



EMPLOYMENT TRIBUNALS

Claimant: Mr S Miah
Respondent: North East London NHS Foundation Trust
Heard at: East London Hearing Centre
On: 20, 21, 22 23 September and 3 November 2022
Before: Employment Judge C Lewis
Members: Mr J Webb
Mr P Lush

Representation

Claimant: In Person
Respondent: Sally Robertson (Counsel)

RESERVED JUDGMENT

The unanimous decision of the Tribunal is that the Claimant's claims for:

1. Detriments for having made protected disclosures fails and are dismissed.
2. Automatically unfair dismissal for making protected disclosures fails and is dismissed.
3. Wrongful dismissal, failing to pay the Claimant his notice pay, is dismissed.
4. Claim for sexual harassment contrary to Section 26 of the Equality Act 2010 fails and is dismissed.
5. The claim of victimisation contrary to Section 27 of the Equality Act 2010 fails and is dismissed.

REASONS

The claims

1 The Claimant was employed by the Respondent NHS Trust as a Reablement Support worker from 4 March 2019 until the 23 October 2020. Early conciliation started on the 3

December 2020 and ended on the 14 January 2021. The claim form was presented on the 2 February 2021.

2 The Claimant brought complains of being subjected to detriments for having made a protected disclosure or disclosures and automatically unfair dismissal for having made a protected disclosure, as well as complaints of sexual harassment, victimisation and wrongful dismissal.

3 The claims were clarified at a preliminary hearing before Employment Judge Gardiner held on the 20 September 2021 and the parties were directed to provide a revised list of issues to reflect all the issues in the claim. At the start of this final hearing we discussed the draft list of issues that had been provided by the Respondent. The Respondent also provided an opening note setting out the relevant law, a chronology and a table with a summary of the Claimant's complaints.

4 Following our discussion of the issues on the first day the Respondent provided a revised draft list of issues to the Claimant overnight; the list of issues was finalised at the beginning of day 3, there having been some minor amendment to the redrafted list of issues to better reflect the Claimant's case. On day 4 of the hearing the Claimant clarified that he was dropping the reference to unsuitable referrals as a protected disclosure, he accepted that he could not show this was a breach of a legal obligation and he relied on being required to undertake personal care without PPE.

5 The agreed issues in the claim are as follows:

The issues in the claim

1 Protected disclosures

1. The Claimant relies on the following protected disclosures made on the 17 April 2019 verbally to Ms Helen Moody as well as through email to the Respondent's Human Resources department.
 1. That the Claimant and his colleagues were being asked to undertake personal care within their roles without a mask and that this endangered their health (the 'masks disclosure');
 2. Being required to undertake personal care without the correct PPE [The Claimant withdrew reliance on the suitable referrals disclosure as a protected disclosure on day 4].
2. Did the disclosures above happen as alleged or at all?
3. It is accepted that any such disclosures which were made, were made to the employer in accordance with section 43C(1)(a)
4. Did any disclosure qualify for protection within section 43B
 1. With respect to the mask disclosure, the Claimant relies on;
 - 4.1.1. Section 43B(1)(d) health and safety

4.1.2. s.43B(1)(b) (Breach of Legal Obligation), namely the legal obligations that the employer should provide a safe place of work and to provide PPE as provided for in Regulation 4(1) of the PPE Regulations 1991 ("the PPE disclosure").

4.2 Did the Claimant have reasonable belief that the mask disclosure (if made) tended to show that his or his colleagues' health and safety was being or was likely to be endangered or that the Respondent was breaching its legal obligations to provide a safe place of work for its employees?;

5. Did the Claimant have a reasonable belief that each such disclosure relied upon were disclosed in the public interest?

Automatic unfair dismissal under section 103A Employment Rights Act 1996

6. It is accepted that the Claimant was dismissed on 23 October 2020.
7. Was the sole or primary reason for the Claimant's dismissal that he had made the mask disclosure or the PPE disclosure?
1. The Respondent's position is that the primary reason for the Claimant's dismissal was that he had harassed Z on 22 July 2019 on the grounds of Z's sexuality.
8. It is accepted that the unfair dismissal claim is brought within time.

Whistle-blowing Detriments under s.47B

9. Was the Claimant treated as described in any of 9.1-9.8 below and if so, did that treatment amount to a detriment:
1. That he was redeployed from the Reablement Service to the Single Point Access team on 29 April 2019;
2. That terms of reference for a disciplinary case against him were provided on 30 May 2019;
3. That two new allegations were added to the disciplinary case against him on 24 July 2019;
4. That amended terms of reference were provided to include those new allegations on 11 September 2019;
5. That a disciplinary investigation report was concluded on 17 July 2020 and (in the Claimant's view) this was biased against him and not a fair analysis;
6. That during the disciplinary hearing on 12 October 2020, the Chair allegedly repeatedly blocked the Claimant from asking questions of witnesses;
7. That the minutes of the disciplinary hearing of 12 October 2020 were tampered with by Steven Inglesfield of HR when produced after the hearing, and were approved by Joseph Lindo; and

8. That the Claimant's complaint of sexual harassment against Z which had been submitted in September 2019 was not dealt with at the time and was not investigated separately when acknowledged on 24 October 2020.
9. The Claimant was denied returning to his original post despite agreeing with the employer on 6 February 2020. This was denied in a letter received by him on 10 February 2020 and then reconfirmed.
10. Dipti Shah, a senior Human Resources personnel advised Z to make a formal complaint against the Claimant rather than give him an option to do so, knowing this would ultimately give grounds for the Claimant's suspension, having prior knowledge of outstanding allegations levied against him. Dipti Shah humiliated the Claimant later on in the investigation by repeatedly calling him by a female name to which no reprimand was made against her by the employer.
11. The Respondent adopted manifest dishonesty in changing the words to the allegation surrounding the incident on 22 July 2019 from speaking to a colleague *'in an aggressive way towards him which left him feeling threatened and intimidated'* to speaking *'in an aggressive and potentially homophobic manner'*
12. The Respondent paid no attention to evidence given by the Claimant in relation to absolving himself from allegations made against him surrounding the 22nd of July 2019.

(together "Alleged Detriments")

10. If any of Alleged Detriments are found to be detriments, were any of them imposed on the Claimant because he had made the mask disclosure or the PPE disclosure?

Time Bar

11. Detriments 9.1 – 9.5, 9.9, 9.10 are outside of the primary limitation period. Detriments 9.6 – 9.8 are within time. Are any of Detriments 9.1 – 9.5 time barred?:
 1. If it is found that any of Detriments 9.6-9.8, 9.11, or 9.12 amounted to a whistle-blowing detriment contrary to s.47B, does it/ do they form part of a series of similar acts or failures together with any of Detriments 9.1 – 9.5, 9.9, or 9.10?
 2. If not, was it reasonably practicable for the Claimant to have issued claims for any of Detriments 9.1 – 9.5, 9.9, or 9.10 within time and if not, did he bring such claims within a reasonable period?

Sexual Harassment (allegations against Z) – s.26 Equality Act 2010

All statutory references below are to the Equality Act 2010 save where expressly stated otherwise

12. It is agreed that there was an incident between the Claimant and Z on 22 July 2019. The Claimant asserts that Z sexually harassed him. The Respondent contends that the Claimant harassed Z on the grounds of Z's sexuality (Z being openly gay).

13. The Claimant contends that on 22 July 2019, Z had been '*giggling like a girl*', '*frisking his hand like women do*' and had been rubbing his groin with an erection visible. Did this conduct happen either as alleged or at all?
14. If it did happen, was it unwanted conduct of a sexual nature that had the effect of violating the Claimant's dignity or creating an intimidating, degrading or offensive environment?
15. The claim for sexual harassment against Z is brought outside of the primary limitation period. Is it just and equitable for the Tribunal to extend time limits with respect to this claim?

III Sexual Harassment (allegations against Margaret Staples) – s.26 Equality Act 2010

16. It is agreed that the Claimant worked in the Single Point of Access team from 29 April 2019 working alongside Ms Margaret Staples.
17. Did Ms Staples carry out conduct towards the Claimant on 29 April 2019 and 6 May 2019, namely:
 1. Asking if '*he'd come to play*' on his first day in the team (29 April 2019); and
 2. On 6 May 2019, referring to a box of condoms and saying '*he had a whole packet to play with all of the women in the office.*'(together "the Alleged Ms Staples Comments")
18. If the Alleged Ms Staples Comments happened, was this unwanted conduct?
19. If so, was it of a sexual nature?
20. If so, did it have the effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant.
21. The claim for sexual harassment against Margaret Staples is brought outside of the primary limitation period. Is it just and equitable for the Tribunal to extend time limits with respect to this claim?

IV Victimisation – s.27 Equality Act 2010

22. Was the Claimant's informal complaint about the Alleged Ms Staples Comments to his managers and subsequent withdrawal of those complaints a protected act?
23. If so, was the inclusion of an allegation relating to the raising and withdrawal of those complaints within the Terms of Reference in September 2019 a detriment?
24. Was any such detriment because of any protected act?
25. Was the informal complaint raised in good faith?

26. The claim for victimisation is brought outside of the primary limitation period. Is it just and equitable for the Tribunal to extend time limits with respect to this claim?

ACAS Code

27. Did the disciplinary procedure used by the Respondent to dismiss the Claimant breach the ACAS Code?
28. If so, should any award for automatic unfair dismissal be uplifted and if so, by what amount?
29. The Claimant sought to raise a grievance about the alleged sexual harassment by Z. The Respondent's position is that this grievance did not reach HR or the managers due to the IT firewall systems and the offensive terms used. Was there a failure by the Respondent to comply with the ACAS Code with respect to this grievance.
30. If so, should any award in respect of any claims for sexual harassment against Z be uplifted and if so, by what amount?

Wrongful dismissal

31. Was the Claimant guilty of conduct so serious as to amount to a repudiatory breach of the contract of employment, entitling the Respondent to summarily terminate the contract without notice ?

Case management orders made

6 For the reasons given orally at the hearing the Employment Tribunal made two orders under Rule 50 of the Employment Tribunal Rules of Procedure. A restricted reporting order to last indefinitely and an anonymity order. One of the witnesses must not be identified by name or otherwise. That person is identified with the letter Z where referred to in the course of this judgment.

Evidence

7 The Tribunal were provided with a witness statement from the Claimant and 9 witness statements from the Respondent. The Tribunal read the witness statements and the documents referred to in those statements on day 1. The Claimant gave evidence on day 2 followed by the Respondent's witnesses, Helen Moody, Carol White, Margaret Staples, Dipti Shah, Steven Inglesfield, Z, Thandanani Ncube, Joseph Lindo, Melody Williams, the evidence concluded at 4:10pm on day four and a further day was found on the 3 November 2022 to hear submissions from the parties and for the Tribunal deliberation.

8 The Claimant and the Respondent both exchanged their written submissions in advance of the resumed hearing and made oral submissions. The Respondent had prepared a bundle of authorities.

9 A provisional date for a remedy hearing was set for 4 April 2023. Regrettably, due to judicial workload, the faired judgment had not been finalised and sent to the parties by that date and that hearing had to be vacated.

Findings of fact

10 The Claimant started employment with the North East London NHS Foundation Trust on the 4 March 2019 as a Reablement support worker. The Respondent is a Mental Health and Community Services Trust covering East London and parts of Essex. The reablement role was part of a new service being launched in the London Borough of Redbridge. The Respondent had previously run the Reablement Service in Havering but had lost the contract and was in the process of preparing to hand over the Havering service to its successors. The reablement role involved the Claimant attending the homes of people who had been discharged from hospital after an event such as a fall, or an episode of illness, which had affected their confidence and ability to carry out activities of daily living. It was a service designed and intended to help patients regain the ability and confidence to do some or all of the things they used to do before the event. This could include things like cooking for themselves, bathing without help or getting to the shops. The Claimant described the aim of the service as not being about doing things for the patient but rather, supporting them to relearn, i.e. how to do things for themselves.

11 During his induction the Claimant had the opportunity to shadow more experienced members of staff, including staff who had been employed when the service was operating in Havering, this included shadowing Renee Darby, the Reablement Coordinator to whom he reported. The Claimant also completed an online STEPS mandatory training module on infection control which covered air borne transmission of disease (page 903). The Claimant asked about the provision of face masks and was told by Renee Darby that they were not provided. The Claimant told us that when he took up the role he had not understood that he would be required to provide personal care to the users of the service.

12 Following his induction the Claimant was assigned service users to visit in the local community. He was informed of which service users he had been assigned through software on a smartphone issued to him by the Respondent. A care plan in the service users' home would specify what help the individual person needed. The service users assigned to the Claimant had a range of needs and varied levels of assistance was required. Some service users required catheter bags changing, stoma bags replacing, continence bags changing and physical assistance to shower.

13 Helen Moody was the Claimant's manager during his time in the Reablement service. She has now retired but had been a Registered Mental Health nurse for 26 years. She described the role of the Reablement Service as being to support service users returning from hospital setting, or recovering from an illness, to regain their independence in undertaking their activities of daily living, including personal care and cooking for themselves etc, back in their own homes. The support was intended to be a transitional service to help them get back from being dependent on others in a clinical environment to being able to self-care in their own homes. The Reablement Support workers would assist the service users in their own home with whatever tasks were required to help them relearn these skills, and, if their every day health needs were different following their stay in hospital, to learn how to carry out new self care tasks for instance if they were learning to live with a stoma bag.

14 Mrs Moody accepted that not all service users would be suitable for reablement; if the view was that the service user was no longer able to look after themselves after going through Reablement, they may still need to be referred on to a long term personal care package. The aim of the service is to avoid that happening and that certainly for many

service users it succeeds in doing so. The service was a transition service and service users' needs may well fluctuate during their time with the Reablement service, they were likely to need more intensive support when they first came out of a clinical setting but hopefully that level of support would decrease as they 'find their feet'. This meant that the level of support required for Reablement workers would be uncertain and variable. Mrs Moody acknowledged that the Reablement Support Worker was not intended at its core to be a personal care provider but in her view that was certainly an aspect of the job, in her view inevitably in some cases helping a service user to move back to being self-reliant would mean supporting them with personal care while they carry out their journey. There would also be some service users who unfortunately did not get to the point of self-reliance and had to be referred on to personal care package but they would still need the transition support from the Reablement services until the personal care package from the local authority was implemented.

15 Whist personal care was not the main function of the role, the Reablement support worker would be expected to undertake or assist with personal care which included washing and personal hygiene such as shaving, assisting with toileting and changing the service users' bedding when necessary. They should not be expected to carry out clinical tasks such as reapplying bandages or administering medication although some skin care could be included if it did not involve administering a medication.

16 Although a Reablement Support Worker is not a registered health professional, it was considered to be fundamental to the role to put patient interest first and to abide by the Trust values of caring and passion. The Tribunal were referred to the job description for the Reablement support worker at pages 55 to 63 of the bundle, the Trust principles are included in there. Mrs Moody expected any worker to understand this.

17 The Claimant objected to carrying out personal care for the service users, maintaining that it is not stated in the job description that the role included personal care and he should not be required to do so. It was not disputed that he referred to the tasks as being "smelly" and "disgusting". During his grievance he again made the point that it was not in his job description and as a result of his complaints, the job description was revised to make it clearer and it now expressly states that the job role includes personal care.

18 Mrs Moody accepted the job description could have been clearer at the time the Claimant was recruited, but that made no difference to whether personal care was required in the role. She did not see how it would be possible to perform the role without being willing to undertake some personal care, for instance, if the Reablement worker was visiting a service user who had a full catheter bag, they could not simply leave them with it full without helping them, by assisting them to change it or showing them how to do so if they were unable to do so themselves, otherwise they would be putting the patient at risk and that would not be in accordance with one of the Trust's core values of putting the patient first.

19 Mrs Moody considered that it would be even more obvious after the induction process that personal care would be required. During the induction she gave a talk to the new Reablement Support Workers (RSWs) which specifically addressed the need for personal care to be carried out. It was also made clear in active supervision and on the shadowing during the induction process. The Tribunal was referred to the record of the visit when the Claimant was shadowing Renee Derby, [page 403] in which she records the personal care tasks she was undertaking and how she discussed with the Claimant how this was part of

the role and affirmed that the worker needed to carry out whatever tasks was needed at the time.

20 We are satisfied that at the point that the Claimant was recruited as a reablement worker, it was not clear the amount personal care that would be required in the job and that the job description was revised as a result of the Claimant's grievance. We find that the Claimant and his colleagues were told about the amount of personal care required during their induction at the beginning of their employment, they shadowed an experienced worker before conducting the role on their own and the level of personal care that might be required would then have become clear to them.

21 The material events in respect of this claim all took place before the COVID 19 pandemic. Prior to the pandemic the Respondent did not issue face masks to their staff for visits to service users or when they were carrying out personal care tasks. The Respondent did provide some personal protective equipment (PPE) to staff, namely disposable gloves, aprons and shoe covers, based on its assessment that staff would on occasion be exposed to some risks of spills or splashes of bodily fluids due to the nature of the tasks carried out. We find that this was in accordance with the Trust's Infection Prevention and Control policy (page 190-203).

22 In Mrs Moody's opinion there was no medical need for face masks in the RSW role pre-COVID, there was minimal risk of any fluids splashing onto the worker's face. The service users that were being supported would not be suffering from infectious diseases any more than any other members of the public, but rather physical or sometimes mental illness, such as recovering from stroke and /or physical fragility. Mrs Moody told us, and we accept, that at that time it was considered that the wearing of face masks by the members of staff could have a negative effect on service users' experience. Many of the service users were elderly and some may have hearing difficulties, it might be difficult to understand what the workers were saying if they were wearing a mask, and some service users might also find a mask threatening.

23 The Claimant's allocated supervisor was Renee Darby, from time to time other coordinators might supervise him, this included Aleisha Sage who was also a Reablement Coordinator. Both Renee Darby and Aleisha Sage undertook supervisions with the Claimant in March and April 2019.

24 Before 17 April 2019 Mrs Moody had some feedback from staff supervising the Claimant indicating there may be some issues. It had been reported that he insisted on wearing a face mask at his service users' properties and he had also been overheard telling service users that they should not be in the Reablement Service. Mrs Moody decided to keep this under review, she was concerned that the comments by the Claimant might lead the service users to feel themselves to be a burden, she expected the matters to be dealt with during supervision. Shortly before 17 April 2019, Aleisha Sage received a complaint from a service user that the Claimant had been wearing a mask during his visit which had meant that the service user had found it difficult to understand what was being said. To address this Aleisha Sage sent round an email to the RSWs asking them not to use face masks (page 405). She reported to Mrs Moody that the Claimant had not seemed happy about this.

25 On the 17 April 2019 Aleisha Sage carried out a live supervision with the Claimant. He was attending a service user, ZK. Following the visit Aleisha Sage reported back to Mrs

Moody and subsequently gave an account in her interview for a disciplinary investigation which is in the bundle at [pages 405-408]. The Claimant provided his account of the incident [page 331-332]. Aleisha Sage reported that the Claimant insisted on wearing a face mask despite her asking him to remove it several times. When asked why he would not remove it, he is alleged to have said because the service user stank, which was what he also said to Mrs Moody in their subsequent discussion and in his later account [at page 331 of the bundle].

26 Mrs Moody described this comment as grossly unacceptable. She considered it was disrespectful to the service user and showed no compassion in what can often be a humiliating and challenging time. She was concerned that if the service user had interpreted the Claimant as wearing the mask because he thought they smelt, it would be likely this would affect them. Mrs Moody was firmly of the view that there was no good justification for wearing the mask as there is no health and safety risks associated with bad smells. Further the mask limited the ability of support workers to effectively communicate with the service user. Another service user, RT, also complained about the Claimant wearing a mask the next day [286 and 287].

27 Aleisha Sage also reported that the Claimant had not initially been going to take gloves into the visit until he realised that it was a live supervision. This suggested to Ms Sage that he was not intending to undertake any personal care during the visit, and he later confirmed that he was unwilling to undertake personal care.

28 Thirdly, Aleisha Sage reported that the Claimant appeared to have an issue with seeing the service user naked, to the extent that that the Claimant showered the service user whilst the service user was still wearing his trousers and was then overly focused on holding the towel over the service user's private parts at the expense of ensuring the service user was stable. This was despite the service user's wife telling the Claimant not to worry about holding up the towel and the service user confirming that this was not necessary.

29 Aleisha Sage reported this to Mrs Moody after she had written up her supervision note [283-284], which the Claimant had refused to sign. Mrs Moody agreed to speak to the Claimant. She was conscious that at this stage he was still very new to the role and may not have understood what was needed and what the priorities were. She was not envisaging that this conversation would be a major confrontation, she was simply envisaging explaining to him what was needed, and how he could work better in the role so the issues could be ironed out. However, she was concerned that he had allegedly refused to follow the guidelines of his supervisors.

30 The Claimant told us that when asked by Aleisha Sage during the live supervision why he was wearing a face mask, he told her that it was to protect himself against infection. He maintained that her instruction to him not to wear a face mask, which he accepts she repeated three times whilst he was assisting the service user use the bathroom, was a breach of the Respondent's infection control policy. He described there being a risk of bodily fluids splashing during the procedure. He acknowledged that he was told not to hold up the towel to cover the service user's private area.

31 Mrs Moody had already asked the Claimant to come to speak to her about a separate issue, where he had been overly abrupt to her in an email about his annual leave sent to her that morning. She decided to speak to him about the supervision at the same time. She

considered this to be an informal meeting to feed back to him and was not envisaging that any formal action would come out of it.

Protected disclosures
Meeting on 17 April 2019

32 Mrs Moody drafted a summary of the meeting the following week and emailed it to the Claimant, (294-295). She set out the contents of the meeting fully in the summary and relied on that as an accurate account of what was said. Mrs Moody's recollection was that the Claimant's main objections seemed to be to the smells and anything he found disgusting. She accepted that he did also refer to infection risk, however she considered that what he said on this did not make much medical sense. The Claimant appeared to think that the service users having dark urine was an indication they had an infectious disease but in her opinion there was no medical basis for that, rather it was normally a sign a dehydration. The Claimant did not accept Mrs Moody's explanation and insisted that it was a sign of a urinary tract infection. She was surprised that he disregarded her 20 plus years of experience as a nurse when he had, at that stage, 6 weeks experience of working with the NHS.

33 It was apparent to Mrs Moody from what he said to her at the meeting that the Claimant's objection was to undertaking any tasks that he found personally disgusting. He kept referring to the service users being smelly or unhygienic and not wanting to have to look at their private parts. Mrs Moody did not consider this to be a good basis for refusing to undertake necessary tasks and considered it to be part of the job as a healthcare professional.

34 Mrs Moody's key concern at this point was that the Claimant was apparently disregarding the instructions from his supervisor, he acknowledged that he had been asked to remove his face mask and had failed to do so, and had been asked to lower the towel and had ignored the instruction; that he was not showing respect and consideration to the service users themselves; and that he was behaving in an unprofessional way in the meeting by shouting and being aggressive.

35 Mrs Moody made clear to the Claimant it was up to him whether he wished to raise his concerns with HR or to the Trust's Chief Executive. She did not think that it was likely that the Infection Prevention and Control Team would take the view that a face mask was needed, however, she was happy for the Claimant to raise the issue with them and if they advised that face masks were needed, she would accept their advice because they were the experts. Mrs Moody disputed that the Claimant had raised the issue in the terms set out in his subsequent emails, however, she acknowledged that he did say that personal care was not in his job description.

36 Towards the end of the meeting, Mrs Moody made clear to the Claimant that she was giving him an instruction not to wear the face mask while attending service users. He appeared to have ignored the direct request from his supervisor Aleisha so she thought it was necessary to make this clear as being a direct instruction. Mrs Moody's concerns about the Claimant at the end of the meeting were increased when he returned shortly after the meeting had finished and asked her not to discuss the meeting with anyone. She found this remark to be unprofessional and odd. Mrs Moody described the Claimant's demeanour as becoming aggressive and confrontational during the meeting, noting that he raised his voice and shouted at her at various points. She was aware that subsequently this was relied on

in the disciplinary proceedings as him acting in an intimidating way, she only partially agreed with that, as she personally did not feel intimidated by him. Mrs Moody told us that she has a high tolerance for confrontational behaviour as a result of her background in mental health nursing. However, she would describe his behaviour as aggressive and acknowledged that it could have intimidated some people, had they been exposed to it. She considered that it grossly unprofessional conduct which she did not want to see in her staff in any work setting.

37 Kathy Wisbey, a colleague from the MacMillan nursing team, happened to be in the next room during Mrs Moody's meeting with the Claimant. She approached Mrs Moody the following day to check if she was okay as she had heard the Claimant shouting at her during the meeting and was concerned about her. Mrs Moody was grateful for the support and after she spoke to HR that day, she went back and asked Ms Wisbey if she would provide a statement [see page 285 of the bundle].

38 The Claimant accepts that Mrs Moody told him not wear a face mask whilst in the service user's home or providing personal care, and that she told him that this could be construed as being offensive and a barrier to effective communication. The Claimant did not dispute that Mrs Moody also informed him that based on her own considerable experience and knowledge there was no indication of a face mask being warranted under the Trust's infection control policy.

39 The Claimant acknowledged that the meeting involved disagreement in respect of the request not to wear a face mask which was accompanied by feelings of hostility, raising of voices and frustration.

40 The Claimant maintained that Mrs Moody's rationale for telling him not to wear a face mask was contrary to the Infection Prevention and Control Policy and the advice of the Infection Prevention and Control Nurse Jeanette Walker, [page 456] the Trust's Health and Safety Advisor, Tricia Coker-Dalling, [page 468] and the investigation officer in his grievance, Michael Chigango. The Claimant accepted in evidence that he did not wear a respirator or FFP3 face mask that had been fit tested.

40.1 Jeanette Walker's email to Mr Ncube dated 4 November 2019 [page 456] states: "All staff should have access to aprons and gloves in case there is contact with blood or bodily fluid. *Further risk assessments are taken by the team or individual staff where there are additional concerns i.e. respiratory where there is potential infection and there are droplets through coughing or sneezing (face shields)* or cases of faecal/urinary incontinence on the carpets where shoe protectors may be required. ..."

40.2 Tricia Coker-Dalling's email dated 7 November 2019 to Mr Ncube states; "The type of PPE used is dependent on the risks posed to the staff and/or patient. Without having the background details of the investigation, I can only indicate that risk assessments should be undertaken and appropriate measures taken to address the risks, clinical and infection control guidance applied and policies adhered to."

40.3 Mr Chigango's third recommendation in the grievance report outcome was that a review be undertaken of infection control policy to establish which PPE was required, [page 544.]

40.4 Each of the above post-dates the Claimant's meeting with Mrs Moody and the making of the disclosures.

41 After the meeting with Helen Moody the Claimant sent four emails to the Respondent's Human Resources department on 17 April 2019, [pages 275-282] each addressed "to whom it may concern", which he relied on as protected disclosures.

41.1 The first email [275-276] sent at 15:49, with the subject "Shahien Miah/Re-enablement team- I am being bullied" set out complaints that he was being forced by his manager and a supervisor ...to "provide [service users] with personal care without using a disposable face mask...

...being forced to enter the homes of service users that have gout, urinary tract infection and low personal hygiene without a disposable face mask on, therefore leaving me vulnerable to disease and infection ..."

The Claimant stated that personal care duties were not part of his job and that the whole of the team were expected to undertake personal care duties without formal training or a mask. He also stated that the root of the problem stemmed from the Respondent accepting non-reablement service users into the service when they in reality required long term care and concluded by asking for advice, including, "How I can overcome my managers decision to allow me to wear a disposable face mask"

41.2 The second email [277-278] was sent at 16:05 with the subject "Formal Complaint Shahien Miah/ Helen Moody" and set out the following:

"I am being forced by my manager, Helen Moody and a supervisor not to wear a disposable face mask whilst visiting service users homes.

This is when some service users suffer from low hygiene, urinate themselves, let bowels loose in their pads and have catheter bags on.

I am trying to prevent myself from catching airborne diseases in accordance with the following amendment

Infection Control [quoting extracts from the Trust's Infection Prevention and Control Policy]"

41.3 The third email was sent at 16:12 [279-280], with the subject "2nd Complaint Shahien Miah/Helen Moddy" and contained the following,

"I am being forced to uncover the dignity of service users when requiring assistance, by a supervisor and my Manager Helen Moody.

I am being forced to stop using the towel to cover the service users private parts whilst working underneath the towel if needed.

Please advise how to take this forward to a investigation or arbitration..."

41.4 The fourth email was sent at 16:19 [281-282] with the subject " 3rd Complaint Shahien Miah/ Helen Moody", stating:

"I work in the new re-enablement team in Redbridge.

I am being forced to undertake personal care duties whilst having no face mask or formal training.

The problem is that NELFT are being assigned non-re-enablement patients that in reality, require long term carers, to boost numbers in the new services client base..

Due to this mistake the re-enablement team are being forced to undertake personal care duties rather than being re-enablement support workers or face indirect threats of job security as everyone is on a six month probation period.”

42 The Claimant originally relied on each of those four complaints as qualifying disclosures, disclosing that his employer was failing or had failed or was likely to fail to comply with a legal obligation and that the health and safety of any individual had been or was likely to be endangered. The Claimant accepted in these proceedings that not all of the four emails were qualifying disclosures. He relied on the email at page 275 dated the 17 April 2019, sent at 15:49, the email at page 277 sent at 16:05 and the email at page 281 sent at 16:19. The Claimant accepted that the email at page 279 was too vague to amount to a qualifying disclosure.

43 We find that Mrs Moody was not aware that the Claimant had sent the emails to HR and other internal Trust staff immediately after their meeting complaining about her and their conversation. She only became aware of this a couple of days later when she was copied into an email about one of the complaints, (see page 288). By that time, she had already become aware that he had ignored her instructions on wearing a face mask and had contacted HR to discuss whether disciplinary action was needed.

Failure to follow instructions

44 On the 18 April, the Claimant was due to attend a service user, RT’s, home, this time on his own. Following the visit, Mrs Moody understood that RT had called the service to complain about the visit and to ask them not to send the Claimant again. This was reported to her by Gillian McEvoy, [page 286]. She called the patient to apologise that he had had an unpleasant experience. The following day, Kingsley Adiele, the Reablement Support Worker who attended RT instead of the Claimant, reported back to Aleisha that RT had been unhappy about the visit from the Claimant and the fact that he had been wearing a mask. Aleisha reported this conversation in an email, [page 287]. While Mrs Moody was disappointed to have a service user complaint, she found particularly shocking the fact that the Claimant had still worn a face mask at the visit despite her clear instruction to him the day before that he was not to do so, she was concerned that the Claimant had ignored a clear management instruction and did not seem to be taking any account of the service users’ needs. She contacted HR to discuss how to deal with this and also took up Kate Wisbey’s offer to provide a statement.

Decision to suspend the Claimant from clinical duties.

45 Mrs Moody discussed the Claimant’s conduct with HR and Carol White, the Integrated Care Director before she became aware that the Claimant had made complaints about her. She talked through the with HR and Carol White the immediate steps in respect of the Claimant’s conduct and it was agreed that his behaviour was a potential disciplinary matter, for refusing to obey a management instruction, consideration was given to whether he should be suspended from the service. Mrs Moody understood from HR that there were two options in a disciplinary context, either to fully suspend i.e suspend someone from all duties/work, or to suspend from clinical service leaving it open for them to be temporarily redeployed to other non-clinical roles in the meantime. Following a discussion with Ms Moody the provisional view reached by Ms White together with the Deputy HR Director,

Yvonne Hood, was to suspend the Claimant from the Reablement Service for the reasons that are recorded in the suspension checklist [298-306].

46 During the period between Mrs Moody's meeting with the Claimant on 17 April and his suspension on the 26 April, a couple of further concerns about his behaviour came to Mrs Moody's attention and these are also referred to in the checklist [300-301].

47 We accept Mrs Moody's evidence that the reasons for proposing clinical suspension were those set out in the checklist, namely, her assessment that the Claimant had shown he would not follow instructions while carrying out the job and that his behaviour strongly suggested that he was not putting the patient's interest first. The fact that they had received multiple complaints from different service about him over a very short period of time was a matter of significant concern as although complaints do happen from time to time, they are not that common. Mrs Moody could not be confident that he would behave appropriately, or in line with the Trust's values when dealing with service users.

48 Mrs Moody completed the checklist which was then considered by Carol White and Yvonne Hood, and it was their decision whether to suspend the Claimant. Mrs Moody sent the completed checklist to Carol White and Yvonne Hood on the 25 April [296] and it was approved by Carol White and then by Yvonne Hood on the 26 April [307]. The decision was taken that the Claimant should not be working in clinical services pending an investigation but that he could continue to work in non-clinical administrative roles; he was therefore transferred to the Single Point of Access team from the 29 April 2019.

49 Mrs Moody had no further personal dealing with the Claimant after his suspension, except through the Trust's disciplinary and grievance processes. He remained suspended from clinical services including the Reablement Service during the disciplinary process until July 2019 when he was fully suspended, that is, suspended from non-clinical as well as clinical services, after the incident with Z.

50 The Claimant's complaints against Mrs Moody were dealt with through the Trust's grievance procedure. Mr Chigango was appointed as investigator and Mrs Moody was interviewed on 20 June 2019 [343-344] and the answered some follow up questions in November 2019 and January 2020 [463-465,481-486,493-494]. Mrs Moody involvement in the disciplinary process was as a witness. She met with Thandanani Ncube on the 25 July 2019, [the notes are at page 390-393] and attended the disciplinary hearing on the 12 October 2020 as a witness, the relevant sections of the minutes are at pages 590-597.

The Claimant's partial suspension – removal from clinical duties

51 Carol White told the Tribunal that she reviewed the suspension checklist prepared by Mrs Moody and was satisfied clinical suspension was appropriate. She told us and we have accepted that this had nothing to do with the complaints the Claimant had raised, it was because he was not following management instructions on how to deal with service users and was acting inappropriately towards service users. Ms White pointed to the examples from support worker GT and the further complaint by a service user about the Claimant recorded in the checklist [at page 300 and 301]. Given that the Claimant was not following instructions from Helen Moody and, it appeared, from his supervisor, Ms White and Ms Hood had no confidence the Claimant would change his behaviour if he was asked to do so. We accept that they were not confident that they could trust him to behave appropriately with service users. We also accept Ms White's evidence that their usual approach was to

err on the side of protecting the service users and, as a result, they decided that the Claimant's suspension was appropriate.

52 We accept that Carol White decided to address the issues via the conduct route rather than simply within the probationary procedure because the matters raised included a repeated refusal to obey managers' and supervisors' instructions and there was concern in respect of the Claimant's approach to conduct towards his manager and genuine concerns that she considered were conduct rather than capability issues.

53 Shezana Malik, Assistant Director for Adult Community Health Services had explored with Ms White alternative non-patient facing teams where the Claimant could be accommodated whilst he was clinically suspended and had found the Single Point of Access team to be suitable. Mrs Malik met with the Claimant to communicate the clinical suspension and his transfer to the non-patient facing role. The Claimant's manager in that team was Margaret Staples. The Claimant stopped attending the Single Point of Access team after around a week, that is from the 7 May 2019. On the 14 May 2019 he contacted Mrs Malik to say that he had been sexually harassed by Margaret Staples and that was why he was not coming into work, he demanded to be returned to the Reablement Service.

Claimant's complaint of sexual harassment

54 On 15 May 2019 the Claimant sent Mrs Malik a document setting out what he described as "indecent" comments he alleged had been made by Margaret Staples, which he described as being "implied with a indecent sexual nature" and which he stated had caused him to suffer mentally [312], he also complained that Ms Staples had stood too close to him on one occasion . The alleged comments were as follows:

54.1 "On meeting Margaret for the very first time she turned round to Shahien in the stairway ... and said ... "So you have come to play, have you?" Shahien says "excuse me" and Margaret quietly apologises."

54.2 In the single Point of Access office ... in front of three other female members of staff.... In response to a enquiry of Shahien, Margaret Staples out of the ordinary says "I am going to give you a whole packet so you can play with us all". "

55 Mrs Malik met with the Claimant on the 15 May 2019 together with Irvine Muronzi, an Assistant Director of the Adult Mental Health and Learning Disability Services. Mrs Malik explained to the Claimant that the allegations were serious and if they were being asserted they needed to be investigated fully. The Claimant's response was that he was unwilling to have them investigated but he wanted them left on the file. He was told this was not possible and he declined to have them investigated further. After the meeting, Mrs Malik emailed a summary to the Claimant and asked him to confirm by the 17 May whether he wished to address the allegations against Ms Staples formally, enclosing a copy of the Bullying and Harassment Policy and informing him she would be in contact on 17 May for his decision [315-316]. Mrs Malik contacted the Claimant on 17 May to confirm whether he had changed his mind about having the allegation looked into, he confirmed that he had not changed his mind. The allegations were therefore taken no further. This meant that Ms Staples was not informed of the allegations at the time, she told us that she only became aware of them in preparation for these proceedings and we accept that evidence.

56 Mrs Malik and Mr Muronzi took the view that although the Claimant was not pursuing the allegations against Ms Staples, given that he had made the allegations and had expressed unhappiness in the Single Point of Access team (he had not attended work since 6 May 2019), it made sense to find him an alternative work place. A role was found in the Child Health Information Service team where the Claimant started on the 10 June 2019 [334].

Allegation that Ms Staples sexually harassed the Claimant on 29 April 2019 and 6 May 2019 by firstly asking if he had come to play on his first day in the team, 29 April and then on the 6 May referring to a box of condoms and saying he had a whole packet to play with all the women in the office.

57 Ms Staples accepted that she may have said to the Claimant or asked the Claimant on his first day whether he had “come to play”, as that was a phrase she not uncommonly used with her team. She did not understand why he would think that was a sexual reference or amounted to sexual harassment, it was not intended in that way and it was a phrase she used with other team members almost all of whom were female, and in no sense was it meant in anything other than a friendly welcome to join the team. We accept her evidence.

58 Ms Staples was certain that she did not make a comment about condoms, nor make any reference to having “a whole packet to play with the women in the office”. She told us that this simply did not happen and that this was absolutely not the kind of comment that she would have made. There would be no reason why there would be any condoms in the office which was the purely administrative department with computer based work and no personal interactions with patients who might require condoms. It was not a sexual health clinic.

59 When asked about this remark in evidence, the Claimant accepted that there was no actual reference to a box of condoms. He told us he believed that was what Ms Staples was referring to. He accepted that Ms Staples did not actually indicate that she had a box of condoms, or make any mention of condoms, but that he had inferred that she was referring to condoms.

60 The Claimant told the Tribunal that he only inferred that the first remark had been of a sexual nature because of the subsequent remark made, to which he had attributed a sexual connotation because of the inferred reference to condoms, and that taken together he had inferred that the remark made on his on his first day about coming to play was also a remark of a sexual nature. We find that inference was only in his head. We do not find it a reasonable inference for him to have made in the circumstances.

61 Ms Staples denied standing too close to the Claimant and we accept her evidence that she did not do so.

Disciplinary terms of reference

62 Mrs Malik commissioned the disciplinary process against the Claimant. The terms of reference dealing with the allegations relating to the Reablement Service were completed by Mrs Malik and Donna Sackey Addoo from HR on the 3 June 2019 [321-325]. Mrs Malik held a further meeting with the Claimant on the 18 June 2019, which she summarised in a letter the same day [336-337]. During that meeting the Claimant requested that the complaints against Helen Moody be treated as a formal grievance. Mrs Malik then took this grievance forward, drafting the terms of reference [at 338-334].

63 Mr Ncube was appointed to carry out the disciplinary investigation. The Claimant was interviewed by Mr Ncube on 17 July 2019 in respect of the allegations in the terms of reference. The notes of that interview are at pages 372-382 of the bundle. The Claimant was asked about wearing a face mask and said that he wore a mask because of poor personal hygiene of the service user [373]. He was asked to explain why he had requested face masks and replied that “some service users had poor personal hygiene, some had gout, catheters in place or would urinate in the living room. These released toxic smells into the air which you were breathing in; you were breathing diseases in.” [374]. When pressed as to whether UTI’s and gout were contagious he referred to it being unhygienic to breathe in the smell of urine or faeces.

64 Mr Ncube asked the Claimant whether he was aware of any medical conditions that may require him to wear protective clothing other than that provided by NELFT he replied ‘no, he was wearing [the] mask to protect him from bad odours or any diseases in the air’. He was asked if he had any specific diseases in mind and replied that “he was not medical and therefore not sure what diseases that there may be in the air; [his] concerns were about service users with catheters, UTI’s, gout and cleaning sacral areas without wearing a mask.”

Addition of further allegations to the disciplinary Terms of Reference

65 On 24 July 2019, two further allegations were added to the investigation. Further concerns had been raised about the Claimant’s behaviour towards colleagues, particularly his conduct towards female colleagues, including a new junior HR colleague who complained he had been following her around, watching her and making her feel uncomfortable; and Mrs Malik whom he asked out on a date and started to text. The Claimant’s conduct towards Mrs Malik led to Ms White taking over as commissioning manager for the disciplinary process. As a result of this further conduct the HR department was considering whether the Claimant’s clinical suspension should be converted into a full suspension [349] however, a firm decision had not been made. The decision was taken to fully suspend the Claimant when the incident on the 22 July 2019 between the Claimant and Z came HR’s attention.

Z incident

66 On the 22 July 2019, Ms White was contacted by Dipti Shah of HR about the Claimant’s conduct towards Z in the Child Health Information Service room. Ms Shah sent Ms White a copy of Z ‘s summary of the incident. Ms White was in email contact with Z that day and met him over the next couple of days [384]. Ms White considered the account to indicate a very serious incident in which it appeared that the Claimant had harassed Z in an aggressive and very upsetting way. She also took into account the earlier incidents of concern and decided that a full suspension was now appropriate. Ms White decided to amend the earlier suspension checklist, and approved a full suspension [989-999], she referred it to Yvonne Hood who also approved it. Ms White told the Tribunal that the decision to fully suspend was as a result of the alleged inappropriate behaviour towards colleagues, particularly Z, and did not have anything to do with any alleged disclosures the Claimant had made. We have carefully considered her evidence and have accepted her explanation for the Claimant’s suspension. Irvine Muronzi met with the Claimant on the 23 July to inform him of the suspension and this was confirmed in writing the following day [388-389].

Amended terms of reference

67 The new allegations were added to the existing terms of reference, an initial proposed draft of the amended terms of reference was created on the 25 July [1003-1009]. This included five new allegations: 1. the Z incident; 2. the fact the Claimant had been absent without leave in May 2019; 3. potential harassment of the junior HR colleague; 4 the potential harassment of Mrs Malik; 5. that he had made an allegation of sexual harassment against Margaret Staples and then withdrawn it when an investigation was proposed.

68 Dipti Shah of HR reviewed the allegations and recommended that only the incident in relation to Z be included within the terms of reference [1002]. Based on that advice, Ms White amended the terms of reference [395-399] and removed the additional allegations from the summary on the first page of the document to leave only the incident relating to Z. However, Ms White omitted to remove all of the allegations from the “specific terms” section [at page 398] and the Margaret Staples allegation was left in there, as was the allegation that the Claimant was absent from work without notifying his line manager or following the NELFT workplace attendance policy. Ms White told us this was an oversight on her part rather than a deliberate decision, which was why that allegation did not appear on the first page [at 396].

69 Ms White also told us that the reason for including the Margaret Staples incident in the initial draft had been because there was a concern that the Claimant had made the allegation in bad faith, in order to justify his absence without leave and to get the clinical suspension reversed. It was considered surprising that having made these allegations, he did not want them investigated but just wanted them to be ‘left on record’ and his unwillingness to have them investigated cast doubt on his reasons for raising them in the first place. However, Ms White was satisfied that steps had been taken to safeguard him and Ms Staples by moving the Claimant to avoid further contact between them and accepted Dipti Shah’s advice that they should not be investigated on a disciplinary basis without further evidence. Ms White admitted that it was an error that the reference to that allegation was included in the final terms of reference. We accept her evidence and find that this was a genuine error.

70 Mr Ncube met with the Claimant on 17 September 2019 to interview him about the additional allegations. He did not consider that there was anything to be investigated in relation to the allegation the Claimant had made against Ms Staples and took no further action. This was confirmed in his investigation report [524].

71 Mr Ali, who also worked in the CHIS, witnessed the Claimant speaking to Z on the 22 July 2019. The following day Mr Ali sent an email to his manager to report the incident. He described the Claimant as calling Z over as Z walked past him and asking him,

“very violently why he keeps looking at him and does he have a problem with him to which Z kept responding he had no problem whatsoever.”

Mr Ali described himself as turning around to de-escalate the situation. He added that the following day the Claimant noticed that he was talking to Z, and turned round to him rudely, asking him why he was talking to Z.

72 The letter dated 24 July 2019 [388], informing the Claimant that he was suspended from duty, referred to the incident on the 22 July, and described the allegation as being that he had,

“behaved in an aggressive way towards a work colleague which left them feeling threatened and intimidated.

... a potential breach of the Trust Disciplinary policy section 2.12 Insulting Behaviour to patients, members of the public or colleagues.”

The Claimant was informed that this allegation was in addition to the allegations currently being investigated by Mr Ncube and that if proven could constitute gross misconduct.

The terms of reference for the investigation [396] described the additional allegation as being that the Claimant “spoke to a work colleague Z in an aggressive way which left him feeling threatened and intimidated”. The “Specific terms” section of the terms of reference recorded “Further specific allegation added, 25 .7.19. [398]

...

‘It was further alleged that on the 22 July 2019, [the Claimant] spoke to [Z] in an aggressive and potentially homophobic manner on the 22.7.19.’

73 Ms White told us that as far as she was concerned the allegation had always been treated as one of potentially homophobic behaviour: the complaint that was received, which was confirmed when she spoke to Z, was that the Claimant had aggressively asked Z what his problem was and had stated “I am straight”, which indicated to Z, and Ms White also understood to be, a reference to Z’s sexuality.

74 On 30 July 2019 the Claimant wrote a “Letter of Apology” to Z, which he asked Mr Muronzi to forward onto him. In his ‘letter of apology’ the Claimant stated that he had been suspended from work because of the allegation and was in the position of potentially losing his employment. He stated that he had not intended to leave Z feeling threatened or intimidated, nor did he see how his behaviour was aggressive or how his words made Z feel threatened or intimidated. Nevertheless, he apologised if the words he used had that effect on him. He stated that he hoped that the letter of apology would persuade Z to drop his allegation as the outcome would be detrimental to the Claimant’s life circumstances.

75 On the 17 September, Mr Ncube conducted his second interview with the Claimant, (the notes are at 422-235) having already interviewed him on 17 July 2019 in relation to the initial set of allegations, (notes at 372-382). In the intervening period, Mr Ncube had conducted interviews with Helen Moody, Renee Darby, Aleisha Sage and Dorothy Wilson (CHIS Administrator). Mr Ncube also interviewed Z on 17 September 2019 after his second interview with the Claimant. At the Claimant’s suggestion Mr Ncube interviewed Reablement Support Workers Aneta Lewin and Gurcharan Battu on 24 September 2019 [440-443] and 25 September 2019, [448-449] respectively. He completed his investigation report on the 17 July 2020 [508-531].

Disciplinary hearing

76 The Claimant was invited to a disciplinary hearing with Joseph Lindo, a letter of invitation was on the 24 September 2020, [548-550]. The hearing took place by video call on the 12 October 2020. Mr Lindo was supported by Steve Inglesfield, HR Investigations Manager, with Kerri Robinson, HR Administrator, as notetaker. The hearing notes are at pages 567-607.

77 The Claimant complains that during the disciplinary hearing he was repeatedly blocked by the Chair from asking questions of witnesses. He told the Tribunal that the

questions that he complained about being blocked were those he wanted to ask Z. He complains that he was not allowed to ask Z how his conduct had been threatening, and was repeatedly blocked from asking that question by Mr Lindo. The relevant parts of the notes are at 567-607 in the bundle. The notes show that Z was asked questions by Thandanani Ncube and that Laura Kemp, HR support, had also contributed to the questions on occasions. We find Ms Kemp's questions were mainly to obtain clarification of some answers, for instance when Z described the Claimant "summoning him over" and that he found the way he summoned him to be quite intimidating. Ms Kemp interjected, "It is a very large office, with around 50-60 staff. If you are able, can you explain the incident again?" Which Z proceeded to do.

78 The description Z gave was that he was walking to his desk at the back of the office. There were tables on both sides of the room. The Claimant was around halfway down and summoned him whilst sitting down. Z did not know what it was about, and the Claimant pulled out a chair, tapped it and told him to sit down. Z was uncomfortable with it, the chairs were arm's length apart and Z felt it was a private chat, which was unsettling, as he had not had any previous conversation with Mr Miah. The Claimant then loudly asked the first question "what is your problem?" At this point in Z's description Laura Kemp asked, "Was that in any way threatening or aggressive?" Z responded that he found it quite intimidating. Ms Kemp asked him to continue with how the conversation had gone and in the course of those questions, Z repeated that the interaction had made him feel vulnerable and intimidated, that it had left a lasting impression and made him feel emotional talking about it again. He also commented that it was not appropriate in the workplace and not in line with Trust values.

79 The Claimant was then given an opportunity to ask some questions. Ms Kemp queried why his first question was relevant, but Mr Lindo allowed the question to continue once the Claimant explained its relevance. The Claimant complains he was not allowed to ask how his conduct had been threatening. Mr Lindo told the Tribunal that he considered that Z had already answered this and that he asked the Claimant to move on. The Claimant accused Mr Lindo of falsely stating that this had already been answered. Having reviewed the notes of the exchange, we accept Ms Kemp intervened to ask the Claimant to clarify the purpose of his question on a number of occasions. We do not find that Mr Lindo prevented any questions being asked, other than asking him to move on when the Claimant queried with Z why he feel threatened, at which point the notes of the hearing record Mr Lindo as saying, "We have heard this one, please move on Mr Miah".

80 We accept Mr Lindo's evidence that it was his genuine view that this had already been answered by Z. Having looked at the questions and answers as a whole, we are satisfied that there was fair management of the questions and that Mr Lindo gave the Claimant a fair opportunity to put questions. He also told us, and we accept, that he had in mind that part of his role was to prevent any oppressive and unnecessary questioning of Z, who had already stated that he had found the incident to be upsetting and that it caused him to become emotional thinking about it. Z had told Mr Lindo that the fact that Mr Miah gave him his sexual orientation i.e. the Claimant had said that he was straight, made him feel there was a homophobic element to the exchange, this was clearly a reference to Z's sexuality being that he was gay. The Claimant in the course of his evidence to the Tribunal was at pains to suggest that he was unable to understand how his remarks could be considered to be homophobic. We are satisfied that this would be obvious to a reasonable observer.

81 Mr Lindo told us that his reason for leaving out reference to the report on infection control by Jeanette Walker from his decision letter was because he had seen the infection control report when the service was set up, he was aware of the controls that were in place when the service was based in Havering and that those were reviewed when Redbridge took the service over.

82 Mr Lindo made several attempts to speak to Mr Ali, who had witnessed the Z incident, in person. Unfortunately he was away from work on long term sick leave and Mr Lindo considered that after a number of unsuccessful attempts it was reasonable to rely on his email sent the day after the incident in question.

83 We accept Mr Lindo's evidence that he had not seen the email disclosures, relied on by the Claimant as protected disclosures, when he conducted the hearing nor had he seen them when he reached his decision, although he was aware of Mrs Moody's account of the meeting on the 17 April 2019. We find that he conducted what he considered to be a fair investigation and he genuinely believed the conclusions in his report which were supported by the evidence. We find that he was not influenced by any of the alleged protected disclosures.

84 On the 22 October 2020, the Claimant was sent the outcome letter from Joseph Lindo informing him of his summary dismissal for gross misconduct with effect from the 23 October 2020, [618-623]. Mr Lindo set out the following reasoning in respect of his decision:

"... I believe the following allegations, which I have found proven need to be considered in totality:

- SM is alleged to have continued wearing a face mask when visiting patients' homes, despite being given a reasonable management instruction not to do so.
- SM is alleged to have advised that he was unhappy at being asked to carry out activities of personal care for patients.
- SM is alleged to have disregarded a reasonable management request and that during the same conversation he refused to listen to his manager and at times became aggressive in manner which was overheard by other staff.

These allegations related to the same fundamental issues and demonstrate your unwillingness to follow reasonable management instructions in relation to the appropriate care of patients who access the service. ***You have stated your rationale in your defence but upon questioning there was not a clear and consistent belief on your part that reflected the Trust values; rather your views seemed to stem from a personal distaste for the hygiene of some of the people we care for and for the levels of odour you encountered in their homes. [emphasis added]***

As these allegations constitute a refusal to follow management requests which also exhibited gross insubordination on your part I conclude that this behaviour constitutes gross misconduct.

In relation to the allegation that on 22 July 2019 you spoke to Z in an aggressive and potentially homophobic manner, which is also found proven, this constitutes insulting and intimidating behaviour. It is also a fundamental breach of Trust values and constitutes discrimination against a colleague on the grounds of their sexual orientation. This also constitutes gross misconduct."

Disciplinary Appeal

85 The Claimant appealed against the outcome of the disciplinary hearing. On 25 October 2020 the Claimant complained that Steven Inglesfield had deliberately concealed crucial evidence relating to a procedural failing in the investigation which had led to his dismissal. He referred to an email he sent to Laura Kemp and Irvine Muronzi in which a counter complaint was made against Z on 18 September 2019 which he said he had forwarded to Steve Inglesfield on 13th, 14th and 15th October 2020. He alleged that Mr Inglesfield had denied receiving this email despite receiving another email he had sent him on 14th and 15th October 2020 concerning another request [627].

86 On the 26 October 2020, Mr Inglesfield contacted the IT department about the missing emails, i.e. the Claimant's complaints about Z, and on the 26 October 2020, the ICT service team released the blocked emails [630]. A screenshot showing the six emails from the Claimant caught by the Respondent's message filter is at page [626]; 4 of the emails held in the message filter were addressed to Mr Inglesfield, one was to Irvine Muronzi and one to Carol White, all were sent in October 2020. The ICT department confirmed that the emails had been blocked by the Respondent's profanity filter due to their explicit content. A screenshot of the text analysis results is at page 900 – the email fell foul of the rule to redact profanity, the offending word being the use of the word 'penis' in the body of the email or attachment.

87 The disciplinary appeal was heard by Melody Williams, Integrated Care Director for Barking and Dagenham, on 25 January 2021. The disciplinary appeal outcome letter was sent to the Claimant on the 15 February 2021 [853-880].

88 On 14 December 2020, in advance of the disciplinary appeal hearing, Mr Inglesfield sent a track change version of the notes of the disciplinary hearing [640-680] to Kerri Robinson with the following message [639]:

"I have now gone through the notes. Please find suggested amendments attached. I have phrased some comments also as would like to seek Joe's view on those as well"

The Claimant alleges that Mr Inglesfield tampered with the minutes, i.e by making the track changes, the relevant passage is at page 646.

89 On the 14 December 2020, Mr Inglesfield sent a draft version of the minutes with his suggested amendments to Kerry Robinson and copied in Joseph Lindo. He asked for Mr Lindo's views on how his amendments.

90 The minutes are at 640-629. The amendments are tracked changes and any other changes other than correcting typos or grammatical suggestions are explained in a comment. The disputed amendment at page 646 is in the passage where the Claimant was being asked why he was asking the questions in the third person and he explained that he had written the questions in the third person. He was asked by Mr Lindo whether there was a reason for that, the note originally records his answer simply as "no", the comment inserted by Mr Inglesfield is as follows: 'I think I remember SM saying that he felt more comfortable asking the questions this way?' This was the note that appeared in the final version of the minutes.

The Claimant's complaint against Helen Moody

91 During the meeting on the 18 June 2019 between the Claimant and Mrs Malik at which the terms of reference for the disciplinary investigation were discussed, the Claimant decided to make formal his allegations raised against Helen Moody. As a result, terms of reference were drafted [338-342] for an investigation which was then conducted by Michael Chigango, Service Manager. Mr Chigango interviewed Helen Moody on 20 June 2019, [343-344] and on the 8 July he interviewed three support workers from the Reablement team, [351-353], [354-355] and [356-358]. On the 9 July he interviewed a further support worker, [359-361]. Mr Chigango gathered further evidence and responses to enquires during November 2019 and January 2020. His investigation report is at pages 532-544 of the bundle.

92 The grievance was heard by Carol White, a meeting was held on the 5 February 2020. Carol White sent the outcome letter to the Claimant on 10 February 2020 [504-507]. She found that the documentation for the role of Reablement Support Worker lacked clarity, with no clear indication that personal care would be undertaken to the level required until the induction process.

Appeal against grievance outcome

93 On 24 February 2020, the Claimant appealed against the grievance outcome decision, [498-503]. On the 23 March 2020, the nation went into a period of national lockdown due to the COVID 19 pandemic. His appeal was acknowledged on 15 July 2020 with apologies for the delay which were stated to be due to pressures of COVID 19 [545].

94 On 28 September 2020, the management response to the Claimant's appeal against his grievance outcome was sent to the Claimant [551-560]. On the 22 October 2020, the Claimant was invited to an appeal hearing on the 16 November 2020, in respect of his grievance [624-625].

95 The Claimant's grievance appeal hearing was heard by Graham Blowes, Business Development and Transformation Director, on 15 December 2020 [681-695]. The grievance appeal outcome letter was sent on the 23 December 2020 [719-722]

Allegation that the Claimant was denied returning to his original post despite agreeing with the employer on the 9 February 2020. This was denied in a letter received by him on the 10 February 2020 and then reconfirmed.

96 The Claimant relies on a discussion that he had with Carol White on the 6 February 2020 in relation to his grievance in which he alleges Carol White offered to return him to his original post. We are satisfied that Carol White was not in a position to make any decisions and /or give assurances as to what would happen as a result of the disciplinary investigation. The Claimant indicated in his appeal against the grievance outcome that he was seeking a return to his original role. Carol White was aware that he had raised concerns in his grievance about the level of personal care involved in the role of Reablement Support worker, she was also aware that the role had not changed and the same degree of personal care would be involved. We are satisfied this was the context in which she asked the Claimant to consider what his position would be in respect of a return to the role; it was

agreed that he would come back to her with his thoughts [see page 506]. We are satisfied that Ms White was not indicating that the outcome of the Claimant's grievance would be that he would return to his original role, rather she was indicating that before he could be returned to the role, he would need to accept that the role involved a degree of personal care. We accept that Ms White was not suggesting that she could pre-judge the outcome of the disciplinary proceedings.

97 We do not find that any offer or promises of a return to his original role were made to the Claimant and that any belief he may have had that this had been offered to him was based on a misinterpretation or misunderstanding of what had been discussed.

The Claimant alleges that Dipti Shah advised Z to make a formal complaint about the Claimant rather than give him an option to do so, knowing this would ultimately give grounds for the Claimant's suspension, having prior knowledge of outstanding allegations made against him. Dipti Shah humiliated the Claimant later on in the investigation by calling him a female name to which no reprimand was made against her by the employer.

98 We find that Ms Shah gave advice to Z in her role as an HR professional. She was contacted by the Medical Staffing Manager on 22 July 2019 who explained she had spoken to Z who was upset about an incident which had happened in the CHIS room. Ms Shah went to see them and observed that Z appeared visibly shaken. He told her that he had been accosted by the Claimant and he believed it was because of his sexuality. We find that she advised him as to what his possible options were in response to the Claimant's actions and Z's complaint that he had been harassed by him. Z gave evidence that Ms Shah gave him information as to what his options were, and that he was not influenced by her into taking one route or another. We do not find that she advised him that he **should** make a formal complaint, we accept the evidence of Ms Shah and Z that she simply advised him that was an option.

99 The Claimant also complains that Ms Shah addressed him by a female name in an email. Ms Shah explained that she had another contact with a similar name to the Claimant in her email contacts and when she began typing in his name, the software autocorrected his name to her female contact's spelling. She did not realise that this had happened, and she sent the email without checking it properly. When the Claimant pointed out her mistake she immediately apologised [1014]. We accept her explanation. We find that it was an innocent mistake for which she apologised as soon as it was pointed out.

Detriment 11: The Respondent's manifest dishonesty in changing the words to the allegation

100 The Claimant alleges that the wording of the allegation about the incident with Z was changed in that it was not originally described as homophobic. Ms White was clear that the allegation had always been considered to be a homophobic incident. Ms Williams addressed the Claimant's complaint about this in the appeal outcome letter [856] she was satisfied that this had been addressed by the disciplinary panel and that the Claimant had been aware of the nature of the complaint and had had an opportunity to deal with it. Ms Moody's evidence is set out at paragraph 14 of her witness statement. We accept that she did not see anything dishonest in the change from "aggressive behaviour", to "aggressive and potentially homophobic behaviour". The Claimant had received the specific terms of reference on 11 September 2019 which included the reference to potential homophobic behaviour and the "potentially homophobic" aspect of the allegation had been set out in the

disciplinary invite letter of 24 September 2019 [548]. She told us that she did not find it surprising that the language used was refined, the terms of reference having been drafted quickly after the incident. As far as Ms Moody was concerned there had never been any doubt that Z's complaint was about potential homophobic behaviour.

101 We find that the Respondent considered the incident to be potentially homophobic from the outset. We are satisfied that this was how it was perceived by Z at the time and that this had been conveyed by him to Ms Shah. We accept that the terms of reference were drafted quickly after the incident, and although the suspension letter did not refer to his conduct as homophobic the specific terms of reference did [398]. When asked about the incident by Mr Ncube in his investigation interview on 17 September 2019 it was the Claimant who first made reference to Z's sexuality in the following terms (SM being the Claimant's initials)[432];

“SM explained that Z is a gay in the workplace and kept staring at SM. SM told VP to not keep looking at him. However SM caught Z staring at him and told him to sit down next to him. SM then explained to Z that SM is straight. ...

The minute taker records that

“SM became quite animated and stated that Z is a gay homosexual who is trying to corrupt him”

The Claimant went on to make several further references to Z's sexual orientation as well as giving a lurid (and we are satisfied wholly untrue) account of Z's conduct. We do not find it at all surprising, given the Claimant's own account of the incident during the investigation, that following the investigation the allegation was explicitly described as a potentially homophobic incident. We do not find there was any link between the change in the description of the behaviour to include the word homophobic and the Claimant's prior complaints relied on as protected disclosures.

Detriment 12: The Respondent paid no attention to evidence by the Claimant in relation to absolving himself from allegations against him surrounding the 22 July 2019.

102 Having heard from Mr Ncube, Mr Lindo and from the Claimant and having been taken to the minutes of the investigation and disciplinary meetings we are satisfied that the Respondent took into account the Claimant's explanation for his actions but did not find that his explanation absolved him from the allegations. We are satisfied that in reaching his decision on the disciplinary offence Mr Lindo considered the Claimant's explanation and rejected his counter allegation that it was Z who had sexually harassed him. We accept that he found the Claimant's counter allegation to be essentially untrue and that the manner in which he had made the counter allegation rather than absolving the Claimant aggravated the original offence.

The relevant law

103 Ms Robertson helpfully set out relevant parts of the statutes and authorities in her written submissions.

104 Section 43A of the Employment Rights Act 1996 provides that a protected disclosure is a qualifying disclosure which is made by a worker in accordance with any sections of 43C to 43H.

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

106 In determining whether an employee has made a qualifying disclosure, the Tribunal must decide whether or not the employee believes that the information he is disclosing meets the criterion set in one or more of the subsections of section 43B(1) and, secondly, decide objectively, whether or not that belief is reasonable. In *Chesterton Global Ltd v Nurmohamed* [2017] IRLR 837 Underhill LJ, giving the leading judgment, made four points about the nature of the exercise required by section 43B(1).

Firstly, the tribunal has to ask (a) whether the worker believed at the time that he was making it that the disclosure was in the public interest and (b) whether, if so that belief was reasonable. Secondly, the tribunal must recognise that there may be more than one reasonable view as to whether a particular disclosure was in the public interest. Underhill LJ continued at [29]-[30]:-

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

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

At [37] Underhill LJ went on to say that: “In a whistleblower case where the disclosure relates to a reach of the worker's own contract of employment (or some other matter within s 43B(1) where the interest in question is personal in character)

there may nevertheless be features of the case that make it reasonable to regard disclosure as being in the public interest, as well as in the personal interest of the worker. Mr Reade's example of doctors' hours is particularly obvious, but there may be many other kinds of case where it may reasonably be thought that such a disclosure was in the public interest."

107 Section 43C provides, amongst other things, that a qualifying disclosure is made if the worker makes the disclosure to his employer.

108 In *Cavendish Munro Professional Risks Management Ltd v Geduld* [2010] IRLR 38 the Employment Appeal Tribunal held that a protected disclosure must be a disclosure of information and not merely an allegation. The ordinary meaning of giving information is conveying facts. In *Kilraine v London Borough of Wandsworth* [2018] IRLR 846, the Court of Appeal held that the concept of "information" used in section 43B(1) is capable of covering statements which might also be characterised as allegations and that there is no rigid dichotomy between the two. Whether an identified statement or disclosure in any particular case does not meet the standard of being "information" is a matter of evaluative judgment by the Tribunal in light of all the facts.

109 Section 103A provides that an employee who is dismissed shall be regarded as unfairly dismissed if the reason (or, if more than one the principal reason) for the dismissal is that the employee made a protected disclosure. The causation test is not legal but factual. A Tribunal should ask why the alleged discriminator acted as he did, consciously or unconsciously; see *West Yorkshire Police v Khan* [2001] ICR 1065 HL.

110 Where an employee brings a whistleblowing claim but does not have sufficient continuity of service to bring an ordinary unfair dismissal claim under section 98 of the Employment Rights Act 1996, and the legislation placing no burden on the employer to show the reason for the dismissal, the burden of proof is on the employee to show on the balance of probabilities that he was dismissed for an automatically unfair reason; see *Maund v Penwith DC* [1984] IRLR 24 and considered in *Kuzel v Roche* [2008] IRLR 530 CA.

111 Section 47B provides that a worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure. Section 48 provides that a Tribunal shall not consider such a complaint unless it is presented before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them or within such further period as the Tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to have been presented before the end of that period of three months.

112 Section 48(2) provides that on such a complaint it is for the employer to show the ground on which any act, or deliberate failure to act, was done. In *London Borough of Harrow v Knight* [2003] IRLR 140 the Employment Appeal Tribunal stated that the ground on which an employer acted in victimisation cases requires an analysis of the mental processes (conscious or unconscious) which cause him to act. Merely to show that "but for" the disclosure the act or omission would not have occurred is not enough. In *Fecitt v NHS Manchester* [2011] IRLR 111 the Employment Appeal Tribunal held that once less favourable treatment amounting to a detriment has been shown to have occurred following a protected act, the employer has to show the ground on which any act or any deliberate

failure to act was done and that the protected act played no more than a trivial part in the application of the detriment. The employer is required to prove on the balance of probabilities that the treatment was in no sense whatever on the ground of the protected act.

Harassment – s26 Equality Act 2010

113 Section 40 of the Equality Act 2010 provides that an employer must not, in relation to employment by him, harass an employee. The definition of harassment is set out in section 26(1) of the Equality Act 2010. [see paragraph 57 of the Respondent's written submissions].

114 The test contains both subjective and objective elements. The Tribunal is required to take into account the Claimant's perception, the other circumstances of the case, and whether it is conduct which could reasonably be considered as having that effect.

Victimisation Contrary to Section 27 of the Equality Act 2010

115 A claim for victimisation is brought under section 27 of the Equality Act 2010. The material parts of that section are set out at paragraph 63 of the Respondent's written submissions.

116 The question is whether the reason for the treatment was because the worker had done a protected act or that the employer knew that he or she intended to do a protected act, or suspected that he or she had done, or intended to do, a protected act? See - Baroness Hale in *Derbyshire and ors v St Helens Metropolitan Borough Council and ors* [2007] ICR 841, HL, and Lord Nicholls in *Chief Constable of West Yorkshire Police v Khan* [2001] ICR 1065, HL both cases decided before a change in the wording included in the Equality Act 2010 but not affected on this question.

117 The test of causation 'because' is not to be approached by asking 'but for the Claimant doing the protected act would the treatment have occurred' but by asking whether the protected act was the reason for the treatment *Greater Manchester Police v Bailey* [2017] EWCA Civ 425 and *Nagarajan v London Regional Transport* [1999] IRLR 572 .

The burden of proof

118 Section 136 of the Equality Act 2010 sets out the burden of proof that applies in discrimination cases. Subsection (2) provides that if there are facts from which the Tribunal could decide, in the absence of any other explanation, that person (A) has contravened the provisions concerned, the Tribunal must hold that the contravention occurred. However, subsection (2) does not apply if A shows that A did not contravene the provision.

Time limits

119 Section 123 of the Equality Act 2010 provides for a primary time limit for complaints to be brought to the Tribunal with 3 months of the act or omission complained of, subject to a possible just and equitable extension. Ms Robertson referred us to *Thompson v Ark Schools* [2019] ICR 292 in respect of the just and equitable discretion under s 123.

Conclusions

Protected disclosures

Section 43B of the Employment Rights Act 1996.

120 The first disclosure relied on by the Claimant is contained in his email sent at 15:49 on 17 April 201 [275-276] in which described his belief as being that undertaking personal care without a face mask left him vulnerable to disease and infection. He also referred to the whole team being forced to undertake personal care duties with no formal training or a face mask due to non-reablement service users wrongly being assigned to the service, the Claimant did not pursue this latter allegation as amounting to a disclosure of a breach of any legal obligation.

121 The second disclosure contained in the email sent at 16:05 on 17 April 2019 relied on contained the 'information' that the Claimant was being forced by his manager and a supervisor to not wear a disposable face mask when visiting service users homes, the Claimant asserted that he was trying to prevent himself from catching airborne diseases and referred to the Infection control policy.

122 The third disclosure relied on is contained in the email sent at 16:19 on 17 April 2019 [281-282] in which the Claimant complains that he is being forced to undertake personal care duties whilst having no face mask or formal training, the Claimant relies on this information as tending to show a breach of legal obligation, namely the legal obligation that the Respondent should provide a safe place of work, and provide PPE as provided for in Regulation 4(1) of the PPE Regulations 1997 and the Health and Safety at Work legislation. [see above in respect of final list of issues]

123 It was not disputed that the emails were sent to the Claimant's employer. Nor was it disputed that the disclosures relied upon contained sufficient factual content so as to be capable of showing the intended failure. The Tribunal had to consider whether the Claimant believed that the information was disclosed in the public interest and tended to show a relevant failure ("the Claimant's belief"), and if so, whether this was a reasonable belief for him to hold.

124 We note that the substantive disclosures in respect of not being allowed to wear a face mask were made in terms of the impact on the Claimant personally, the other members of the team were mentioned in respect of the effect on them of alleged inappropriate referrals, however a reference was also made to face masks within that contention [275]. We have given the Claimant the benefit of the doubt and have accepted that when he sent the emails he was seeking to raise the issue of lack of face masks and risks to health and safety not just on his own behalf but also had in mind the effect on others in the team, he made no mention of the safety of the service users or any section of the public.

125 We accepted that the Claimant's belief appeared to be genuine. The Respondent acknowledged that he may have had a "genuine but wrong belief" that using a face mask prevented the risk of infection. The next question for us was whether it was reasonable for him to hold that belief. That belief must be objectively reasonable. *Korashi v Abertawe Bro Morgannwg University Local Health Board* [2012] IRLR 4 EAT. The test requires us to consider what a worker in the Claimant's shoes knows or ought to know about the matters

disclosed and what a person in his position would reasonably believe to be a risk to health and safety.

126 The Claimant accepted that he was not a qualified nurse or medical practitioner, he was a Reablement Support Worker.

127 We are satisfied that Helen Moody's note at page 271 was an accurate record of what was discussed her meeting with the Claimant. Aleisha Sage, the Claimant's supervisor, had reported that he wore mask and refused to remove it when instructed to do so and that he gave the unpleasant smell as the reason. The Claimant did not appear to understand that wearing a mask for this reason might be offensive to the service user. We have found that Mrs Moody explained that face masks were not needed and were not part of the PPE issued by NELFT, the Claimant was instructed not to wear one. We find the Claimant did not mention splashes or contact with bodily fluids in his conversation with Helen Moody; his stated concerns at the time, were specifically about the smell and the risk of airborne disease. We have found he was told it was not necessary to wear a mask in the those circumstances and it was not provided as part of PPE. The Claimant, [paragraph 13 of his witness statement] accepted that Helen Moody told him that wearing a face mask was not warranted by the Trust's infection control policy.

128 In respect of the second disclosure relied on, the Claimant quotes from the infection control policy. The Respondent says he did so, 'selectively and not in the relevant context, i.e. for PPE, and that his statements are very general statements in respect of training and infection control.'

129 We were referred to the content of the policy at page 193 which states that standard precautions are based on risk assessments of the likelihood of exposure to blood or bodily fluids. The section in respect of masks is, 6.3.4 [198]

"Masks and Respirators

Face masks must be worn to protect the healthcare worker when there is a risk of blood or bodily fluids splashing onto the face. Respirators, for example a filtering face-piece particulate (FFP) mask, must be worn when clinically indicated to protect the healthcare worker from airborne transmission of communicable disease (see Prevention and Control of Communicable Disease Policy)

The policy set out how masks should be used in order to function effectively, including being: worn correctly and close fitting, handled as little as possible, changed between procedures or patients, worn only once and discarded immediately after removal as clinical waste followed by hand decontamination, never reused ... and when any mask is worn in patient contact, the reasons should be explained to the patient and their family."

"Use of Masks for Protection against Body Fluids [199]

Fluid-repellent surgical masks must be worn for all procedures where there is a risk of blood or body fluid splashing onto the face. The decision to wear a mask should be based on a risk assessment of the likelihood of splashing during a procedure. Masks are also recommended when potentially contaminated aerosols or dusts are produced, e.g. nail filing in podiatry.

Use of Masks (Respirators) for Communicable Disease Control

Respirators, i.e. FFP3 masks, provide a higher level of protection as they prevent the inhalation of infectious airborne particles. This is one of the key measures required when delivering care to those with infections spread by the airborne route. Respirators should be FFP3 which conform to European standard EN149:2001, and must be fit tested for the user ...”

The Claimant did not wear a respirator or FFP3 face mask that had been fit tested. We note that according to his supervisor the Claimant was observed wearing the same mask at different service users’ homes and touching his mask during and between visits. He did not explain the reason for wearing a mask to the patient or their family. We are satisfied that the infection of control policy does not in fact assist the Claimant and that he has quoted from it selectively.

130 We find that Mrs Moody is an experienced nurse with over 26 years of experience. The Claimant was new to the Trust and to healthcare work, he did not have the same level of experience as Helen Moody. We are satisfied that it was not reasonable for him to continue in his belief once Mrs Moody had told him that masks were not needed and was not part of the PPE issued, i.e. it was not considered necessary under a risk assessment carried out by the Trust. We find that the Claimant’s reference to risk of splashes of urine was introduced later, it was not mentioned in his disclosures made at the time. In any event we find that it was not reasonable for the Claimant to believe that this posed a realistic risk and that if it did the use of a IIR face mask would guard against that risk. We accept Mr Lindo’s evidence that the risk of a splash to the face was not likely to happen, he was an experienced healthcare professional and described that risk is negligible to zero and not something that would be reasonable to expect, or to anticipate or guard against.

131 We are not satisfied that it was reasonable for the Claimant to believe that a simple face mask, such that he was insisting on wearing, which was not surgical grade and not a FFP3 face mask, would protect him from the risk about which he complained. We are also satisfied that his own conduct when wearing a mask in failing to use his mask in accordance with the policy, is inconsistent with his holding a rational or considered belief.

132 We find that the Claimant was primarily seeking to protect himself from what he considered to be obnoxious fumes or smells. We are satisfied that his belief that the smells might infect him with airborne disease was an ill-founded belief, it was not one that was reasonable for him to persist in once he had been told by his manager, who was an experienced nurse, that it was not a risk.

133 We are therefore satisfied that at the time the Claimant made the disclosures relied on, after his meeting with Helen Moody, it was not reasonable for him hold the belief that failing to provide him with, or allow him to wear, a face mask was exposing him or his colleagues to a risk to his health and safety, or that there was a breach of a legal obligation to protect his health and safety and to provide relevant PPE.

134 The unsuitable referrals disclosure was dropped on the 22 September 2022 as an allegation. If it had not been, we would have found that it was not reasonable for him to have held the belief that this was a breach of health and safety requirements or a legal obligation.

No protected disclosures

135 We have found that the disclosures relied upon by the Claimant do not qualify as protected disclosures. We have, however, considered the matters relied upon as detriments and set out our conclusions on those in chronological order below.

Detriments

Detriment 1: That he was redeployed from the Reablement Service to the Single Point Access team on 29 April 2019

136 We are satisfied that the Claimant's supervisor raised her concerns about the Claimant with Mrs Moody following complaints from service users and their families and as a result of her live supervision. We have accepted that the decision to suspend the Claimant was as set out by Mrs Moody in her evidence and in her checklist at page 298 and 299.

137 We are satisfied that the Claimant was removed from clinical duty because of the genuine concern of a risk to service users, namely that the Claimant might neglect their needs due to his objection to carrying out personal care. The Respondent took steps to provide the Claimant with other duties and we find that there was a genuine assessment of his suitability for other work which was consistent with the reason for removing him from clinical duties being the concern in respect of the safety and care of service users.

138 As set out above we have accepted the evidence of the Respondent's witnesses as to the reason for removing the Claimant from clinical duty. We are satisfied that they had a genuine concern that the Claimant had failed to follow reasonable instructions and that the service users' needs had not been prioritised by him. We do not find that his disclosures played any part in that decision.

Detriment 2: That terms of reference for a disciplinary case against him were provided on 30 May 2019

139 We have set out above our findings in respect of the commencement of the disciplinary and the amendments of the allegation. We are satisfied that the details of concern set out in the terms for reference for the investigation into the Claimant's conduct dated the 30 May 2019 [321] were recorded there and included because they were matters raised by the patients and the service manager, and which were supported by evidence from managers, supervisors and an independent patient therapist. We have accepted Carol White's explanation for why she considered it was more appropriate to address the issues via the conduct route rather than simply within the probationary procedure. The matters included a repeated refusal to obey a manager's and supervisor's instructions; and concern in respect of the Claimant's conduct towards his manager. These were genuine concerns which she considered to be conduct rather than capability issues.

Detriment 3: That two new allegations were added to the disciplinary case against him on 24 July 2019

Detriment 4: That amended terms of reference were provided to include those new allegations on 11 September 2019

140 We have accepted Carol White's evidence that the additional allegation in respect of Ms Staples appeared in the terms of reference by error. We are also satisfied that on

investigation, there was found to be no need to take this any further and this did not feature in the report as being a matter the Claimant needed to answer in the disciplinary hearing.

141 We have also accepted the Respondent's explanation for adding the allegation in relation to the incident with Z. We are satisfied that the allegation was added because it was serious and warranted investigation under the disciplinary procedure. We find that the Claimant's disclosures had no influence whatsoever on the decision to add the new allegations or to amend the terms of reference.

Detriment 5: That a disciplinary investigation report was concluded on 17 July 2020 and (in the Claimant's view) this was biased against him and not a fair analysis

142 We have accepted Mr Lindo's evidence that he had not seen the disclosures relied on by the Claimant when we produced his report. He was aware of Mrs Moody's account of the 17 April meeting which included the concerns raised by the Claimant. The Claimant's grievance was being dealt with separately. Mr Lindo interviewed the witnesses suggested by the Claimant as well as those suggested by the Respondent. We accept that he conducted what he considered to be a fair investigation and set out a fair analysis of the relevant evidence in his report. We are satisfied that he was not influenced by any of the Claimant's disclosures. We find that Mr Lindo conducted a fair investigation and that there is no proper basis for alleging that he was biased against the Claimant. We accept that the reason he left out Jeannette Walker's report on infection control was because he had already seen the infection control report when the service was set up, he was aware that risk assessments were carried out and considered that appropriate controls were put in place when the service was based in Havering and those were reviewed when Redbridge took the service over.

143 In cross-examination the Claimant put to Mr Lindo a different reason (rather than the protected disclosure) for his report being allegedly biased and unfair; namely, that he wanted Mrs Moody's job and so he wrote a biased report in order to gain favour or approval from more senior managers. We do not find that that was the reason for him drafting the report in the way that he did. Nor do we find that Mr Lindo was influenced in any way by the disclosures made by the Claimant, he was simply not aware of them. He did not have any connection with the department the Claimant worked in, or any prior connection to the case, nor was he aware of the Claimant's emails relied on as protected disclosures.

Detriment 6: During the disciplinary hearing on the 12 October 2020, the chair allegedly repeatedly blocked the Claimant from asking questions of witnesses.

144 For the reasons set out above, we are satisfied that Mr Lindo did not know anything about any potential protected disclosures. We accept that his handling of the questioning during the disciplinary hearing was an attempt by him to try and keep the Claimant on track in a hearing which lasted 6 hours. We do not find that he repeatedly blocked the Claimant from asking questions of witnesses. We have found that he did step in occasionally to stop some questions where he felt those had already been answered and that he allowed interjections from all those concerned if he thought they were relevant. We have not found any evidence of bias in Mr Lindo's approach to the Claimant. We find that overall, he was trying to manage the hearing fairly as best he could.

Detriment 7. That the minutes of the disciplinary hearing of the 12 October 2020 were tampered with by Steven Inglesfield of HR when produced after the hearing and were approved by Joseph Lindo

145 The comment inserted by Mr Inglesfield into the minutes is as follows: 'I think I remember SM saying that he felt more comfortable asking the questions this way?' We are satisfied that this was a Mr Inglesfield's best recollection of what was said in the meeting. We find that the amendment was intended to give a fuller and more accurate record of what the Claimant said by including his explanation for asking questions in the third person which was not recorded in the original minutes. We find that Mr Inglesfield approached his role in good faith and that the amendment is consistent with Mr Inglesfield trying to be balanced and fair to the Claimant.

146 We are satisfied that at that time of suggesting the amendments to the minutes Mr Inglesfield was not aware of any of the Claimant's emails relied on as protected disclosures. When he was asked about it before the Tribunal the Claimant accepted that Mr Inglesfield's insertion of this in the minutes was not improper. We are satisfied that there is no evidence to any link to any protected disclosure, let alone any detriment.

Detriment 8: That the claimant's complaints of sexual harassment against Z which had been submitted in September 2019 was not dealt with at the time and was not investigated.

147 We have accepted the Respondent's explanation that the Claimant's complaint was blocked by the it's profanity filter due to its content. Mr Inglesfield only became aware that there was a problem when the Claimant raised the fact that no one had responded to his complaint. Mr Inglesfield investigated the matter to discover that the email which had been sent more than once, each time had been blocked by the profanity filter.

148 We find that there was no connection whatsoever between the Claimant's complaint not being dealt with and not being investigated and his having made any disclosures relied on as protected disclosures.

Detriment 9: The Claimant was denied returning to his original post despite agreeing with the employer on the 6 February 2020. This was denied in a letter received by him on the 10 February 2020 and then reconfirmed.

149 We have not found that Ms White had agreed on 6 February 2020 that the Claimant would return to his original role. There was no change in position about his return to that role and the Claimant was not subjected to any detriment.

Detriment 10: Dipti Shah, a senior Human Resources personnel advised Z to make a formal complaint against the Claimant rather than give him an option to do so, knowing this would ultimately give grounds for the Claimant's suspension, having prior knowledge of outstanding allegations levied against him. Dipti Shah humiliated the Claimant later on in the investigation by repeatedly calling him by a female name to which no reprimand was made against her by the employer.

150 We have not found that Ms Shah advised Z to make a formal complaint against the Claimant. Nor have we found that the advice she gave was influenced in any way by the Claimant's disclosures.

151 We have accepted Ms Shah's explanation for using a female name to address the Claimant in an email. We find that it was an innocent error and there is no link to any of the Claimant's disclosures.

Detriment 11: The Respondent adopted manifest dishonesty in changing the words to the allegation surrounding the incident on 22 July 2019 from speaking to a colleague 'in an aggressive way towards him which left him feeling threatened and intimidated' to speaking 'in an aggressive and potentially homophobic manner'

152 We have not found that there was any manifest dishonesty by the Respondent in changing the words of the allegation. The element of homophobia was contained within the original allegation and was not something new. We find that this amendment to the description of the allegation more accurately reflected the allegation the Claimant had to meet. We do not find that this amounts to a detriment. We are also satisfied that the changes to the wording were in sense whatsoever influenced by the Claimant having made his disclosures.

Detriment 12: That the Respondent paid no attention to evidence given by the Claimant in relation to absolving himself from allegations made against him surrounding the 22 July 2019.

153 We are satisfied that the Respondent gave due attention to the Claimant's account, he was able to explain himself at length during the disciplinary hearing and was also able to put his version of events to Z at the disciplinary hearing. We are satisfied that it was not that the Respondent paid no attention to his account but that it preferred the account given by Z where there was a conflict: Z's account was also supported by Akhtar Ali and the Claimant's account was found not to be credible in parts. Having given due consideration to the Claimant's account and his explanation for his behaviour the Respondent did not accept it.

154 We have not found that Mr Lindo was influenced in any way by the disclosures made by the Claimant, we have found that he was not aware of them.

S 47B Detriments in summary

155 We have not found that any of the matters relied upon by the Claimant as detriments were influenced by the Claimant having made the disclosures relied upon. Had we found the disclosures to be protected disclosures based on our findings set out above we would not have found that he was subjected to any detriments as a result of, or on the ground of, having made any protected disclosures. The claim under section 47B of the Employment Rights Act 1996 fails.

Automatic unfair dismissal – s 103A ERA

156 We have found that the reason for the Claimant's dismissal was the Respondent's genuine belief that he had behaved in breach of the Respondent's code of behaviour and conduct and that his conduct towards Z was such that it warranted summary dismissal in its own right. We are satisfied that the reason given by the Respondent was the principal

reason for his dismissal. We have found that the complaints that the Claimant relies on as protected disclosures did not play any part in the decision.

157 The claim for automatically unfair dismissal under s 103A of the Employment Rights Act 1996 therefore fails.

Sexual harassment allegations against Z.

The Claimant asserts that Z sexually harassed him. The Respondent contends that the Claimant harassed Z on the grounds of Z's sexuality (Z being openly gay).

The Claimant contends that on 22 July 2019, Z had been 'giggling like a girl', 'frisking his hand like women do' and had been rubbing his groin with an erection visible.

158 We have accepted Z's evidence. His contemporaneous account in his email is consistent with that given in his interviews and to the Tribunal. It also consistent with Mr Ali's account. We find that Mr Ali volunteering an account of the incident in writing to his manager gives weight to Z's contention that it was an unusual incident and one that was likely to be intimidating.

159 The Claimant accepts that he called Z over, indicated that he should sit down, asked him what his problem was and told him that he was straight. Where the Claimant's account of the incident differs from that of Z and Mr Ali is in respect of his attribution to Z of the actions 'giggling like a girl', 'frisking his hand like women do' and 'rubbing his groin with an erection visible'. In his interview with Mr Ncube the Claimant describes the incident in lurid terms expressing stereotypical and prejudiced views about gay people [at 432-434]. Having heard from both Z and the Claimant we find that the Claimant's account is highly unlikely to have occurred and is not credible.

160 Mr Lindo found that the Claimant's actions amounted to harassment of Z and that any sexual element was only in the Claimant's own head or imagination. We have reached the same conclusion. We do not find that Z sexually harassed the Claimant.

Sexual harassment allegation against Ms Staples.

Did Ms Staples carry out conduct towards the Claimant on 29 April 2019 and 6 May 2019, namely:

- 1. Asking if 'he'd come to play' on his first day in the team (29 April 2019); and*
- 2. On 6 May 2019, referring to a box of condoms and saying 'he had a whole packet to play with all of the women in the office.'*

(together "the Alleged Ms Staples Comments")

161 Ms Staples did not refer to a box of condoms and we have not found that it was reasonable for the Claimant to infer any sexual connotation to either of Ms Staples remarks. We have not found any evidence of unwanted conduct of a sexual nature or relating to sex. This allegation of sexual harassment also fails.

Victimisation complaint

Was the Claimant's informal complaint about the alleged comment by Ms Staples to his manager and the subsequent withdrawal of those complaints a protected act:

162 We are satisfied that making a complaint that you have been sexually harassed by your manager qualifies as a protected act under the Equality Act 2010 subject to any allegation not being made in good faith.

If so, was the inclusion of an allegation relating to the raising and withdrawal of those complaints within the Terms of Reference in September a detriment?

163 The Respondent's explanation for including this as an allegation in the terms of reference was that there was a concern that this allegation was made in bad faith: it being made not because the Claimant believed it to be true but rather in order to explain the Claimant's refusal to attend work and his unauthorised absence from work. The Respondent was concerned that when the Claimant was informed that the allegation would need to be investigated, he said he did not want it to be pursued.

164 We accept Carol White's evidence set out at paragraph 36 of her witness statement that there was a decision not to pursue the allegation in a disciplinary and it was removed from the list of allegations. However, it was an oversight that reference to it was included in the description of the terms of reference. Mr Ncube referred to it in his meeting of 17 September. However, he did not consider there to be anything in the allegation and took it no further. We are satisfied that the original inclusion of the allegation as a disciplinary matter was on the basis that the allegation had not been made in good faith.

165 We have also found that Mr Ncube met with the Claimant on 17 September 2019 to interview him about the additional allegations. He did not consider that there was anything to be investigated in relation to the allegation the Claimant had made against Ms Staples and took no further action. This was confirmed in his investigation report [524].

166 The detriment relied on is this being included in the terms of reference. We are satisfied that a reasonable worker might consider that including an allegation in the terms of reference for a disciplinary investigation was to their detriment. The Claimant was asked questions about it as well as about his unauthorised absence in the investigation interview [431].

Was any such detriment because of any protected act?

167 We accept that the reason for including it in the terms of reference in the first place was due to a genuine concern that the Claimant was not acting in good faith.

168 We have accepted Carol White's evidence that this was removed from the terms of reference following advice from Dipti Shah and that the remaining reference to it in the Specific terms of reference at p398 and find that this was a genuine error.

169 We are satisfied that reference to this was included in error and this is consistent with it not being pursued in the disciplinary.

170 We are satisfied that this allegation was not included in the terms of reference as a result of the Claimant having made an allegation of sexual harassment against his manager but because of his action in withdrawing the allegation on being told that it would need to be investigated thereby giving rise to the suspicion that he was making a spurious allegation in order to explain his unauthorised absence from work. It was the Respondent's suspicion that he was acting in bad faith which was the reason for the allegation being included in the

terms of reference in the first place. The reason it remained in the updated terms of reference was due to an error of oversight on Carol White's part. We have accepted the Respondent's explanation.

Was the informal complaint raised in good faith?

171 We do not make any finding in respect of bad faith the issue not having been put to the Claimant, in these terms and having accepted the Respondent's explanation for its actions it is not necessary for us to do so. We note however that the allegation of sexual harassment against Ms Staples fell apart under the slightest scrutiny and the Claimant accepted the sexual inferences he relied on were simply in his head.

The claim for victimisation is brought outside the primary limitation period is it just and equitable for the Tribunal to extend time limits with respect to this claim?

172 Early conciliation started on 3 December 2020 and ended on 14 January 2021. The claim from was presented on 2 February 2021. Acts or omissions occurring before 4 September 2020 fall outside the primary time limit of 3 months, unless they form part of conduct continuing over a period, sometimes described as a series of continuing acts.

173 We are satisfied that the inclusion and then removal of an allegation in relation to the raising and then withdrawal of the complaint in the Terms of Reference in September 2019 was a discrete incident not forming part of conduct continuing over a period and about which a claim has been brought outside the 3 months' time limit within the Equality Act 2010.

174 The Claimant has not presented any reasons why we should extend time in respect of this allegation. The Claimant received the terms of reference document [395-399] on 11 September 2019. He was aware from 11 September 2019 of the allegation being included and then withdrawn and has not explained why he did not bring a complaint about for nearly a whole year.

175 We have not found it just and equitable to extend time in relation to this complaint.

176 The Claim of sexual harassment by Ms Staples fails and is dismissed.

Wrongful dismissal

Was the Claimant guilty of conduct so serious as to amount to a repudiatory breach of the contract of employment entitling the Respondent to summarily terminate the contract without notice.

177 We have found that the Claimant was guilty gross misconduct under the Respondent's disciplinary procedure, in that he harassed Z on the basis of Z's sexual orientation. We are satisfied that this was conduct that was in breach of the Trust's values and which amounted to gross misconduct under its disciplinary policy. We find that the Respondent was entitled to dismiss the Claimant summarily, that is, without notice, as a result.

178 There is no basis for awarding an uplift for failure to follow the ACAS code.

- 179 The Claimant's claims fail and are dismissed
- 180 The provisional remedy hearing listed for the 4 April 2023 has been vacated.

Employment Judge C Lewis
Dated: 19 April 2023