EMPLOYMENT TRIBUNALS

Claimant: **Ms D Dorrington**

Respondent: **Tower Hamlets GP Care Group CIC**

Heard at: **East London Hearing Centre**

On: **21, 22, 23, 24, 27 & 28 June 2022**

Before: **Employment Judge John Crosfill**

Members: **Ms G Forest**
Ms B K Saund

Representation:
For the Claimant: **In Person**
For the Respondent: **Neil Ashley of Counsel instructed by Paladin**

JUDGMENT having been sent to the parties on 4 July 2022 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013.

REASONS

Introduction

1. The Respondent operates an out of hours service on behalf of General Practitioners. The Claimant has worked in the NHS for a number of years including at times working for the out of hours service.

2. In September 2014, the Claimant applied for, and was offered, a Band 6 position as a Service Delivery Manager for the out of hours service. She worked full-time in that position until April 2016 when she reduced her hours in order to take up an additional post working in the Pathway Homeless Team. Thereafter, she continued to work part-time as a Service Delivery Manager.

3. On 15 July 2016, the Claimant, principally for her financial reasons, decided to formerly retire. She took what was referred to as a "retirement break" and returned to work on 15 August 2016. She returned to work in the same part-time capacity she had done prior to her retirement break.

4. Prior to 1 April 2017 the out of hours service was operated by the Barts Health Trust who had at that point been the Claimant's employer. On 1 April 2017 the out of hours service transferred under the Transfer of Undertakings (Protection of Employment etc) Regulations 2006 ('TUPE') to the Respondent which is a Community Interest Company.

5. In August 2017, the Claimant had covered the on-call duties of her Line Manager and another manager who had been on annual leave. She submitted a claim for payment for the additional on-call duties and extra hours that she had worked. She has consistently claimed that that payment was authorised by her Line Manager, Jane Baylis and Jane Baylis denies that that was the case. The claim for payment was investigated and ultimately led to disciplinary proceedings. The Claimant was dismissed summarily on 9 May 2018.

6. The Claimant says that between 15 November 2016 and 13 December 2017 she raised a series of issues that amounted to protected disclosures. It is her case that it was these disclosures which caused her to be subjected to various detriments culminating with her dismissal.

7. The Claimant contacted ACAS for the purposes of Early Conciliation on 6 July 2018 and she obtained an Early Conciliation Certificate on 16 July 2018. The Claimant presented her ET1 to the Employment Tribunal on 7 August 2018.

The procedural history and the hearing before us

8. When the Claimant submitted her ET1 she gave the dates of her employment as commencing on 2 January 2010, a date which we understand she started working for the NHS or perhaps Barts. In section 8 of her ET1 she indicated that she was bringing an unfair dismissal claim. Where she was required to set out the details of her claim, she included the first section of a timeline of events which she later submitted to the Tribunal under the cover of an email. It appears that the Claimant's ET1 was not processed for some considerable time.

9. The Respondent filed its ET3 on 22 November 2018. It responded to the claim taking only the procedural point that the Claimant had insufficient service to bring a claim of ordinary unfair dismissal.

10. The matter was listed for an Open Preliminary Hearing which took place on 14 February 2019 before Employment Judge Hyde. The purpose of the hearing was to determine whether the Claimant had sufficient continuity of employment to bring a claim of ordinary unfair dismissal. Employment Judge Hyde determined that she did not. She found that the retirement break broke the continuity of service and accordingly that the Claimant's continuous service ran only from 15 August 2016.

11. It is clear from the judgment of Employment Judge Hyde that the Claimant was maintaining at the hearing before her that she had also brought what are often referred to as whistleblowing claims relying on protected disclosures. Employment Judge Hyde listed the matter for a further Preliminary Hearing to determine whether the Claimant's claim included such claims and/or whether she should be permitted to amend her claim to bring such claims if not already brought.

12. The matter became before Employment Judge Martin in an Open Preliminary Hearing on 16 April 2019. At that hearing, Employment Judge Martin determined that the Claimant needed permission to amend her claims, she was refused permission and therefore the claims were struck out. The Claimant then appealed to the Employment Appeals Tribunal. A judgment handed down on 18 December 2020 Mr Justice Bourne allowed the Claimant's appeal and reinstated the claim. He determined that the ET1 had always included the claim of automatic unfair dismissal contrary to Sections 94 and 103A of the Employment Rights Act 1996. He took the unusual step of endeavouring to undertake some Case Management. He directed the parties to seek to agree a list of issues. The parties sought to agree a list of issues which included claims that the Claimant had been subjected to a detriment short of dismissal by reason of her protected disclosures. Mr Justice Bourne directed that the question of whether the Claimant had brought any additional claims under Section 47B and 48 of the Employment Rights Act should be determined at any further Preliminary Hearing.

13. A further Preliminary Hearing took place before Employment Judge Gardiner on 21 July 2021. Employment Judge Gardiner considered that notwithstanding the efforts made by the parties to agree the issues there was insufficient clarity about the nature of the Claimant's alleged protected disclosures and the detriments that she relied upon. In his Case Management Summary, he listed nineteen matters which he required the Claimant to address by giving further information.

14. The Claimant prepared a document in which she set out her responses to Employment Judge Gardiner's Orders. Unfortunately, that document was not as comprehensive as it could have been and in particular did not always provide details of the information said to be contained within protected disclosures. It appears that Employment Judge Gardiner was either unaware, or took it as read, that the Claimant was bringing claims under Section 47B and Section 48. It does not appear that the Claimant has ever sought formal permission to bring those claims nor has anyone considered whether she should be given permission to bring them. The Respondent did not ask the Tribunal to adjudicate on the scope of the Claimant and we proceeded to hear evidence on the basis that all matters included in the agreed list of issues were live claims before us. We reproduce that list of issues as an annex to this judgment.

15. We conducted the hearing using the cloud based video system. Whilst there were some connection issues these were all resolve without any great delay in the proceedings.

16. Employment Judge Gardiner made had standard directions to prepare the matter for a final hearing. Those directions included at paragraphs 21 and 22 the following Orders (with emphasis added).

> *'21. The Claimant and Respondent must prepare witness statements in use of the hearing. Everybody who was going to be a witness at the hearing including the Claimant needs a witness statement.*

22. A witness statement is a document containing everything relevant the witness can tell the Tribunal. Witnesses will not be allowed to add to this statement unless the Tribunal agrees.'

17. At the outset of the hearing, we established that the Claimant had not prepared a witness statement for herself. She had submitted to the Respondent a number of short witness statements from other people which with one exception were limited to character evidence. Mr Ashley tells us, and we accept, that the Respondent wrote to the Claimant and told her that she was expected to prepare a witness statement. He quoted from the correspondence that the Claimant had been advised that the statement should address each matter in the list of issues.

18. The Claimant told us that she had not understood the Orders that had been made and implicitly suggested that she had not understood the correspondence from the Respondent. We were conscious that this case concerned events that took place primarily in 2016 to 2018 and that the parties had waited many years for a final hearing. We explained to the Claimant that it was possible for her apply to introduce a witness statement at this stage but there might be some risk that this would be opposed by the Respondent and/or it might be necessary for there to be a postponement unless a witness statement was produced very promptly.

19. Whilst this matter was explored the Employment Judge asked the Claimant where her factual case was set out and the Claimant pointed to three documents. These were:

19.1. the timeline that she had originally sent to the Tribunal as an addendum to her ET1; and

19.2. an excel spreadsheet which she prepared in response to a request for clarification made by Employment Judge Brown at the outset of the proceedings; and

19.3. her responses to Employment Judge Gardiner's request for further information.

20. Mr Ashley on behalf of the Respondent accepted that the Respondent would not be suffer any significant prejudice if the Claimant adopted these two documents as her witness statement. He did fairly put the Claimant on notice that, in his view, the evidence contained in those documents would be insufficient to establish some elements of her claims. He accepted however that anything the Claimant said in response to his questions in cross examination would add to her evidence.

21. We gave the Claimant a short period to consider her position. After that she was certain that she did not wish to produce an additional document or and in particular risk the hearing being postponed. The Employment Judge ensured that when she took that decision that she was aware of the position taken by the Respondent and there might be gaps in her evidence. The Claimant elected to rely on the three documents which taken together we have treated as her witness statement.

22. The Claimant had not made any arrangements to ensure that her witnesses attended the hearing. As we have indicated all but one of the statements provided by the Claimant was a character reference. She had served a statement from Sasha Byfield apparently dated 22 April 2022. Sasha Byfield was a Health Care Assistant working for the Barts NHS Trust. In her witness statement she claimed to have overheard Jane Baylis authorise the Claimant to make the claims for payment that led to her dismissal. The Claimant indicated that Sasha Byfield was unable to attend to give evidence as she was at least thought to be abroad. We asked the Claimant to make enquiries to see if she could attend remotely. The Claimant told us that she believed that would not be possible. The Claimant did not ask for a postponement. We read all the statements. When assessing want weight to give the evidence we have had regard to the fact that Sasha Byfield did not attend for cross examination. The remaining witness statements were not controversial.

23. We were provided with a bundle of documents in electronic format that ran to 505 pages. The Respondent had prepared a chronology reading list which was an assistance to the Tribunal both in their deliberations and their reading.

24. Reading the witness statements and dealing with applications set out above took entirely the first day of the hearing and thereafter we heard from the following witnesses:

24.1. We heard from the Claimant herself who gave evidence the second day and then briefly answered questions from the Tribunal and some additional questions from the Respondent on the third day.

24.2. We then heard from Jane Baylis who gave evidence from her home on the Isle of White and who had some technical difficulties joining the hearing. She at all material times was the overall manager of the service holding the title of “Operations Manager”. She was the person who the Claimant says gave her permission and then authorised her claim for an on-call payment.

24.3. We then heard from David Robertson who was at the material time the Programme Lead of the Respondent’s Organisation. The Claimant says that she raised some of her concerns with David Robertson. He was also the person that commissioned the investigation into her claim for payments.

24.4. We heard from Nicholas Percival who is the Human Resources Consultant for the Respondent at the time and the person who advised the Respondent in respect of the decision to suspend the Claimant and who also sat on the panel which determined that the Claimant should be dismissed.

24.5. We heard from Tracy Cannell who was, at the time, the Chief Operating Officer of the Respondent and was the person who suspended the Claimant and then sat on, and was the principal decision-maker of, the panel that determined that the Claimant should be dismissed.

24.6. Finally, we heard from Zainab Arian who, from September 2017, was the Chief Financial Officer for the Respondent and he sat on the panel which considered the Claimant's appeal against her dismissal.

25. On the first day of the hearing, we had asked the parties whether or not they would be assisted if we provided a draft self-direction on the law which should be applied in a case concerning protected disclosures. Both parties agreed that we should. Whilst the draft direction was sent to the Claimant, she did not open the email immediately, but she was able to access it before making her submissions. She said that it was not something that she would readily understand.

26. We heard the parties' submissions on 24 June 2022. Each party addressed us at length focusing principally on the factual issues in the case. We shall not set out those submissions in full but refer to the principal arguments made in our discussions and conclusions below.

27. We spent Monday 27 June 2022 deliberating and indicated that we would give our judgment orally that afternoon, which we did.

28. The Claimant sent an e-mail to the Tribunal after the hearing requesting written reasons for the decision. These are our reasons.

Our Findings of Fact

29. We set out below our findings of fact in respect of the events giving rise to this claim. We do not seek to set out all of the evidence we have heard and restricted our findings to those parts necessary to decide the issues in the case. In making these findings we have had regard to all of the evidence before us. In our discussions and conclusions below we make further findings of fact in particular drawing in our primary findings to examine the Claimant's state of mind when she made any disclosures and the reasons for the treatment that the Claimant complains of.

30. It was agreed that when the Claimant was promoted to the position of Service Delivery Manager in 2014, she had been approached, and then recruited by, Jane Baylis. The Claimant does not complain about Jane Baylis's conduct in the early stages and we find that they had mutual respect for each other as employees at that point in time.

31. The Claimant says that her relationship with Jane Baylis deteriorated upon her return from her retirement break. Jane Baylis disputes that the Claimant's retirement was a trigger for any disagreements. She says that the decision about whether or not to permit the Claimant to return from her retirement break was entirely her gift and that she wanted the Claimant to return and bore her no resentment whatsoever for having retired. We accept the evidence of Jane Baylis in this regard. Had there been any desire at this stage to dispense with the Claimant's services her retirement gave the perfect opportunity for that. It was however common ground that the relationship did deteriorate.

32. The Claimant complains that Jane Baylis failed to complete some paperwork upon her return to work. Jane Baylis disputes this. We find that this minor dispute was a factor in the downturn of their working relationship. The Claimant says that upon her return to work a number of duties were taken away from her. Jane Baylis did not disagree. She said that the circumstances in place when the Claimant returned were not the same as when she was working full-time. We accept that it was inevitable that the would be some reallocation of duties as a consequence of the changes that had occurred. Jane Baylis also described an incident where the Claimant had a disagreement with Shamina Khatun, a band 5 employee who would ordinarily have reported the Claimant. As a consequence of the disagreement, the relationship had broken down, and because of that Jane Baylis managed both employees.

33. Prior to the transfer of undertakings that took place on 1 April 2017 the Claimant was employed by Barts Health Trust. That Trust is a significantly larger organisation than the Respondent. It has a substantial number of employees and the policies it has in place reflect the size of the organisation. Barts Health Trust is part of the NHS. Barts Health Trust recognised a number of Trade Unions including Unison and Unite who were recognised as the staff side representatives for the employees who worked in the out of hours service. A proposal to transfer the out of hours service the Respondent had been in place for some time. Barts Health Trust consulted with their staff side representatives but also held meetings where affected employees were invited to attend. We have seen some very clear documents that describe the process including a letter from the Trust that was sent out when the transfer was complete. It is clear from that letter that all employees were provided with what is usually described as a 'measures letter' which set out the anticipated changes. In order to deal with queries from any affected employees, Barts Health Trust nominated Bola Ogundeji, an HR business partner to deal with any enquiries from the staff.

34. On 15 November 2016 the Claimant sent an email to Bola Ogundeji where she asked, *"could you please confirm if we maintain our continuous service with the NHS once we are TUPE'd over to THIPP/THT as I now understand you are CIC Social Enterprise".* The Claimant was informed that continuous service would be recognised in accordance with the TUPE Regulations. The Claimant questioned that via an email sent to her on 25 November 2016 saying that her understanding was that, if it was a break of more than one year before returning to the employment with the NHS, then that would break the continuity of service. The Claimant received a response saying that the matter would be checked, and she might be right. There are some additional employment protections for employees of the NHS who move between NHS employers. We find that this was what the Claimant was concerned about. The Claimant says these emails taken together amount to a protected disclosure.

35. On 17 March 2017, the Claimant sent a further email to Bola Ogundeji, in that email she set out an assertion that there had been no elections to appoint representatives to engage in consultation on behalf of the people likely to transfer to the Respondent. She set out a substantial quotation from the ACAS Website which summarised the legal requirements for consultation when there was a TUPE transfer and with whom it should take place. She said that she had spoken to ACAS by telephone, and they confirmed that there should be an elected representative in the absence of trade union membership. The Claimant refers the potential for a 90-day protective award if there was a failure to consult in accordance with the legislation. The quote from the ACAS Website correctly paraphrases

the legislation which provides that it is only in circumstances where there are no recognised Trade Unions for the employees in question that it is necessary to have elected representatives.

36. On 17 March 2017 Bola Ogundeji responded to the Claimant in the following terms:

> *'Before we proceed to any consultation, we have to first consult with the Trust's staff side reps through the Consultation Subgroup. We engage all Trade Unions on behalf of all the staff in scope to transfer whether they are members of Trade Union or not. These Trade Union Reps include Trade Union Groups such as Unite, Unison, The Royal College of Nursing and any others. The Staff Side Chair was also part of the process. If you were at any of the consultation meetings you may recall that we had two Trade Unions there, the Chair on behalf of everyone and an RCN Rep.*
>
> *So, in a nutshell the Trust recognises elected Trade Unions and they had been part of the process.'*

37. On 21 March 2017 the Claimant responded again. She asserted in her email that she had spoken to ACAS and had read the advisor the email that we have just quoted. She said that ACAS had told her that if you are not a Union Member you must have elected representatives and that the onus is with the outgoing and the incoming employer to arrange the election. She went on to say that a Trade Union Representative would not represent a non-member. We find it highly unlikely that ACAS would have given the Claimant this advice. It is wrong in law. The obligation to consult only with a Trade Union does not depend on whether or not there are a group of employees were not members. What is necessary is that the Trade Union is recognised as a representative of that group. In addition, the obligation to organise elections is not fall on the transferee in a TUPE situation. We consider that the Claimant probably heard the answer she believed to be the case rather than carefully considering whether the position stated by the Respondent was correct. The Claimant relies on this further exchange of emails as being her second protected disclosure.

38. When Jane Baylis gave evidence one of the matters, she dealt with was the question of her knowledge of the Claimant's correspondence about the TUPE matter. She did not accept that she knew anything about this specifically. She accepted that she knew that the Claimant was unhappy about the transfer out of the NHS. That was something that was very evident to the Tribunal throughout the whole of this hearing. The Claimant is clearly highly committed to the NHS. We accept that Jane Baylis was unaware of the email exchange itself. The matter was not explored in any great depth with the other witnesses. Nicholas Percival accepted that he knew the Claimant had raised questions about the TUPE transfer but did not say that he had any knowledge of the detail. We are satisfied that, other than knowing that the Claimant was not happy about being transferred out of the NHS, none of the witnesses we heard from had any knowledge that she raised an allegation that there had been a breach of the TUPE Regulations in relation to consultation on this particular occasion.

39. On 30 March 2017, the Claimant sent a long email to Mohammed Mohit who was a General Manager at Barts. The email was headed "Complaint against my Line Manager". The first matter complained of was a suggestion that Jane Baylis had failed to arrange her return to work. She then complained that changes had been made to her role without a

consultation. She complained that Jane Baylis had 'barracked' her. She complained that she had been doing more on call work that she should be expected to do. She raised the same issue about consultation and the absence of an elected representatives. Within the body of that email, there are paragraphs where the Claimant referred to an event where Jane Baylis had been on call and the Team Leader in charge at out of hours service had been unable to find cover for a receptionist who was unwell. She alleged that Jane Baylis had told the driver (who was employed by a third party to transport doctors to home visits) to answer the telephone. She says later on that the GPs requested the driver to tell people to ring 111 rather than speak to them about their health. The Claimant says that this email as a whole amounts to a third protected disclosure. The passage that dealt with the issue of a driver answering the telephone say as follows:

> *'When this happened whilst Jane was 'on call' the Team Leader (B4) was unable to find cover on Jane's behalf so Jane told the driver to take the calls, this person doesn't work for the NHS let alone know how to use any of the systems. In the end one of the GPs on duty told the driver to advise patients to call 111 who would then put them on the Adastra system rather than the patient's details being written on paper then passed to the GP.'*

40. The Claimant's grievance was passed to David Robertson. He organised a meeting between the Claimant, Jane Baylis and himself that took place on 4 May 2017. We were provided with a letter from David Robertson dated 5 June 2017 in which he sets out his summary of the meeting. He apologised for the delay in providing his response. He deals only with the matters that the Claimant raised directly about her own employment and the treatment of herself. He set out in a conclusion the suggestion that Jane Baylis had been unaware that the Claimant was upset and had put forward an apology for any misunderstanding. He recorded that both parties agreed that they were comfortable to continue working together as they had done before. At the conclusion of the letter, he stated his hope that that was a satisfactory outcome but gave the Claimant 14 days if she wished the matter to be considered further under the relevant grievance policy.

41. The Claimant did write a response to that letter on 11 July 2017. We were not provided with a copy of that letter but its contents are summarised in David Robertson's response which was included in the bundle (but is undated). David Robertson states that he has addressed each of the points raised by the Claimant in turn, we are satisfied if he had not done so there would have been further correspondence. In common with his previous letter the contents of that letter deal only with the complaints made by the Claimant about the way she personally had been treated. The letter concludes by reminding the Claimant that she could take the matter further, it does not appear the matter progressed any further at that stage.

42. We find that the issue of whether it was improper for a driver to have been asked to answer telephone calls was not addressed at all in the course of the meeting of 4 May 2017 or in the correspondence. The consequence of that is that the allegation that Jane Baylis had instructed the driver to answer the phone was never directly put to her at the time. When it was put to her in the course of these proceedings, she denied she had ever given that instruction. It is not a matter which we need to specifically resolve to determine this case. Jayne Baylis told us, and we accept that the issue of her having instructed a driver to

answer telephone calls was never directly raised with her. We find that at best, she was only vaguely aware that the Claimant had mentioned this issue in her e-mail of 30 March 2017.

43. Tracy Cannell told us, and we accept, that she was aware that the drivers had been acting in excess of their responsibilities. It appears that the drivers spent considerable time sitting around the reception desk, we find it plausible that the concerns that the drivers having access patient's confidential information. Both Jane Baylis and Tracy Cannell accepted that would be inappropriate and it would need to be stopped.

44. The Claimant says that on 21 April 2017 she had a conversation with David Robertson about the Clinical Lead, Dr Jenny Read. She says she discussed Dr Read bullying staff and complaints had been made to have a professional body. She also says that she discussed Dr Read asking for payment for work that she had not done. David Robertson dealt with this matter in his witness statement. He says that he has absolutely no recollection of having this conversation with the Claimant, he was adamant that there was no question of Dr Read asking for payment for work that she had not done, and he complained that, if anything, he had to chase Dr Read to ask for monies which she was due.

45. In relation to this particular dispute, we were hampered by the absence of a detailed witness statement from the Claimant saying precisely what she said was said and putting matters into context. We were told by David Robertson that there had in fact been some anonymous allegations raised against Dr Read but only after the Claimant left. When they were investigated, they came to nothing. Nothing was known by any Respondent's witnesses about a complaint made to any of Dr Read's professional bodies. It was accepted that the Respondent would only find out about a complaint to a professional body if a complaint was deemed worthy of investigation. Having had regard to the entirety of the evidence we are not satisfied the Claimant raised any of these matters in a conversation with David Robertson at the time suggested. This conversation was said to be the Claimant's sixth protected disclosure.

46. The Claimant then says that on 4 May 2017 she had a further conversation with David Robertson about a contract that had been awarded to a company Emergency Education Limited to provide transport for the GPs. We were provided with two contracts, both of which had been seen by the Claimant. The first of these contracts was not executed. The contracting parties are said to be a company called "Call Centre Solutions Limited" (CCS Limited) and the Royal London Hospital. The proposed dates and service level agreement cover 1 April 2012 to 31 March 2013 on the front piece although on the acceptance form the dates had not been properly amended. The acceptance form was entirely blank. We are satisfied that this contract was never executed. On the evidence before us Call Centre Solutions was never a contracting party. We have seen a second contract which was executed on 15 and 16 March 2012 with Jane Baylis signing the contract on behalf of the organisation. That contract is between the organisation and Emergency Education Limited. The contract is for an initial period of five years with an optional two year rollover taking the contract through to 31 March 2019.

47. We were told, and we accept, the contract for services of this nature would ordinarily be for a number of years given the cost of a tender process. The Claimant suggested that the contract was hugely valuable and was a waste of resources. When David Robertson

gave evidence, he suggested that this was not the case. When properly analysed the hourly rate for a driver and a car is something close to £16 an hour which he considered to be a reasonable cost.

48. David Robertson told us, and we accept, that as the existing contractual arrangements were due to expire on the very date of the transfer of undertakings (unless rolled over) the Respondent investigated whether or not the contract should be renewed. He told us, and we accept, that having received other quotations there was no company that came close to matching the price of the existing contractor. He told us that as the amount of the contract exceeded the authority of the then Chief Executor Officer it was necessary to obtain approval from the Board. He says that the approval was given and a new contract with some additional terms was finally agreed.

49. The Claimant has suggested that Jane Baylis was the person who had renewed the contract annually without putting the matter out to tender. She suggests that it was Jane Baylis's decision to extend the contract beyond the date of the transfer. She alleges that was done by changing the date. The Claimant is wrong about all of these matters. Given that she had access to contractual documents it is surprising that she has come to the conclusions that she did. The original contract is quite clear. The Claimant maintained that she had seen a signed document as well as an annual contract, but she was unable to produce it. We find that no such contact was signed.

50. David Robertson has no recollection of discussing this matter with the Claimant on 4 May 2017, or at all. Once again, we are not assisted by not having a witness statement from the Claimant which set out her account of discussions and the context. We have to infer from the documents we have seen, including the list of issues, quite what the Claimant says occurred. In her excel spreadsheet she does no more than to say she mentioned the matter to David Robertson. We are not satisfied that there is any occasion where the Claimant told David Robertson anything to the effect that the contract had been renewed without going out to tender. Had the Claimant mentioned the matter in May 2017 David Robertson would undoubtedly have informed her of the process that was being undertaken at that time. The Claimant did later make a report to NHS Counter Fraud about this matter. She did that only after she was the subject of disciplinary proceedings. Her account to NHS Counter Fraud infers that Jane Baylis was solely responsible for the renewal of the contract. Had she had a conversation with David Robertson she would have been told what had actually occurred. We are not satisfied that there was any conversation with David Robertson about this at the time suggested by the Claimant, or at all.

51. On the night of 3 June 2017, the Royal London Hospital received a number of people injured in the London Bridge attacks including the perpetrator. This was categorised as a major incident. Under the Respondent's service level agreement, it was required to divert its resources from ordinary primary care to assisting in the major incident. The Claimant was on call and was faced with a situation where the ordinary service might have to close in order to provide the resources to assist the major incident. Responsibly in our view, she wished to escalate the decision about whether or not there were alternatives to closure. She decided to call Chris Banks, then the Co-Chief Executive Officer to ask for his help. Chris Banks was understood to be 'second on call'. Our understanding is that, simply put, he put himself forward as a point of contact. When the Claimant telephoned Chris Banks, he did not pick up the call. It appears that he did not contact her until he sent her a WhatsApp

message at 7:27 the following morning. There was then a cordial and responsible exchange of messages.

52. The Claimant says that she sent an email on 4 June 2017 to Jane Baylis, Tracy Cannell, Chris Banks and David Robertson which referred to Chris Banks not answering the telephone. We were not provided with a copy of that email, but we are satisfied that there was such an email because Tracy Cannell remembers it being received. We are entirely unsure of what it said other than we accept that the Claimant would have indicated that she was unable to contact Chris Banks when she wanted to. This email is said by the Claimant to be a further protected disclosure. The Claimant does not say that that e-mail prompted any push back or reaction at the time. She does not suggest that anybody criticised what she said. Jane Baylis had no recollection of the e-mail at all. We find that whatever the Claimant wrote it was in terms which were unremarkable.

53. The evidence given by the Respondent's witnesses was that whilst very unfortunate that the call was missed it was not a very unusual set of circumstances. We infer that ordinarily, if there were difficulties, there were a number of avenues escalating for matters and other managers could have been contacted.

54. We turn then to the matters which gave rise to the disciplinary proceedings against the Claimant. The Claimant was expected to be on call one weekend in every three. The remaining on call duties were covered by Jane Baylis and Shamina Khatun. The Claimant was employed under the Agenda for Change terms and conditions. Those terms and conditions were introduced nationwide in order to eliminate, where possible, disparities amounting to sex discrimination. We find these terms are rarely departed from in the NHS and employers bound by those terms. Under those terms and conditions, the on call arrangements were not remunerated on a time basis but the subject of an allowance of salary. The terms and conditions provide that where a person is on a call one day in three or more, they are entitled to a maximum salary enhancement of 9.5%. If being on call necessitated coming in to work that time would be paid as additional hours. The Claimant shared her on call duties with Jane Baylis and Shamina Khatun. On a number of occasions, including when Jane Baylis had family difficulties, the Claimant had additional on call duties without claiming any remuneration.

55. In August 2018 both Jane Baylis and Shamina Khatun were due to take annual leave and the Claimant was the only person available to cover the on call. A highly contentious issue in this case is whether or not Jane Baylis authorised the Claimant to claim for the additional on call work that she undertook to cover the annual leave of the other managers. It is accepted by everyone that there was a meeting that took place on 18 August 2017. When she gave evidence in answer to a question by Mr Ashley, the Claimant accepted that that meeting was between herself and Jane Baylis and took place in a GP consulting room where there was no possibility of being overheard by any passing staff member.

56. The Claimant has a handwritten note of the matters that she says were discussed at that meeting. There was no dispute between the Claimant and Jane Baylis of the issue of on call work that the Claimant would be doing was discussed. The Claimant says throughout the disciplinary process and has said before us that Jane Baylis instructed her to claim for the on call work on a sheet known as the "Enhancement Sheet". The Claimant's

handwritten note includes the word *"on call, claimed through enhancements".* The enhancement sheet is a spreadsheet where additional payments are ordinarily claimed such as overtime and additional hours. Those matters are generally referred to as enhancements. Jane Baylis disputes the Claimant's account. Like the Claimant she has been consistent in her account through the disciplinary process and before us. She says that she told the Claimant in respect of the on call work that she would work something out.

57. In resolving this dispute, we had regard to particular issues which we consider impact on the reliability of the Claimant's evidence. The first of these is that during the disciplinary process the Claimant obtained a witness statement from Sasha Byfield. At face value, Sasha Byfield claims to have overheard the Claimant complaining that she did all the on call covers, was not getting paid for it and she claims that she heard the Claimant say that this was a third time in a row. She claims that Jane Baylis said *'you could put it on a form'* although she does not recollect the name of the form. The Claimant submitted that statement to her employer in the course of the disciplinary process. She also exchanged that statement with the Respondent indicating that Sasha Byfield was likely to give evidence before the Employment Tribunal. At the outset of the hearing, she told us that Sasha Byfield was unavailable having gone on holiday.

58. The Respondent suggests that the statement provided in these proceedings was not a genuine document but we do not need to resolve that. What does surprise us is that the Claimant accepts that the meeting where the matter was discussed took place in a private consulting room. It follows that she must know that Sasha Byfield's account is inaccurate because she knew that Sasha Byfield was not present. It is therefore surprising that she ever put this witness statement forward being a truthful account of events.

59. The second matter relates to the fact that during her cross-examination the Claimant alleged not only had Jane Baylis in agreed in principle to her claiming money for on call work but also that she agreed to the mechanism used by the Claimant for calculating it. This was the first time that claim had been made. We were provided with notes of the disciplinary hearing and the appeal and, having had regard to those notes, we see that the Claimant was asked directly by Tracy Cannell whether she ought to have agreed the mechanism in advance with Jane Baylis. Her answers indicate that she had not at that point claimed to have done so. This means that the Claimant's evidence before us on this point was unreliable. Taking those two points together we find that the Claimant has allowed her belief that she has been treated unfairly to adversely affect the reliability of her evidence.

60. It is necessary to make a finding whether or not Jane Baylis authorised the payment only for the purpose of determining whether, when Jane Baylis claimed she had not done so, she was materially influenced by the protected disclosures made by the Claimant.

61. We had come to the conclusion that what occurred on 18 August 2018 was that both parties came away from a meeting with a misunderstanding about what had been agreed. We find that the Claimant knew that she had undertaken more than her fair share of on call work and reasonably believed that it would take a considerable time for her to be 'paid back' by others covering her responsibilities. We find that she understood Jane Baylis's comment that she would sort something out as being that she would be entitled to claim money rather than have someone else cover her shift. We find that Jane Baylis did no more than she has

accepted in her evidence and during the disciplinary proceedings. She said that she would 'sort something out' by which she meant that the Claimant would be relieved future duties. In short, we find there is an honest misunderstanding. This is a further example of the Claimant hearing, and in this case recording, what she wanted to hear.

62. The Claimant went on to complete the Enhancement Form. She calculated an amount in respect of the on call work that she had done by working out how much extra each day she got paid for the on call work on the basis that she was contractually entitled to do no more than a one in three on call rota. She then used that figure to claim for the additional work that she had actually done. If the Claimant had been right, that there was a contractual right to payment for on call work in excess of a one in three, then her method of calculation is not unreasonable. When the Claimant completed the spreadsheet that was later forwarded as a claim for payment it included an express reference to the fact the payment was being made for on call work. We find that the Claimant did not conceal that she was claiming monies in respect of on call work. Jane Baylis did not at the time check the figures that she had been given or pay any attention to the claim made by the Claimant. She appears to have simply forwarded the claim for the Respondent's payroll company.

63. On her return from holiday, on or around 12 September 2017, Jane Baylis met the Claimant. One of the matters that was discussed was an offer by Jane Baylis to undertake some of the Claimant's on call work. That is entirely consistent with Jane Baylis's account of sorting something out rather than making payment to the Claimant. The Claimant declined Jane Baylis's offer and then mentioned that she had claimed an enhancement. Jane Baylis did not say anything about this at the time but then proceeded to check on what had been claimed. She then discovered that the Claimant made a claim for money for on call work. She was also surprised that the Claimant did not accept her offer of cover for her on call work.

64. There was a further meeting between Jane Baylis and the Claimant on 27 September 2017. The notes of that meeting disclose that Jane Baylis was attempting to resolve some of the issues related to the difficult working relationship between the Claimant and Shamina Khatun. The notes, which we accept are a summary of the discussions, record the Claimant accepting that it had been unhelpful of her to have referred to Shamina Khatun as not being as well educated as her in a meeting that had taken place on 12 September 2017. During the meeting Jane Baylis raised the question of why the Claimant had claimed additional monies and asked how they had been calculated. In the course of that conversation, she also raised a subject which touched on ethics. We find that she mentioned a previous incident where somebody who had been dismissed after unethical conduct concerning a laptop. It is clear from the subsequent correspondence that the Claimant believed that she had been accused of dishonesty.

65. After the meeting the Claimant sent an email where she endeavoured to explain how the payment she had claimed had been made and calculated. It is fair to say that it is not immediately obvious from that email quite how the Claimant came up with the figure that she did. Jane Baylis was not satisfied with the Claimant's explanations and forwarded the Claimant's email to David Robertson who in turn forwarded the matter to Nicholas Percival writing the following terms: *"As you will see from the email below DD has written back to justify why she claimed 35.5 hours. This was not agreed. In my view she is just taking the*

monies. Her explanations are unacceptable, I am going to ask Hamida to investigate". He then asked about the appropriate process and whether the Claimant should be suspended.

66. On 5 October 2017 David Robertson commissioned an investigation into whether the Claimant had improperly claimed monies. The Claimant was not suspended at this time. The person asked to undertake the investigation was Hamida Serdiwala the Clinical Lead for Health Visiting.

67. On 10 October 2017 Jane Baylis met with the Claimant. It was her intention to inform the Claimant personally that she was to be the subject to a formal investigation. The Claimant almost immediately took offence and refused to discuss the matter further. Jane Baylis then sent her an email informing her that the investigation had been commenced. We find that that email is entirely appropriate and was couched in reasonable terms. The Claimant would have been aware the nature of the allegations from the previous discussions. If she was not, she had the opportunity to ask Jane Baylis about them. The Claimant then sent an e-mail addressed 'to whom it may concern' in which she complained about Jane Baylis and suggested that she was the person who ought to be investigated for authorising the payment to her.

68. The Claimant says that she had approached NHS Fraud on 23 August 2017 about the renewal of the GP car service contract. She said she spoke to somebody with the name of Lorna Cunnew. She also says she approached the same person on 10 October 2017 by email. There is no dispute that the Claimant did approach the NHS Fraud organisation in October. We were provided with an email sent on 5 October 2017 which shows that to be the case. In relation to the allegation that an earlier conversation took place in August we are hampered by the absence of a witness statement from the Claimant. She has referred to approaching NHS Fraud within the documents she has adopted as a witness statement but precious little detail is given. The email that we have seen in relation to the contact in October 2017 does suggest that there had been a previous telephone call but the implication is that this had been recent. Having regard to all of the evidence we are not satisfied that there is any contact made by the Claimant on 23 August 2017.

69. We find that the Claimant was so incensed at being accused of obtaining money dishonestly that she took it upon herself to investigate matters where she believed that Jane Baylis had behaved inappropriately. She did contact NHS Fraud in October by telephone and later by email, but we find that this is the only time that the matter was raised by her. We set out what she said in our discussions and conclusions below.

70. The Respondent's witnesses all said that they had absolutely no knowledge of any investigation by NHS Fraud. The Claimant has no evidence to suggest that NHS Fraud ever contacted the Respondent. As the contractual arrangements appear to have been perfectly proper it is difficult to see why NHS Fraud would have taken any interest in the matter. We find that whether the Claimant contacted NHS Fraud once, twice or more than that, the matter never came to the attention of the Respondent's witnesses.

71. On 27 October 2018 the Claimant sent an e-mail to Nicholas Percival with the subject line 'FOI Subject access request'. In her e-mail the Claimant requested documents passing

between a large number of managers where her name was mentioned. Nicholas Percival responded on the same day pointing out that as the Respondent was not a public body the Freedom of Information Act did not apply. The Claimant then responded taking the position that as she had been transferred from a public body the Act should continue to apply. Nicholas Percival responded promptly saying that he did not believe that to be the case. On 7 November 2018 the Claimant, having checked the position with the Information Commissioner's Office clarified that she was not making an application under the Freedom of Information Act but under the Data Protection Act. That position was accepted by the Respondent who then supplied the Claimant with data. The Claimant has suggested that this was incomplete but she has not said what was missing. We would accept that, had he given the matter a little more thought, Nicholas Percival might have recognised that the Claimant's reference to the Freedom of Information Act was an error. However, having heard his evidence we accept that he was genuinely confused about what he was being asked to comply with. Ultimately he passed on the request and he was not responsible for deciding what data did or did not fall to be disclosed.

72. The Claimant has criticised the investigation carried out by Hamida Serdiwala. We accept that the investigation, which was not completed until December 2017, took some time and that this would have added to the Claimant's anxiety. However, we have read the report that was produced and consider it was a well written and a comprehensive document. It gets straight to the nub of the allegation which concerned the factual dispute between the Claimant and Jane Baylis as to whether the payment was authorised. The report then identifies an additional issue as to whether, if the Claimant was authorised in principle, whether the calculation of the amount had been discussed with Jane Baylis.

73. We find that all the relevant people were interviewed. The key factual dispute was between the Claimant and Jane Baylis. Hamida Serdiwala interviewed Jane Baylis who was recorded as saying that she had told the Claimant that show would work something out in respect of the Claimant covering the on call duties. The Claimant accepted that she had never previously asked to be paid when she had undertaken additional on call duties. She said that she had done so on this occasion because Jane Baylis had referred to her claiming via the Enhancement Form. Hamida Serdiwala went on to interview three further employees, Shamina Khatun and two admin staff responsible for processing any claims for additional payment. None of these witnesses was able to comment directly on whether Jane Baylis had authorised the Claimant's claim for additional on call payments.

74. The Claimant complains that corrections needed to be made to notes made in interviews before a final version was agreed by those people interviewed. In our experience it is not surprising that amendments and revisions were suggested. That is ordinarily a part of a robust process to make sure that the notes are accurate. We are not satisfied that the intention behind any changes was to prejudice the Claimant.

75. The conclusion that was reached by Hamida Serdiwala was that there was a disciplinary case to answer. We find that that was a conclusion that was reasonably open to her. The evidence she had looked at revealed that the Claimant had made a wholly exceptional claim for payment for on call duties. There was a clear dispute about whether that claim had been authorised in advance of it being made. The evidence that had been gathered included evidence that the Claimant may have been aware that any claim for

enhancements was unlikely to receive any great scrutiny. In respect of the claim for overtime there was also a question about whether the additional hours worked by the Claimant had been authorised in advance.

76. The Claimant says that Hamida Serdiwala was inexperienced. There was no evidence to support a suggestion that Hamida Serdiwala was selected as an investigator because she was inexperienced. Having reviewed the investigation we find that she did a reasonable job of carrying out the disciplinary investigation. We find that this is was a relatively straightforward matter. The key issues being whether the additional payments claimed by the Claimant had been authorised in advance or whether they had been claimed improperly and/or dishonestly. We find that Hamida Serdiwala reached a perfectly reasonable conclusion that there was a real question as to whether the Claimant had acted improperly. On the basis of the evidence she had gathered it was almost inevitable that she would conclude that that there was a case to answer. We record for completeness that Hamida Serdiwala made a number of recommendations for tightening up the process for claiming additional payments.

77. On 8 January 2018 the Claimant sent an e-mail to David Richardson complaining of the amount of time it had taken to resolve the matter. She sent a further e-mail chasing a response on 17 January 2018. Before us David Robertson accepted that the Claimant was perfectly entitled to complain and accepts that he failed to respond to her emails before being chased by her.

78. On 22 January 2018 the Claimant met with Tracey Cannell and Nicholas Percival in the workplace. They told her that she was to be suspended from work pending the outcome of the disciplinary investigation. The Claimant was accompanied as she left the premises. We need to examine the circumstances and reach a conclusion about why that decision to suspend the Claimant was taken.

79. Tracey Cannell told us, and we accept the reason for the Claimant's suspension was the breakdown in the working relationships between what had become two rival camps. Well before the events that gave rise to the disciplinary proceedings there had been a difficult working relationship between the Claimant on the one hand and Jane Baylis and Shamina Khatun on the other. That deteriorated when Jane Baylis reported the enhanced payments that the Claimant had claimed. We saw several e-mails between September and December where the Claimant was very critical of Jane Baylis. The Claimant regarded herself as a popular employee. One of the matters raised by Jane Baylis in September was that band 4 employees would bypass Shamina Khatun and speak directly to the Claimant. We accept the evidence of Jane Baylis that before and after the Claimant was suspended she had assembled a group of employees who believed that she was being treated unfairly. That account is supported by the fact that the Claimant was able to put a large number of character witnesses forward for the disciplinary hearing.

80. We accept the evidence of Tracey Cannell and Nicholas Percival that the tension in the workplace had given rise to some informal complaints. We further accept that the reasons for suspending the Claimant were in part to allow the informal complaints about

how the Claimant was conducting herself to be investigated and in part because the working relationship between the Claimant and Jane Baylis was becoming untenable.

81. Nicholas Percival told us, and we accept that whilst the informal complaints were investigated, with a view to bringing further allegations, nobody with the exception of Jane Baylis was prepared to 'go on record'.

82. The Claimant suggests that she was told at this time that the allegations of dishonesty she was accused of were considered by the Respondent to be ill founded. We do not accept that the Claimant was told any such thing. The investigation had been completed and a conclusion reached that there was a case to answer. What actually happened was that there was consideration of enlarging the investigation but that approach was abandoned when employees declined to make their complaints formal.

83. Shortly after the Claimant was suspended Nicholas Percival engaged in correspondence with the Claimant in relation to whether or not she would be prepared to leave the organisation in return for a payment of a sum of money. The question of privilege was dealt with by Employment Judge Gardiner in his Case Management Order following a Preliminary Hearing before him. The Respondent has agreed that, insofar as these negotiations might have been privileged as being the subject of without prejudice negotiations, that privilege has been waived by both parties.

84. In all, there were no less than three without prejudice offers made to the Claimant. We find that the Claimant did not wish to leave the Respondent's organisation. She did engage in the discussions by making counter proposals and we find that she would have been willing to have left the organisation had she been paid what she viewed as a suitable amount of money but, at the same time, she was seeking an apology. We were initially surprised at the approach of the Respondent to enter into a 'without prejudice' conversation with an employee who was, at that point, suspended on allegations that she had improperly received payment from the Respondent. However, we were impressed by the explanation given by Tracy Cannell who gave evidence that the decision to engage in a without prejudice negotiation was in her words 'principally a commercial decision'. What we got from her evidence was that she viewed these sorts of protracted disciplinary matters as a distraction from a main work of the Respondent which was caring for patients. She said it was better from the Respondent's perspective to pay-off an employee than to deal with such disciplinary matters. She saw such negotiations as a means to avoid the time and expense as well as to forestall any proceedings. We accept her account that that was the Respondent's purpose in engaging in these negotiations.

85. On 8 February 2018 Jane Baylis sent an e-mail to the team that she managed. She initially stated only that team members should not send work e-mails to the Claimant. She then followed that up with a further e-mail in which she said:

> *'I am sure that most of you already know the situation with Dorothy. She has been asked not to attend work until the investigation that took place recently has been concluded. This means that Dorothy has been told not to contact any of us about*

work and now I have been told that we cannot contact her regarding work either by phone, in person or email.

Other than that I have not been included in any of the discussions that may or may not be taking place within the Care Group.

Any questions you have about work please direct either to me, Shamina or your line manager.

I hope the situation gets resolved soon.'

86. As Jane Baylis accepted her e-mail had the effect of informing the whole team that the Claimant was suspended pending a disciplinary matter. She accepted that this should have been done differently. She explained her actions by saying that despite the Claimant's suspension the factionalism had continued. Jane Baylis said, and we accept, that the Claimant would be present in the building (as she was entitled to be as she had not been suspended from her other role) and she that believed that the Claimant was discussing her position with other staff members.

87. The negotiations with the Claimant did not resolve the situation and on 3 April 2018 the Claimant was invited to a disciplinary meeting which was to be held on 18 April 2018. That was not a day on which the Claimant worked and the date was brought forward to 17 April 2018. On 10 April 2018 she was sent a letter informing her of the composition of the panel, the management case and the allegations that she would face. The Claimant was reminded of her right to be accompanied at the meeting. The allegations were set out as being:

'• That you knowingly and falsely claimed pay for additional hours worked during August 2017 without the agreement, knowledge or approval. of your manager

• That you knowingly and falsely claimed additional pay for covering periods of on call during August 2017 without the agreement, knowledge or approval of your manager'

88. The Claimant says that the Barts disciplinary policy, which she had been told the Respondent was following, says that where there was an allegation of fraud the matter should be referred to NHS Fraud before the disciplinary process took place. The Claimant believes that would involve a delegation of the investigation to NHS Fraud. We are not ourselves convinced that that was the purpose of the provision of the policy. The policy does provide for a reference to the Counter Fraud team but also indicated that an investigation is commenced within 2 weeks. Elsewhere in the policy it says that 'In cases of suspected fraud, theft or corruption of NHS resources, the Trust's Local Counter Fraud Specialist must be consulted before further action is taken and await their advice'. It appears to us that the requirement to alert NHS Fraud to any allegations to reduce the risk of them being 'covered up' by an internal process. The requirement to contact a Local Counter Fraud Specialist is a requirement to seek specialist internal advice.

89. The evidence from the Respondent, in particular from Zainab Arian, dealt with this matter. We accept that the Respondent believed that it was unable, as a private organisation, to turn to NHS Fraud for assistance or advice. There was a dispute between the parties about what the Claimant was told about this. The Claimant suggested that Tracy Cannell has been dishonest to her as she had said that the Respondent had internal auditors. Zainab Arian told us, and she was not questioned about it, that the matter of whether the matter should be referred to NHS Fraud was something she was aware of. She said that the Respondent has its own external auditors and that she was delegated with the task of approaching those auditors to ensure that the processes that had been followed by the Respondent were appropriate in the circumstances. She says that she was told they were. It may be that there has been some misunderstanding by Tracey Cannell about whether the auditors are internal or external, but it seems to us that it is a trivial misunderstanding or miscommunication.

90. In advance of the disciplinary hearing the Claimant was informed that the disciplinary panel would consist of Tracey Cannell and Nicolas Percival. The Claimant objected to this. Under the Barts disciplinary policy the person who ordinarily chairing the disciplinary panel would have been the Commissioning Manager. That would have been David Robertson. In this case the Claimant has taken exception to David Robertson's attitude suggesting that when he commissioned the investigation, he had expressed a concluded view at the outset. The Barts disciplinary policy also says that a disciplinary panel should ordinarily comprise two members one to chair the meeting and make any decision and one to provide advice. In cases where the allegation is gross misconduct the panel should also include a member of the HR team. The Respondent is a far smaller organisation than Barts Health. In deciding who might hear a disciplinary allegation we accept that Respondent needed to bear in mind the possibility of an appeal to a more senior employee.

91. The Claimant has suggested that Tracey Cannell should not have been involved in the disciplinary hearing. It seems to us that Tracy Cannell's appointment to the panel is one to which the Claimant could not take reasonable objection. The fact that she had been involved in the decision or communication of the suspension of the Claimant was suspended in our view does not suggest that she had predetermined the disciplinary allegations against her. We note throughout the minutes of the disciplinary hearing that Tracy Cannell frequently asked pertinent and important questions of the Claimant. We find that she did so in order to ascertain the truth of the matter.

92. On 13 April 2018 the Claimant sent a grievance letter to Nicholas Percival. She made the following complaints:

92.1. That the matter of her claim for enhancements was not referred to NHS Fraud; and

92.2. That the conclusions of the investigation report were one sided; and

92.3. That David Robertson had expressed a concluded view before the investigation; and

92.4. That the investigation had taken longer than the Barts disciplinary policy provided for; and

92.5. She claimed that she had been told by Tracy Cannell that the fraud allegation had been found to be unfounded but that she was being suspended whilst a further investigation was being conducted into her conduct but also because she had chased up her subject access request; and

92.6. She complained that staff members had been told of her suspension; and

92.7. She complained generally about her treatment and then alleged that she had been victimised for raising the issue of how the TUPE transfer had been handled by Jane Baylis; and

92.8. She complained about the composition of the disciplinary hearing panel.

93. Nicholas Percival responded to the Claimant by an e-mail sent on 16 April 2018. Whilst he provided a response to some of the points raised he started his e-mail by saying that the issues raised by the Claimant all concerned the disciplinary process and could be addressed at the disciplinary hearing.

94. On 15 April 2018 the Claimant sent an e-mail to Nicholas Percival in which she indicated that she would seek to rely on 11 witnesses but stated that not all of them would be available on 17 April 2018. Nicholas Percival responded saying that it would not be possible to rearrange the meeting. Further e-mails were exchanged. The Claimant protested that not all of the witnesses she wanted would be able to attend. Nicholas Percival reminded the Claimant of the allegations she faced and of the need for the witnesses to be relevant. The correspondence ended with a suggestion that the meeting would go ahead with the issue of whether the Claimant was unable to call relevant witnesses to be explored at the hearing.

95. The disciplinary hearing took place on 17 April 2018. The Claimant was accompanied by a colleague who was also a person she had named as a potential witness. The meeting was recorded on a mobile telephone. We have been provided with minutes of the meeting which are not verbatim but we find are an accurate summary of what was discussed. We also have a transcription of the recording. When the meeting started Hamida Serdiwala essentially read out her report. The Claimant was then invited to raise any issues with the investigation. She produced her own hand written note of the meeting that she had with Jane Baylis where she says she was told to claim an enhancement for the additional on call work she had done. In the course of those questions the Claimant accepted that she had never sought payment for on call work in the past. Hamida Serdiwala stated that there had never been a claim like that from anybody else. The Claimant is recorded as accepting that Jane Baylis did not actually check what was written on the enhancement form but she later denied that knowledge of this was widespread.

96. The first witness called by Hamida Serdiwala was Jane Baylis. She maintained her account that she had not authorised either the payment for the on call work nor had she approved the additional hours claimed. The Claimant robustly challenged that account but Jane Baylis maintained her position. Tracey Cannell asked Jane Baylis about her

relationship with the Claimant. Jane Baylis said that it had deteriorated since the Claimant returned from her retirement break. Tracey Cannell asked whether communication difficulties might have been at the root of the problem. Jane Baylis is recorded as agreeing with that. Hamida Serdiwala then asked Roxanne Webster who administered the payroll to give evidence. She was one of the witnesses that the Claimant had indicated that she wished to call. Roxanne Webster was unable to comment on the core dispute about whether the payments claimed by the Claimant had been authorised in advance. When the Claimant asked her questions she agreed that the Claimant often stayed at work beyond her contracted hours without claiming any payment.

97. The Claimant was given an opportunity to present her case. She maintained her stance that she should not have been expected to work in excess of a 1 in 3 on call rota and that having done the additional work she was entitled to be paid for it. She said that she had expected that any claim would have been checked before being paid. In response to questions the Claimant accepted that she had never previously made a claim for on call work. She accepted that she had not agreed the amount that she should claim. As we say above, she resiled from that in her evidence before us.

98. At the conclusion of her evidence the Claimant was asked whether she wanted to rely upon additional witnesses. The Claimant said very clearly that she did not. Her response was that she did not believe that it would make any difference. We understand her to be saying that she believed that she was going to be dismissed whatever she did. That is consistent with the stance she took in correspondence with Nicholas Percival in the days before the hearing. Rather than just accept the Claimant's position there was a discussion about whether the Claimant wished to rely upon any witness statements. The Claimant indicated that she might. She was then told that if she wanted to rely on any witnesses statement she should provide witness statements by midnight on 'Monday'. That was 23 April 2018. A date for the panel to reconvene was fixed for 24 April 2018.

99. The Claimant did not provide any witness statements by midnight on 23 April 2018. She indicated that she would be unable to attend any reconvened hearing on 24 April 2018 as she had received some bad family news and her trade union representative was said to be unavailable. Nicholas Percival had a telephone conversation with the Claimant's daughter that he says ended when she became abusive. We did not need to resolve that issue. On 24 April 2018 the Claimant corresponded with Nicholas Percival by e-mail. She asked for a copy of the recording of the meeting and stated, incorrectly, that she had objected to the meeting being recorded (she had queried it but later agreed). She stated, incorrectly, that the recording would be inadmissible. She stated that she had not agreed to the deadline of midnight on 23 April 2018 to provide statements. She is correct that that had not actually been agreed rather than being imposed. However, under the Barts Disciplinary Policy any statements really ought to have been provided 3 days before the hearing on 17 April 2018. That requirement was not enforced but the Claimant was reminded of that by Nicholas Percival when he responded to her.

100. Later on 24 April 2018 the Claimant sent 7 statements to Nicholas Percival. Four of them did not identify the maker of the statement. Two further statements did identify the maker. None of those 6 statements had any direct bearing on whether the Claimant's claims for payment was authorised but did speak to her integrity. The seventh statement was in

the form of an e-mail apparently coming from Sasha Byfield a health care assistant working for Barts. We have referred to that statement above. She stated that she had overheard Jayne Baylis expressly authorising the Claimant to claim for payments for on call work.

101. On 27 April 2018 Tracey Cannell wrote to the Claimant. She told the Claimant that the disciplinary hearing would not be reconvened. She said that the anonymous statements would not be considered. She categorised the statement of Sasha Byfield as a report of a conversation by a third party. We find that that was a dismissive description of a statement which if it were true would have suggested that the Claimant's claim for payment had been authorised by Jane Baylis.

102. Having had regard to what had been said at the close of the meeting on 17 April 2018 we find that the Claimant had a legitimate expectation that the disciplinary hearing would be reconvened to deal with any witness statements that she provided. Whilst we have come to the conclusion, and the Claimant actually conceded, that Sasha Byfield's account (if it is indeed her account) cannot be true, the disciplinary panel could not have known that at the time. The way in which the arrangements were made also left no opportunity for the Claimant to sum up her position and make any final submissions that she saw fit. This was an important matter given the fact that she was fighting for her job and indeed to an extent her reputation.

103. The Claimant sent an e-mail to Nicholas Percival on 18 April 2018 asking him to approve a period of annual leave between 11 and 29 May 2018. Recognising that there was a question about her continued employment the Claimant asked that she be told how much leave she had accrued. Nicholas Percival did not respond directly to that e-mail. The Claimant e-mailed again on 19 and 27 April 2018 repeating her request. She got no response until 27 April 2018 when Nicholas Percival responded telling her that he was unable to agree to the request at that time but that he would respond in one week. The Claimant wrote again on 3 May 2018. She explained that she urgently needed to know whether her request was granted because her children wanted to take her away to celebrate her 60th birthday. There was no response prior to the letter informing the Claimant that she was dismissed.

104. We find that the reason for the failure to deal with the Claimant's request for annual leave was that Mr Percival, and presumably Ms Cannell, had come to the conclusion that it was almost inevitable that the Claimant was going to be dismissed and did not feel it appropriate to give her leave for that reason. In the view of the Tribunal, they were not good reasons, the Claimant could have been given leave whether she was going to be dismissed or not, it made no difference financially to the Respondent and had no particular impact on the proceedings. It was, in our view, unkind.

105. By a letter dated 9 May 2018 the Claimant was summarily dismissed. That letter was written by Tracey Cannell after discussions with Nicholas Percival. We are satisfied that Tracey Cannell was the primary decision maker but that the reasons are the reasons of them both. The conclusion that was reached was that the Claimant had made a claim for payment that was 'fraudulent'. The reasoning focuses entirely on the claim for additional pay because of the on call duties. The factual dispute about whether the payment was authorised is recorded but it is not apparent from the letter that it was resolved. The reasoning appears to be focussed on the Claimant's concession that she had come up with

her own formula for claiming an additional payment and had claimed for that without any discussion with her manager. Tracey Cannell comments upon the lack of respect shown to Jane Baylis in the course of the disciplinary hearing and a lack of respect shown to the panel. Having carefully read the transcript of the hearing and had regard to the oral evidence we heard we are satisfied that there was a reasonable basis for criticising the Claimant's behaviour. For ourselves we would have made considerable allowance for the Claimant given that the stress that she was no doubt under. A point that Tracey Cannell particularly emphasised in her decision letter was her view that the Claimant did not consider herself bound by the policies of the Respondent.

106. It is not strictly necessary for us to make any findings for ourselves about whether the Claimant had acted fraudulently. What we are concerned with is whether the process was influenced by any protected disclosures. If a decision or process is manifestly unfair, that might shed some light on the issues we need to decide. For that purpose we record that we agree with Tracey Cannell and Nicholas Percival that the Claimant claimed for monies that she was not contractually entitled to and that she did so having chosen her own method of calculation which had not been discussed with Jane Baylis even on her own account. We would not have reached the conclusion that this was fraudulent. We would have resolved the issue of whether the payment was expressly authorised. We would have found that it was not but that the Claimant believed that Jane Baylis's offer to sort things out was an offer of payment. The Claimant's note of the meeting reflects her belief and not what was actually said. We would have placed weight on the fact that the Claimant openly declared the reason for the claim on the enhancement form. We find that that lack of concealment points away from dishonesty. We would not have found that there was any dishonesty for ourselves. We would accept that there was evidence which went the other way and that it was open to other decision makers to reach different conclusions.

107. By an e-mail sent on 22 May 2018 the Claimant appealed her dismissal. The Claimant had indicated that Sasha Byfield would attend and give evidence at the appeal hearing. In fact she did not attend. The appeal was considered by Chris Banks and Zainab Arian at a hearing on 21 June 2018. The decision was made that the appeal would not be upheld.

108. One specific complaint made by the Claimant relates to the appeal. As set out in the list of issues it appears that the Claimant was saying that Tracy Cannell and Nicholas Percival sat as members of the appeal panel. By the end of her submissions the Claimant had effectively conceded that that was not the case. That concession was rightly made. Tracy Cannell and Nicholas Percival did attend the appeal hearing but not as decision makers. They attended to present the management case on the appeal. This was fully and properly explained in the appeal outcome letter which recorded the Claimant as having accepted this position during the hearing. We would accept that the presence of Tracey Cannell and Nicholas Percival would have added to the stress that the Claimant was under.

109. The appeal outcome letter set out the reasons for rejecting a ground of appeal that focussed on the finding of dishonesty. The reasons given were:

' As explained in the Appeal meeting the normal process for compensating for excess on-call time is for the other managers to pay back time in kind. We note that you had accrued a larger than normal amount of time owed and that you wanted to be compensated in pay as it would be difficult to take this back through time off due to your part-time hours. There is disagreement about who said what but it appears to us that with the imminent departure of Jane Baylis on holiday, you inappropriately took her comment to sort it out later as authorisation to make a claim for payment for on-call time worked even though this was not the normal process. In addition the rate you claimed was arbitrary and of your own calculation.'

The law to be applied

Protected disclosure claims

110. The protection for workers who draw attention to failings by their employers or others, often referred to as 'whistle-blowers', was introduced by the Public Interest Disclosure Act 1994 which introduced a new Part IVA to the Employment Rights Act 1996.

111. In ***Jesudason v Alder Hey Children's NHS Foundation Trust*** **[2020] ICR 1226** Elias LJ described the purposes of the protection as follows:

'Ever since the introduction of the Public Interest Disclosure Act 1998, the law has sought to provide protection for workers (colloquially known as whistleblowers") who raise concerns or make allegations about alleged malpractices in the workplace. Too often the response of the employer has been to penalise the whistleblower by acts of victimisation rather than to investigate the concerns identified. The 1998 Act inserted a new Part IVA into the Employment Rights Act 1996 designed to prevent this. The long title to the Act describes its purpose as follows:

> *"An Act to protect individuals who make certain disclosures of information in the public interest: to allow such individuals to bring action in respect of victimisation; and for connected purposes."*

The law which gives effect to the simple principle enunciated in the long title is far from straightforward. The basic principle, set out in section 47B of the Employment Rights Act 1996, is that a worker has the right not to be subject to a detriment by any act of his employer on the grounds that he has made what is termed a "protected disclosure".'

112. Section 43A of the Employment Rights Act 1996 provides that a disclosure will be protected if it satisfies the definition of a 'qualifying disclosure' and is made in any of the circumstances set out in Sections 43C-H. The material parts of the statutory definition of

what amounts to a qualifying disclosure are found in Section 43B of the Employment Rights Act 1996 which says:

> 43B Disclosures qualifying for protection.
>
> (*1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—*
>
> *(a) that a criminal offence has been committed, is being committed or is likely to be committed,*
>
> *(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,*
>
> *(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,*
>
> *(d) that the health or safety of any individual has been, is being or is likely to be endangered,*
>
> *(e) that the environment has been, is being or is likely to be damaged, or*
>
> *(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.*

113. The proper approach to assessing whether there is a qualifying disclosure for the purposes of Section 43B is that summarised by HHJ Aurbach in ***Williams v Michelle Brown AM*** **UKEAT/0044/19/OO**. He said:

> *"It is worth restating, as the authorities have done many times, that this definition breaks down into a number of elements. First, there must be a disclosure of information. Secondly, the worker must believe that the disclosure is made in the public interest. Thirdly, if the worker does hold such a belief, it must be reasonably held. Fourthly, the worker must believe that the disclosure tends to show one or more of the matters listed in sub-paragraphs (a) to (f). Fifthly, if the worker does hold such a belief, it must be reasonably held."*

114. To amount to a 'disclosure of information', it is necessary that the worker conveys some facts to her or his employer (or other person). In ***Kilraine v London Borough of Wandsworth*** **2018 ICR 1850, CA** the meaning of that phrase was explained by Sales LJ as follows (with emphasis added):

> *"35. The question in each case in relation to section 43B(1) (as it stood prior to amendment in 2013) is whether a particular statement or disclosure is a "disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show one or more of the [matters set out in sub-paragraphs (a) to (f)]". Grammatically, the word "information" has to be read with the qualifying phrase, "which tends to show [etc]" (as, for example, in the present case, information which tends to show "that a person has failed or is likely to fail to comply with any legal*

obligation to which he is subject"). In order for a statement or disclosure to be a qualifying disclosure according to this language, it has to have a sufficient factual content and specificity such as is capable of tending to show one of the matters listed in subsection (1)…….

36. Whether an identified statement or disclosure in any particular case does meet that standard will be a matter for evaluative judgment by a tribunal in the light of all the facts of the case. It is a question which is likely to be closely aligned with the other requirement set out in section 43B(1), namely that the worker making the disclosure should have the reasonable belief that the information he discloses does tend to show one of the listed matters. As explained by Underhill LJ in Chesterton Global at [8], this has both a subjective and an objective element. If the worker subjectively believes that the information he discloses does tend to show one of the listed matters and the statement or disclosure he makes has a sufficient factual content and specificity such that it is capable of tending to show that listed matter, it is likely that his belief will be a reasonable belief."

115. The effect of Section 43B Employment Rights Act 1996 is that to amount to a qualifying disclosure, at the point when the disclosure was made, the worker must hold a belief that (1) the information tends to show one of the failings in subsection 43B(1) (a) – (e) and (2) that the disclosure is in the public interest. If that test is satisfied the Tribunal need to consider whether those beliefs were objectively reasonable. The proper approach was set out in ***Chesterton Global Ltd (t/a Chestertons) and anor v Nurmohamed (Public Concern at Work intervening)*** **2018 ICR 731, CA** where Underhill LJ said:

26. The issue in this appeal turns on the meaning, and the proper application to the facts, of the phrase "in the public interest". But before I get to that question I would like to make four points about the nature of the exercise required by section 43B (1).

27. First, and at the risk of stating the obvious, the words added by the 2013 Act fit into the structure of section 43B as expounded in Babula (see para. 8 above). The tribunal thus has to ask (a) whether the worker believed, at the time that he was making it, that the disclosure was in the public interest and (b) whether, if so, that belief was reasonable.

28. Second, and hardly moving much further from the obvious, element (b) in that exercise requires the tribunal to recognise, as in the case of any other reasonableness review, that there may be more than one reasonable view as to whether a particular disclosure was in the public interest; and that is perhaps particularly so given that that question is of its nature so broad-textured. The parties in their oral submissions referred both to the "range of reasonable responses" approach applied in considering whether a dismissal is unfair under Part X of the 1996 Act and to "the Wednesbury approach" employed in (some) public law cases. Of course we are in essentially the same territory, but I do not believe that resort to tests formulated in different contexts is helpful. All that matters is that the Tribunal should be careful not to substitute its own view of whether the disclosure was in the public interest for that of the worker. That does not mean that it is illegitimate for the tribunal to form its own view on that question, as part of its thinking – that is indeed often difficult to avoid – but only that that view is not as such determinative.

29. Third, the necessary belief is simply that the disclosure is in the public interest. The particular reasons why the worker believes that to be so are not of the essence. That means that a disclosure does not cease to qualify simply because the worker seeks, as not uncommonly happens, to justify it after the event by reference to specific matters which the tribunal finds were not in his head at the time he made it. Of course, if he cannot give credible reasons for why he thought at the time that the disclosure was in the public interest, that may cast doubt on whether he really thought so at all; but the significance is evidential not substantive. Likewise, in principle a tribunal might find that the particular reasons why the worker believed the disclosure to be in the public interest did not reasonably justify his belief, but nevertheless find it to have been reasonable for different reasons which he had not articulated to himself at the time: all that matters is that his (subjective) belief was (objectively) reasonable.

30. Fourth, while the worker must have a genuine (and reasonable) belief that the disclosure is in the public interest, that does not have to be his or her predominant motive in making it: otherwise, as pointed out at para. 17 above, the new sections 49 (6A) and 103 (6A) would have no role. I am inclined to think that the belief does not in fact have to form any part of the worker's motivation – the phrase "in the belief" is not the same as "motivated by the belief"; but it is hard to see that the point will arise in practice, since where a worker believes that a disclosure is in the public interest it would be odd if that did not form at least some part of their motivation in making it.

116. When going on to consider what was required to establish that something was in the public interest Underhill LJ said at paragraph 37:

"….. *in my view the correct approach is as follows. In a whistleblower case where the disclosure relates to a breach of the worker's own contract of employment (or some other matter under section 43B (1) where the interest in question is personal in character), there may nevertheless be features of the case that make it reasonable to regard disclosure as being in the public interest as well as in the personal interest of the worker. Mr Reade's example of doctors' hours is particularly obvious, but there may be many other kinds of case where it may reasonably be thought that such a disclosure was in the public interest. The question is one to be answered by the Tribunal on a consideration of all the circumstances of the particular case, but Mr Laddie's fourfold classification of relevant factors which I have reproduced at para. 34 above may be a useful tool. As he says, the number of employees whose interests the matter disclosed affects may be relevant, but that is subject to the strong note of caution which I have sounded in the previous paragraph."*

117. The 4 relevant factors identified by Underhill LJ were (at paragraph 34):

"(a) the numbers in the group whose interests the disclosure served – see above;

(b) the nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed – a disclosure of wrongdoing directly affecting a very important interest is more likely to be in the public interest than a disclosure of trivial

wrongdoing affecting the same number of people, and all the more so if the effect is marginal or indirect;

(c) the nature of the wrongdoing disclosed – disclosure of deliberate wrongdoing is more likely to be in the public interest than the disclosure of inadvertent wrongdoing affecting the same number of people;

(d) the identity of the alleged wrongdoer – as Mr Laddie put it in his skeleton argument, "the larger or more prominent the wrongdoer (in terms of the size of its relevant community, i.e. staff, suppliers and clients), the more obviously should a disclosure about its activities engage the public interest" – though he goes on to say that this should not be taken too far."

118. In ***Dobbie v* Felton UKEAT/0130/20/OO** HHJ Tayler reviewed the decision in ***Chesterton*** he extracted the following propositions:

(1) the necessary belief is that the disclosure is made in the public interest. The particular reasons why the worker believes that to be so are not of the essence

(2) while the worker must have a genuine (and reasonable) belief that the disclosure is in the public interest, that does not have to be his or her predominant motive in making it – Underhill LJ doubted whether it need be any part of the worker's motivation

(3) the exercise requires the tribunal to recognise, as in the case of any other reasonableness review, that there may be more than one reasonable view as to whether a particular disclosure was in the public interest

(4) a disclosure which was made in the reasonable belief that it was in the public interest might nevertheless be made in bad faith

(5) there is not much value in trying to provide any general gloss on the phrase "in the public interest". Parliament has chosen not to define it, and the intention must have been to leave it to employment tribunals to apply it as a matter of educated impression

(6) the statutory criterion of what is "in the public interest" does not lend itself to absolute rules

(7) the essential distinction is between disclosures which serve the private or personal interest of the worker making the disclosure and those that serve a wider interest

(8) the broad statutory intention of introducing the public interest requirement was that "workers making disclosures in the context of private workplace disputes should not attract the enhanced statutory protection accorded to whistleblowers"

(9) Mr Laddie's fourfold classification of relevant factors may be a useful tool to assist in the analysis

i. the numbers in the group whose interests the disclosure served

ii. the nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed

iii. the nature of the wrongdoing disclosed

iv. the identity of the alleged wrongdoer

(10) where the disclosure relates to a breach of the worker's own contract of employment (or some other matter under section 43B(1) where the interest in question is personal in character), there may nevertheless be features of the case that make it reasonable to regard disclosure as being in the public interest

119. The fact that a disclosure is about a subject that could be in the public interest does not automatically lead to the conclusion that the worker believed that she or he was making the disclosure in the public interest: ***Parsons v Airplus International Ltd*** **UKEAT/0111/17/JOJ**. It is a question of fact as to whether the worker held the necessary belief.

120. Where a worker says that the information they conveyed tended to show a breach or likely breach of a legal obligation they do not have to be right either about the facts relayed or the existence of the legal obligation. It is sufficient that the worker actually holds the belief and that objectively that belief is reasonable - see ***Babula v Waltham Forest College*** **[2007] EWCA Civ 174**. However, it is necessary that the belief is actually held. In ***Eiger Securities LLP v Korshunova*** **[2017] IRLR 115** Slade J said:

'…. in order to fall within ERA section 43 B(1)(b), as explained in Blackbay the ET should have identified the source of the legal obligation to which the Claimant believed Mr Ashton or the Respondent were subject and how they had failed to comply with it. The identification of the obligation does not have to be detailed or precise but it must be more that a belief that certain actions are wrong. Actions may be considered to be wrong because they are immoral, undesirable or in breach of guidance without being in breach of a legal obligation.'

121. There is no requirement for a worker to spell out what legal obligation they say is engaged within any disclosure but a failure to do so is evidentially relevant to the question or whether they actually held the necessary belief that their information tends to show the commission of any offence and/or breach of any legal obligation see ***Twist DX Ltd and ors v Armes and anor*** **EAT 0030/20**

122. In ***Kraus v Penna plc*** **[2003] UKEAT 0360_03_2011** Cox J held that where Section 43B required a reasonable belief that some wrongdoing was 'likely' that word was to be understood as equating to probable. That case was subsequently overturned by the Court of Appeal in ***Babula v Waltham Forest College*** on other grounds the conclusion in respect of the meaning of the word likely was not disturbed.

123. Any assessment of the belief held by the worker is entitled to take into account any specialist knowledge the worker may have - ***Korashi v Abertawe Bro Morgannwg University Local Health Board*** **[2012] IRLR 4**

124. As a general rule each communication by the worker must be assessed separately in deciding whether it amounts to a qualifying disclosure however, where some previous communication is referred to or otherwise embedded in a subsequent disclosure, then a tribunal should look at the totality of the communication see ***Norbrook Laboratories (GB) Ltd v Shaw*** **2014 ICR 540, EAT** and ***Simpson v Cantor Fitzgerald Europe*** **EAT 0016/18** (where the worker had failed to make it clear which communications needed to be read together) and ***Barton v Royal Borough of Greenwich*** **EAT 0041/14** (where it was held that separate and distinct disclosures could not be aggregated). When reached the Court of Appeal it was held that the issue of whether disclosures could be aggregated is a matter of common sense and a pure question of fact - see ***Simpson v Cantor Fitzgerald Europe*** **[2021] ICR 695].**

125. Section 43C provides that a qualifying disclosure will be a protected disclosure if it is made to the employer.

126. Section 47B provides:

47B Protected disclosures.

(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.

(1A) A worker ("W") has the right not to be subjected to any detriment by any act, or any deliberate failure to act, done—

(a) by another worker of W's employer in the course of that other worker's employment, or

(b) by an agent of W's employer with the employer's authority,

on the ground that W has made a protected disclosure.

(1B) Where a worker is subjected to detriment by anything done as mentioned in subsection (1A), that thing is treated as also done by the worker's employer.

(1C) For the purposes of subsection (1B), it is immaterial whether the thing is done with the knowledge or approval of the worker's employer.

(1D) In proceedings against W's employer in respect of anything alleged to have been done as mentioned in subsection (1A)(a), it is a defence for the employer to show that the employer took all reasonable steps to prevent the other worker—

(a) from doing that thing, or

(b) from doing anything of that description.

(1E) A worker or agent of W's employer is not liable by reason of subsection (1A) for doing something that subjects W to detriment if—

(a) the worker or agent does that thing in reliance on a statement by the employer that doing it does not contravene this Act, and

(b) it is reasonable for the worker or agent to rely on the statement. But this does not prevent the employer from being liable by reason of subsection (1B).]

(2) This section does not apply where—

(a) the worker is an employee, and

(b) the detriment in question amounts to dismissal (within the meaning of Part X).

(3) For the purposes of this section, and of sections 48 and 49 so far as relating to this section, " worker ", " worker's contract ", " employment " and " employer " have the extended meaning given by section 43K

127. In ***Timis and anor v Osipov (Protect intervening)*** **2019 ICR 655, CA**, the Court of appeal held that S.47B(2) does not preclude an employee from bringing a detriment claim against a co-worker under S.47B(1A) for subjecting him or her to the detriment of dismissal. This means that a detriment claim in such circumstances can also be brought against the employer, who will be liable for the detriment under S.47B(1B) unless the 'reasonable steps' defence can be established.

128. The meaning of the phrase *'on the grounds that'* in sub-section 47(1) has been explained in ***Fecitt v NHS Manchester (Public Concern at Work intervening)*** **[2012] ICR 372** where Elias LJ said:

'the better view is that section 47B will be infringed if the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistleblower.'

129. A detriment can be on the grounds that the employee has made a protected disclosure whether the motivation is conscious or subconscious. It is not a necessary ingredient of the test that there was any malice towards the worker - ***Croydon Health Services NHS Trust v Beatt*** **2017 ICR 1240, CA.**

130. Depending on the facts there can be a distinction between the fact of the disclosure itself and the manner in which the employee raises or pursues any complaints: ***Panayiotou v Chief Constable of Hampshire Police and anor*** **2014 ICR D23, EAT,** ***Mid Essex Hospital Services NHS Trust v Smith*** **EAT 0239/17,** ***Woodhouse v West North West Homes Leeds Ltd*** **[2013] I.R.L.R. 773 and** ***Martin v Devonshires Solicitors*** **2, EAT,2011 ICR 35.** The underlying principle in those cases was approved by the Court of appeal in ***Page v Lord Chancellor and another*** **[2021] IRLR 377** per Underhill LJ at paragraphs 53 -56.

131. An employer who subjects an employee to a detriment or dismissed her of him on the grounds that they have raised some complaint that the employer genuinely and honestly

does not regard as being a protected disclosure runs the risk that if an employment tribunal later concludes that a disclosure was made it will be taken to have acted unlawfully – see ***Croydon Health Services NHS Trust v Beatt*** *where Underhill LJ* said:

> *'I wish to add this. It comes through very clearly from the papers that the Trust regarded the Appellant as a trouble-maker, who had unfairly and unreasonably taken against colleagues and managers who were doing their best to do their own jobs properly. I do not read the Tribunal as having found that that belief was anything other than sincere, even though it found that it was unreasonable. But it is all too easy for an employer to allow its view of a whistleblower as a difficult colleague or an awkward personality (as whistleblowers sometimes are) to cloud its judgement about whether the disclosures in question do in fact have a reasonable basis or are made (under the old law) in good faith or (under the new law) in the public interest. Those questions will ultimately be judged by a tribunal, and if the employer proceeds to dismiss it takes the risk that the tribunal will take a different view about them. I appreciate that this state of affairs might be thought to place a heavy burden on employers; but Parliament has quite deliberately, and for understandable policy reasons, conferred a high level of protection on whistleblowers. If there is a moral from this very sad story, which has turned out so badly for the Trust as well as for the Appellant, it is that employers should proceed to the dismissal of a whistleblower only where they are as confident as they reasonably can be that the disclosures in question are not protected (or, in a case where Panayiotou is in play, that a distinction can clearly be made between the fact of the disclosures and the manner in which they are made).'*

132. The meaning of the word 'detriment' in Section 47B is the same as in a claim of direct discrimination under the Equality Act 2010 and is treatment that a reasonable worker would consider to be to their disadvantage. In ***Jesudason v Alder Hey Children's NHS Foundation Trust*** the Court of Appeal stated:

> *"27.In order to bring a claim undersection 47B, the worker must have suffered a detriment. It is now well established that the concept of detriment is very broad and must be judged from the view point of the worker. There is a detriment if a reasonable employee might consider the relevant treatment to constitute a detriment. The concept is well established in discrimination law and it has the same meaning in whistleblowing cases. In Derbyshire v St Helens Metropolitan Borough Council (Equal Opportunities Commission intervening) [2007] ICR 841, para 67, Lord Neuberger of Abbotsbury described the position thus:*
>
> > *"67. In that connection, Brightman LJ said in Ministry of Defence v Jeremiah [1980] ICR 13, 31A that 'a detriment exists if a reasonable worker would or might take the view that the [treatment] was in all the circumstances to his detriment'.*
> >
> > *68.That observation was cited with apparent approval by Lord Hoffmann in Chief Constable of the West Yorkshire Police v Khan [2001] ICR 1065, para 53. More recently it has been cited with approval in your Lordships' House in Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337. At para 35, my noble and learned friend, Lord Hope of Craighead, after referring*

to the observation and describing the test as being one of 'materiality', also said that an 'unjustified sense of grievance cannot amount to "detriment"'. In the same case, at para 105, Lord Scott of Foscote, after quoting Brightman LJ's observation, added: 'If the victim's opinion that the treatment was to his or her detriment is a reasonable one to hold, that ought, in my opinion, to suffice'."

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

133. Where, as in the present case, there are several alleged protected disclosures and a number of alleged detriments and/or a dismissal it is necessary to take a structured approach. Guidance was given in ***Blackbay Ventures Ltd T/A Chemistree v Gahir*** **UKEAT/0449/12/JOJ** where it was said a tribunal should take the following approach:

a. Each disclosure should be separately identified by reference to date and content.

b. Each alleged failure or likely failure to comply with a legal obligation, or matter giving rise to the health and safety of an individual having been or likely to be endangered as the case may be should be separately identified.

c. The basis upon which each disclosure is said to be protected and qualifying should be addressed.

d. Save in obvious cases if a breach of a legal obligation is asserted, the source of the obligation should be identified and capable of verification by reference for example to statute or regulation. It is not sufficient as here for the Employment Tribunal to simply lump together a number of complaints, some of which may be culpable, but others of which may simply have been references to a checklist of legal requirements or do not amount to disclosure of information tending to show breaches of legal obligations. Unless the Employment Tribunal undertakes this exercise it is impossible to know which failures or likely failures were regarded as culpable and which attracted the act or omission said to be the detriment suffered. If the Employment Tribunal adopts a rolled up approach it may not be possible to identify the date when the act or deliberate failure to act occurred as logically that date could not be earlier than the latest act or deliberate failure to act relied upon and it will not be possible for the Appeal Tribunal to understand whether, how or why the detriment suffered was as a result of any particular disclosure; it is of course proper for an Employment Tribunal to have regard to the cumulative effect of a number of complaints providing always they have been identified as protected disclosures.

e. The Employment Tribunal should then determine whether or not the Claimant had the reasonable belief referred to in S43 B1 of ERA 1996 under the 'old law' whether each disclosure was made in good faith; and under the 'new' law introduced by S17 Enterprise and Regulatory Reform Act 2013 (ERRA), whether it was made in the public interest.

f. Where it is alleged that the Claimant has suffered a detriment, short of dismissal it is necessary to identify the detriment in question and where relevant the date of the act or deliberate failure to act relied upon by the Claimant. This is particularly important in the case of deliberate failures to act because unless the date of a deliberate failure to act can be ascertained by direct evidence the failure of the Respondent to act is deemed to take place when the period expired within which he might reasonably have been expected to do the failed act.

g. The Employment Tribunal under the 'old law' should then determine whether or not the Claimant acted in good faith and under the 'new' law whether the disclosure was made in the public interest.

134. Section 48(1) of the Employment Rights Act 1996 provides for a right of enforcing any claim brought under Section 47B in the employment tribunal. Sub section 48(2) provides that:

'(2) On a complaint under subsection (1), (1ZA), (1A) or (1B) it is for the employer to show the ground on which any act, or deliberate failure to act, was done.'

135. The effect of Sub section 48(2) of the Employment Rights Act 1996 is that once the worker proves that there was a protected disclosure and a detriment the Respondent bears the burden of showing the reason for any treatment The fact that the employer leads no evidence, or that the explanation it does give is rejected, does not lead automatically to the claim being made out. It is for the tribunal looking at all the evidence to reach a conclusion as to the reason for the treatment - See ***Ibekwe v Sussex Partnership NHS Foundation Trust EAT*** **0072/14** and ***Kuzel v Roche Products Ltd*** **2008 ICR 799, CA**. Where there is no evidence or the employer's explanation is rejected it may be legitimate for the tribunal to draw an inference from the failure to establish the grounds for any treatment.

136. Inferences can only be drawn from established facts and cannot be drawn speculatively or on the basis of a gut reaction or 'mere intuitive hunch' see ***Chapman v Simon*** **[1994] IRLR 124** see per Balcombe LJ at para. 33 or from 'thin air' see ***Chief Constable of the Royal Ulster Constabulary*** **[2003] ICR 337**.

137. Where the worker is an employee and complains of a dismissal by their employer (in contrast to the actions of a fellow worker in deciding to dismiss them) then the employee may present a claim that they have been unfairly dismissed under Section 111 of the Employment Rights Act 1996. If they can establish that they have been dismissed, then the dismissal will be automatically unfair if the requirements of Section 103A are met. Section 103A reads as follows:

103A Protected disclosure.

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

138. Where, as here, an employee has less than 2 year's continuous service they have the burden of proving that the reason for the dismissal falls within Section 103A and therefore falls into the exception found in Section 108(3)(ff) of the Employment Rights Act 1996 - see ***Smith v Hayle Town Council*** **[1978] ICR 996** for the general principle and ***Ross v Eddie Stobart Ltd*** **UKEAT/0068/13/RN** specifically in relation to a complaint relying on Section 103A.

Time Limits

139. The time limits for a claim brought under Section 48 of the Employment Rights Act 1996 are set out in sub sections 48(3)-(5) which read as follows:

> *(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, a temporary work agency or a hirer 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.*

140. The effect of these provisions is that the claim must be brought within 3 months (plus any extension due to ACAS early conciliation) of the detriment complained of, the last of a series of similar acts. Where any detriment amounts to an act extending over a period time will not start running until the end of that act.

141. Where a claim is presented outside the period of 3 months it is necessary to ask firstly whether it was not reasonably practicable to present the claim in time and, only if it was not, go on to consider whether it was presented in a reasonable time thereafter. The two questions should not be conflated. There is no general discretion to extend time and the burden of proof rests squarely on the Claimant to establish that both limbs of the test are satisfied.

The meaning of "reasonably practicable"

142. The expression "reasonably practicable" does not mean that the employee can simply say that his/her actions were reasonable and escape the time limit. On the other hand, an employee does not have to do everything possible to bring the claim. In ***Palmer and Saunders v Southend-On-Sea Borough Council*** **[1984] IRLR 119** it was said that reasonably practicable should be treated as meaning "reasonably feasible".

143. ***Schultz v Esso Petroleum Ltd*** **[1999] IRLR 488** is authority for the proposition that whenever a question arises as to whether a particular step or action was reasonably practicable or feasible, the injection of the qualification of reasonableness requires the answer to be given against the background of the surrounding circumstances and the aim to be achieved.

"Reasonable ignorance"

144. The question of whether it is open to an employee ignorant of her rights to rely upon that ignorance as a reason why it was not reasonably practicable to present a claim in time has been the subject of a number of decisions of the higher courts. In ***Dedman v British Building and Engineering Appliances Ltd*** **[1973] IRLR 379** Scarman LJ said the following:

> *"Does the fact that a complainant knows he has rights under the Act inevitably mean that it is practicable for him in the circumstances to present his complaint within the time limit? Clearly no: he may be prevented by illness or absence, or by some physical obstacle, or by some untoward and unexpected turn of events.*
>
> *Contrariwise, does total ignorance of his rights inevitably mean that it is impracticable for him to present his complaint in time? In my opinion, no. It would be necessary to pay regard to his circumstances and the course of events. What were his opportunities for finding out that he had rights? Did he take them? If not, why not? Was he misled or deceived? Should there prove to be an acceptable explanation of his continuing ignorance of the existence of his rights, it would not be appropriate to disregard it, relying on the maxim "ignorance of the law is no excuse." The word "practicable" is there to moderate the severity of the maxim and to require an examination of the circumstances of his ignorance. But what, if, as here, a complainant knows he has rights, but does not know that there is a time limit? Ordinarily, I would not expect him to be able to rely on such ignorance as making it impracticable to present his complaint in time. Unless he can show a specific and acceptable explanation for not acting within four weeks, he will be out of court."*

145. In ***Wall's Meat Co Ltd v Khan*** **[1978] IRLR 499** Brandon LJ dealt with the issue of ignorance of rights as follows:

> *"The impediment may be physical, for instance the illness of the complainant or a postal strike; or the impediment may be mental, namely, the state of mind of the complainant*

in the form of ignorance of, or mistaken belief with regard to, essential matters. Such states of mind can, however, only be regarded as impediments making it not reasonably practicable to present a complaint within the period of three months, if the ignorance on the one hand, or the mistaken belief on the other, is itself reasonable."

146. In those and in subsequent cases it has been held that the question of whether bringing proceedings in time was not reasonably practicable turns, not on what was known to the employee, but upon what the employee ought to have known ***Porter v Bandridge Ltd*** **[1978] ICR 943,** ***Avon County Council v Haywood-Hicks*** **[1978] IRLR 118**. A further proposition can also be gleaned from those authorities. Where an employee is aware that a right to bring a claim exists it will be considerably harder to show that they ought not have taken steps to ascertain the time limit within which such claims should be presented.

147. The meaning of 'an act extending over a period' is the same as the equivalent phrase in the Equality Act 2010. In ***Commissioner of Police of the Metropolis v Hendricks*** **[2002] EWCA Civ 1686** it was held that:

'*the burden is on [the Claimant] to prove, either by direct evidence or by inference from primary facts, that the numerous alleged incidents of discrimination are linked to one another and that they are evidence of a continuing discriminatory state of affairs covered by the concept of 'an act extending over a period".*

148. In ***Tait v Redcar & Cleveland BC*** **UKEAT/0096/08** it was held that a disciplinary suspension was an act extending over a period.

149. In ***Arthur v London Eastern Railway Ltd*** **| [2007] IRLR 58** the Court of Appeal held that in order for time to be extended on the basis that an act ostensibly out of time forms part of a series of similar acts the Claimant needs to establish that there is at least one unlawful similar act that was presented in time.

150. We are prepared to accept that a dismissal might be a similar act to an earlier detriment (despite the claims falling under different sections of the Employment Rights Act 1996).

Discussion and Conclusions

151. We have structured our decision in the same way as the list of issues. We have started off by asking whether the Claimant has established that she made protected disclosures. We then ask whether she has established the detriments she has complained of then turning to whether any detriment was on the ground that the Claimant has made any protected disclosures. In respect of the unfair dismissal claim we also ask whether the reason or principle reason for the dismissal was because the Claimant had made protected disclosures. Finally we address any relevant issues relating to time limits.

152. As we have set out above the Claimant did not produce a witness statement. We record that this was entirely her fault. The directions of the Tribunal were perfectly clear and the Claimant was prompted by the Respondent but failed to take any notice of what she was told. We did permit the Claimant to adopt all of the documents where she had set out an account of events. The process of cross examination allowed the Claimant to expand on her evidence. We were anxious not to let a procedural failure obscure justice and have carefully analysed what the Claimant has told us when looking at each element of her claims.

153. We have addressed the issue of whether there were protected disclosures asking the 5 questions identified by HHJ Aurbach in ***Williams v Michelle Brown AM***.

154. The Claimant has suggested that the disclosures she made about the TUPE process are qualifying disclosures because they tend to show that there has been, is being or was likely to be a miscarriage of justice. We find that the expression miscarriage of justice relates to the justice system and the outcome of proceedings within that system. We find that the Claimant has included this in the list of issues based on a misunderstanding of what the phrase might mean. We do not accept that the Claimant ever held an actual belief that any of the information she conveyed in any of her disclosures tended to show that there might be a miscarriage of justice. It does not assist the Claimant's alternative cases that she is prepared to say that she did believe this. We find that she has not approached the task of saying what she actually believed at the time with the rigor that she ought to have done. In case we are wrong about the Claimant's actual belief we find that she could not have reasonably believed that any information she disclosed tended to show that there had been, was or was likely to be a miscarriage of justice.

The Claimant's e-mail of 15 November 2016 and/or her follow up e-mail of 27 November 2016 – TUPE Issue

155. The first question for us is whether or not that email conveys information in the sense identified in ***Kilraine***. We conclude that this is an exchange of emails and the e-mails from the Claimant are phrased by way of questions. The Claimant simply asks whether NHS continuity of service will be preserved after a TUPE transfer. In her later emails she sets out her understanding that it might not be. The subject matter of the Claimant's e-mails is a pure enquiry as to the effect of the TUPE transfer was in these particular circumstances. We would accept that the fact that a disclosure takes the form of a question is not determinative. Information can be embedded into a question. However other than the fact that there is an impending TUPE transfer and that employees might lose the benefit of NHS continuous service there is no information at all. The existence of a TUPE transfer is not of itself information tending to show any wrongdoing. We have concluded that this e-mail correspondence does not satisfy the test that is set out in ***Kilraine***. If we are wrong about that, we then ask ourselves whether the Claimant actually believed that what she has said tended to show a breach of a legal obligation. The Claimant did not assist herself by setting out in a witness statement (or her ET1) exactly what wrongdoing she says this information tended to show. We are prepared to accept that the Claimant might have recognised that the TUPE transfer might have disadvantaged a group of employees. It is not impossible that she thought that was unlawful. There was such a paucity of evidence we cannot be sure what she believed. However, even assuming the Claimant did believe that her e-mail tended

to show wrongdoing we must ask whether her belief was reasonable. We would accept that it would be unrealistic to expect the Claimant to have a detailed understanding of the effect of a TUPE transfer. Even making allowances for that we cannot accept that the Claimant could reasonably have believed that the outsourcing employees from the NHS with any contingent effect on the special rules of continuity that apply to the NHS amounted to unlawful conduct per se. We find that the Claimant did not reasonably believe that the information she gave tended to show any breach of the requirements of TUPE. In the light of those conclusions it is unnecessary to deal with the issue of public interest.

156. It follows that we do not accept that the Claimant made a qualifying disclosure on this occasion.

The Claimant's email of 17 March 2017 – TUPE Issue

157. The Claimant's email of 17 March 2017 was sent to Bola Ogundeji. In this e-mail she raises the question of whether or not Barts HNS Trust should have organised elections to elect employee representatives. In our view that email quite clearly does contain information, it carries with it an assertion that there is a TUPE transfer, that there have not been any elected employee representatives and it discusses the fact that there are a number of employees who are not Trade Union Members. We find that there was sufficient information to satisfy the test in ***Kilraine***.

158. We turn to whether the Claimant actually believed that this information tended to show a breach of the TUPE regulations. The Claimant alleges within the body of the email that the failure to combat elections of employee representatives is unlawful and it would attract a penalty of a 90-day protected award. It seems to us quite clear that, if the Claimant is right about the law, the facts that she has put forward would amount to a breach. We find that what she says in that email reflected her genuine belief in the position and therefore we have concluded that she had a genuine belief the facts tend to show a breach of a legal obligation.

159. We then turn to whether the Claimant's belief was reasonable. As a matter of law the Claimant was wrong. We consider that the information provided within the ACAS guidance relied upon by the Claimant is reasonably clear. However there is a real risk of us substituting our own view of what is reasonable for that of the Claimant. The Claimant had no specialist knowledge. It seems to us that whilst the legal position here is clear and is straightforward, it would be impossible for us to say that a person could not reasonably have believed that where a large segment of the workforce were not members of a Trade Union that the legislation would not require election of employee representatives, it is wrong, but in our view, it is not unreasonable.

160. We then turn to the question of whether the Claimant believed her disclosure to be in the public interest. We accept the Claimant's evidence in this respect. The Claimant says she is public spirited, she says a person who sticks up for other employees. We have no reason to doubt that and we have no reason to doubt that when she spoke up, she

considered she was speaking both for herself and a large group of other people. We find that the Claimant did have the public interest in mind when she wrote these e-mails.

161. We turn to the issue of whether the Claimant's belief that the matter was in the public interest was reasonable. We have had regard to the reasoning in ***Chesterton***. We need to ask ourselves whether the Claimant could reasonably have believed that what is essentially in internal employment dispute could be in the public interest. We take into account the fact that there was a public body transferring employees to the private sector. We take into account the fact that there were a reasonably a large group of employees. Taking those two matters into account, perhaps by a small margin, we have concluded that the Claimant could have reasonably believed that passing on the information she did was in the public interest.

162. The conclusion that we have come is that the email of 17 March 2017 was a qualifying disclosure and as it was made to the Claimant's then employer it was a protected disclosure.

21 March 2017 – Email to Bola Ogundeji regarding the TUPE Issue

163. In essence within her e-mail of 21 March 2017 the Claimant repeats the stance taken in her earlier e-mails. We shall deal only with the question of whether at this stage the Claimant could have reasonably believed that the information she repeated tended to show a breach of the requirements of TUPE. At the point that the Claimant sends this e-mail she has received what we consider to be a clear explanation of the law by Bola Ogundeji. She explained why the Claimant was wrong and why Barts NHS Trust had not acted unlawfully. We have made findings above as to the Claimant's contact with ACAS. The Claimant is no doubt sincere but she, we find, has heard what she wanted to hear. The question of whether this is protected disclosure turns solely on the question of whether the Claimant at this stage with the additional information she had could have reasonably believed that the Respondent was acting unlawfully. We find that she could not. It is not reasonable to ignore clear information that contradicts a position initially taken. It is not reasonable to hear only what you want to hear. There comes a point where a person who has started from a reasonable position will be acting unreasonably if faced with clear information contradicting their stance but they refuse to take than information into account. We find that this is what occurred here and assuming in her favour that the Claimant maintained an actual belief in the unlawfulness of Barts NHS Trust's actions her belief was unreasonable. We are prepared to assume that both of the 'public interest' questions are answered in favour of the Claimant. The further information she had did not affect those questions.

164. It follows that we do not find that the Claimant made a qualifying disclosure on this occasion.

29 March 2017 – Email to Mohammed Mohit regarding (1) the TUPE Issue and (2) the Reception Staffing Issue

165. The list of issues refers to the Claimant's e-mail having been sent on 29 March 2017. In fact the e-mail was sent the following day. The e-mail includes a grievance about Jayne

Baylis and how she dealt with the Claimant's return to work. Those parts of the e-mail are not said to be protected disclosures. Within the e-mail the Claimant repeats her contention that there was a failure to elect staff representatives. We can deal with the question of whether this element of the e-mail was a qualifying disclosure by referring to our reasons given in relation to the Claimant's 17 March 2017 e-mail. The same reasoning applies here. The Claimant might have believed that there was a failure to elect representatives but given the information she had any such belief was not reasonable. Accordingly we find that the Claimant did not make any qualifying disclosure in this e-mail concerning the TUPE issue.

166. Within her e-mail the Claimant also included information about the staffing on the reception. She says that she had a follow up conversation with Mohammed Mohit about this issue the following day. It is sensible for us to deal with the balance of the issue above together with the issue identified below.

31 March 2017 – Conversation with Mohammed Mohit regarding Jayne Baylis failing to ensure that the Barts Health reception was adequately staffed.

167. We are prepared to accept that the Claimant repeated matters included in her e-mail of 30 March 2017 when she spoke to Mohamed Mohit the following day. In her e-mail the Claimant includes information that the reception was short staffed, that as a result a driver who was not a Barts employee and who had not been DBS checked was speaking to patients on the telephone at the reception desk. We are satisfied that the Claimant referred to the same matters orally. We are satisfied that this amounts to information that satisfies the test in ***Kilrane***.

168. The Claimant says that she actually believed that the information she conveyed tended to show that Barts was had breached, was breaching or was likely to breach the following legal obligations the 'protection of patient's private information, data protection, triaging emergencies, due care, adhering to the patient safe & secure pathway, making sure that the best possible care was given, the lack of professionalism, ensuring public safety'. We accept that the Claimant had some if not all of these matters in mind when she raised this matter. That would be sufficient to satisfy the actual belief requirement for any qualifying disclosure.

169. The Claimant puts her case on an alternative basis that she believed her disclosure tends to show that Jane Baylis had committed the criminal offence of fraud because he was claiming pay for being on-call when she was not performing her duties. We do not accept that the Claimant believed any such thing. There is no suggestion in her e-mail of 30 March 2017 that she believed a criminal offence had been committed. There is no such suggestion during the grievance process that followed. The basis of the suggestion is that Jane Baylis lived too far away from the hospital to be able to come in to work in an emergency. It seems to us that that is a tenuous basis to suggest that she was guilty of fraud. If we are wrong about our conclusions that this belief was never held we go on to say that the Claimant could not have reasonably believed that the information she gave tended to show that Jane Baylis had committed the criminal offence of fraud. It would not have been reasonable to have believed that there could have been fraud in the absence of dishonesty. There could

have been no reasonable belief that Jane Baylis was being dishonest in accepting her wages.

170. We turn to the question of whether the Claimant could reasonably have believed that the information she gave tended to show a belief in the wrongdoing she has identified (other than fraud). Other than a concern about professionalism we find that the Claimant could have reasonably believed that the information she gave tended to show a breach of a legal obligation. The Claimant has not identified any actual legal obligation with any great precision. It is not an essential requirement that the Claimant is correct either about there being an actual breach or whether the legal obligation actually exists. She was probably right about the potential risks to health and safety. She was probably right about risks to data. In our view the Claimant could reasonably have believed that information showing that a non medically qualified driver answering the telephone to patients with no proper controls over personal data tended to show a breach of legal obligations. It emerged during the evidence that both Jane Baylis and Tracy Cannell shared the thrust of the Claimant's beliefs. This reinforces our view that the beliefs were reasonable.

171. We accept that when the Claimant drew attention to this state of affairs she did so with the intention or ensuring that there was no repetition. She says that she thought her disclosure was in the public interest. We have had regard to the fact that these concerns were in the context of wide ranging criticisms of Jane Baylis. Whilst the Claimant might have acted from personal motives we do not find that these were the only matters in her mind. We accept that the Claimant believed that drawing attention to these matters was in the public interest.

172. We have no hesitation in concluding that the Claimant could have reasonably believed that drawing attention to this matter was in the public interest. Whilst the practice of asking or allowing drivers to answer the telephone had swiftly been dealt with that does not in our view mean that the Claimant could not have reasonably believed that raising the matter was in the public interest.

173. It follows that we find that where the Claimant referred to the reception staffing issue in her correspondence and conversations with Monammed Mohit she made qualifying disclosures which, as they were made to her employer were protected disclosures.

174. At one stage it appeared that the Claimant was relying on her complaints relating to Jane Baylis's treatment of her as being a protected disclosure. We did not understand the Claimant to be pursuing that. If she was pursuing that argument we can deal with it very simply. The Claimant could not have reasonably believed that Jane Baylis's treatment of her personally as set out in her e-mail was a matter which was in the public interest. The Claimant was the only person directly affected. There was no element of public interest at all.

<u>21 April 2017 – Conversation with David Robertson regarding Dr Jennie Read (1) bullying staff and (2) seeking payment for hours not worked. AND 04 May 2017 – Conversation with David Robertson regarding the Nationwide Emergency Education Limited drivers' contract</u>

175. In respect of both of these alleged disclosures our findings of fact are sufficient to dispose of these claims. We have not accepted that these conversations took place. The standard of proof that we have to apply is the balance of probabilities. The Claimant has failed to establish to that standard that the conversations took place. It follows that we are not satisfied that there were any qualifying or protected disclosures on these two occasions.

<u>04 June 2017 – Email to Jayne Baylis, Tracy Cannell, Chris Banks and David Robertson regarding Chris Banks not answering his telephone whilst on call on 3 June 2017</u>

176. This alleged protected disclosure is said to have been included in an email said to have been circulated by the Claimant in the wake of the London Bridge attacks. The email is unfortunately not in the bundle. No party has been able to produce a copy of it. We accept that the Claimant did send an e-mail commenting about this issue and we have set out above our findings of fact about what was said. We accept that the Claimant would have referred to David Robertson not responding to her call.

177. We accept that the reference by the Claimant to not being able to speak to David Richardson on the night of 3 June 2017 contains sufficient factual content to satisfy the test in ***Kilraine***.

178. The Claimant says, in the list of issues at least, that at the time she sent this e-mail she actually believed that the information tended to show:

178.1. A breach of a legal obligation – 'the legal obligations arising from Public Safety'

178.2. The commission of the criminal offence of 'fraud' – 'in that Chris Banks was claiming wages for duties not fulfilled by him'.

178.3. That the health and safety of any person was likely to be endangered in that – 'in that Chris Banks was creating a risk of the service having to close and thereby not being able to treat patients'.

179. We shall deal with the suggestion that the Claimant actually believed that informing people that Chris Banks had not responded to her telephone call tended to show that he had committed the criminal offence of fraud. We do not accept that the Claimant ever held such a belief. We find that this is something that has only occurred to her when she was asked to say which subsections of Section 43B of the Employment Rights Act she relied upon. Had she genuinely thought that Chris Banks had committed a criminal offence we have no doubt she would have raised it either with NHS Fraud or with the Police or internally. It would have been a startling belief to have held for a reasonably intelligent woman. All the Claimant knew was that Chris Banks had not answered his phone when the Claimant expected him to be available. She would have known that a person would not have committed a criminal offence by say allowing a mobile to become discharged or falling asleep and missing a call. She would have known that some element of dishonesty was necessary for the conduct to reach any criminal standard. For these reasons we do not believe that she ever gave a thought at the time she wrote her e-mail to the issue of Chris

Banks committing a criminal offence. We find the allegation symptomatic of the Claimant lashing out in circumstances where her own integrity has been called into question. If we are wrong and she did hold the relevant belief, any belief was wholly unreasonable. There was no basis whatsoever for believing that simply because a person fails to complete a task at work they are guilty of fraud. The Claimant's disclosure cannot be a qualifying disclosure on this basis.

180. We would accept that the Claimant was concerned about the fact that Chris Banks had not answered his telephone in what were very serious circumstances where important decisions needed to me made about the provision of out of hours health services. We would accept that the Claimant believed that the Respondent was under a legal duty to provide health services and that she believed that there was a risk that those services might not be provided if the Out of Hours Service had to close. We are satisfied that the Claimant believed that her e-mail tended to show that a breach of a legal obligation had occurred and that she believed that the health and safety of a person had been endangered.

181. We therefore turn to the question of whether either of those beliefs was reasonable. As a matter of fact, and with no small thanks to the efforts of the Claimant and others, the Out of Hours Service was maintained and no patient was neglected. At the time the Claimant wrote her e-mail she knew that. The way in which the Claimant appears to put her case is that it was a breach of the legal obligations relating to public safety to have what might be thought of as a near miss. We remind ourselves that the Claimant does not have to be right. It is sufficient that her belief was reasonable. We find that it was reasonable for the Claimant to believe that disclosing information that a senior manager could not be contacted in an emergency did amount to a breach of some legal obligation to maintain public health. We reach a similar conclusion in respect of the alternative basis for the Claimant's claim. Here she is on stronger ground. Sub-section 43B(1)(d) requires only that the health and safety of an individual need have been, is being or is likely to be endangered. In our view it would be reasonable for the Claimant to have believed that service users were 'endangered' in the sense that there was a risk at least of the service being closed and patients not being treated.

182. We have little difficulty with the issue of public interest. We find that the Claimant raised the fact that she was unable to speak to Chris Banks in order to prevent any repetition of the events. We accept that she would have had in her mind the public interest in maintaining the best possible levels of service. We find that that belief was reasonable.

183. It followed that we find that on this occasion the Claimant made a qualifying disclosure pursuant to Sub-sections 43B(b) and (d) but not (a). She made the disclosure to her employer and therefore the qualifying disclosure is a protected disclosure.

<u>23 August 2017 – Conversation with Lorna Cunnew of NHS Counter Fraud re the Procurement Issue</u>

184. As we have set out in our findings of fact above we are not satisfied that there was any such conversation on this date between the Claimant and any person called Lorna Cunnew. There may have been more than one occasion when the Claimant contacted NHS Fraud about the issue of the contract for transport services but it is incumbent on the Claimant to show, to the relevant standard, that a conversation took place and to go on and

show what was said. It is not for the Tribunal to guess what she might have said and when (particularly when the chronology is important).

185. It follows that we are not satisfied that there was any disclosure on this occasion.

10 October 2017– Email to Lorna Cunnew of NHS Counter Fraud re the Procurement Issue

186. The Claimant did contact NHS Counter Fraud by e-mail on 5 October 2017. Her e-mail was addressed to Kam Johal. It is clear that at a point prior to this she had had an earlier telephone conversation which she refers to as 'earlier'. The Claimant has not produced or included in the bundle any e-mail sent on 10 October 2017. In her e-mail of 5 October 2017 the Claimant said:

> *With regard to our earlier conversation I have attached an invoice for the drivers confirming the name of the company.*
>
> *Tower Hamlets GP Out of Hours Service was TUPE'd over to Bart's Health c.July 2011, at this time the contract was in place with Nationwide Emergency Education though they were trading under another name then which I may be able to find out tomorrow. They had originally been given the contract before I started working for THGP OOH and whilst the service was under Tower Hamlet's Primary Care Trust.*
>
> *The company director, John McConnell, is allegedly close friends with Jane Baylis. The drivers for this company have reported to myself that they had attempted to put in an application to supply the service themselves at a cheaper rate but the application was never considered or taken further by Jane Baylis.*
>
> *TH GP OOH has now been TUPE'd over from Bart's Health to TH Care Group and Jane has managed to secure the contract for Nationwide Emergency again for another year, after which it is not expected that this type of service will be needed*.

187. We are prepared to infer that in her telephone call the Claimant told NHS Fraud the same information as she gave to us in her evidence. This is consistent with her e-mail of 5 October 2017. The Claimant appears to have believed that Jane Baylis was obliged to undertake an annual tender exercise but instead renewed the contract for driver services. She appears to have believed that a driver who was interested in tendering for the service was prevented from doing so. She appears to have believed that the services were provided at an excessive cost. The Claimant is wrong about almost all of those things. However we accept that for whatever reasons she was convinced that she had discovered some wrongdoing at the time and that she would have repeated the gist of those matters to NHS Fraud during her telephone call. We are satisfied that she conveyed information capable of satisfying the test in ***Kilraine***.

188. The Claimant has said that she held the following beliefs:

188.1. That the information she gave tended to show a person had failed, was failing or was likely to fail to comply with any legal obligation to which they were

subject namely the legal obligations arising from fraudulent use of public funds and tendering of contracts.

188.2. That the information she gave tended to show that the criminal offence of fraud had been committed, was being committed or was likely to be committed in respect of the in that public money was used to fraudulently pay a contract that had not been tendered according to due process.

188.3. That the health or safety of any individual had been, was being or was likely to be endangered in respect of the in that the failure to go through a competitive tender exercise meant that drivers were not DBS-checked and therefore posed a greater risk to patients

189. In assessing whether the Claimant actually held the believes she professed to do we have regard to the timing of the disclosures. We find that the Claimant was actively looking for material which she believed would cast Jane Baylis in a bad light. She did not raise this matter internally. We find that she did not do that because she was not at all sure that she was correct in her assertions. She wanted NHS Fraud to investigate rather than to raise the matter in her own name. We remind ourselves that the motivation for making disclosures is not determinative of whether a disclosure is a qualifying disclosure. Had we found for the Claimant then we would have needed to consider whether the disclosures were made in good faith. We do not need to deal with that issue.

190. We shall deal first with the question of whether the Claimant held a belief that the information she gave tended to show a breach of any legal obligation. We accept that the Claimant had convinced herself that there was an obligation to put the Driver's contract out to tender each year. The Claimant also believed that that was the responsibility of Jane Baylis. We find that the Claimant believed that had the contract been put out to tender a cheaper option might have emerged. From this we would accept that when the Claimant raised the issue with NHS Fraud she actually believed that there had been a breach of some legal obligation to put public contracts out for a tender process.

191. We then turn to whether the Claimant's belief in that respect was reasonable. We take into account the fact that the rules on public procurement are complex. The Claimant knew that the contract had been in the same hands for in excess of 5 years. She knew that the sums paid were significant. Taking all of those matters into account we are satisfied that the Claimant could reasonably have believed that the information she gave tended to show a breach of a legal obligation to put contracts out to tender on annual basis.

192. We then turn to the question of whether the Claimant actually believed that making the disclosure was in the public interest. The fact that the Claimant was looking for material to attack Jane Baylis is not irrelevant. If that was all consuming and the Claimant gave no thought to the public interest then there would not be a qualifying disclosure. We have regard for the fact that the Claimant staunchly supported the service provided by the Respondent. If she was right in what she said then the drivers who had expressed an interest in tendering would benefit. If the Claimant had been right there was an obvious public interest in making this disclosure. The contract concerned a large sum of public funds. Taking all this into account we do not find that the Claimant was exclusively concerned with

her own agenda and that she gave at least some thought to the public interest. We find that she could reasonably have believed that her disclosure was in the public interest.

193. In the light of those findings we do not need to deal with the alternative basis upon which the Claimant put her claim.

194. We find that the Claimant made a qualifying disclosure when she contacted NHS Fraud. NHS Fraud was used by the Claimant to refer to the NHS Counter Fraud organisation. That body is (and was) a prescribed body for the purposes of the Public Interest Disclosure (Prescribed Persons) Order 2014. Section 43F of the Employment Rights Act provides that:

> *43F Disclosure to prescribed person*
>
> *(1) A qualifying disclosure is made in accordance with this section if the worker—*
>
> > *(a) makes the disclosure to a person prescribed by an order made by the Secretary of State for the purposes of this section, and*
> >
> > *(b) reasonably believes—*
> >
> > > *(i) that the relevant failure falls within any description of matters in respect of which that person is so prescribed, and*
> > >
> > > *(ii) that the information disclosed, and any allegation contained in it, are substantially true.*

195. It is not entirely clear from the description 'of matters in respect of which' the NHS Fraud Authority is prescribed whether the activities of the Respondent would fall within the ambit of that body. It is not necessary for us to decide that. We find that the Claimant did believe that NHS Counter Fraud was the proper person to whom she should report her concerns. She explained her reasoning to us as including the fact that her concerns related to how public monies were being spent. We find that it was reasonable for her to believe that her concerns were matters falling within the ambit of NHS Counter Fraud.

196. We are further prepared to accept that the Claimant reasonably believed that the information she passed to NHS Counter Fraud was substantially true. We reach this finding because it appears that the Claimant was perhaps more careful about what she actually said than the manner in which she has put her case before us. She restricted herself to pointing out that a contract had not been put out to tender. She made no direct allegation that Jane Baylis was involved in any fraud. She stated that Jane Baylis was friendly with the Director of the contractor. She said that another driver was interested in tendering for the contract. She could reasonably have believed what she said was true.

197. It follows that we accept that the Claimant made a protected disclosure to NHS Counter Fraud both orally and in her e-mail of 5 October 2017.

13 December 2017 – Email to Jayne Baylis

198. The Claimant had suggested when compiling the list of issues with the Respondent that she made a protected disclosure in an e-mail of this date. The Claimant was unable to provide a copy of the e-mail and the Respondent's position is that it is unaware of any such e-mail. The Claimant did not give us any sufficient detail of what this e-mail might have ben about or why she reasonably believed what she had said showed any relevant wrongdoing. In the absence of any sufficient evidence we are unable to find that the Claimant made a protected disclosure on this date.

Protected disclosures - conclusions

199. We have agreed with the Claimant (although not always for the entirety of her reasons) that she made protected disclosures on the following occasions:

199.1. On 17 March 2017 when she alleged that there had been a failure to elect employee representatives in relation to the TUPE transfer; and

199.2. On 30 and 31 March 2017when she drew attention to the shortage of staff at the reception and the drivers answering the telephone; and

199.3. On 4 June 2017 when she referred to Chris Banks not answering his telephone when he had been second on call; and

199.4. Shortly before and on 5 October 2017 when the Claimant contacted NHS Prevent Fraud and passed on information about the procurement issue.

Detriments and the reason for any treatment

200. When we gave our oral reasons we firstly dealt with the issue of whether each matter complained of by the Claimant amounted to a detriment for the purposes of a claim under Section 47B of the Employment Rights Act 1996. In providing full written reasons the Employment judge has revised the structure of the reasons to make the reasons clearer. We address each matter complained of below dealing with the issue of detriment and the grounds for the treatment at the same time.

201. We reach the following general conclusions about the impact or knowledge about the Claimant's protected disclosures:

201.1. We find that nobody that took any action the Claimant complained of knew anything about the Claimant's e-mail of 17 March 2017 when she complained about the failure to elect employee representatives. David Robinson and Nicholas Percival knew of the Claimant's repeated complaints later on but we have held that those repeated complaints were not protected disclosures. Jane Baylis was only aware of some general unhappiness. In any event if we are wrong and the knowledge was more detailed or widespread we find that

none of the individuals who the Claimant complains off was at all concerned about the Claimant's concerns about TUPE. The issue had been and gone well before the events leading to the Claimant's dismissal.

201.2. Having regard to the evidence surrounding the inadequate staffing of the reception and the drivers answering the telephone we are satisfied that Jane Baylis and the other managers entirely agreed with the Claimant that this was inappropriate. This is significant because it is relevant to but not determinative of, the question of whether the Claimant's decision to raise this matter caused any resentment.

201.3. We find that the fact that Chris Banks had not answered his telephone whilst he was second on call was not viewed by anybody the Claimant says subjected her to a detriment as unusual. The fact that there was no reaction or response to what the Claimant said in her e-mail of 4 June 2017 supports the inference that what was said was not overly critical or strong and as such far less likely to provoke any retaliation.

201.4. In respect of the last protected disclosure we have made a finding of fact that none of the individuals responsible for any act the Claimant complains of was aware of the fact that the Claimant had raised her concerns with NHS Counter Fraud. There was no evidence before us that there was ever any investigation. It follows that that protected disclosure cannot have been a reason for any of the subsequent treatment of the Claimant.

<u>a. September 2016 - removal of the Claimant's responsibility for line management, supervision</u>

202. In our findings of fact set out above we have accepted that there were some changes to the Claimant's role both before and after she retired and returned. It is unnecessary for us to dwell on whether the Claimant could have reasonably considered those changes to have been to her disadvantage. The changes were implemented before the Claimant made any protected disclosures. It follows from that that the changes cannot have been implemented on the ground that the Claimant made protected disclosures. That is sufficient to dispose of this claim.

<u>b. April 2017 – removal of the Claimant's responsibility for rota production, attending meetings, liaising and recruiting clinical staff</u>

203. It was not disputed by Jane Baylis that there were some changes to the duties carried out by the Claimant after she returned having retired. She did not accept that there were any changes to the responsibilities for the production of rotas. We accept her evidence about that. We put to one side the issue of whether the Claimant could have reasonably regarded the changes that were made as being a disadvantage. We shall assume she could have. The Claimant had gone from a full time to a part time employee and she had gone from being directly responsible for the Band 4 employees to being indirectly responsible for

them. The Claimant had fallen out with Shamina Khatun and her role in supervising her was removed from her as a consequence. Jane Baylis explains that the reason for any initial changes was because of these matters. We are entirely satisfied that that was the case.

204. In respect of any later changes it was not entirely clear to us what the Claimant was complaining about. We were not helped by a lack of specific complaints. We would accept that the relationship between the Claimant and Jane Baylis remained unresolved despite what appeared at the conclusion of the meeting on 4 May 2017 to be a positive outcome to the grievance process.

205. Jane Baylis says, and we accept that other than knowing that the Claimant was very unhappy about the transfer generally she knew nothing about her concerns about elected representatives. We are satisfied that election of employee representatives played no material part in any of decisions about the Claimant's duties because Jane Baylis had no knowledge at all that the Claimant had raised this matter.

206. We find that insofar as there were any changes to the Claimant's duties that postdate the Claimant's grievance of 30/31 March 2017 (which we have accepted was a protected disclosure) the changes were not materially influenced by the reference in the Claimant's e-mail to drivers answering the telephone. Had there been any downturn in the relationship after that point the Claimant had two opportunities to mention it. The meeting of 4 May 2017 and her subsequent letter to David Robertson. The Claimant made no such complaint.

207. We are satisfied that the Claimant's disclosure about the driver answering the telephone had no material influence on the manner in which she was managed by Jane Baylis. There were minor changes in duties before and after the protected disclosures but non were influenced by them.

<u>c. 25 September 2017 – at a meeting with Jayne Baylis, verbally accusing the Claimant of fraud in that Ms Baylis said she compared the Claimant's behaviour to that of another member of staff who was dismissed for allegedly stealing laptops and said that the Respondent "does not take theft lightly"</u>

208. On 25 September 2017 Jane Baylis intended to inform the Claimant that she was going to be investigated for the claims for payment that she had made. We have accepted that in the run up to announcing this Jane Baylis did refer to an employee who had been found to have been dishonest in relation to a laptop. Whilst we would accept that the purpose of this was to explain to the Claimant how seriously the Respondent was likely to take any dishonesty the Claimant could quite reasonably have believed that she was being accused of dishonesty and reasonably perceived this as being a disadvantage. We are satisfied that the Claimant has established that she was subjected to a detriment.

209. We need to assess whether the fact that the Claimant had made any protected disclosures was a material reason for this treatment. We have already said that Jane Baylis was unaware of the Claimant's concerns that there had been a failure to elect employee representatives prior to the TUPE transfer. That cannot have been an operative reason for

her treatment. She was perhaps vaguely aware of the fact that the Claimant had raised the issue of the short staffing of the reception as it had been a matter raised by the Claimant in her grievance although not discussed at the meeting on 4 May 2017. Jane Baylis said in her witness statement that she had no recollection of the issue of Chris Banks failing to answer his telephone being raised by the Claimant. We accept that she could not recall this but have found that she was copied in to the e-mail. Her lack of recollection is understandable as it does not appear that anybody considered what the Claimant was saying to have been of any significance.

210. Jane Baylis's explanation for reporting the Claimant's claims for payment to David Richardson was that she believed that the Claimant had made a claim for payment which had not been authorised and which in respect of the claim for additional on-call duties was remarkable because it would never have been authorised. On the basis of our findings of facts Jane Baylis believed she had not authorised the claim for on call payments. She believed that she would sort something out by offering to take some of the Claimant's on call duties (which she later did). We find that Jane Basis had a reasonable basis for believing that the Claimant had behaved improperly. We find that that was why she reported the Claimant to David Richardson and that is why he commissioned an investigation. Jane Baylis wanted to inform the Claimant about this. We find that her analogy with another employee who had been dismissed for theft was clumsy but was done for the purposes of explaining to the Claimant that she needed to take the matter seriously.

211. We find that it was the fact that Jane Baylis thought that the claim for payment was improper was the only reason for her speaking to the Claimant in the manner she did. The Claimant's three protected disclosures were not a material part of the reasons for the treatment.

<u>d. 29 September 2017 David Robertson pre-judging the Claimant's guilt in relation to the allegations of fraud as evidenced by his email of that date</u>

212. We would agree with the Claimant that the language used by David Richardson indicated that he believed, prior to any investigation, that the Claimant had acted improperly. Whilst in a sense the Claimant had certainly acted improperly in asking to be paid for working additional on call duties the issue of whether she had done dishonestly was something that required an investigation. We would accept that the Claimant could reasonably consider that approach to be a disadvantage even in circumstances where David Richardson did not take the decision to dismiss her.

213. David Richardson had seen the Claimant's grievance. He was also a recipient of the Claimant's e-mail of 4 June 2017 which referred to him not responding when he was second on call. The Claimant's grievance of 30 March 2017 did refer to Jane Baylis not informing the employees about TUPE matters but did not repeat the complaint about elected representatives. We accept that David Richardson knew nothing about this.

214. David Richardson explained his comment in his e-mail of 29 September 2017. He said that his comment set out his initial response to what he had been told about what the

Claimant had claimed. We accept his evidence. He could reasonably have been very concerned by the claim for covering additional on call duties. That had never been done before and was outside the Agenda for Change agreement. He was told by Jane Baylis that this was not authorised. We fins that however intemperate his initial response was is reasons for reacting in that way were entirely concerned with his view that there had been an improper claim for payment. We are satisfied that the Claimant's protected disclosures played no material part in his actions.

e. 09 October 2017 – the Claimant receiving an email from Jayne Baylis advising her that an investigation was to take place in relation to the alleged fraud

215. The Claimant was told by Jane Baylis that she was being investigated for fraud. Whilst we consider it good practice to inform an employee of any investigation at an early stage we do not understand the Claimant to be complaining about being told of the investigation per-se. Our understanding of the complaint is that she was complaining about the fact that an investigation had been commissioned.

216. Whilst the investigation was commissioned by David Richardson he acted on the information received by Jane Baylis. We have set out above the scope of their knowledge about the Claimant's disclosures.

217. We are satisfied that the reason that an investigation was commissioned and the Claimant informed of that was that both Jane Baylis and David Richardson believed that the Claimant had made claims for payment that had not been authorised and in respect of the claim for on call payments would not have been authorised. We are satisfied that those reasons were the entirety of the reasons and that the fact that the Claimant had made protected disclosures was not a material influence on either of them.

f. 27 October 2017 – 27 November 2017 – failing to respond appropriately to the Claimant's subject access request

218. Nicholas Percival did fail to treat the Claimant's correspondence as a subject access request under the Data Protection Acts. He acknowledged in his witness statement that despite the reference to the Freedom of Information Act he ought to have recognised that the Claimant was making a subject access request. We are satisfied that the Claimant could reasonably believe this to have placed her at a disadvantage and that she has established that she was subjected to a detriment.

219. Nicholas Percival told us, and we accept, that he had no knowledge about Chris Banks not responding to a telephone call. He accepts that he was aware of the Claimant's concerns about TUPE and had been aware of the Claimant's grievance where she raised her concerns about drivers answering the telephone. He said that he also had heard the driver's contract being discussed but had no recollection of the context.

220. We find that the reason that Nicholas Percival did not treat the Claimant's

correspondence as a subject access request was that he made a mistake and fixated on the reference to the Freedom of Information Act which did not apply to the Respondent. We find that this error was not influenced in any material sense by the Claimant's protected disclosures.

g. 06 December 2017 – providing the Claimant with an incomplete response to her subject access request

221. The Claimant did not provide any sufficient evidence about this part of her claim. There was nothing more than an assertion that the response given to the Claimant was incomplete. The Claimant would have needed to tell us what the deficiencies were. In the absence of that it is impossible for us to say that the Claimant could reasonably consider the deficiencies to be a disadvantage.

222. We find that the Claimant has failed to establish that she was subjected to any detriment in this regard.

h. 25 December 2017 – the Respondent failing to complete the Claimant's disciplinary investigation in good time and in any event within 3 months.

223. We accept that the investigation took some time. It was commissioned on 5 October 2017. There were interviews with the Claimant and Jane Baylis in October and interviews with other staff in early November. The Claimant was sent some questions by Hamida Serdiwala on 29 November 2017 concerning how she had calculated the sums she had claimed. The Claimant responded on 1 December 2017. The report was completed in December 2017. Whilst we accept that there was some delay we have found that the report was thorough and would accept that the process of interviewing a number of individuals together with gaining an understanding of rotas for ordinary work and for on call duties would be a time-taking task. We also have regard for the fact that Hamida Serdiwala had other duties. We would accept that the period of delay would cause the Claimant some anxiety. It would have been possible to have reduced the delay and as such we find that a reasonable employee would have considered this to be a disadvantage.

224. We turn to the reasons for the delay. We did not hear directly from Hamida Serdiwala but we are able to see from her report and the appendices that she worked on the matter throughout the period complained of. Her questions of all witnesses was even handed and her conclusions were certainly conclusions which were open to her. She found that there was a case for the Claimant to answer. She also found that the systems in place needed improvement – that was a criticism of others. We consider the report well balanced.

225. The Claimant did provide Hamida Serdiwala with a copy of her grievance and therefore Hamida Serdiwala would have had some knowledge of the Claimant raising concerns about TUPE (but not the matter we found met the threshold of being a protected disclosure). She would have also seen that the Claimant raised the issue of a driver covering telephone calls in the reception. We do not know if she saw the Claimant's e-mail of 4 June 2017 about Chris Banks.

226. We are satisfied that the reason the report took some time to produce is that it was undertaken in a thorough manner which was necessarily time taking. We are satisfied that the Claimant's protected disclosures played no material part in the delay.

227. There was of course further delay between the report being produces and the disciplinary hearing. The reasons for that delay were (1) the further investigation into the Claimant's conduct and (2) the attempts to resolve matters by agreement. These matters are referred to below but for the avoidance of doubt we find that these reasons were in no material sense on the grounds of any protected disclosure.

i. 22 January 2018 – suspending the Claimant on grounds of suspected fraud by Tracy Cannell without NHS Counter Fraud having first been consulted, and the Claimant being falsely told by Ms Cannell that the Respondent had its own in-house fraud team

228. There was no dispute that the Respondent did not contact NHS Counter Fraud. It is correct that Tracey Cannell said words to the effect that the Respondent had its own auditors who were asked for their advice at the time. We have found that the auditors were external rather than internal auditors. The Claimant believes that if NHS Counter Fraud had investigated this matter she would have been exonerated. We find that the Barts Disciplinary Policy did provide for NHS Counter Fraud to be contacted where fraud was suspected but that the policy did not require any investigation to be taken by that body. The policy required the decision maker to consult a local counter fraud team. We have some very real doubt whether the Claimant has established that the failure to refer this matter to NHS Counter Fraud was a detriment. We shall proceed on the basis that she has.

229. We are satisfied that the reasons that the Respondent did not contact NHS Fraud was that it was believed that that organisation would only deal with fraud within the NHS and not overclaimed wages for a private employer. It does not matter for our purposes whether that was right or wrong. We find that that belief was genuinely held and was the only reason why NHS Counter Fraud was not contacted.

230. We find that what Tracey Cannell told the Claimant about the Respondent's auditors was intended to be accurate. The Respondent had consulted its own auditors. If that was conveyed as a suggestion that the auditors were in house then that was a simple miscommunication.

231. Nether of these two reasons are in any material sense on the grounds that the Claimant made her protected disclosures.

232. We have understood that this heading also includes a complaint about the Claimant being suspended. This is important to the Claimant's case as her suspension continued until her dismissal. We have set out above that a disciplinary suspension will ordinarily be an act extending over a period and any time limit will run from the end of that period.

233. We have no doubt that being suspended from work was a matter that the Claimant

could reasonably have regarded as a disadvantage. She enjoyed her job and the company of some of her colleagues. She was passionate about the work. Suspension will often carry with it a stigma.

234. We turn to the reason for the suspension. We have dealt elsewhere with the factionalism that had been engendered in the workplace. The Claimant had written highly critical e-mails about Jane Baylis. The working relationships were poor before these events and only got worse. Jane Baylis was supposed to manage the Claimant and the Claimant was in theory, but not in practice, managing Shamina Khatun. The Claimant was facing serious disciplinary allegations.

235. We find that the reasons that the Claimant was suspended were those reasons given by Nicholas Percival and Tracey Cannell. The factionalism that we find was occurring had caused informal complaints about the conduct of the Claimant. Nicholas Percival and Tracey Cannell decided that these complaints should be investigated and this was best done with the Claimant outside of the workplace. We find that those were the reasons for the initial suspension. We find that those reasons were not in any material sense influenced by any protected disclosures.

236. We have considered whether there was any revisiting of this decision. In particular whether there was any fresh decision once it became apparent that nobody except Jane Baylis was prepared to make a formal complaint about the Claimant's behaviour. We find that the matter was not consciously revisited. We find that Nicholas Percival and Tracey Cannell believed that it would be better if the Claimant remained out of the workplace until the disciplinary matters were resolved. We find that whether consciously or not they believed that it would have been disruptive to have lifted the suspension whilst the existence of the disciplinary proceedings was causing tension between factions in the workplace. This may not have been the only way of managing this situation but we are satisfied that the continued suspension of the Claimant was not materially influenced by any protected disclosure.

<u>j. 22 January 2018 – Tracey Cannell and Nick Percival appointing an inexperienced investigating officer to investigate the allegations of fraud against the Claimant</u>

237. The way this has been expressed does not reflect the way the case unfolded before us. Hamida Serdiwala was not appointed by Tracey Cannell or Nick Percival. David Robertson appointed her. Hamida Serdiwala may not have had a great deal of experience in investigating overclaimed wages. However, we find that her report was thorough and well-reasoned. We are not satisfied that a reasonable employee would consider that hey had suffered a disadvantage by the appointment of Hamida Serdiwala.

238. What the Claimant is really complaining about is the conclusions reached. We find that the conclusions reached were ones reasonably open to Hamida Serdiwala. There is no evidence that she was influenced in any material sense by the protected disclosures.

<u>k. 26 January 2018 – the Claimant being invited to leave the Respondent's employment with a good reference and a payment of £4,443 by Tracey Cannell and Nick Percival for</u>

the reasons set out in the offer letter

AND

l. 06 February 2018 – the Claimant being invited to leave the Respondent's employment with a good reference and a payment of £7,000 - £8,000 by Tracey Cannell and Nick Percival for the reasons set out in the offer letter

AND

n. 23 February 2018 – the Claimant being invited to leave the Respondent's employment with a good reference and a payment of £11,000 by Tracey Cannell and Nick Percival for the reasons set out in the offer letter

239. We have dealt with these matters together as there are common considerations. We are satisfied that being approached by an employer and being asked if you want to leave a job you enjoy is a matter which the Claimant could reasonably consider to be a disadvantage. The fact that the Claimant was potentially facing dismissal and was being offered increasing sums of money to leave does not in our view change the position. The Claimant wanted to be exonerated and she wanted to remain in her post. Anything less was a disappointment to her.

240. We then turn to the reason for the treatment. We find that the reason that these discussions were initiated and continued was that Nicholas Percival and Tracey Cannell thought that it was a more efficient use of the Respondent's resources to seek an agreement than to pursue the disciplinary matter to its conclusion and to potentially face tribunal or other legal proceedings whatever the merits of any claims. That is the explanation given to us by Tracey Cannell and we accept that it reflected the Respondent's main reasons for entering into these discussions. In addition we find that Jayne Baylis and Nicholas Percival had regard to the fact that the working relationships between the Claimant and Jane Baylis and Shamina Khatun were seriously damaged and that there was a great deal of factionalism engendered by the Claimant's continued presence.

241. We find that those reasons were not influenced in any material sense by the fact that the Claimant had made protected disclosures. The breakdown in relationships was itself not on the ground that the Claimant had made protected disclosures. It was a result of long running disagreements for other reasons but exacerbated by Jane Baylis reporting the Claimant's claim for wages.

m. 08 February 2018 – Jayne Baylis sending emails to the whole of the GP Out of Hours and SPA staff advising that the Claimant had been placed under investigation and forbidding the recipients from contacting her

242. There was no dispute that Jane Baylis sent this e-mail and that it had the effect of informing anybody who did not already know that the Claimant was suspended pending an investigation. We find that the Claimant could have reasonably regarded this as a disadvantage. It was a clumsy response to the situation as Jane Baylis later accepted.

243. We accept Jane Baylis's explanation that the reason she sent this e-mail was to suppress the continuing factionalism that the Claimant's suspension had not stopped. We find that she genuinely believed that the Claimant was discussing her situation with others and that her efforts to drum up support were agreeable to some but perceived by others,

including herself, as a form of bullying. We have found that the Claimant was looking for 'dirt' on Jane Baylis when she investigated the Driver's contract. We know that she had spoken to numerous employees about her situation and her account of events. We accept the level of factionalism that had ensued was a real problem. We accept that this is why Jane Baylis acted as she did. We find that she was not influenced in any material way by any protected disclosures.

o. 17 January 2018 – David Robertson failing to respond to the Claimant's correspondence regarding the delayed disciplinary investigation

244. David Robertson accepts that he was very slow to respond to the Claimant when she chased for progress about the disciplinary process. We accept that this was a matter that the Claimant could consider to be to her reasonable disadvantage.

Having heard his evidence we are satisfied that the reason that David Robertson did not reply more promptly was an administrative failure and was not in any material sense because of any protected disclosures. He blames pressure of work and the fact that other aspects of the process were then being handled by Nicholas Percival and Tracey Cannell. We accept that this was the case and that these were his reasons. These were not good reasons but nevertheless they were not in any material sense on the ground that the Claimant had made protected disclosures.

p. 17 April 2018 – i. Tracey Cannell disciplining the Claimant

245. It was not at all clear to us what this allegation related to. No disciplinary sanction was imposed on the Claimant on 17 April 2018. She was dismissed at a later date. The dismissal is covered by a later allegation and we deal with it below.

ii. Tracey Cannell and Nick Percival failing to comply with the Barts Health Disciplinary Procedure with regard to the make up of the Claimant's disciplinary hearing panel

246. The Claimant had been told that the respondent was following the Barts Disciplinary Policy. As we have set out above that policy envisaged that a Chair would be assisted by another manager. In cases of Gross misconduct the panel would have an additional HR advisor. As we understand the policy the role of the additional manager was to add any necessary clinical or similar expertise and not to be an additional decision maker. Whilst this case did not concern clinical issues we would accept that the Claimant could consider that an additional voice on the panel might have given some further perspective on her case. We shall proceed on the basis that the Claimant has established a detriment.

247. The reason that we were given for the panel being composed of one manager and an HR representative was the size of the Respondent's organisation and the need to keep more senior employees in reserve in case there was any appeal. The Claimant argued that any GP might have been asked to sit on the panel. We agree with her. That might have been a possibility. We remind ourselves that we are not considering the fairness of any dismissal. We are concerned with the reasons for the treatment. We are satisfied that the reason for what was a fairly minor departure from the Disciplinary policy was in the relatively smaller resources of the Respondent as opposed to the Barts NHS Trust. We find that it was the issue of resources which was the only reason for having a smaller panel. This was in no material sense because of any protected disclosures.

iii. Tracey Cannell and Nicholas Percival 'marching' the Claimant off of the premises after

the disciplinary hearing;

248. It is correct that the Claimant was walked off the premises after the disciplinary hearing. We do not accept that the Claimant was 'marched' from the premises. We would however accept that she perceived this as representing a lack of trust and that this was not necessary. Looking at matters from her perspective, as we must, we find that she has established that this was a detriment.

249. Nicholas Percival told us, and we accept, that he would always walk any employee off the premises when they attended a disciplinary hearing. The claimant was not treated any differently. Whilst no comparator is necessary in a claim under Section 47B the fact that anybody else would have been treated in the same way is evidence which we can have regard to. We are satisfied that the fact that the Claimant had made protected disclosures had no material influence on the decision to walk with her when she left the meeting on 17 April 2017.

iv.Tracey Cannell failing to allow the Claimant's witness to attend and then allowing her to attend at short notice without telling the Claimant

250. This is a reference to Roxanne Webster. Roxanne Webster was a person who the Claimant wanted to call as a witness. She had also been interviewed as a part of the disciplinary investigation. It seems that when enquiries were made about attending the hearing Roxanne Webster and others were told that clinical duties would need to take priority. In the event Roxanne Webster did attend and gave evidence and was asked questions by the Claimant.

251. We are not satisfied that the Claimant has established that she had any reasonable basis for considering that she was placed at a disadvantage. If we are wrong about that we find that the reasons that any potential witness was told that they needed to prioritise any clinical duties was in no material sense because the Claimant had made any protected disclosures.

v.Tracey Cannell and Nick Percival failing to complete the disciplinary hearing and failing to ensure that the Claimant had a reasonable opportunity to be heard

252. As presented to us this complaint concerned the decision to reach a conclusion not to have a further hearing on 24 April 2018 or at a convenient time for the Claimant and her representative following that date before any final decision was made on the disciplinary charge.

253. The Claimant was notified on 10 April 2018 that she was required to attend a disciplinary hearing initially on 18 April 2018 and then brought forward to 17 April 2018. The Claimant has said that this was a short period (she compares it to the length of the investigation). She complained that it gave insufficient time to organise the attendance of her 11 witnesses. We do not consider that 7 days' notice of a disciplinary meeting caused the Claimant any particular prejudice in presenting her own evidence. She was able to give her account of why she claimed the payments she had.

254. We find that when the Claimant provided a list of 11 witnesses it was not unreasonable to query what the relevance of those witnesses might be when several were said to be unavailable for the hearing. We consider that the compromise proposed by Nicholas Percival, that the hearing would proceed and that the Claimant could explain at

the hearing why those witnesses were necessary was a fair and sensible approach.

255. As we have found above at the hearing the Claimant initially stated that she did not want to call any witnesses stating that in her view it would have made no difference. However that was not how the matter was left. The Claimant was given an opportunity to send in witness statements by 23 April 2018. A further hearing was fixed for 24 April 2018. We do not think that it was unfair or unreasonable to set a deadline of 23 April 2018 for any statements. The transcript of the meeting would suggest that there was al least a degree of consensus on this point.

256. Before taking the decision to proceed Tracy Cannell and Nicholas Percival knew (1) that the Claimant was unable to be accompanied by her chosen representative at a hearing on 24 April 2018 (2) that she was coping with bad family news and (3) that she had sent witness statements on 24 April 2018 one day later than had been agreed. A decision was taken not to reconvene the hearing without asking the claimant whether she had any more to add.

257. We find that the Claimant could have reasonably considered that this approach was to her disadvantage. Insofar as the decision to proceed rested on the fact that the Claimant was one day late providing statements then that was a very harsh approach. We would accept that Tracey Cannell and Nicholas Percival might have concluded that witness statements from unidentified persons should be given little weight but they did not ask the Claimant to rectify that issue. Character references may have been of little weight in deciding whether the Claimant had been entitled to claim for the payments she did but they might have been given some weight in assessing the issue of dishonesty and in any event the question of mitigation. Sasha Byfield's statement went directly to the issue of whether, as the Claimant claimed, the payment for on call work was authorised. That statement was not true but Tracy Cannell and Nicholas Percival did not know that. We do not base our decision on that because we would doubt whether it is a detriment not to be permitted to rely on a statement that was untrue. We consider that, given the way the matter was left on 17 April 2018, the Claimant had a legitimate expectation of the hearing being reconvened and that she could then say why her witnesses assisted her case and make any closing submissions. The Claimant was fighting for her job and her reputation. We find that this called for a scrupulous process. We are satisfied that the Claimant has established a detriment in this respect.

258. We then turn to the reasons that this decision was taken. We are satisfied that the decision not to reconvene was for the reasons set out in Tracey Cannell's letter of 27 April 2018. Tracey Cannel and Nicholas Percival believed that way matters were left was that the hearing would be reconvened only if the Claimant produced witness statements by 23 April 2018 and only then if the statements assisted with the decisions that needed to be made. We find that they took the view that none of the statements were of any assistance. We have considered whether they could really have believed that Sasha Byfield's witness statement was irrelevant. We find that they did. We would not have done so but we have found above that the approach that was taken by Tracey Cannell and Nicholas Percival was to put to one side the dispute about whether Jane Baylis had authorised the payment. Their approach was that claiming a payment that the Claimant ought to have known was not in accordance with the Agenda for Change contract, and had never been claimed before, was dishonest.

259. The harshness of the decision is relevant to the issue of whether the reasons put

forward are genuine. Taking into account all of the evidence relevant to this allegation and the other allegations we are satisfied that whilst the decision was harsh it was not influenced in any material respect by the protected disclosures.

q. 18 April 2018 – Nicholas Percival failing to respond to the Claimant's request for annual leave

AND

r. 19 April 2018 – Nicholas Percival failing to respond to the Claimant's request for annual leave

AND

s. 27April 2018 – Nicholas Percival failing to respond to the Claimant's request for annual leave

AND

t. 04 May 2018 - Nicholas Percival refusing the Claimant's request for annual leave

260. Nicholas Percival accepted the factual basis of this allegation. We have found that keeping the Claimant in limbo like this was unkind. The Claimant did not miss out on her birthday trip but she must have been very anxious not knowing whether she could or could not go. We find that this treatment was something that the Claimant could reasonably have thought was to her disadvantage.

261. The reasons for the treatment are clear. Nicholas Percival did not deal with the Claimant's application for annual leave because he was increasingly confident that the Claimant was going to be dismissed. Tracey Cannell was quite clear about the impression that the Claimant had left at the disciplinary meeting on 17 April 2018. She believed that the Claimant had been disrespectful to Jane Baylis and to her and Nicholas Percival. She was particularly disturbed by the failure of the Claimant to recognise that she was bound by the policies of the organisation. We find that Nicholas Percival would have known this and that barring some significant new evidence the Claimant was likely to be dismissed. By 27 April 2018 that possibility was almost a certainty. The dismissal letter was drawn up shortly after that.

262. The reasons put forward are somewhat brutal. However, we are satisfied that they are the entirety of the reasons and that the Claimant's protected disclosures had no material influence on the treatment she received.

u. 09.05.18 – Tracey Cannell and Nick Percival summarily dismissing the Claimant [including whether the dismissal was a detriment to which the Claimant was subjected by TC and NP as individual workers, or the decision of the Claimant's employer and therefore the basis for an automatic unfair dismissal claim]

263. This allegation was fairly included by Mr Ashley because he was aware of, and recognised the effect of, ***Timis and anor v Osipov***. The effect of that decision is that the Claimant is able to rely on the test of 'on the grounds of' in respect of the decision to dismiss her rather than the more stringent 'principal reason' test in Section 103A of the Employment Rights Act 1996. Mr Ashley is to be commended for his integrity in extracting this from the

less refined manner in which the Claimant presented her claims.

264. It was not disputed that being subjected to a dismissal decision is something an employee could reasonably consider to be a disadvantage.

265. Tracey Cannell and Nicholas Percival say that the reason that the Claimant was dismissed was because Tracey Cannell had come to the conclusion that she had acted dishonestly. It is our task to ask whether that was the real reason for the dismissal and whether the fact that the Claimant had made protected disclosures played any part in the reasons.

266. We have set out in our findings of fact and in our discussions and conclusions in respect of other matters that at various times the Claimant was subjected to detriments. We accept that many of these could have been avoided had the Respondent acted with greater care, expedition, or compassion. We have looked at the treatment on either side of the dismissal in this and in all of our other conclusions.

267. We have indicated that, had it been a matter for us, we would not have found the Claimant dishonest. We would have found that she was stubborn in her view that she was entitled to payment outside anything that was set out in the Agenda for Change Terms and Conditions. We would have agreed with Tracy Cannell that the Claimant's approach to the disciplinary hearing demonstrated a refusal to accept any fault.

268. We are not assessing the fairness of the dismissal but looking at the reasons for it. Unfairness might suggest that there were some other factors at play but that is not necessarily so.

269. We find that Tracey Cannel, with whom Nicholas Percival agreed genuinely believed that the Claimant had claimed for money which she knew she should not have claimed for (whatever Jane Baylis might have said). She believed that was a reckless disregard of established policy and that led her to say that the claim was fraudulent. In reaching this conclusion she had regard to what she honestly believed was the Claimant's disrespect towards the panel, Jane Baylis, and the policies of the Respondent.

270. We have commented generally that the protected disclosures that we have found the Claimant made did not appear to have caused any pushback upset or concern. We find that the people we heard from had little knowledge of them and were utterly unconcerned that the disclosures had been made.

271. In deciding whether the reasons for dismissing the Claimant were on the ground that she had made protected disclosures we have considered whether the motivation of Jane Baylis in making her report to David Robertson and maintaining her position during the disciplinary hearing should be treated as the reasons for the dismissal having regard to the decision in ***Royal Mail Group v Jhuti*** **UKSC 2017/0207**. We find that approach of no assistance. We have found that Jane Baylis had not authorized the payment for on call duties. What she reported was true. We have found that when she made that report any protected disclosures played no material part in her decision making. In those circumstances ***Jhuti*** is of no assistance to the Claimant.

272. We find that the only reasons for the dismissal were a genuine belief that the Claimant had acted improperly. We find that the fact that she had made protected disclosures had no material part in the decisions.

v. 21.06.18 – Chris Banks convening an appeal panel comprising Chris Banks, Tracy Cannell and Nicholas Percival.

273. The Claimant conceded that the factual basis for this allegation was not made out on the evidence. In our experience it is not at all unusual for at least one member of a disciplinary panel to attend any appeal to present their reasons and to answer any questions or challenges from the employee. We would accept that having two members of the disciplinary panel present might have been intimidating. On that basis we accept that there was a detriment.

274. The Claimant did not suggest that the outcome of the appeal was influenced by protected disclosures. This may have been an omission and in fairness to her we shall deal with the point.

275. We are satisfied that inviting Tracey Cannell and Nicholas Percival to the appeal hearing was done because that was the usual process that was followed by the Respondent. We are satisfied that the fact that the Claimant had made protected disclosures had no material influence on the decision.

276. We are further satisfied that protected disclosures had no influence on the outcome of the appeal. We are satisfied that the reasons set out on the outcome letter are the entirety of the reasons. The reasons for rejecting the substantive ground of appeal that challenged the finding of dishonesty are set out in our findings of fact. We might not have come to the same conclusion but that is not the issue.

Time Limits

277. When we announced our oral reasons we dealt with the issue of whether individual complaints were in time at the same time as we set out our conclusions in respect of the reasons for any treatment. We have not changed any of our decisions but set out the time points here as it makes our reasoning easier to follow.

278. We have set out the date that the Claimant presented her claim and the dates during which she engaged in early conciliation with ACAS. We have also set out the statutory provisions in Section 48 of the Employment Rights Act which set out the time limits. The effect of those provisions is that any complaint that arose any earlier than 7 April 2018 would have been presented outside the statutory time limit UNLESS:

278.1. It had not been reasonably practicable to bring the claims within time and they were presented a reasonable time thereafter; or

278.2. The act complained of is an act extending over a period which persisted beyond 7 April 2018; or

278.3. The act complained of is part of a series of similar acts and at least one of those acts took place after 7 April 2018.

279. The Claimant told us that she had not brought a claim earlier because she believed that a claim could only be brought after she was dismissed. We are sceptical about that. The Claimant had identified that a claim could be brought under the Transfer of undertakings (Protection of Employment etc) Regulations 2006 whilst she was still employed. She had

consulted ACAS on that occasion. It is surprising that she would not have done any basic research about her potential claims. However we do not need to decide that point. Where a person relies on their ignorance of the ability to make a claim or about the applicable time limits the question is whether that ignorance is reasonable.

280. As more and more information is placed on the Internet and as more and more people become computer literate the harder it is becoming to establish that any ignorance of rights or time limits is reasonable. The Claimant is intelligent. She had a responsible job and she is computer literate. She had in the past accessed information from ACAS and when she eventually began these proceedings she navigated the Early Conciliation process without difficulty. We take into account the fact that the Claimant had not understood the Order that she provide a witness statement. That does suggest that the Claimant does not always follow instruction. That is not to say that that error was a reasonable one. We find that it was always open to the Claimant to undertake some on-line research into time limits and whether she needed to be dismissed to bring a claim. We find that if she did not do this then her failure to understand what she needed to do was not reasonable. It follows that we find that it was reasonably practicable for the Claimant to have presented her claims within the applicable time limits.

281. It follows from this that the Tribunal would have no jurisdiction to entertain any matter earlier than the events of 17 April 2018 (issues 6(a)-(o)) unless one of the two exceptions we have identified above applied.

282. Whilst the concept of an act extending over a period is a broad one the act must be unlawful before the Tribunal could grant any remedy. We would accept that the Claimant's suspension was an act extending over a period. We would accept that commencement and continuation of disciplinary proceedings was an act extending over a period. We would not have accepted that the following matters, even if unlawful, would have constituted an act extending over a period. They are in our view individual acts that lack sufficient nexus to form part of an act extending over a period in the sense explained in ***Hendricks*****.** The acts which fall into that category are,

282.1. 6(a) because it was an act entirely separate to the others and far removed in time

282.2. 6(d) and (o) because they were acts committed by David Robertson and there is no evidence he acted in concert with others

282.3. 6(g) because it was an act of a person responsible for subject access requests and there is no evidence that acted together or in concert with anybody else; and

282.4. 6(h) because the investigation was carried out by Hamida Serdiwala and there is no evidence that she acted together or in concert with anybody else.

283. We would accept that had they acted unlawfully the Tribunal would have found that the other matters were at least capable of being an act extending over a period. As we have found that the reasons for the treatment were not influenced in any material sense by the protected disclosures the point is academic.

284. We have found no act that occurred after 7 April 2018 unlawful. Had we found that there were unlawful acts prior to this date the Claimant could not have used the latter part of Sub-Section 48(3)(a) in order to bring those earlier acts within the statutory time limit – see ***Arthur v London Eastern Railway Ltd.***

Unfair dismissal

285. The Claimant can only succeed in her claim brought under Sections 94 and 103A of the Employment Rights Act 1996 if the Tribunal find that the reason or principle reason for her dismissal was that she had made protected disclosures. We have found above that the Claimant's disclosures were not a material influence on the decision to dismiss the Claimant. It follows from that conclusion that the disclosures were not a reason at all for the dismissal.

286. For the reasons given above the Claimant's claims fail.

Employment Judge Crosfill
Dated: 21 November 2022

LIST OF ISSUES

Disclosures

1. Did the Claimant disclose information within the meaning of s.43B(1) Employment Rights Act 1996? Specifically, the Claimant relies upon the following:

    a. 15.11.2016 – Email to THIPP regarding TUPE (the "TUPE Issue");

    b. 17.03.2017 – Email to Bola Ogundeji regarding the TUPE Issue;

    c. 21.03.2017 – Email to Bola Ogundeji regarding the TUPE Issue;

    d. 29.03.2017 – Email to Mohammed Mohit regarding (1) the TUPE Issue and (2) the Reception Staffing Issue (see below);

    e. 31.03.2017 – Conversation with Mohammed Mohit regarding Jayne Baylis failing to ensure that the Barts Health reception was adequately staffed. During this conversation the Claimant advised Mr Mohit that the reception had been staffed by a driver who did not know how to use the system, did not work for the NHS and had not been DBS-checked. This resulted in the individual having improper access to confidential patient information, and being unable to flag up emergencies to GPs (the "Reception Staffing Issue");

    f. 21.04.2017 – Conversation with David Robertson regarding Dr Jennie Read (1) bullying staff and (2) seeking payment for hours not worked. During this conversation the Claimant advised Mr Robertson that complaints had been made against Dr Read to both the Royal College of General Practitioners and the British Medical Association, by both GPs and admin staff. These complaints alleged that Dr Read was guilty of bullying, intimidation and racism. The Claimant advised Mr Robertson specifically of (1) Rina Begum accusing Dr Read of making racist remarks about her taxi driver, and (2) Uzo Otusi accusing Dr Read of bullying her by accusing her of causing a delay to a home visit to a palliative care patient which resulted in the patient dying in an ambulance (the "Dr Read Issue");

    g. 04.05.2017 – Conversation with David Robertson regarding the Nationwide Emergency Education Limited drivers' contract (the "Drivers Contract"). During this conversation the Claimant advised Mr Robertson that one of the drivers had approached her to say that the Driver's Contract had again been given to NEE Ltd rather than being put out to tender as had been promised by Jayne Baylis and was required by Bart's Health policy (the "Procurement Issue");

    h. 04.06.2017 – Email to Jayne Baylis, Tracy Cannell, Chris Banks and David Robertson regarding Chris Banks not answering his telephone whilst on call on 03.06.2017 (the "Chris Banks Issue");

i. 23.08.2017 – Conversation with Lorna Cunnew of NHS Counter Fraud re the Procurement Issue;

j. 0.10.2017– Email to Lorna Cunnew of NHS Counter Fraud re the Procurement Issue;

k. 13.12.2017 – Email to Jayne Baylis.

NB The Respondent's position is that: (i) disclosures a, d and h are not capable of being protected disclosures within the meaning of s.43A ERA 1996 as a matter of law; (ii) disclosures b and c, d, e, f and g are capable of being protected disclosures within the meaning of s.43A ERA 1996 (if they were made), but were not on the facts of this case and having regard to the test found in s.43B of the Act (iii) disclosures i, j and k are unknown because the Respondent has no knowledge of the contents of the alleged disclosures. The Respondent therefore reserves its position generally in relation to these alleged disclosures.

Reasonable belief

2. Was the disclosure in the reasonable belief of the Claimant made in the public interest and tending to show that a person had failed, was failing or was likely to fail to comply with any legal obligation to which they were subject? Specifically, the Claimant relies upon the following:

a. TUPE Issue – the legal obligations arising from the Transfer of Undertakings (Protection of Employment) Regulations 2006;

b. Reception Staffing Issue - the legal obligations arising from Public Safety, specifically (the Claimant says) "The protection of patient's private information, data protection, triaging emergencies, due care, adhering to the patient safe & secure pathway, making sure that the best possible care was given, the lack of professionalism, ensuring public safety";

c. Dr Read Issue - the legal obligations arising from bullying and harassment, specifically (the Claimant says) "Protection of staff and patient's that they are provided with a safe work and public access environment, that they are listened to and not made to feel threatened or uncomfortable in their work place, that they are not humiliated in front of their colleagues, that they are shown respect and show respect to others";

d. Procurement Issue - the legal obligations arising from fraudulent use of public funds and tendering of contracts;

e. Chris Banks Issue - the legal obligations arising from Public Safety.

3. Was the disclosure in the reasonable belief of the Claimant made in the public interest and tending to show that the criminal offence of fraud had been committed, was being committed or was likely to be committed in respect of the:

a. Reception Staffing Issue, in that Jayne Baylis was claiming wages for duties not fulfilled by her;

b. Dr Read Issue, in that Dr Read was claiming payment for hours not worked by her;

c. Procurement Issue, in that public money was used to fraudulently pay a contract that had not been tendered according to due process; and/or

d. Chris Banks Issue, in that Chris Banks was claiming wages for duties not fulfilled by him.

4. Was the disclosure in the reasonable belief of the Claimant made in the public interest and tending to show that the health or safety of any individual had been, was being or was likely to be endangered in respect of the:

a. Reception Staffing Issue, in that Jayne Baylis was creating a risk of the service having to close and thereby not being able to treat patients;

b. Procurement Issue, in that the failure to go through a competitive tender exercise meant that drivers were not DBS-checked and therefore posed a greater risk to patients; and/or

c. Chris Banks Issue, in that Chris Banks was creating a risk of the service having to close and thereby not being able to treat patients.

5. Was the disclosure(s) in the reasonable belief of the Claimant made in the public interest and tending to show that a miscarriage of justice had occurred, was occurring or was likely to occur in respect of the TUPE Issue, specifically the failure to comply with the legal duties to inform and consult representatives?

Detriment – s.47B ERA 1996

6. Was the Claimant subjected to a detriment within the meaning of s.47B of the 1996 Act? Specifically the Claimant relies upon:

a. September 2016 - removal of the Claimant's responsibility for line management, supervision;

b. April 2017 – removal of the Claimant's responsibility for rota production, attending meetings, liaising and recruiting clinical staff;

c. 25.09.17 – at a meeting with Jayne Baylis, verbally accusing the Claimant of fraud in that Ms Baylis said she compared the Claimant's behaviour to that of another member of staff who was dismissed for allegedly stealing laptops and said that the Respondent "does not take theft lightly";

d. 29.09.17 – David Robertson pre-judging the Claimant's guilt in relation to the allegations of fraud as evidenced by his email of that date;

e. 09.10.17 – the Claimant receiving an email from Jayne Baylis advising her that an investigation was to take place in relation to the alleged fraud;

f. 27.10.17 – 27.11.17 – failing to respond appropriately to the Claimant's subject access request;

g. 06.12.17 – providing the Claimant with an incomplete response to her subject access request;

h. 25.12.17 – the Respondent failing to complete the Claimant's disciplinary investigation in good time and in any event within 3 months;

i. 22.01.18 – suspending the Claimant on grounds of suspected fraud by Tracy Cannell without NHS Counter Fraud having first been consulted, and the Claimant being falsely told

by Ms Cannell that the Respondent had its own in-house fraud team;

j. 22.01.18 – Tracey Cannell and Nick Percival appointing an inexperienced investigating officer to investigate the allegations of fraud against the Claimant

k. 26.01.18 – the Claimant being invited to leave the Respondent's employment with a good reference and a payment of £4,443 by Tracey Cannell and Nick Percival for the reasons set out in the offer letter;

l. 06.02.18 – the Claimant being invited to leave the Respondent's employment with a good reference and a payment of £7,000 - £8,000 by Tracey Cannell and Nick Percival for the reasons set out in the offer letter;

m. 08.02.18 – Jayne Baylis sending emails to the whole of the GP Out of Hours and SPA staff advising that the Claimant had been placed under investigation and forbidding the recipients from contacting her;

n. 23.02.18 – the Claimant being invited to leave the Respondent's employment with a good reference and a payment of £11,000 by Tracey Cannell and Nick Percival for the reasons set out in the offer letter;

o. 17.01.2018 – David Robertson failing to respond to the Claimant's correspondence regarding the delayed disciplinary investigation;

p. 17.04.18 –

i. Tracey Cannell disciplining the Claimant;

ii. Tracey Cannell and Nick Percival failing to comply with the Barts Health Disciplinary Procedure with regard to the make up of the Claimant's disciplinary hearing panel;

iii. Tracey Cannell and Nicholas Percival 'marching' the Claimant off of the premises after the disciplinary hearing;

iv.Tracey Cannell failing to allow the Claimant's witness to attend and then allowing her to attend at short notice without telling the Claimant;

v.Tracey Cannell and Nick Percival failing to complete the disciplinary hearing and failing to ensure that the Claimant had a reasonable opportunity to be heard;

q. 18.04.18 – Nicholas Percival failing to respond to the Claimant's request for annual leave;

r. 19.04.18 – Nicholas Percival failing to respond to the Claimant's request for annual leave;

s. 27.04.18 – Nicholas Percival failing to respond to the Claimant's request for annual leave;

t. 04.05.18 - Nicholas Percival refusing the Claimant's request for annual leave;

u. 09.05.18 – Tracey Cannell and Nick Percival summarily dismissing the Claimant [including whether the dismissal was a detriment to which the Claimant was subjected by TC and NP as individual workers, or the decision of the Claimant's employer and therefore the basis for an automatic unfair dismissal claim];

v. 21.06.18 – Chris Banks convening an appeal panel comprising Chris Banks, Tracy Cannell and Nicholas Percival.

Causation

7. If the Claimant was subjected to a detriment, what was the reason for this?

Automatic Unfair Dismissal – s.103A ERA 1996

8. Was the reason (or if more than one, the principal reason) for the Claimant's dismissal on 9th May 2018 that the Claimant made a protected disclosure?

Time limits

9. In the case of each detriment alleged to have occurred prior to 17th April 2018, is the Tribunal barred from considering the Claimant's complaint on the basis that it was presented before the end of the period of 3 months beginning with the date of the alleged detriment (including, where the alleged detriment is part of a series of similar acts or failures to act, the last of them?

10. Alternatively, is the Tribunal able to consider the Claimant's complaint on the basis that it was presented within such further period as the Tribunal considers reasonable, the Tribunal having concluded that it was not reasonably practicable for the complaint to have been presented within time?