# EMPLOYMENT TRIBUNALS

**Claimant:** Ms Elaine Woodward-Bennett

**Respondent:** Cardiff and Vale University Local Health Board

**Heard at:** Cardiff **On:** 6, 7, 8, 9, 10, 13, 14, 15, 16 and 17 (in Chambers) March 2023

**Before:** Employment Judge S Jenkins
Mr A Fryer
Mr B Roberts

**REPRESENTATION:**

**Claimant:** Mr A Gloag (Counsel)
**Respondent:** Mr M Islam-Choudhury (Counsel)

# RESERVED JUDGMENT

The Claimant's claims of: unfair dismissal pursuant to sections 94, 100(1)(c), and 103A of the Employment Rights Act 1996; wrongful dismissal; detriment on the ground of protected disclosures, pursuant to section 47B of the Employment Rights Act 1996; detriment on the ground of health and safety matters, pursuant to section 44(1)(c) of the Employment Rights Act 1996; and wrongful dismissal; all fail and are dismissed.

# REASONS

## Background

1. The hearing was to consider the Claimant's claims of: unfair dismissal, brought on an "automatic" basis pursuant to sections 100(1)(c) of the Employment Rights Act 1996 ("ERA") and section 103A ERA; and also on an "ordinary" basis, pursuant to section 94 ERA; of detriment on the basis of having made protected disclosures pursuant to section 47B ERA; of detriment on the ground of having raised a health and safety matter pursuant to section 44(1)(c) ERA; and wrongful dismissal.

## Evidence

2. We heard evidence from the Claimant and Mr Steve Ashill, Theatre Assistant/Porter, on the Claimant's behalf. We also considered a written witness statement from Ms Eleni Boutsi, Nurse, on behalf of the Claimant, although as Ms Boutsi was not present before us to be cross examined we gave little weight to that statement.

3. On behalf of the Respondent we heard evidence from: Catherine Heath, formerly Director of Nursing for Children and Women's Services; Adam Wright, formerly General Manager for Perioperative Care; Steve Waites, Theatre Porter/Assistant; Clive Baker, Porter; Amanda Senior, formerly Clinical Lead for Orthopaedics; Paul Warman, formerly Duty Manager; Clare Landells, formerly Clinical Lead for General Surgery and Other Specialties; Barbara Jones, Educational Lead for the Perioperative Care Directorate; Jason Roberts, formerly Deputy Executive Nurse Director; Ruth Walker, formerly Executive Nurse Director; Jon Barada, formerly Theatre Manager; Clare Wade, Director of Nursing for the Surgical Clinical Board; Sarah Matthews, formerly Senior Nurse in Transplant and Nephrology Services; Linda Hughes-Jones, Head of Safeguarding; and Jane Murphy, formerly Deputy Director of Nursing.

4. We considered the documents in a hearing bundle spanning 1,853 pages to which our attention was drawn, together with further supplementary documents spanning 48 pages which were produced during the course of the hearing.

5. We considered the parties' oral, and, in the case of the Respondent. written, submissions.

## Issues

6. A list of the issues to be determined at the hearing had been agreed between the parties prior to an earlier preliminary hearing and were as follows:

> ***The Issues***
>
> *The issues the Tribunal will decide are set out below.*
>
> ***Unfair Dismissal/Automatic Unfair Dismissal***
>
> *1. What was the reason (or, if more than one, the principal reason) for the Claimant's dismissal?*
>
> *2. Was the reason (or principal reason) for the Claimant's dismissal:*
>
> *(i) that she made one or more of the protected disclosures detailed at paragraph 1 above? (**section 103A ERA**)*
>
> *(ii) that she had, in accordance with **section 44(1)(c) ERA**, brought to the Respondent's attention by reasonable means*

*circumstances connected with her work which she reasonably believed were harmful or potentially harmful to health or safety, in circumstances where either there was no health and safety representative or committee or alternatively, where there is but it was not reasonably practicable for the Claimant to raise the matter by those means? (**section 100(1)(c) ERA**)*

3. *If not, was the Claimant dismissed for a potentially fair reason under **section 98(1)** and **(2) ERA 1996**)? The Respondent asserts that the Claimant was dismissed for a reason related to her conduct.*

4. *If the Respondent establishes that the Claimant was dismissed for a reason related to her conduct, did the Respondent act reasonably in all the circumstances in treating the said reason as a sufficient reason for dismissing the Claimant? In particular:*

   *(i) did the Respondent have a genuine belief that the Claimant had committed the misconduct found against her;*

   *(ii) were there reasonable grounds for that belief;*

   *(iii) at the time of forming that belief, had the Respondent carried out as much investigation as was reasonable in the circumstances;*

   *(iv) did the Respondent follow a fair procedure. (The Claimant relies upon the matters set out at paragraph 70 of the Amended Particulars of Claim);*

   *(v) did dismissal fall within the range of reasonable responses of a reasonable employer having regard to the misconduct which the Respondent found?*

5. *If the Claimant's dismissal was procedurally unfair, what is the percentage chance (if any) that the Claimant would have been fairly dismissed if a fair procedure had been followed?*

6. *If the Claimant was unfairly dismissed:*

   *(i) does the Tribunal consider that the conduct of the Claimant before dismissal was such that it would be just and equitable to reduce the amount of the basic award to any extent, pursuant to **section 122(2) ERA**? If so, what is the appropriate reduction?*

   *(ii) was the Claimant's dismissal to any extent caused or contributed to by any action on her part? If so, what reduction to the compensatory award, pursuant to **section 123(6) ERA**, does the Tribunal consider to be just and equitable having regard to that finding?*

***Wrongful Dismissal***

7. *Was the Respondent entitled to dismiss the Claimant without notice, or without paying her in lieu in respect of her full notice entitlement under her contract of employment, by reason of the Claimant's conduct? If not, to what sum is the Claimant entitled by way of contractual notice pay.*

***Protected Disclosures***

8. *Pursuant to the Judgment of Employment Judge R Evans, dated 25th May 2022, it has been determined that the following disclosures amounted to protected disclosures within the meaning of* ***Part IVA*** *of the* ***Employment Rights Act 1996*** *(**"ERA 1996"**):*

    (1) *The Claimant's email to Sam Skelton, Manual Handling Adviser, of 24th April 2019 in which she expressed her concerns about health and safety issues arising out of the introduction of the new theatre beds (**§5 Amended Particulars of Claim**).*

    (2) *The Claimant verbally raising concerns in a meeting with Jon Barada, Theatre Manager, on 25th April 2019, about the health and safety issues arising out of the practice of only using one porter to push the new theatre beds, which concerns were summarised and followed up in emails of the same date (**§§6-7 Amended Particulars of Claim**).*

    (3) *The Claimant verbally reporting to Jon Barada on 6th May 2019 that there had been a failure to comply with the risk assessment that had been completed in relation to the new theatre beds (**§8 Amended Particulars of Claim**).*

    (4) *The Claimant's email to Jon Barada and Paul Warman, Porters Manager, of 15th May 2019 in which she expressed concerns about the potential compromise of patient safety if qualified staff were required to assist in the pushing of beds (**§10 Amended Particulars of Claim**).*

    (5) *The Claimant's email to Ceri Chinn, Lead Nurse, of 23rd May 2019, clarifying her concerns about patient safety arising out of the practice of only using one porter to push the new theatre beds (**§12 Amended Particulars of Claim**).*

    (6) *The Claimant, on 28th May 2019, verbally raising concerns (and demonstrating those concerns) about health and safety issues arising out of the practice of only using one porter to push the new theatre beds to, inter alia, Sarah Mortimer, Manual*

*Handling Adviser, and Jon Barada (**§13 Amended Particulars of Claim**).*

*(7) The Claimant, on 17th June 2019, forwarding to Jon Barada an email from Elena Boutsi in which Ms Boutsi expressed concerns about an incident that had taken place on 31st May 2019 during which there had been a refusal to provide a second porter to assist in the moving of a new theatre bed (**§14 Amended Particulars of Claim**).*

*(8) The Claimant verbally raising concerns at a Governance meeting on 19th June 2019 in relation to the health and safety issues arising out of the practice of only using one porter to push the new theatre beds (**§20 Amended Particulars of Claim**).*

*(9) The Claimant's email to Ceri Chinn, Lead Nurse, and Clare Wade, Directorate Nurse of 25th June 2019 in which she raised concerns about Mr Barada telling staff to "use their professional judgment" when dealing with pushing patient beds from theatres to the wards rather than following the protocol (**§24 Amended Particulars of Claim**).*

*(10) The Claimant's email to Jon Barada of 27th June 2019 detailing her concerns in relation to Mr Barada's proposed approach to the issue (**§25 Amended Particulars of Claim**).*

***Health and Safety***

*9. Did the Claimant believe that circumstances connected with her work, namely the practice of only using one porter to push the new theatre beds (and the associated practice of requiring qualified staff to assist in the pushing of those beds), were harmful or potentially harmful to the health or safety of patients?*

*10. If so, was such belief reasonable?*

*11. Did the Respondent have designated representative(s) of workers on matters of health and safety at work and/or a safety committee within the meaning of **section 44(1)(c) ERA**?*

*12. If so, was it reasonably practicable for the Claimant to have raised the concerns at paragraph 1 above with the designated representative(s) and/or safety committee?*

*13. If not, and/or if there was no such representative or safety committee, did the Claimant's disclosures detailed at paragraph 1 above (or any of them) amount to the Claimant bringing her health or safety concerns to the Respondent's attention by reasonable means?*

***Detriment Claims***

*Jurisdiction*

*14. Does the Tribunal have jurisdiction to determine the Claimant's detriment complaints? In particular:*

*(i) were the Claimant's detriment complaints presented before the end of the period of three months (having regard to the effects of early conciliation) beginning with the act or series of acts to which the complaint relates? It is common ground that, if viewed as standalone acts, any complaint in respect of an act or omission which occurred on or before 7th February 2021 would be out of time.*

*(ii) in respect of any act or omission which occurred before 7th February 2021, does the said act or omission form part of a series of similar acts or failures, the last of which occurred within time?*

*(iii) if not, was it reasonably practicable for the relevant complaint to have been presented in time?*

*Substantive Merits*

*15. Was the Claimant subjected to the following treatment:*

*(1) on 25th April 2019, being threatened with being the subject of a grievance if she continued to raise health and safety issues, by Clive Baker, a theatre porter;*

*(2) on multiple occasions, being subjected to bullying behaviour and threats by Paul Warman, Porters Manager, specifically, did Mr Warman:*

*i. Replace the Claimant's name on the duty manager rota with David Smalley's name;*

*ii. Intentionally embarrass the Claimant inform of Karen Morgan and Ronnie Schon by implying that the Claimant was not capable of doing her job without them and that they did all the work;*

*iii. Purposely ostracise her at the workplace by ignoring and excluding her when she was working in the clinical leader's room;*

*iv. Withhold important information about changes such as sickness absence and only sharing information with the Claimant's deputies;*

*v. Subject the Claimant to belittling and mocking comments about Mr Warman bringing in cakes on the Claimant's day off as he did not like the Claimant and did not want to share them with her;*

*vi. Make a joke about the Claimant's dog killing her pet parrot.*

*(3) on 18th and 19th June 2019, being shouted at by Amanda Senior, Orthopaedic Clinical Leader;*

*(4) on 19th June 2019, being threatened with being the subject of grievances by Steve Waites and Clive Baker, theatre porters, in the CAVOC Recovery Unit;*

*(5) on or around 25th June 2019, Jon Barada, Theatre Manager, breaching an assurance given to the Claimant that he would raise her concerns at the theatre manager group meeting;*

*(6) on or around 25th June 2019 Paul Warman countermanding the Claimant's instruction to the housekeeping staff to flush the showers and sign their flushing sheets, thereby undermining the Claimant's authority;*

*(7) Jon Barada, despite having previously instructed the Claimant to introduce the All Wales Nursing Uniforms, creating a hostile working environment for her:*

*(i) by informing staff that they could wear whatever colour uniforms they liked,*

*(ii) describing her as somebody who liked applying policies "in an extreme way", and*

*(iii) accusing her of being controlling and unsupportive of staff*

*(8) on 17th July 2019, being subjected to threats by Clive Baker and Glyn Jenkins, theatre porters, following a request for two porters on the theatre beds;*

*(9) the Respondent failing to investigate the two incidents in which Amanda Senior had shouted at the Claimant on 18th and 19th June 2019;*

*(10) the Respondent failing to investigate an incident form completed by the Claimant following the incident on 17th July 2019 and being told that Paul Warman, Porters Manager, had determined that there was no case to answer;*

*(11) Jon Barada, contrary to the risk assessment, informing Recovery Unit staff to use their own judgement in moving the new theatre beds, thereby further undermining the Claimant's position;*

*(12) Jon Barada and Clare Wade, without any discussion in advance with the Claimant and/or her representative, removing the Claimant from her role prior to the formal investigation stage;*

*(13) Jon Barada failing to consult with the Claimant in advance about her redeployment and failing to have regard to considerations of reasonableness in relation to the proposed redeployment;*

*(14) the Respondent failing to attempt to resolve concerns raised against the Claimant informally;*

*(15) the Respondent ignoring concerns raised by the Claimant about being transferred to work at the University Hospital of Wales and, in particular, her need to work close to home in order to be able to care for her mother;*

*(16) on or after 30th August 2019, having her work diary, last seen in the possession of Karen Morgan, Deputy Clinical Leader for Recovery, and Paul Warman, go missing;*

*(17) from 3rd October 2019, the Respondent unreasonably and deliberately delaying the investigation and resolution of the Claimant's grievance;*

*(18) the Respondent failing to conduct appropriate investigations and/or to implement the outcomes of the Claimant's grievance;*

*(19) on or around 13th October 2020, Paul Warman submitting a statement for the purposes of the disciplinary proceedings against the Claimant which was materially untrue;*

*(20) the Respondent instructing Ceri Chinn, Lead Nurse, to investigate Paul Warman's behaviour towards the Claimant as part of the grievance outcome, when it knew or ought to have known that Ms Chinn was not impartial;*

*(21) the Respondent conducting a biased disciplinary process against the Claimant, inter alia:*

*(i) by using witness evidence from Amanda Senior, Paul Warman and the theatre porters during the disciplinary process against the Claimant when it knew or ought to have known that the Claimant had raised allegations of bulling behaviour against those individuals; and*

*(ii) by using witness evidence from Jon Barada when it knew or ought to have known that the Claimant had raised a grievance against him;*

*(22) the Respondent using correspondence from a previous disciplinary investigation during the disciplinary process, notwithstanding (i) that the previous investigation had no connection with the material disciplinary process, and (ii) the previous investigation had determined that the Claimant had no disciplinary case to answer;*

*(23) Linda Hughes-Jones, on 26th May 2021, forwarding information to the Nursing and Midwifery Council for the purposes of commencing an investigation into the Claimant's Fitness to Practice in respect of a serious allegation of assault notwithstanding that the same had been found to be unsupported at the disciplinary hearing?*

*16. In relation to any treatment at paragraph 15 above which the Claimant is able to establish, did the said treatment amount to the Respondent subjecting the Claimant to a detriment?*

*17. If so, was that detriment on the ground that:*

*(i) the Claimant made one or more of the protected disclosures detailed at paragraph 1 above? (**Section 47B ERA**) and/or*

*(ii) the Claimant brought to its attention by reasonable means circumstances connected with her work which she reasonably believed were harmful or potentially harmful to health or safety and in circumstances where either, there was no health and safety representative or safety committee or, if there was such a representative or committee, where it was not reasonably practicable for the Claimant to raise those disclosures by those means? (**Section 44(1)(c) ERA**)*

***Remedy***

*18. If the Claimant's complaint of unfair dismissal (or automatic unfair dismissal) is upheld:*

*(i) should an order for reinstatement be made?*

*(ii) if it is not practicable to reinstate the Claimant, should an order for re-engagement be made?*

*(iii) in considering (i) and (ii) above, in the event that the Claimant is found to have caused or contributed to any extent to her own dismissal, would it be just, having regard to that finding, for the Tribunal to make the relevant order?*

*19. Insofar as the relevant complaints succeed, should a declaration be made:*

*(i) that the Claimant has been automatically unfairly dismissed under **section 103A ERA** and/or under **section 100(1)(c) ERA**?*

*(ii) that the Claimant has been subjected to a detriment contrary to **section 47B ERA** and/or **section 44(1)(c) ERA**?*

*20. If the Claimant succeeds in whole or in part upon her claims, what financial compensation is appropriate in all of the circumstances:*

*(i) in respect of injury to feelings upon her detriment complaints;*

*(ii) in respect of her complaint of unfair dismissal;*

*(iii) should any compensatory award for unfair dismissal be increased under **section 207(A)** of the **Trade Union and Labour Relations (Consolidation) Act 1992** because of any unreasonable failure on the part of the Respondent to comply with the ACAS Code of Practice when dismissing the Claimant? If so, what percentage increase (up to a maximum of 25%) to the compensatory award does the Tribunal consider would be just and equitable in all the circumstances.*

*21. When deciding what level of compensation (if any) should be awarded, the Tribunal should have regard to:*

*a. What financial losses has the detrimental treatment caused the Claimant?*

*b. Has the Claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?*

*c. If not, for what period of loss should the Claimant be compensated?*

*d. Did the Claimant cause or contribute to the detrimental treatment by their own actions and if so, would it be just and*

*equitable to reduce the Claimant's compensation? By what proportion?*

*e. Was the protected disclosure made in good faith?*

f. *If not, is it just and equitable to reduce the Claimant's compensation? By what proportion, up to 25%?*

7. As was noted at paragraph 8 of the List of Issues, it had been determined at an earlier preliminary hearing that the Claimant had made protected disclosures for the purposes of her section 47B and section 103 ERA claims. It had also been previously decided that this hearing would focus on liability only, i.e. whether or not the claims, or any of them, succeeded. If they did, a subsequent remedy hearing would then be scheduled.

**The Law**

Detriment Claims

8. The claims of detriment under both section 47B and section 44 ERA involve two elements; there must be a detriment, and that must be "on the ground" of the disclosure or the health and safety matter.

9. "Detriment" is not defined within the ERA but the House of Lords in **Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337** noted, in relation to similar claims under the Equality Act 2010, that a detriment exists if a reasonable worker would or might take the view that the treatment was in all the circumstances to his or her disadvantage. The court noted that an unjustified sense of grievance cannot amount to a detriment, but emphasised that whether a Claimant has been disadvantaged is to be viewed subjectively. The Court of Appeal confirmed the same test applies in relation to detriments in protected disclosure cases in the case of **Jesudason v Alder Hey Children's NHS Foundation Trust [2020] IRLR 374.**

10. In relation to the question of whether detriment is "on the ground of" the disclosure of a health and safety matter, the Court of Appeal in **Manchester NHS Trust v Fecitt [2012] ICR 372** noted 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*" (paragraph 45).

11. The Court of Appeal in **Bolton School v Evans [2007] ICR 641** quoted paragraph 57 of the EAT Judgment in that case, which noted that the assessment of whether a detriment was "on the grounds that" a protected disclosure had been made, "*requires an examination of the mental processes which caused the employer to act as he did*".

12. The Court of Appeal in **Evans** also noted that an employee's conduct in making a disclosure may, in certain circumstances, be separable from the disclosure itself, such that the employer may be justified in dismissing an employee, or in

treating them to their detriment, due to the manner in which a disclosure is made

13. Again, the House of Lords had previously examined similar provisions within the Equality Act 2010 where treatment was required to be "by reason that". In **Chief Constable of West Yorkshire v Khan [2001] ICR 1065**, Lord Nicholls noted that the test of assessing whether treatment had arisen "by reason that", involved questioning, "*why did the alleged discriminator act as he did? What, consciously or unconsciously, was his reason?*". The Court of Appeal in **Jesudason** endorsed that approach and we bore it in mind, changing "alleged discriminator" to "alleged causer of a detriment".

14. As the same wording is used in relation to claims of detriment on the ground of health and safety matters in section 44, the same principle applied. In the case of the claim under section 44 however we first needed to consider whether the terms of section 44(1)(c) had been engaged in the ways noted at paragraphs 11-13 of the List of Issues.

Unfair Dismissal

15. The focus under both section 103A and section 100 ERA was whether the reason, or if more than one the principal reason, for the dismissal was the protected disclosure and/or the making of a health and safety complaint. If we were satisfied that the reason or principal reason had been either of those matters then one or other of the Claimant's claims of automatic unfair dismissal would succeed.

16. With regard to the reason for dismissal, we noted that the Court of Appeal had observed, in **Abernethy v Mott Hay and Anderson [1974] ICR 323**, that the reason for dismissal is "*the set of facts which led to the decision to dismiss*".

17. If we were not satisfied that the reason or principal reason for the dismissal was either the protected disclosures or a health and safety matter then we would need to consider whether the Respondent had satisfied us that its dismissal of the Claimant was for a potentially fair reason falling within section 98 ERA. If the Respondent did that then we would have to consider whether dismissal for that reason was fair in all the circumstances, applying section 98(4) ERA where the burden of proof was neutral.

18. In this case, the Respondent contended that the reason for dismissal was the Claimant's conduct, which is a potentially fair reason falling within section 98(2)(b) ERA. If we were satisfied that that was indeed the reason for dismissal then we would need to apply the long-established test set out by the Employment Appeal Tribunal ("EAT") in **British Home Stores Limited v Burchell [1978) IRLR 379**, which would require us to assess the three matters set out at paragraph 4(i), (ii) and (iii) of the List of Issues.

19. We would also need to consider whether the Respondent had applied a fair procedure, taking into account the relevant provisions of the ACAS Code of

Practice on Disciplinary and Grievance Procedures, together with any specific elements of the Respondent's own disciplinary policies.

20. We would also need to take into account the fairness of the sanction of dismissal, assessing whether the decision was within the range of reasonable responses of a reasonable employer in the circumstances, as directed by the EAT in **Iceland Frozen Foods v Jones [1982] IRLR 439**. We noted that the range of reasonable responses test was also directed to apply in relation to the consideration of the reasonableness of the investigation by the EAT in **Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23**.

Wrongful Dismissal

21. Our assessment of this claim required us to consider objectively whether the Claimant had committed an act or acts of gross misconduct i.e. which amount to repudiatory breach of breaches of contract which entitled the Respondent to dismiss the Claimant summarily without notice.

**Findings**

22. Our findings, reached on the balance of probability where there was any dispute, are set out below. Whilst we have endeavoured to follow the usual chronological order, there were three broad themes which underpinned the events in this case: issues about the movement of beds which formed the subject matter of the Claimant's disclosures, issues regarding the wearing of uniforms, and issues regarding legionella prevention. We have dealt with those matters together which, of necessity, has led to our findings not being set out in a completely chronological order. We have also considered in some detail the technical background to the Claimant's disclosures, relating to the movement of beds carrying post-operative patients in a hospital setting, even though, as we have noted, it had already been decided that those disclosures were protected disclosures for the purposes of the Claimant's claims under section 47B and 103A ERA.

Background

23. The Claimant's period of continuous employment with the Respondent started on 1 September 2004, when she started work at the University Hospital of Llandough ("UHL") as a Recovery Nurse. She had previously worked for the Respondent for some four months but that did not count towards her continuity of employment.

24. In August 2006 the Claimant was promoted to Deputy Clinical Leader in the Recovery Department at UHL; she became Acting Clinical Leader in 2010, and that position was made permanent in 2011.

25. The Respondent is the health board covering the Cardiff and Vale of Glamorgan local authority areas. Its principal hospital is the University Hospital

of Wales ("UHW") in Cardiff, with its other main hospital being UHL, situated some five or so miles to the south-west of Cardiff.

26. By the Spring of 2019, when the events giving rise to the claims in this case started to take place, the Claimant was directly managed operationally by Jon Barada, who had taken up the position of Theatre Manager at UHL in March 2019. Professionally, the Claimant also reported to Ceri Chinn, Lead Nurse. Mr Barada also reported to Ms Chinn, and to Adam Wright, General Manager for Perioperative Care.

27. Prior to the events of 2019, there had been concerns over the management of the Recovery Unit at UHL, which included concerns over the Claimant's management style. We did not hear any direct evidence on those matters, but reference was made, both before us and in internal proceedings, to a letter sent to the Claimant by the then Director of Nursing of the Respondent dated 1 August 2016. That letter, whilst referring to management broadly and with only certain references being made to the Claimant directly or by inference, indicated the following:

    a. The investigation was commissioned to look into formal concerns raised by staff, the trade union and HR regarding the management of the UHL Recovery Unit. The investigation commenced on 1 March 2016 and the report was submitted on 3 June 2016.

    b. It was emphasised that the Recovery Unit was a high performing team with excellent patient care.

    c. However, there was evidence that the culture within the Unit was not healthy, and that staff did not function as a cohesive team. Cliques had formed over several years and there was evidently a lack of respect between both management and staff.

    d. There appeared to be an autocratic management style, with too much reliance placed on rules, which created an atmosphere of inflexibility/rigidity such as rules around breaks.

    e. There was a lack of information sharing.

    f. There was a lack of respect throughout the team, with staff speaking to each other in a way that did not uphold the values and behaviours of the Health Board.

    g. That the two Band 6 nurses were taken away from the Unit by the Claimant on a frequent basis, which had developed a feeling of resentment and favouritism by other staff.

    h. That the professional development of staff was viewed as not important.

i. That there were misperceptions by staff as to who had agreed or not agreed certain matters between staff and the Claimant and another manager, such that there was a perception that some staff had been treated differently.

j. That management, which we took to have included the Claimant, always had other Band 7 nurses present when speaking with staff.

k. That staff sat in different camps – those who had an issue with management and those who did not, with relationships between some staff and management having broken down.

l. It was noted however, on the positive side, that there was no direct evidence of bullying or intimidation, but that that was certainly a perception held by some staff on the Unit, and there was evidence from the investigation that the behaviour of both staff and management was questionable at times.

27. The Director of Nursing noted that whilst some of the concerns raised could be improved through better co-operation, a more radical approach was needed to address the culture that had been allowed to develop within the Unit over several years. The Director of Nursing noted that in 2009 there had been a review and that some of the findings of that review were similar to the outcome of the 2016 investigation, albeit seven years later. The Director of Nursing therefore decided, in order to address the poor team dynamics and culture within the Unit, to rotate staff out of the unit into the UHW so that they could experience working in different teams. A piece of organisational development intervention was also commissioned, focussing on issues such as teamworking, communication, dignity and respect. As a result of this, the Claimant moved to work at UHW for a six month period from July 2016.

28. Turning to the events from 2019 onwards, we have separated our findings into broad subject areas as follows.

<u>Movement of Beds</u>

29. In late 2018 or early 2019, a new type of bed was introduced within the Respondent's organisation, and it appeared that the new bed was introduced across all Health Boards within Wales at around this time. It appeared that the old type of bed, or something similar to it, had been in use for some fifteen years or more.

30. A manual handling risk assessment in relation to the movement of beds had been produced in 2004 and had been periodically reviewed, most recently in March 2018, that review having been undertaken by Mr Barada. It transpired during this hearing that that review had been confined to the movement of beds to and from theatres at UHW. It also transpired that Mr Barada was not strictly qualified to act as an "assessor", as defined in the form, as he had not undertaken the relevant courses which the definition indicated an assessor

should have followed. No issue however appeared to have been taken during the course of events relating to this claim about either Mr Barada's qualification to undertake the risk assessment or the applicability of the risk assessment to UHL.

31. The risk assessment recorded the overall risk level at 12, which fell into the category of "Unacceptable" risk, which was stated as being a level of risk where work should not be started until the risk had been reduced. In terms of risk reduction measures, the form noted that a minimum of two staff were needed to move the bed if it was empty, with three or four staff being used if a patient was on the bed.

32. From the evidence from all relevant witnesses however, it appeared that those recommendations were not complied with, as the practice, certainly within UHL, was that one person, usually a porter, would push the bed, whether occupied or unoccupied. When taking a patient from the Recovery Unit back to a ward, which was the type of movement which gave rise to the concerns raised by the Claimant, a nurse or Operating Department Practitioner ("ODP") would accompany the porter, but would not usually be involved in the pushing of the bed, instead walking alongside. That practice was clearly not compliant with the risk assessment but was a practice that had been undertaken for at least the previous fifteen years. It did not appear that anyone had ever raised a concern about the safety of the practice, including the Claimant.

33. The new beds introduced within the Respondent organisation in late 2018 and 2019 were larger and they were also manoeuvred via the back wheels rather than the front. That made the beds more difficult to manoeuvre and led to requests from porters that nurses/ODPs assisted more with the movement of beds. The method changed from the principal person pushing the bed from the back to the principal person pulling the bed from the front, with the second person assisting by pushing and guiding the bed from the back.

34. The Claimant was against her staff assisting in the movement of beds in this way, and wished them to continue to walk alongside beds, observing the patient. The upshot of that was that that would effectively require a third person to be involved in the movement of the bed, as there would be little a nurse/ODP would be able to do to assist with the movement of the bed unless they were at the rear.

35. The Claimant consistently voiced her concerns about recovery staff being involved in the pushing of the new beds, but the first occasion on which she appeared to have done this was on 24 April 2019, the day after attending manual handling update training. On that day the Claimant emailed Samantha Skelton, one of the Respondent's manual handling advisers, noting that, since the new beds had been introduced, her staff had been used to push at the head of the bed which she had strongly recommended should not happen for safety reasons, as they would not be able visually to see the patient from behind the bed that they were pushing. The Claimant noted that she had been aware that the Respondent's manual handling staff were able to measure the pushing and

pulling for women and men over the distance that the bed had to be moved, and she asked for Ms Skelton to advise so that she could appropriately assess the risk involved. We observed that that last comment did not tie in with the Claimant's general approach about how beds should be moved, which was that recovery staff should effectively play little role in the movement of beds as they were to be alongside observing the patient.

36. Ms Skelton replied, on 29 April 2019, noting that she had forwarded the Claimant's email to one of her colleagues, Sarah Mortimer, as she was the manual handling adviser for surgery and covered the Claimant's area.

37. On 25 April 2019, the Claimant sent an email to Mr Barada, copied to Paul Warman, who by then had line management responsibility for porters at UHL, setting out her concerns about the practice of recovery staff pushing beds on their return to wards. She noted that she had asked Ms Skelton to come to assess the push and pull measurement, and that she would also do a risk assessment as the new beds had not been risk assessed since their introduction.

38. Later on the same day, the Claimant had cause to email Mr Barada again, although this email was not copied to Mr Warman, being forwarded to him by the Claimant on 30 April 2019 without comment. In the email, the Claimant reported an issue that had arisen within the Recovery Unit on 23 April 2019 when porters had not attended two requests to assist with the movement of patients, seemingly on the basis that it was felt by the porters that there were sufficient porters already present at the Recovery Unit.

39. In addition to outlining concerns about that, and also raising concerns about a contention by a porter that showering time should be allowed, the Claimant then reported to Mr Barada a conversation that she had had with Clive Baker, one of, and, it appeared to us the *de facto* leader of, the porters, on 25 April 2019 in which she had raised concerns about Recovery Unit staff pushing beds back to the ward from the head of the bed.

40. The Claimant noted that she had informed Mr Baker that she was happy for her staff to assist in the return of the beds, but that ultimately the recovery nurses were responsible for the patient and needed to be at the side of the bed where they could see the patient. She noted that she had said that the recovery staff would help if asked to assist with manoeuvring the bed around a corner or obstacles if needed, and recorded that Mr Baker was happy with that. A point of contention appeared to have arisen however, in that the Claimant reported that she had asked Mr Baker if, when it was quiet, a second porter could attend to help move the bed, to which Mr Baker had replied that that would not happen as it would mean more manual handling for the porters whilst recovery staff were sitting doing nothing. The Claimant reported that she had told Mr Baker that she felt it was reasonable to ask for two porters to assist if they were free and that Mr Baker had replied that he did not agree, and that he would see his trade union representative and put in a grievance if the Claimant persisted with her requests.

41. Mr Baker, in his evidence before us, could not recall a conversation with the Claimant on the particular day. Mr Warman, who, as we have noted, was by then the porters' line manager, confirmed however that there had been tensions between the Claimant and the porters. He also confirmed that Mr Baker was someone who was not afraid to speak his mind and that he himself had addressed grievances brought by porters, and had had dealings with a trade union representative in relation to them. On balance, we were satisfied that the discussion between the Claimant and Mr Baker on 25 April 2019 had not been an easy one, and that Mr Baker had indicated that he would take matters up with his trade union, which would have included the possibility of a grievance. Whilst we did not consider that that would objectively have involved a "threat", as subsequently maintained by the Claimant, we could see how the Claimant could have perceived that it had been a threat.

42. Although the Claimant referred, in her email to Mr Barada of 25 April 2019, to proceeding to undertake a risk assessment, a document was produced during the course of this hearing which indicated that she, together with her deputy, Ronnie Schon, had in fact completed a risk assessment form on 24 April 2019. In this, the Claimant and her deputy had assessed the risk at 16, although this did not alter the assessment of the level of risk as Unacceptable. In terms of control measures to reduce risk, it was recorded that one porter would push the bed, with one nurse to help manoeuvre the bed around corners and to guide the bed on straight sections. It was noted that the nurse would observe the patient for safety reasons and that a manual handling adviser would advise on pushing and pulling and would undertake a push/pull assessment.

43. Also produced to us during the hearing was an email from the Claimant dated 30 April 2019 to Mark Bennion, the Respondent's Clinical Lead for Governance, Quality and Safety, and Sarah Mortimer, in which she noted that she had done the risk assessment for manual handling on the new beds, but that she was awaiting the pushing and pulling assessment. She asked Mr Bennion where she should keep the risk assessment. She did not forward that risk assessment to Mr Barada.

44. On that day, the Claimant sent a separate email to Ms Mortimer alone, asking her to come to advise on the assessment of the pushing and pulling of the new beds. She referred to having the "form" but commented that she needed help filling it in.

45. The Claimant also emailed a representative of the company which supplied the beds on 2 May 2019, asking her if it was possible for her to go in to do some training on the new beds. She did not copy the email to anyone else but suggested that the representative liaise with the Respondent's Practice Educator with regard to dates for the training. The representative replied the following day, copying in the Practice Educator together with Mr Warman and Ms Mortimer. She questioned whether there had been a number of new starters in the unit as a colleague of hers had provided training to the team in October and November 2018. She confirmed that she was happy to go in to do more training but would appreciate some clarification on the issues involved.

46. Ms Mortimer then replied on 7 May 2019 noting that training had been provided. She also noted that, "*This has been more of a management issue in the past involving nurses being asked to push the bed when they need to be supervising the patient*". She commented that there needed to be a risk assessment of the new beds and a decision as to the number of staff required to push.

47. Ms Mortimer then forwarded her email to Mr Barada and Mr Warman, copying in the Claimant and the Practice Educator, on the following day. In this email she noted that he had spoken to the representative from the bed company and to the Claimant and that they had agreed that, "*this is not a training issue or a problem physically pushing the beds but is the lack of establishing best practice between Portering and Nursing Staff*".

48. Mr Warman replied to that email on 10 May 2019, noting that all porters had been trained, and that there was a risk assessment which would be looked at and updated. He summarised that the nature of the issue was where recovery staff stood during the transfer of beds to wards. He noted that porters were quite happy to push, pull or steer, but that recovery staff preferred to stand at the head end so that they could observe the patient on route with the porter guiding the heavier foot end. He indicated that he agreed with Mr Barada that they should "*not start reinventing the wheel*", and would look at what happened in UHW to standardise practice.

49. The Claimant replied on 15 May 2019 noting that, as she had said before, she was happy to help, but did not want to compromise patient safety. She summarised that the role of recovery unit staff was to accompany the patient and to support and help where needed, but was not to push beds.

50. Mr Barada then replied to the Claimant later that day, copying in only Mr Warman, noting that he would pick the matter up with the Claimant when they were next on duty together, and that it was an issue that needed to be discussed and agreed within the Perioperative Care Directorate. He went on to note that his observation of the previous emails was that the Manual Handling Department had been copied into a dispute, which was not appropriate, as it was a decision for the Directorate. He asked the Claimant to be mindful of who was copied into emails in the future.

51. In the meantime, Mr Barada had emailed the Claimant and her two counterparts at UHW on 9 May 2019. He noted that it seemed that a more in-depth risk assessment needed to be done, and he attached the one that he had done for porters at UHW when he had managed them in 2017. He asked for agreement on the number of people needed to push a bed and a trolley, and on where the recovery practitioner should be, whether at the head of the patient or at the foot of the patient. One of the UHW counterparts replied the next day saying that two people were used to push beds and trolleys, with the recovery nurse standing at the head end of the patient. The Claimant sent a response on 13 May 2019 noting that whilst she agreed that two persons would take a patient back to the ward, she did not consider that it would be appropriate for

recovery staff to push the beds. She confirmed that she was happy to continue with recovery staff at the end of the bed, guiding and assisting around corners where necessary. She pointed that it could be an idea to see what other hospitals did with the post-operative movement of patients.

52. Mr Barada then sent a further email summarising that there were different views being put forward by the two people who had replied, and asking the other UHW counterpart for their view, commenting that it would be worth meeting if an agreement could not be reached.

53. Mr Barada then emailed the Claimant on 21 May 2019 noting that he had met with his counterpart at UHW, with Ms Barbara Jones, the Education Lead for the Perioperative Directorate, and Mr Bennion that day. He confirmed that, prior to the meeting, he had undertaken an internal benchmarking exercise involving the Recovery Leads, the Claimant and her counterparts at UHW, and had also undertaken external benchmarking using his contacts with other Theatre Managers along the South Wales corridor.

54. Mr Barada noted that, in every Recovery area other than in UHL, the Recovery nurse stood at the head of the patient, guiding the bed from that end, whilst the porter pulled the bed from the foot. He confirmed that he disagreed with the Claimant's contention that standing at the head of the patient could potentially compromise patient safety, and commented that, as far as he was concerned, the risk assessment was satisfactory and there was no risk to patient safety. He noted that the practice at UHL was not only different to that of the rest of the Perioperative Care Directorate, i.e. to that followed in UHW, but also conflicted with other hospitals within the immediate locality.

55. Mr Barada then moved on to outline his recommendations, which included that the same approach should be used for transferring patients from Recovery to the post-operative destination, that the risk assessment was sufficient, and clearly stated that a minimum of two people should push/pull the bed with typically the porter pulling from the foot end and the recovery nurse steering from the head end, enabling the recovery nurse to converse with the patient. He noted that inviting a representative from the bed company would be counterproductive, and that he would support members of the Recovery team and the Porters team visiting UHW to see how the task was performed so that practice could be shared.

56. Later that same day, Mr Barada emailed Ms Mortimer, again referring to his meeting, stating that his view was that adequate risk assessments were in place, and that, following internal and external benchmarking, the practice of the Recovery nurse guiding the bed from the head whilst the porter pulled from the foot end was commonplace. He noted that the practice at UHL differed and, for that reason, he had agreed that the UHL practice would change. He confirmed that the bed manufacturer was not required to attend, and that the issue would be managed within the Directorate.

57. Despite that, Ms Mortimer did attend at the Recovery Unit on 28 May 2019 to undertake the push/pull assessment. No record of that assessment, in terms of a completed form similar to the risk assessment, was ever produced, and it was not clear to us whether one had ever existed. As we note below, it became an issue which was dealt with in the Claimant's grievances. Produced to us during the hearing however, was an email from Ms Mortimer to the Claimant and others dated 29 May 2019, noting that a push force test had been undertaken the day before, which produced average readings which were within HSE guidelines. She concluded her email by stating that the guidelines recommended a further risk assessment specifically for push/pulling, which she had completed and would forward on to the Claimant when she was able to scan it the following week. There was however no record of any such document.

58. Ms Mortimer also continued to correspond on the matter of manual handling risk assessments, and that included copying in Ceri Chinn, the Lead Nurse for Perioperative Care. Ms Chinn emailed Ms Mortimer on 23 May 2019 noting that the issue was not a manual handling one but was more of a patient safety discussion that would be undertaken as a Directorate through the appropriate forums. She noted that Mr Barada was on leave that week but, on his return, would be having discussions with the Claimant about her concerns and appropriate escalation measures.

59. Ms Chinn then forwarded that email to the Claimant and noted that she was quite disappointed about how the matter had escalated so quickly and how it had not gone through the appropriate forums or been discussed with her. She pointed out that she had not seen any incident forms about the matter and was confused as to why it had become such an issue. She referred to Mr Barada having carried out some benchmarking, and that she did not believe that this was an emergency decision which needed to be discussed that week, and she therefore asked the Claimant not to raise it again until she had spoken to Mr Barada the following week. She commented that if the Claimant was still not happy then she could escalate the matter to her, and that a meeting could take place and, if necessary, the matter could be taken through the appropriate governance forum. The Claimant replied later that day reiterating her concerns, and noting that she would like to meet with Ms Chinn and her union representative to discuss the matter further. There was no evidence that such a meeting ever took place.

60. Neither the Claimant nor Mr Barada commented on any further discussions they had about the issue, but it appeared that the Claimant remained unconvinced that the practice of the recovery nurse pushing the bed from the head was appropriate. Mr Barada then agreed that the matter would be taken to the next meeting of the Governance Group of the Perioperative Care Department on 19 June 2019. This is a standing group, which meets every two months or so to discuss policies and procedures within the Department. It was chaired by Barbara Jones, the Respondent’s Education Lead for the Perioperative Care Directorate.

61. The matter was placed on the agenda for the meeting sent out a week or so in advance, and Mr Barada indicated to the Claimant that she should attend. Mr Barada was himself in attendance, together with his Theatre Manager counterpart at UHW. One of the Claimant's counterparts at UHW was also present. The Claimant attended and was accompanied by one of her ODPs.

62. The minutes of the meeting only briefly describe the discussion of the issue, noting that Mr Barada raised an issue highlighted by the Claimant regarding the transportation of patients back to the ward, the number of staff required and the placement of the recovery practitioner. The minute noted that there were different practices across the Directorate and that a risk assessment was already in place. It concluded that Ms Jones, as the Chair of the group, suggested that Mr Barada and his counterpart at UHW take the issue to the All Wales Theatre Management Group for discussion.

63. From the witness evidence about the meeting, it appeared that all those present who had relevant experience in relation to the movement of beds, had a different view to that of the Claimant, with her ODP colleague not contributing to the meeting. Notwithstanding the feeling within the Group that the Claimant's suggestions were not necessary, due to the strength of her feelings, it was agreed to take the matter up further with the All Wales Group as opposed to the usual practice which was to adopt the majority view of the Group.

64. On 21 June 2019, Mr Barada then completed a revised risk assessment. This was stated to apply to both UHW and UHL and again recorded the risk rating as 12. In relation to control measures, the assessment noted that two staff were needed if the bed was empty, and that additional staff could be required if the patient was bariatric or if there were any other manual handling concerns, in which case three or even four staff could be required.

65. Mr Barada went into more detail, and noted that the movement of patients from the ward to the theatre would typically be performed by the theatre porter supported by a member of the ward staff who would assist with the movement of the bed. He noted, with regard to the return of patients from Recovery to the ward, that that activity was again typically performed by a theatre porter supported by a member of the Recovery team who would typically position themselves at the patient’s head end of the bed and would participate in the manual handling activity of transferring the patient back to the ward. Mr Barada noted that there could be occasions when a theatre porter was unavailable, in which circumstances a minimum of two staff would transfer the patient back to the post-operative destination. Notwithstanding the additional detail that Mr Barada provided about the process, he, rather confusingly, in the concluding section of the assessment form, noted that “*Practice remains unchanged*”.

66. Shortly after revising the risk assessment, Mr Barada informed certain members of the Recovery team that they could use their own judgement as to where they would stand in relation to the beds when being moved. That appeared to be a comment that Mr Barada made to certain members of staff when they had asked a question of him, and was not something that he

communicated to the Recovery staff generally. He had also not communicated that to the Claimant.

67. The Claimant then sent an email to Ms Chinn and Ms Wade on 25 June 2019, raising a concern that two members of her team had been told by Mr Barada that, "*they can go where they like on the bed*". She noted that she had not been told that by Mr Barada, and commented that it was a change in the practice at UHL, and that the change was in the process of being discussed. She confirmed that she now sought written clarity as where she stood as the clinical leader.

68. Mr Barada, to whom the email had been copied, replied on 27 June 2019, noting that the Claimant had expressed a preference about her way of transporting patients from Recovery to wards and that he, and the other clinical leads for Recovery, disagreed with that view. He noted that, on balance, it could be argued that both practices were safe, and that there had been no reports of injury to either staff or patients from either method, which supported the viewpoint that both practices were indeed safe. He concluded by saying that his view as Theatre Manager was that both methods were safe, and that, in terms of patient/staff safety, it had been assessed as a two person task and that provided that both ways of working complied with this he was happy.

69. In the event, Mr Barada did not raise the bed movement issue at a meeting of the All Wales Theatre Manager Group. It was not clear whether this was because Mr Barada did not attend, or whether the meeting did not take place, as it appeared that scheduled meetings would not always go ahead due to logistical difficulties of staff from across Wales travelling to the meeting location. Mr Barada did however carry out a benchmarking exercise with members of the group by email.

70. The Claimant in her evidence before us was adamant that Mr Barada had "promised" that he would attend and would ask two specific questions: "What is the role of the recovery nurse in the transfer of a patient following surgery back to the ward?", and "Where should the nurse be positioned on the bed during the transfer?". She was critical of Mr Barada, asserting that he had not kept that promise, as he had not attended the meeting and had not asked the specific questions. The minutes of the Governance Group meeting however only record that Mr Barada would take the issue to the Theatre Manager Group for discussion. We did not consider that any specific "promise" as to how that would be discussed or as to the specific questions that would be asked had been made.

71. Mr Barada, in his benchmarking report, noted his findings under the headings of three questions:

- "*I have assessed this as being a two person task (as a minimum), any objections?*";

- "*Does the recovery nurse stand at the patient's head? Or at the patient's feet?*"; and

- "*Do your recovery nurses participate with the transfer of patients from the recovery room to the ward?*".

72. The responses indicated that where a member of a recovery team participated in the return of a patient to a ward, they would always stand at the patient's head.

73. Mr Barada produced his report on 31 July 2019, and provided it to the Claimant by email on 1 August 2019.

74. Ms Mortimer emailed Ms Wade on 30 July 2019 noting that there were a number of manual handling issues within theatres that had not been resolved, one of which was the push/pulling of beds to and from Recovery to the wards. Ms Wade replied the same day, noting that she believed that matters had already been managed through health and safety meetings and risk assessments, and Mr Barada confirmed later on the same day that the matter had been risk assessed and had been resolved.

75. Two other instances were referred to in evidence before us regarding the movement of beds, both involving Ms Boutsi. She reported to the Claimant on 14 June 2019 that, on 31 May 2019, she had requested two porters to return a patient from Recovery to the ward, and when two porters arrived it became apparent that they had expected there to be two patients to be returned. When it became apparent that only one person was there, one of the porters left, leaving Ms Boutsi and the other porter to return the patient.

76. Ms Boutsi reported a similar concern on 17 July 2019. Again a request for two porters was made, but when they arrived and found that there was only one patient, whilst they did both move the patient back to the ward, they did so whilst complaining. In particular, it was asserted that Mr Baker, who was one of the porters involved, had said that he would complain to Mr Barada about the Claimant. The Claimant indicated that she had heard Mr Baker commenting about reporting the matter to Mr Barada, and indeed to the trade union, when walking past the Claimant's room.

77. Ms Boutsi in fact submitted a Datix (an internal incident report) about the incident, which was investigated by Mr Warman. He concluded that Ms Boutsi's reason for requesting two porters had been because she had hurt her foot earlier in the day, but that neither she nor the other member of the Recovery team had made that known to the porters when requesting that two attend. Mr Warman concluded that Mr Baker had not been aggressive, which was how the Claimant had described Ms Boutsi reporting it, as none of the witnesses reported to Mr Warman that the porters had been aggressive. He noted however that, whilst not aggressive, Mr Baker had admitted feeling annoyed about two porters being called to move a bed when he had thought that the matter had been sorted out following the Governance Group meeting

on 19 June 2019. He also confirmed that he had said that he intended to take the matter up with Mr Barada. Mr Warman ultimately concluded that he did not consider that the matter needed to be taken further, but that he would speak to Mr Baker explaining that he needed to be more careful about voicing concerns in front of patients. The Claimant accepted that action, provided that Mr Warman mentioned the Respondent's values and behaviours in his discussion with Mr Baker.

78. A further incident which had its genesis in the bed issue also occurred with the Claimant directly on 19 June 2019. That was the day of the Governance Group meeting and, at the start of the morning, Mr Baker and Mr Waites were present in the Recovery area. They were discussing with the Recovery staff that there was a meeting that afternoon at UHW at which the movement of beds was going to be discussed. At this point the Claimant approached and aggressively told the two porters and the Recovery staff that they should not be discussing the issue. The Claimant in her evidence denied that she was in any way aggressive in her discussion with the porters, indeed she records that one of her asserted detriments was being threatened by Mr Waites and Mr Baker with grievances in relation to the incident. Both Mr Baker and Mr Waites were particularly clear that the Claimant had been aggressive. They described the Claimant as not only "shouting" at them but as "screaming" at them. On balance, we preferred the evidence of Mr Baker and Mr Waites on this matter, particularly as Amanda Senior confirmed in her evidence that she had heard raised voices from her own room, even above music that she was playing, and recognised the Claimant as one of the voices.

Uniforms

79. In March 2019 an issue arose over the shortage of theatre scrubs within the Respondent's organisation. The concern principally related to UHW, but also had relevance for UHL. The concern was that, as theatre scrubs were worn by a range of staff, there were occasions when there were insufficient scrubs to be worn by theatre staff, . It was decided that a concerted effort would be made to ensure that a supply of scrubs was always available for theatre staff.

80. Staff working in the Recovery unit would, it appeared, often wear theatre scrubs, and it was therefore recommended that nurses working in the Recovery area were to wear the All Wales nursing uniform, or a suitable alternative, instead of scrubs. Mr Barada emailed relevant staff, including the Claimant, about the issue on 19 March 2019. He noted that nursing recovery staff could wear the All Wales nursing uniform, whilst ODP recovery staff could have a suitable alternative to that uniform.

81. Approximately a week later however, staff within the Recovery unit raised concerns with Mr Barada about being required to wear the All Wales uniform. The concern was that it was made of comparatively thick material, and could get warm, particularly in the Summer. Mr Barada reported that concern to the Claimant by email on 26 March 2019, but noted that his decision was to carry on with the ordering of uniforms.

82. By summer 2019 however, the concerns about the warmth of the All Wales uniform resurfaced, along with concerns about the Claimant's inflexibility over the use of fans that had been ordered, and the access of Recovery unit staff to water.

83. Mr Barada decided that, in the circumstances, his directive that the All Wales nursing uniform should be worn no longer needed to be followed, and he informed staff that he had no objection to them purchasing their own scrubs as long as they were laundered in accordance with infection control recommendations. Mr Barada did not inform the Claimant about that decision, and she found out about it from staff members who reported to her. Mr Barada subsequently agreed, when the matter was raised by the Claimant as part of her grievance, that, on reflection, he should have communicated the change of approach to the Claimant, and he apologised about that.

Legionella

84. By early 2019, a concern had been identified with regard to the observation of legionella prevention processes within the Respondent's organisation. An audit had shown that parts of the organisation were not complying with the required processes, with flushing logs either not being used or being out of date. Areas of the organisation were tasked with putting together and implementing an action plan for the management of legionella risks, and Mr Barada asked the Claimant to take responsibility for that in an email dated 13 June 2019.

85. In implementing her action plan, the Claimant produced forms which, whilst they were the forms that she felt were current, were in fact old, out of date forms. This was noted by others, including Mr Warman and Ms Senior, who checked with the relevant department who confirmed that the forms were incorrect. Ms Senior noted that on the plastic file in which the forms had been placed.

86. As part of her action plan, the Claimant had identified that a member of the housekeeping/cleaning team should flush the staff showers on a regular basis, it transpired every Monday, Wednesday and Friday. Mr Warman would however regularly cycle to work and then shower in work and, when he did so, he would then sign the sheets in the male showers to confirm they had been flushed. Ms Landells would, in a similar manner, regularly use the female showers on Monday, Wednesday and Friday mornings, as she would go to the gym in the morning before starting work. She also would then sign the flushing sheets to confirm that the showers had been flushed on those days.

87. It did not appear to us that the Claimant's instruction that the cleaner should flush the showers had, in any sense, been countermanded, as she asserted. It was simply the case that the showers were regularly used and, when they were used, it was a simple matter for the person using the shower to sign to confirm that flushing had taken place. If no-one had signed on a required day to confirm that flushing had taken place then the cleaner would undertake the flushing.

Other background matters

88. Evidence was put before us of other incidents relating to the Claimant. Two related specifically to Ms Senior. The first related to the morning of 18 June 2019 when the consultant anaesthetist who had supervised the first patient of the day saw that there were no Recovery staff in the Recovery unit, as, it transpired unbeknown to the Claimant, they had gone to the cafeteria for breakfast. The Claimant was herself in another area at the time.

89. Whilst Mr Warman took steps to ensure that staff returned from their break, Ms Senior came across the Claimant talking to a colleague. The Claimant described Ms Senior as shouting, "*Really!*". Whilst Ms Senior did not agree that she had shouted, she agreed that she may well have said "*really?*". She confirmed that she said something along the lines of the anaesthetist "kicking off" because Recovery was empty, and that she had questioned why staff had been allowed to go on break at the same time.

90. A further incident occurred between the Claimant and Ms Senior the following day. That related to the legionella flushing forms. As we have noted, Ms Senior had marked on the plastic folder that the forms were not to be used, which the Claimant, in her witness statement, described as the forms having been "defaced". The Claimant went to Ms Senior's office to ask her why she had done that, and Ms Senior explained that the forms were the wrong ones. Both accused the other of behaving inappropriately during the discussion and it certainly seemed to us that the discussion was not an easy one. Ms Senior confirmed that she had asked the Claimant to leave the office on several occasions; the Claimant contended that it happened on five occasions and Ms Senior did not disagree that it could have been as many as that, which culminated in Ms Senior asking the Claimant to "get out" of her room.

91. The Claimant submitted a Datix about the incident with Ms Senior on 19 June 2019, in which she also noted the incident between them on 18 June.

92. Mr Barada investigated the Datix. Ms Senior denied being aggressive, and that was supported by the other clinical lead who had been in the room at the time, although it was accepted that the door had not been closed, and that the discussion therefore had been within earshot of other staff. Mr Barada then concluded that no further action would be taken, but that both staff members would consider their approach and treat each other professionally in future.

93. The Claimant's relationship with Mr Warman also gave rise to difficulties. By 2019 they had worked together for some four years, and their relationship initially appeared to have been a reasonable one, with Mr Warman speaking up for the Claimant at a meeting in relation to the complaints about management in 2016. By 2019, however, their relationship appeared to have deteriorated. Mr Warman suggested in his witness statement that that may have been as a result of an application he had made for the Theatre Manager post in late 2018, the post to which Mr Barada was ultimately appointed, and for which the Claimant had also applied.

94. The Claimant, in a grievance submitted later in 2019, referred to having spoken to Mr Barada about Mr Warman on 6 May 2019. In her grievance she summarised that she had told Mr Barada that she had felt that she was being bullied by Mr Warman because of the concern she had raised about the way beds were being moved. Mr Barada recorded that the Claimant had spoken to him about Mr Warman, although not that that had been connected to her concerns about how beds were moved.

95. The Claimant did not put in any formal written concerns about Mr Warman at the time, although the concerns she outlined in her grievance later in October 2019 were considered by Ms Chinn following the conclusion of the Claimant's grievance processes. The Claimant raised particular allegations about Mr Warman's behaviour as detriments caused by her public interest disclosures, and we deal with those specific matters in our Conclusions below.

Complaints against the Claimant

96. The Claimant commenced a period of two weeks' annual leave from 11 August 2019. Just prior to that, Karen Morgan, one of the Recovery Unit nurses who worked under the Claimant, submitted her resignation to Mr Barada, noting that she had enjoyed her time within the Unit, but that, unfortunately, as she felt that Mr Barada and Human Resources were well aware, there had been many issues with her line manager, the Claimant, who, "*seems to have consistently gone out of her way to undermine my professionalism and commitment to your department*". In relation to that asserted knowledge, there was, within the hearing bundle, a copy of a letter Ms Morgan had sent to the Respondent's HR department on 14 January 2019. That summarised a number of issues of concern that Ms Morgan had about the Claimant going back to October 2017, but with a particular focus on the period from November 2018 onwards. She confirmed, in that letter, that her objective at that time was to register the disputes and that she did not want it to be processed further. She noted that she had been offered a three-month secondment which she had then taken up. In her resignation letter however, Ms Morgan complained that, since returning from that secondment, she had felt demotivated and undermined by the Claimant, with all but a few of her tasks having been taken away from her by the Claimant.

97. The following week, Mr Adam Wright, the Respondent's General Manager for Perioperative Care, was running one of his regular drop-in sessions at UHL. These were sessions which were publicised in advance, and involved Mr Wright basing himself in the particular department with staff dropping in to discuss anything they would like to talk about. The meetings had no agendas, and no minutes were taken. Ordinarily Ceri Chinn, as the lead nurse, would also have been in attendance, but she had just commenced a period of maternity leave.

98. The session that Mr Wright was due to have in the Recovery Unit at Llandough was on Thursday 15 August 2019. The day before however, Mr Wright received an email from a member of the Recovery Unit, who was not going to

be in work on the following day, in which she expressed concerns regarding the working environment. She referred to there being many issues which had been present for years, since the individual had started work in 2014. She went on to say that the last few months had been challenging, and that the best way to explain the issue was that the Claimant had come across as completely focussed on trying to regain control in any area she could. She commented that the Claimant appeared to have been like that since she had expressed a change in how to push beds from one place to another. She also referenced staff changing from scrubs to uniform. She commented that the issues had been recently resolved, but that how the Claimant had dealt with those issues had been inappropriate and unprofessional.

99. In addition to issues arising from beds and uniform, the person referred to issues she had with the Claimant's management style, referring to morning meetings which used to take place no longer taking place, with the Claimant preferring to have one-to-one meetings with staff which she described as involving, "*about twenty minutes of Elaine talking to us like we are children*". She put forward her view that the Claimant interpreted anything anyone said in contradiction to her as an attack, which meant that it was very difficult to approach her. She also criticised the Claimant for being unsupportive when she had looked to swap shifts to attend her grandmother's funeral. She concluded by saying that she was at a point where she was waiting for her job to be advertised (we presumed a job that she had informally arranged to take up) and then she would leave.

100. Mr Wright forwarded that email in the evening of 14 August to Mr Barada, Ms Wade, and to Terrie Waites, the Respondent's Assistant Head of Workforce. They discussed that it would be appropriate for Mr Barada to have a conversation with the Claimant focussing on concerns around her health and wellbeing, and that if the Claimant accepted that there was a problem, whether related to her health or to personal matters, then she could be referred to Occupational Health. However, if the Claimant did not indicate that there was an underlying problem then she would have to be informed that an initial assessment under the Respondent's disciplinary procedure would have to be implemented.

101. Prior to the commencement of the drop-in session on 15 August 2019, Mr Wright was informed by Mr Barada that he had been approached by several staff within the Recovery Department who had told him that they intended to attend the drop-in session to discuss concerns they had about the Claimant. In the circumstances, Mr Wright allocated an hour before the scheduled drop-in session for the Recovery staff to see him about those issues.

102. Mr Wright had not taken any notes of those discussions, and could not recall the particular identities of who had attended. He referred to four groups of staff coming to him, with one attending individually, and with the others attending in groups of two or three.

103. On 15 August 2019, a further email was received from a member of staff of the Recovery Unit raising concerns over the Claimant's management style and referring to having had "*run-ins*" with the Claimant over the years. It was not clear whether the person who sent the email was one of the ones who met with Mr Wright on the day.

104. On 20 August 2019, Karen Morgan then sent a more detailed email to Lianne Morse of the Respondent's HR department, going into detail about a number of the issues she had raised about the Claimant in her letter of January 2019, and adding in additional matters.

105. Having met the individuals on 15 August 2019, Mr Wright sent an email to Ms Waites, Mr Barada and Ms Wade, noting that he was supportive of the approach Ms Waites had suggested, but that he felt that it was important that the strength of feeling from the staff was not underestimated. He referred to five members of Recovery staff having come to see him reporting the same themes. He then sent a further email, approximately half an hour later, confirming that he had now seen a further member of the Recovery staff and that he felt that the "investigation" from a couple of years earlier seemed to be part of the issue. He seemed there to be referring to the investigation into the Recovery Unit's management in 2016. Mr Wright described the staff as, "*all reporting their anxiety at raising things again as they were raised previously, which many of them found traumatic, and nothing actually changed in reality*".

106. The Claimant returned from annual leave on 27 August 2019, and Mr Barada met with her that morning. Mr Barada produced a note of that discussion, which he did not share with the Claimant at the time and with which the Claimant subsequently disagreed. The Claimant did confirm however, that Mr Barada had informed her that theatre staff had raised concerns about her with Mr Wright, and that she had been described as controlling and unsupportive of staff. On balance, bearing in mind that the themes outlined by Mr Barada in his note echo those raised in the emails that had very recently been sent in by Recovery Unit staff, we were satisfied that the summary was accurate. We noted that the Claimant in her witness statement noted that Mr Barada had told her during that meeting that an initial assessment had been arranged, but we did not consider that that happened at that meeting, but instead took place following a meeting between the Claimant, Mr Barada and Ms Wade the following day. As at 27 August 2019, no further action was indicated.

107. On the following day, 28 August 2019, Clare Wade was in attendance at UHL. Ms Wade, as Ms Chinn's line manager, was now effectively in line management control of the Claimant from a professional perspective. Ms Wade and Mr Barada felt that it would be helpful to the Claimant for them to meet, as Ms Wade had previously mentored the Claimant during the time she had spent at UHW in 2016.

108. Prior to this meeting, further email discussions had taken place between Mr Barada, Ms Waites, Ms Wade and Mr Wright, following the receipt of the further email from Karen Morgan and the further complaint from a member of the

Recovery Unit staff. In an email on 21 August 2019, Mr Barada reported that his concern was that the Claimant was due back the following week and that he wished to be in the best possible position to support her. He noted that the strength of feeling in the Recovery Unit was such that it had reached a tipping point, where staff were quite openly writing to senior management to express their concerns about the Claimant's management style and behaviour. Mr Barada commented that he was concerned that when the Claimant returned the atmosphere may become toxic, and that he was concerned as to how that would affect the Claimant and he wanted to make sure that she was well supported. He questioned whether he should stick with the plan where there could be a referral to Occupational Health, or whether they should make a more formal intervention and remove the Claimant from Recovery pending investigation. He raised a specific question of Ms Waites in this email asking, "*Do we have enough to do something more formal?*".

109. Ms Waites replied briefly, stating that she thought that whatever the conversation was, the Claimant needed to be moved, and Ms Wade noted that she agreed that, based on what staff had shared, for her there was already enough information. She confirmed that she had spoken to other senior nurses, and one was content to have the Claimant working with her non-clinically in UHW. She also confirmed that she had someone lined up to do the initial assessment and queried of Ms Waites whether that was still needed, bearing in mind the amount of information that they already had.

110. Whilst Ms Wade and Mr Barada indicated in their evidence that the decision to redeploy the Claimant from the Recovery Unit in UHL only took place in view of her actions during the meeting on 28 August, it seemed clear to us that there was already a plan in place that the Claimant should be redeployed pending investigation. In our view, it would only be if the Claimant had accepted that there was a health or personal problem which may have impacted on her behaviour that redeployment would not have happened with, in that case, Occupational Health advice being obtained, presumably with the Claimant spending a period of time on leave.

111. Regardless of that prior position however, both Mr Barada and Ms Wade expressed concerns about the way the Claimant conducted herself during the meeting. Regrettably, no notes of the discussion were put before us, but Ms Wade and Mr Barada were consistent in their evidence, both before us and during the internal processes, and we were therefore satisfied that we could accept it. They described the Claimant as being disrespectful and unprofessional, and indeed that she mimicked Ms Wade's words in a childlike voice. Ms Wade confirmed that the Claimant's behaviour confirmed her decision that she be redeployed.

112. The Respondent's disciplinary procedure notes that, in some circumstances, it may be appropriate to suspend an employee or to deploy them to another post or work pattern or workplace on a temporary basis. The provision (paragraph 11.1) goes on to say that, where alternatives to suspension are being considered, that would only be done following a discussion with the employee

and their representative, and would take into account the reasonableness of the action in all the circumstances. Paragraph 11.3 confirms however, that if suitable temporary deployment is offered then the employee is expected to accept.

113. As a consequence of Ms Wade's decision, the Claimant was told that she would be redeployed to a role in UHW whilst the initial assessment was undertaken. The Claimant did not mention during the meeting any concern that she had about attending at UHW, but did, in an email to Mr Barada of 6 September 2019, note that she had caring responsibilities for her mother and would therefore find it difficult to work at UHW rather than UHL.

The Claimant's grievance

114. The Claimant then wrote to Ms Wade on 3 September 2019 referring to the meeting, that she had been told that staff had put in complaints about her management style, and that she had informed Ms Wade and Mr Barada that she felt that she was suffering "*retaliation discrimination*" because she had raised issues over what she felt to be unsafe manual handling practices and the introduction of uniforms. She noted that she was being moved from her role until a further investigation had been undertaken.

115. The Claimant went on to refer to having been out of her role for a week, and to having had no letter or explanation in writing. She noted that she would therefore wish to invoke the grievance policy at stage one because she felt that she had suffered unlawful retaliation discrimination which had resulted in a catalogue of harassment and conflict within her team due to the changes, and lack of support from her line manager in managing those changes.

116. Ms Wade replied, by a letter of the same date, although it was sent by recorded delivery and was ultimately not received by the Claimant until she raised the lack of any response from Ms Wade with Mr Barada on 26 September 2019, following which he sent her a copy. In the letter, Ms Wade noted that she was sorry that the Claimant felt that the meeting had been unsupportive and that she was saddened by some of the points the Claimant had raised in her letter. She commented that she believed that the Claimant had been supported in the meeting and therefore she had not agreed with her version of events, but noted her perspective that she felt that the behaviour the Claimant had displayed towards herself and Mr Barada during the meeting had been unprofessional and unacceptable. Ms Wade confirmed that the Claimant had already been informed that the initial assessment would be undertaken. She concluded the letter by indicating her hope that the Claimant felt that she had answered the key points in the grievance.

117. Mr Barada had in fact written to the Claimant on 3 September 2019 referring to the two meetings on 27 and 28 August 2019 and the concerns that had been raised about the Claimant's behaviour. Mr Barada confirmed that the Claimant had been informed that she would be temporarily redeployed for the duration of the initial assessment to the Trauma and Orthopaedics Directorate, but that it

had been agreed that she would be placed on authorised paid leave for a period of one week from 29 August 2019. The letter confirmed that, as the Claimant had a day off on 6 September 2019, she should report to the Trauma and Orthopaedics Director in UHW on Monday 9 September. In the event, the Claimant did not report for work at UHW on 6 September 2019 and was certified as unfit for work until the end of February 2020. She then worked at other departments at UHL.

118. Stage one of the Respondent's grievance policy is an initial informal grievance discussion with the employee's line manager, which should take place within seven calendar days of the matter being raised. Although no discussion took place, it appeared to us that Ms Wade intended her letter to serve as her response to that initial informal grievance.

119. The Claimant then indicated that she wished to progress the matters to stage two, the stage of a formal grievance. In the grievance form, dated 3 October 2019, however, the Claimant noted that she wished to invoke stage one of the grievance policy. Ms Wade then wrote to the Claimant on 15 October 2019 noting that she had already responded to the Claimant's concerns at stage one, and therefore asked the Claimant to confirm that the grievance she had recently submitted was actually a stage two grievance. She pointed out that, if it was, then it would need to be considered by the Deputy Executive Director of Nursing in accordance with the Respondent's policy.

120. Ms Wade went on to say that she felt that she had responded in her letter of 5 September 2019 to a lot of the concerns the Claimant had raised, but she then provided further responses. She concluded by saying that, in light of the two grievances that the Claimant had submitted, she felt it would be best if the initial assessment of the disciplinary investigation was managed by an independent manager, and that Barbara Davies, Lead Nurse of the Medicine Clinical Board, would consider the initial assessment when it had been completed. The Claimant replied to Ms Wade on 21 October 2019 noting that she wanted to invoke stage two of the policy.

121. The initial assessment was undertaken by David Mr Pitchforth, a Senior Nurse in the Medicine Clinical Board, in October and November 2019. His report, in which he noted the material he had reviewed and the meeting he had with the Claimant and her trade union representative on 12 November 2019, was provided to Mrs Davies, who then met with the Claimant and her union representative on 13 December 2019. Mrs Davies then confirmed the action that she had directed should be undertaken in a letter dated 13 December 2019. That was that a formal investigation was required which would consider the following broad allegations:

    *(1)* "*Your behaviour as a manager/leader has been inappropriate and could constitute bullying. Examples include: being too rigid/inflexible in your approach: too controlling: undermining staff in front of others: showing a lack of empathy towards your staff;*

*(2) You have breached the confidentiality of your staff;*

*(3) You have shouted at staff and failed to listen to their ideas/opinions;*

*(4) You have failed to treat staff in an equitable way;*

(5) *You have failed to adhere to the Health Board's Values and Behaviours*".

122. Mrs Davies referenced a particular person as having been appointed as investigating officer, although in the event that person did not actually undertake the investigation, with Sarah Matthews undertaking the investigation instead. She then undertook some investigatory interviews with staff working in the Recovery Unit in January and February 2020.

123. In the meantime, the Claimant's stage two grievance was acknowledged formally by the Respondent's HR department on 30 October 2019. Then, on 25 November 2019, the Claimant was invited to attend a grievance meeting with Jason Roberts, Deputy Executive Nurse Director, on 18 December 2019. In the event, the Claimant's union representative was unavailable on that date, and, due to diary difficulties in relation to Mr Roberts, Ms Wade (who was to present the management case) and the Claimant's trade union representative in January and February, it was not possible to convene the hearing until 17 February 2020.

124. The grievance hearing went ahead on that day with Jason Roberts acting as the decision maker, supported by a member of the Respondent's HR team. The Claimant attended and was accompanied by her trade union representative. Prior to the hearing, Mr Roberts received and reviewed a pack of documents, including a management statement of case prepared by Ms Wade and a staff statement of case prepared by the Claimant. The Claimant had intended to call two witnesses during the hearing but ultimately decided that she did not require them to attend. Mr Barada, Ms Wade and Lianne Morse from HR all attended to give evidence. Mr Roberts then produced his outcome decision the following day, 18 February 2020. He noted the grounds of the Claimant's grievance, which were:

- That she had suffered unlawful retaliation due to raising concerns relating to patient safety and the safe manual handling of beds and the introduction of uniforms;

- That she felt that the Respondent's policies and procedures were not being applied correctly in relation to the initial assessment undertaken as part of the disciplinary policy; and

- That she felt that the disciplinary policy had not been followed in relation to her temporary redeployment.

125. Mr Roberts then went on to outline the matters highlighted by the Claimant and to set out the responses to those matters provided by Ms Wade, Ms Morse and

Mr Barada. He concluded, in relation to the concerns raised by the Claimant regarding the moving of beds that her concerns had been addressed in a number of ways, including face to face meetings with Mr Barada, numerous risk assessments, communications with the health and safety adviser, the benchmarking exercise undertaken by Mr Barada, and the raising of concerns at the Governance Group and the All Wales Theatre Manager Group. He concluded that there had been significant support in relation to addressing the Claimant's concerns and in implementing the bed changes, but he noted that the push/pull assessment still needed to be shared with the Claimant and the department.

126. Mr Roberts commented that, based on Mr Barada's evidence and the Claimant's own account of concerns raised regarding Mr Warman, he believed that the Claimant had been subjected to some inappropriate behaviour from him. Mr Roberts clarified during the course of the hearing, when giving oral evidence, that he had not meant to state definitively that the Claimant had been subjected to inappropriate behaviour from Mr Warman, but that the Claimant had raised concerns about being subjected to such behaviour which needed to be investigated.

127. Mr Roberts concluded that the Claimant had not suffered inappropriate behaviour with regard to uniforms, although he noted that there was evidence that Mr Barada had undermined the Claimant's approach to the introduction of uniforms by telling staff that they could buy their own scrubs. He concluded that Mr Barada should have communicated with the Claimant better and have supported her more with the implementation. Mr Roberts concluded, with regard to the initial assessment of the Claimant under the disciplinary policy, that management had acted in the best interests of all parties. He noted that there had been eleven separate concerns raised by staff.

128. With regard to that, there was some discussion with a number of witnesses during the course of the hearing about whether there had indeed been eleven separate concerns, as it was not clear as to whether some individuals had been counted more than once. It seemed to us however, that concerns had been raised by at least seven individual members of staff.

129. Mr Roberts also observed that Ms Wade had explained that the Claimant's behaviour during the meeting on 28 August 2019 had reassured management that a move out of the department was necessary. Mr Roberts noted that he did have some concerns regarding the length of time that the fact finding process had taken, but felt that the decision to move the Claimant out of the department had been correct, in order to support the Claimant during the process and to protect those who had raised concerns regarding the Claimant's behaviour.

130. Mr Roberts also commented that he was satisfied that the initial assessment had been impartial as it had been completed by a senior nurse from the Medicine Clinical Board and had been reviewed by a Lead Nurse from that Board who had deemed the findings serious enough to warrant a full

investigation. He commented that he felt that management had acted fairly by appointing someone from outside the Surgery Clinical Board following the submission of the Claimant's stage two grievance. He commented that, whilst he acknowledged that the fact finding stage had taken a considerable amount of time, he believed that a fair process had been followed. He also commented that he believed that the ongoing disciplinary process was being dealt with appropriately.

131. Mr Roberts concluded by saying that his decision was to "not uphold" the Claimant's grievance. However, he recommended the following:

- "*That the push/pull assessment is completed and shared with the Clinical Board.*

- *That the concerns you have raised regarding Paul Warman's behaviour towards you are dealt with accordingly.*

- *Ensure you are receiving regular updates in relation to the ongoing investigation and that this is concluded as quickly as possible.*"

132. Mr Roberts confirmed the Claimant's ability to appeal his decision. The Claimant submitted an appeal on 6 March 2020, and that was acknowledged by the Respondent's HR department on the same day. It was noted that a stage three grievance hearing, i.e. an appeal hearing, would be arranged to enable the grievance to be discussed.

133. However, by this stage the COVID-19 pandemic was starting to take hold, and that had obvious implications for Health Boards. That led to the Respondent taking a decision to put internal processes on hold, and no progress was then made with regard to the Claimant's stage three grievance or the disciplinary investigation until July 2020.

134. With regard to the latter, the Claimant met with the investigating officer, Sarah Matthews, on 23 July 2020. With regard to the former, the grievance appeal was considered at a hearing on 11 September 2020, the Claimant having been notified of that date on 16 July 2020. The appeal hearing had initially been arranged for 23 April 2020, with a letter sent to the Claimant on 12 March 2020 confirming that. However, that hearing did not take place due to the decision not to progress internal procedures at that time. The Claimant was informed of that by a letter dated 23 March 2020.

135. The appeal decision-maker was Ruth Walker, and she was supported by a different member of the Claimant's HR department. The Claimant was supported by her union representative. As with the stage two grievance hearing, Ms Walker was provided with a pack of documents, including a management statement of case prepared by Mr Roberts and a staff statement of case prepared by the Claimant, together with a number of supporting documents. Ms Walker provided her decision on the appeal by a letter dated 25 September 2020.

136. Ms Walker noted the Claimant's grounds of appeal, which were as follows:

> "*1. You had been treated unfairly due to the concerns that you had raised in relation to the new beds in recovery. You stated that the appropriate risk assessments were not being adhered to.*
>
> *2. As a result of raising your concerns you had also been subjected to snide comments by theatre porters and threatened with grievance procedures.*
>
> *3. You specifically complained about the behaviour of Paul Warman and this was not addressed in accordance with human resource policy.*
>
> *4. You were undermined in your role as Clinical Leader by your Line Manager, Jon Barada. Specifically relating to the implementation of the All Wales Uniform Policy.*
>
> *5. You were not notified of the complaints that had been made by staff and suffered psychological detriment from being from being moved out of the department. The delay in this process has caused you psychological detriment, particularly when linked to being moved out of the department in to another hospital.*
>
> *6. There were significant delays in the fact finding/initial assessment which took almost five months. During this time you were moved out of the department.*"

137. Ms Walker summarised the points the Claimant had made in support of her appeal, whilst noting the points made by Mr Roberts in response, and matters arising from the documentation.

138. Ms Roberts then concluded that her decision was to "*partially uphold*" the Claimant's grievance on the basis that there had been significant delays in the fact finding/initial assessment which had taken almost five months. She also noted the recommendations contained in the stage two grievance outcome letter had not been followed up to ensure that they had been completed. She noted that she recognised that they were not in "normal times" and the pressures of the COVID-19 outbreak had impacted upon timescales and would continue to do so. She confirmed however that she had chased up all three recommendations and that they were now being actioned.

139. Ms Walker also commented that she upheld Mr Roberts' decision that Mr Barada's actions towards the Claimant in relation to the implementation of the All Wales uniform policy had been undermining, and that his behaviour in that regard had been inappropriate. She noted however that she had been, "*unable to find any evidence that the formal investigation was commissioned as a result of the concerns you have raised in relation to the beds*".

140. She commented that she supported the view that management had made an appropriate decision to temporarily redeploy the Claimant, and that that decision had been reasonable in the circumstances where eleven members of

staff had raised concerns, as she felt that it had been made in the best interests of everyone involved. Again, we note that it was not clear from the evidence put before us that eleven members of staff had raised concerns as it was possible that some had been counted more than once. As we have previously noted, however, it seemed clear that at least seven members of staff had raised concerns about the Claimant.

141. Ms Walker concluded by saying that as a result of her decisions she was directing that the following recommendations were carried out without delay:

- "*That the formal disciplinary investigation process is completed in a timely manner and that you receive regular updates from the Investigating Officer as per Section 10.1 of the Cardiff and Vale UHB Disciplinary Policy and Procedure. I have been advised that the Investigating Officer has one more witness to interview and will then be in a position to complete the report.*

- *That an initial assessment is undertaken by Ceri Chinn, Lead Nurse, into the concerns raised by yourself regarding Paul Warman's behaviour towards you, I understand that she has already been in contact with you to arrange a meeting.*

- *That the Push and Pull Assessment completed by Sarah Mortimer is shared with yourself by Ceri Chinn by week ending 2 October 2020.*"

142. Ms Walker concluded by saying that her decision was the final stage of the grievance policy and could not be appealed.

143. With regard to the initial assessment in relation to the concerns raised by the Claimant about Mr Warman, Ms Chinn spoke to the Claimant by telephone to get the detail of her concerns and also spoke to Mr Warman. The Claimant then indicated that she wished to meet with Ms Chinn as she had evidence to provide to her, but she also raised concerns about Ms Chinn's impartiality, as Ms Chinn had had some involvement in the bed issue in April and May 2019. The Respondent's HR team however confirmed that as Ms Chinn had had no involvement with the concerns the Claimant had raised about Mr Warman it was therefore appropriate for her to undertake the initial assessment. It was however confirmed that the initial assessment carried out by Ms Chinn would be reviewed by a manager from outside the Surgical Clinical Board.

144. Ms Chinn met the Claimant in January 2021, and received from her a detailed statement of her concerns relating to Mr Warman. She then completed her initial assessment form. In it she noted the concerns raised by the Claimant which were the concerns raised in the various sub-paragraphs of the Claimant's second detriment under paragraph 15 of the List of Issues, and also the Claimant's sixth detriment, together with some additional matters. In relation to each concern, Ms Chinn set out Mr Warman's response. She concluded that no action should be taken.

145. The initial assessment was then passed to Catherine Heath, Director of Nursing at the Children and Women's Clinical Board, for review. She reviewed the assessment and the documents produced in relation to it, and was satisfied that the initial assessment had been thorough. She also felt that there was little tangible evidence provided to support the allegations, with Mr Warman making some limited admissions about his behaviour, e.g. in relation to a comment about the Claimant's dead parrot, for which he apologised, but that otherwise it was very much a "he said/she said" situation. She wrote to the Claimant on 11 February 2020 noting that she did not consider the issues described in the information presented to her to be sufficiently serious to invoke further disciplinary investigation. She did however recommend that the Claimant and Mr Warman work with a trained mediator to find an acceptable resolution to allow them to work together. In the event, as the Claimant was subsequently dismissed, that did not take place.

The disciplinary process

146. Having met the Claimant in July 2020, Ms Matthews continued with the investigation, although she continued to experience difficulties because of COVID-19 restrictions. Ms Matthews worked at UHW rather than UHL and was managing a ward with COVID positive patients which meant that she could only go to UHL first thing in the morning. She met Ms Senior in September 2020 and Mr Warman in October 2020, and then interviewed a member of the Recovery Unit to whom the Claimant had suggested she speak in November 2020. She then produced an initial version of her report at the start of December 2020, but it was pointed out to her by the Respondent's HR team that it was not felt that the allegation around confidentiality had been covered sufficiently. Ms Matthews then met with the Claimant again on 6 January 2021. She then submitted her final report on 2 February 2021.

147. Ms Matthews concluded that evidence had been obtained which supported allegations 1, 3, 4 and 5, but that there was little actual evidence to support allegation 2 regarding breaching confidentiality. Ms Matthews' report was then passed to Linda Hughes-Jones, who by then had been identified as the person to act as the disciplining officer under the Respondent's disciplinary policy. She concluded that there was a case to answer in relation to all five allegations.

148. Ms Hughes-Jones wrote to the Claimant on 17 March 2021, inviting her to a disciplinary hearing to be held on Monday 19 and Wednesday 21 April 2021. A copy of Ms Matthews' report together with its appendices was enclosed with the letter and the Claimant was asked to submit any further information or documentation in support of her case by 12 April 2021. It was confirmed that Ms Hughes-Jones would be the disciplining officer and would be supported by the Respondent's Assistant Head of Workforce. It was also confirmed that Ms Matthews would present the findings of the report and that eight members of staff would attend as witnesses. That was out of the ten staff who were interviewed by Ms Matthews. The Claimant was asked that, if she wished to call any employees as witnesses, she should contact Ms Hughes-Jones fourteen days prior to the hearing date. The Claimant submitted additional

documentation and also requested that four employees, three recovery practitioners and one porter, attend as witnesses.

149. Due to the ongoing COVID restrictions, only the members of the disciplinary panel; Ms Hughes-Jones, supported by a lead nurse from Cardiac Services who acted as the professional adviser, and a representative of HR; the Claimant and her trade union representative were present in person. Ms Matthews also attended in person on one day. All witnesses, and Ms Matthews on the other days, attended remotely via Teams. Whilst there were some difficulties with regard to the management of the hearing in that manner, all witness evidence was able to be received in that way.

150. There was insufficient time on the two days allocated to complete the consideration of all evidence, and the hearing therefore continued for a third day on 27 April 2021. The evidence was concluded on that day and closing submissions were made. The hearing then adjourned for the panel to reach its decision, and was reconvened for Ms Hughes-Jones to deliver that decision. That was that allegations 1, 3 and 5 were proven but that, whilst some evidence was available to support allegations 2 and 4, they were not found proven. Ms Hughes-Jones confirmed that the allegations which had been found proven were considered to be gross misconduct and therefore the Claimant's employment was terminated with immediate effect.

151. Ms Hughes-Jones confirmed that decision in a letter sent to the Claimant on 4 May 2021. Ms Hughes-Jones confirmed in her evidence before us that the panel's conclusion had been that the three proven allegations were considered to amount to gross misconduct both individually and collectively.

152. During the course of the disciplinary hearing, reference was made, by several witnesses and by the Claimant herself, to the investigation into the management of the Recovery Unit in 2016. Ms Hughes-Jones then requested that the letter sent to the Claimant at that time be procured in order to have a better understanding about the points that were being raised. During the course of this hearing the Claimant contended that she had not agreed to the letter being used during the hearing, or at least that she had not been in a position where she could have objected. We noted however that the transcript of the hearing gave no indication that the Claimant or her trade union representative had any concern about Ms Hughes-Jones' request to have sight of the letter relating to the 2016 investigation. On balance, we were satisfied that the letter, which was provided to the panel by HR, was obtained with the consent of the Claimant.

153. In any event, the letter was not used by the panel as a direct part of their decision making, but it did cement what the panel thought. It was referred to within the dismissal letter, in which it was noted that the investigation had highlighted some challenging team behaviours and had referred to an autocratic management style.

154. The panel concluded that, notwithstanding the mitigation put forward by the Claimant, dismissal was the appropriate sanction. The panel was concerned, particularly as the Claimant had not shown any insight into her behaviour, that redeployment into a different area would be likely to lead to similar instances of behaviour. The panel then concluded that summary dismissal was the appropriate sanction to impose.

155. Ms Hughes-Jones confirmed to the Claimant that she had a right to appeal the dismissal decision and she did submit an appeal on 18 May 2021. There were four elements to the appeal:

    "*1. Unfair process of the investigation itself and the disciplinary hearing*

    *2. Unfair inconsistent treatment*

    *3. Unfair judgment of the disciplinary officer*

    *4. Unfair harshness of the disciplinary penalty imposed*"

156. The Claimant then expanded on those points in a sixteen-page appeal letter. The letter was acknowledged the same day and an appeal hearing was arranged for 30 June 2021, chaired by Jane Murphy, the then Deputy Director of Nursing.

157. In advance of the hearing Ms Murphy received documentary submissions and evidence from the Claimant in support of her appeal, and documentation provided by the Respondent. A management statement of case, summarising the procedures followed at the disciplinary hearing, was produced by Ms Hughes-Jones. In this, she noted the three allegations that had been upheld and that disciplinary rules 9, 12, 19 and 20 from the Respondent's disciplinary policy, namely gross insubordination, unacceptable behaviour, failure to meet required standards, and gross areas of professional misconduct, had been made out. Ms Hughes-Jones also commented on the Claimant's appeal.

158. Following the appeal hearing, at which the Claimant was accompanied by a friend, noting that she was aware of her right to be accompanied by a trade union representative but had chosen not to be so accompanied, Ms Murphy produced her appeal outcome letter on 26 July 2021.

159. Ms Murphy summarised the Claimant's grounds of appeal and the submissions she had made in respect of them. She also summarised Ms Hughes-Jones' statements in response. Ms Murphy then concluded that, having considered all the documentation, discussions and evidence, she had determined that the disciplinary process had been followed in line with the disciplinary policy and the decision made to summarily dismiss the Claimant was, in her view, a reasonable and fair judgment. She confirmed that she was satisfied that the Claimant had had appropriate opportunities to respond to the allegations, that there was no evidence to suggest that any of the decisions made or steps taken as part of the disciplinary process had been made in direct response or

as retaliation to the Claimant raising concerns in relation to the new beds. Rather, Ms Murphy was satisfied that it was evident that decisions had been made based on the Claimant's behaviours. She confirmed that she was satisfied that steps had been taken to consider any possibility that actions had been taken out of retaliation and to remove any potential bias by having impartial decision makers at each stage of the process, ensuring a cross section of witnesses were heard from, and ensuring that evidence relied on to uphold allegations had come from a number and range of witnesses.

160. The Claimant had raised her concerns about the use of information from the 2016 investigation during the appeal hearing, and Ms Murphy confirmed that she considered that it was reasonable for Ms Hughes-Jones to have requested that further information on the basis that it was referred to during the hearing, and that the themes arising were similar to the allegations being faced during this disciplinary hearing. Ms Murphy confirmed that she had not seen any evidence that any formal objections had been raised about the use of the relevant letter.

161. Ms Murphy confirmed that she was satisfied, from the combination of the inappropriate behaviour described by the witnesses and the consequential impact on the Recovery team, that the Claimant's actions amounted to gross misconduct. She confirmed that some of those behaviours were observed during the appeal hearing, for example by the Claimant appearing not to listen to, and talking over, Ms Hughes-Jones.

162. Ms Murphy noted that it was clear that other sanctions had been available to panel and had been considered, but that a significant factor in terms of why alternative sanctions were not imposed was due to the fact that the Claimant had not appeared to demonstrate any remorse or insight in terms of the impact of her behaviour and did not appear to understand the significance of the allegations. Ms Murphy noted that, when questioned during the appeal hearing about her insight, the Claimant continued to maintain the issue was down to the perceptions of staff, which Ms Walker felt did not demonstrate any insight in terms of how her own actions or behaviours could have contributed to those perceptions. Ms Murphy concluded therefore that she did not uphold the appeal.

NMC referral

163. Subsequent to the dismissal decision, Ms Hughes-Jones submitted a report to the Nursing and Midwifery Council. This was understood to be a standard step taken whenever a nurse is dismissed. The report form asked various specific questions relating to the allegations which led to the dismissal decision. It also asked a question as to whether the Respondent had been aware of any other concerns about the nurse of a similar nature, and Ms Hughes-Jones then noted the comments made in 2016. The form requested copies of the evidence that had been considered, including witness statements, and that was provided.

164. That caused the Claimant to be concerned about the inclusion of a statement given to Ms Matthews by one of the members of the Recovery Unit which the Claimant felt had given rise to a concern that she may have assaulted a patient. The statement recorded by Ms Matthews referred to the Claimant inappropriately waking up a post-operative patient by pressing on her bandaged chest. During the disciplinary hearing, the nurse member of the panel queried that, and the member of the Recovery Unit clarified that she had not meant to suggest that the Claimant had done anything untoward other than wake up the patient. The Claimant was concerned that only the initial statement to Ms Matthews was included in the documentation provided to the NMC, without clarification. However, as the matter had not been addressed as a matter of professional misconduct, Ms Hughes-Jones had not seen any need to provide any particular clarificatory comment. Indeed, we noted that the NMC did not take any action in relation to the Claimant following the referral.

**Conclusions**

165. Applying our findings and the applicable law to the issues we had to decide, our conclusions are set out below. As it had already been decided that the Claimant had made protected disclosures, we focused first on whether she had been treated to her detriment as a result of that before moving on to consider whether she had been dismissed as a result of that. We then moved to consider whether any detriment or dismissal had arisen on health and safety grounds for the purposes of the claims under sections 44(1)(c) and 100(1)(c) ERA. We then moved on to consider the "ordinary" unfair dismissal claim under section 94 ERA, before finally considering the wrongful dismissal claim.

Protected Disclosure Detriment

166. In relation to each asserted detriment, we adopted a three stage process. We first considered whether the asserted act or omission happened in fact. We then moved to consider whether the act or omission, if it happened, amounted to a detriment. Finally, if the act or omission occurred and amounted to a detriment, we considered whether the detriment had occurred on the ground that the Claimant had made protected disclosures. We considered each of the 23 detriments set out at paragraph 15 of the List of Issues in turn.

*Detriment (1)*

167. As we noted in our findings, we were satisfied that Mr Baker had indicated to the Claimant that he could raise a grievance against her. Whilst we would not have described it as being a "threat", we nevertheless considered, on balance, that Mr Baker had indicated to the Claimant that he would raise the matter further if the Claimant insisted that Recovery nurses would not assist with the movement of beds. The evidence we heard indicated that Mr Baker would not be slow to raise, and escalate, issues of concern within the workplace if he was dissatisfied.

168. We were also then satisfied that Mr Baker's indication that he would escalate matters amounted to a detriment. Whilst, as we have noted, this was not an entirely unusual step for Mr Baker to take, and whilst those working with him may have taken such comments with something of a pinch of salt, in the context of the **Shamoon** test, we were satisfied that the Claimant could reasonably have perceived the comment as a detriment.

169. However, we were not satisfied that Mr Baker's comments had arisen because of the protected disclosures. By the time of this incident, the morning of 25 April 2019, only the Claimant's first protected disclosure, her email to the manual handling adviser the day before, had been made. Mr Baker had no knowledge of that and the Claimant did not contend that she had made any form of protected disclosure to Mr Baker directly during the course of their conversation on 25 April 2019.

170. Whilst the discussion between the Claimant and Mr Baker clearly arose in relation to the subject matter of the disclosures that the Claimant had made and would go on to make, i.e. the movement of beds, we did not see that Mr Baker's reaction was, in any sense, retaliation for the disclosure that the Claimant had made. It was rather simply a reaction by Mr Baker to the position being taken by the Claimant, a position with which Mr Baker, and as it subsequently transpired the vast majority of other employees, disagreed with.

171. Indeed, that ultimately seemed to be something of a theme in relation to some of the Claimant's claimed detriments, in that whilst several may have had their genesis, in terms of a basic "but for" analysis, in the "bed issue", we considered that where acts or omissions occurred and could be considered to be detrimental to the Claimant, they did not arise because of the subject matter of the Claimant's disclosures but, at most, because of the way in which she raised the issue and discussed it with others.

*Detriment (2)*

172. This asserted detriment contained six sub-paragraphs and we deal with each of those in turn.

*(i) Replace the Claimant's name on the duty manager rota with David Smalley's name.*

173. The evidence before us was that the rota for undertaking the duty manager role was placed on a whiteboard. Mr Warman, who was the duty manager, would write in his name on the days on which he would be in work, leaving blank spaces on the days on which he would not be in work, which would then be completed by others who would undertake the duty manager role on those days. The Claimant contended that she had put her name down on one of those days, but it was then removed by Mr Warman who replaced it with the name of another employee. There was however no evidence to indicate that the Claimant's name had been replaced. Further, there was no indication to suggest that, had the Claimant's name been replaced, it had been done by Mr

Warman. We noted the evidence he gave, during internal processes and to us, that his only interest would be to put his own name on the rota for the days on which he would be at work, and he had no reason to take any action in relation to the other days. On balance, we did not conclude that this act occurred in fact.

*(ii) Intentionally embarrass the Claimant inform [sic] of Karen Morgan and Ronnie Schon by implying that the Claimant was not capable of doing her job without them and that they did all the work.*

174. This matter was again raised internally by the Claimant. She did not provide specific detail of the occasions on which she asserted that Mr Warman had intentionally embarrassed her in front of the two named individuals, whether during those internal processes or before us. Mr Warman noted, both in relation to the internal processes and during this hearing, that he could recall one incident when he had observed Mr Schon trying to explain to the Claimant how to use a particular software package. Mr Warman was in the room at the time and ultimately left because he could not concentrate. As he left, he commented, he said in a light-hearted way, to Mr Schon that he, "deserved a medal".

175. We were satisfied that that event happened, although we did not consider that Mr Warman had done it to "intentionally embarrass" the Claimant. Beyond that, we did not consider that Mr Warman's comment had in any sense been driven by the Claimant's disclosures. In our view, it was simply a reaction to what Mr Warman observed.

*(iii) Purposely ostracise her at the workplace by ignoring and excluding her when she was working in the clinical leader's room.*

176. We saw no evidence to support the Claimant's contention that Mr Warman purposely ostracised her by ignoring her and excluding her when working in the clinical leader's room. We noted that, for some time, certainly back into 2018, the relationship between the Claimant and Mr Warman was not a good one, and that Mr Warman would by then have limited his interactions with the Claimant to the purely professional. We did not however consider that that amounted to ostracism and therefore did not consider that this asserted detriment had occurred in fact.

*(iv) Withhold important information about changes such as sickness absence and only sharing information with the Claimant's deputies.*

177. Again, there was a lack of detail from the Claimant about the occasions on which she asserted that Mr Warman would withhold information from her about changes such as sickness absence and would only share information with the Claimant's deputies. Mr Warman's observation on this was that one of the Claimant's deputies, Mr Schon, would generally be in work earlier than the Claimant, and that if, for example, one of the Recovery Unit staff had called in sick, Mr Warman would then tell Mr Schon on the basis that he was the first

senior member of the Recovery team to be in work. He would not then go on to repeat that information to the Claimant. We did not consider that Mr Warman had withheld any important information from the Claimant and had shared it only with the Claimant's deputies.

*(v) Subject the Claimant to belittling and mocking comments about Mr Warman bringing in cakes on the Claimant's day off as he did not like the Claimant and did not want to share them with her.*

178. We did not consider that this could be an allegation of bullying behaviour or threats by Mr Warman as there was no indication that any comment had been made by Mr Warman himself. The Claimant in her evidence suggested that Ms Landells had made a comment about Mr Warman not bringing in cakes, although that was not put to Ms Landells by way of cross examination. In any event, Mr Warman confirmed in his evidence, which we saw no reason to doubt, that he had, for a time, been in the habit of making a cake on his day off, which was usually a Thursday, which he would then bring in on a Friday, which was usually the Claimant's day off. He also confirmed that the last cake he had made had been some time before the disclosures were made by the Claimant, and we were satisfied about that as he could reference the particular purpose of that cake, being to commemorate the retirement of a colleague.

*(vi) Make a joke about the Claimant's dog killing her pet parrot.*

179. Mr Warman accepted that he did make a joke about the Claimant's pet parrot being killed by her dog. That was not however a comment to the Claimant, but was a comment to others which happened to be overheard by the Claimant. Whilst the Claimant indicated in her evidence that she had told Mr Barada about the death of her parrot, and had asked him to keep it confidential, Mr Warman confirmed that the matter was discussed freely by the Claimant, and we anticipated that it is the sort of thing that she would have mentioned at the time. Whilst we were satisfied that the making of a joke in this way would have been a detriment, we saw nothing to connect it to any of the Claimant's protected disclosures. It was simply a reaction, which Mr Warman accepted with hindsight had been misplaced, to the particular incident.

*Detriment (3)*

180. Whilst there were exchanges between Ms Senior and the Claimant on 18 and 19 June 2019, we did not necessarily agree that it would have involved the Claimant being shouted at by Ms Senior. We could appreciate that the exchanges could reasonably have been considered by the Claimant to have been to her detriment, but we again did not find any connection of the incidents to the Claimant's disclosures. It did not seem to us that Ms Senior was aware of any of the disclosures, although she was aware of discussions around the bed movement issue more generally. However, it appeared to us that Ms Senior's actions were driven purely by the events of the two relevant days. On 18 June, Ms Senior was reacting to concerns raised by a Consultant Anaesthetist about the lack of staff in the Recovery Unit, and on 19 June Ms

Senior reacted to the Claimant visiting her office to discuss the flushing sheets. Ms Senior's actions were not, in our view, driven by the Claimant's disclosures.

*Detriment (4)*

181. As with the incident on 25 April 2019 referred to under detriment (1), we were satisfied that the Claimant had been informed by both Mr Waites and Mr Baker that grievances could be raised. Again, we were not convinced that these necessarily should have been viewed as "threats". Similarly, we considered that the Claimant could reasonably have viewed the comments of Mr Waites and Mr Baker as detriments, although we did note that there appeared to be a stronger basis for Mr Waites and Ms Baker to raise the issue of grievances on this day than had been the case with Mr Baker on 25 April, bearing in mind the nature of the Claimant's behaviour. However, our view again was that the comment about the raising of a grievance was simply a reaction by Mr Waites and Mr Baker to the manner of the discussion on the day. Whilst, again, that discussion had its genesis in the bed issue, we did not consider that the actions of Mr Waites and Mr Baker had been done because of the issue, but because of the way the Claimant behaved.

*Detriment (5)*

182. We did not consider that this asserted detriment occurred in fact. The Claimant asserted that Mr Barada breached an assurance that he had given to her that he would raise her concerns at the Theatre Manager Group meeting. However, we did not consider that Mr Barada had given any such assurance to the Claimant. First, the matter was discussed at the Governance Group generally and did not involve any specific assurance to the Claimant. Secondly, the indications from that meeting were that Mr Barada would raise the question of the movement of beds with the Theatre Manager Group. As that did not happen in a meeting of the Group, Mr Barada raised the matter with the Theatre Manager Group generally by email.

183. Even if there had been an indication to the Claimant that Mr Barada would raise the matter at a meeting with the Theatre Manager Group, we did not consider that any detriment would have arisen to the Claimant, due to Mr Barada doing the next best thing, which was to raise his questions of the group by email.

*Detriment (6)*

184. We were not satisfied that this asserted detriment had happened in fact. Mr Warman did not countermand the Claimant's instruction to the housekeeping staff to flush the showers and sign the sheets, he simply informed housekeeping staff that, on days when he used the showers and then had signed the forms, they did not need to flush the showers and sign the forms. That seemed to us to have been an entirely sensible step to take, which could not reasonably have been considered by the Claimant to amount to a detriment.

*Detriment (7)*

185. This detriment contained three specific allegations which we dealt with in turn.

*(i) by informing staff that they could wear whatever colour uniforms they liked.*

186. Mr Barada did indeed tell Recovery Unit staff that they could wear whatever colour uniforms they liked. We were satisfied that that would reasonably have been perceived by the Claimant as a detriment, as the staff reported to the Claimant and she could therefore have been undermined by Mr Barada's actions. We would not however have gone as far as to say that that created a hostile working environment for the Claimant.

187. Regardless of that however, whilst Mr Barada was clearly aware of the Claimant's protected disclosures, we do not consider that his direction to staff about uniforms was in any way connected to those disclosures. Our view was that Mr Barada as a manager was someone who favoured the "path of least resistance" and simply reacted to the request by Recovery Unit staff to wear cooler scrubs than the All Wales nurses uniform.

188. We noted that Mr Barada did not, at any stage, attempt to prevent the Claimant from raising her concerns about how beds should be moved, and that he, in fact, suggested that the issue should be a matter to be discussed in various forums, even though he himself disagreed with the Claimant's view. In our view, those were not actions of someone who had any desire to act against the Claimant for raising those concerns. He made his decision with regard to uniforms simply in reaction to the issue presented to him and not to retaliate against the Claimant.

*(ii) describing her as somebody who liked applying policies "in an extreme way", and*

*(iii) accusing her of being controlling and unsupportive of staff.*

189. We dealt with both of these together as they both arose in the context of Mr Barada passing on comments about the Claimant made by those who complained about her. They were not views that Mr Barada expressed independently, and merely arose in the context of the investigation of the complaints against the Claimant. In our view, they could not be considered to have created a hostile working environment for the Claimant. In any event, for the reasons we have already outlined, we did not consider that Mr Barada would have been motivated to have made them by the Claimant's disclosures. He was simply reacting to the comments that had been made about her.

*Detriment (8)*

190. As a matter of fact, we were not satisfied that the Claimant had been subjected to threats by the two porters on 17 July 2019. Even from the Claimant's own evidence, there was no direct exchange between the Claimant and the porters

on this day, and she simply overheard the porters speaking outside her office. Again, as with detriments (1) and (4), we were satisfied that there were comments made by the porters that they would complain about being required to use two porters to move beds rather than one porter and one Recovery Unit member of staff. Similarly to those earlier detriments, we were satisfied that the comments about raising matters further could reasonably have been considered by the Claimant to have been a detriment. Again, however, we did not see that the comments by the porters were done on the ground of the Claimant's protected disclosures. Again, the background to the comment was the movement of beds, but we did not consider that the porters reacted to the Claimant's disclosures, they simply reacted to the event which happened on the day, which was that a request was made for two porters to attend the Recovery Unit when only one person was to be moved.

*Detriment (9)*

191. We were not satisfied that this asserted detriment occurred in fact. The Claimant submitted a Datix form relating to the two particular incidents involving Ms Senior, and there was evidence that Mr Barada had undertaken an investigation into the incident, sufficient to enable him to respond to the Datix.

*Detriment (10)*

192. Similarly, we did not consider that there was any failure by the Respondent to investigate an incident form around the incident on 17 July 2019. We noted that the Datix in this case was not in fact completed by the Claimant but by a member of staff of the Recovery Unit. However, it was clear that Mr Warman had investigated that incident.

*Detriment (11)*

193. As a matter of fact, Mr Barada did inform Recovery Unit staff that they could use their own judgement in moving the new theatre beds. We were not satisfied however that that was contrary to the risk assessment, as the assessment produced by Mr Barada on 21 June 2019 expressly left open the question of where the individuals would place themselves when moving the bed, albeit there was an indication that typically the Recovery Unit practitioner would be at the head of the bed and the porter at the foot of the bed.

194. We were also satisfied that Mr Barada's indication to Recovery Unit staff that they could use their own judgement could reasonably have been viewed by the Claimant as a detriment. She had steadfastly maintained that members of the Recovery Unit should walk alongside the bed, and in effect should not materially participate in the moving of the bed, and Mr Barada's direction to the staff could be viewed as having undermined her in that regard.

195. Again, however, we considered that this was simply an example of Mr Barada's management style and had not been done because of the Claimant's disclosures. Mr Barada had his own view as to how beds should be moved, but

he did not seek to impose that, recognising that it was a matter of individual judgement. He was also aware that several members of the recovery team, it seemed a clear majority, preferred to be involved in the movement of beds by being positioned at the head of the bed as opposed to the foot. Mr Barada's instruction was simply recognising that difference of view, and was not done to retaliate against the Claimant in any way.

*Detriment (12)*

196. As a matter of fact, Mr Barada and Ms Wade did remove the Claimant from her role prior to the formal investigation stage, and did that without any advance discussion with the Claimant and/or her representative. This was detrimental to the Claimant in that she was being required to work at a different location, and indeed the Respondent's own disciplinary policy required such a redeployment to be discussed with the employee and/or their representative. However, we did not consider that this action was taken on the ground of the Claimant's protected disclosures.

197. By this stage the complaints about the Claimant had been made by several individuals, all of whom were going to be required to work with the Claimant whilst she was being investigated. Redeploying someone under investigation in those circumstances seemed to us to be a straightforward step for an employer to take. Whilst we have noted that the step should have been taken after discussion with the Claimant and/or her representative, we noted that Ms Wade confirmed the decision following the way the Claimant behaved at the meeting on 28 August 2019. Again therefore we did not consider that that lack of discussion was motivated by the Claimant's disclosures. Rather, it was motivated by the way the Claimant presented herself at the meeting.

*Detriment (13)*

198. This asserted detriment is very similar to that set out at detriment (12). As we have noted, as a matter of fact Mr Barada did not consult with the Claimant in advance about her redeployment. It was not clear to us however that he had failed to have regard to considerations of reasonableness in relation to the proposed redeployment. As we have noted in relation to detriment (12), the redeployment was, in our view, a straightforward and sensible step for an employer to take when faced with several complaints made against one of its employees and where those who made the complaints were due to work with the person against whom the complaints had been made.

199. The Claimant's contentions with regard to failing to consider reasonableness focused on the difficulties that she would have had in relocating to UHW due to the need to be as near as possible to her mother in case called upon for emergency care. However, at the time that the redeployment decision was made, no information about the Claimant's position had been provided to Mr Barada or Ms Wade, and we did not therefore consider that there had been a failure to have regard to those matters.

200. We also observed that subsequently, due to a period of agreed leave and a period of sick leave, the Claimant did not, in fact, work at UHW, but instead worked at a different part of UHL on her return from sick leave. Whilst there was no evidence before us about whether that decision had been expressly based on the Claimant's personal situation, it seemed to us likely that it would have been based on her situation and thus there had not in fact been any overall failure to have regard to the Claimant's personal position. In any event, as we have noted, the decision taken was motivated by the particular situation in the workplace, and was not impacted by the Claimant's protected disclosures.

*Detriment (14)*

201. As a matter of fact the Respondent did not attempt to resolve the concerns raised against the Claimant informally. We did not however consider that this was reasonably to be viewed as a detriment, as the Respondent's procedures did not require any such informal step to be taken and, in any event, we did not consider that a decision not to attempt informal resolution when faced with at least seven separate complaints was unreasonable. As with the other detriments, we would, in any event, have concluded that the decision not to attempt to resolve the concerns informally was driven by the Claimant's disclosures. It was simply a reaction by the Respondent to the situation in which it found itself.

*Detriment (15)*

202. This largely repeats the substance of detriment (13). As we have noted, the Respondent did not ignore concerns raised by the Claimant about being transferred to work at UHW when there was need for her to work close to home in order to be able to care for her mother. As we have noted above, the Claimant did not in fact work at UHW at this time, and, in our view, her concerns were not therefore ignored.

*Detriment (16)*

203. We could not discern what particular act the Claimant was asserting amounted to the detriment here. She referred to her work diary having gone missing shortly after what was effectively her last day at work in UHL on 28 August 2019. Whilst there is an indirect allusion to this having been done either by the Claimant's Deputy Clinical Leader, Karen Morgan, or by Mr Warman, she could provide no evidence to support that contention. We could not therefore conclude that anything untoward had happened in relation to the Claimant's work diary, let alone that any action had been motivated by the Claimant's disclosures.

*Detriment (17)*

204. The Claimant's grievance was raised by her at the start of October 2019, with the Claimant then replying to a query from Ms Wade, confirming that she

wished to pursue the grievance at stage two of the Respondent's policy, on 21 October 2019. On 25 November 2019 the Claimant was then invited to a grievance meeting on 18 December 2019, but that meeting could not go ahead due to the unavailability of her representative. Due to further difficulties regarding the availability of those involved in the hearing, it did not then take place until 17 February 2020, with the outcome being produced on 18 February 2020. Whilst the grievance process up to stage two took four months, two months of that was taken up with the logistics of arranging the meeting. We did not consider that that involved any unreasonable, let alone deliberate, delay.

205. There was then something of a delay, indeed a failure, to implement Mr Roberts' stage two recommendations. However, there appeared to be significant confusion within the Respondent's organisation about the push/pull assessment with no formal, separately documented, assessment being produced even to this day. The outcome of the assessment had however previously been included in an email sent to the Claimant.

206. The concerns regarding Mr Warman's behaviour were not immediately investigated and nor did the Claimant receive regular updates on the ongoing investigation prior to the grievance appeal in September 2020. However, those processes were effectively put on hold between March and July 2020 which, in our view, explained the lack of progress in relation to such matters.

207. The matters were then reiterated as needing to be put in place by Ms Walker in her grievance appeal outcome. Again the push and pull assessment, as we have noted, could not be found, but the formal disciplinary investigation process was then progressed and completed in April 2021, and the initial assessment into Mr Warman by Ms Chinn was completed promptly.

208. Whilst there were delays in completing the disciplinary investigation, and then in progressing that investigation to a hearing, we again noted that there were significant operational difficulties faced by the Respondent's employees in relation to ongoing COVID-19 effects, and arranging a hearing with a number of panel members, representatives and witnesses was always very likely to take a degree of management. We did not overall consider that there had been any unreasonable, let alone deliberate, delay in the investigation and resolution of the Claimant's grievance, whether at stage two or stage three.

*Detriment (18)*

209. This largely repeats detriment (17) and our conclusions in relation to that detriment apply equally here.

*Detriment (19)*

210. Whilst the Claimant was unhappy about Mr Warman's statement to Ms Matthews, and took issue with some of the things he said, we did not consider that Mr Warman's statement was materially untrue. We did not therefore consider that this assertion was made out in fact.

*Detriment (20)*

211. Whilst the Respondent did indeed instruct Ms Chinn to investigate the Claimant's concerns about Mr Warman's behaviour, we did not consider that Ms Chinn was not impartial and that it therefore had been in some way inappropriate for her to undertake that investigation. The Claimant's concerns about Ms Chinn's involvement appeared to be that Ms Chinn had had some involvement in email discussions over the bed issue in April and May 2019. However, the investigation of concerns about Mr Warman's behaviour was different to that matter, and Ms Chinn, being in the line management chain, was an appropriate choice to undertake the investigation. We did not therefore consider that any detriment arose to the Claimant in that regard.

*Detriment (21)*

212. We did not consider, as a matter of fact, that the Respondent conducted a biased disciplinary process against the Claimant. The evidence of Ms Senior, Mr Warman, the theatre porters, and Mr Barada had a bearing on the allegations against the Claimant, and it was therefore appropriate for their evidence to be considered. It was also entirely open to the Claimant and her trade union representative to put forward representations about the validity and credibility of the evidence from those individuals if it was felt that there was any bias on their part. Consequently, we did not consider that any detriment arose in relation to this matter. If it had however, we did not see that there would have been any connection of any such detriment to the Claimant's protected disclosures. It was simply the case that the Respondent made use of evidence from relevant witnesses.

*Detriment (22)*

213. Some reference was made to the letter from the 2016 investigation during the disciplinary hearing. Ms Hughes-Jones however confirmed that that arose because reference to that investigation had been made by the Claimant herself and by other witnesses. Ms Hughes-Jones' evidence also confirmed that the document was not directly used in relation to the allegations against the Claimant, although it was clear that it did reinforce, or to use Ms Hughes-Jones' word "cement", the views reached about the allegations against the Claimant.

214. Whilst we were satisfied that the Claimant could reasonably have perceived the use of the document as detrimental to her, we did not see that its use arose from the protected disclosures. The document was referenced in the disciplinary hearing and we considered that the panel, not unreasonably, wished to have sight of it to try to get an understanding of the points being made by the witnesses, including the Claimant.

*Detriment (23)*

215. As we have noted, Ms Hughes-Jones did forward a report to the NMC following the decision to dismiss the Claimant, and the disciplinary investigation report

together with its appendices was provided as part of that. The information was not however forwarded for the purpose of the NMC commencing an investigation in respect of a serious allegation of assault.

216. As we have noted in our findings, the Claimant was concerned that the reference from one of the Recovery Unit staff to the way in which the Claimant woke up a patient suggested that an assault had taken place, and it seemed that the medical member of the panel questioned whether the Claimant's actions could be viewed as an assault, with the member of staff confirming that that was not her intention in raising it. No conclusions were drawn by the disciplinary panel about the incident, let alone that it involved an allegation of assault, and the process of providing the disciplinary investigation report and appendices was simply the usual step that would be taken in response to the questions raised in the NMC report form. We also noted that the NMC took no action in relation to the referral. Consequently, we did not see that the forwarding of information to the NMC involved any detriment. However, even if it had, we did not see that it had been done as any form of retaliatory action to the Claimant's protected disclosures. It had only been done in order to comply with the obligation on the Respondent to provide information to the NMC following the dismissal of a nurse.

Health and Safety Detriment

217. The asserted detriments at paragraph 15 of the List of Issues were pursued both as detriments on the ground of protected disclosures pursuant to section 47B ERA, and as detriments on the ground of a health and safety matter pursuant to section 44(1)(c) ERA. As we have noted, we did not conclude that any detrimental acts or omissions that may have arisen had been done on the ground of protected disclosures. Our conclusions also applied equally to the health and safety detriment claim, in that we did not consider that any detrimental act or omission that occurred was on the ground that the Claimant had raised the required health and safety matters.

218. More fundamentally in relation to the health and safety detriment claim however, we saw no evidence to suggest that the terms of section 44(1)(c) ERA had been made out. In fact, there was a paucity of evidence regarding the application of section 44(1)(c) put before us. No direct evidence was put before us from the Respondent about the existence of a safety representative or safety committee, other than Ms Wade's evidence that she chaired health and safety meetings for the Clinical Board. Whilst the position was not unequivocally clear, that evidence suggested to us that the Claimant was employed at a place where there was a safety representative or safety committee.

219. From the Claimant's perspective, no evidence was put before us about it not having been reasonably practicable for her to have raised her health and safety concerns about the movement of beds to the relevant safety representative or safety committee. There was nothing to suggest to us that there had been anything which would have prevented the Claimant from raising her concerns by those means. Regardless therefore of our views about any detrimental act

not having been done on the ground of the Claimant having raised a health and safety matter, section 44(1)(c) was simply not engaged and therefore the Claimant's claim failed in any event.

Unfair Dismissal

220. Having concluded that section 44(1)(c) ERA was not engaged in relation to the Claimant's detriment claims, we also concluded, for exactly the same reasons, as the wording is identical, that section 100(a)(c) ERA was not engaged. The Claimant's claim under that section therefore failed and fell to be dismissed.

221. With regard to the Claimant's claims of unfair dismissal under section 103A ERA and section 94 ERA, our initial focus was on the reason for dismissal. If we concluded that the reason or principal reason for the Claimant's dismissal was that she had made protected disclosures then her claim under section 103A would succeed. If we did not, then that claim would fail. We would then need to go on to consider whether the Claimant's claim of unfair dismissal under section 94 ERA succeeded.

222. With regard to the reason for dismissal, for the same reasons as we outlined repeatedly in relation to the Claimant's detriment claims, we did not consider that the reason or principal reason for the dismissal of the Claimant was the protected disclosures that she had made. Whilst, as we noted in relation to the detriment claims, the "bed issue" i.e. the concerns raised by the Claimant about the way beds were moved, formed the backdrop to the events which gave rise to her dismissal, they did no more than that. Other therefore than by adopting the most basic "but for" analysis, we did not consider that it could be said that the Claimant's disclosures were the reason for her dismissal.

223. The reason for the Claimant's dismissal was, in our view, her conduct, in the form complained about by several members of staff. Some of those complaints referenced the way in which the Claimant dealt with the bed issue as being an example of the Claimant's poor behaviour. For example, the member of the Recovery team who emailed Mr Wright the day before the drop-in session at UHL on 15 August 2019 stated, "*For myself she appears to have been like this since she has expressed a change in how to push beds from one place to another*". Even there, however, the complaint was not about what the Claimant was putting forward in relation to the bed issue, but the way in which she was doing so. Furthermore, staff pursued complaints about the Claimant's behaviour in relation to a number of other issues. For example, referencing the same email sent to Mr Wright, the member of the recovery team went on immediately to say, "*Also staff changing from scrubs to uniform*". That employee then went on to complain about the Claimant's management style, referencing how morning meetings had ended up with, "*twenty minutes of Elaine talking to us like we are children, dictating to us what we are to do, when we are to do it and how we are doing it*".

224. The same themes emerged from others who raised complaints about the Claimant's behaviour, and even though some of them referenced the bed issue,

it was again in relation to the way the Claimant went about managing the issue within the team as opposed to the underlying point that she was making.

225. We also noted that those involved in the dismissal decision, Ms Hughes-Jones and other members of the panel at the initial disciplinary stage, and Ms Murphy at the appeal stage, had no knowledge of the particular disclosures made by the Claimant, and only a very rudimentary knowledge that there was an "issue" regarding the movement of beds. Bearing in mind the direction of the Court of Appeal in **Abernethy**, we did not consider that the Claimant's disclosures had been the, or indeed a, reason for her dismissal. Instead, we were satisfied that the reason for her dismissal had been her conduct.

226. We then moved on to consider whether dismissal for that reason had been fair or unfair, considering the matters set out at paragraph 4 of the List of Issues, in essence applying the **Burchell** test, considering procedural fairness, and assessing the reasonableness of the sanction.

227. With regard to the **Burchell** test, we were satisfied that there was a genuine belief that the Claimant had committed the acts of misconduct asserted to have taken place. Those involved in the dismissal decision were drawn from other parts of the Respondent organisation, had no preconceived ideas about the Claimant or the Claimant's department, and came to matters without prior knowledge. No evidence was put before us to suggest that those involved in the dismissal decision had anything other than a genuine belief that the Claimant had committed the acts of misconduct.

228. We were also satisfied that there were reasonable grounds for that belief. A disciplinary investigation in which interviews took place with ten employees in addition to the Claimant had been completed, and the disciplinary hearing then heard from thirteen witnesses and from the Claimant. There was a consistent view expressed by a range of witnesses that the Claimant had committed the acts of misconduct complained of, and we were therefore satisfied that there had been reasonable grounds for the Respondent's belief of the Claimant's guilt.

229. We were also satisfied that the Respondent had carried out as much investigation as was reasonable in the circumstances. We did not consider that the initial assessment contributed anything material to the investigation process as it was simply designed to gauge whether there were matters worthy of investigation. As we have noted however, the investigation was comprehensive, and the Claimant was invited to provide names of witnesses she felt were relevant, and all those she identified were spoken to. The Claimant was also then invited to bring witnesses to the disciplinary hearing and did so. It seemed to us that reasonable steps had been taken by the Respondent to investigate the concerns raised about the Claimant, and certainly the steps taken fell comfortably within the range of reasonable responses.

230. With regard to procedural matters, we were satisfied that the core provisions of the ACAS Code had been observed by the Respondent. The complaints were investigated, the Claimant was informed of the case she had to meet and was provided with all relevant documents, a meeting was held to discuss the allegations and the evidence relating to them, at which the Claimant was accompanied, the Claimant was informed of the outcome of the disciplinary hearing, and was provided with an opportunity appeal against it.

231. We noted that the Claimant had made specific allegations of procedural failings as set out at paragraph 70 of her amended particulars of claim, which she contended were in breach of the ACAS Code as well as the Respondent's own disciplinary and grievance policies. Thirteen numbered concerns were raised, and we concluded in respect of them as follows:

    (1) Whilst the Respondent did not resolve the concerns raised against the Claimant informally, we did not consider that that amounted to a procedural deficiency or to a breach of the ACAS Code. We considered that, in light of the severity of the complaints raised and the number of them, it was not unreasonable for the Respondent to proceed to address them formally through its disciplinary policy.

    (2) As we have noted, the Respondent did remove the Claimant from her role prior to the formal investigation stage, and did that without discussion with the Claimant or her representative, which was in breach of the Respondent's own policy. However, we did not see that the Claimant objected to the redeployment, other than to the fact of the redeployment initially being proposed to be to UHW rather than to a different part of UHL. Notwithstanding the fact that the redeployment took place without the steps set out in the Respondent's disciplinary policy being complied with, we did not see that that impacted in any way on the fairness of the disciplinary process that was otherwise followed, or on the fairness of the dismissal decision.

    (3) We did not consider that the Respondent ignored the Claimant's concerns about being transferred to work in UHW as, as we have noted, following the period of some five months spent on sick leave, the Claimant did not, in fact, transfer to work at UHW but worked in a different part of UHL. Again, even if this amounted to a breach of the Respondent's disciplinary policy we did not see that it had any impact on the disciplinary process that was followed, or the decision that was reached.

    (4) We did not consider that there were unreasonable delays in the disciplinary investigation. Bearing in mind that the Claimant had raised a grievance, it would have been inappropriate to have completed the disciplinary process before the grievance had been concluded. However, the disciplinary investigation was run largely in parallel with the grievance process.

The Claimant having been notified of the disciplinary concerns formally at the start of September 2019, Mr Pitchforth completed his disciplinary initial assessment by the middle of November 2019, and the Claimant was notified of the formal disciplinary investigation on 13 December 2019. Ms Matthews then undertook investigatory interviews with several employees in January and February 2020 before matters were put on hold in March 2020 due to the COVID-19 impact. Ms Matthews met the Claimant for the first time in July 2020, and then undertook further investigatory meetings with others in September, October and November 2020. She then completed her initial report in December 2020 and was asked to look into one of the complaints in more detail. That led to Ms Matthews meeting the Claimant again in early January 2021, and the conclusion of her investigation report at the start of February 2021. The Claimant then received notice of the disciplinary hearing on 17 March 2021, and it took place at the end of April 2021. The Claimant then submitted her appeal against that decision in May 2021, and that appeal hearing took place some two months later, in July 2021.

The procedures were impacted significantly by the COVID-19 pandemic. That caused matters to be put on hold for some four months, but even after that impacted on the ability to progress matters swiftly. We also noted that the matters covered a range of issues and several employees needed to be interviewed. Whilst, as is probably the case with almost any investigation, it could have been handled more quickly, we did not consider that there were any unreasonable delays. In any event, we did not see that any delay had any impact on the fairness of the process or the decision reached.

(5) As we have noted, references were made to the investigation undertaken in 2016. We also noted that the Respondent's disciplinary policy, albeit only in relation to the investigation stage, stated that the investigation should be confined to the particular complaints. The policy did not make any specific reference to a similar focus at the disciplinary hearing stage, but we considered that it would be implicit that the disciplinary hearing should also be confined to the allegations under consideration. However, as we have noted, the use of the letter sent to the Claimant following the 2016 investigation arose following references to it by several witnesses, including the Claimant herself. It was also used only as a form of support for the conclusions the disciplinary panel reached in relation to the allegations they were considering, and was not used as a direct or specific criticism of the Claimant. We did not therefore consider that its use had any material impact on the outcome of the disciplinary process.

(6) We have dealt with this in our conclusions in relation to detriment (21) above. The theatre porters, Mr Warman, Mr Barada, and Ms Senior all had evidence relevant to the areas under consideration, and there was nothing inappropriate in their evidence being used for the purposes of the disciplinary decision.

(7)+(8) We have referenced the Claimant's grievances and how they were handled in some of our conclusions in relation to the Claimant's detriments above. However, whatever failures may have existed in relation to the management of the grievance or the implementation of the grievance outcomes, they had no impact on the fairness of the disciplinary process or decision.

(9)+(10) Similarly, any concerns about the investigation of the behaviour of others, or about who was used to investigate those concerns, had no bearing on the fairness of the disciplinary processes taken in relation to the Claimant or the disciplinary decision taken in relation to her.

(11) Whilst signed witness statements were not universally included within the disciplinary appeal pack, those witnesses had been asked to confirm their evidence at the disciplinary hearing stage and all had, in all material respects, confirmed that they were accurate. We did not consider therefore that the existence of any unsigned witness statements in the appeal pack involved any element of procedural unfairness.

(12) We did not consider that there was any failure to consider all evidence provided by the Claimant in support of her rebuttal of the allegations. Both the disciplinary panel and Ms Murphy at the appeal stage confirmed that they had considered the evidence produced by the Claimant, and it was a matter for her to identify any particular matters arising from that material.

(13) The Claimant referred to the reasons for the Claimant's dismissal in the disciplinary appeal outcome letter being different from those provided in the disciplinary outcome letter. It appeared that whilst the dismissal letter referred to "gross misconduct", the appeal letter referred to "gross insubordination". It was not clear to us how that change came about, and the matter was not raised with Ms Murphy during cross examination. In any event, we did not consider that the difference in wording had any material bearing on the fairness of the decision reached.

232. During the hearing, the Claimant maintained that unfairness arose from the Respondent's decision to operate the grievance and disciplinary processes separately. We noted that the Respondent's policies catered for that to happen, but equally catered for the two being run together. In this case, the better option may have been to combine the two processes, bearing in mind that the Claimant's contentions in her grievance focused on concerns that the complaints made about her, which were dealt with under the disciplinary process, had been made in retaliation for the concerns the Claimant had raised about the movement of beds. However, we considered that the Respondent's method of dealing with matters was within the range of responses open to a reasonable employer acting reasonably in the circumstances. The key issue is that grievances which question the motives behind the asserted disciplinary allegations are addressed prior to the disciplinary process being concluded. That was the case in this case, with the grievance outcome being provided in

February 2020 and the appeal outcome being provided in September 2020, and the disciplinary investigation being completed in February 2021 and the disciplinary hearing taking place in April 2021. We did not conclude that the Respondent's method of handling the grievance and disciplinary matters had any material impact on the fairness of the process followed or the decision reached.

233. We then turned to the question of whether the dismissal decision fell within the range of reasonable responses. We noted that the option of redeployment was available to the Respondent, indeed the Claimant had been working in a redeployed role, for the most part dealing with track and trace issues in relation to the COVID-19 pandemic, for over a year. However, we noted the breadth and severity of the allegations raised against the Claimant, and we also noted the views formed, at both the disciplinary hearing stage and the appeal hearing stage, that there appeared to be no insight on the part of the Claimant to her behaviour or the impact it had on others. Ultimately, whilst another employer may have imposed a lesser disciplinary sanction, such as a final written warning, coupled with redeployment, we did not consider that this Respondent's decision, that summary dismissal should be the appropriate sanction, was outside the range of reasonable responses.

234. Ultimately therefore our conclusion was that the Claimant had been fairly dismissed by reason of her conduct.

Wrongful Dismissal

235. We finally turned to consider the Claimant's claim of wrongful dismissal, noting that the test for us there was quite different to the test in relation to unfair dismissal. We were not assessing reasonableness, but rather we were assessing whether, on balance, we considered that the Claimant had committed acts of gross misconduct which justified her summary dismissal.

236. In that regard, we considered the evidence produced during the disciplinary investigation and presented to the disciplinary panel. We considered that the disciplinary panel was correct to conclude that the Claimant had been guilty of misconduct in the form of inappropriate behaviour which constituted bullying, including undermining and excessively controlling staff, autocratic management. and rigidity and inflexibility in her approach. We also noted several occasions when the Claimant had shouted at staff, indeed there were occasions when witnesses described the Claimant as having screamed rather than shouted.

237. Bearing in mind the important role carried out by the members of staff of the Recovery Unit, and taking into account the need for all staff, regardless of their role, to feel secure in the workplace and not to feel threatened, we considered that the Claimant's behaviour did amount to gross misconduct which justified her summary dismissal. Her wrongful dismissal claim therefore failed.

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Employment Judge S Jenkins
Date: 12 April 2023

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON 13 April 2023

FOR THE TRIBUNAL OFFICE Mr N Roche

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