find that the claimant made this disclosure because he was genuinely concerned about the risk to patient safety as a result of the behaviour he complained about. There was no evidence of any personal motivation for making the disclosure, as he also referred in the email to wanting to stay on the ward, rather then leave it.

169. Turning now to whether the disclosure was in the public interest, and the four questions in Chesterton:

a. The numbers in the group whose interests the disclosure served: we find that this was all of the patients on Lister ward – 16 people, and potentially any future patients on the ward as well;
b. The nature of the interests affected and the extent to which they were affected by the matters disclosed: we find that the health of vulnerable adults who are being cared for by a public body is in the public interest. The respondent is an NHS Trust which is funded publicly through taxation, and the manner in which it treats its patients is a matter of public concern.
c. The nature of the wrongdoing disclosed: the claimant accepted that deliberate wrongdoing is more likely to be in the public interest than inadvertent wrongdoing, and there is no suggestion in this case that the wrongdoing was deliberate. The nature of the wrongdoing in this allegation is akin to negligence and poor standard of patient care.
d. The identity of the wrongdoer: the respondent is an NHS Trust which operates in the public sector and is publicly funded.

170. In light of our conclusions above, we find that the claimant considered patient care and safety to be a matter of public interest, that he reasonably believed he was making his disclosure in the public interest, and that it was objectively reasonable for him to form that belief. The information disclosed on 6 August was disclosed to the claimant's employer and therefore falls within section 43C of the ERA.

171. We therefore find that the email to Vicki Watson on 6 August 2018 is a protected disclosure.

Second alleged disclosure: 9 October 2018

172. In light of the findings of fact that we have made at paragraphs 24 to 27 above, and in particular our finding that the claimant did not raise any concerns during his meeting with Ms Watson in October 2018 about the situation at work being unbearable, or about a clique of staff running the ward and bullying new members of staff and patients, it follows that there was no disclosure of information falling within section 43(B)(1) of the ERA.

173. We accept that a disclosure can be made orally and does not have to be made in writing, but we find on the facts that the claimant did not disclose information tending to show that the respondent had failed to or was failing to comply with a legal obligation, nor of any risk to the health and safety of any individual.

174. There was, therefore, no protected disclosure made on either 9th or 10th October 2018.

Third alleged disclosure: 12 December 2018 report to two band 6 Healthcare Assistants

175. There was insufficient evidence before us as to what was allegedly said by the claimant to two band 6 Healthcare Assistants on 12 December 2018. The only evidence on this was one line in the claimant's witness statement where he said that he "*went to see two Band 6 Health care assistants to report her* [Angela Beardmore] *abuse of this patient."*

176. The claimant has not named the Healthcare Assistants to whom he allegedly made the disclosure on 12 December. There is no written or contemporaneous evidence of what was allegedly said on that day. In the statement that he provided for the grievance investigation he referred to reporting the incident to a nurse and to speaking to the team leader about it, but there is no mention of speaking to any band 6 Healthcare Assistants.

177. There is therefore insufficient evidence before us for us to conclude there was a protected disclosure on 12 December 2018.

Fourth alleged disclosure: Grievance meeting with Lorraine Lockley

178. The allegations about patient care were disclosed to Lorraine Lockley on the morning of the 10th January 2019 in preparation for the grievance meeting. The concerns sent by the claimant to Ms Lockley on 10th January include allegations that:

a. There were no staff on the ward
b. Patients were being bullied by staff

c. Patients weren't being given food and were being talked to in a disrespectful manner;
d. Patients were being ignored;
e. There were insufficient activities for patients;
f. Poor management and supervision of staff;
g. Patients being told there is no point going to tribunal as they were never getting out; and
h. ASCOM alarms were not working.

179. The information disclosed contained factual information tending to show matters that could put the safety and health of patients and staff at risk and also tending to show that the respondent was failing to comply with its duty of care towards patients.

180. We find, for the same reasons as in relation to the first protected disclosure, that the claimant reasonably believed that the disclosure tended to show matters falling within sections 43(B)(1)(b) and (d) of the ERA, that the claimant reasonably believed the disclosure to be in the pubic interest and that this belief was reasonable.

181. We therefore find that the concerns about patient care disclosed by the claimant to Ms Lockley on 10th January 2019 do amount to a protected disclosure.

Fifth alleged disclosure: emails to Chief Executive of the respondent, the Care Quality Commission and NHS England on 8 May 2019

182. The email that the claimant sent to the respondent's Chief Executive on 9 May 2019 refers to 'huge concerns about the standard of care towards patients', to a flawed investigation into the concerns that the claimant has raised, to the claimant being verbally abused, to no action being taken against Ms Beardmore, and to a staff member making threats to have a patient dragged to low stimulus again. It refers to issues of patient care and malpractice at the Wells Road Centre and gives specific examples of the behaviour.

183. The email discloses information, including about patient care and the way in which whistleblowing concerns are investigated. We accept that the claimant believed that the information he disclosed tended to show a breach of a legal obligation and / or a risk to health and safety and that his belief was reasonable.

184. For the reasons set out above, we find that the disclosure of information about patient care is a protected disclosure. We also find that disclosure of information about the way in which an NHS Trust investigates whistleblowing concerns is in the public interest. The public has an interest in whistleblowing allegations being properly investigated, particularly in the public sector. The claimant believed his disclosure to Mr Brewin on 8 May 2019 to be in the public interest and his belief was reasonable.

185. The disclosure to the Chief Executive was a disclosure to the claimant's employer falling within section 47C of the ERA.

186. In relation to the alleged disclosures to the Care Quality Commission and to NHS England, there is quite simply insufficient evidence before us for us to make findings as to whether they were qualifying disclosures. The emails that the claimant sent to the CQC and NHS England were not before us in evidence and there was no oral evidence as to their content.

187. We accept that a qualifying disclosure to the CQC would have fallen within section 43F of the ERA as the CQC is a prescribed person to whom disclosures can be made. NHS England however is not, and a disclosure to NHS England would not have fallen within section 43F.

188. We therefore find that the disclosure to the Chief Executive of the Trust on 8 May 2019 was a protected disclosure but that the alleged disclosures to the CQC and NHS England were not.

Detriments

(1) Failure to investigate the complaints made in August and December 2018

189. When the claimant made his complaint to Vicki Watson in August 2018, he specifically asked for it to be dealt with informally. The claimant was invited to a meeting with Gregg Murray to discuss them the very same week. Given the claimant's request for things to be dealt with informally, that was in our view an appropriate way for the respondent to respond to the complaints. Gregg Murray was senior to Vicki Watson and was the right level of manager to meet with the claimant to discuss his concerns as Vicki Watson was due to be on leave and did not want to delay in responding to the claimant.

190. The meeting to discuss the complaints made in August couldn't take place because the claimant went off sick within a very few days of having made them and remained off work for approximately two months. When he returned to work in October, he did not refer to his email of 6 August, and it is understandable that the focus of both the claimant and the respondent at that time was on supporting the claimant to return to work.

191. Given the nature of the concerns raised, and the claimant's request that they be dealt with informally, it was in our view appropriate for the respondent not to carry out any further investigation into them whilst the claimant was off sick. We acknowledge however that the respondent could have picked up on the concerns with the claimant when he returned to work in October 2018, and that the failure to do so amounts to a detriment.

192. We find however that the reasons why no investigation was carried out into the issues raised on 6 August were the claimant's sickness absence, the fact that he asked for them to be dealt with informally and that, when he returned to work, things seemed to be well initially. He did not raise any further concerns until after the incident with Angela Beardmore on 12 December 2018, at which point

formal grievance and whistleblowing investigations were initiated. The respondent initially replied quickly to the email of 6 August, offering a meeting the same week. When he came back in October all seemed well and he was keen to come back to Lister ward. There was no suggestion of a continued problem at that stage.

193. We also find that the respondent's reasons for not investigating the concerns raised in August were not linked in any way to the fact that the concerns raised amount to a protected disclosure. It is clear from the subsequent whistleblowing investigation that was carried out, that the respondent takes whistleblowing concerns very seriously, and does not try to sweep them under the carpet or ignore them. There is no evidence before us, therefore, from which we could draw an inference that the failure to investigate the concerns raised on 6 August 2018 until January 2019 was because the claimant made a protected disclosure.

194. Turning now to the complaints made by the claimant in December 2018 and January 2019. We have no hesitation whatsoever in finding that both the grievance and the patient care concerns were investigated thoroughly and appropriately, with great professionalism on the part of Ms Lockley and Ms Alsop, both of whom spent considerable time on their investigations.

195. We make no criticism whatsoever of the way in which the respondent dealt with either the grievance or the whistleblowing investigation – in many ways both investigations were exemplary. They were dealt with quickly and openly, and the respondent took care to feed back the conclusions and outcome to the claimant. They also shared the conclusions of the whistleblowing investigation with Nottingham City Council and with staff, and arranged an open feedback session. The respondent was transparent and supportive in the way that it dealt with both investigations and made repeated offers to talk to and support the claimant.

196. It is telling that the claimant did not make any complaints about either investigation whilst they were ongoing. It was only when he received the outcomes, which were not as he had hoped, that he raised concerns about the process. The claimant clearly wanted Ms Beardmore to be 'punished' and was not willing to accept any other outcome.

197. It was the claimant's decision not to pursue the appeal. Had he done so he would have seen the CCTV footage. Mr Latham bent over backwards to try and get the claimant to the appeal hearing. There was no requirement for him to arrange for Ms Beardmore to be at the appeal.

198. There was no attempt whatsoever to cover up the whistleblowing investigation as the claimant suggested – quite the reverse in fact. Both the fact of the investigation and the conclusions were shared with staff and with the local authority. Feedback sessions were arranged for staff and there was an independent review of the whole whistleblowing investigation by Peter Wright.

199. The claimant's concerns could not, in our view, have been taken more seriously. Unfortunately, the claimant became so entrenched in his views that he would not accept any finding which he did not consider to be in line with those views. He gave no credit whatsoever for the amount of time and effort invested by several senior members of the respondent's staff in carrying out the grievance and whistleblowing investigations and in reviewing the latter.

200. The claimant complained that Benjamin Madden and Anthony were not interviewed as part of the whistleblowing investigation. We find that they were not interviewed, but that this did not amount to any failing in the investigation or to any detriment to the claimant. If the claimant had wanted them to be interviewed, he could have asked Ms Alsop to speak to them. They could also have attended the 'drop in' sessions that Ms Alsop organised. A failure to interview two members of staff who were not identified by the claimant, when 17 members of staff were interviewed, is not in our view a detriment to the claimant.

201. In any event, the reason Benjamin Madden and Anthony were not interviewed is that the claimant did not provide their names to Lynne Alsop. It was nothing whatsoever to do with the fact that the claimant had made protected disclosures.

202. The claimant also complained about the lack of exit interviews in the report. We accept Ms Alsop's evidence that exit interviews were requested and considered by her but she quite reasonably concluded that they were not helpful because they related to the Trust as a whole rather than Lister ward. It is difficult to see what detriment there was to the claimant because exit interviews specific to Lister ward were not obtained. In any event, the reason that exit interviews specific to Lister ward were not obtained was because they were not available. It was not because of the claimant's protected disclosures.

203. The claimant suggested that the failure to interview 'invisible observers' on the ward, as suggested by Peter Wright, was a failing in the investigation and therefore a detriment to the claimant. We find that it was not a failing. There was no evidence before us to suggest that, had invisible observers been interviewed, the outcome of the investigation would have been any different. The claimant did not suggest they be interviewed, and the suggestion was made by Mr Wright as a way of possibly improving the investigation process that had been followed. It does not mean that the investigation was flawed.

204. In any event, there is no evidence before us to suggest that the reason invisible observers were not interviewed was because the claimant had made protected disclosures.

205. The final criticisms made by the claimant of the whistleblowing investigation were that 10 patients on Lister ward were not interviewed and that only 17 staff out of 130 working at the Wells Road Centre were interviewed.

206. We find that it was entirely reasonable for Ms Alsop to limit the patient interviews to five of the sixteen patients on the ward. She initially wanted to interview six but one was unwell. All of the patients on Lister ward are very vulnerable adults, and the respondent has a duty of care towards them. Given the nature of the patients on that ward, to interview a third of them was, in our view, reasonable and proportionate. Ms Alsop went to great lengths to interview the patients that she did, involving a patient advocate and speech and language therapists. It could, indeed, be said that the respondent's concern to protect patients was indicative of a high level of care.

207. Limiting the number of patients interviewed was not a detriment to the claimant, and was not done because the claimant had made protected disclosures. Rather it was done out of concern to protect the patients, whilst at the same time interviewing enough patients to get meaningful feedback from them.

208. We also find that it was reasonable of Ms Alsop to interview 17 members of staff rather than the 130 suggested by Mr Mann in submissions. Interviews were carried out with a wide range of staff, in different roles and at differing levels of seniority, some of whom worked all of the time on the ward, and some who didn't. This was a reasonable and proportionate approach for Ms Alsop to take.

209. There is no evidence before us to suggest that limiting the number of staff interviewed to 17 was a detriment to the claimant, or that it was done because the claimant had made protected disclosures. If anything the claimant's concerns were treated particularly seriously because they were considered to be protected disclosures.

210. We therefore find that the complaints made in December 2018 were properly investigated and that the respondent did not subject the claimant to any detriments on the ground that he made protected disclosures in the way that it investigated either the August or the December complaints.

(2) Questioning the reason for the claimant's sickness after his complaints to the Chief Executive, CQC and NHS England, i.e. suggesting that it was not work related and that he would have to pursue compensation via legal means

211. For the reasons set out above, we find that only the complaint to the Chief Executive amounts to a protected disclosure, and that the alleged complaints to the CQC and NHS England were not protected disclosures.

212. We find that the respondent did not at any time question the reason for the claimant's sickness absence. It accepted that it was work related, as Mr Wright made clear during the appeal hearing. Rather, the respondent concluded that the claimant's absence fell within one of the exceptions in the Injury Allowance policy.

213. Although the wording of that policy and of the associated Management Guidance is open to interpretation, the conclusions reached by Mr Fuller and Mr Wright that the claimant did not qualify for payments were decisions which it was open to them to reach.

214. Having heard their evidence we accept that both Mr Fuller and Mr Wright genuinely believed at the time they made their decisions that the reason for the claimant's absence was because of a dispute between himself and Ms Beardmore on 12 December which was an employment dispute. Indeed the claimant agreed during the appeal hearing that the reason for his absence was the incident with Ms Beardmore and the subsequent grievance.

215. Whilst we may have formed a different view as to whether the claimant qualified for Injury Allowance, it is not for us to step into the shoes of the employer and substitute our view for that of the employer.

216. Whilst both Richard Fuller and Peter Wright were aware of the whistleblowing investigation, Mr Fuller did not know the details of it. Both came across in evidence as having integrity and as having formed their views based upon the evidence before them at the time they made their decision, including in Mr Wright's case, the claimant's comments at the appeal hearing that his absence related to the incident on 12 December and the investigation of that incident, and their genuine interpretation of the policy. Their decisions were not made on the ground that the claimant had made protected disclosures.

(3) Informing the claimant of inappropriate roles at the Trust which upset him

217. The Tribunal was particularly impressed by the redeployment process followed by the respondent. When the claimant first went off sick, he wanted to return to work on Lister ward. The respondent also wanted him to return to work there. When the claimant changed his mind and asked to move to a different workplace, the respondent did everything reasonably possible to accommodate this.

218. The claimant was informed of alternative roles within the Trust. He was asked if he was interested in Band 2 roles and said that he was not. As a result, the respondent did not send him details of any Band 2 roles.

219. The claimant's complaint about the redeployment process, in essence, was that the respondent sent him details of two secretarial roles at Band 3 / 4 which the claimant considered were not appropriate. These roles were sent to him because the claimant had agreed with HR that he wanted to be sent details of Band 3 roles. The email containing details of the roles were sent to him as part of an automated service which alerted the claimant to all Band 3 roles within the Trust. No one took a decision to send the job roles to the claimant and there was therefore no intention to send inappropriate roles to the claimant.

220. The redeployment process was, in the view of the Tribunal, exemplary. The claimant secured an alternative role very quickly after asking for redeployment, in a role that he is still employed in. There

was no detriment to the claimant when the respondent sent him details of alternative roles.

221. The Tribunal also finds that the redeployment process was a result of the claimant's request to be redeployed. It was not because the claimant made protected disclosures.

222. For the above reasons, we find that the claimant was not subjected to any detriment contrary to section 47B of the ERA.

223. In light of this finding, it is not necessary for us to consider the question of whether there was a continuing act or failure to act which is part of a series of similar acts and/or whether the claimant's complaints are in time.

224. The claim fails and is dismissed.

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Employment Judge Ayre

17 May 2022

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