EMPLOYMENT TRIBUNALS

Claimant: Mr W Sivyer

Respondent: East Lancashire Hospitals NHS Trust

Heard at: Manchester, in public by CVP **On:** 7, 8 , 9 & 10 February 2023

Before: Employment Judge Holmes
Mr A Gill
Mr J Ostrowski

REPRESENTATION:

Claimant: In Person
Respondent: Ms R Levene (Counsel)

JUDGMENT ON PRELIMINARY ISSUE AND RESERVED JUDGMENT

JUDGMENT ON PRELIMINARY ISSUE

It is the unanimous judgment of the Tribunal that the claimant's disclosure in his email of 14 February 2021 was a protected disclosure, and his claims of detriment can accordingly proceed.

RESERVED JUDGMENT

It is the unanimous judgment of the Tribunal that the respondent did not subject the claimant to any detriment because he had made a protected disclosure, and his claims are dismissed.

REASONS

1. The claimant worked as a vaccinator for the respondent NHS trust from 12 January 2021 until the termination of his employment on 31 July 2021. The claimant presented his claim to the Tribunal on 15 June 2021. The claimant was engaged on a short fixed term contract that

after an extension expired on 31 July 2021. The claimant sent an email on 14 February 2021 to the respondent's safeguarding team. The claimant raised in that email concerns that a patient had been vaccinated without having the capacity to give consent to the vaccination. The claimant says this was a public interest disclosure.

2. The claimant complains that after this he was subjected to a wide-ranging campaign of bullying and harassment in response to having made that disclosure.

3. A preliminary hearing was held on 16 September 2021, at which (in addition to those relating to whether the claimant had made a protected disclosure) the complaints and issues were identified as being:

Detriments:

Detriment 1

8/3/21 (now likely to be 6/3/21) Sonya Monks shouted at the claimant in front of a patient to "give the vaccination now" after the claimant had asked her to go through the possible side effects with the patient.

Detriment 2

11/3/21 (estimated date, but now likely to be 8/3/21) Deanna Whalley took vaccines the claimant was intending to administer off the claimant and told him "you just sit there, I will do the vaccinations"

Detriment 3

13/3/21 (estimated date) Deanna Whalley complained about the claimant. At a meeting with Anna Grey and Nicky Nye (now identified to be 1/4/21) to discuss the complaint the claimant stated that the nurses were being aggressive towards him and Anna Grey allegedly said to the claimant "snitches get stiches", referring to his email of 14 February.

Detriment 4

13/4/21 At a meeting with Jane Butcher (wellbeing manager) and Lindsay Emmitt (HR), regarding the claimant's email of 14 February, Jane Butcher slammed a form down on a table in front of the claimant; and blamed the claimant that for causing her anxiety to kick in.

Detriment 5

11/5/21 Anna Grey arranged with someone in HR for her to be assigned as the claimant's supervisor. The claimant alleges that that Anna Grey had bullied him on or around 13 March 2021 as noted above.

Detriment 6

3/6/21 The claimant was sent an email by Kate Quinn which deliberately misstated the facts, asserting that the respondent had followed correct procedures. The claimant asserts that this was a detriment in response to his having made a public interest disclosure.

Detriment 7

29/7/21 The claimant alleges that Alan Johnson parked outside his house in a deliberate attempt to intimidate him.

4. Pursuant to the case management orders made the Cast List and Chronology were produced, and were largely agreed. The latter erroneously suggested that there were 8 detriments, whereas there are only 7.

5. There was an agreed bundle, plus a Supplementary Bundle. There had been issues as to delivery of the bundles, with the claimant complaining about the manner in which the respondent had created and delivered the bundles. Be that as it may, in the end, all the material that each party wanted in the bundles was put before the Tribunal. The Tribunal agreed with the parties that, although listed to deal with all the issues, the Tribunal would not deal with remedy in this hearing.

6. The parties exchanged witness statements, and had done some time before this hearing, which had previously been postponed. The claimant, being unrepresented had prepared a witness statement which he signed and dated on 25 February 2022. On perusal, however, the Employment Judge noted that it failed to address a number of significant evidential issues which were central to his detriment claims, in that he had not actually deposed to events which he relied upon as constituting the detrimental conduct upon which his claims are based. This was discussed with him at the outset of the hearing, and he explained that he expected to be able in the hearing to give that further evidence about what had occurred, believing this was what he had been led to believe at a preliminary hearing. That was, of course, an erroneous understanding, and it was explained how he would need to address these missing factual issues in a supplementary statement. The claimant had prepared, for the hearing, a further document in which he had elaborated upon these matters, and he submitted that to the Tribunal and the respondent on the afternoon of the first day of the hearing. This is a 7 page document, entitled “Day 1 – Claimant’s Evidence”. The respondent did not object to this further document, which was treated as his supplementary statement, and which he duly adopted and confirmed as his evidence in the hearing.

7. That document, however, still did not appear to address all of the issues, although it was an improvement, and the claimant was afforded a yet further opportunity to produce another statement. The claimant did this over the adjournment between 7 and 8 February 2023, the respondent again not objecting.

8. Having read into the case on the first day, and noting that whilst the respondent conceded that the claimant’s disclosure on 14 February 2021 had been a disclosure of information, no further concession was made, and hence the first issue that the Tribunal would have to determine was whether that (the only) disclosure was in fact a protected disclosure

within the meaning of s.43B of the Employment Rights Act 1996. As all the claims made by the claimant were dependent upon whether he had in fact made a protected disclosure, the Tribunal proposed, and the parties agreed, that the Tribunal determine that issue as a preliminary issue, and the Tribunal duly did so, hearing the claimant's evidence on this issue on 7 February 2023, and the parties' submissions on 8 February 2023.

9. By a judgment given orally in Tribunal on 8 February 2023, the Tribunal unanimously found that the claimant's disclosure in his email of 14 February 2021 was a protected disclosure. Reasons having been given orally at the time, they are not repeated here, but will be supplied if a request is made in accordance with rule 62.

10. The claimant gave evidence himself, but called no witnesses. The respondent called Alan Johnson, Sonia Monks, Deanna Whalley, Anne Grey, Karen Quinn, Jane Butcher, and Lindsay Emmitt. The parties made their submissions, Ms Levene preparing written submissions to which she spoke, and the claimant also provided written submissions, to which he also spoke.

11. Having heard the evidence, read the relevant documents in the bundle, and having considered the submissions of both parties, the Tribunal unanimously finds the following relevant facts:

11.1 The claimant was employed on a fixed term contract to administer Covid vaccines at the Winter Gardens Blackpool from 25 January 2021 to 31 May 2021.

11.2 On 13 February 2021 a wheelchair patient who had serious learning disabilities presented for vaccination, with her carer. The claimant was working under the control of Registered Healthcare Practitioner ("RHCP") called Carole Richardson. The carer had no Power of Attorney documentation with them, and the patient lacked capacity to give consent to be vaccinated.

11.3 The Standard Operating Procedure (SOP) agreed to be in force at the time required that in those circumstances a "Best Interests" procedure be followed (see page 399 of the bundle, agreed to be the relevant procedure in force at the time, although dated April 2021), which provided that a meeting be held with the Local Authority MCA and DoLS team, and that the decision made in such a meeting be recorded. A record of that meeting was also required to be maintained.

11.4 The claimant's belief (not challenged) was that no such meeting was held in relation to this patient. When the claimant realised this, he raised the matter with Carole Richardson, who said that she would get the patient vaccinated that day. She then completed (online, it seems) the necessary formalities, and indicated that the patient had given consent. The claimant knew that she had not, and that she was incapable of doing so. He therefore declined to administer the vaccine to this patient.

11.5 He raised the issue with Nick Medway, the Deputy Director of Nursing and Quality, and indicated that he would make a complaint. Later that day there was a meeting between the claimant, Nick Medway, Carole Richardson and another

Registered Nurse and a Safeguarding Practitioner, Katherine Greenhalgh. An account of that meeting is at pages 267 to 271 of the bundle. The claimant does not agree that this note or report was created when it purports to have been, but does agree with much of its contents.

11.6 Whilst the claimant had been of the view that a "best interests" decision could only be taken by a doctor, in this meeting he was assured that it could be taken by an RHCP.

11.7 The following day, 14 February 2021, however, the claimant still had concerns (whether he indicated in this meeting that he would not make a complaint is not crucial), and at 08.38 that morning he sent an email to the Staff Guardian Office, the designated place for whistleblowing complaints, which had as the subject "Health and Safety Issue" and reads as follows (page 223 of the bundle):

"I wish to report a health and safety breach under the whistleblowing policy.

On 13/02/2021 whilst working as a Vaccinator at Winter Gardens, Blackpool a Patient was brought in by wheelchair with her carer to be vaccinated. The patient did not understand any questions, could not hear or speak, she has serious learning disabilities. I was working under a nurse called Carol Richardson. The carer said that the rest of the care home was done by a doctor, I advised that the patient would also have to be done by the doctor as she could not consent or have Power of Attorney for the carer to consent on her behalf. Carol(nurse) said wait a moment i will try to get her done today, she then went out of the pod. About 4 minutes later she came back in and said she will be happy to give the injection. I objected and said I would not give the injection and stepped back. Carol then filled the form online and ticked the box that 'Patient gave Consent', i then said 'you can't do that' and she replied 'i have to as the carer does not have the right paperwork' at no point did the patient give consent as she did not understand or was able to communicate in any way. I approached the manager 'Nick' he replied 'there is more to it, i will speak to you and Carol later' he made me feel stupid and that i dont know what is right and wrong. He then came to talk to me and Carol in the pod and said 'right Wayne when you are in the pod, you work under the nurses, it is their licence as stake and what they say goes' I replied i was not happy, but had to agree as i did not want to lose my job as i feel threatened.

Should the p.o.a or family of the patient complain or go to the press it would break the NHS and probably end up in the other nurses suffering and losing their jobs when they are doing so well. I was a carer for 7 years and nhs renal healthcare technician for 2 years. Carol the nurse there is constantly breaking H&S rules by not listening to guidelines, she wants everything done her way, she will not listen to other nurses points of view which i feel is very intimidating for us all, as we are a team. I feel that all management wants is that the figures look good, we have also been told to let the patients finish getting dressed in the waiting room to be faster

I hope this can be resolved before somebody gets hurt."

11.8 The claimant's disclosure was received by the Staff Guardian Office, where Jane Butcher was the Staff Guardian, with a Deputy, Nicola Canty (also Bamber). It was Nicola Canty who responded to the claimant on 15 February 2021, seeking his consent to share his complaint with senior managers at the vaccination hub, which, by reply the same day, he gave (page 633 of the bundle). Nicola Canty then established contact details for the claimant.

11.9 Over the next couple of days, arrangements were made for Lindsay Emmett of HR to support the investigation, and for Jane Gallimore, the Senior Nursing Support to the L&SC Mass Vaccination Programme to carry out the investigation. By email of 16 February 2021 (pages 246 and 247 of the bundle) to the claimant, she acknowledged his email, and informed him of the procedure that would be followed, how he would be supported thorough the process. She set out proposed dates for an initial meeting with him.

11.10 On 4 March 2021 Nicola Canty emailed the claimant to "check in" and see how he was feeling, and told him to get in touch is he needed any support at all.

11.11 On 6 March 2021 the claimant was working with Sonia Monks, the RHCP in his pod. There was a discussion between them about informing the patient of the possible side effects of the vaccine. The claimant claims that Sonia Monks shouted at him to just give the patient the vaccine, but we do not find that she did. The claimant reported Sonia Monks to Deborah Rothwell, the site clinical lead, and the three of them had a discussion about it. After it Sonia Monks did change her practice to give information about the side effects earlier in her discussions with the patient. After the discussion the incident was over, and was resolved.

11.12 The Tribunal is quite satisfied that Sonia Monks did not know of the claimant's protected disclosure. She was not a friend of Carole Richardson, and had not, until the setting up of the vaccination hub at the Winter Gardens in January 2021, previously worked with her.

11.13 On 6 March 2021 (page 631 of the bundle) there was an email exchange between the claimant and Nicola Canty, he replying to her email of 4 March 2021 above. In this email he said:

"Yes, everything is fine. She is on holiday this week. I feel that some nurses, Karen Oldham and Sonia monks have been a bit aggressive with me along with having to take my 30 min lunch at around 12 pm when I am on a long shift which leaves a long day till 8pm without food when people on early need breaks first. It's just making me feel like I'm being pushed out".

11.14 It is unclear whether this was after the alleged shouting incident, but the claimant makes no mention of it. The "she" referred to is taken to be Carole Richardson.

11.15 Nicola Canty replied to the claimant on 8 March 2021 (same page of the bundle) in these terms:

"I'm sorry to read that. How come you feel they have been like that with you? I assume they don't know about the concern that you have raised as we have kept it confidential for you from our point of view. Is there anyone there who you trust who you want to raise this with to get some support?"

11.16 The claimant responded to her later on 8 March 2021 (pages 630 and 631 of the bundle) thus:

"I don't know. They are Carol's friends, they all know it was me be because of my meeting. Sonia was quite aggressive with me the other day. I reported it to Debbie site lead we had a discussion and was sorted but later she went to another pod and Carol came down to us later and came to work with me, again she made my night worse. I was supposed to be in till 8pm today but when I came back from lunch there was no room for me, so I have had to change shift. I'm made to feel unwanted, it's not fair."

11.17 Nicola Canty replied the same day (page 630 of the bundle) saying:

"I'm really sorry to hear that. I really think we need to escalate this to Jane Gallimore who is investigating the case to let her know, if you give me permission. We don't want anyone to suffer who has raised a concern.

Would that be ok?"

The claimant replied the same day that it would be.

11.18 Nicola Canty the same day did share the claimant's last two emails in which he raised concerns about his treatment with Jane Gallimore in an email of 8 March 2021 (page 279 of the bundle). She asked Ms Gallimore to have a think about some measures to address these issues. Jane Gallimore was on leave, but agreed to speak to Nicola Canty on her return.

11.19 On 16 March 2021 Anna Grey, Band 7 held a meeting with the claimant (notes are at page 285 of the bundle). They discussed concerns that the claimant had raised about use of the computer system, and possible breaches of the GDPR. Whilst Anna Grey sought to reassure him on these issues, he stated that he did not wish to use the computer henceforth, which she acknowledged and accepted. He did not thereafter use the computer when carrying out vaccinations. On 25 March 2021 Nicola Canty emailed the claimant to ask how he was, and to update him (page 628 of the bundle). The claimant did not reply.

11.20 On 30 March 2021 the claimant was working in a pod with Deanna Whalley, a band 6 Clinical Supervisor. The claimant had taken a break, at Deanna Whalley's suggestion, during which time two patients had been processed by Deanna Whalley, prior to the administration of the vaccine. She had taken their details and obtained their consents. The claimant reappeared during this process, and offered to administer the vaccinations. As he had not been present during the pre – vaccination procedure, and had not been introduced to them, Deanna Whalley did not consider it appropriate for him to administer the vaccines. She therefore told him that she would do them. She did not, the Tribunal finds, take the vaccinations off him or tell him to sit down, she simply, and for good reason, told him that she would carry out the vaccinations. She had not, she accepts, re-sanitised after touching the computer mouse, which she accepts was an error. The claimant noticed this, and raised this with her, saying he would report this. He did not in fact do so.

11.21 Deanna Whalley was concerned about the incident, and made a handwritten note later that day (pages 291 and 292 of the bundle) which was placed on the claimant's file.

11.22 Deanna Whalley was not, the Tribunal finds, a friend of Carole Richardson, and had not worked with her previously. She did not know of the claimant's disclosures made on 14 February 2021.

11.23 On 1 April 2021 there was a further meeting between Anna Grey, Nicola Nye, a Clinical Site Lead and the claimant. This was primarily to discuss the concerns raised by Deanna Whalley and noted in her handwritten note. In this meeting the claimant discussed the incident and other issues that passed between him and Deanna Whalley on 30 March 2021. He made reference to hostility between them, especially after he had refused to use the computer. He made reference to other staff not liking him since he had "spoken out", although he was not clear about what he was referring to. Anna Grey suggested that mediation with Deanna Whalley may be a solution. The claimant was awaiting a wellbeing report, and matters left pending this.

11.24 Whilst the claimant alleges that in this meeting Anna Grey said, "snitches get stitches", referring to his email of 14 February 2021, the Tribunal does not so find. Nicola Nye, however, when made aware of this allegation told Anna Grey that she had used that phrase in a meeting either or the same day, or a day or so later. She gave this account when interviewed by Lisa Cooke on 16 June 2021 (pages 552 to 557 of the bundle).

11.25 Whilst the claimant claims that he reported this to the Safeguarding Team, probably Nicola Canty, this was purely verbal, and there is no email or other written corroboration of this. The claimant first raised the allegation on 13 April 2021 when he met with Jane Butcher and Lindsay Emmett, as set out below.

11.26 On 13 April 2021 there was a meeting between Jane Butcher, Lindsay Emmett of HR, and the claimant. Prior to this meeting Lindsay Emmett wanted to understand more about the Standard Operating Procedure ("SOP") for the Winter Gardens vaccination hub, and so, on her way to the meeting with the claimant and Jane Butcher, she called in at the office and collected a hard copy of the SOP to take into the meeting and discuss with the claimant. She did not discuss it with Jane Butcher ahead of the meeting, as the claimant was already present waiting for them, and accordingly the meeting started with no prior discussion between Jane Butcher and Lindsay Emmett.

11.27 The record of the meeting, which was an informal meeting, is at pages 301 and 302 of the bundle. Whilst the claimant alleges that Jane Butcher slammed down the SOP on the table in front of him, the Tribunal does not so find. Only Lindsay Emmett handled the SOP document, Jane Butcher had no reason to.

11.28 In the course of the meeting Jane Butcher suffered an anxiety attack, and became dizzy. She feared that she may faint or have to leave the meeting, and said that she was feeling this way. This, however, passed, and she was able to continue the meeting and did so. The reasons for her anxiety were personal ones, and wholly unconnected with the claimant's whistleblowing, as she (or rather her companion, Faith Woods - Beradi) explained when interviewed about this incident on by Lisa Cooke on 27 May 2021. Jane Butcher did not, the Tribunal finds, say anything to indicate that she blamed the claimant for causing her anxiety to kick in.

11.29 During this meeting the claimant did make reference, for the first time, to Anna Grey saying, "snitches get stitches", but he did not say when this had occurred. There was discussion about when the claimant would receive the report into his whistleblowing complaints, which had been completed, but was going through further process before it could be released to him. There was also discussion about the early resolution process, and how the claimant should follow that, putting into the form what he wished to complain about. He was specifically told to ensure that he included the allegation about Anna Grey's alleged comment in the form. The claimant did become upset in the meeting, and was in tears at one point.

11.30 The claimant was then absent from work due to his mental health from 16 April to 19 April 2021. During his absence attempts were made to redeploy the claimant into other roles but these were unsuccessful.

11.31 On 15 April 2021 Lindsay Emmett sent the claimant an email (page 313 of the bundle) in which she made reference to shifts that were available for work as an observer, but she had spoken to him, and he had wanted to stay on vaccinations. She also attached an early resolution form, and accompanying leaflet, for the claimant to complete in relation to the issue that he had raised with her and Jane Butcher in their meeting. The claimant replied some 15 minutes later (same page)

questioning why he needed to complete this form. Lindsay Emmett replied, almost immediately, (page 312 of the bundle) to the effect that this was part of the resolution process, to enable the respondent to assess the correct procedure to follow to seek resolution of the issues that the claimant had raised. She offered further continuing support from Jane Butcher as the Staff Guardian.

11.32 The claimant replied by further email on 15 April 2021 to Lindsay Emmett and Jane Gallimore (page 312 of the bundle), in which he said this:

"I wish to escalate this further, I was integrated (sic) *and reduced to tears at our meeting, this is affecting my mental health to go through all this again, I'm considering legal advice, or last resort to go to press if it is not sorted out. I have told you that since whistle blowing, I'm being bullied and basically threatened, the phrase 'Snitches get Stitches' By the band 7 Anna Grey, nurses are shouting at me in front of patients, Not allowing me to vaccinate, having to use my holidays as i am being sent to sit in the canteen. This was all in the meeting, now you are asking me to go through it again?*

Your solution is to move me elsewhere, whilst the bullies get to carry on with their job, bad mouthing and laughing at me behind my back, I did mention in our meeting that i did not want to have Debs or Any other band 7 as my mentor, it seems you did not listen to me then.

Regarding the whistle blowing which was done this is still unresolved over 6 weeks ago, I wish now for someone else to look into this as this is a serious matter, Along with the bullying and threats i am being given at work.

Therefore can i ask that somebody more senior can look into this as i understand i can ask for as an appeal, as i feel you are not taking it seriously and trying to blame me."

11.33 Following the meeting and this email exchange, Nicola Canty discussed the meeting of 13 April 2021 with Jane Butcher and Lindsay Emmett. Following that discussion she sent the claimant an lengthy email on 16 April 2021 (pages 315 and 316 of the bundle). In this email she sets out the account of the meeting that Lindsay Emmett and Jane Butcher had given her. She explained to the claimant what had been discussed and why, and encouraged him to use the early resolution procedure, and to ensure that all the matters he wished to raise were included in. She offered him continuing support, and expressed concern for his wellbeing.

11.34 The claimant did not respond to Nicola Canty, but on 17 April 2021 submitted a bullying and harassment complaint (pages 317 and 342/343 of the bundle). This was on a form under the respondent's Early Resolution policy (pages 136 to 143 of the bundle). In it he referred to the incidents with Sonia Monks, Deanna Whalley and Anna Grey's comment about "snitches". He also referred to being

interrogated in a meeting, the date of which he incorrectly gave as 13 March 2021. His submission was acknowledged on 20 April 2021 (page 344 of the bundle).

11.35 On 19 April 2021 the claimant returned to work and attended return to work meeting with Kayla Watts, a Site Lead, but left work early due not feeling well enough to return (see his email at pages 478 and 479 of the bundle). An Occupational Health referral was made. The claimant remained absent due to his mental health until his employment terminated. The claimant's fixed term contract was extended to 31 July 2021 on 4 May 2021 (see page 418 of the bundle), along with the rest of the team on similar contracts.

11.36 On 27 April 2021 Matt Ireland Head of HR sent an email (page 366 of the bundle) to the claimant informing him of the steps he had taken to appoint an investigator into the claimant's complaints, and assuring him of the continued support of Nicola Canty. The claimant replied later that day saying "that's great" (page 367 of the bundle). After further email communication at the end of April 2021, on 4 May 2021 the claimant sent an email to Nicola Canty asking if it was possible to "get a pay off amount", and saying that if it was decent he may take it. He followed this up with a further email on 5 May 2021 saying he would accept around £20,000 if he could get a quick decision. He made reference to his high blood pressure and being on anti – depressive medication (page 650 of the bundle).

11.37 On 6 May 2021, having in the interim spoken with Nicola Canty, the claimant sent a further email to Matt Ireland, in which he expressed his frustration that he had not heard from anyone apart from Nicola Canty, and said that he had told her that he wanted to be "paid off", as all this was having a bad effect upon his health. Matt Ireland replied later on the same day, explaining the steps that were being taken to progress the investigation, and to the effect that a settlement was not something that could be considered before the investigation had been completed, and assuring him of continuing support. The claimant next wrote to Matt Ireland on the same day, saying, amongst other things that as the bullies were still working, he would be likely to get another doctor's note, and might seek legal advice. He also made reference to his pay going down to half pay if he remained off sick (page 368 of the bundle).

11.38 Matt Ireland appointed Lisa Cooke, a Senior Communications Manager, to carry out the investigation. Terms of reference were agreed with her on or about 8 May 2021 (pages 430 to 433 of the bundle). She wrote to the claimant on 11 May 2021 (page 439 of the bundle) informing him of her appointment, and arranging to meet with him on 19 May 2021.

11.38 Jane Gallimore completed her Report into the claimant's whistleblowing complaints some time in April 2021. She informed the claimant by email of 2 May 2021 that she had completed it, but that it had been sent to the Deputy Director of Quality Governance (page 409 of the bundle).

11.39 After some discussion as to who would feed the report back to the claimant, Jane Gallimore agreed to do so, and by email of 10 May 2021 Nicola Canty contacted him to inform him the report was ready, and to enquire what the best way would be. The claimant, by email of the same day, that any time by telephone would be fine (pages 433 and 434 of the bundle).

11.40 Also on 10 May 2021 the claimant sent an email to Nicola Canty at 15.10 (page 434 of the bundle) saying that he had spoken to ACAS, and wanted to be paid off, having been told that he had a case for compensation. He made reference to his blood pressure. Later that day he sent a further email, asking for the outcome to be sent by email (page 436 of the bundle). He was told by email later that day by Nicola Canty that she could not negotiate for him, and she reported this to Matt Ireland by email (page 436 of the bundle).

11.41 On 11 May 2021 Lisa Cooke was appointed the Investigating Officer into the claimant's complaints, and she wrote to him to invite him to an investigation meeting on 19 May 2021 (page 439 of the bundle).

11.42 On or about 16 May 2021 the claimant, by accessing his contract details on the Oracle HR system, noticed that Anna Grey was showing as his supervisor, from 11 May 2021. A copy of the page that he saw is at page 440 of the bundle. He took a screenshot of this. By email to Deborah Rothwell on 16 May 2021 (page 442 of the bundle) he attached this screenshot, and asked to know by Wednesday whether she had been promoted. She referred the issue to Lindsay Emmett, who contacted Kathryn Taylor – Russell, passing on this enquiry. She replied by email later that day as follows:

"A staff member's manager in ESR should be their direct line manager, this means notifications about training, and annual leave etc go to that person.

From the start of this programme, myself, Sam, and Emma H have been put in ESR as most staff members line manager so there could be someone, but this isn't especially appropriate now the programme is maturing, and we have stable site leads.

The Ops team have been going through ESR updating line managers so they are more accurate.

If this isn't suitable for this team member, happy to look at putting another site lead, but we're locked out of ESR from Tuesday so would need the change making tomorrow."

11.43 Anna Grey was wholly unaware of this, and had not been involved in this designation. This explanation was communicated to the claimant by Kayla Watts, Site Lead, by email on 17 May 2021 (pages 444 and 445 of the bundle). He replied briefly the same day (same page) at 1.06 p.m. thanking her, and saying "Anyone

but Anna Grey" in response to Kayla Watts' offer to have one of the other Site Leads named as his direct line manager. The Tribunal is quite satisfied that Anna Grey did not make herself the line manager of the claimant, and this designation on the HR system had nothing whatsoever to do with the claimant's protected disclosure.

11.44 On 19 May 2021 the claimant was notified of the outcome of the investigation into concerns raised on 14 February 2021 in the report by Jane Gallimore (pages 379 to 408 of the bundle). It is unclear when, precisely, the claimant received the Whilstleblowing report, but it was fed back not by anyone in the respondent, but by Kelly Bishop, Senior Nursing Support to the Healthier L&SC Mass Vaccination Programme in the NHS Midlands and Lancashire Commissioning Support Unit (see pages 458 and 459 of the bundle).

11.45 Later that day the claimant telephoned Ms Bishop, and followed this up with an email at 14.11 (page 458 of the bundle), in which he said he wanted to contest the report, which he said had been "doctored".

11.46 Also that day the claimant was interviewed by Lisa Cooke as arranged. The notes of that interview are at pages 449 to 445 of the bundle. The claimant was accompanied by Nicola Canty (a.k.a Bamber).

11.47 In that interview the claimant went through the incidents with Sonia Monks, and Deanna Whalley which form the basis of two of his claims in these proceedings. He also made reference to other matters, which are not, and to Anna Grey using the term "snitches get stitches". He also mentioned the meeting with Jane Butcher and Lindsay Emmett, in which he alleged that Jane Butcher had slammed down "the national protocol", and had said that her anxiety was kicking in because of him. He went on to refer to an incident with Alan Johnson, about the claimant not using computers, and his response to this. Alan Johnson was another band 3 vaccinator, but was also an ambulance driver. He was initially taken on at the same time as the claimant to start on 31 January 221, similarly on a fixed – term contract until 31 May 2021.

11.48 The claimant went on to allege that Alan Johnson had made a remark about not messing up his (i.e. Alan Johnson's) job, and the value of the private number plate on his car. At no point in this meeting did he suggest that Alan Johnson had behaved this way because of the disclosure that the claimant had made.

11.49 In this meeting the clamant also expressed his concern that he would go onto half pay. This was picked up by Lauren Staveley, the Assistant HR Manager, who was in the meeting, and undertook to deal with this, and ensure that the claimant remained on full pay. Finally the claimant referred to seeing Anna Grey's name on his contract. Lauren Staveley explained again how this had been done "in bulk" by the recruitment team, and had been done without intent or to be malicious, and a site lead had been put on everyone's letters.

11.50 Lisa Cooke's investigation proceeded during May and June 2021. She interviewed a number of witnesses for this purpose, most notably Sonia Monks, Deanna Whalley, Anna Grey, Nicola Nye and Alan Johnson. Her report is at pages 579 to 601 of the bundle. The interviews with the individuals referred to are Appendices to the report but they have (rather unhelpfully, it has to be said) not been left in situ, but have been taken out of the report, and appear in the bundle at various places, seemingly in chronological (i.e the dates of the interviews) order.

11.51 In each instance, Lisa Cooke introduced the interview with a preamble in which she made reference to the purpose of the meeting, why she had been appointed, and what the process would be. Save in the case of Lindsay Emmett, Jane Butcher and Anna Grey, who were all aware of the claimant's disclosure, Lisa Cooke did not mention it in her introduction, referring instead only to the claimant alleging that he had been bullied harassed and threatened since mid – February 2021 (see, for example, page 496 of the bundle, the interview with Alan Johnson). Jane Gallimore, of course was aware of it, as she was investigating it, but none of the other interviewees were told that the claimant had made a whistleblowing complaint by Lisa Cooke in these interviews.

11.52. It is not the Tribunal's intention to repeat what each of the relevant individuals said in their interviews, save to make the following summary:

Anna Grey – interview 9 June 2021 (pages 527 to 532 of the bundle)

She discussed the claimant's complaints of being isolated and having to sit in the canteen, and when the allegation that she had said in the meeting with him "snitches get stitches" was put to her she replied, having confirmed that Nicola Nye was int the same meeting, that she (Anna Grey) had never heard of, nor had she used, that expression. The claimant had disclosed that people had turned against him, but she had reassured the claimant, and was supportive of him.

Sonia Monks – interview 10 June 2021 (pages 533 to 536 of the bundle)

She denied shouting at the claimant, and had thought that the incident, which was on 6 March 2021, had been dealt with informally at the time with Deborah Rothwell. She had not heard any more about it since. She had accepted that her practice needed changing, and she had done so after the incident.

Alan Johnson – 16 June 2021 (pages 496 to 500 of the bundle)

At the beginning of the interview, in answer to a question about his status with the respondent Trust, he said that he had a bank contract. He probably did not, although he might have been expecting that he would get one.

He was asked about the incident in which the claimant had alleged that they had been discussing his computer use, and Alan Johnson was alleged to have said "bollocks" when the claimant explained his reasons for not wanting to use the computer. Alan Johnson denied this, but did make the observation that he thought that the claimant was always looking at the rules, like he was trying to build a case to take to tribunal, as he believed he had done so before. There was also discussion about how Alan Johnson parked near where the claimant parked, and the allegation that Alan Johnson had expressed concern lest the claimant messed up his job. It was not suggested to Alan Johnson that his conduct towards the claimant had been because of the claimant's disclosure, nor was there any discussion of whether he knew of it.

Nicola Nye – 16 June 2021 (pages 552 to 557 of the bundle)

She was asked questions about the behaviour of the claimant and other members of staff on site, and how the claimant worked. His non – use of the computers was discussed. When the meeting on 13 April 2021 was put to her, and the allegation that Anna Grey had said "snitches get stitches" she said that Anna Grey had not said that, but that she herself had used that phrase in a staff briefing the same day. She had used it in the context of encouraging candour, that staff had to get away from that mentality. The claimant was present , she said, in a room of 30 to 35 people. This resulted in the offer to suspend the meeting, as Nicola Nye was not potentially the subject of the allegation, whereas she previously had not been. She was content to proceed, and elaborated upon what had occurred in the meeting she was referring to.

Deanne Whalley – interview 17 June 2021 (pages 53 to 567 of the bundle)

She denied making the claimant go on a break, and said that she would not have allowed him to vaccinate if he had not been present for the whole of the patient "journey", and had not been introduced. She denied telling him to sit down, and denied that her behaviour towards him was because of any friendship with Carole Richardson.

11.53. On 2 June 2021 the claimant sent an email to Kate Quinn, Operational Director of HR and OD (page 509 of the bundle). She replied later that day (page 508 of the bundle) informing him of her role, and offering him a discussion to assist in his returning to work, or to be redeployed. The claimant replied later that day (page 511 to 512 of the bundle) in these terms:

"This is my last email, as it is causing too much pain for me.

ACAS should contact you soon.

I am suffering from mental health due to being threatened, harassed and bullied by:

1. *Things being put in place to stop me doing my job, telling me I'm not wanted, telling me to go sit in the canteen, terrorised by guardian manager.*

2. *Delay, due to incorrect procedures and wrong advice given, causing more mental health, high BP. I'm now on 3 types of medication.*

3. *I'm suffering from agoraphobia due to being threatened by band 7 nurse Anna Grey, telling me snitches get stitches regarding whistleblowing*

And so on.

I will make 1 offer valid until 28th June.

I would accept £30,000 after tax, in my bank. Bearing in mind I have been bullied by 5 different senior nurses each on 30k year, this would continue my prescriptions and pay any treatment and my bills.

I will not send anymore offers. I will allow to go to tribunal, where the press will be to get their story, staff may have to finally tell the truth any price will be a lot more.

I find this to be a very fair offer."

11.54 On 3 June 2021 the clamant sent an email to (amongst others) Kate Quinn, in which he alleged that he had been given the wrong advice by Lindsay Emmette, and the wrong policy had been followed. He therefore enclosed further forms, and copies of the HR10 and HR7 Bullying and Harassment policies (page 514 of the bundle).

11.55 In reply late the same day, Kate Quinn of HR sent an email which asserted that the respondent had followed correct procedures (page 513 of the bundle), saying this:

"Thank you for this, however I need to reassure you that Lindsey has been using the correct approach. The Trust moved away from a Bullying and Harassment Policy some time ago and moved to Resolution which is the policy that is being used. This seeks to resolve issues early and help parties move forward positively. There is provision to make a complaint formal if this is unsuccessful.

Thank you for the other information, I will make sure that these are included with the various investigations that are taking place."

11.56 On 1 June 2021 the claimant commenced the ACAS early conciliation procedure, obtaining a certificate on 15 June 2021.

11.57 On 29 July 2021 Alan Johnson, along with others, was invited to an informal meeting at which the outcome of the investigation (which was that no action was to be taken against any of the person who were investigated) was given to those who had been interviewed.

11.58 Later on 29 July 2021 Alan Johnson parked his car on the road where the claimant's house is located. This was because he was interested in looking at a property which he thought was for sale, but which turned out to have been sold.

11.59 At the time Alan Johnson was not an employee of the respondent, nor would his concurrent or subsequent employment with North Western Ambulance Service (which the Tribunal understands to be a separate NHS Trust) make him one.

11.60 Whilst Alan Johnson was aware that the claimant had made allegations against him, which resulted in his being interviewed, the Tribunal is quite satisfied that he did not know, when interviewed on 16 June 2021, of the claimant's protected disclosure on 14 February 2014.

11.61 Lisa Cooke's Report of July 2021 (it bears no more specific date) was provided to the claimant by Matt Ireland on 23 August 2021 (pages 602 to 604 of the bundle). The claimant appealed the outcome by email also on 23 August 2021 (page 605 of the bundle).

11.62 An Appeal hearing was held on 17 November 2021 by Emma Davies, Deputy Director of HR and OD. (The notes are at pages 686 to 703 of the bundle). The Appeal outcome was provided to the claimant on 22 November 2021 (pages 704 to 706 of the bundle). The claimant was unsuccessful in his appeal.

11.63 Alan Johnson had decided that he wished to leave the vaccination role, and by email of 5 May 2021 (page 710 of the bundle) he resigned. His last shift was worked around the end of April 2021.Whilst in his email he had asked to be considered for bank work, the respondent did not, however, take him up on that offer. Rather, as can be seen in the email from Lauren Staveley to Jelena Kavanagh on 81 May 2021 on 2021 (page 711 of the bundle) no bank contracts were to be offered to anyone. There is, however, some ambiguity about this, as there is a distinction drawn between substantive and bank posts, with Alan Johnson expressly being referred to as "not terminated Bank posts only".

12. Those then are the relevant facts. It will be apparent that where there has been a conflict in the evidence the Tribunal has accepted the accounts of the respondent's witnesses over that of the claimant. That is for a number of reasons. The Tribunal found the claimant to be an unreliable witness, which is not to say that it found him a dishonest witness. He may well have believed the facts that he alleged, but we did not find his account reliable.

Findings of fact : reasons.

13. In respect of each of the alleged detriments, the factors which largely persuaded the Tribunal to accept the accounts of the respondent's witnesses were as follows.

14. In relation to the alleged shouting by Sonja Monks on 6 March 2021, the Tribunal noted the email exchange between the claimant and Safeguarding on 6 and 8 March 2021 where no reference is made to this alleged incident, despite it being recent. The most that is mentioned is Sonja Monks being "a bit aggressive", and the claimant's breaks, which suggests that whilst the claimant was feeling isolated, and was expressing concerns at his breaktimes (not advanced as detriments), he makes no mention of this incident, nor does he when Nicola Canty emails him on 25 March 2021 to ask how he is.

15. In relation to the alleged treatment by Deanna Whalley on 8 March 2021, again no mention is made of this in this email chain, or in reply to the email of 25 March 2021.

16. In relation to the allegation that Anne Grey said "snitches get stitches" on 1 April 2021, this allegation is not made by the claimant until 13 April 2021, and whilst he claims that he made a phone call to Nicola Canty of Safeguarding after it, there is no evidence of that, nor any of any email follow up. Given how, in other instances, any suggestion of any problems that the claimant suffered because of his whistleblowing led to some action or email from the Safeguarding team, the Tribunal finds it most unlikely that, had the claimant reported such a serious and obviously whistleblowing – related comment to Safeguarding, there would be no record of it, and no action taken in relation to it.

17. In relation to the allegation that Jane Butcher slammed down a document in the meeting on 13 April 2021, the Tribunal notes the inconsistent terminology used by the claimant. In his claim form it is a "form" that is said to have been slammed down. That persisted, with the claimant's agreement, throughout the preliminary hearings and the identification of the issues. In his evidence, however, he said it was the SOP document, a copy of which (or of a version of which) is in the bundle. In his interview with Lisa Cooke, however, the claimant said it was not the SOP, which was a local document, that was slammed down, but rather the national standards document. The Tribunal considers that the difference between a form, a one or two page document, and either the SOP or the national, document is considerable, and that the claimant would have noticed the difference in size and weight. He has been inconsistent in this allegation.

18. In relation to the allegation that Jane Butcher blamed the claimant for the anxiety attack that she suffered in that meeting, the claimant, as with some of the claimant's other allegations (e.g. Deanna Whalley stopped him giving a patient a vaccination) there is an element of truth in what the claimant contends, in that Jane Butcher did have an anxiety attack in the meeting. She did not, however, attribute that to the claimant's disclosure, but to personal issues that she was undergoing at the time.

19. This also resonates with the "snitches get stitches" allegation, in that there was an element of truth to it, in that Nicola Nye admitted that she had used that phrase in a meeting on or about the same day. Whether the claimant heard it directly, or got to hear of it, may explain how he came to associate with Anne Grey in the meeting on 1 April 2021. The fact that Anne Grey had worked in a prison may also have led the claimant to believe that she used this

phrase. We , however, accepted her evidence that she had not heard the phrase, let alone used it.

20. That the claimant is capable of "getting the wrong end of the stick" is perhaps also demonstrated by his misunderstanding of the Tribunal's orders, and what should or should not have been contained in his witness statement, about which there was a discussion on the first day of the hearing. That is not to be critical of him, but it perhaps illustrates how, on occasion, he can misunderstand , or mis – remember things.

21. All this, of course, was against the background of his protected disclosure, as a result of which the claimant doubtless felt vulnerable, and possibly isolated, as he informed Safeguarding. He did, on 16 April 2021, go off sick with anxiety, and his mental health at the time may well have affected his perceptions or his memory.

22. A less charitable view, however, would be that , as evidenced by his email of 5 May 2021, in which he indicated that he would accept a settlement of £20,000, and his later email of 2 June 2021 in which this figure was increased to £30,000, the claimant was building a case, and was deliberately distorting events which had some basis in fact in order to extract money from the respondent.

23. Whatever the position, we found the claimant's evidence generally less reliable than the respondent's. Our decision is not based wholly on a negative view of the claimant's evidence, but also upon our positive view of the evidence of the respondent's witnesses.

24. Mrs Monks, Ms Whalley , Ms Grey and Ms Butcher in particular impressed us open, honest and sincere experienced senior professionals, with no prior knowledge of, or allegiance to, Carole Richardson, about whom the relevant disclosure was actually made, with no reason to behave in the manner that they allegedly did. It will be apparent from our findings of fact above that in most instances we simply do not accept that they behaved in the manner alleged by the claimant, so the claims in respect of detriments allegedly perpetrated by them all fall at the first factual hurdle.

Discussion and findings.

The Law.

25. The first relevant provisions are those of s.47B ERA. In any detriment claim under that provision, it is for the employer to show the ground on which any act, or deliberate failure to act, was done, s.48(2). The relevant statutory provisions are set out in the Annexe to this Judgment.

26. Section 48(2) is easily misunderstood. It does not mean that, once a claimant asserts that he or she has been subjected to a detriment, the respondent (whether employer, worker or agent) must disprove the claim. Rather, it means that once all the other necessary elements of a claim have been proved on the balance of probabilities by the claimant — i.e. that there was a protected disclosure, there was a detriment, and the respondent subjected the claimant to that detriment — the burden will shift to the respondent to prove that the worker was not subjected to the detriment on the ground that he or she had made the protected disclosure.

27. The majority of cases under s.47B turn on the question of whether the worker was subjected to a detriment on the ground that he or she had made a protected disclosure. Section 48(2) means that the employer (or fellow worker or agent) will bear the burden of proving, on the balance of probabilities, the ground on which it acted or failed to act.

28. In ***Aspinall v MSI Mech Forge Ltd EAT 891/01*** the EAT held that the words 'on the ground that' in s.47B require a causal nexus between the fact of making a protected disclosure and the decision of the employer to subject the worker to the detriment. This mirrored the approach adopted in the context of race discrimination victimisation by the House of Lords in ***Chief Constable of West Yorkshire Police v Khan 2001 ICR 1065***. In that case, their Lordships had been considering s.2(1) of the Race Relations Act 1976, which, until its repeal by the Equality Act 2010, provided that victimisation occurred where the discriminator treated the person victimised less favourably than other persons 'by reason that the person victimised [had]… brought proceedings against the discriminator or any other person under this Act' . Their Lordships ruled that the proper approach was not to ask whether 'but for' the protected act having taken place the treatment would have occurred, but rather what, consciously or unconsciously, was the employer's reason or motive for the less favourable treatment. Where a tribunal finds a motive for the less favourable treatment, and is satisfied that this is not consciously or unconsciously related to the protected act, the less favourable treatment cannot be said to be 'by reason' of the protected act. Accordingly, there is no victimisation. The EAT in ***Aspinall*** borrowed the words of Lord Scott in the ***Khan*** case when concluding that, 'for there to be detriment under s.47B "on the ground that the worker has made a protected disclosure" the protected disclosure has to be causative in the sense of being "the real reason, the core reason, the causa causans, the motive for the treatment complained of"'.

29. This interpretation of the protected disclosure provisions was upheld and expanded upon by another division of the EAT in ***London Borough of Harrow v Knight 2003 IRLR 140***. This is not a 'but for' inquiry. It does not permit loose causal factors to determine the outcome; it must be the reason and just related factually to the linked protected disclosure as was made clear in ***Knight*** , at para 16 dealing also with deliberate failure to act:

> *"It is thus necessary in a claim under s.47B to show that the fact that the protected disclosure had been made caused or influenced the employer to act (or not act) in the way complained of: merely to show that 'but for' the disclosure the act or omission would not have occurred is not enough (see **Khan**). In our view, the phrase 'related to' imports a different and much looser test than that required by the statute: it merely connotes some connection (not even necessarily causative) between the act done and the disclosure. On any view, the failure of Mr Redmond to answer Mr Knight's letters was related to the protected disclosure: after all, the disclosure was the fundamental subject-matter of the letters and they would never have been written but for the fact that the disclosure had been made.Likewise any failure on the part of the council to look after Mr Knight related to the disclosure:the awkward situation created by the disclosure was the very reason why he needed help. But that does not answer the question whether that formed part of the motivation (conscious or unconscious) of Mr Redmond or Mr Esom. Mr Redmond, for example, might have failed to answer the letters because he was annoyed by the original report and regarded whistleblowers as disloyal and a nuisance: that would indeed be a deliberate omission 'on the ground that' he had made the*

protected disclosure. But he might in principle equally have failed to do so for one of a number of other reasons."

30. The correct approach to the words 'on the ground that' in s.47B was considered by the Court of Appeal in ***Fecitt and ors v NHS Manchester (Public Concern at Work intervening) 2012 ICR 372***, which concerned three whistleblowers who claimed to have been subjected to a detriment by their employer when it failed adequately to protect them from victimisation by colleagues. An Employment Tribunal dismissed the complaints, finding that the employer's acts and omissions had not been motivated by the fact that the workers had made protected disclosures but rather by the employer's desire to resolve the dysfunctional state of the NHS walk-in centre where they worked. On appeal, the EAT held that the tribunal had adopted the wrong standard of proof in relation to whether the claimants' treatment was on the ground of their protected disclosure. The EAT held that s.47B(1) requires an employer to show, if it is to avoid liability, that the detrimental treatment was 'in no sense whatsoever' on the ground of the protected disclosure: the standard that applied in discrimination law as set out by the Court of Appeal in ***Igen*** . Although protection of whistleblowers stems from domestic law and, unlike the anti-discrimination legislation, does not give effect to EU directives, the EAT considered that it was bound by ***Igen*** to adopt the same approach.

31. The case progressed to the Court of Appeal, which accepted the employer's argument that, even if the EAT were right that it had to show that the making of the protected disclosure played 'no part whatsoever' in its acts and omissions, the tribunal's decision demonstrated that this stringent standard of proof had in fact been met. It had therefore been unnecessary for the EAT to remit the case on this point. Given that finding, it was not strictly necessary for the Court of Appeal to consider whether the ***Igen*** test proposed by the EAT was the correct one in this context, but Lord Justice Elias went on to address the point for the sake of completeness. He agreed with the employer that ***Igen*** was not strictly applicable, given that it was decided in the context of EU law. However, he noted that the principle which informed ***Igen*** is that 'unlawful discriminatory considerations should not be tolerated and ought not to have any influence on an employer's decisions'. Although the Public Interest Disclosure Act 1997 did not enact any EU legislation, Elias LJ considered this principle to be 'equally applicable where the objective is to protect whistleblowers, particularly given the public interest in ensuring that they are not discouraged from coming forward to highlight potential wrongdoing'.

32. The term 'detriment' is not defined in the ERA, but it clearly has a broad ambit. Its meaning has been given extensive consideration in case law, much of which has examined the term in the similar context of the anti-discrimination legislation, which makes it unlawful for an employer to discriminate against an employee by subjecting him or her to 'any other detriment'. In ***Ministry of Defence v Jeremiah 1980 ICR 13*** , Lord Justice Brandon said that 'detriment' meant simply 'putting under a disadvantage', while Lord Justice Brightman stated that a detriment 'exists if a reasonable worker would or might take the view that [the action of the employer] was in all the circumstances to his detriment'. Brightman LJ's words, and the caveat that detriment should be assessed from the viewpoint of the worker, were adopted by the House of Lords in ***Shamoon v Chief Constable of the Royal Ulster Constabulary 2003 ICR 337*** . Subsequent cases have established that detriment covers such things as failure to promote, refusal of training or other opportunities, disciplinary action and reductions in pay, as well as general unfavourable treatment.

33. It is important to stress that s.47B provides protection from any detriment: there is no test of seriousness or severity and the provision could well be breached by detrimental action that seems very minor to an objective observer (although the severity of the detriment will be relevant to the question of compensation). In ***Shamoon*** (above) their Lordships emphasised that it is not necessary for there to be physical or economic consequences to the employer's act or inaction for it to amount to a detriment. What matters is that, compared with other workers (hypothetical or real), the complainant is shown to have suffered a disadvantage of some kind.

Findings.

34. It will be apparent from our findings of fact that in relation to detriments 1, 2, 3 and 4 the claimant fails, because we find as a fact that the allegedly detrimental behaviour in each instance simply did not occur. It is unnecessary therefore to enquire as to causation, but if we were wrong on our primary findings, we would still have found in relation to nos. 1 and 2, that any such conduct was (and has been shown by the respondent, upon whom the burden would then lie) not because of the claimant's protected disclosure. The claimant has failed to show that the alleged perpetrators, Sonja Monks and Deanna Whalley, even knew that he had made the protected disclosure. He could advance no evidence that they did, it only being a belief, based upon their alleged friendship with Carole Richardson. The Tribunal accepts their evidence that they were not friends with her. Indeed, given the ad hoc staffing arrangements for the Winter Gardens vaccination centre, which drew in staff from many and varied previous roles, none of these three ladies had previously worked together, and there is nothing whatsoever to suggest that they were friends as opposed to professional colleagues, and nothing to suggest that the fact of the claimant having made the disclosure that he had was actually known to them.

35. Detriments 3 and 4, of course, the "snitches get stiches" comment, and the alleged conduct of Jane Butcher in the meeting on 13 April 2021, we accept could amount to detriments, but we are not satisfied that they occurred.

36. That leaves nos. 5, 6 and 7 to consider. Detriment 5, we find also did not occur. Anna Grey did not arrange with anyone to be assigned the claimant's supervisor. The evidence shows that she knew nothing about this, still less was she responsible for it. In any event, we can see nothing to suggest that any such conduct (which may have been inappropriate, but was in any event quickly remedied when the claimant complained about it) was because of the claimant's whistleblowing.

37. Turning to detriment 6, the email by Kate Quinn on 3 June 2021 which the claimant contends deliberately misstated the facts, asserting that the respondent had followed correct procedures, we do not find that this can be viewed as a detriment. It is to be recalled that the claimant's case is that the email was the detriment, not the following of the allegedly incorrect procedure. The email is no more than the expressing of a difference of opinion. The claimant had made an assertion about whether the correct procedure had been followed in relation to his complaints, Kate Quinn disagreed with him, and told him why. This was in a private email, addressed only to him. It was not any form of public disagreement, and would have further ramifications or purpose than to explain to the claimant why the respondent did not accept his

view of whether the correct procedure had been followed. Even taking the broad approach directed by ***Shamoon*** , there is simply no detriment.

38. Again, if the Tribunal were wrong on this, it would have no hesitation in finding that this was not because of the fact that the claimant had made any protected disclosure. The claimant, not for the first time, with respect, confuses the context of his treatment with the reason for it. That is understandable, as many whistleblowers feel vulnerable, and expect that there may be some retaliation for their disclosures. That something happens after something does not mean that it has happened because of it. The Tribunal does not apply a "but for" test, but rather whether the disclosure materially (in the sense of more than trivially) influenced the treatment. The Tribunal is quite satisfied that even if Kate Quinn's email did amount to a detriment, it was in no way because of the claimant having made a protected disclosure.

39. Finally, in relation to detriment 7, Alan Johnson parking outside his house in a deliberate attempt to intimidate him, the first issue is whether, whatever he did, and for whatever reason he did it, the respondent is only liable for the conduct of Alan Johnson if it was vicariously liable for his conduct. That would only be the case if he was acting either as the agent of the respondent (i.e. he had been asked or told to behave in this way), of which there is no evidence whatsoever, or he was an employee of the respondent, and was behaving in this manner in the course of his employment.

40. The evidence is that he was not, as at 29 July 2021, an employee or worker of the respondent. Whilst the claimant has sought to suggest that he was on a "bank contract", and he may have thought he was, or was going to be, the evidence is that he in fact was not. In any event, a bank contract, in the view of the Tribunal, is not a contract of employment, it is a contract under which certain staff are offered periods of employment, in effect a pre-selection process, like a zero – hours contract. It would be an absurd and dangerous extension of the law of vicarious liability if an "employer" were to remain vicariously liable for the acts or omissions of all persons on bank contracts with it if they were not actually carrying out employment duties for that putative employer, or actions closely connected with them.

41. Further, accepting for these purposes that Alan Johnson's conduct could be viewed as a detriment (a generous view, but taken for these purposes) , the Tribunal is quite satisfied that any such conduct had nothing to do with the protected disclosure that the claimant made. It is not enough, for detriment claims to succeed that the alleged perpetrator had some idea, notion or suspicion that the claimant was "a whistleblower", the perpetrator must have known that the claimant had made a protected disclosure, so must know what that was, at least in general terms. The legislation affords protection to persons who have made any protected disclosure, it does not protect persons who are believed to be whistleblowers, or with whistleblower "status". There is no evidence that Alan Johnson did know what disclosure the had made. That he may have known, as a result of meeting at which he was told that the allegations against him were being dismissed, that the claimant had been a whistleblower is not enough. As it was, his motivation may well have been pique at being the subject of an investigation into his conduct. Again, whilst the claimant's disclosure may have been the context in which he made allegations about Alan Johnson's conduct, that does not mean that any subsequent detrimental conduct on his part was because of that disclosure.

42. For all these reasons, the Tribunal finds that all the claims have no foundation, and they are dismissed.

Postscript: application for 24nonymization of witnesses and persons referred to it the evidence.

43. The respondent made an application at the conclusion of the hearing that the names of the main protagonists in the respondent be 24nonymizat, by the use of initials. It was contended that they had (as the Tribunal has indeed found) done nothing wrong, and should not therefore, be identifiable in any Tribunal judgment.

44. The claimant did not object to this proposal. The Tribunal has considered it. It was an application made very late in the hearing, which had been conducted in public (albeit by CVP) over 4 days, with no attempt during the evidence, or in references to the extensive documentation before the Tribunal, at any form of anonymisation or redaction. No specific reasons were advanced for it, and no rights under the ECHR were identified as requiring protection.

45. The Tribunal has considered this application, which is, in effect, an application under rule 50. Notwithstanding the lack of objection by the claimant, the starting point for the Tribunal is the principle of open justice. It is clear from the caselaw such as ***British Broadcasting Corporation v Roden [2015] IRLR 627***, where reference was made to the paramount importance of open justice and freedom of expression such that 'derogations from it can only be justified when strictly necessary as measured to secure the proper administration of justice', that the Tribunal should only depart from that principle in clear and compelling cases. No such grounds have been advanced in this application. The allegations made against the alleged perpetrators, which have been rejected, are not of any particularly heinous types of conduct. Some of the participants are no longer in what were temporary posts for the purposes of the vaccination programme, others were in, and may remain in, what are fairly public – facing roles within the Trust. The Tribunal considers that insufficient grounds for making any orders under rule 50 have been established, and this application, if really necessary, ought to have been made at the outset of the hearing. No rule 50 order is made.

Employment Judge Holmes
Date: 3 March 2023

JUDGMENT SENT TO THE PARTIES ON

7 March 2023
AND ENTERED IN THE REGISTER

FOR THE TRIBUNAL OFFICE

ANNEXE

The relevant statutory provisions

The Employment Rights Act 1996

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,

© 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, or is likely to be deliberately concealed.

47B Protected disclosures

(2) 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—

(2) 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—

(2) from doing that thing, or

(b) from doing anything of that description.

(1E) (N/A)

(2) … this section does not apply where—

(2) 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.

48 Complaints to employment tribunals

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