EMPLOYMENT TRIBUNALS

Claimant:	**Mr Subramaniam Ahillan**
Respondent:	**Mid and South Essex University Hospitals NHS Foundation Trust**
Heard at:	**East London Hearing Centre**
On:	**21 to 24 and 28 February and 1 March 2023** **9 and 10 March 2023 in chambers**
Before:	**Tribunal Judge D Brannan, acting as an Employment Judge**
Members:	**Mr L O'Callaghan** **Mr J Webb**

Representation
Claimant: Representing himself
Respondent: Mr Sudra of Counsel instructed by Capsticks Solicitors LLP

RESERVED JUDGMENT

1. The claimant's claim of direct race discrimination is upheld.

2. The claimant's claim of protected disclosure detriment is dismissed.

REASONS

1. This decision is contains the following sections:

   (a) Evidence and Hearing – A description of what we have considered in reaching this decision and key interim issues at the hearing

   (b) Facts – Our primary findings on what happened

   (c) Law – A brief summary of the applicable law for this case

   (d) Application of Facts to Issues

(e) Conclusion

Evidence and Hearing

2. The hearing was originally listed for 5 days. Ultimately we spilt over onto a sixth day with the parties and then required two days for deliberations. We are grateful to the parties and witnesses for making themselves available for longer than originally planned.

3. The judgment and reasons were reserved and we appreciate the patience of the parties while we have prepared these.

4. For the hearing we had a bundle of documents and a bundle of witness statements. A number of documents were added during the hearing resulting in the last document in the bundle being the Suspension Policy & Procedure beginning on page 1067. We also considered, but never added to the bundle, the transcript of the recording from 9 April 2020 which we explain further below.

5. The witnesses we heard from were:

(a) The claimant

(b) Paul Major

(c) Michael Noakes

(d) Claire Dowler (previously Smithers)

(e) Amanda Brokenshow

(f) Jenni Brown

(g) Ifenyu Nwonwu

(h) Florence Looi

(i) Ali Sadik

(j) Nicola Rees

6. At the beginning of the hearing we were informed that the claimant had made another claim against the respondent with reference 3205796/2022. The claimant applied for this case to be joined with the existing case. The respondent opposed this saying that the new case arose from issues happening after the issues complained about in the existing case, and that joining the cases would necessarily involve adjourning the present case for which everyone was ready to proceed. We refused the application because it was not in the interests of justice to delay the existing case. I did however commit to making directions for the new case in light of the outcome of the present case.

7. The claimant was unrepresented. He suffers from anxiety and depression. He told us that he may need additional breaks. We were careful to have regular breaks for everyone's benefit and sensitive to the claimant's specific

needs. During the hearing the claimant also told us that he could have a catatonic absence (my words, based on his description) for up to five minutes, in which case we should not try to intervene. I explained that we would need to take action if there was a danger to him or others. He did not in fact suffer any such symptoms.

8. The claimant had some difficulty cross-examining witnesses. We assisted as much as we were fairly able to without descending into the arena. As is evident from the decision, the claimant's claim in fact succeeds based on the respondent's own account and the documentary evidence.

9. Mr Sudra provided written submissions at the conclusion of the evidence. The claimant responded verbally, though had some difficulty doing so, becoming tearful at one point. We invited him to make his own written submissions and he specifically declined.

10. However, the claimant then sent written submissions on 3 March 2023. It would be unfair for us to consider these. Having read them they are anyway immaterial because they contain nothing that was not already apparent from the hearing and evidence.

Facts

11. The claimant is an Asian of Sri Lankan origin. He began working for the respondent on 16 April 2019 as an Engineering Team Leader.

12. By March 2020, the claimant's line manager was Darren Harris, Mechanical and Engineering Workforce Manager. Mr Harris reported into Paul Major, Engineering Operations Manager. Alongside the claimant worked Jack Isbell, Building and Plumbing Services Supervisor.

<u>Background</u>

13. The treatment about which the claimant complains all took place during the coronavirus pandemic. It was a time of enormous strain on the whole country, and particularly within the NHS where all the people involved with this matter worked at the relevant times. However during the pandemic there were no changes to the law on whistleblowing or discrimination that affect this case. We use the term whistleblowing throughout this decision to refer to the making of protected disclosures under the Employment Rights Act 1996.

14. Matters begin on 23 March 2020, the day the Prime Minister introduced the first national lockdown in England. From that moment, we observe that the experience of the pandemic of NHS workers was in one key respect very different that of from many other people. NHS workers had to continue to attend work as far as possible to save lives. People who did not have to attend work had to stay home to save lives. Both circumstances put strain on people and led to behaviour which we know would not necessarily be typical of them in normal times. We of course do not know the individuals involved in this case outside of the evidence we have heard. But we emphasise that our findings are not aspersions on individuals as people, but conclusions based on actions and reasonable inferences about thought processes.

15. Finally, by way of introduction, we observe that the evidence presented to us prior to the hearing was incomplete in two key areas:

    (a) The claimant did not, until the hearing, explain to the Tribunal why he thought:

        (i) his claimed detriments were on the ground that he had made protected disclosures; or

        (ii) his less favourable treatment was because of race.

    (b) The respondent nevertheless knew facts relevant to both of these points well in advance of the hearing:

        (i) In relation to the protected disclosures, Mr Sudra rightly conceded during the hearing, responding to questions from the Judge, that three of the claimant's five claimed protected disclosures were indeed protected. The first of these, which preceded any claimed detriment, named the claimant's then line manager, Mr Harris, as being responsible for a contractor which had attempted to overcharge the respondent, and his colleague, Mr Isbell, as responsible for two contractors from which (unspecified) members of staff were financially benefiting.

        (ii) In relation to race discrimination, it transpired that Mr Harris was part of a WhatsApp group which involved racist content. He left employment while under investigation concerning this group. The respondent dismissed other participants of the WhatsApp group. When the claimant first raised this at the hearing (not knowing the full facts), the respondent's position that this was totally irrelevant to the claimant's claim. That is obviously wrong because Mr Harris was involved in the actions about which the claimant complained from 9 April 2020, which led to the claimant's suspension. Mr Harris's state of mind and motivations (on 9 April 2020) are obviously relevant to the issues of race discrimination in the claim, given the legal framework and shifting burdens of proof.

16. The Panel did consider whether to order further disclosure in order to fill in the gaps the respondent left. We decided it was not proportionate or in the interests of justice to do so, once we heard witness evidence on the relevant points.

<u>Disclosure 1 – 23 March 2020</u>

17. On 23 March 2020 at 07.12 the claimant wrote to Florence Looi, Estates & Facilities Manager, an email with the subject "RE: Whistle-blowing". As relevant he said:

    > I am writing to you regarding a matter which I would like to bring to your attention. I recently came across a concern about the work carried out by the two contractors: ELM Site and CCR and I understand that at least two members of staff are financially benefiting from this.

I am currently concerned about a third company, ADS, as according to their quotation No: 2579 from the 19/08/2019, the estimated quotation to carry out work is £5580.80 + VAT. However, unfortunately, the invoice from 01/11/2019 showed the price to be £6696.96 + VAT. In total, this came to £8036.35.

I find this additional amount included in the invoice shocking. This only came to my attention when someone left the completion of work form on my desk to be signed and approved and showed that the invoice was only received on the 13/03/2020. I am therefore very doubtful about approving this invoice, as I had a meeting a few months ago with the same company about the inconsistent charge rates.

I would therefore like to bring your attention to this matter and hope that it will be taken seriously. I spoke to Rachel about this issue but did not discuss anything about the other two companies mentioned above. Due to the extent of the problem, I feel that it is right to inform you and the Financial Director about this matter.

I would be grateful if the companies and myself could be anonymised for this whistle-blowing matter.

If you need any further information, please do not hesitate to contact me.

18. With the email the claimant attached an email dated 12 July 2019 which listed Mr Harris as responsible for ADS, and Mr Isbell as responsible for Elm site roofing and CCR drainage. We accept these to be the same companies to which the claimant referred in his email.

19. The claimant also attached the invoice and quote from ADS showing the discrepancies described in his email.

20. The respondent accepts this is qualifying disclosure within the meaning of section 43B of the ERA.

21. Mrs Looi said under cross-examination that the claimant met her at around 8 in the morning (23 March 2020) prior to him sending Disclosure 1. The claimant disagreed with this. He recalled that they met in the corridor later when Mrs Looi said she had sent Disclosure 1 on to the Finance Director. We think Mrs Looi's recollection is unlikely because the email was sent at 07.12 and was worded as if the claimant had not already told her. We find there was no conversation on 23 March 2020 before the claimant sent Disclosure 1.

22. It should be noted that this disclosure, along with Disclosures 3 and 5, which effectively repeated it through different channels, ended up with RSM UK Risk Assurance Services LLP, which the respondent describes as its independent counter-fraud specialist. From them we know there were "initial investigations" but there is no explanation of what this involved, including whether any of the people accused were contacted. After initial investigations the cases were closed. In order to understand that possible motivations that could arise as a result of the disclosures, it is important to know that in

Disclosure 5 the claimant explicitly said that the two members of staff benefiting from contractor overbilling were Mr Harris and Mr Isbell.

<u>2 April 2020 Email</u>

23. On 2 April 2020 the claimant sent another email to Ms Looi. In this he said:

> Rachel contacted ADS and they sent a different invoice which came to less than £1339. They stated that they had mistaken the VAT. I would like to mention this to you and that they are using appropriate invoicing software which would not make a mistake. We should also consider that this is the way NHS fraud starts and it is difficult to find out about it until later, as it is done slyly. I will try to email you about any other problems in the future and would be grateful if you could keep me anonymous with this matter.

24. Ms Looi's evidence is that she does not remember this email but would have sent it to Mr Major who had day to day oversight of such issues. Mr Major reported into Ms Looi, and in oral evidence confirmed he would meet with her several times a day. Also in oral evidence Ms Looi said it likely would have gone to the contracts director, Rachel, who could well have discussed it with Mr Harris as the person responsible for the ADS contract.

25. Mr Major said he did not remember the email and did not know about any of the claimant's protected disclosures. We find that the issue in the email of 2 April 2020 will have reached Mr Harris either through Rachel or Mr Major. We are conscious that though the claimant does not claim it was itself a protected disclosure, it would have alerted Mr Harris to the claimant raising issues about ADS, and his request to be kept anonymous.

<u>9 April 2020 Fire Alarm</u>

26. A "Hot Works Permit" ("HWP") is a risk assessment document that confirms to a contractor performing works that involve heat (e.g. soldering) that they are authorised to do so. It is completed by an "authorised person" for the respondent and countersigned by the contractor who will be performing the hot works.

27. It is meant to be completed when the authorised person and contractor visit the site of the works together to identify risks.

28. At the completion of the task or at the end of the working day, the authorised person and contractor sign to close the permit.

29. The following is undisputed.

30. On 1 April 2020 Aether Medical Gases Limited ("Aether") had begun a two week project to install medical gases infrastructure in the respondent's Day Surgery Unit ("DSU") of Basildon University Hospital. This work involved hot works and required Aether to obtain hot works permits. The work was needed because the day unit was being transformed into a ward capable of treating the growing number of patients with serious illness caused by with Covid-19.

31. On the morning of 9 April 2020 Mr Harris asked the claimant to complete a HWP for Aether's work that day. The HWP for the previous day (8 April 2020) had been completed by Mr Isbell. It had not been closed. At 08.15 the claimant first closed the hot works permit for 8 April 2020. He then completed a new hot works permit for 9 April 2020 starting at 08.20. The 9 April 2020 permit was essentially identical to that on 8 April. Within the permit the material statements are:

    (a) "Job Location: DAY SURGICAL UNIT / DSU CORRIDOR / UNDER CROFT"

    (b) The claimant circled "YES" against the statement "Are your fire extinguisher [sic] correct for the hazard and have been checked by the AP?"

    (c) The claimant circled "YES" against the statement "Have Smoke/Heat detectors in the vicinity of work been capped off with suitable detector covers supplied from Estates Workshop?"

    (d) The claimant signed under the statement "Authorised/Appointed Person: This permit will be issued on the understanding that all agreed systems of work will be adhered to and that any risks or hazards shall be maintained at a level as low as reasonably practicable"

    (e) Mr R McDade of Aether signed under the statement "Person In Charge: I confirm that I have verified the job detailed on this form and ensure that all necessary precautions have been taken. The work will be undertaken in a safe manner. All risks and precautionary measures have been explained to work is involved. I accept responsibility for carrying out this work."

32. The claimant did not walk around the site with the contractor before completing the HWP. He says that he had passed by the site earlier in the day as he was walking to the office. This was before he knew he would be completing any HWP.

33. There are two ways to deal with the risk of false fire alarms: capping any smoke/heat detectors in the vicinity or disabling the fire alarms for the area on a central panel (which is referred to as being isolated). If the fire alarms are isolated, it should be indicated in the "State Additional Hazard Control Measures Taken/To Be Taken" box of the HWP. The claimant did not isolate the relevant alarms.

34. According to a contemporaneous record for responding to fire alarm activations (page 328 of the bundle), at 08.47 the smoke detector in the Day Unit's roof void was activated, resulting in the fire brigade being called. The cause of the activation was stated to be:

    Estate's team leader Ahillan not isolating fire zone's [sic] for contractor's [sic] when asked to do so

35. The outcome was to reset the fire alarm system. It was signed by shift estates technician Mr D O'Dea. Mr Major explained that Mr O'Dea is a man who does

not mince his words – if he thought blame lay with the claimant, he would say so.

36. The fire brigade was called and arrived at the hospital. There is some dispute about whether they arrived before or after the reset of the fire alarm. The answer to this is not material to our decision.

37. What happened after this began the chain of decision-making about which the claimant complains.

Information Gathering on 9 April 2020

38. Mr Major is the only witness before the Tribunal who was involved in gathering information on 9 April 2020. He told us that the reason he started doing so was that when he heard the fire alarm and saw the fire engines arriving (from his office window), he thought hot works might have caused it as he knew they were happening.

39. The reason that he knew they were happening was that he says he was in the estates office when the claimant completed the HWP for Aether. Mr Major's account of this has changed over time. When Claire Dowler, who was appointed to investigate the claimant's actions, interviewed him on 28 May 2020 he said he had seen Mr Harris ask the claimant to complete the HWP, the claimant complete it, and the claimant hand it back to the contractor.

40. Mr Major did not mention seeing the permit being completed and handed to the contractor in his witness statement. When asked about this he thought his account to Ms Dowler may have been incorrect. This is surprising given it was said only seven weeks after the incident. whereas Mr Major completed his statement nearly three years afterwards. We find it more likely that Mr Major witnessed the claimant completing the permit, and would have seen that the claimant did not visit the site of the works.

41. It consequently follows that there is no indication that it struck Mr Major as inappropriate that the claimant did not visit the site when completing the HWP.

42. Mr Major also said to Ms Dowler that he obtained statements from Mr Harris, the claimant and Mr Isbell. There is no statement from Mr Isbell before us and no sign of one being referred to when Ms Dowler first interviewed Mr Isbell on 29 May 2020. However Mr Isbell did send a statement from Julie Lunn to Mr Major on 9 April 2020. That is in evidence.

43. Ms Lunn said Mr Isbell asked her to contact the switchboard when the fire alarm went off to tell them it was a false alarm. She did not get through until the fire brigade had been called. She said the claimant was no help at all considering he knew what was happening. She sent her statement to Mr Isbell at 10:47.

44. Mr Harris said in an email at 14:50:

> At approx. 8:10 this morning I asked Aki [the claimant] to produce and manage a hot works permit for Aether medical this morning so that they could start brazing medical gas pipe work in the Basildon day unit.

> At approx. 8:35 I was called by the technicians working in the day unit to inform me that the fire alarm was activated. I attended immediately and found all alarms activated to the site. Aether confirmed that the alarms had activated as soon as they started brazing at 8:30, I checked the areas and confirmed it was a false alarm.
>
> I also called switchboard to tell them to cancel the call to the fire brigade but it was too late. The brigade attended and were happy for me to reset the alarm panel which I did.
>
> Upon speaking to the technicians, they advised me that no one had attended to inspect the works or their extinguishers before commencing. Neither had they been asked to wait for permission to commence, and were also not provided with any detector covers or advised that the zone had been isolated.
>
> I isolated the zone on the panel, and check that their extinguishers were present and correct.
>
> In my opinion, this could have been totally avoided if Aki had followed standard procedures, ensuring the zones had been isolated and informed the staff that they were safe to commence.

45. The claimant said in his email at 14:14:

> This morning I issued the Hot work permit to AETHER MEDICAL permit number 01153 around 8.20 am.
>
> Please note this only allowed to work day surgery unit/ under croft area .Unfortunately contractor extended to work inside the loft area there was a smoke detector inside the loft and activated. Immediately I visited the day surgery unit and discussed with the contractor.
>
> I believe this will satisfy you. [all sic]

46. Mr Major also said he asked Mr Harris to obtain a statement from the contractor (who was Mr McDade). Two typed statements were provided in evidence. They are found at page 337 and 338 of the bundle. These are the statements on which the respondent relied throughout the subsequent investigation and disciplinary procedure. However Mr Major's oral evidence was that the statement he received from the contractor initially was handwritten. He could not be sure whether he received either typed statement.

47. The claimant has always questioned the authenticity of the two typed statements from Mr McDade. He specifically and repeatedly questioned the signatures, but his case has essentially been that he believes Mr Harris prepared one or both of them. He particularly draws attention to his belief that Mr McDade had no access to a computer and printer on 9 April 2020 while working on the Respondent's site so could not have prepared typewritten statements.

48. Prior to hearing Mr Major's evidence, this claim appeared to us to be somewhat paranoid, which on paper was exacerbated by the fact that contact

was made with Mr McDade twice after 9 April 2020, without the involvement of Mr Harris. It is necessary for us to consider this contact at this stage in our decision in order to reach a conclusion on the statements.

49. The first contact was by Ms Dowler. She told us in oral evidence that it was around the time of preparing her terms of reference for the investigation, so around 28 April 2020. When she spoke to Mr McDade he said he was recently bereaved and was adamant he could play no part in the investigation.

50. The second contact was by Nicola Rees in connection with the claimant's later grievance. She spoke to Mr McDade on 11 August 2020 by telephone. Although he confirmed that he signed the statements, he did not confirm that he prepared them. Ms Rees emailed him asking him specifically to confirm:

    (a) He prepared the statements himself

    (b) It is his signature on the statements

51. He replied saying:

    I confirm that is my signature and I do recall the incident

52. He did not confirm he prepared the statements.

53. We are also conscious that there is no reference to Mr McDade's statement in either the claimant's suspension letter of 17 April 2020 or undated suspension risk assessment, which the respondent thinks was prepared prior to the claimant's suspension on 14 April 2020.

54. We are conscious that the account in the statement on page 337, that Mr McDade asked the claimant to isolate the fire alarm and he said he would, is inconsistent with all the evidence, except the statement of Mr Harris. It is inconsistent with the HWP as completed. Isolation of the fire alarms would have to be stated in the box entitled "State Additional Hazard Control Measures Taken/To Be Taken". It could of course have been carelessness for the claimant not to do so when asked. But we think this unlikely for three reasons.

55. First, Mr McDade relied upon the HWP as completed. To assume isolation of the fire alarms if the HWP did not refer to this happening, especially as he signed it, would show an error on his part.

56. Second, Mr Isbell had completed a HWP for the previous day, also countersigned by Mr McDade. On this it was not shown that isolation of the fire alarms was undertaken. We were told by Mr Major that isolation of the alarms was the most appropriate precaution in the circumstances. Mr Isbell also told Ms Dowler on 29 May 2020 that he thought capping the smoke and heat detectors (rather than isolation) was the "worst option". We cannot see why Mr McDade would specifically ask for isolation of the fire alarms on 9 April when he successfully worked without this on 8 April 2020. In saying this, however, we sound a loud note of caution. Mr Isbell may have isolated the fire alarms and failed to document this on 8 April 2020. We can see this from page 685 of the bundle, which shows him saying during the claimant's disciplinary hearing that he isolated the alarms. If that was indeed what he

did, the claimant would not have known this from the 8 April HWP, and furthermore Mr McDade would have worked on the basis of an incorrect permit on 8 April.

57. Third, the claimant is not trained to isolate fire alarms, which is not disputed by the respondent. Other staff were present who could have done this. It strikes us as odd that in such a situation Mr McDade would ask the claimant to do so, or that he would agree, given he was personally unable to do so.

58. The final element of context is that the claimant says that on the afternoon of 9 April 2020 Mr Harris was angry at him regarding the protected disclosure. He covertly recorded goings on in the estates office. That recording was disclosed to the respondent shortly before the hearing, though the claimant attempted to rely on it during his stage 1 grievance meeting on 17 August 2020. The Tribunal did not listen to the recording because an agreed transcript was produced. It shows much of the recording was inaudible, but it finishes with a dialogue between the claimant and Mr Harris during which Mr Harris said “I’ve got the hump at the moment” and “I don’t wanna say something I’ll regret”. The recording is not conclusive on whether Mr Harris did know about the protected disclosure. However the claimant’s subsequent conduct, saying in an email on the next working day after the easter break, 14 April 2020, at 07.23 to Ms Looi that his whistleblowing had been leaked and he was getting pressure due to that, suggested he believed that to be the case. We find that Mr Harris did know about the protected disclosure on 9 April 2020.

59. Looking at all these factors together, we find the statements from Mr McDade to be unreliable. There is no evidence that anybody within the respondent properly considered this. If they had, it would be clear that they would need to hear directly from him.

<u>Disclosure 2 – 14 April 2022</u>

60. 9 April 2020 was the last working day before the Easter weekend. On 14 April 2020 the claimant returned to work. At 07.23 he emailed Ms Looi saying:

> As you know, I previously brought some matters to your attention. I understand my whistle-blowing has been leaked and due to that, I am getting pressure.
>
> Furthermore, please note the day surgery unit has two distribution boards [akin to domestic consumer units or fuse boxes]. There are more than enough spare ways. I am not sure why the board will be changed as this will cost a lot of money. I believe that there needs to be about 5/6 extra circuits.
>
> I am not in a position to justify this. At the end of the day we would expect a large invoice due to the work. I understand that it is not just two boards they will change but have decided to change more boards. Therefore, I believe in the future the cost of any work needs to be justified. You may alert the relevant department about this.

61. We are not aware of any action having been taken on this email.

Suspension – 14 April 2020

62. On 14 April 2022 Mr Major suspended the claimant. He told us in oral evidence that he had never suspended anyone before. He said he was heavily reliant on HR for what to do. His HR contact was Lucy Croft.

63. Ms Rees said that at the time Ms Croft was "overwhelmed". It appears that over a video call she completed a risk assessment form, which was only found in preparation for the Tribunal hearing. It is at pages 331 to 334 of the bundle. Mr Major met with the claimant and Ms Croft and told him of his suspension. He sent a letter confirming this on 17 April 2020.

64. The letter, which it is not claimed fails to reflect the content of the meeting, said that the suspension was to enable an investigation into the following allegation/complaint made against the claimant:

    - On the 9th April 2020 you entered false information on a Hot Works Permit detailed below

    - You stated that you had checked the fire extinguishers available in the working area and they were of the correct type when you had not done so.

    - You stated that covers had been supplied for the fire alarm smoke and heat detectors and that the detectors in the working area had been covered and you had not ensured that this had taken place.

65. We accept that the evidence before Mr Major supported the allegation. There was no evidence or even suggestion by the claimant that he had inspected the fire extinguishers at this point. There was also no evidence that the claimant had capped the detectors with suitable covers.

66. The letter went on:

    > I advised you that I was not at liberty at this stage to inform you who had made the complaints or to discuss their contents, but informed you that these would be formally investigated.

67. Mr Major told us that the person who made these complaints was him. He sought to excuse this contradiction in the letter by saying it was a standard letter. We find it troubling that Mr Major concealed his role in the suspension of the claimant.

68. The letter also said that Ms Dowler was appointed to undertake the investigation. Nobody could tell us who chose her for this role. The claimant complained to the Tribunal that Ms Dowler reported in to Mr Major at that time due to a secondment to being Interim Maintenance Manager. Ms Dowler could not remember the exact dates of that secondment. She signed her first letter in the bundle, dated 1 May 2020, as Domestic Services Manager. We find that she was not then reporting into Mr Major. However on 20 May 2020 she signed another letter as Interim Maintenance Manager, which was a role managed by Mr Major. We find she had that role during the rest of her investigation.

69. We consequently find that during her investigation she was investigating complaints made by her own line manager.

Claimant Explains His Case – 20 April 2020

70. On 20 April 2020, the Monday after the suspension letter was sent, the claimant sent a letter to Mr Major, cc'ing Ms Croft and Ms Dowler, in response to his suspension letter. To paraphrase he raised the following material points:

    (a) He asked about the investigation process and next steps in suspension.

    (b) He said the HWP he issued on 9 April 2020 was for work in the corridor and under croft area.

    (c) He said another permit was issued by another person on 8 April 2020 with the exact same control measures as the claimant used and he closed it at 08.15 on 9 April 2020. That permit said that fire extinguishers had been checked and covers had been provided for smoke and heat detectors. Mr McDade (and a colleague who is not relevant) accepted there were fire extinguishers available and these had been checked.

    (d) The claimant visited the area at 07.30 on 9 April 2020 and saw there were appropriate fire extinguishers present.

    (e) He asked what had happened to the smoke detector covers that should have been in place when he closed the permit at 08.15 and the fire extinguishers that he had seen at 07.30.

    (f) He asked which smoke detector was activated and when it was reset.

    (g) He said he understood that the initial complaint was regarding the fire alarm be activated but that the letter said it was about "false information" entered on the "sheet" (which we understand to mean the HWP). He said that the work was the joint responsibility of himself and the "person in charge" (which would be Mr McDade). He queried why he was made wholly responsible for the case.

    (h) He requested copies of the HWPs from 8 and 9 April 2020 and asked for these to be sent to Ms Dowler.

    (i) He highlighted that between January 2019 February 2020, Basildon and Thurrock University Hospital had 79 false alarms, six fire related problems and seven special services. He asked if those incidents had been investigated as well.

    (j) He said that the situation could have been avoided if appropriate policy and procedures were followed by everyone.

    (k) He concluded by seeking to appeal to lift his suspension and allow his return to work as soon as possible.

71. In oral evidence, Mr Major said that he took no action as a result of this letter. He did not know what to do with the letter, and passed it on to HR. Ms Dowler

was asked about the letter and she said she did take it into account during her investigation. However she was clear that her investigation related to what the claimant had put on the HWP on 9 April 2020. She had no remit to look at the HWP on 8 April 2020.

72. We are not aware of any written reply having been sent to the claimant.

Disclosures 3 and 4

73. On 21 April 2020 the claimant emailed James O'Sullivan, Director of Finance at the respondent, forwarding his email of 23 March 2020 to Mrs Looi. This is referred to as "Disclosure 3".

74. On 23 April 2020 Mr O'Sullivan replied saying the Mrs Looi raised it with him and he in turn contacted their independent counter fraud specialist. He said he would check on progress and let the claimant know.

75. Mark Kidd is the Local Counter Fraud Specialist for the respondent. At the time he was an Assistant Manager at RSM UK Tax and Accounting Limited. On 27 April 2020 he contacted the claimant following the concerns raised with Mr O'Sullivan. In response the claimant sent him an email on 28 April 2020 attaching the invoices from ADS about which he had raised questions. He also forwarded to Mr Kidd his email to Ms Looi of 2 April 2020.

76. On 5 May 2020 the claimant sent a further email to Mr O'Sullivan saying:

> I spoke to Mark Kidd last week, who I briefly told about the problems. Unfortunately, I am not in a position to give the name of the suspected people involved with this financial benefit, as I am currently suspended from work for which they are saying a different reason. I believe that the whistleblowing is behind this, in order to protect them. For this reason, I am not able to access my work email and further details about the fraud.
>
> I will approach the problem in a different way and in the meantime, the whistleblowing should be dealt with appropriately. As you are aware the whistleblower should be protected within their job and this should be kept confidential. I can give the full details and further problems, if you give me an opportunity to meet you face-to-face.
>
> In the meantime, I am appealing to you to please check all invoices with the initial quotations and work carried out.

77. In parallel with this, the claimant made a freedom of information request to the respondent about the respondent's purchases of extension leads between 1 February and 30 April 2020 on 29 April 2020. On 8 June 2020 he received a response containing the details he had requested. On 15 June 2020 he sent this on to Mr O'Sullivan saying:

> I received a response from Freedom of Information but please note that this is not part of the whistle-blowing I made.
>
> I am not sure why this small company in particular was approached, rather than looking for a reputable company or companies on the RS

website. The price for the extension leads with this company is higher compared to the normal price and the company also did not mention the correct manufacturer either. With this, the company bought some switches from MK and assembled it themselves. I am therefore unsure if a second quotation was asked before this order was approved. I will submit further evidence about this later on.

When the order for my suspension has been lifted and I return to work, I will explain this matter further to the relevant people.

78. The emails of 28 April and 15 June, although their content is entirely different, are identified as the same disclosure in the List of Issues. We will refer to them respectively as Disclosures 4A and 4B.

Reviews of Suspension

79. Michael Noakes was appointed as the claimant's point of contact during his suspension. On 22 April 2020 Mr Noakes sent a letter to the claimant saying he had formally reviewed the circumstances regarding the suspension and confirmed that the terms of the suspension still applied and formally extended it. He reiterated it does not constitute disciplinary action nor is it a punitive measure. The claimant was told to contact only Ms Dowler and himself during his suspension. Mr Noakes provided contact details to the claimant for the Employee Assistance Programme.

80. The parties agree that under the disciplinary policy Mr Noakes should have undertaken such reviews every fortnight. He says he did not do so because of the other work pressures as a result of the coronavirus pandemic. He explained in detail the extreme pressure he was under during the relevant period and we accept this was the reason for his failure. He sent seven or eight letters in similar terms to the claimant during the claimant suspension.

81. However, there is no evidence that Mr Noakes was aware of the letter from the claimant of 20 April 2020 when deciding that suspension remained appropriate. Given that the claimant was specifically requesting his suspension to be lifted in that letter, it would have been helpful for Mr Noakes to have that information.

82. Mr Noakes was also appointed as the Commissioning Manager for the disciplinary investigation. This meant that he reviewed the terms of reference prepared by Ms Dowler and made the decision that the investigation should continue. He also reviewed the investigation report of 26 June 2020 to decide, on or around 3 July 2020, that the disciplinary process should continue. In that role he also appears not to have been made aware of the claimant's letter of 20 April 2020.

Disciplinary Investigation

83. Ms Dowler was the Investigating Officer. Her initial terms of reference are dated 28 April 2020. In this the allegation is stated to be:

2. On the 9th April 2020 Subramaniam Ahillan entered false information on a Hot Works Permit stating:

- That he had issued fire heat alarm covers to the contractor.

- That he had visited the area to ensure the correct fire extinguishers were in situ.

2. Subramaniam Ahillan did not act in line with the Trust's Values and Behaviours.

84. We note that the wording of this is different from the allegations made in the suspension letter of 17 April 2020. The change in relation to fire extinguishers appears to us to be immaterial. The change in relation to the heat alarm covers is material, in that the allegation was changed to requiring the covers to be provided, rather than checking they were put on. The reference to the Trust's Values and Behaviours was entirely new.

85. The terms of reference went on to describe the scope of investigation as:

> To establish the facts relating to the allegations made in a letter to Paul Major, Engineering Operations Manager from Richard McDade, Aether Medical, stating concerns about Subramaniam Ahillan not checking the area before signing off the Hot Works Permit.

86. The timetable for completion of the investigation was a target date of 23 June 2020.

87. The potential witnesses who were identified were Mr McDade, Mr Harris, Ms Lunn and Mr Major.

88. On 20 May 2020 Ms Dowler wrote to the claimant inviting him to attend an investigation interview to take place on 28 May 2020. On 22 May 2020 the claimant sent a letter to Ms Dowler enclosing his letter of 20 April 2020. In this letter he also:

    (a) noted that he had still not received a response from Mr Major

    (b) raised again the issue of the HWP on 8 April 2020

    (c) raised again that he had seen the fire extinguishers on 9 April 2020

    (d) explained that due to the equipment being used the fire alarm should have been isolated rather than covered and he was not trained to do so

    (e) raised again the number of false alarms at hospital and asked about investigation of those

89. The claimant also said:

> I would also like to confide my concern that this pressure is as a result of a protected closure [sic] that I have made. Making a protected disclosure would qualify legal protection under the Trust policy and law and I should also not have detrimental treatment from employers or co-workers for making a protected disclosure. I would therefore value your assurance that this is not the case.

90. Ms Dowler told us that she spoke about the letter of 20 April 2020 with HR and agreed that the points raised by the claimant could be looked at as part of the investigation. In relation to the protected disclosure she said in her witness statement:

> The allegations that I considered had been raised and were being investigated following events that occurred on 9 April 2020 in relation to Mr Ahillan's issuing of a Hot Works Permit. This was an entirely separate issue to any concerns he may have raised and, in any event, I was not involved in the alleged protected disclosures Mr Ahillan says he raised.

91. It is clear to us that the issue was not entirely separate. The claimant believed the complaints about him were because of protected disclosures he had in fact made. Had Ms Dowler considered the claimant's concerns, she would have been able to find out that Mr Harris was implicated in the protected disclosure and, on the claimant's account, knew about it. We find this would have influenced how she would have conducted the investigation.

92. We nevertheless accept that Ms Dowler was not influenced by the claimant having made a protected disclosure. Indeed we find it would have been better if she had been so influenced, in order to better conduct her investigation.

93. As part of her investigation Ms Dowler interviewed, in this order:

    (a) Ms Lunn on 26 May 2020

    (b) Mr Harris on 26 May 2020

    (c) Mr Major on 28 May 2020

    (d) Elaine Mizon 28 May 2020

    (e) The claimant on 28 May 2020

    (f) Mr Isbell on 29 May 2020

94. Ms Dowler interviewed Ms Isbell a second time on 15 June 2020 at his request.

95. Transcripts of all of these interviews are in the bundle (although the one of Mr Major's interview stops short of the end). We consider it helpful to briefly set out what was discussed so far as is material.

96. Ms Lunn was mainly asked about her statement dated 9 April 2020. She also discussed general procedures when alarms go off.

97. Mr Harris was asked about his statement. There was discussion about the procedure which ought to be followed when completing an HWP. In particular he said that it was best to isolate the entire fire alarm zone rather than just using the caps and that the Authorised Person ought to be going around the site of the works to make sure the smoke alarm caps are fitted. He also discussed the process for contacting the Fire Brigade in the event of an alarm. Mr Harris also answered questions about what happened. He said that

one of the contractors actually asked the claimant if they were okay to start the works. That person is named as Gerry Shoot. Mr Harris said that this person was given the okay from the claimant. Mr Harris also said that he left the estate's office before the claimant started writing out the HWP. Mr Harris also agreed that fitting of the caps is a joint responsibility for the contractor and the Authorised Person.

98. Mr Major discussed what he had seen on 9 April 2020. As already covered, it is in this interview that Mr Major said that he was present throughout the claimant completing the HWP on 9 April 2020. He explained his investigation involving getting a statement from the contractor (as discussed above) and from Mr Harris. He also explained that it was the failure to check that the fire safety precautions had been put in place that raised concern. Ms Dowler asked Mr Major about whether he had investigated the HWP on 8 April 2020 completed by Mr Isbell. He said he had not investigated it at all. Ms Dowler suggested that the fact that no alarm went off on 8 April 2020 suggested that the fire and heat detectors had been appropriately capped. Mr Major said that they would have been capped or isolated. Mr Major also discussed the claimant's experience which can be summarised as him having appropriate training and experience to complete the HWP.

99. The interview with Ms Mizon was about her recollection of 9 April 2020. She could not remember anything material.

100. The transcript of the interview with the claimant is considerably longer than the others. There are a number of points where phrases are incomplete and replaced with timestamps. We understand this to be where the transcriber was unable to hear what was said. We can easily believe this to have been a problem, as at the hearing the claimant was prone to mumble and also talk at a tangent to the issue in question before tailing off.

101. We have, nevertheless, carefully considered the transcript. From it we cannot see the claimant raising any issue that he had not already mentioned in his letters of 20 April and 22 May 2020. His emphasis that he was effectively continuing the permit that had been issued on 8 April 2020 which had not led to problems. But he realised that isolation should have been used given the nature of the works. He also explained when he spoke to the contractors, which was at 09.30 or 09.45 (line 281) and that he was told that on the previous day the contractors had isolated the alarms (line 626). Ms Dowler probed extensively the point that the claimant would have known that the work was in the loft if he had visited the area before completing the HWP. She also specifically put to the claimant that the contractor told him to isolate the alarm (line 1025) and the claimant replied "no".

102. Ms Dowler also asked the claimant about the protected disclosures at line 1057. At this point they appear to have been 1 hour and 20 minutes into the interview. This section of the transcript is difficult to follow but in it the claimant appears to raise issues about people lying about what happened because of his protected disclosure. Ms Dowler finishes this section explaining the following to the claimant (at line 1188):

> And hopefully you will agree that, we are friends you know, we have worked closely together and all of that. This is an investigation for what

happened on that day. Whether you believe that the team over there have, I think what you are saying is they have got it in for you or something like that. If that is the case that something for another investigation it is not for this one Aki. This one I was hoping because we have such a great relationship that you would see that I would investigate fully on this investigation and nothing further. The fact is what will come out of this, it is not a personality or anything like that.

103. The meeting concluded with Ms Dowler explaining the next steps in the process and Mr Noakes' role in this.

104. In the first interview with Mr Isbell, Ms Dowler discussed what happened on 9 April 2020 and find out general information about how an HWP should be completed. He explained the process of checking the Risk Assessment Method Statements ("RAMS") and inspection of the area of the works prior to completing the HWP. Mr Isbell specifically said that the alarm went off when the contractor started brazing in the loft. Ms Dowler brought to Mr Isbell's attention that it was the claimant who had closed down the permit from 8 April 2020 on the morning of the following day. Mr Isabel could not tell Ms Dowler why it was not closed on the 8th. He said that he did not do a sweep at the end of the day but rather found the caps on his desk. His assumption was the wrong date had been put on the permit for the date of closure and the contractor had closed down the permit on the 8th. He said specifically he did not do the sweep on that day, by which he means he did not do the checks to make sure the caps had been removed. As mentioned above, he also said that he would isolate the fire alarms because of the ineffectiveness of the caps and that his department was under-resourced.

105. Mr Isbell's account in the second interview was quite different regarding what happened on the 8th. Then he said that he went down to close off the permit and check in the relevant areas that the smoke heads had been removed. At that time there was a medical gas problem in another area. He had to leave the area as a result. The only thing he failed to do was close the HWP. The contractor removed the caps and they were on Mr Isbell's desk when he returned to the office.

106. As noted above, though not disclosed to Ms Dowler at the time, at the claimant's disciplinary hearing Mr Isbell said that he actually did isolate the alarms on 8 April, so no caps would have been needed.

107. Following the interviews, Ms Dowler completed her Workforce Investigation Report. This is dated 26 June 2020. Whilst we find this to be a thorough report, it entirely omits reference to the claimant's letters of 20 April or 22 May 2020, nor are these provided in the appendices. There is no consideration of the possible motives of Mr Harris or Mr Isbell to target the claimant. There is no consideration of the provenance of the statements of Mr McDade or his apparent decision to proceed with hot works without the HWP saying the area had been isolated. Nevertheless, we do not find the report to exhibit bias because the allegations relate solely to what the claimant wrote on the HWP, and its inaccuracy because of his failure to visit the area when doing so.

108. A problem for us is that Ms Dowler did not explain then (or until giving oral evidence to us) that her view is that the under croft and loft are in fact the same location. She explained to us that the DSU is an extension to the original hospital. It has a loft space above it in the extension, but this is continuous with the under croft of original hospital building. It is impossible for us to determine whether this is correct, and in our view it does not matter. Mr Isbell referred to the area as the loft, as did the claimant. We do not think either of them meant the area of the works referred to on the HWP when talking about the under croft. However the issue for Ms Dowler was that if the claimant had visited the site he would have known that the works were in fact going to be in the loft. That was a conclusion open to her.

109. Connected to this is the point that Ms Dowler said, that she accepted Mr Isbell had done his work properly on 8th except for signing to close the HWP, because no fire alarm went off on that day. We observe two things in relation to this. First, the only account of the smoke caps being returned to Mr Isbell is his second statement that they were waiting on his desk. His own accounts differed between this and his first interview. Second, as we explain above, we consider it likely that Mr Isbell actually isolated the fire alarms on 8th April and failed to document this on the HWP. This would be in accordance with the best practice he and Mr Major identified. It would explain why the fire alarm did not go off despite works in the loft. It would be consistent with the request Mr Harris claimed to have witnessed and Mr McDade claims to have made on 9 April 2020 to the claimant. It is what he said he did at the disciplinary hearing. However the failure to document this on the HWP would create a fire risk incriminating Mr Isbell. If he did not isolate the alarms, the other possibility would be that the caps stayed on overnight. This would also be a fire risk incriminating Mr Isbell. In both cases the information on the HWP would be incorrect.

110. Overall we find that Ms Dowler ought to have raised questions about Mr Isbell's conduct on 8 April 2020 for inaccurate information on a HWP. We accept she had no remit to investigate this, however.

Grievance 1

111. On 14 July 2020 the claimant raised a grievance to Clare Panniker, Chief Executive of the respondent. In this letters he raised the following concerns:

    (a) Who prepared the statements of Mr McDade

    (b) Failure to include his documents (which we take to be 20 April and 22 May letters)

    (c) The fact he was witnessed completing the HWP

    (d) Inappropriateness of Mr Noakes reviewing suspension because he was Band 7 but only a Band 8 could suspend the claimant, resulting in a overlong suspension

112. He summarises his complaint as being unfair treatment and wanting fair treatment as the outcome.

113. The claimant sent a further letter on 20 July 2020. In this he raised issues about Mr Harris's interview referring to rising sewers causing the alarm, and a missing transcript from Mr Major. The issue of 'rising sewers' was clearly a transcription error which was corrected. The transcript of the interview with Mr Major was provided. We find there to have been no malice, detriment or less-favourable treatment in connection with these.

114. The claimant did not state that he had made protected disclosures when raising the grievance.

115. As explained, Ms Rees contacted Mr McDade on 11 August 2020. On 12 August 2020 the claimant was invited to a grievance meeting with Mandy Brokenshow to take place on 17 August 2020. This was "informal", and no notes were retained. On 18 August 2020 the claimant was sent an outcome letter.

116. That letter shows that Ms Brokenshow thought that the statements had been validated by Mr McDade, and said that the claimant could call witnesses to the disciplinary hearing to answer any further queries he might have in relation to the statements. In relation to the documents from the claimant, Ms Brokenshow referred to the invitation to the disciplinary hearing dated 3 July 2020 which said that the claimant could provide any documentation for consideration at the hearing. With respect, we consider that this rather missed the point because the investigation had not explicitly had regard to the contemporaneous explanation the claimant had provided in his letters of 20 April or 22 May 2020.

117. The issue of the claimant having been witnessed completing the HWP is not mentioned in letter.

118. The authority of Mr Noakes to review the suspension was explained simply by reference to the fact that it was Mr Major who had decided to suspend the claimant.

119. In relation to the issues with the transcripts, the claimant was provided with the transcript from the interview with Mr Major and it was explained that the reference to sewers rising was simply a transcription error.

120. It is also evident from the outcome letter that two other issues arose during the meeting. First, the claimant tried to provide his recording from 9 April 2020. In oral evidence Ms Rees explained that at the meeting they refuse to listen to the recording, saying they need to take advice about doing so. Afterwards they reached the conclusion that they should not listen to the recording because it was made covertly in breach of the trust's Information Security Policy. This refusal to listen to the recording was then confirmed back to the claimant. Second, the claimant told Ms Brokenshow that he had made a protected disclosure. Ms Brokenshow told the claimant in the outcome letter that an investigation was undertaken by the fraud team and no evidence was found. It appears not to have occurred to Ms Brokenshow that the claimant was in fact concerned that he was being targeted because he had made protected disclosures or that even if an allegation within a protected disclosure has not been upheld, that does not remove the person's rights.

Grievance 2

121. The claimant was not satisfied with the outcome of the Stage 1 Grievance. On 24 August 2020 he made a written Stage 2 Grievance in which he raised 4 points:

    (a) Dissatisfaction that Mc McDade's statements were signed by him

    (b) Dissatisfaction with transcript of Mr Harris's interview being changed

    (c) Appeal against suspension still outstanding (which we understand to be the claimant's letter of 20 April 2020).

    (d) Failure to investigate the protected disclosure.

122. On 9 September 2020 Jennifer Brown, at the time Head of Operations, invited the claimant to a stage 2 grievance meeting to take place remotely on 16 September 2020. The respondent's Grievance Policy and Procedure says that a meeting to discuss a Stage 2 Formal grievance will take place within five working days of the request being raised.

123. On 12 September 2020 the claimant wrote to Ms Brown. In this letter he specifically said that as one of his protected disclosures was leaked, he believed it had led to continuous detrimental treatment. He also reiterated that he was waiting for a response to his letters from 20 April and 22 May 2022. He added that his suspension was not reviewed regularly by Mr Noakes and there was no reason for it to be so long. He said that the reason he had been suspended for this amount of time was to protect some of the people he had made a protected disclosure about.

124. The claimant also complained about the fact that the meeting had been scheduled to take place by video, requesting instead it was face-to-face.

125. The claimant also sent a separate email on 15 September 2020 to Samson DeAlyn where he cc'd Ms Brown and Ms Rees. The subject of this was "Objection to Carrying out Disciplinary Heading by Florence Looi". In this he specifically explained that he had made the protected disclosure to Ms Looi and it had leaked, and that all the people involved in the disciplinary process ultimately reported in to Ms Looi.

126. The meeting took place by video as planned on 16 September 2020. This meeting was recorded and we have the transcript. After this Ms Brown provided an outcome letter on 28 September 2020.

127. In that letter, Ms Brown considered the following areas of the complaints:

    (a) statements from Mr McDade

    (b) the transcript of the meeting with Mr Harris

    (c) the appeal against the suspension

    (d) protected disclosures

128. In relation to the statements from Mr McDade, Ms Brown was satisfied that the previous verification process was sufficient to corroborate the statements, and the signatures were indeed Mr McDade's and no further verification was necessary. She told the claimant he could raise this to the panel with the disciplinary hearing if it was still a concern.

129. In relation to the transcript of the meeting with Mr Harris, Ms Brown was satisfied that the issue was simply a transcription error.

130. Turning to the appeal against the suspension, Ms Brown's conclusion appears to have been that while the disciplinary hearing was outstanding. the suspension was likely to be continued and it would be reviewed in light of the outcome of the disciplinary. Ms Brown specifically said:

    > You advised that you felt you had been unnecessarily suspended and at the meeting you clarified your concerns and claimed that the suspension and investigation were due to the protected disclosure you made. I have reviewed the reason for the investigation been commissioned and found that the allegations being investigated are that you had entered false information on a Hot Works Permit and that this was not related to the protected disclosure.

131. Ms Brown then went on to look specifically at the protected disclosure considering whether it had been dealt with properly. She advised that the claimant would need to take that up with the NHS Fraud service if he had any new evidence.

132. We note that at this point it is clear that there were two strands to the claimant's complaint about the protected disclosure. First, and more important from the claimant's point of view at the time, was his perceived failure to investigate the fraud he alleged. Second, as with the response from Ms Brokenshow, was the detrimental treatment he said he received because of the protected disclosures.

133. We are in no position to assess whether there was any fraud. The responses we have seen from RSM UK Risk Assurance Services LLP are brief and contain no details of any investigation.

134. Our concern is detrimental treatment because of the protected disclosures.

135. The claimant had clearly made the connection between his treatment and protected disclosure. It was not taken seriously. Rather Ms Brown simply referred back to the information on the Hot Works Permit. She did not investigate why the two issues might be connected.

136. The claimant also specifically linked this to suspension. There is no suggestion that Mr Noakes was given information about the claimant's side of the story when deciding whether to continue the suspension. Ms Brown is correct that he was simply maintaining the suspension because the disciplinary process was still ongoing. We note that Mr Noakes told the Tribunal that he was never even aware of the grievance, so it strikes us that he was not applying his mind to the reviews – otherwise he would have probed as to why the disciplinary process had not completed. He said in evidence he looked only at the original suspension notes.

Disclosure 5

137. On 14 September 2020 (i.e. before he was advised to at the meeting on 16 September 2020) the claimant submitted an online report to the NHS Counter Fraud Authority. In this he essentially repeated the allegations that he had made on 23 March 2020, along with some additional details and new allegations. He also made a new allegation about key cutting done with an outside company for a high price and the person who handled this benefiting from it.

138. On 16 September 2020 an Information Governance Officer from NHS Counter Fraud Authority emailed the claimant asking for further details. The claimant replied specifically saying that he saw Mr Harris and Mr Isbell receive money from contractors. He said that the person responsible for the key cutting was Mr Isbell. In relation to the electrical distribution boards, which the claimant had complained about in Disclosure 2 and repeated in Disclosure 5, the claimant said that Andy Butler was responsible and he suspected that this could have been done for financial benefits.

Grievance Stage 3

139. The claimant was not satisfied with the outcome of his Stage 2 grievance. He therefore raised a stage 3 grievance on 7 October 2020. In this he said his dissatisfaction with the outcome of the Stage 2 Grievance was:

> 1. Both signatures are different from Richard McDade
>
> 2. Statement from Darren Harris which was sent me was not validated by him or may not have been a true statement by him
>
> 3. My suspension reason was altered by the commissioning manager Michael Noakes. He is only banned seven – please refer the trust policy
>
> [all sic]

140. He went on to say that his desired outcome was that:

> Case should be looked at again before the disciplinary hearing or the case should be dismissed. Protected disclosure should be deal [sic] appropriately.

141. On 2 December 2020 Ifeanyi Nwonwu, Group Director of Operations – Estates/Facilities wrote to the claimant inviting him to a grievance appeal hearing to take place on 7 December 2020. With this Mr Nwonwu provided a set of documents from the Stage 2 and Stage 1 grievance process. These documents were poor quality. Ms Rees told us that this was because of a problem with a photocopier. It is not disputed that once the claimant raised this issue a clear copy was provided.

142. In parallel with this on 5 October 2020 the claimant had requested the notes from the Stage 2 grievance meeting and CD with the recording of it. He was provided with the transcript on 3 December 2020. The CD of the recording was not available because, as was explained to us at the hearing, that meeting had been conducted using an online system where a CD was not

automatically created. During face-to-face meetings which were recorded at the respondent, the system was that there was a recorder which would have two CDs put into it. The meeting would be recorded on the CDs in real time and at the end each participant could leave with a copy. There was no equivalent system for the online meetings which were recorded without the need for a CD. Therefore the delay in providing a CD was due to the need to produce one specially. We accept this explanation. Ms Rees in fact gave the claimant the CD at the meeting on 7 December 2020.

143. That meeting did not, however, deal substantively with the Stage 3 grievance. While the meeting did begin, it was adjourned so that the claimant could find a trade union representative to attend with him. Ultimately the meeting took place on 5 January 2021.

144. Mr Nwonwu sent an outcome dated 19 January 2021. In this he dealt with three points:

(a) "Appeal Point 1 – Both signatures are different from Richard McDade"

(b) "Appeal Point 2: Darren Harris (DH), Mechanical Engineer statement"

(c) "Appeal Point 3: SA's suspension reason was altered by the Commissioning Manager (as per SA's grievance form)"

145. In relation to the signatures, Mr Nwonwu said in the letter that after the meeting he met Mr Isbell to seek information regarding the issue and to ascertain if he had signed any paperwork relating to it. Mr Isbell said he had never had sight of any of the statements from 9 April 2020. Mr Nwonwu also sought further verification from Mr McDade, but received no response from him (albeit we heard from Mr Noakes that Mr McDade still had jobs in the hospital). He nevertheless concluded he had no reason to doubt Mr McDade's earlier email confirmation. The claimant at the hearing described this outcome as "verification failure". Mr Nwonwu nevertheless decided that what he had was sufficient to conclude that the documents were genuine. We do find ourselves wondering why he checked if he was confident in the evidence already obtained.

146. Mr Nwonwu repeated the points already made in relation to the transcript of the meeting with Mr Harris and we see no need to repeat them.

147. In relation to the suspension, Mr Nwonwu concluded that a Band 8 manager should have been appointed, rather than Mr Noakes. However he found that the outcome would not have been different if a Band 8 had handled it.

148. What is most telling is that Mr Nwonwu did not refer to whistleblowing at all. His explanation at the hearing was that he was unaware of the claimant's protected disclosure. However, notably, the claimant specifically mentioned it in his Stage 3 Grievance Form. It was also referred to in the stage 1 and 2 grievance outcomes. Mr Nwonwu said that he did not read documents from stages 1 and 2. We find the handling of this to be very poor. It shows an abject lack of concern for protecting whistleblowers. The Grievance Policy and Procedure specifically says that all supporting documentation from Stages 1 and 2 should be submitted, and we can see from the file that was prepared for consideration at the hearing of the Stage 3 grievance that it was.

149. Mr Nwonwu said that he did understand that the claimant was complaining about Mr Harris. He said he wanted evidence that Mr Harris was involved. When put to Mr Nwonwu that the motive might be the protected disclosure, Mr Nwonwu said there were assumptions in that statement.

150. We also note that at the hearing it was raised that Mr Nwonwu used the expression “all human” or “all humans” at the grievance hearing. He accepted that he said that and denied it was discriminatory. We agree that it was an innocent remark.

Disciplinary Hearing

151. Following completion of the grievance process, the disciplinary process resumed. On 27 January 2021 Phil Robson invited the claimant to attend a disciplinary hearing that would take place on 12 February 2021. He was provided with the Workforce Investigation Report that Ms Dowler had already completed subject to the amendments resulting from the Stage 2 grievance.

152. On 9 February 2021 the claimant emailed the respondent saying he was not well enough to attend the disciplinary hearing. He provided a fit note saying he was not fit to work because of depression and anxiety. He was signed off from work until 8 March 2021. Ms Looi wrote to the claimant the next day asking for his consent to refer him to Occupational Health. The claimant replied on the same day saying he had already contacted them. Ms Looi also referred him. The claimant was signed off from work again from 8 March 2021 to 30 April 2021 for the same reason. On 23 February 2021 he had an occupational health assessment and the report was provided on 19 March 2021,saying he was unfit to work, and that when he could return there should be a staged return and individual stress risk assessment. A further assessment was conducted on 20 April 2021, with a report on 22 April 2021, with the intention that he return to work from 30 April 2021. and that he could proceed to the formal meeting.

153. On 4 May 2021 Ms Looi wrote to the claimant inviting him to attend the formal meeting on 14 May 2021. She had returned to be the disciplinary chair in the intervening period. The claimant does not appear to have objected to Ms Looi chairing the disciplinary hearing at this stage, despite his objections earlier.

154. The hearing took place as planned. The claimant was accompanied by a representative from Unite. Mr Harris did not attend the hearing. He was noted to be on sick leave at the time, but it is now clear to us that he would never return to work, as he resigned during the investigation into misconduct surrounding the WhatsApp group, which had already begun. Mr McDade also did not attend the hearing. Mr Major, Mr Isbell and Ms Lunn were called as witnesses

155. Coming out of this on 20 May 2021, the claimant was issued with a final written warning and told that he was expected to return to work. The allegations in that letter, both of which were upheld, were:

    Allegation 1: It is alleged that on 9 April 2020, you entered false information on a hot work permit stating that:

    - You had issued five heat-detector covers to the Contractor

- That you completed a risk assessment of the Day Surgical Unit ensuring that the correct fare extinguishers are in situ.

Allegation 2: you did not act in line with the Trust Value's and behaviour.

156. In relation to Allegation 1, Ms Looi specifically relied on the content of the HWP, the claimant saying in his own interview that he did not know if the smoke's caps were still in place from the previous day and the statement from Mr McDade saying that he did not receive smoke caps at all and was told that the claimant would isolate the fire alarms.

157. In relation to Allegation 2, the issue was basically the claimant having failed to act properly when he signed the HWP.

158. There is one material change to the allegations from those made earlier. This is the change from the word "fire" to "five" in the first bullet point. In her witness statement, Ms Looi said this was a typo. However in her oral evidence she referred to it being the actual number of covers that were needed. The latter explanation is not correct in light of Ms Dowler's evidence that 23 caps would be needed in that area. This accords with Mr Isbell's evidence at the disciplinary hearing (page 685-686) where he said that on 8 April 2020 that eight smoke caps were insufficient so he then isolated the panel.

159. The letter finished by saying that the claimant was now expected to return to work.

<u>Disciplinary Appeal</u>

160. In 23 May 2021 the claimant indicated his intention to appeal against the disciplinary decision, and requested the form to do so. On 28 May 2021 he completed the form from which we summarise the complaints as:

    (a) failure to invite Mr McDade or Mr Harris as witnesses

    (b) not have enough time for the hearing

    (c) bias in the investigation report

    (d) the reference to "five" heat detector covers

    (e) failure to follow the correct procedure

    (f) Ms Looi chairing the panel despite having received the claimant's whistleblowing complaint

    (g) Ms Looi failing to sign the disciplinary hearing outcome letter and enclose the appeal form

    (h) the origins of the statements of Mr McDade

161. Preeti Sud, Head of Strategy Unit, was appointed chair of the appeal hearing and arranged for it to take place on 29 June 2021. In preparation for this Ms Looi provided a Management Case dated 15 June 2021. It is not necessary

to consider the substance of the appeal in detail because no complaint is made to the Tribunal about it. The sole complaint relates to the timelines and we therefore only set that out here. The meeting took place as planned and Ms Sud sent an outcome on 6 July 2021. She did not uphold any aspect of the appeal.

Return to Work

162. At the same time as the disciplinary appeal going on the claimant returned to work. During his absence hospital trusts had merged resulting in some reorganisation. His line manager on return was Ali Sadik.

163. Only one of the list of issues is attributed to Mr Sadik. This is changing and taking away some of the claimant's duties, including refusal of access the switch rooms and plant rooms on 24 May 2021.

164. From the witness evidence and documents we are satisfied that on his return to work the claimant did not have keys for the switch rooms or plant rooms. Mr Sadik said that he did not know that the claimant did not have keys for plant rooms because the claimant was in fact accessing these. The claimant says that he was using other people's keys. We are not satisfied that Mr Sadik prevented the claimant having access to the plant rooms.

165. The issue with the switch rooms is different. The claimant brought to the attention of Mr Sadik that he did not have access to the switch rooms. Mr Sadik's evidence is that the Authorised Person for granting such access did not think it necessary for the claimant to have such access, nor did he think the claimant was familiar with the equipment in place. Access was therefore refused.

166. The claimant has not explained why he needed access to the switch rooms. We note that in an email on 22 August 2021 the claimant wrote to Ms Panniker that he was not given keys for the plant room and switch room "in order to prevent escalating whistleblowing". He has not explained to us how these issues are connected.

Job Applications

167. On or shortly before 21 July 2021 the claimant applied for the job of Mechanical Engineering Manager. By way of context that had been Mr Harris's role. It is common ground that the claimant was unsuccessful in this application. Both Mr Major and Ms Looi did not remember specifically considering the claimant's application but said that he would have been unsuitable in part because of his outstanding final written warning.

168. The claimant told us at the hearing that a junior colleague was interviewed for that role and the claimant overheard Mr Major saying he would not get the role because of a lack of management experience. The claimant has taken that to mean that this junior colleague was otherwise suitable for the role. There was some discussion at the hearing about the equivalence of the qualifications of the claimant and that colleague. This does not appear to be material because we have been provided with the application of the successful candidate.

169. Mr Major was also responsible for recruiting a replacement Estates Operations Manager, his own job, when he retired. The claimant told us at the hearing that he expressed to Mr Major his intention to apply for this role and Mr Major then withdrew the vacancy. The documentary evidence shows that Mr Major was the recruiting manager for this role. However there is no evidence except for the claimant's assertion that Mr Major withdrew the advert. The claimant did not witness this happen, but simply infers it from the coincidence of him expressing a plan to apply and then being unable to. We do not accept that Mr Major withdrew the advert at all.

Law

Direct discrimination

170. Section 13 of the Equality Act 2010 (the "EA 2010") provides that:

> (1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

171. On a comparison of cases for the purposes of section 13, there must be no material difference between the circumstances relating to each case: section 23(1).

172. "Because of" means that the protected characteristic has to be "the reason" for the less favourable treatment: *Essop v Home Office (UK Border Agency)* [2017] UKSC 27, paragraph 17. It is not sufficient for the protected characteristic to simply be part of the background context or circumstances in which the treatment occurred.

173. The protected characteristic does not need to be the only or main reason for the less favourable treatment, it need only contribute to the reason: *London Borough of Islington v Ladele* [2009] I.C.R. 387, paragraph 39.

174. Section 39 of the EA 2010 prohibits an employer discriminating against its employee in various ways including subjecting the employee to any detriment.

Discrimination Burden of Proof

175. Section 136 of the EA 2010 potentially applies to all the claims. This says, as relevant:

> **136 Burden of proof**
>
> (1) This section applies to any proceedings relating to a contravention of this Act.
>
> (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
>
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision.

(4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.

(5) This section does not apply to proceedings for an offence under this Act.

(6) A reference to the court includes a reference to—

(a) an employment tribunal;

176. In relation to subsection (2), it is not sufficient for the employee merely to prove a difference in protected characteristic and a difference in treatment. Something more is required: *Madarassy v Nomura International Plc* [2007] EWCA Civ 33.

177. If the burden does shift, *Igen Ltd v Wong* [2005] EWCA Civ 142 makes two points about the burden on the respondent to show that it did not contravene any provision. First, *Igen v Wong* says that the employer must prove the less favourably treatment was in no sense whatsoever because of the protected characteristic. The second point is that because the evidence and support of the employer's explanation will usually be in the possession of the employer, the Tribunal should expect cogent evidence for the employer's burden to be discharged.

178. Given a global pandemic was interfering with the respondent's normal operations throughout the period that we are looking at, we also particularly have in mind *Komeng v Sandwell and Metropolitan Borough Council* UK/EAT/592/10. This said that it can be an easy defence for the employer to hold its hands up and say was just disorganised, inefficient or unfair but a Tribunal must carefully test such an explanation.

<u>Discrimination Time Limit</u>

179. Section 120 of the EA 2010 confers on the Tribunal jurisdiction to consider the claimant's complaints. Section 123 goes on:

123 Time limits

(1) Subject to section 140B proceedings on a complaint within section 120 may not be brought after the end of—

(a) the period of 3 months starting with the date of the act to which the complaint relates, or

(b) such other period as the employment tribunal thinks just and equitable.

(2) Proceedings may not be brought in reliance on section 121(1) after the end of—

(a) the period of 6 months starting with the date of the act to which the proceedings relate, or

(b) such other period as the employment tribunal thinks just and equitable.

(3) For the purposes of this section—

(a) conduct extending over a period is to be treated as done at the end of the period;

(b) failure to do something is to be treated as occurring when the person in question decided on it.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—

(a)when P does an act inconsistent with doing it, or

(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

Whistleblowing

180. Relevant protection of whistleblowers is found in the following sections of the Employment Rights Act 1996

43A Meaning of "protected disclosure".

In this Act a " protected disclosure " means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H.

43B Disclosures qualifying for protection.

(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—

(a) that a criminal offence has been committed, is being committed or is likely to be committed,

(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,

(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,

(d) that the health or safety of any individual has been, is being or is likely to be endangered,

(e) that the environment has been, is being or is likely to be damaged, or

(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.

(2) For the purposes of subsection (1), it is immaterial whether the relevant failure occurred, occurs or would occur in the United Kingdom or elsewhere, and whether the law applying to it is that of the United Kingdom or of any other country or territory.

(3) A disclosure of information is not a qualifying disclosure if the person making the disclosure commits an offence by making it.

(4) A disclosure of information in respect of which a claim to legal professional privilege (or, in Scotland, to confidentiality as between client and professional legal adviser) could be maintained in legal proceedings is not a qualifying disclosure if it is made by a person to whom the information had been disclosed in the course of obtaining legal advice.

(5) In this Part " the relevant failure ", in relation to a qualifying disclosure, means the matter falling within paragraphs (a) to (f) of subsection (1).

43C Disclosure to employer or other responsible person.

(1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure F2 ...—

(a) to his employer, or

(b) where the worker reasonably believes that the relevant failure relates solely or mainly to—

(i) the conduct of a person other than his employer, or

(ii) any other matter for which a person other than his employer has legal responsibility,

to that other person.

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

47B Protected disclosures.

(1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.

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

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

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

on the ground that W has made a protected disclosure.

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

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

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

(a) from doing that thing, or

(b) from doing anything of that description.

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

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

(b) it is reasonable for the worker or agent to rely on the statement.

But this does not prevent the employer from being liable by reason of subsection (1B).

(2) This section does not apply where—

(a) the worker is an employee, and

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

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

48 Complaints to employment tribunals.

…

(1A) A worker may present a complaint to an employment tribunal that he has been subjected to a detriment in contravention of section 47B.]

…

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

(3)An employment tribunal shall not consider a complaint under this section unless it is presented—

(a) before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them, or

(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

(4) For the purposes of subsection (3)—

(a) where an act extends over a period, the "date of the act" means the last day of that period, and

(b) a deliberate failure to act shall be treated as done when it was decided on;

and, in the absence of evidence establishing the contrary, an employer, a temporary work agency or a hirer shall be taken to decide on a failure to act when he does an act inconsistent with doing the failed act or, if he has done no such inconsistent act, when the period expires within which he might reasonably have been expected to do the failed act if it was to be done.

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

…

181. In section 43B(1), "on the ground that" means that the provision will be infringed if the protected disclosure materially (in the sense of more than trivially) influences the employer's treatment of the whistleblower (*Fecitt and ors v NHS Manchester (Public Concern at Work intervening)* 2012 ICR 372, CA.

182. There is no clear answer to the question whether knowledge of a protected disclosure can be imputed to an innocent decision-maker who subjects the whistleblower to a detriment (see 5.47 to 5.55 of the IDS Handbook on Whistleblowing). In this case, because of the way the issues are framed and our findings on knowledge, the question is immaterial.

Application of Facts to Issues

183. The parties agreed a list of issues at a preliminary hearing on 11 November 2022. In this each of the five Disclosures are listed under the question:

> Did the following communications set out by the Claimant amount to the making of "qualifying protected disclosures" as defined in s.43 of the ERA 1996?

184. As noted above, during the hearing before us the respondent conceded that Disclosures 1, 3 and 5 were qualifying protected disclosures. This is a

sensible concession because it is obviously correct. It therefore strikes us as extremely strange that the respondent denied that the claimant had made any protected disclosure during the proceedings until that point. This case would have had a very different appearance, and the issues could have been significantly narrowed, if the respondent had accepted that the claimant had made protected disclosures at the outset. We particularly note that Disclosures 1 and 3 were made directly to the respondent and Disclosure 1 was made to the person who chaired the claimant's disciplinary hearing, which took place after the claim was submitted. It should not have been difficult to identify that the claimant was a whistleblower.

185. We do however need to turn our attention to whether Disclosures 2 and 4 qualifying protected disclosures.

186. Disclosure 2 was the claimant's email to Ms Looi on 14 April 2020 about his whistleblowing having leaked and two distribution boars. We find Disclosure 2 is a qualifying protected disclosure. The key point in this is not the allegation about the distribution boards. It is the allegation that the claimant's whistleblowing has leaked and he is getting pressure. There is a public interest in protecting whistleblowers. Pressure, which in statutory language is a detriment, is not allowed under the ERA, so the information tends to show failure to comply with a legal obligation.

187. Disclosure 4A was the email of 28 April 2020 to Mr Kidd attaching invoices from ADS. We find Disclosure 4A was not a protected disclosure. This is because it contained only the information about correction of an incorrect invoice, without any allegation that anybody in the trust was financially benefiting from this. We particular draw on the fact that the claimant sent only his email of 2 April 2020, which is not relied on as a protected disclosure, to Mr Kidd.

188. Disclosure 4B was the email of 15 June 2020 to Mr O'Sullivan about extension leads. We find Disclosure 4B was not a protected disclosure. The claimant has failed to show he reasonably believed that what he raised tends to show wrongdoing.

189. However we are conscious that our findings on Disclosure 4 are really immaterial as the claimant does not claim that the people who knew about them subjected him to any detriment.

190. We now turn to the claimant's less favourable treatment and detriments. In the list of issues there are 14 claimed acts of direct race discrimination numbered 5.1 to 5.14. There are also 21 claimed whistleblowing detriments numbered i to xxi. Some acts fall into both lists while others are only in one or other list. We therefore now turn to each claimed act, identify whether it is relied on in relation to race, whistleblowing or both, and consequently consider the applicable legal framework to decide whether it is made out.

<u>5.1 The Respondent decided to investigate only the Claimant (and not the contractor, Richard McDade) in relation to the Hot Works Permit issue [C's 22 May FPs paras 7 and 12]. Race Only</u>

191. We need to look at the wider context to properly analyse this issue. The core of the issue is that the claimant was investigated in relation to the HWP when nobody else was.

192. Once it was clear that Mr Isbell's permit was not closed on 8 April 2020, and therefore alarms could have been disabled overnight, the respondent should have, if treating Mr Isbell and the claimant the same, suspended and investigated Mr Isbell as well. Subsequent evidence suggests that Mr Isbell wrongly stated on his HWP that he provided caps whereas in fact he isolated the alarms. We find Mr Isbell to be a valuable evidential comparator.

193. Mr Harris was involved in a WhatsApp group that contained (based on respondent oral evidence, albeit no examples were provided) racist material. He was investigated and resigned while being investigated. He was the claimant's line manager. This raises issues about his motivations as well as giving context to the workplace. He is most likely the person who obtained the statements from Mr McDade which we find for the reasons set out above not to be reliable.

194. We are conscious that the claimant raised issues about Mr McDade and the permit on 8 April 2020 immediately after his suspension. The difference in treatment between the claimant and Mr Isbell and the possibility of their being racist motives of Mr Harris, are each on their own, sufficient to shift the burden of proof onto the respondent.

195. We find there were good reasons to investigate the claimant because Mr Major thought the claimant had done something wrong. Mr McDade, as a contractor, was not obliged to follow trust policy whereas the claimant was. However that does not explain the difference in treatment between the claimant and Mr Isbell. That difference could be said to be because the claimant's behaviour caused a fire alarm whereas Mr Isbell's behaviour did not cause a fire alarm.

196. However, that has never been the reason given for investigating the claimant. From the suspension letter on 17 April 2020 onwards the issue according to the respondent has always been false information on the HWPs. While it appears from the claimant's letter of 20 April 2020, he initially thought the issue was the fire alarm being activated, the respondent has always maintained that was not the case.

197. Yet the claimant and Mr Isbell were therefore treated in a materially different way despite doing materially the same thing in relation to their HWPs. (Indeed, arguably the shortcomings from Mr Isbell were the more serious by leaving a risk of a fire being undetected overnight rather than a false alarm during the day.) Investigation of the claimant continued despite the claimant drawing attention to the 8 April HWP on 20 April 2020. The respondent's explanation for this does not make sense. We do not find that Mr Major's decision to commission an investigation into the claimant had nothing whatsoever to do with race.

198. We are conscious that this investigation arguably ended on 26 June 2020 when the investigation report was prepared. If that were the case, given that the claimant raised a grievance about bias within that process, which only concluded on 5 January 2021, and was still subject to a disciplinary process when he lodged his claim, we would consider it just and equitable to extend time for bringing this claim.

199. Consequently we uphold this race discrimination complaint.

<u>i. Place the Claimant on suspension on 14 April 2020 [C's 22 May FPs paras 5 and 45], without first discussing the issue informally [C's 22 May FPs para 14]; Whistleblowing Only</u>

200. There are two parts to the issue:

    (a) the decision to suspend; and

    (b) the lack of informal discussion.

201. We are satisfied that it was Paul Major who made these decisions. The respondent argues that suspending the claimant was not a detriment, however we find that it was. This is because it is clearly a very unusual step to take and it shows a real lack of confidence in an employee. Although it is expressed to be neutral, in this situation for reasons we explain below, it was disproportionate to suspend. Furthermore, in the context of the pandemic it had a big impact on what the claimant could do. It meant he had to stay at home every day.

202. There must have been some reason for the decision to suspend the claimant.

203. Mr Major claims that he did not know about Disclosure 1. On balance we find that it more likely than not that Mr Major did know about Disclosure 1, because he had either received the email of 2 April from Ms Looi and/or Mr Harris had mentioned it to him. We are conscious in saying this that if he only received the email of 2 April, he would know that the claimant had identified himself as a whisteblower, but would not know the details of the alleged wrongdoing.

204. We then turn to whether this was the ground on which the claimant was suspended. Mr Major's professed reason for doing this is that the claimant had put people in danger, potentially constituting gross misconduct. We find it incredulous that the claimant would be suspended for this, particularly when staff were under so much pressure due to the pandemic. False fire alarms are not unusual and indeed there were 67 false alarms in a year and nobody else was suspended. Mr Major had never suspended anyone before or even disciplined anyone for a fire alarm. We are also conscious that Mr Major's concerns arose because of the fire alarm, but the allegations pursued against the claimant were couched in terms of false information on the HWP.

205. We consequently do not accept this explanation.

206. However that does not mean we find the claimant was suspended on the ground of his protected disclosure. Rather, the evidence is clear that the claimant did not get on with his team, he went over the head of his

management to raise issues and he was critical of the work of others but did not complete his own work. This was evidence we heard from Mr Major, Mr Noakes, Ms Dowler and Ms Looi, and we accept it.

207. The protected disclosure, which from the 2 April 2020 email only related to incorrect figures in an invoice, rather than the more detailed allegation in 23 March 2020 email that staff were financially benefiting, was just another incident that contributed to Mr Major's overall view of the claimant. We find that Mr Major saw the claimant as not contributing to the team and they would be better off without him. He took the opportunity presented by the false alarm, which did expose another issue in terms of the information on the HWP, to act on this. But even if Mr Major had been unaware of any protected disclosure, we find that he would have treated the claimant in the same way. The protected disclosure was not material.

208. Turning to the issue of informal discussion before suspension, the respondent was not obliged to have informal discussion with the claimant. The policy says where possible you should have informal discussion. We are conscious that this incident was three weeks after lockdown started and that the respondent's organisation was in flux and staff were busy as a result. Had a discussion taken place with the claimant before the suspension, Mr Major may have become aware of the issues subsequently raised in the letter of 20 April 2020 and might have thought more carefully and avoided the error of discriminating against the claimant. But we are satisfied that the reason no informal discussion was had was none was required and in the circumstances Mr Major did not see one as feasible or necessary. Although this was a detriment, it was not due to the claimant's protected disclosure.

ii. Commission an investigation on 28 April 2020 in respect of the Claimant's conduct in respect of the Hot Works Permit issue [C's 22 May FPs para 10]; Whistleblowing Only

209. Although this issue mentioned the commissioning of the investigation on 28 April 2020, the claimant's further particulars of 22 May 2022 specifically mention that the claimant complains about the investigation beginning from the letter of 17 April 2020. We find this not to be a detriment. The claimant was already suspended, which was a detriment. It was in his interests for there to be an investigation to bring his suspension to an end.

iii. Fail to contact the Claimant during his suspension period [C's 22 May FPs para 15]; Whistleblowing Only

210. We do not accept the premise of this complaint. Mr Noakes sent regular letters to the claimant. The claimant could have contacted Mr Noakes in response to these letters, as his contact details were provided. He chose not to.

iv. Change the disciplinary investigation allegations on 22 May 2020 [C's 22 May FPs para 24] Whistleblowing Only

211. The date of the change in the wording of the allegations is wrongly recorded in the list of issues. The material change in the allegations between the suspension letter and terms of reference was the addition of the allegation

that the claimant did not act in line with the trust's values and behaviours. We find this was a detriment because it was an additional accusation. However it was clearly the result of analysis of the incident during the drafting of the terms of reference and we can see no reason why it would be connected with the claimant's protected disclosure.

v. Ignore and omit the Claimant's version of events sent by email on 22 May 2020 to Claire Woodley (HR Partner) and Claire Dowler Investigating Officer) [C's 22 May FPs para 27]; Whistleblowing Only

212. With the letter of 22 May 2020 the claimant also provided his letter of 20 April 2020. We look here at the consideration of both of these. We find this to have been a detriment. By not dealing with his concerns the claimant was not being listened to in the investigation into him. We have explained above the points he made in these letters. Of particular concern is that he pointed out the disproportionateness of the suspension, the issues with the HWP on 8 April 2020 and his concern that the actions against him were due to his protected disclosure. Ms Dowler effectively decided they were not within the remit of her investigation. We accept that Ms Dowler made those decisions for reasons unconnected with the claimant's protected disclosure.

213. We do not accept this was the right decision, because as a result she failed to consider the possible motives of Mr Harris and Mr Isbell in the evidence they gave to her. Mr Harris was potentially motivated by the protected disclosure. Mr Isbell was potentially incriminated by his actions on 8 April in failure to properly complete a HWP.

214. We are conscious that this issue is not relied upon as a race complaint, and therefore the obvious difference in treatment of the claimant and Mr Isbell is of only limited relevance.

vi. Invite the Claimant to a disciplinary hearing [C's 22 May FPs para 30]; Whistleblowing Only

215. It is clear from the further particulars of 22 May 2022 that the claimant's complaint is that the evidence provided with the invitation to the disciplinary meeting on 17 June 2020 was biased. We find this to be a detriment for the same reasons as given in relation to issue v, but not on the ground of the protected disclosure for the same reasons.

5.4 Mandy Brokenshaw failed to provide verification that the email to and from Richard McDade (in which he confirmed his signature on the statement) was sent from his email address [C's 22 May FPs para 39] Race Only

216. There are no facts from which we can conclude that this was connected with race. Unlike the issues with the initial investigation of the claimant by Mr Major with the assistance of Mr Harris, there is no evidential comparator or other race-related conduct connected with Ms Brokenshow's decision that causes the burden of proof to shift.

<u>5.3 and vii. Fail to hold a meeting with Claire Dowler regarding the Claimant's allegation that her investigation was biased [C's 22 May FPs para 38]; Race and Whistleblowing</u>

<u>And</u>

<u>5.5 and viii. Fail to commission an investigation at stage two of the grievance process [C's 22 May FPs para 40]; Race and Whistleblowing</u>

217. It is agreed that at no point during the grievance process was there a meeting with Ms Dowler regarding an allegation of bias. The claimant raised bias in his initial grievance on 14 July 2020. The decisions on this throughout the grievance were that it could be dealt with within the disciplinary process. It is therefore unclear why the respondent decided to postpone the disciplinary process while the grievance was ongoing. Nobody could tell us who made that decision. The policy allowed both processes to be joined together. With hindsight that would have been a better approach because it would have sped up the process, thereby reducing the length of suspension, and allowed all issues to be dealt with together.

218. There was an opportunity at each stage in the grievance to look at the content of the investigation report alongside the protected disclosures of the claimant to consider whether the claimant's treatment had anything to do with the protected disclosures. However, instead of doing this, the respondent never looked at whether any detrimental treatment was because of a protected disclosures. The approach throughout the grievance process was, where the protected disclosures were considered at all, to look at whether they had been investigated, rather than their impact on the claimant's suspension in disciplinary treatment. The fact that the disclosures were investigated and that no evidence was found is simply missing the point.

219. Nevertheless, this failure had nothing to do with race or the actual making of the protected disclosures.

220. Specifically in relation to race, there are no facts on which we can conclude in the absence of an explanation that the decision not to interview Ms Dowler was because of race.

221. Similarly, looking at whistleblowing, the decision was because the decision-makers failed to look at the big picture and consider the possible motivations that Mr Harris might have because of an unproven allegation of wrongdoing against him. There was failure to protect a whistleblower, but this detrimental treatment was not because of any protected disclosure.

<u>5.6 and ix. Give the Claimant short notice to attend the hearings on 16 September 2020 and 4 December 2020 meaning that the Claimant could not arrange for representation [C's 22 May FPs paras 40 and 42]; Race and Whistleblowing</u>

222. We find that the respondent did not give short notice. Notice given was within the time limits in the respondent's policy.

223. We note that the claimant did not complain at the time. Rather in an email dated 15 September 2020 he specifically asked for the meeting to go ahead without delay. Therefore there was no detriment.

224. The hearing on 4 December 2020 was postponed at the claimant's request so there was also no detriment then.

225. Turning to less favourable treatment because of race, there are no facts from which we could conclude that, absent explanation, the treatment was because of race.

<u>5.7 and x. Delay in providing the Claimant with a CD recording and transcript of the hearing on 16 September 2020 [C's 22 May FPs para 40]; Race and Whistleblowing</u>

226. The claimant has never explained why this caused him any problem at all and it therefore not less favourable treatment or a detriment.

227. In any case the reason for the delay was explained to us. The respondent conducted the hearing on 16 September 2020 remotely so production of a CD recording of it was more complex than for face to face meetings. We accept this explanation. It had nothing to do with race or protected disclosures.

<u>xi. Use the wrong HR Policy to conduct the disciplinary investigation [C's 22 May FP's para 44]; Whistleblowing Only</u>

228. There is no explanation for why this is a detriment. There was confusion regarding which policy was and should have been used. On 3 July 2020 the wrong policy was sent to the claimant. The wrong policy was also included in the trial bundle. However it is clear to us that the policy which should have been used was the one in place when the investigation began. That is the policy with reference PE/PO/00003, which although expressed to expire in January 2020, was still in place at the relevant time.

229. We are satisfied that the correct policy was in fact used in the process, albeit the wrong policy was provided during the process at one point.

<u>5.8 and xii. Poorly copy and omit documents from the stage three grievance bundle [C's 22 May FPs para 49]; Race and Whistleblowing</u>

230. The respondent accepts that this happened. We accept it was just an administrative error. We note it was corrected as soon as the claimant raised it. There was no less favourable treatment or detriment, and even if there were it had nothing whatsoever to do with race or the claimant's protected disclosures.

<u>5.2 Ifeanyi's Nwonwu's decided to not uphold the Claimant's grievance on appeal [C's 22 May FPs para 62] Race Only</u>

231. We do not find the term "all human" or "all humans" to be discriminatory. It inherently could apply to any human.

232. Turning to the decision not to uphold the grievance, there are no facts from which we conclude that his decision had anything to do with race. The claimant draws on a hypothetical comparator, but there is no reason for us to think a person of a different race would be treated any differently.

xiii. Include a report by Paul Major that contained false allegations that the Claimant was performing poorly in his role [C's 22 May FPs paras 47 and 52]; Whistleblowing Only

233. We have no more information on this allegation than is contained in paragraphs 47 and 52 of his further particulars which say:

> 47. In addition, insignificant performance issues about my conduct were unduly highlighted by the employer.
>
> 52. It is my strong belief that the report created by Paul Major contained false allegations that I was performing poorly in my role.

234. Mr Major denied making such reports and did not know what the claimant referred to. Without evidence we do not accept that such reports have been made. The claimant provided neither oral evidence on it nor did he question Mr Major about it.

xiv. Produce transcripts of the investigation interviews that differed from the tape recordings [C's 22 May FPs para 55]; Whistleblowing Only

235. There are two parts to this issue.

236. One is the change to Mr Harris's transcript. For the reasons explained above we find this to be due to a straightforward transcription error. It was entirely proper for the respondent to correct this and unconnected with the claimant's protected disclosure.

237. The second issue is the missing words in the transcripts of the claimant's interviews. We accept words are missing. The claimant has had the recordings of all the meetings he attended and has never sought to provide any corrections to the transcripts. It is therefore impossible for us to know whether he has suffered any detriment as a result of these or whether the issues are entirely immaterial. In any case, as explained above, we accept that there are likely to be innocent issues with picking up the claimant's voice in a recording that have nothing to do with his protected disclosures.

xv. Include Florence Looi on the disciplinary hearing panel, despite the Claimant's objection [C's 29 Aug App to Amend para 5] and in respect of her role on the panel, did she; a. fail to understand Paul Major's role as a witness (at the appeal hearing) [C's 29 Aug App to Amend para 8]; and b. fail to mention that Richard McDade was not directly employed by Aether Medical [C's 29 Aug App to Amend para 11] Whistleblowing Only

238. We look at each part of this issue in turn.

Objection to Ms Looi

239. On 3 July 2020 Ms Looi was asked by HR to chair the disciplinary hearing. On 17 July she invited the claimant to the hearing. The claimant raised his grievance pausing the disciplinary process. It restarted on 17 January 2021 when Phil Robson, Estates and Facilities Site Manager, was asked to chair the disciplinary hearing. This was because Mr Harris had taken on Ms Looi's role, but could not conduct the disciplinary hearing because he was a witness.

At some point prior to the hearing, which actually took place on 15 May 2021, Mr Harris was moved back to his original role. Ms Looi returned and therefore conducted the disciplinary hearing as originally envisaged.

240. The claimant objected to Ms Looi carrying out the disciplinary hearing in an email on 15 September 2020. He specifically explained that he had made the protected disclosure to Ms Looi and it had leaked, and that all the people involved ultimately reported in to Ms Looi.

241. The claimant's complaint about Ms Looi chairing the disciplinary was clearly well-founded. She would have had to consider how a protected disclosure which only she received was (allegedly) leaked to the people who gave evidence against claimant. The claimant's defence was that his treatment was motivated by the protected disclosure. She was, on this basis, clearly unsuitable for hearing the grievance. Her doing so was a detriment.

242. However there is no evidence that Ms Looi remained responsible for the disciplinary because of the protected disclosure. Indeed we accept that it was because of staffing circumstances and moreover, the failure systematically to see the connection between the protected disclosures and the motivations of Mr Harris.

Mr Major's Role as Witness

243. The claimant's complaint here is that Ms Looi said that Mr Major oversaw the investigation and she did not understand his role as a witness. For the reasons already given, we have some sympathy with the claimant seeing a misunderstanding of Mr Major's role as very important to the case. He did not make clear the origins of the statements from Mr McDade and he took a decision to begin an investigation of the claimant that was tainted with discrimination. However we cannot see in what way any failure of Ms Looi to understand this was on the grounds of the claimant's protected disclosure. To put it simply, any complaint is about Ms Looi's error rather than her treatment of the claimant. It is hard to see how an unintentional error could be on the ground of a protected disclosure, and we find it was not.

Mr McDade not being Employed

244. We are unclear on how Mr McDade being or not being directly employed by Aether made any difference to the claimant. There is no evidence this was concealed from the claimant and we accept that it would not have been actively brought to his attention because of its irrelevance. There is no detriment.

<u>5.10 and xvi. Fail to call key witnesses Richard McDade and Darren Harris to the disciplinary hearing and fail to notify the Claimant that Darren Harris had started his own business on 9 April 2021 (to the detriment of the Claimant's case) [C's 29 Aug App to Amend para 10]; Race and Whistleblowing</u>

245. We will look first at the reason for not calling Mr Harris in relation to whistleblowing and then race. We will then look at these issues in relation to Mr McDade.

Harris – PD

246. We are satisfied that the claimant suffered a detriment because he did not have the chance to explain his case and in turn Mr Harris was not there to answer. In fact, on the evidence before us, nobody has ever asked Mr Harris about protected disclosure and any impact on his behaviour, which has obviously been to the claimant's detriment.

247. The respondent's reason for not calling Mr Harris is that he was off sick. Although the reason for that sickness appears to us to be the disciplinary investigation ongoing in relation to him, it was an acceptable reason for the Mr Harris not to attend. There is also no evidence that it was in any way connected with any protected disclosure.

Harris – Race

248. We find this was clearly less favourable treatment in that the claimant could not put his case to Mr Harris. However there are no facts on which we can conclude in the absence of explanation that this was because of race. To put it simply, if claimant had been a different race Mr Harris still would not have attended.

McDade – PD

249. We find this was a detriment because the claimant was unable to ask Mr McDade about his two statements or whether Mr McDade was working in the loft or undercroft.

250. Ms Rees said he was not called because of not being an employee of the respondent, social distancing and because he had already provided written statements. We do not accept this as true in context for the following reasons. First, Mr McDade had made the allegations according to the investigation report. Second, the written statements were core to the claimant's case. Third, Mr Noakes said that Mr McDade still works with the trust as a contractor. He would have an interest in assisting the trust to maintain good relationships.

251. However that does not mean we consider the failure to call him to be because of the claimant's protected disclosures. Rather, again, it was due to the failure to see the protected disclosures as a possible motive for Mr Harris's evidence.

McDade – Race

252. We find this was clearly less favourable treatment because the claimant could not ask Mr McDade about his two statements or whether he was working in the loft or undercroft. However there are no facts from which we could conclude, in the absence of explanation, that this was because of race. If the claimant had been different race we are quite satisfied that Mr McDade still would not have been in attendance.

5.11 and xvii. Issue the Claimant with an outcome to the disciplinary hearing that changed the wording of allegation 1 [C's 29 Aug App to Amend paras 7 and 9]; Race and Whistleblowing

253. As explained above, this was a stupid error, and confusing. It was stated to be a typo in Ms Looi's witness statement. However she resiled from that simple explanation under cross-examination, saying that there were in fact five detector caps needed. This explanation flies in the face of the other evidence, which suggests 23 detectors were in the work area. We prefer the explanation originally given by Ms Looi that "five" is a typo and the intention was to write "fire". We find there to be no detriment because it is still substantively the same allegation. We find it to involve no less favourable treatment as it has no impact on the outcome. Even if it were a detriment or less favourable treatment, we find it was a typo having nothing whatsoever to do with race or any protected disclosure.

5.12 and xviii. Respond to the Claimant's appeal against the disciplinary outcome outside of the Trust's Disciplinary Policy timescales [C's 29 Aug App to Amend para 7]; Race and Whistleblowing

254. The only element of the disciplinary appeal which we can see to have been outside the timescales in the policy was to hear the appeal within 21 calendar days of it being submitted. The appeal form is dated 28 May 2021 but is acknowledged as having arrived on 4 June 2021 by email. It was heard on 29 June, which was four days late. The outcome is dated 7 July 2021.

255. We note that the claimant was already back at work from 24 May 2021.

256. Looking first at the protected disclosure detriment, we are not satisfied this was a detriment in the circumstances. However, even if it was, we find it was entirely unconnected with the claimant's protected disclosures. We accept it was because of the impact of the pandemic as claimed by the respondent.

257. Turning to race, we find there was no less favourable treatment. We accept the explanation that the delay was due to the pandemic. We also accept the evidence that many other cases were taking much longer.

xix. Try to change the Claimant's duties and take away some of Claimant's duties, including a refusal to access the switch rooms and plant rooms on 24 May 2021 (the alleged perpetrator is Ali Sadik) [C's 29 Aug App to Amend para 12]; Whistleblowing Only

258. Mr Sadik says he did not know about the protected disclosures of the claimant. We accept this. However Mr Sadik did not make the decision that the claimant could not access the switch rooms. This decision was made by an authorised person for that purpose, who was Andy Butler. We have no evidence that Mr Butler knew about the protected disclosures. We therefore cannot find that any detriment caused by this (on which we make no finding) was on the ground of the protected disclosures.

259. Mr Sadik said that the claimant was not refused access to the plant rooms. We can see that the claimant claimed not to have a key for these in an email to Ms Looi on 1 July 2021. During cross-examination of Mr Sadik the claimant said he had no plant room key but accessed these rooms borrowing the keys

of others. Mr Sadik said that he thought the claimant did have a key as a result. We find that at the very worst, any lack of access was an oversight by Mr Sadik. As he did not know of the protected disclosures, it cannot have been on their grounds.

<u>5.13 and xx. Decline the Claimant's application for the post of Mechanical Engineering Manager in or around July 2021 (the alleged perpetrators are Paul Major and Florence Loui) [C's 29 Aug App to Amend para 12]; and Race and Whistleblowing</u>

260. Looking first at race, the claimant identifies as a comparator Adam Lock. It is not claimed that Mr Lock got the job of Mechanical Engineering Manager, though we accept he was interviewed. As he was not appointed, we cannot see how he shows that the claimant was treated less favourably because of race or for any other reason. There are no facts from which we can conclude the decision was because of race.

261. Turning to the protected disclosure, we find that not promoting the claimant was a detriment. The reason the respondent gives for not promoting the claimant is that he did not have the required expertise and was subject to a final written warning. We accept the decision not to appoint the claimant to this role was not on the ground he had made a protected disclosure.

<u>5.14 and xxi. Close the post of Estates Operation Manager on 20 August 2021 before the deadline (the alleged perpetrator is Paul Major) [C's 29 Aug App to Amend para 13]. Race and Whistleblowing</u>

262. The claimant claims he was planning to apply for the post of Estates Operations Manager and the closing date was 26 August 2021. He claims Mr Major was recruitment manager for the post was aware of this and closed the vacancy early on 20 August 2021. There is no documentary evidence that the advert was closed early. Mr Major denies doing so or having the ability to do so. We prefer his evidence on this point to the claimant's vague accusation. Furthermore, for the reasons explained in relation too 5.13 and xx, we find the claimant would be very unlikely to be appointed to this role had he applied. We cannot see why Mr Major would nevertheless stop the claimant from applying.

<u>5.9 The Respondent failed to recognise the profound negative impact of the process on the Claimant's health [C's 22 May FPs para 56]; Race Only</u>

263. There was a reminder on every communication from the respondent that the claimant could access the employee assistance programme and it appears that he did so. The claimant first brought the impact on his health to the attention of the respondent on 14 September 2020 in an email to Ms Brown and Ms Rees. He specifically linked the length of his suspension to stress he was experiencing. It was not specifically acted on then however, whereas when he was signed off sick later we saw immediate action.

264. We ask ourselves if there are facts from which, in the absence of any explanation, we could conclude this was because of race? The answer is no. There was a failure to look at the reason the claimant had been suspended for so long. It was fundamentally the failure to consider the disciplinary and

grievance together. It is obvious to us that the whole process did have a profound negative impact on the claimant's mental health. We can see that he made rational, clear written points, which were in many ways correct, on 20 April 2020. Had these been properly considered at the time the suspension could have been much shorter. It is evident that the claimant was far less able to explain himself at oral hearings. With his mental health deteriorating, that became all the more difficult. We observe that at the end of the hearing before us the claimant burst into tears, having had real difficulty explaining his case throughout the Tribunal proceedings. We have significant sympathy with him because the allegation he made on 20 April 2020, that he was singled out despite doing the same thing as a colleague had done on 8 April 2020, was fundamentally true. Being suspended and disbelieved for so long is bound to take its toll.

265. Nevertheless, this failure by the respondent was not because of race.

Conclusion

266. Overall we therefore uphold one of the claimant's 35 complaints (Issue 5.1). It is a claim of direct race discrimination. We reject all of the claimant's whistleblowing complaints. None of them show the claimant being subjected to detriment on the ground of his protected disclosures. That said, it is clear that the respondent failed miserably to appreciate the need to protect whistleblowers.

Tribunal Judge D Brannan acting as an Employment Judge
Dated: 9 May 2023