EMPLOYMENT TRIBUNALS

Claimant: **Mr M Pitman**

Respondents: **Hampshire Hospitals NHS Foundation Trust (1)**
Dr Lara Alloway (2)

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Heard at: Southampton

On: 25 September to 9 October 2023 (last day the parties attended)

Before: Employment Judge Gray
AND Members Mr Sleeth and Mr Wakeman

Appearances
For the Claimant: Mr Mitchell (Counsel)
For the Respondent: Mr Sutton (KC)

RESERVED JUDGMENT (Liability Only)

It is the unanimous judgment of the Tribunal that the Claimant's complaints of detriment on the grounds of whistleblowing, fail and are dismissed.

REASONS

Background and this Hearing

1. The Claimant claims that he was subjected to detriment on the grounds that he made protected qualifying disclosures also known as whistleblowing.

2. The Claimant was employed as a Consultant Obstetrician and Gynaecologist at the First Respondent.

3. The Claimant asserts that in the period from 7 March 2019 to 27 July 2021 he made seven protected qualifying disclosures (originally eight, but one was struck out at an earlier hearing by Employment Judge Rayner). He then asserts that one or more of those alleged disclosures were then the grounds for him being subjected to detriment. He alleges thirteen detriments.

4. The claim is brought against two Respondents, the Claimant's then employer, an NHS foundation Trust, and an individual who was the Chief Medical Officer (CMO) at the Trust at the time of matters complained about in this claim.

5. The Respondents deny all the complaints made, including that any of the alleged disclosures meet the required legal definition.

6. This is a claim that has generated a significant amount of public and media interest. We therefore consider it helpful to remind readers of this Judgment that the Employment Tribunal's role was to determine the matters set out in the agreed list of issues only. That is, whether any of the Claimant's seven alleged protected qualifying disclosures meet the legal definition under the Employment Rights Act 1996. Then if so, did any of the thirteen alleged detriments happen, and if so, was that detriment done on the ground that the Claimant had made one of the alleged disclosures, it being found to be a protected qualifying disclosure. This claim is not to determine the Claimant's clinical abilities, whether there was an unfair dismissal or not (which is the subject of a separate claim), nor the rights and wrongs or otherwise of medical intervention versus normalised births within NHS Trusts (which is not a matter raised in any of the alleged protected qualifying disclosures).

7. This claim had the benefit of previous case management hearings at which the issues to be determined in this case were agreed (pages 154 to 158 of the agreed hearing bundle). Through that case management process a hearing timetable for this final hearing was also confirmed (pages 146 and 147 of the agreed hearing bundle), which was broadly met.

8. The claim was listed for a 14-day final hearing to determine matters of liability only. Evidence and closing submissions concluded just before 1pm on day 11. The Tribunal then reserved judgment to allow for an adjustment to the listed deliberation days (it not being possible for the panel to meet on days 12 and 13 as listed).

9. We were presented with the following material for reference during this hearing:

a. Witness statements:

i. For the Claimant

1. Claimant
2. Aznvik Madadi (AM)
3. Caroline Gee (CG)
4. James Steen (JS)
5. Michael Heard (MH)
6. Daniel Pebody (DP)

ii. For the Respondent:

1. Lara Alloway (Second Respondent)
2. Alexandra Whitfield (AW)
3. Ben Creswell (BC)
4. Nicolette Hutchinson (NH)
5. Kieron Galloway (KG)
6. Steve Erskine (SE)

10. Agreed bundle of 1138 pages.

11. Supplemental bundle of 57 pages.

12. Respondents' chronology, key people, and key documents.

13. Claimant's versions of the Respondents' chronology, key people, and key documents with tracked changes, which were not objected to by the Respondents.

14. An un-redacted version of page 561.

15. A copy of the Responsible Officer NHS training material concerning Conflict of Interest or Appearance of Bias (that was permitted after hearing submissions from the parties for the reasons given orally at the time). The document is 13 pages and was labelled as being page 1139 onwards for ease of reference.

16. A further supplemental bundle from the Respondents titled "Recruitment Documents Bundle" consisting of 22 pages. The inclusion of this was not objected to by the Claimant.

17. Written submissions from both Counsel with an agreed authorities bundle.

The Issues

18. The issues as to liability that we were to determine, as previously agreed at the case management hearing on the 5 January 2023, were confirmed as follows:

1. Time limits

1.1 The claim form was presented on 4 November 2021. The Claimant commenced the Early Conciliation process with ACAS on 6 September 2021

(Day A). The Early Conciliation Certificate was issued on 5 October 2021 (Day B). Accordingly, any act or omission which took place before 7 June 2021 (which allows for any extension under the Early Conciliation provisions) is potentially out of time so that the Tribunal may not have jurisdiction to hear that complaint.

1.2 Were the detriment complaints made within the time limit in section 48 of the Employment Rights Act 1996? The Tribunal will decide:

1.2.1 Was the claim made to the Tribunal within three months (plus the Early Conciliation extension) of the act complained of?

1.2.2 If not, was there a series of similar acts or failures and was the claim made to the Tribunal within three months (plus the Early Conciliation extension) of the last one?

1.2.3 If not, was it reasonably practicable for the claim to have been made to the Tribunal within the time limit?

1.2.4 If it was not reasonably practicable for the claim to have been made to the Tribunal within the time limit, was it made within a reasonable period?

2. **Protected Public Interest Disclosures ('Whistle Blowing')**

2.1 Did the Claimant make one or more qualifying disclosures as defined in section 43B of the Employment Rights Act 1996? The Tribunal will decide:

2.1.1 What did the Claimant say or write? When? To whom? The Claimant relies on these disclosures:

2.1.1.1 Disclosure 1 - on 7 March 2019 a verbal disclosure to Janice McKenzie; and

2.1.1.2 Disclosure 2 - on 7 November 2019 a verbal disclosure to Alex Whitfield - [***This was struck out by Employment Judge Rayner in a Judgment dated 15 June 2023 (pages 186 to 208), therefore references to disclosure 2 against a particular detriment no longer apply***]; and

2.1.1.3 Disclosure 3 - on 4 September 2020 a letter to the Second Respondent; and

2.1.1.4 Disclosure 4 - on 26 February 2021 an email to Steve Erskine, Jane Tarbor and Gary McRae; and

2.1.1.5 Disclosure 5 - on 7 April 2021 a verbal disclosure to Jane Tarbor; and

2.1.1.6 Disclosure 6 - on 20 May 2021 his written grievance sent to both Respondents; and

2.1.1.7 Disclosure 7 - on 10 June 2021 a verbal disclosure to Alex Whitfield; and

2.1.1.8 Disclosure 8 - on 27 July 2021 an email with enclosures to Alex Whitfield and Kieron Galloway.

2.1.2 Were the disclosures of 'information'?

2.1.3 Did the Claimant believe the disclosure of information was made in the public interest?

2.1.4 Was that belief reasonable?

2.1.5 Did the Claimant believe it tended to show that:

2.1.5.1 (Disclosures 2, 3, 4, 5, 6, 7 and 8) a person had failed, was failing or was likely to fail to comply with any legal obligation; and/or

2.1.5.2 (All Disclosures) the health or safety of any individual had been, was being or was likely to be endangered?

2.1.6 Was that belief reasonable?

2.2 If the Claimant made a qualifying disclosure, then it was a protected disclosure because it was made to the Claimant's employer pursuant to section 43C(1)(a) of the Act.

3. **Whistle Blowing Detriment (s 47B of the Act)**

3.1 Did the Respondent do the following things:

3.1.1 Detriment 1 - on 25 May 2021 both Respondents convening an extraordinary PSAG meeting to discuss performance issues relating to the Claimant (said to be on the grounds of Disclosures 1 to 6 inclusive); and

3.1.2 Detriment 2 - on 25 May 2021 the First Respondent, and the PSAG [Professional Standards Advisory Group] meeting personnel (including the second respondent but not Mr Ben Cresswell) criticising and managing the performance of the Claimant (said to be on the grounds of Disclosures 1 to 6 inclusive); and

3.1.3 Detriment 3 - on 25 May 2021 the First Respondent, and the PSAG meeting personnel (including the Second Respondent but not Mr Ben Cresswell) conducting the PSAG process which was put together with the intention of managing the Claimant and was not objective (for example the chair of the process Dr Alloway had been named in the Claimant's grievance and should not have chaired the PSAG process, and that process did not have a clear remit or process and was used as a vehicle to make decisions about the claimant's management, which included inappropriate findings about patient safety which

the claimant was not afforded the opportunity to address or to challenge) (said to be on the grounds of Disclosures 1 to 6 inclusive); and

3.1.4 Detriment 4 - on 25 May 2021 during the PSAG meeting the First Respondent, and the PSAG meeting personnel (including the second respondent but not Mr Ben Cresswell) the Claimant alone was blamed for continuing communication issues (said to be on the grounds of Disclosures 1 to 6 inclusive); and

3.1.5 Detriment 5 - on 9 June 2021 the first respondent by the hand of the Second Respondent wrote a letter to Alex Whitfield raising the possibility of the Claimant's dismissal acting as chair of the PSAG meeting when she should not have been acting as chair (said to be on the grounds of Disclosures 1 to 6 inclusive); and

3.1.6 Detriment 6 - on 10 June 2021 Alex Whitfield of the First Respondent should have recused from chairing the Claimant's grievance hearing following that letter from the second respondent and should have communicated to the second Respondent that the PSAG's recommendation to terminate the claimant's employment was entirely inappropriate (said to be on the grounds of Disclosures 1 to 6 inclusive); and

3.1.7 Detriment 7 - on 9 July 2021 the first respondent and Alex Whitfield not upholding the Claimant's grievance and continuing to make unsubstantiated allegations of concerns over patient safety (said to be on the grounds of Disclosures 1 to 7 inclusive); and

3.1.8 Detriment 8 - on 20 July 2021 the first respondent Alex Whitfield and Steve Erskine commissioned an external report from Mr Hay, but he was known to the First Respondent and its chair Alex Whitfield and he was not independent, and they deliberately restricted the terms of reference to the claimant's disadvantage. The Claimant subsequently wrote to the Respondents challenging the factual findings as being inaccurate (and the claimant has agreed to supply a copy of this letter to the respondent within 14 days (all said to be on the Disclosures 1 to 7 inclusive); and

3.1.9 Detriment 9 - from July 2021 onwards the First Respondent, Alex Whitfield and Kieron Galloway unreasonably delaying the process of the Claimant's appeal for several months (said to be on the grounds of Disclosures 1 to 8 inclusive); and

3.1.10 Detriment 10 - from 3 August 2021 the First Respondent, Alex Whitfield and Kieron Galloway unreasonably delaying the completion of the Claimant's DSAR and FOIAR requests, particularly in excess of the 28 days allowed under the relevant procedures (said to be on the grounds of Disclosures 1 to 8 inclusive); and

3.1.11 Detriment 11 - from September/October 2020 to date the First Respondent, Fay Corder, the Second Respondent Nicky Hutchinson, and Avideah Nejad behaving prejudicially towards the Claimant in that they arranged

for him to be monitored and colleagues were invited and encouraged to complain about him (said to be on the grounds of Disclosures 1, 2 and 3); and

3.1.12 Detriment 12 – with regards to the 2020 MHPS investigation the First Respondent, Alex Whitfield, Kevin Harris, the members of the PSAG (with the exception of Ben Cresswell) and Julie Dawes continued with a vindictive investigation process against the Claimant as compared with others such as Gary Dickinson in 2019 and Avideah Nejad in 2021/2 who were treated in a supportive manner (said to be on the grounds of Disclosures 1 and 2); and

3.1.13 Detriment 13 - from July 2021 onwards the First Respondent, the Second Respondent, Alex Whitfield, the PSAG, Kieron Galloway, Avideah Nejad and Renee Behrens placing the Claimant on special leave despite the accusations of patient safety concerns being unsubstantiated and not supported by evidence (said to be on the grounds of Disclosures 1 to 7 inclusive).

3.2 By doing so, did it subject the Claimant to detriment?

3.3 If so, was this done on the ground that the Claimant had made the protected disclosure(s) set out above?

The Facts

19. We heard oral evidence from all witnesses save for AM, CG, and JS, as the Respondents and Panel had no questions for these witnesses.

20. We found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after considering the factual and legal submissions made by and on behalf of the respective parties. We also had the benefit of an agreed factual chronology.

21. We remind ourselves that this is a claim for detriment because of the making of a protected qualifying disclosure. Our focus is to determine the matters set out in the agreed list of issues. That is, whether any of the Claimant's seven alleged disclosures meet the legal definition under the Employment Rights Act 1996. Then if so, did any of the thirteen alleged detriments happen, and if so, was that detriment done on the ground that the Claimant had made one of the alleged protected qualifying disclosures, it being found to be such a disclosure. This claim is not to determine the Claimant's clinical abilities, whether there was an unfair dismissal or not (which is the subject of a separate claim), nor the rights and wrongs or otherwise of medical intervention versus normalised births within NHS Trusts (which is not a matter raised in any of the alleged protected qualifying disclosures).

22. On the 1 April 2003 the Claimant commenced work for the First Respondent as a Consultant in Obstetrics and Gynaecology.

23. Although the first matter chronologically in the agreed list of issues is whether the Claimant made a protected qualifying disclosure on the 7 March 2019 orally to

Janice McKenzie (Divisional Chief Nurse/Midwife) (JM), there are some relevant factual background matters to note.

24. MH (Clinical Director for maternity, neonatal and breast services between 2015 and 2018), as a supporting witness for the Claimant, says in paragraph 2 of his statement that he was the Claimant's… "direct line manager between 2015 and 2018, was responsible for his annual appraisals and recommendation for revalidation ... I also acted as a mentor for him.".

25. About the Claimant (at paragraph 3 of his statement) MH says that he … "… was a sound clinician and a central part of the clinical services provided at Winchester. There would be no criticism from his consultant and midwifery colleagues of his clinical skills and attention to detail.". … (at paragraph 21) the Claimant … "… sets himself high standards and expects those working with him to work to and maintain those standards. If he feels those standards are not being met, he will say so. Certainly, I would say that he can lack insight into how he presents his views and that some people may find that challenging [page 291 - 292].".

26. In paragraph 4 of his statement MH says … "The merger of Winchester and Basingstoke was challenging for us all, but Martyn found it particularly difficult. He was genuinely concerned about clinical standards at Basingstoke and his attempts to use the clinical governance in place to identify issues and improve care, led to friction, in particular with the senior midwifery management team (SMT). I know this led him to feel very frustrated. Martyn always felt that the merger was a "takeover", and he wasn't alone in this [page 1094-1095]. It is correct that the management post-merger was Basingstoke centric [page 291].".

27. Also, in paragraphs 10, 11 and 12 …. "Martyn was well respected by the midwives on the labour ward, who he worked closely with. Indeed, the majority of the midwives who had complex pregnancies in Winchester would choose to transfer to Martyn's care. … 11. I worked very closely with Janice McKenzie when I was Clinical Director and I hope she would agree that we had a sound and respectful working relationship. We both identified that there were communication issues between the obstetricians and the SMT and both therefore must take responsibility that the issues that have led to this Tribunal were not resolved on our watch. … 12. It is clear now that the problems had been identified as suitably serious that the senior midwifery team drafted a letter to the Chief Executive and Chief Medical Officer in August 2018 [page 213]. That letter was never sent and I am clear that the issues in it were allowed to fester and were not taken forward by Kevin Harris, the Clinical Director at that time [page 289, 299]. When Kevin took over from me in January 2018, there was very little communication between us, with me only being contacted by him on a couple of occasions, regarding clinical issues. That working relationship was completely different to when I started as Clinical Director and worked closely with the previous Clinical Director, Claire Iffland [page 294].".

28. An amendment added to the agreed chronology by the Claimant refers to this letter as … "2 August 2018 - Unsigned draft letter from the Senior Midwifery Management Team to Alex Whitfield and Andrew Bishop (pages 213 to 214)".

29. About this letter the Claimant says in his witness statement (paragraphs 13 and 14) that he discovered the letter within the Maintaining High Professional Standards Investigation (MHPSI) complaint dossier. The Claimant says that the letter was drafted … "a matter of weeks after MH had raised issues, similar to those that I had raised with JM in March 2019, with members of the SMT [page 273].". The Claimant says that it … "was established during the course of my MHPSI that this letter was intercepted by KH and JM who, realising the potential repercussions of its content should it reach its intended recipients, prevented it from being sent.". The Claimant does not direct us to any page reference in the bundle to support this and we understand it to be his opinion on the matter as we note from the MHPSI notes (page 353) that they refer to JM sharing a copy of the letter with KH and a meeting then being convened between KH, JM and a group of midwives. The notes then extract notes from the interview with KH where he refers to those individuals finding the Claimant's behaviour very challenging.

30. Also of significance in the factual background is a meeting that took place on the 1 March 2019 between MH, the Claimant and Hilary Goodman (Deputy Head of Midwifery).

31. About this meeting the Claimant says (paragraph 5) … "At the request of my much-respected senior Consultant colleague, Michael Heard (MH), I attended a meeting on 1 March 2019, with him and Hilary Goodman (HG), newly appointed Deputy Head of Midwifery. I remained a passive observer during this meeting. MH raised the above concerns in addition to significant criticisms regarding the structure, functioning, management style of and appointments made to the entirely BNH-centric SMT. I knew that this discussion would be managerially escalated immediately following this meeting.

32. This meeting on the 1 March 2019 is referred to by the Claimant in his timeline document dated 4 July 2019 at page 277 of the bundle:

    "This meeting was called by MJH, I mistakenly thought, to 'calm the waters' between HG and both of us, following her recent appointment to the post of Deputy HOM. (Both MJH and I had experienced significant problems working and interacting with HG when she was in her previous post as the departmental Screening and Antenatal lead. Both of us were opposed to her appointment as DHOM.)

    MJH, very much, led this meeting with me being, for the most part, a passive observer. I was surprised by the tone, and approach that MJH used in this meeting. We discussed developing and increasing, on-going concerns that we all had regarding the midwifery (MW) staffing situation, spirally deteriorating MW morale, increasingly common unsafe MW staffing levels of the unit, poor relationships between the Senior Midwifery Management Team and the clinical MWs, reluctance of any of the SMT to assist in clinical areas, even when staffing levels were at their lowest. We also discussed the collective perception that we were no longer feeling that the unit was genuinely Consultant-led, as we as Obstetricians were increasingly commonly being completely by-passed when important decisions were made. At the meeting, I stated that I was genuinely

concerned that the inevitable result of these issues would be an increase in adverse clinical outcomes.

Somewhat to my surprise, MJH proceeded to criticize recent appointments to the SMT, including HG's own, concluding that 'the structure of the SMT is little more than a Basingstoke stitch-up!' I expressed concern towards the end of the meeting that I felt that it was likely, if not inevitable, that the RHCH MW's would soon get to the point of submission of a vote of no confidence in the HOM and the SMT. I was certain at the cessation of the meeting that HG would feed everything that MJH and I had said straight back to the HOM JMcK.

This meeting represented a Whistleblowing exercise, with 2 senior Consultants, acting according to their defined professional standards and guidelines set out in Good Medical Practice and according to the Trust's own Whistleblowing guideline. This placed the recipient Manager in a position where she had defined professional responsibilities to address the significant concerns that had been raised, or to delegate this to a more experienced senior colleague ie the HOM.".

33. The Claimant views what is said on the 1 March as a "whistleblowing" and this is confirmed by him in his letter dated 4 September 2020 (page 424 to 426) … "… none of my protected disclosures, raised with both Hilary Goodman and Janice McKenzie in the Spring of 2019 … have ever been appropriately addressed.", (page 425). However, the Claimant does not rely on the 1 March 2019 meeting as a protected qualifying disclosure in this claim.

34. It is within this factual background that we arrive at the first alleged disclosure, being on 7 March 2019 the Claimant says he made a verbal disclosure to JM disclosing that the health or safety of any individual had been, was being or was likely to be endangered.

35. The Claimant refers to the meeting with JM in paragraphs 6 and 7 of his statement … "The meeting therefore proceeded, in keeping with numerous previous discussions between JM and myself [page 284-285] one-to-one, in her office. I had a professional responsibility and legal duty to voice my concerns related to patient safety and to represent the views of my colleagues. This is fully supported by the Trust's own guideline related to raising concerns and whistleblowing. I also felt a responsibility to inform JM regarding the concerning status of our department as, at this time I viewed her as a friend as well as respecting her as a managerial colleague [page 286]." … "The issues I raised with JM in this meeting are set out on page 133. Unusually, little response was received from JM until I stated that I was concerned that JM and the SMT could receive a vote of no confidence from their clinical midwifery colleagues (which would have had a dramatically detrimental effect on her, her colleagues and the service as a whole). On hearing this JM became emotional, picked up her bag and phone, stated 'well let them do it' and left her office [page 285].".

36. The Claimant in his evidence refers us to the notes of the investigation meeting with JM dated 5 July 2019. At page 285 JM is recorded as saying … "… he turned up and said can we have that conversation. Absolutely. He had just finished a scan list. We went into my office, we sat down and I remember noticing he had a

bit of paper in his hand, I didn't really take much notice of it and he just spent the next 45 minutes to an hour basically, the only way I can describe it and it's really hard because I was so upset afterwards, is that he just took apart every decision I've made in the previous 12 months; I don't know why you've appointed this person as a deputy, I don't know why you've given her the title of consultant midwife, she's not a consultant midwife, she hasn't done this. Why are you making these decisions? Do you know you haven't got this? There's not enough staff, there's not enough, and he just, it felt like a-verbal attack, is the only way I can describe it. I've never been in that-position before with Martyn and I felt like whoa, because we've had some challenging conversations before, and he just kept going and I got to the point Lucy where normally he would say to me oh I've got this and I'd go oh have you thought about that and we would have that conversation but he just I felt like attacked me, and I just remember challenging him on one aspect; he said to me I don't believe there has been any discussion about this you've just unilaterally made this decision and I remember putting my hand up and saying I'm really sorry Martyn I'm going to disagree with you on that point because actually because if you would like I'll go and get the member of staff and we'll bring her in the room and we'll see who is telling the truth because what you've been told is factually not correct because I had just to the point where I just thought, and then he just kept going and I really wouldn't like to read this in the transcript [REDACTED] I got really scared for the first time ??????? I got, really scared and I just said to him this conversation is over, I'm out of here and I just left the room".

37. We note from this account that it is confirmed by JM that the Claimant says to her there is not enough staff.

38. During evidence, reference was also made to page 1092 which is an email from JM dated 7 March 2019 timed at 21:41. JM writes … "As you are all aware I had made the decision to not go ahead with speaking to the person today as I did not think this was the right thing to do today given my concerns. Tonight however just after 6pm the person came to speak to me as he had wanted to talk to me about a number of issues. He informed me that he wanted to talk to me as he wanted to raise a number of concerns and then proceeded to challenge and undermine every decision I have made over the last 6-12 months about the Senior Midwifery team His stance was that I needed to justify my decisions as the 'staff were very unhappy'. I let him talk and share all of his concerns and did not challenge with the exception of one event for which the information he shared either meant one of his colleagues or he was telling a lie. The conversation ended by me leaving the room as I no longer felt comfortable sitting in the room with him as he continued to undermine and challenge all of the decisions made I have spoken to my husband tonight and I am going to go ahead to proceed to raise the issues formally and will let you know in due course which route this will be".

39. We note from this contemporaneous account that JM refers to pre-existing concerns about the Claimant and that she does not hide that the Claimant raises concerns with her … "I let him talk and share all of his concerns". It is the manner of the Claimant that she complains about.

40. This is completely consistent with the evidence of MH in support of the Claimant (at paragraphs 13 to 15 of his statement):

> "13. Martyn sees himself as an advocate for high standards and can be singly minded in ensuring that others receive the message, however difficult they find it. This was not a problem in a clinical setting [page 296- 297] but became a huge issue when it was directed at the SMT, who found the conflict unacceptable. They felt that he was being antagonistic, and sometimes, he was. It wasn't personal from Martyn's perspective, but the individual members of the SMT clearly felt that it was.
>
> 14. There were many meetings where it was clear that the SMT were genuinely distressed by the tone and criticism they were receiving, with some occasions of them walking out of a meeting [page 293]. That was very destructive and led to the allegations of bullying and harassment, though of course on the other hand, Martyn would perceive he was an advocate for high standards and was simply being clear in making his point.
>
> 15. This appeared to come to a head when Martyn had a one-to-one meeting with Janice in March 2019. This meeting was not witnessed or minuted, but I talked to both parties soon after it. It summed up how the relationship had deteriorated. Martyn felt the meeting had gone well and he had been clear in the points that he had made, but Janice was deeply upset by whatever was said."

41. Whether the Claimant made a qualifying protected disclosure or not on the 7 March 2019 remains in dispute between the parties. We remind ourselves that relevant factual considerations are whether:

    a. there has been a disclosure of information;

    b. the worker believes that the disclosure is made in the public interest;

    c. If the worker does hold such a belief, is it reasonably held;

    d. the worker believes that the disclosure tends to show one or more of the matters listed in sub-paragraphs (a) to (f), in this case that the health or safety of any individual had been, was being or was likely to be endangered;

    e. if the worker does hold such a belief, is it reasonably held.

42. Also, that the statement relied on must have a sufficient factual content and specificity such as is capable of tending to show the health or safety of any individual had been, was being or was likely to be endangered. Also, disclosures must be viewed in the context in which they are made, and any context relied on as forming part of the basis on which the Claimant says they made a protected disclosure should be set out in the claim form and clearly in evidence.

43. The focus is on whether in the reasonable belief of the Claimant (at the time) the information provided tended to show the health or safety of any individual had been, was being or was likely to be endangered. They must also believe at the time that the disclosure is made in the public interest.

44. The Claimant asserts that he meets with JM on 7 March 2019 and makes a verbal disclosure tending to show that the health or safety of any individual had been, was being or was likely to be endangered. In paragraph 7 of his witness statement the Claimant refers us to page 133 of the bundle (being his further information document) which sets out what he says that the gist of the words said were that he relies upon:

    "there are very significant concerns amongst the Consultants regarding the style of management…Managerial appointments are being made based on personal friendship status rather than genuine merit…The Senior Midwifery Management team has pretty much withdrawn from regular interactions with the Consultant body, which we feel is a negative and unhealthy development for on-going, amicable relationships and safe working".

    "We are losing and about to lose more experienced midwifery staff which is a danger to patient safety". "Staffing levels are serially low, the midwives are down in the dumps, with a detrimental effect on patient safety…The clinical midwifery work force on the Winchester site feel that they are completely unsupported by their Basingstoke-dominated Senior Midwifery Management team".

    "Staff morale was low, creating a toxic mix when getting work done safely…absenteeism through sickness and stress has become a real problem". The Department "is not working as a consultant led unit, with decisions being made without any consultant referral, a danger to patients".

    Without change, the Department will experience "deteriorating clinical standards and potential avoidable tragedies…in my clinical opinion, should immediate steps not be taken, we will begin to see avoidable clinical disasters…,I am not prepared to let our unit be the next to hit the headlines".

    "I have been made aware by several clinical midwives that discussions are underway to co-ordinate a vote of no confidence in you and your Senior Midwifery Management Team. Realising the effect that this would have both on you and our service, I feel it is my professional responsibility to inform you of this"

45. In broad terms the Claimant recalls disclosing information about staffing levels/morale issues and its decision-making structure that has a detrimental impact on patient safety.

46. The written closing submissions of Claimant's Counsel also direct us to what the Claimant says in his timeline document (pages 277 to 278) about the meeting on the 7 March 2019:

"The meeting was held in JMcK's office. It was evident I thought that JMcK was unusually subdued when we initially met. I asked JMcK why she thought I had called the meeting to which she replied curtly 'Probably, knowing you, because you are pissed off about something.' I proceeded to tell JMcK that I had a list of issues, listed on a page of A4 paper that I wished to raise with her. I stressed that several of them would be difficult to hear but that they were not all my opinion but rather those of numerous of her clinical departmental colleagues on the RHCH and AWMH sites. I then stated that, after several months of deliberation, I had decided to set up this meeting, because I felt that I owed it to her 'as a trusted and respected senior Manager and friend' to feedback what I hoped would be viewed as constructive criticism. I then proceeded to go through my list of points, which were pretty much identical to those listed above *[i.e., what was raised on the 1 March 2019, as we have already set out in our fact find above*], discussed in the meeting with HG. To my immense surprise, on pausing after each point JMcK said nothing. After the third point she interjected saying 'You are doing this to get back at me due to you feeling that I did not support you over your diathermy injury.' I stated that this was entirely incorrect, although it was correct that I was upset that neither she nor any of the the other Managers in the Trust had shown genuine on-going concern about me in this regard. I continued to progress through my list. JMcK muttered at one point that 'there is a problem with bullying in this department and no-one likes change,' to which I replied that I sincerely hoped that she did not feel that his meeting was an example of bullying? I carried on. When I mentioned the realistic possibility of a 'vote of no confidence in JMcK and the SMT, it became clear that she was becoming emotional and started to cry. I stopped and JMcK stated 'Well I suggest that you get whoever these people are to submit their vote of no confidence in me.' With that she grabbed her mobile phone and handbag, left the room and never came back. I deliberately conducted this meeting in a calm and non-confrontational manner. At no point did I raise my voice or become intimidating. I was, and still am, immensely surprised by the manner in which a senior Manager and Service lead could react in this way. In an identical way to the earlier meeting with HG, my meeting with JMcK represented a further Whistleblowing exercise. It should have been recognised as such by her and that the points that I raised were essentially protected disclosures. As the HOM and departmental service lead, JMcK should have been aware of her professional obligations inherent with being the recipient of such concerns from a senior Consultant, or indeed anyone else."

47. The Claimant matches the issues he raises to those raised on the 1 March 2019. He also considers this is a "Whistleblowing exercise" as happened at the meeting on the 1 March 2019.

48. It was confirmed in oral evidence by the Claimant that he had not retained a copy of the page of A4 paper he referred to at the meeting.

49. We also note from this more contemporaneous account, that the Claimant observes JM at the start of the meeting "is unusually subdued". This is consistent with what JM articulates in her email sent on 7 March 2019 (page 1092). Also … "… After the third point she interjected saying 'You are doing this to get back at me due to you feeling that I did not support you over your diathermy injury.'. JM does not appear to view what the Claimant is doing as being motivated by any

form of “whistleblowing”. It also records that … “… it became clear that she was becoming emotional and started to cry.”.

50. Considering the contemporaneous documents, the fact the Claimant raises concerns, and the content of those concerns does not appear to be in dispute between the Claimant and JM. The issue for JM is the way the Claimant does it. We would also observe that no issue is raised about MH’s conduct when he relays the same concerns that the Claimant relies upon on the 1 March 2019.

51. It is then by letter dated 21 April 2019 that JM submits a complaint about the Claimant on behalf of the senior midwifery team to Chief Medical Officer (CMO) and Chief Nurse (pages 226 to 228).

52. The Second Respondent explains (paragraph 5 of her witness statement) … “Mr Pitman was the subject of a Maintaining High Professional Standards (MHPS) investigation in 2019 as a result of a formal grievance being lodged against him by members of the senior midwifery team on 21 April 2019 (pages 226 - 228). The then Chief Medical Officer Dr Andrew Bishop asked me, as one of the most senior clinicians with some previous experience in dealing with these types of matters, to be the Case Manager which was permitted under the terms of the Handling of Concerns and Disciplinary Procedures Relating to the Conduct and Performance of Doctors and Dentists Policy (pages 1043 - 1071). Prior to this point, I had not had any involvement with Mr Pitman.”.

53. By letter dated 17 May 2019, the Second Respondent confirms to the Claimant that an MHPS investigation will be commenced (page 251).

54. We were referred in the agreed chronology to the agreed terms of reference as signed by Second Respondent and the Claimant (page 267):

    “<u>Background</u>

    A formal written complaint was made on 21 April 2019 by Janice Mackenzie (JM), Divisional Chief Nurse/Midwife, regarding alleged bullying and undermining behaviour of Mr Martyn Pitman (MP) towards the Senior Midwifery Management Team (SMT), and breakdown in working relationships. These allegations will be investigated within the framework outlined in the policy for Handling of concerns and disciplinary procedures relating to the conduct and performance of doctors and dentists - HH(1)/HR/546/16.

    The matters to be investigated are:

    TOR1. The allegations of bullying and harassment made against MP by members of the senior midwifery team, as referred to in the letter dated 21 April 2019 and accompanying statements.

    TOR2. The impact of alleged poor working relationships and communication between MP and the senior midwifery team on maternity care in RHCH.

TOR3. What, if any, previous attempts have been made to address alleged difficult interactions between MP and senior midwifery colleagues, and their effectiveness.

The investigation will commence on 1 July 2019. Due to annual leave and pre-existing commitments, the investigation period (usually four weeks) will be extended by 3 weeks i.e. with the aim for completion by 16 August 2019. A report should then be submitted to Case Manager Dr Lara Alloway within one further week i.e. by 23 August 2019. All parties will be made aware of any extensions or delays on this timeline."

55. The Second Respondent refers to the investigation into these terms of reference in paragraph 10 of her witness statement …

"10. The investigation was undertaken by Dr Lucy Sykes [*LS*], Clinical Director for Medicine after Mr Pitman requested a change to the first suggested case investigator. The investigation was completed in September 2019. It was concluded that:

a. TOR 1 – No evidence of deliberately setting out to bully/harass but evidence that MP's prevailing style of communication is a challenge to many, particularly those working in non-clinical roles in the SMT, which caused a significant degree of negative impact on the complainants' wellbeing.

b. TOR 2 – No effect to date on the health or wellbeing of the women and babies under MP's care, but there is the potential for this to occur if the situation is not addressed.

c. TOR 3 – Interventions to date have been informal and unsuccessful, supporting move to formal investigation."

56. Then at paragraph 12 the Second Respondent confirms …

"12. I considered Lucy Syke's investigation to be very thorough (pages 327 - 361). The report concluded that there was a case to answer. There were communications from Mr Pitman that were aggressive and had impacted on the senior midwifery team. However, the investigator had concluded that the evidence did not demonstrate an intent to cause distress. This was not a performance matter and there were no concerns with Mr Pitman's clinical performance."

57. We have considered the investigation report. We note from page 331 … "Throughout the course of this investigation it was clear that all members of the obstetrics and gynaecology, midwifery, sonography, anaesthetic, and paediatric teams including trainees have a great deal of respect for MP's clinical knowledge and skills. At no time was his competence as a clinician called into question. The primary issue for consideration here is his professional communication and behaviour.".

58. We also note the extent of people interviewed (17 including the Claimant) (page 357).

59. The conclusions of the report record (page 358):

"After extensive review the following conclusions have been drawn against each of the TOR:

TOR1 The allegations of bullying and harassment made against MP by members of the senior midwifery team, as referred to in the letter dated 21 April 2019 and accompanying statements.

This investigation has not provided any evidence that MP is deliberately setting out to bully, harass or otherwise cause distress to any of his colleagues. However, ample evidence has been found that his prevailing style of communication is a challenge to many, particularly those working in non-clinical roles in the SMT. This has caused a significant degree of negative impact on the wellbeing of JM, HG, FC, KP and CH.

TOR2 The impact of alleged poor working relationships and communication between MP and the senior midwifery team on maternity care in RHCH.

There has been no effect to date on the health or wellbeing of the women and babies under MP's care, but there is the potential for this to occur if the situation is not addressed. Service delivery, development and innovation, including participation in regional and national programmes of quality improvement and research are likely to be limited in future if relationships between MP and the SMT do not improve.

The overall culture of team-working and leadership within the SMT was observed to be disconnected from staff working 'on the shop floor' leading to a sense of disengagement and disempowerment in staff working at band 7 and below. This has also affected the relationship between the SMT and the obstetric consultant body. Team-working behaviours have altered as a consequence of this resulting in further damage to professional relationships.

There is potential reputational damage to MP, the department as a whole, and to HHFT as a result of these observed occurrences.

TOR3 What, if any, previous attempts have been made to address alleged difficult interactions between MP and senior midwifery colleagues, and their effectiveness.

Despite numerous opportunities for intervention to occur prior to March 2019, informal 'chats' appear to have been the mainstay of action up to this point without a more structured approach apparently having been seriously considered. These informal approaches have not been successful, hence the move to formal investigation. It is suggested that a more formal approach at an earlier stage might have helped to mitigate some of the effects observed during this investigation."

60. Chronologically (in line with the agreed chronology and the Claimant's witness statement) it is this investigation process that is the subject matter of the alleged detriment 12 … "3.1.12 Detriment 12 – with regards to the 2020 MHPS investigation the First Respondent, Alex Whitfield, Kevin Harris, the members of the PSAG (with the exception of Ben Cresswell) and Julie Dawes continued with a vindictive investigation process against the Claimant as compared with others such as Gary Dickinson in 2019 and Avideah Nejad in 2021/2 who were treated in a supportive manner (said to be on the grounds of Disclosure 1)".

61. The Claimant refers to Gary Dickinson (GD) in paragraph 15 of his statement … "The revised TORs are included in the bundle at page 276 [*this reference is actually to page 267 as referred to above*]. Despite exemplary Appraisal and Revalidation records I was being accused of being the sole source of issues in the unit [page 320]. During my MHPSI I became aware of gross discrepancies between how I was being treated, and how the Trust acted following receipt of formal complaints against other senior staff. Coincident with the launch of my MHPSI, Gary Dickinson, a senior Consultant Anaesthetic colleague, received a serious complaint from medical colleagues containing allegations far more serious than those I faced [page 296]. They were however never escalated to the CEO or CMO, instead being managed solely by facilitated mediation.".

62. The Second Respondent addresses the circumstances of the Claimant's asserted comparators in paragraph 18 of her witness statement … "Mr Pitman did not raise any concerns with me during the MHPS process that he felt he was being treated differently to other individuals. I understand this was first brought up in his later grievance which was considered by Ms Whitfield. Of the two individuals that Mr Pitman mentions in his claim, I recall that there was a difficult situation between Gary Dickinson and one other individual which was managed informally. I was not involved in managing this situation and have limited knowledge of it. I do believe this was not comparable to Mr Pitman's situation where four senior individuals were raising formal concerns about bullying. In regard to Avideah Nejad, concerns were raised regarding this individual and her performance conducting a specific procedure, as part of a whistleblowing process. There was an investigation done, with recommendations and this was considered in our Professional Standards Advisory Group. As the procedure of concern was no longer undertaken by Ms Nejad, or in the Trust, no further action was considered necessary. I do not consider that this was a comparable situation either ….".

63. We accept what the Second Respondent says about these comparators. She was not involved in managing the GD matter, so has not personally treated him differently to the Claimant. It is the Second Respondent that is overseeing the MHPS process involving the Claimant. The situation of Avideah Nejad (AN) is different to the Claimant's, hers arising out of the performance of a specific clinical procedure, which is no longer performed either by AN or the First Respondent.

64. The MHPS investigation report including its conclusions as completed by LS are dated 16 September 2019, (pages 327 to 361).

65. There is an Internal Review Committee meeting on the 16 October 2019 (pages 366 to 367) which is held … "in relation to the alleged bullying and undermining behaviour of Mr Martyn Pitman towards the Senior Midwifery Management Team (SMT) and alleged breakdown of working relationships.". That review meeting is attended by amongst others the Second Respondent and NH. We note here that no allegations of detriment are now continued by the Claimant against NH.

66. It is at that review meeting that the following action plan is agreed:

"The actions from the IRC were summarised as follows:

1. LA will meet with MP to feedback the conclusions of the IRC and the recommendations from PPA for a behavioural assessment and assisted mediation.

2. LA and JD will meet with the complainants to feedback the conclusions of the IRC, as far as so to maintain confidentiality.

3. LA will seek advice from Dr Jane Spenceley (JS), Consultant in Occupational Medicine, MP's reintegration into the department on the Winchester site and participating in the PPA recommendations and any recommendations for coaching/counselling etc. going forwards."

67. The recorded intention is to reintegrate the Claimant.

68. As noted in the agreed chronology it is then on the 28 October 2019, that there is a meeting between the Second Respondent, the Claimant, the Claimant's BMA representative and Elizabeth Eddie (EE) to discuss the MHPS report (pages 375 to 376).

69. The actions agreed at that meeting are (page 376):

"1. LA to seek advice from Dr Jane Spenceley regarding MP's reintegration into the department, participating in the PPA recommendations and any recommendations for coaching/counselling etc. going forwards.
2. LA will check what has been agreed with interviewees regarding sharing of their transcripts and confirm whether or not these will be shared.
3. CEE will correct the error in the report regarding Janie Pearman's tenure as Head of Midwifery.
4. LA/EE will confirm timescales for holding investigation documentation on MP's personal file.
5. MP to submit any further comments to be filed alongside the report and the previously submitted responses.
6. MP to confirm whether he wishes to return to the RHCH site.
7. LA to liaise with NHS Resolution PPA to organise the behavioural assessment and assisted mediation."

70. The agreed chronology then notes that it is on the 31 October 2019, that the Second Respondent writes to the Claimant confirming that the investigation is now concluded and with the outcome of the internal review committee meeting

held on 16 October 2019 (pages 377 to 378). However, there is then an identical letter dated 4 November 2019 (pages 379 to 380) that we have also been referred to.

71. We have considered what the Second Respondent says about this matter (paragraph 14 of her statement) … "In October 2019, the Trust's Internal Review Committee confirmed that they agreed with the conclusions of the investigation report (pages 366 - 367, 375 - 376). I informed Mr Pitman of the outcome of the Internal Review Committee in a meeting and then a letter dated 4 November 2019 stating clearly this was the end of the investigation (pages 379 - 380). I confirmed to Mr Pitman in this letter that the concern was with his style of communication, not with what he was communicating.".

72. The letter states that the investigation is now concluded. It is also clearly articulated in the letter from the Second Respondent that … "Firstly, I would like to reiterate that the IRC recognise that you are a respected clinician and that you had genuine concerns, which are being addressed outside this process. As I explained, while they considered there is a case to answer, they did not feel that that you intended to cause harm but that your style of communicating could be, and was, perceived as such by the recipients, and that this had caused harm to their health and wellbeing. To be clear, it is your communication style, not the message you are trying to convey, that is at variance with what is expected of doctors in GMC Good Medical Practice.".

73. Having considered the investigation report and the conclusions reached, in the context of the background facts we have already noted, we accept the evidence of the Respondents on this matter.

74. We now consider the asserted disclosure on the 4 September 2020, when the Claimant writes to the Second Respondent (Disclosure 3). This is relied upon for the subsequent detriments. The Claimant asserts this disclosure tends to show that a person had failed, was failing or was likely to fail to comply with any legal obligation; and/or the health or safety of any individual had been, was being or was likely to be endangered.

75. The Claimant refers to this disclosure in paragraph 24 of his witness statement and the letter is at pages 424 to 426 of the bundle.

76. At paragraph 24 the Claimant in his statement says … "I wrote to LA on 4 September 2020 [page 424-426] …. I set out in this letter evidence of significant deficiencies throughout the handling of my MHPSI, which breached both local and national guidelines, including negligent managerial actions. I highlighted the personal, reputational and career damage that the process had caused. I questioned the decision at this meeting to offer me a without prejudice meeting to discuss "a severance package" [page 422]. Critically I also highlighted LA's admission that I would be returning to 'an unhappy department' and that a recent meeting had clearly shown that the original issues that I had raised with JM in March 2019 had not been addressed, posing ongoing risks to patient safety and staff well-being."

77. The parts of the letter relied upon by the Claimant as being a protected qualifying disclosure is referred to in the further information document at page 134:

    "I had been inappropriately and unfairly victimised and persecuted".

    "this specific issue was one of the major concerns which prompted my whistleblowing declaration, nearly 18 months ago, that directly precipitated my victimisation". … "all of the other issues that I had initially raised with Janice McKenzie"

    "none of my protected disclosures … have ever been addressed. This is gravely concerning for our service, our staff and our patients."

    …. "the process was unnecessarily protracted over a 15 month period, in direct contravention of the Trust's own guideline (in keeping with the National one) which clearly states that the investigation should have been concluded within a 6 week period. ... damage this process has wrecked on myself, my family, my career and .. reputation".

    "I merely expected a 'fair trial'– timescale".

78. Although it is helpful to understand what the Claimant asserts from what he writes amounts to a protected qualifying disclosure, it also takes some of the context and meaning away from that which is better understood when reading the whole thing. In particular, we note that the full text of the letter referring to his previous protected disclosures says (page 425) … "none of my protected disclosures, raised with both Hilary Goodman and Janice McKenzie in the Spring of 2019 (later accepted and discussed by you, Nicki Hutchinson and the Chief Nurse in the emergency Consultant meeting on Tuesday 24th September 2019) have ever been appropriately addressed.".

79. The Claimant is referring to having made protected disclosures to HG and JM in the Spring of 2019, them not having been addressed and that being in his view gravely concerning for the service, staff and patients.

80. Within the letter the Claimant asserts victimisation. The Claimant says he is victimised, linking that to previous disclosures he says he made.

81. He also refers to the investigation process being unnecessarily protracted in contravention of guidelines. The remainder of the asserted disclosures relate to the process against him, he says it being … "unnecessarily protracted over a 15 month period, in direct contravention of the Trust's own guideline (in keeping with the National one) which clearly states that the investigation should have been concluded within a 6 week period. ... damage this process has wrecked on myself, my family, my career and .. reputation". And that … "I merely expected a 'fair trial'– timescale".".

82. There is no articulation or clarification as to the specific legal obligations that are in issue for the Claimant in what the Claimant has set out in his witness statement. Potentially it could be asserted there was a breach of the Employment

Rights Act itself in the treatment of whistle-blowers, but that is not what the Claimant is telling us he believes he disclosed at that time.

83. As to health and safety the Claimant states in his witness statement that he has disclosed in his letter that the original issues that he had raised with JM in March 2019 had not been addressed, posing ongoing risks to patient safety and staff well-being. That is not what is expressly stated in the letter, it being … "I am also aware of the meeting held 2 weeks ago, during which on-going staffing, morale and patient safety concerns were, again, raised by my senior Labour Ward Midwifery colleagues with the Trust's Chief Nurse and the current Senior Midwifery Management Team. The nature of these discussions and the concerns raised tragically leave me with no doubt whatsoever that none of my protected disclosures, raised with both Hilary Goodman and Janice McKenzie in the Spring of 2019 (later accepted and discussed by you, Nicki Hutchinson and the Chief Nurse in the emergency Consultant meeting on Tuesday 24th September 2019) have ever been appropriately addressed. This is unacceptable and gravely concerning for our service, our staff and, most importantly, our patients.".

84. It may have been the intention of the Claimant to state that a failure to appropriately address his disclosures to HG and JM posed ongoing risks to patient safety and staff-well-being, but that is not what is written.

85. Taking the Claimant's case at its highest that this is what was intended to be communicated, accepting therefore that when he writes … "This is unacceptable and gravely concerning for our service, our staff and, most importantly, our patients", it is his belief it tended to show the original issues that he had raised with JM in March 2019 had not been addressed, posing ongoing risks to patient safety and staff well-being. With that finding we do go on to consider the causation questions that arise from this being a protected qualifying disclosure. Two important and relevant observations should in our view be noted here though. Firstly, that the Claimant does in his asserted disclosure acknowledge that his concerns have been accepted and discussed. Also, an unclear "disclosure" would make it harder to conclude that it was that "disclosure" that was the grounds for what then happened.

86. Although not quoted as being part of his asserted disclosure the Claimant does note in his witness statement his challenge to being offered to have a without prejudice meeting at the meeting on the 20 August 2020 (page 422) … "I questioned the decision at this meeting to offer me a without prejudice meeting to discuss "a severance package" [page 422].".

87. This was an issue explored in cross examination of the Second Respondent and AW. It was acknowledged that the statement is credited to Catherine Hope-MacLellan (CHM) (Director of People). We also note that the quote refers to a … "without prejudice conversation?", not a meeting (page 422).

88. AW confirmed that CMH did have the authority to start a conversation, but not without further authority make a commitment or offer a settlement. When the Claimant and his representative DP make it clear they are not interested it goes no further.

89. The Second Respondent maintained that it was the view of CHM and not her that the relationship had broken down. The Second Respondent confirmed that for her this meeting with the Claimant was to plan his return to work, and she did not think it was in her mind that relationships had broken down, they were strained, strained with her and the midwifery team, they were though trying to get him back into the workplace. What CMH suggests at the meeting was not approved by the Second Respondent. The surrounding minutes from this meeting (pages 1109 to 1114) (in particular, pages 1113 and 1114) do support what the Second Respondent says, and we accept this.

90. Chronologically we then arrive at Detriment 11, which is noted in the Claimant's amendments to the agreed chronology that … "September/October 2020 - C monitored and colleagues invited/encouraged to complain about C (Detriment 11)". It is referred to in the agreed list of issues as … "3.1.11 Detriment 11 - from September/October 2020 to date the First Respondent, Fay Corder, the Second Respondent, Nicky Hutchinson, and Avideah Nejad behaving prejudicially towards the Claimant in that they arranged for him to be monitored and colleagues were invited and encouraged to complain about him (said to be on the grounds of Disclosures 1 and 3)".

91. As we are reminded in the written closing submissions on behalf of the Respondents (paragraph 2) … "It was conceded in the course of the hearing that detriment 11 in the table [144] should be read in the more specific terms reflected in the issues recorded in the case management order. [157 §3.1.11].".

92. In the Claimant's written closing submissions this detriment is then focused on the named individuals of the Second Respondent and AN (paragraph 346). Although expanded out to include Fay Corder in paragraph 353.1.

93. The Claimant addresses this alleged detriment in paragraph 25 of his witness statement … "On my eventual return to my previous role in late September 2020 realisation dawned that my entire jobplan had been changed without either prior discussion, explanation or agreement with me. It was also abundantly clear that my activities, attendance and interactions, particularly with managers and remaining members of the SMT, were being closely and invasively monitored and escalated to the Trust's senior management. In the bundle there is ample evidence of various individuals "reporting back" to LA and Nicki Hutchinson (NH, Departmental Divisional Director) about interactions they had with me during that period [e.g. page 416-417, 421]. I believe that the remaining individuals, who were integral to promoting and propagating my initial MHPSI, including LA, were behind this pre-motivated, entirely unwarranted and intimidating strategy [page 431]."

94. BC was asked about page 417 (the NH email dated 9 July 2020) in cross examination, and whether it was usual for members of the Professional Standards Advisory Group (PASG) to be seeking out such material. BC confirmed that if NH was responsible for that division, she would be asked to provide an update, she would be expected and quite within her rights to ask the team for the current situation to take to the meeting, given NH doesn't have a

clinical role, so she would be relying upon reports. We also note that no allegations of detriment are now pursued against NH.

95. By way of background, PSAG, its role and set up are described by the Second Respondent in paragraphs 22 to 24 of her witness statement. The Second Respondent confirms … "The PSAG Committee was set up following my attendance at Responsible Officer training in November 2019, where the benefits of having a Responsible Officer advisory group were discussed and I considered this would be useful to implement at the Trust.". Its role was … "… to discuss any issues or concerns raised about any doctors, consider what actions could be taken to try to address concerns at an early stage where possible, with feedback provided and/or intervention being given before matters escalate where possible. The committee would also oversee any formal cases where doctors or teams were in difficulties and ensure that there is improved process around difficult situations by allowing me to consider other views, before making the decision as Responsible Officer.". We accept what the Second Respondent says as to the setting up and role of the PSAG.

96. The Second Respondent was asked about the email dated 12 August 2020 from AN at page 421 in cross examination. She was asked if she was seeking issues. She denied that categorically, saying that when people said things were going on she asked them to provide detail and not just anecdotes. She explained that she wanted specific details and that they were trying to re-integrate the Claimant into the department, they needed to look forward not backwards. The Second Respondent confirmed that she did not canvass views, when things were raised, but would ask for more detail.

97. Within the Claimant's written closing submissions our attention was also directed to other parts of the Claimant's witness statement in relation to this alleged detriment.

98. At paragraph 350.1.2 of the submissions … "[C§27] – 12th March 2021 meeting with NH. "presented … with an array of falsified and fabricated allegations, including claims of absenteeism … escalated up the senior management chain".".

99. Considering the Claimant's paragraph 27 it says … "I was summoned to a meeting on 12 March 2021 by NH, attended by another senior departmental manager Diane Pittard (DP) and my Consultant colleague Kate Aston (KA). To my astonishment I was presented at this meeting with an array of falsified and fabricated allegations, including claims of absenteeism from clinic and operating sessions, refusal to attend Labour Ward sessions, absconding from other scheduled clinical sessions and an array of exaggerated 'communication issues' that had evidently been escalated up the senior management chain. My critique of the notes of that meeting, setting out the inaccuracies are at page 473-477. The conduct of this meeting was akin to an adolescent school child being reprimanded for truanting by their Headmaster. I informed NH that this further wave of allegations against me were fabricated and entirely vexatious. This meeting proved to me (at the time) that my concerns regarding being 'managed' and invasively monitored by my remaining complainants and the Trust's senior management since my return to my Consultant role the previous autumn were

very well founded [page 478 – 481, 482 – 486 "Meeting to Discuss Martyn Pitman"] ….".

100. This meeting is addressed in paragraph 12 of NH's witness statement … "…. I wrote to Mr Pitman on 3 February 2021 to request a meeting to discuss his job plan and rota. I also recorded that there had been some issues raised with his communication style (pages 470-471). Ms Nejad provided me with a written report on 5 February 2021 detailing the occasions whereby Mr Pitman had failed to attend specific clinics for use at my meeting (pages 465).".

101. Also, in paragraph 13 of NH's witness statement … "On 12 March 2021, I met with Mr Pitman to discuss the concerns that had been raised with me by Ms Nejad regarding his not fulfilling his job plan and to discuss the other complaints made in regards to his communication style (pages 473-477). I started by querying his missed clinics. Mr Pitman stated that he did not believe that he had missed any clinics but was instead adhering to the guidelines to restrict face to face sessions. He made reference to being asked to cancel certain clinics in order to cover the labour ward. Mr Pitman suggested that he was being placed under more scrutiny than other consultants on the ward. Mr Pitman asserted that whilst he had missed certain clinics he had undertaken additional sessions at other points. On review of the evidence, I did not consider that Mr Pitman was unfairly singled out. Consultants are expected to work their agreed Job Plan unless there are exceptional circumstances. A repeated failure to do can have a direct impact on patient care.".

102. And, NH's paragraph 14 … "I also raised with Mr Pitman the communication issues that there had been on the ward. It was clear that there continued to be issues with Mr Pitman and a number of the midwives on the ward. I set out that we had received a number of complaints including him being cited as the reason for resignations. Mr Pitman stated that he was not surprised but that the allegations had been falsified and fabricated in order to end his career. Mr Pitman stated that he had, by way of proof, a letter that the midwives actions were pre-motivated and planned. I had no reason to believe that this was the case and was not provided with a copy of any letter.".

103. We note that the Claimant acknowledges that clinics were not done, but he asserts others were done in their stead. This is an issue which we therefore find appears reasonably explored by NH and an explanation provided. We also note that no allegations of detriment are now pursued against NH.

104. At paragraph 350.1.3 of the Claimant's submissions ... "[C§30] – C accused of no longer being competent to provide gynaecological on-call cover. This downgraded C to a middle-grade consultant.".

105. Considering the Claimant's paragraph 30 … "Following a surgical complication in March 2021, during a procedure undertaken by a Middle Grade (without my knowledge) when I was on-call, I was accused by AN and RB of no longer being competent to provide gynaecological on-call cover. There was no objective evidence to support the accusation that my practice had been unsafe or sub-standard either then or at any previous time. A decision was however

made to cover my future on-call commitments with additional Consultant cover [page 479 - 480]. This essentially downgraded me to a middle-grade. This aggressive and vindictive decision was unjustifiable on both clinical and financial grounds. I highlighted how some Consultants were being remunerated for providing Obstetric on-call cover whilst voluntarily deskilling in this critically important discipline. This incident was another example of vindictive gas-lighting and retaliatory victimisation against me, which was hugely threatening, challenging and destructive to me at the time.".

106. The Claimant does not present evidence to say he responded to AN's email, which is sent to him, dated 23 March 2021 (page 479), either to challenge what is said or confirm his decision on matters as requested.

107. At paragraph 350.1.4 of the Claimant's submissions … "[C§31] – 30 March 2021, LA regarding "fabricated allegations" raised by Avideah Nejad and RB.".

108. Considering the Claimant's paragraph 31 … "A meeting was called by LA on 30 March 2021 following escalation of a series of fabricated allegations against me, lodged by AN and RB [page 482 – 486]. The timeline of events undeniably proves that their action was provoked by my raising concerns about the management of the intrapartum maternal death. No attempt was made then, or indeed at any subsequent opportunity, to either validate these concerns or to confirm their factual accuracy."

109. The Claimant himself links what is happening here (if it did as he says) to being provoked by him raising concerns about the management of the intrapartum maternal death, so therefore not because of any of the alleged protected qualifying disclosures he makes.

110. At paragraph 350.1.5 of the Claimant's submissions … "[C§32] "two further meetings … Nick Ward". C spoke to him "off the record" having stated the meetings were "entirely confidential". C was candid, bearing in mind the stress he was under, and his private conversations were reported back to R2 [495-496].".

111. Considering the Claimant's paragraph 32 … "Later in the Spring of 2021 two further meetings were held out of hours, virtually, between myself and Nick Ward (NW) who by this stage had replaced NH as our Departmental Divisional Director. I got the impression that NW had been given the role of informally mediating the situation that had developed since my return to my previous role. Fully realising by this time that my Consultant position in the Trust was in severe jeopardy, I commenced each of these sessions by stressing to NW that the only way that these sessions would prove beneficial was if he assured me that our discussions would remain 'off the record and entirely confidential.' He agreed. I trusted him. I therefore proceeded to be entirely frank in our discussions, outlining my concerns regarding how my MHPSI had been managed and the ongoing significant difficulties that I faced. I stated that, as things stood, with the level of unjust scrutiny and vexatious monitoring that I had been placed under during my supposed reintegration to the department, I was unable to see a long-term future for myself at the Trust. I stressed in the follow-up meeting that this feeling was

certainly not through choice. I was devastated to realise later that every word of these discussions with NW had been immediately escalated to LA [page 495 - 496]. NW clearly viewed senior managerial loyalty as far more important than breaching the trust of a senior Consultant colleague."

112. Although we are directed to this paragraph it does not relate to the alleged detriment.

113. About detriment 11 the Respondents submit in their closing submissions (paragraph 154) … "This allegation is without foundation. There is clear evidence that C was refusing to engage with his managers over the agreement of his job plan; attendance at pre-arranged clinics; non-adherence to leave notification; refusal to engage in necessary retraining; slamming the door at a departmental meeting and demonstrating an antagonistic attitude towards his managers at all levels. There is no evidence that reporting of such conduct was encouraged. It was clearly conduct with potential implications for patient safety and service delivery and was properly escalated."

114. Based on the evidence we have considered and the facts we have found we accept what the Respondents assert.

115. Addressing next the alleged fourth disclosure which is referred to in the agreed chronology as being on the 26 February 2021 the Claimant emails Steve Erskine, Jane Tabor and Gary McRae. In the agreed list of issues it is referred to as … "2.1.1.4 Disclosure 4 - on 26 February 2021 an email to Steve Erskine, Jane Tarbor and Gary McRae", and it is asserted that it tends to show that a person had failed, was failing or was likely to fail to comply with any legal obligation; and/or the health or safety of any individual had been, was being or was likely to be endangered.

116. The Claimant addresses this asserted disclosure in paragraph 26 of his witness statement … "On 26 February 2021 I emailed the Trust Chair Steve Erskine (SE), JT and the NED responsible for whistleblowing Gary McRae (GM) [page 469]. I requested a meeting with them to raise concerns about the Trust's destructive handling of my MHPSI, which I believed was managed contrary to both local and national guidelines. I also intended to highlight the damaging effects that the process had wreaked on myself and my family. The main reason for requesting this meeting however was that I recognised that, if the Trust did not immediately amend the manner in which they handled staff members under formal disciplinary investigation, there was significant on-going risk to their health and well-being. I was genuinely concerned that staff members could be pushed to take their own lives if subjected to the same protracted, destructive and vindictive stresses that I had been exposed to during my MHPSI [page 375]."

117. In the further information document at page 135 the words relied upon are stated to be … "over the last 2 years, having been subjected to a Trust Disciplinary Investigation throughout this protracted period. I also have recommendations that I wish to make that are relevant both to Trust's handling of my case but also I believe, are potentially critical for the future health and wellbeing of every member of the HHFT workforce".

118. Considering though the full text of the email at page 469, we note what is missing at page 135 are the opening words … “I would welcome the opportunity to meet with you virtually to feedback my experiences and reflections ….”.

119. It is clear from reading the entirety of the email that the Claimant wants to meet to make recommendations that he believes are potentially critical for the future health and wellbeing of every member of the Trust workforce. His witness statement also confirms he … “intended to highlight”.

120. This is a request for a meeting to then share information, it is not a disclosure of information that would in our view be sufficient to satisfy the relevant tests.

121. The Claimant’s amendments to the chronology include reference to a letter dated 24 May 2019 from Baroness Dido Harding to NHS Trust and NHS foundation trust chairs and chief executives (pages 252 to 256). The Claimant refers to this letter in paragraph 29 of his witness statement when referencing his asserted fifth disclosure that he says he made on the 7 April 2021.

122. The fifth alleged disclosure is referred to in the agreed list of issues as … “2.1.1.5 Disclosure 5 - on 7 April 2021 a verbal disclosure to Jane Tarbor “ and it is asserted that it tends to show a person had failed, was failing or was likely to fail to comply with any legal obligation; and/or the health or safety of any individual had been, was being or was likely to be endangered.

123. The Claimant refers to this asserted protected disclosure in paragraph 29 of his statement … “In response to my letter of 26 February 2021, I met again with JT on 7 April 2021 (SE and GM did not attend). I told her about my concerns relating to the maternal death [page 487]. I set out the litany of deficiencies in the Trust’s handling of my case, representing undeniable breaches in local and national guidelines, that my experiences showed that the Trust did not genuinely support whistleblowing and that there was an endemic culture of managerial bullying across the Trust. I also highlighted the tragic case of Amin Abdullah, a senior nurse in London who had taken his own life in 2015, following a protracted formal disciplinary investigation, which had numerous, chilling similarities to the Trust’s handling of my own case. I made her aware of the sentinel 2019 NHSI Directive [page 252-256], sent to the CEO and Chair of every NHS Trust in late May 2019 (just following the launch of my own MHPSI) which resulted from a formal external investigation into the handling of the Abdullah case, commissioned by NHSI. Evidence was undeniable that the Trust had breached the 7 requirements specified in this directive, including failure to declare a Never Event due to the harm that had been caused to me during my MHPSI and subsequent failure to commission an independent external review of my case. I suggested that this should now be undertaken by Verita, who NHSI had previously commissioned. I disclosed my on-going fear that other Trust staff placed under formal disciplinary investigation and treated in the same manner could take their own lives, risking accusations of corporate manslaughter against the Trust….”.

124. There are minutes of this meeting (pages 487 to 488) which the Claimant quotes from in his further information clarifying what parts of what he said he asserts is a protected disclosure (pages 135 and 136). The quotes from the minutes are:

> ""it had been a very traumatic time for him and he felt he had suffered irreparable damage both professionally and personally"
>
> "His concern now was to highlight the problems with the Trust's disciplinary processes which he and others had experienced in order to prevent these from being perpetuated. If things remained as they were, he felt that someone could be pressured into taking their own life and the Trust could face a manslaughter charge" "All the deficiencies which he raised then had since become worse, including poor staffing levels, low morale, lack of consultant leadership and deteriorating clinical standards, which he felt might have contributed to a recent maternal death"
>
> "The Trust clearly did not support whistleblowing and had an endemic culture of managerial bullying. The whole department was now fearful of speaking up, which could lead to further adverse events."
>
> "Mr Pitman said he had read of a case in London in 2015 where a nurse at Charing Cross Hospital was put through a disciplinary process so stressful that he was admitted to a psychiatric unit and, having been found guilty of something he didn't do, committed suicide… All the criticisms levelled at Charing Cross were exceeded by his own experience. One of the recommendations was that Trust Boards take responsibility for ongoing investigations to ensure the safeguarding of staff health and wellbeing, referencing section 6.c that any harm resulting from the process should be reported as a never-event. Although Mr Pitman would not have taken his own life, he could understand why someone else in his position might have done so without the support of family and friends, which was his reason for pursuing this. He felt it was now a requirement for HHFT to ask Verita to appraise its disciplinary processes, using his own case and that of others as a template.""

125. We also note from the minutes (page 487) … "… He recognised that an external review was now underway, but that this could all have been forestalled if his concerns had been addressed at the outset.". The Claimant acknowledges that matters are being addressed.

126. The Claimant is recorded as saying that he wants to highlight problems with the Trust's disciplinary processes which he and others had experienced in order to prevent these from being perpetuated. The notes do not record him describing what they are. The Claimant does not set them out in paragraph 29 of his witness statement either.

127. We note that the Claimant's witness statement and the meeting note records do say … "All the deficiencies which he raised then [asserted to be 2019] had since become worse, including poor staffing levels, low morale, lack of consultant leadership and deteriorating clinical standards, which he felt might

have contributed to a recent maternal death". We can appreciate how this, in the context of the previous disclosures (1 and 3) could satisfy the tests of a qualifying disclosure with it tending to raise health and safety matters, if taken at its highest. Again, as with disclosure 3 we would note that the Claimant does at this time acknowledge that his concerns are being addressed. Also, an unclear "disclosure" would make it harder to conclude that it was that "disclosure" that was the grounds for what then happened.

128. It is then noted in the agreed chronology that from Mid-April 2021 to early May 2021, Steve Erskine confirms details and arrangements for the Gary Hay investigation to Claimant (pages 497 to 499, 503 to 508).

129. It is then on the 20 May 2021 the Claimant raises a grievance which is relied upon as alleged disclosure 6. It is described in the agreed list of issues as … "2.1.1.6 Disclosure 6 - on 20 May 2021 his written grievance sent to both respondents" and that it tends to show a person had failed, was failing or was likely to fail to comply with any legal obligation; and/or the health or safety of any individual had been, was being or was likely to be endangered.

130. A copy of the grievance is at pages 514 to 547.

131. The Claimant addresses this matter in paragraph 34 of his witness statement … "On 21 May 2021 I submitted a formal Grievance to LA and AN related to the Trust's handling of my MHSPI [page 514 – 547]. I specified in this document the damage that had been done to me on a personal and professional level and how the Trust had breached numerous local and national guidelines throughout their handling of my case. Clarity was expressed in my view that I had been persecuted and victimised for whistleblowing, that the concerns of significant public interest that I initially raised had been ignored (as confirmed by a subsequent 2021 Care Quality Commission (CQC) inspection) and that this negligent omission of managerial responsibility had further jeopardised patient safety and staff wellbeing. I stated that I sought managerial accountability for the way that I had been mistreated, seeking to achieve assurance that no other staff under formal investigation in future would be treated by the Trust and particularly LA (who had abused her position of managerial power and responsibility, to my direct detriment), in the same destructive manner.".

132. We also note from pages 137, 138 and 139 of the further information, the parts of the grievance relied upon by the Claimant:

""The evidence presented demonstrates that I have become a victim of Whistle-blower persecution. As a consequence of this my family and I have suffered significant detriment due to both individual and corporate contravention of the Trust's own Whistleblowing Guideline, published in 2018."

"I have been subjected to continued levels of scrutiny, monitoring, criticism and gas-lighting that constitute persecution, victimisation and bullying. I fear that these constitute a continued and focussed campaign to challenge my ability to undertake the Consultant role that I have undertaken,"

“In the Spring [to] Department and the Trust”.
“I had become a victim of whistle-blower persecution, … forbidden in the Trust’s own guideline”.

“Members of the Trust's Senior Management were fully aware of this, were in the perfect position to have intervened to prevent the situation from deteriorating and escalating which, if the allegations made were proven to be true, could have jeopardised patient safety”.

“Over the subsequent 2-year time period I have been subjected to an unnecessarily and inhumanely protracted and drawn-out disciplinary investigation. This process has been managed with complete disregard to my employing Trust's own guideline, that of the National regulators and, critically, updated guidance received from NHS Improvement, coincident with the launch of the grievance against me. This process has been and, regrettably, has been allowed to continue to be, hugely damaging to my career, my professionalism, my professional and personal reputations and to my physical and psychological health”.

“Tragically, none of the concerns that I raised nearly 2 years ago … clinical tragedies”.

“numerous deficiencies in the way that my investigation has been managed”.

“I also seek some degree of Managerial accountability for this, to seek acceptance address [sic] of the Managerial incompetence and dishonesty that was demonstrated repeatedly throughout the process, to provoke a truly Independent, thorough and detailed review of the Trust's handling of my and other's Disciplinary Investigations and, ultimately, to prevent other employees from being treated in the same way that I have.”

Appendix 1 “Critique”

“The complaint against me was clearly never submitted to any form of 'screening process, prior to escalation to a Formal Investigation”;

“Case Manager Deficiencies:
The section in the Trust's policy detailing the responsibilities of the Case Manager states that their responsibility is 'to identify the nature of the problem or concern and to assess the seriousness of the issue and likelihood that it can be resolved without resorting to formal procedures, based on the information available…”

“The Trust's policy also states that my Case Manager should 'analyse the adverse events to understand whether there are broader systems or organisational failures which may have contributed to the issue of concern. Given the concerns that I attempted to raise ...this basic requirement was not satisfied'”

“The policy also details the Case Manager's responsibility `to decide whether offer of internal or external support for individual is appropriate ('buddy'), to provide personal support to the individual throughout the process.' I was neither

offered any internal nor external Clinician support .. nor contacted … throughout its protected course".

"Case Manager … repeatedly refused to investigate the conduct of her … colleagues … Such behaviour is incompatible with a senior Managerial role and contravenes the basic requirements set out in the GMC guidance for such senior Managerial positions".

"The case Investigator … was not given any protected time to support the investigation, which caused unacceptable delay";

"Investigation timeline: … Both the NPSA and Trust's own policy quite clearly state that the investigation should be completed within 4 weeks and the report completed in a further week."

"if the Trust does not immediately amend how it treats and investigates … it needs to prepare itself for the inevitable tragic outcome... that a member of staff will elect to take their own life, rather than be subject to the imposed, protracted investigation process".

"I attach the letter dated 24th May 2019 (just 1 week following receipt of my Complaint documentation) sent from Dame Dido Harding, the then Chair of NHS Improvement. This was sent to the Chair and CEO of every NHS organisation, following investigation into the tragic case of Mr Amin Abdullah in 2015 / 2016. Clear and, to my reading, non-negotiable recommendations were made in this document, resultant from the deficiencies uncovered in how his case was handled by his employing Trust."

"the fact that not one of the recommended actions in this document were applied to the handling of my case … the Trust simply chose to ignore it". "I specifically challenge the Trust's adherence". "HHFT specifically failed to adhere to 6 of the 7 recommendations contained".

"As someone who has certainly 'suffered in similar (if not identical) circumstances' to Amin Abdullah, I regret that I can find no evidence at all that HHFT acted, in any way, appropriately following receipt of this document".

"over the last 2 years certainly do not indicate, in any way, that HHFT is a 'responsible and caring employer,' reflecting NHS values' which 'treats people fairly and (to) protect their well being."

"To date I have not received any direct notification, formal or informal, from my Case Manager CMO that my investigation has indeed terminated".

"To my understanding, such practice directly contravenes the actions and responsibilities set out in the GMC guidelines for the practice of NHS Clinical Managers"

Appendix 1 [Same as disclosure 3 above].

Appendix 3. “A formal grievance … process that remains on-going and continues to impact the team””

133. We can see, how taking what the Claimant asserts at its highest, that it is possible to distil out a potential qualifying disclosure as we have done in respect of disclosures 3 and 5, particularly when considering the opening paragraphs to the grievance letter (page 514) where the Claimant writes … “that the concerns of significant public interest that I initially raised had been ignored … and that this negligent omission of managerial responsibility had further jeopardised patient safety and staff wellbeing.”.

134. It is clear that making such a qualifying disclosure is not the primary purpose of the grievance letter, which is to raise a grievance as the Claimant says within his document (page 515) … “My decision to submit this grievance is to highlight the deficient and inhumane manner in which my disciplinary investigation has been managed by the Trust. I also seek some degree of Managerial accountability for this, to seek acceptance address of the Managerial incompetence and dishonesty that was demonstrated repeatedly throughout the process, to provoke a truly Independent, thorough and detailed review of the Trust’s handling of my and other’s Disciplinary Investigations and, ultimately, to prevent other employees from being treated in the same way that I have.”.

135. Chronologically we reach the first four alleged detriments which are all said to arise on the 25 May 2021, being the PSAG meeting to discuss issues relating to the Claimant, the minutes of which are at pages 559 to 561. They are:

a. “3.1.1 Detriment 1 - on 25 May 2021 both Respondents convening an extraordinary PSAG meeting to discuss performance issues relating to the Claimant (said to be on the grounds of Disclosures 1 to 6 inclusive); and”

b. “3.1.2 Detriment 2 - on 25 May 2021 the First Respondent, and the PSAG meeting personnel (including the Second Respondent but not Mr Ben Cresswell) criticising and managing the performance of the Claimant (said to be on the grounds of Disclosures 1 to 6 inclusive); and”

c. “3.1.3 Detriment 3 - on 25 May 2021 the First Respondent, and the PSAG meeting personnel (including the Second Respondent but not Mr Ben Cresswell) conducting the PSAG process which was put together with the intention of managing the Claimant and was not objective (for example the chair of the process Dr Alloway had been named in the Claimant’s grievance and should not have chaired the PSAG process, and that process did not have a clear remit or process and was used as a vehicle to make decisions about the claimant’s management, which included inappropriate findings about patient safety which the claimant was not afforded the opportunity to address or to challenge) (said to be on the grounds of Disclosures 1 to 6 inclusive); and”

d. “3.1.4 Detriment 4 - on 25 May 2021 during the PSAG meeting the First Respondent, and the PSAG meeting personnel (including the second respondent but not Mr Ben Cresswell) the Claimant alone was blamed for

continuing communication issues (said to be on the grounds of Disclosures 1 to 6 inclusive)".

136. The Claimant addresses these alleged detriments in paragraph 35, of his witness statement … "35. LA subsequently convened an extraordinary meeting of the Trust PSAG on 25 May 2021, just 4 days following her receipt of my Grievance, in which she was appropriately heavily criticised. In Chairing this meeting LA breached a basic requirement of the TOR of this group [page 1085 – 1088] in failing to recuse herself due to undoubted confliction. Two other attendees (KH and EE) of the 7 in total present, were similarly conflicted, having been named and criticized in my Grievance. The group were informed of the (unsubstantiated and fabricated) allegations against me, presented by AN and RB to LA on 30 March. The minutes from this meeting [page 559-561] suggest that LA criticised me for exerting my basic employment rights in submitting Freedom of Information and Subject Access Requests and for pursuing a Personal Injury Claim (incorrectly termed a Clinical Negligence Claim by her) against the Trust, having sustained a life-long neuropathic injury following an electro-diathermy injury in August 2018, sustained by the use of defective and inappropriately maintained diathermy forceps (this claim was later settled by the Trust out of court). The minutes also contained evidence that since my return to my role I had been 'managed'. The unprecedented conclusion drawn from this meeting was that my relationship with the Trust's senior management was no longer tenable (unilaterally blaming me for this breakdown) and recommended that the Trust CEO should consider termination of my contract of employment. Such action ventured way beyond the remit and TOR of this group. LA's actions were a vindictive and retaliatory response to my initial whistleblowing, her failure to exit me from the Trust following the initial MHPSI, and for criticising her role throughout the course of it in my Grievance, submitted just days earlier.".

137. The Second Respondent was challenged about these matters in cross examination. About the timings she confirmed the Claimant's grievance was received after she had decided to have a PSAG discussion. The Second Respondent clarified that by referring back to the minutes of the meetings with AN and Renee Behrens (RB) an impact was clearly stated. Also, that as a result of the meeting with external reviewers and feedback she directly received, she was concerned. The Second Respondent explained that she was concerned about patient safety, people crying, time off, reference to taking the hospital down, and that she met another senior colleague saying it was getting untenable. She explained that she was concerned, and the increasing concerns led her to decide to call a PSAG meeting, and this was some time before the Claimant's grievance.

138. The Second Respondent was challenged in cross examination about this answer it being asserted to her that it was material not in her statement and that she was constructing evidence to explain her actions. The Second Respondent did not accept that and explained that she wanted the Tribunal to understand her thinking at the time and why she wanted to have a discussion at the PSAG.

139. We note that the Second Respondent does address these matters in her witness statement, (paragraphs 36 and 37):

"36. On 30th March 2021, I met with Avideah Nejad and Renee Behrens at their request and they reported very difficult interactions with Mr Pitman and his colleagues and their concern about the risk this could have on patient safety (pages 482-486). On 7th April 2021, I met with the obstetricians undertaking the external review of our maternity services and they reported multiple concerns had been raised by a number of individuals they had spoken to, about one obstetrician, Mr Pitman. … I sought to meet with Mr Pitman to discuss the multiple concerns that were coming to me, but requests to meet me were ignored (page 509). At this point it was clear that concerns were escalating and that action taken to date had not brought about any change to Mr Pitman's behaviour within the team.

37. On 20 May 2021, I met with a different consultant obstetrician, Keith Louden, about a separate matter who explained that Mr Pitman was increasingly difficult to work with, that he had been threatening to take the department and Trust down, and that all of his consultant colleagues have had enough. This information (along with the previous concerns I had received) prompted me to arrange to discuss the issues again with the PSAG Committee. My primary concern was the safety of the maternity department."

140. There is a file note of the meeting between the Second Respondent and Keith Louden at page 551 of the bundle.

141. Also, it was noted that at paragraph 41 of her witness statement the Second Respondent states … "The decision to hold the PSAG Committee meeting on this date was made before the Claimant's grievance was received.".

142. We remind ourselves that the test to be applied when considering whether a detriment was done "on the ground" of a protected disclosure is for the Tribunal to determine whether a protected disclosure was a "significant influence" on the decision to act or not act. An influence is significant provided it is "more than trivial". To do so the Tribunal must focus on the "mental processes (conscious or subconscious) of whoever caused the detriment".

143. The Second Respondent has explained what she is doing and why and what influenced her. She did not accept that the grievance was a significant influence on her, nor were any of the other asserted disclosures. The Second Respondent stated in cross examination about the grievance, that it had all been said before by the Claimant, it was not an influence on her.

144. The Second Respondent has provided evidence to support her escalating concerns. They are also not just her concerns.

145. As mentioned, the Claimant's supporting witness, MH, has a view as to the way the Claimant presents on matters noting that the Claimant … "… can lack insight into how he presents his views and that some people may find that challenging".

146. JM had concerns about the Claimant before the 7 March 2019 meeting.

147. The email of the 12 August 2020 from AN (page 421) refers to concerns about a "… lack of communication with me and the department".

148. We were referred in evidence to the exit interview notes of HG dated 10 November 2020 (pages 433 to 434), which although noted during oral evidence do not refer to the Claimant in the first and second paragraphs of the section responding to "What could we do better at HHFT". However, the subsequent four paragraphs do refer to the Claimant.

149. NH refers in paragraph 11 of her witness statement that … "In November 2020, Ms Nejad raised concerns with me and Kieron Galloway that Mr Pitman had not been attending a number of his rota sessions. On 16 November 2020 I had a teams meeting with Ms Nejad and Diane Pittard, Divisional Chief Nurse to determine what the issues were. Prior to this meeting Ms Nejad provided me with a log that set out the instances whereby Mr Pitman had not attended (pages 1042). On 19 November 2020, I therefore attempted to invite Mr Pitman to a meeting to discuss these issues through our personal assistants. Mr Pitman was reluctant to come to a meeting questioning why he would be required. My PA Rebecca Jones chased twice on 20 and 26 November 2020 to meet but we did not receive a response (pages 436-439).".

150. About the meeting on the 12 March 2021 between the Claimant and NH, we have already noted that the Claimant acknowledges that clinics were not done, but he asserts others were done in their stead. This is an issue that is reasonably explored by NH and an explanation provided.

151. We also note that the MHPS process had identified concerns about the Claimant, although he did not accept them, and as the Second Respondent herself notes in paragraph 16 of her statement … "… during the MHPS investigation and after it had concluded, further concerns were being raised regarding Mr Pitman from Janice Mackenzie, Divisional Chief Nurse/Midwife (pages 362 - 363, 413), Fay Corder, Associate Director of Midwifery (pages 416 - 417, 440 - 441), Avideah Nejad, Clinical Director Women Health Services (page 421), Hilary Goodman, Deputy Head of Midwifery (page 430), Julie Dawes, Chief Nurse (pages 466 - 468) along with other concerns that were addressed to Alex Whitfield, Chief Executive or other senior individuals.".

152. We accept the evidence presented to us shows a diverse expression of concern about the Claimant, relayed it appears independently of any particular asserted disclosure said to have been done by the Claimant.

153. There is an independent verification of matters in the form of BC who attended the PSAG meeting, gave evidence to this Tribunal and stood by what was decided at that meeting when cross examined about it. BC is not accused of acting to the Claimant's detriment on the grounds of any alleged disclosure.

154. It was also confirmed what internal legal advice was given at that PSAG meeting, privilege being waved in respect of that particular aspect (page 561) … "LW advised that the PSAG was being consulted. If the PSAG is of the view that

the employment relationship with MP is untenable, and that there is no realistic prospect of it being restored, then the next step would be for LA, as Chair of the PSAG, formally to outline that view to the Chief Executive.". This is what the Second Respondent then does.

155. It was also confirmed at the conclusion of the cross examination of NH that no detriment claims would be pursued against her as an individual (being alleged detriments 2, 3 4, 12, and 13). Therefore, we can accept that NH's views as to the way the Claimant is perceived, were contributed independent of any alleged protected qualifying disclosure.

156. Both BC and the Second Respondent were cross examined about conflicts at the PSAG and whether the Second Respondent should have chaired the PSAG process in view of the Claimant's grievance. They did not accept that. The Second Respondent was the CMO for the First Respondent, is the responsible officer and it is her role to manage issues such as those raised about the Claimant. Both the Second Respondent and BC confirmed that through their responsible officer training the existence of a grievance would not be a basis to recuse oneself from this process. We accept what they say which is consistent with paragraph 4 of the Responsible Officer training document (page 1146 (or page 8 of that document)) which notes the situations where it may not be appropriate to appoint an alternative responsible officer giving the example of where there is an ongoing disciplinary process or a grievance that has been raised by the doctor against the responsible officer that has not concluded.

157. The alleged fifth detriment then follows the PSAG meeting. The agreed list of issues says … "3.1.5 Detriment 5 - on 9 June 2021 the First Respondent by the hand of the Second Respondent wrote a letter to Alex Whitfield raising the possibility of the Claimant's dismissal acting as chair of the PSAG meeting when she should not have been acting as chair (said to be on the grounds of Disclosures 1 to 6 inclusive".

158. A copy of this letter is at pages 578 to 579 of the bundle.

159. The Claimant addresses it at paragraph 36 of his witness statement … "Following the PSAG meeting LA formally wrote to AW [page 578 – 579] making the recommendations detailed above.".

160. The Second Respondent refers to it in paragraph 48 of her witness statement … "Following the meeting I wrote to Ms Whitfield on 9 June 2021 setting out the concerns of the PSAG Committee and raised the possibility of the Claimant's dismissal (pages 578 - 579). I did this because I, along with the rest of the PSAG Committee, were concerned that there appeared to be a fundamental breakdown in relationship between Mr Pitman and those responsible for his clinical management, as well as some of his clinical colleagues. The view was that he showed no recognition of the part he played in those issues nor accepted the legitimacy of the people to whom he is responsible. I cited that concerns had been raised from a number of sources and that he had openly been saying that he has no future in the organisation and that he was collecting evidence to 'take everyone down' (as referred to above). I also said

that I was concerned that the fact he raised a grievance which raised serious allegations about multiple members of the senior management team was itself indicative of the breakdown in normal relations. I said I was concerned about the risk the impact of these broken relationships could have on patient safety. This letter was not sent because of any alleged whistleblowing allegation. I was aware at this point that there was an independent investigation reviewing the MHPS process and was happy to participate in this as required.".

161. In cross examination the Second Respondent denied that the letter was written being significantly influenced by the Claimant's disclosures. She explained that she was within the letter trying to put across it was not her sole view, she had discussed it, and she did not agree she was trying to convey the PSAG were advising her to do so. Also, she did accept that her reference to a clinical negligence claim was written incorrectly and that what she meant was the Claimant had threatened to write to the solicitors of someone pursuing a clinical negligence claim. She accepted it was badly written.

162. AW was also challenged about this letter in cross examination as to whether the Second Respondent believed the Claimant was a risk and AW noted that the letter says not directly, but there is a high level of risk. AW confirmed that if there were direct patient concerns, then she or the Second Respondent would say to the Claimant he could not return to practice.

163. Both the Second Respondent and AW made it clear that this letter was the start of a process, to investigate if what was understood by the Second Respondent and PSAG was correct. It was not the conclusion of the process.

164. We are directed in Claimant's written closing submissions to note what the Second Respondent says in paragraph 48 of her statement … "I also said that I was concerned that the fact he raised a grievance which raised serious allegations about multiple members of the senior management team was itself indicative of the breakdown in normal relations". It is in the Claimant's submissions that this evidences it as being a significant influence on the Second Respondent.

165. We note that the letter (at page 578) does say … "The lengthy grievance that he has submitted makes serious allegations about multiple members of the senior management team and the Board, which is indicative of the breakdown in normal relations for clinical management and PSAG considers exposes the Trust and potentially its patients to unacceptable risk.".

166. We do not accept what the Claimant submits about this. Based on what we have set out in our fact find above, we find that the Second Respondent does what she does based on her concerns as to the Claimant's working relationships with colleagues, PSAG input and internal legal input. What is stated by the Second Respondent about the grievance in her subsequent letter is a matter of fact, and not the significant influence on why she did what she did. We accept what the Second Respondent says.

167. BC, who is not accused of any act of detriment, in his oral evidence also stood by the course of action implemented by the letter.

168. Chronologically next comes the sixth alleged detriment. In the agreed list of issues it is stated … "3.1.6 Detriment 6 - on 10 June 2021 Alex Whitfield of the First Respondent should have recused from chairing the Claimant's grievance hearing following that letter from the Second Respondent and should have communicated to the Second Respondent that the PSAG's recommendation to terminate the Claimant's employment was entirely inappropriate (said to be on the grounds of Disclosures 1 to 6 inclusive)".

169. The notes from this meeting are pages 580 to 590.

170. The Claimant addresses this matter at paragraph 37 of his witness statement … "Despite AW's undeniable confliction, she continued to Chair my entire Grievance process... She, along with SE, were justifiably threatened by my protected disclosures regarding their negligent omission to act following their receipt of the 2019 NHSI Directive and how this, not only prejudiced their entire handling of my MHPSI, but other Trust staff under investigation throughout that time period. They fully realised that agreeing to the appointment of genuinely independent input to Chair future processes could not only lead to appropriate challenge in this regard but could also threaten what I believe was their individual and collective aim to achieve my dismissal. AW also clearly wished to demonstrate a degree of managerial loyalty towards LA, her newly appointed CMO."

171. AW addresses this matter in paragraph 19 of her witness statement … "In line with the Trust Grievance Policy (pages 1072 – 1084), I met with Mr Pitman and his union representative on 10 June 2021 to explore the reasons for his grievance more fully, to understand his desired outcome and to gather any further documentation Mr Pitman had in relation to his areas of concern. Notes from the meeting are at pages 580 - 590 of the bundle."

172. Also, at paragraph 26 … "I held a separate discussion with Mr Pitman, after the grievance outcome meeting, on 9 July 2021 to discuss the letter I had received from the PSAG Committee. I had asked Mr Pitman whether he wanted to discuss it at this time, given it had no bearing on my grievance outcome, and we had already had a long discussion relating to the grievance, and he confirmed he did want to discuss it then. I explained that the letter had cited a persistent breakdown unlikely to be recoverable in terms of the employment relationship between the Trust and Mr Pitman. I explained that the letter had asked me to consider terminating Mr Pitman's employment. I had never received such a letter before and I was clear that a proper investigation needed to be done to see what had led the PSAG Committee to say that relationships had broken down and could not be retrieved.".

173. AW did not accept she was conflicted when challenged about this in cross examination. AW confirmed that she did not believe being given a view that the relationship was broken made her conflicted. She understood conflicts related to pecuniary, family, or personal relationships. That did not apply in this case. AW

clarified that receiving more information (i.e., the letter from the Second Respondent) does not make her conflicted.

174. We accept what AW says. We also accept the submissions made in the Respondents' written closing submissions at paragraphs 144 and 145. In view of the grievance raised and the seniority of AW, it was properly part of her role to address the Claimant's grievance.

175. We now need to consider alleged disclosure 7 which is also relied upon for the remaining detriments. In the agreed list of issues it is stated that … "2.1.1.7 Disclosure 7 - on 10 June 2021 a verbal disclosure to Alex Whitfield". It is stated that this tends to show a person had failed, was failing or was likely to fail to comply with any legal obligation; and/or the health or safety of any individual had been, was being or was likely to be endangered.

176. The Claimant refers to this alleged disclosure in paragraph 38 of his witness statement … "At my initial Grievance hearing on 10 June 2021, I presented my Grievance submission to AW and Kieron Galloway (KG), the Trust's Director of People [page 580 – 590]. My BMA Representative, Daniel Pebody (DP), was also in attendance. I criticised the Trust's handling of my MHPSI process, claiming that the entire damaging process could have been avoided had the Trust adhered to its own and national guidelines. I stated that failure to address my initial whistleblowing concerns had led to further deterioration in staff and patient safety. I reiterated my growing concern that, failure to immediately address the destructive manner that the Trust employed when undertaking formal disciplinary investigations could result in staff members taking their own lives, risking future prosecution for corporate manslaughter."

177. The minutes from the hearing are at pages 580 to 590.

178. The further information document highlights which parts of the minutes the Claimant relies upon as being part of this protected disclosure (page 140):

"MP's "biggest concern is the manner in which the process was run".

"Trust's own guidelines and national guidelines were breached in how the investigation was planned and conducted".

"if the Trust continues in this way, it will kill someone".

C "reinforced … prevent other people being treated the same way… if others were put through suffering in the manner in which he had, that he had no doubt that they may contemplate ending their lives".

"situation could have been avoided if the Trust had followed its own guidelines".

"MP said that patient safety standards had dropped and that a recent maternal death was a tragic 'closure of the circle' that MP had been trying to avoid". [401]
"MP said he feared for his future and believes that if his whistleblowing concerns

had been heard 2 years ago, the retention issues with midwifery staff could have been avoided".

"MP said he had also expected the whole process [investigation] to be managed in a timely manner which hadn't happened. Said that this was hugely worrying and that he remains bemused as to why 6 out of the 7 guidelines from the Dido Harding letter had been breached in his case".

"MP stated that he wanted 'answers and accountability' along with reassurance that this would not happen again at the Trust."

"Said that even if an accusation was of a serious nature, that shouldn't prevent a 'screening process' taking place in line with Trust and national guidelines".

179. We note that although DP attended this meeting with the Claimant and attended this Tribunal to give evidence, he says nothing about this meeting in his witness statement.

180. We can see how taking what the Claimant asserts at its highest that it is possible to distil out a potential qualifying disclosure as with disclosures 3, 5 and 6. The Claimant asserts in his witness statement … "I stated that failure to address my initial whistleblowing concerns had led to further deterioration in staff and patient safety.".

181. We then have the seventh alleged detriment … "3.1.7 Detriment 7 - on 9 July 2021 the First Respondent and Alex Whitfield not upholding the Claimant's grievance and continuing to make unsubstantiated allegations of concerns over patient safety (said to be on the grounds of Disclosures 1 to 7 inclusive)".

182. Also as noted in the agreed chronology on the 9 July 2021 and 13 July 2021, AW meets with the Claimant regarding the grievance outcome then writes to confirm this (pages 609 to 621 and 629 to 642.

183. At paragraph 40 of the Claimant's witness statement, he says … "I attended my Grievance conclusion meeting on 9 July 2021, the same attendees being present as at the meeting on 10 June 2021 [page 609 - 621]. AW informed me that no aspects of my Grievance had been upheld. I was then informed that further concerns had been raised that "needed a further discussion" [page 622 – 626]. I was told about the PSAG meeting and its recommendations, which immediately raised concerns regarding the confliction of its Chair and the other attendees. To my consternation AW also claimed that she (and the PSAG) believed that my return to my previous role could pose a potential significant risk to patient safety. Whilst this is not recorded in the minutes, it was discussed, given the reference to it in LA's letter. To direct challenge, AW stated that she had no evidence to back-up this allegation. To date no objective supportive evidence has been forthcoming in this regard. This accusation against me was levelled despite me having an exemplary past record regarding the standard of clinical care that I provided to my patients and entire absence of any adverse clinical incidents directly attributed to my care.".

184. AW addresses these matters at paragraphs 20 to 22 of her witness statement:

"20. I met with Mr Pitman on 9 July 2021 to confirm my decision regarding his grievance. Notes from the meeting are at pages 609 - 621. I had been provided with a comprehensive timeline of events, along with emails, letters and other documents which narrate the events. I considered whether to appoint an investigator into Mr Pitman's grievance but, on reviewing all of the available documents, considered that I had sufficient information to answer Mr Pitman's questions and respond to his concerns.

21. I wrote to Mr Pitman on 13 July 2021 with my decision (pages 629 - 642). I did not uphold Mr Pitman's grievance, although I did accept that there were some elements of the MHPS process that the Trust could have done better as set out in that letter. I considered that the implementation of the PSAG committee was an improvement now in place.

22. One concern (Concern 11) that Mr Pitman had raised in his grievance was that he felt that there had been a failure to respond to safety concerns he had raised. Mr Pitman had made a formal whistleblowing concern in 2020, after his MHPS process had concluded, relating to maternity care in Andover which had been thoroughly investigated under the Trust's whistleblowing policy by an external investigator and the report had been reviewed by a panel including experienced clinicians and a clinical non-executive director. In addition, a full review into maternity services at the Trust was underway by experienced obstetricians and midwives. It was clear to me that the Trust had responded to his concerns, had looked into those concerns and put actions in place to improve where required."

185. An area of challenge put to AW in cross examination was that she had taken over the four questions posed by Gary Hay (GH) following his investigation, the assertion being to supress matters.

186. The four questions GH proposes in his email to HR dated 9 June 2021 are (page 593/594):

"1. Did MP raise whistleblowing concerns in early 2019 as he alleges? If yes, what were they and were they investigated or managed appropriately in a separate process?
2. Do the contents of the draft October 2018 letter to the CEO and MD suggest that there was collusion on the part of the midwives, as MP has alleged?
3. Is there any other evidence to support the allegation that a group of midwives had planned an assault on the consultant body, as has been alleged?
4. Does the answer to any of the above provide evidence to support a suggestion that the decision to proceed with an investigation under MHPS in 2019 was disproportionate or otherwise inappropriate?

187. After being forwarded the GH email, AW replies on the 22 June 2021 (page 592) that … "These questions are very much part of the grievance which

Martyn has raised and which I am currently looking into. I will make sure that these are addressed through the grievance process.".

188. AW responded in cross examination by explaining how she had conducted the grievance process, reviewing all documents and the statements made at the time, which she considered would be more helpful than comments later on, and that she structured her response under 15 headings pulled out of the Claimant's grievance document. As to specifics for example to address the question … "Is there any other evidence to support the allegation that a group of midwives had planned an assault on the consultant body, as has been alleged", she referred to page 637 of the grievance outcome and it being a more widespread view … "There is evidence of this confrontational communication style from the complainants' testimonies, from the emails attached to the investigation report and from a number of other witnesses. Even those who say you are supportive describe a direct communication style that is "uncomfortable for a lot of people".".

189. As to the first question GH poses … "Did MP raise whistleblowing concerns in early 2019 as he alleges…", AW directed us to her responses at page 630 … "I want to acknowledge that you have raised concerns about standards of care in the maternity service either informally or more formally through the whistleblowing policy. This is a good thing, and I always encourage colleagues to raise concerns in order to help us improve. As Lara says in her letter of 4 November 2020, it is your communication style and not the message you are trying to convey which triggered the investigation and the events which your grievance relates to. The concerns you have raised have been taken incredibly seriously by the service and the Trust, resulting in a number of external investigations into quality of care.".

190. Having considered what AW submits in evidence and her responses to cross examination we accept that what AW finds, as set out in her grievance outcome letter (pages 629 to 642), is detailed and reasoned and does reflect on the questions posed by GH. What she finds is for those reasons and cannot be inferred to be significantly influenced by any particular asserted disclosure or disclosures made by the Claimant.

191. As to AW continuing to make unsubstantiated allegations of concerns over patient safety, these are reflective of what is communicated to her by the Second Respondent in the letter dated 9 June 2021 (page 578) … "Whilst we do not have direct patient safety concerns, there are concerns about the high level of risk that a team under such pressure of relationships poses and in my capacity as Responsible Officer, it is very difficult for me to take assurance around safety when a doctor will not engage with me and I am hearing such concerns from his management and colleagues.".

192. The Claimant asserts (in paragraph 40 of his statement) that AW said to him at the meeting on the 9 July 2021 … "To my consternation AW also claimed that she (and the PSAG) believed that my return to my previous role could pose a potential significant risk to patient safety.".

193. AW did not accept this was said and confirmed that it is not referred to in the minutes of the meeting (pages 622 to 626). She also felt confident this was the case in view of the way the Claimant raised the matter at appeal and in her oral evidence referred us to page 828 of the bundle which records the Claimant saying about the meeting on 9 July 2021 … "To have your CEO announce that the senior members of your organisation want your employment terminated was devastating.".

194. We also note that DP although present at that meeting does not say what the Claimant says was said to him was said.

195. We accept the evidence of AW on this matter.

196. Chronologically this is where alleged detriment 13 should be considered, it being stated in the Claimant's amendment to the agreed chronology that it was on the 9 July 2021 that the Claimant starts a period of special leave (being Detriment 13) (pages 681 to 684). This is referred to in the agreed list of issues as … "3.1.13 Detriment 13 - from July 2021 onwards the First Respondent, the Second Respondent, Alex Whitfield, the PSAG, Kieron Galloway, Avideah Nejad and Renee Behrens placing the Claimant on special leave despite the accusations of patient safety concerns being unsubstantiated and not supported by evidence (said to be on the grounds of Disclosures 1 to 7 inclusive).".

197. It is not in dispute that the Claimant is on special leave. The Respondents assert it was offered and accepted by the Claimant rather than them placing him on it.

198. In paragraph 41 of his statement the Claimant states … "Due to this (entirely unsubstantiated) allegation of my return posing a risk to patient safety, I was advised by DP that I had no realistic choice but to accept the offer of "exceptional leave" put forward by AW at least until the patient safety allegations against me had been clarified and subjected to challenge. I was effectively suspended from my Consultant role...".

199. The Claimant refers to what he says AW said to him at the meeting on the 9 July 2021 (the … "(entirely unsubstantiated) allegation") in paragraph 40 of his witness statement. As detailed above we do not find this was said by AW.

200. The Claimant in paragraph 41 of his statement says he was advised by DP that he had no realistic choice but to accept the offer of "exceptional leave" put forward by AW at least until the patient safety allegations against him had been clarified and subjected to challenge.

201. This is different to what DP says. In paragraph 20 of his statement DP explains … "Martyn was placed on exceptional leave around the time of his grievance outcome, on the basis that the Trust had made it impossible for him to return to work, because of both how he was treated upon his return following the MHPS investigation, and how the Trust subsequently responded to the allegations in Lara's letter of June 2021 [page 684, 740]. Martyn was prevented from undertaking his existing job plan, was undermined and unfairly monitored at

work in relation to his clinical capability, despite the fact that no clinical concerns had ever previously been raised. Lara's letter [page 578-579] and subsequent correspondence from the Trust insinuated that there were concerns about Martyn and his conduct that could impact patient safety, despite the fact there was no evidence for this...".

202. By email dated 23 July 2021 (pages 682 to 684), DP states … "Under the imposed circumstances Martyn, with Dr Spenceley's and my support, believes that the most appropriate option, at this stage, is to accept the suggestion of a period of Exceptional Leave until his Grievance and the other, as yet unspecified, allegations against him have been appropriately addressed, by whatever means are finally deemed necessary. It is however important that this is recognised as an entirely localised issue, and therefore that any such leave would not prohibit Martyn's private practice work.".

203. We find that the reason the Claimant is on special leave is that it is offered and then accepted by the Claimant, with the support of Dr Spenceley and DP. This is what the Claimant wants so it is unclear how it is to his detriment. In his statement at paragraph 41 the Claimant explains that he views it as enforced exclusion from his clinical role. However, even accepting that, there is nothing in our view to infer that what happened was because of any alleged disclosure or disclosures the Claimant says he made.

204. The next matter chronologically is detriment 8 which is dated as the 20 July 2021, when GH concludes his report (pages 650 to 666). This is referred to in the agreed list of issues as … "3.1.8 Detriment 8 - on 20 July 2021 the first respondent Alex Whitfield and Steve Erskine commissioned an external report from Mr Hay, but he was known to the First Respondent and its chair Alex Whitfield and he was not independent, and they deliberately restricted the terms of reference to the Claimant's disadvantage. The Claimant subsequently wrote to the Respondents challenging the factual findings as being inaccurate (and the claimant has agreed to supply a copy of this letter to the respondent within 14 days (all said to be on the Disclosures 1 to 7 inclusive)".

205. The Claimant refers to this issue in paragraph 33 of his witness statement … "Following the meeting with JT in April 2021, I was informed by SE on 6 May 2021 that he had commissioned Gary Hay, a local solicitor, to undertake a supposedly independent review of the Trust's handling of my MHPSI, mapped against this sentinel document [page 503]. I and the BMA had initially requested that this review should be undertaken by Verita [page 504], who had previously been commissioned by NHSI to review the Amin Abdullah case. This request was adamantly refused. We questioned Mr Hay's independence in his commissioned role due to his prior affiliation with Capstick's solicitors, who the Trust had regularly used for legal advice and his on-line professional profile detailing his specialisation in assisting investigations into "difficult doctors" [page 1041]. The TOR were deliberately restricted by SE to purely investigate the nature of harm that I had been subjected to during my MHPSI, thereby omitting review of the other 6 components of the directive [page 507, 510-511, 512-513]. This deliberate decision was made with the intention of withdrawing any potential risk of my whistleblowing allegations, highlighting AW's and SE's failure to act

following receipt of the NHSI directive being subjected to any scrutiny or challenge. SE was sadly successful in this regard, highlighting the deceitful and corrupt nature of this review.”.

206. SE refers to the GH matter in paragraphs 9 to 14 of his witness statement. He explains how he sought to keep the process independent by having independent HR support and appointing someone independent of the Claimant’s recommendations.

207. SE was challenged about this matter in cross examination. He confirmed that he did not know GH and they did not overlap in their respective roles at the Portsmouth Hospitals Trust. We accept what he says.

208. SE also did not accept that the terms of reference had been deliberately restricted. He highlighted a number of times that the final form of the terms included at his request, a broader focus than just the Claimant, and do not match what AW was suggesting. He referred us to the words … “is there any learning for the Trust with regards to its investigation processes or the support provided to individuals who are the subject of an investigation or disciplinary procedure that could be implemented going forwards?” in the terms of reference within the specific focus of the investigation section (page 510).

209. As was confirmed in oral evidence the Claimant did not supply details about any factual inaccuracies to either GH or SE at the time. This is not something that was therefore challenged or explored at the time.

210. We accept what SE says about the commissioning of GH.

211. As is highlighted in paragraph 150 of the Respondents’ closing submissions and which we accept, the GH report is commissioned because of the Claimant asking for a review of the case. It is agreed to by the First Respondent despite no obligation to do so, and by doing so it is subjecting its own procedures to external scrutiny. We do not find the Claimant has proven the detriment he alleges.

212. Chronologically we then get to the last disclosure the Claimant alleges. As recorded in the chronology as being on the 27 July 2021 when the Claimant appeals the outcome of the grievance (pages 692 to 710). It is referred to in the agreed list of issues as … “2.1.1.8 Disclosure 8 - on 27 July 2021 an email with enclosures to Alex Whitfield and Kieron Galloway”, and asserted it tends to show a person had failed, was failing or was likely to fail to comply with any legal obligation; and/or the health or safety of any individual had been, was being or was likely to be endangered.

213. Paragraph 42 of the Claimant’s statement refers to this alleged disclosure … “I submitted an Appeal against my Grievance outcome to AW and KG on 27 July 2021 [page 690 – 717]. This detailed critique again outlined the litany of deficiencies in the Trust’s handling of my MHPSI. I reiterated the personal and professional damage this had caused. I again highlighted the ongoing patient safety and staff wellbeing concerns that failure to act on my initial whistleblowing

protected disclosures had caused. The gross inconsistencies in how the Trust handled complaints against individuals was further discussed. I stressed my determination to do all that I possibly could to prevent the Trust from treating others, subjected to formal disciplinary investigation, from being treated in the same destructive manner that I had."

214. The quotes relied upon by the Claimant are set out in the further information document at pages 141 and 142:

""The events since the launch of my Maintaining High Professional Standards Investigation (MHPSI) in May 2019 have destroyed my career, my Private Practice, the love of my job, my financial security, my reputation and professional standing, my physical and psychological well-being and have also damaged my family."

"I had, unwittingly, become the victim of whistle- blower persecution".

"I expected the investigation to be undertaken and concluded in a reasonable timescale and in accordance with accepted local and national guidelines".

"fails to appropriately focus on the 7th point that my meeting with Janice Mackenzie on March 2019 represented the presentation of protected disclosures, in what was, on my part, a whistle-blowing episode.".

"I initially raised with Janice Mackenzie in the Spring of 2019… deteriorating clinical standards and potential avoidable tragedies".

"None of the concerns that I raised in 2019 have been appropriately and properly addressed".

"Concern 2: The instigation of the investigation did not follow a screening process as required by NPSA and HHFT policies."

"an appropriate and fair screening process".

"there is no consistency in the way … complaints are assessed, screened and managed by the Trust".

"Concern 3: You were denied the right to be accompanied at the meeting on 17th May 2019 because you believed it be an informal meeting.".

"The commissioning of a Formal External Review of our Department was suggested and agreed as an action point in this meeting in September 2019. This Review did not even commence until the Spring of 2021 and has yet to report."

"Realising and recognising that I was struggling, from the psychological perspective and was reaching a crisis point towards the end of 2019, I contacted Lara Alloway and requested her to support me in obtaining an urgent Occupational Psychologist assessment";

"Concern 6: the investigation took too long".

"In keeping with the National guidelines, the Trust's own clearly states that investigations should be completed within a 6-week timeframe, to limit the harmful effects of such processes on the subject of the investigation. … They are compounded, in my case, by the Trust's apparent complete disregard and non-adherence to the directive from NHS Improvement".

"Concern 10: Failure to look after your well- being over the last two years and specifically during the investigation and not in line with the letter from Dido Harding in May 2019".

"The process that I was put through resulted in me being forced into an acute depressive crisis, requiring GP, Psychiatric and Psychologist input and a subsequent long-term dependence on anti-depressant medication. My psychological status was so concerning at the depths of this that I began to appreciate why others, faced with what I had been put through, without the support and love of family and friends that I was fortunate enough to have, would consider taking their own lives.".

"Concern 11: Failure to respond to safety concerns raised"

"7th Regarding my protected disclosure declaration in my meeting with Janice Mackenzie on March 2019 … were completely ignored".

"My whistle-blowing concerns regarding the standard of care provided by a group of Midwives in Andover was commendably handled through the Trust's whistle-blowing policy. However, the nature and conduct of the investigation was negligently deficient. … areas of unquestionably deficient practice were entirely trivialised".

"24th according to the directive received by the Trust from NHS' in May 2019, the organisation had a defined obligation to declare my case as a 'Never Event' and to commission this review (along with exploration of the other 6 non-negotiable recommendations in this directive) when it first became apparent that I had been harmed by my investigation process in November 2019".

"This apparent failure to act is gravely concerning, given the reason for its distribution was the avoidable suicide of a healthcare professional, Amin Abdulla, who had been subjected to an identically inappropriate disciplinary investigation to mine.".

"Conclusion … no other HHFT staff members would be exposed to the experience that I had been subjected to."."

215. By taking what the Claimant asserts at its highest it is possible to distil out a potential qualifying disclosure similar to as we have done in respect of disclosures 3, 5, 6 and 7. As the Claimant states in his witness statement … "I again highlighted the ongoing patient safety and staff wellbeing concerns that failure to act on my initial whistleblowing protected disclosures had caused.". We

can see these matters are raised in his appeal … ""I initially raised with Janice Mackenzie in the Spring of 2019… deteriorating clinical standards and potential avoidable tragedies". … "None of the concerns that I raised in 2019 have been appropriately and properly addressed"… "Concern 11: Failure to respond to safety concerns raised" … "7th Regarding my protected disclosure declaration in my meeting with Janice Mackenzie on March 2019 … were completely ignored".

216. We then reach detriment 9 which in the agreed list of issues is **… "**3.1.9 Detriment 9 - from July 2021 onwards the First Respondent, Alex Whitfield and Kieron Galloway unreasonably delaying the process of the Claimant's appeal for several months (said to be on the grounds of Disclosures 1 to 8 inclusive)".

217. It is not in factual dispute that there was a delay.

218. The Claimant addresses this allegation in paragraph 43 of his witness statement … "Significant delay ensued between late July 2021 and 18 November 2021, when my Grievance Appeal was finally heard…". The Claimant states … "This delay resulted from the Trust's recurrent delay in responding to FOIAR and SARs…", which is detriment 10. The Claimant does not blame anyone in particular for this in his witness statement. The Claimant does refer to the impact on him with there being a delay in the process … "Enduring further delays at this stage of the handling of my case prove to be very psychologically challenging.".

219. We note from the Respondents' closing submissions (paragraph 151) that they submit … "There was no detriment. All the delays were at the request of C and his representative. The Trust was continually trying to hold the appeal meeting. Mr Galloway gave evidence that the Trust could have proceeded the appeal without waiting for the SAR. C had all the information he required to pursue his appeal.". At paragraph 152 of the submissions, a number of examples are then provided of the Claimant's side requesting delays to the appeal process.

220. There does not appear to be a dispute between the parties that the delay in the appeal process at the Claimant's request is because the Claimant wants the responses to his FOIAR and SARs. Detriment 9 therefore requires a finding that detriment 10 as alleged is proven. We therefore address this matter as part of detriment 10 below.

221. The agreed chronology noted that it is on the 3 August 2021 the Claimant makes his Subject Access Request (page 733)

222. Detriment 10 is stated in the agreed list of issues as being … "3.1.10 Detriment 10 - from 3 August 2021 the First Respondent, Alex Whitfield and Kieron Galloway unreasonably delaying the completion of the Claimant's DSAR and FOIAR requests, particularly in excess of the 28 days allowed under the relevant procedures (said to be on the grounds of Disclosures 1 to 8 inclusive)."

223. It is not in factual dispute that there was a delay.

224. The Claimant addresses this allegation in paragraph 43 of his witness statement. The Claimant asserts detriment because the delay in providing the

requested information delayed his appeal. He does not direct blame towards anyone in particular in his witness statement.

225. The Claimant asserts in the agreed list of issues that the delay was unreasonably done by the individuals AW and KG. Then, that the act of unreasonably delaying was on the grounds of the alleged disclosures.

226. Paragraph 43 of the Claimant's witness statement states …. "Significant delay ensued between late July 2021 and 18 November 2021, when my Grievance Appeal was finally heard, chaired by Paul Musson (PM), a Trust NED. This delay resulted from the Trust's recurrent delay in responding to FOIAR and SARs, related to their handling of my MHPSI, their response to the receipt of the 2019 NHSI Directive and delays in releasing investigation interview transcripts. I submitted my requests on 3 August 2021 [page 733]. I was still receiving documents in December 2021 and beyond [page 853]. These delays were a deliberate attempt to prevent me from accessing information that was highly relevant to my case, the Trust's handling of my whistleblowing and to AW's and SE's failure to respond to the 2019 NHSI Directive. Enduring further delays at this stage of the handling of my case prove to be very psychologically challenging. When the requested documentation was eventually received much of it was redacted beyond comprehension.".

227. AW addresses this matter at paragraph 37 of her witness statement … "As I had heard the grievance, I was not involved in the management of Mr Pitman's appeal. I do, however, recall Mr Pitman's representative saying that he would not be in a position to confirm the appeal hearing date until he had had certain responses and received certain documentation which he had requested under the Subject Access Request (SAR) and Freedom of Information (FOI) processes. I was on leave at this time and Mr Galloway responded on my behalf (pages 734 - 739). I fully expected the grievance appeal to happen in August or September as I had referenced in my letter of 16 July 2021 (pages 646 - 647).".

228. Then at paragraph 42 … "Mr Pitman raised a subject access request on 3 August 2021 (page 733). I was aware that there was only one person at the Trust looking at subject access requests and that Mr Pitman's request was extensive. I therefore suggested that we arrange for external support in order to accelerate the response to the request which happened. Save for this, I had no involvement in this process and do not consider that there was any unreasonable delay given the extent of the request (pages 742 - 744)."

229. The witness statement of AW confirms that her involvement in the DSAR and FOIAR requests was to suggest ways of speeding up the process. There is no evidence to show she was involved either directly or indirectly in any delay. AW maintained this position in cross examination, and we accept what she says.

230. It was clear during the cross examination of the Respondents' witnesses and as confirmed in the closing written submissions of Claimant's Counsel (paragraphs 337 and 343), that the allegation (as to both detriment 9 and 10) is maintained against KG only.

231. KG addresses the matter in paragraphs 24 to 33 of his witness statement. In paragraph 25 KG refers to an email he sends to the Data Protection Officer on the 4 August 2021 (pages 741 to 744) providing the Claimant's SARS request and confirming its urgency. We note that the email is marked as urgent. KG describes how the delay of the appeal is requested by the Claimant's representative (DP) and acceded to, to allow for the provision of the SARs. At paragraph 32, KG refers to him communicating to his HR colleague it being possible to hear the appeal after the SARs and stressed the importance of trying to avoid further delays in the process.

232. KG maintained this position in cross examination. He agreed that DSAR and delays in appeal go hand in glove, without documents the appeal cannot take place. He was asked if he was motivated to cause delay, to time the Claimant out of making a claim. He confirmed that he found that professionally insulting, and that he did everything through the process to support the Claimant. He explained they could have proceeded to the appeal without discharging the SARs, the Claimant had information to raise his grievance so he could have taken the position to move forward without the SARs, but he did not, because the release of SARs was important to the Claimant. He confirmed that he is not a data privacy expert and data matters sit in a different team, he was also cautious of PSAG confidentially him not being an expert in that. He did not accept he was stalling. He did not accept he was significantly influenced by the knowledge of the Claimant's whistleblowing claim in causing or contributing to delay.

233. We were referred to in the Respondents' written closing submissions to the scale and demands of the SAR exercise and the Claimant's acknowledgment of that (paragraph 153). This can be seen when reviewing the emails between the First Respondent's Data Protection Officer and the Claimant at pages 790 to 797. The Claimant does not make any allegations against the Data Protection Officer.

234. In relation to detriments 9 and 10, it has not been shown that what KG does is influenced in any way by any particular disclosure or disclosures by the Claimant. In cross examination it was put to KG that he was motivated by the knowledge of the Claimant's whistleblowing claim, and to time the Claimant out, rather than any particular alleged disclosure or disclosures. Considering the facts we have found, KG has no involvement in any "delay" in the SARs and his input as to the delay of the appeal is to respect the Claimant's requests to delay the process, but highlighting the importance of trying to avoid further delays in the process.

The Law

Protected disclosures (relevant sections from 43A to 43L ERA 1996)

235. Under section 43A of the Employment Rights Act 1996 (ERA) a protected disclosure is a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H. Section 43B(1) provides that a qualifying disclosure means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public

interest and tends to show one or more of the following – (a) that a criminal offence has been committed, is being committed or is likely to be committed, (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject, (c) that a miscarriage of justice has occurred, is occurring or is likely to occur, (d) that the health or safety of any individual has been, is being or is likely to be endangered, (e) that the environment has been, is being or is likely to be damaged, or (f) that information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed.

236. Under Section 43C(1) a qualifying disclosure becomes a protected disclosure if it is made in accordance with this section if the worker makes the disclosure – (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.

237. A disclosure of information can still amount to a qualifying disclosure if the information was already known to the recipient (section 43L (3)).

238. We have been referred by both Counsel to multiple case authorities about matters relevant to consider when deciding if a protected qualifying disclosure has been made:

239. ***Easwaran v. St George's University of London (EAT/0167/10, 24 June 2010)*** suggests breaking down the test in s 43B itself into three key elements:

a. Did the worker disclose any information?

b. If so, did the worker believe that the information tended to show at least one of the relevant failures?

c. If so, was this belief reasonable?

240. ***Williams v Michelle Brown AM UKEAT/0044/19/00***, for there to have been a qualifying disclosure there must be:-

a. a disclosure of *information*,
b. C must believe that the disclosure is made *in the public interest*,

c. C must believe that the disclosure tends to show *one or more of the matters listed s43B(1)(a) to (f)* Employment Rights Act 1996; and

d. the belief under b. and c. above must be *reasonably held*.

241. We were referred to the structured approach to decision making recommended by the EAT in ***Blackbay Ventures v Gahir [2014] IRLR 416, ICR 747***:

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

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

c. The basis on which the disclosure is said to be protected and qualifying should be addressed.

d. Each failure or likely failure should be separately identified.

e. … It is not sufficient … for the employment tribunal to simply lump together a number of complaints … Unless the employment tribunal undertakes this exercise it is impossible to know which failures … attracted the act or omission said to be the detriment suffered. If the employment tribunal adopts a rolled-up approach it may not be possible to identify the date when the act or deliberate failure to act occurred as logically that date could not be earlier than the latest of act or deliberate failure to act … it is of course proper for an employment tribunal to have regard to the cumulative effect of a [number] of complaints providing always [they] have been identified as protected disclosures.

f. The tribunal should then determine whether or not the claimant had the reasonable belief referred to in section 43B(1) … and … whether it was made in the public interest.

g. Where it is alleged that the claimant has suffered a detriment, short of dismissal it is necessary to identify the detriment in question and where relevant the date of the act or deliberate failure to act relied upon by the claimant. …"

242. This decision was affirmed in ***City of London Corp v. McDonnell [2019] ICR 1175***. Although, in ***The Chief Constable of Greater Manchester Police v Aston and others UKEAT/0304/19/RN***, the question as to whether it is necessary to slavishly follow the ***Blackbay*** guidance was considered and in reaching judgment in that case, it was held that it was not.

243. Information

244. In ***Kilraine v London Borough of Wandsworth 2018 ICR 1850***, the Court of Appeal notes that the concept of '*information'* tending to show a relevant failure did not include a statement which is general and devoid of specific factual content. The Court of Appeal stressed that the word '*information'* in S.43B(1) has

to be read with the qualifying phrase 'tends to show' — i.e. the worker must reasonably believe that the information 'tends to show' that one of the relevant failures has occurred, is occurring or is likely to occur. Accordingly, for a statement or disclosure to be a qualifying disclosure, it must have sufficient factual content to be capable of tending to show one of the matters listed in S.43B(1)(a)–(f). An example is given of a worker who brings his or her manager to the ward and points to abandoned sharps, and then says 'you are not complying with health and safety requirements', the oral statement would derive force from the context in which it was made and would constitute a qualifying disclosure. The statement would clearly have been made with reference to the factual matters being indicated by the worker at the time.

245. A Tribunal can take into account the factual context in which a disclosure is made. See ***Royal Cornwall Hospital NHS Trust v. Watkinson UKEAT/0378/10***. A failure to use a specific form, document or to follow a procedure, is not only irrelevant to the legal status of a disclosure, but also to its inherent quality.

246. In **Norbrook Laboratories (GB) Ltd v Shaw 2014 ICR 540**, the EAT explained that two or more communications taken together can amount to a qualifying disclosure (so by aggregation) even if, taken on their own, each communication would not. In ***Simpson v Cantor Fitzgerald Europe 2020 EWCA Civ 1601***, the Court of Appeal described the decision in ***Norbrook*** as 'plainly correct' but observed that whether two communications are to be read together is generally a question of fact; there is nothing unusual in this respect about the law on protected disclosures. The proximity in timing between the relevant communications was one relevant consideration.

247. Reasonable Belief

248. In ***Babula v Waltham Forest College [2007] ICR 1026*** the focus is on what the worker in question believed rather than on what a hypothetical reasonable worker might have believed in the same circumstances. However, the test is not solely subjective — S.43B(1) requires a *reasonable* belief of the worker making the disclosure, not a genuine belief. The test is a subjective then an objective assessment. In reliance on ***Twiss DX Ltd v Armes UKEAT0030/20/JOJ*** we are directed that whilst the reasonable belief test necessarily involves an objective element, the tribunal cannot simply substitute its view for that of the worker and must recognise that there may be more than one reasonable view.

249. What the information disclosed 'tends to show' was considered in ***Babula***. If a worker reasonably believed that a criminal offence had been committed, was being committed or was likely to be committed, and provided his belief was found by the tribunal to be objectively reasonable, neither the fact that the belief turned out to be wrong nor the fact that the information which he believed to be true did

not in law amount to a criminal offence was sufficient, of itself, to render the belief unreasonable.

250. There is a requirement that there should be some objective basis for the worker's belief. This was confirmed by the EAT ***in Korashi v Abertawe Bro Morgannwg University Local Health Board 2012 IRLR 4****,* which held that the Tribunal's assessment of reasonableness under S.43B(1) involves applying an objective standard to the personal circumstances of the discloser, and that those with professional or 'insider' knowledge will be held to a different standard than lay persons in respect of what it is 'reasonable' for them to believe. This analysis was further endorsed by the EAT in ***Phoenix House Ltd v Stockman 2017 ICR 84.*** The subjective element is that the worker must believe that the information disclosed tends to show one of the relevant failures and the objective element is that that belief must be reasonable.

251. If a worker reasonably believes information they were passing on tended to show a state of affairs identified in section 43B(1), the disclosure could be a qualifying disclosure (***Dr Y-A-Soh v Imperial College of Science, Technology and Medicine*** UKEAT/0350/14/DM).

252. The assessment of reasonableness is by reference to the facts as they were reasonably understood by the worker, albeit that the truth or otherwise of an allegation may be a useful evidential tool (***Darnton v University of Surrey [2003] IRLR 133]***).

253. An unsubstantiated expression of opinion is unlikely to amount to a reasonable belief (***Easwaran v St George's University of London UKEAT/0167/10/CEA***)

254. A belief cannot be reasonably held if the disclosure does not have sufficient factual content and specificity to be capable of reasonably supporting such a belief (**Simpson v Cantor Fitzgerald Europe UKEAT/0016/18)**.

255. Public Interest

256. In ***(1) Chesterton Global Limited and (2) Verman v Nurmohamed (Public Concern at Work intervening [2017] I.R.L.R. 837***, Underhill LJ considered that the key questions a Tribunal must ask are … "…. *whether the worker believed, at the time of making the disclosure, that it was in the public interest and* whether, if so, that belief was reasonable.".

257. In ***Chesterton Global Ltd (trading as Chestertons) v Nurmohamed 2018 I.C.R 731*** the Court of Appeal *w*hen considering whether a disclosure had been made by a worker in the reasonable belief that it was made "*in the public interest*", the essential test was whether disclosure served a wider interest than the private or personal interest of the worker making the disclosure. The Court held that relevant factors to be weighed by the Tribunal included:

a. the numbers in the affected group;

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

c. the nature of the wrongdoing;

d. the identity of the alleged wrongdoer.

258. The Court of Appeal did not discount the possibility that the disclosure of a breach of a worker's contract may be in the public interest, or reasonably be so regarded, if a sufficiently large number of other employees share the same interest. Tribunals should, however, be cautious about reaching such a conclusion — the broad intent behind the 2013 statutory amendment was that workers making disclosures in the context of private workplace disputes should not attract the enhanced statutory protection accorded to whistleblowers, even where more than one worker is involved.

259. Breach of a legal obligation

260. It must be possible to identify what obligation a claimant believed had been breached (***Eiger Securities LLP v Korshunova [2017] IRLR 115, I.C.R. 561***), not least in order to then go on to determine whether that belief was reasonable. The EAT emphasised that save in obvious cases, "a necessary precursor" to the assessment of whether the claimant held a reasonable belief is:

a. the identification of the nature of the legal obligation the claimant believed to apply; *and*

b. how it was believed there had been a failure to comply.

261. In respect of a legal obligation, we were also referred to ***Jain v Manchester University NHS FoundationTrust [2018] EWHC 3016*** a case which considered whether, by virtue of a governmental direction, NHS Foundation Trusts were contractually bound to implement the MHPS framework into its own local procedures. Even if that process of adoption at Board level had taken place, there would then arise a question of whether any particular feature was '*apt'* to be given contractual effect. This requirement of 'aptness' was considered by the High Court in ***Chakrabarty v Ipswich Hospital NHS Trust, [2014] EWHC 2735***, where it was noted that not all the provisions of MHPS should be read as having contractual effect. Some provisions will be advisory or 'aspirational', while other, more fundamental procedural features, will be regarded as giving rise to contractual rights. One such example, focused upon in that case, was the practitioner's right for his or her case to be referred to NCAS (now PPA) referral to consider a performance assessment before a Trust proceeds to a capability hearing.

262. We were asked to note the Supreme Court's decision in ***Chhabra v West London Mental Health NHS Trust [2014] I.C.R. 194***, and that the court saw the Trust's local MHPS policy as a workplace procedure that should not be applied with 'unhelpful inflexibility' – nor in a way that was 'unduly restrictive'.

263. In summary what we need to consider when determining if the Claimant has made a qualifying disclosure is whether:

a. there has been a disclosure of information;

b. the worker believes that the disclosure is made in the public interest;

c. If the worker does hold such a belief, is it reasonably held;

d. the worker believes that the disclosure tends to show one or more of the matters listed in sub-paragraphs (a) to (f);

e. if the worker does hold such a belief, is it reasonably held.

264. Although it is not possible to draw a clear dichotomy between information and a mere 'allegation' or expression of opinion, in order to amount to a 'disclosure of information' the statement relied on 'must have a sufficient factual content and specificity such as is capable of tending to show one of the matters listed in subsection (1) (see ***Kilraine*** at paragraph 35 and at paragraphs 21 and 29 to 36).

265. Disclosures must be viewed in the context in which they are made, and any context relied on as forming part of the basis on which a claimant says they made a protected disclosure should be set out in the claim form and clearly in evidence (***Kilraine*** paragraphs 41 to 42).

266. The focus is on whether in the reasonable belief of the worker (at the time) the information provided tended to show one or more of the matters relied on. It is not whether the worker genuinely / reasonably believed that there had been such a failure. The worker must also believe at the time that the disclosure is made in the public interest.

267. Both aspects involve a subjective and objective element, i.e., that the worker believes the information tended to show the matters relied on was in public interest *and* that they were reasonable in holding that belief (***Chesterton*** at paragraphs 8(1) and 27).

268. A belief can be reasonable even if it is wrong (***Chesterton*** at paragraph 8(2)).

269. There may be a range of reasonable views as to whether a disclosure is made in the public interest (***Chesterton*** at paragraph 28).

Detriment on the ground of a protected disclosure (section 47B)

270. Under Section 47B 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. This provision does not apply to employees where the alleged detriment amounts to dismissal.

271. Under section 48(2) of the Act, on a complaint to an employment tribunal it is for the employer to show the ground on which any act, or deliberate failure to act, was done.

272. Section 47B and Section 48(2) provides:

...47B Protected disclosures

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

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

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

(b) by an agent of W's employer with the employer's authority, on the ground that W has made a protected disclosure.

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

…48 Complaints to [employment tribunals]

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

273. Both Counsel drew our attention to the relevant authority of ***Fecitt and Ors v NHS Manchester [2011] EWCA Civ 1190; [2012] ICR 372 [2012] IRLR 64***.

274. Claimant's Counsel confirming that ***Fecitt*** firmly established that the test to be applied when considering whether a detriment was done *"on the ground*" of a protected disclosure is for the Tribunal to determine whether a protected disclosure was a *significant influence"* on the decision to act or not act. An influence is significant provided it is *"more than trivial"*. To do so the Tribunal must focus on the "*mental processes (conscious or subconscious) of whoever caused the detriment*.".

275. Respondents' Counsel highlighted that while its comments on this point are *obiter*, the Court of Appeal indicated that an employer will breach the worker's right not to be subjected to a detriment if the worker's disclosure "materially influences (in the sense of being more than a trivial influence)" the treatment meted out to the worker.

276. We note that a worker is subjected to a detriment *on the grounds of* a protected disclosure if the protected disclosure was a material (more than trivial) influence on the alleged perpetrator's treatment of the whistlebower (***Fecitt*** at paragraph 45).

277. In respect of the operation of the burden of proof LJ Elias said as follows in ***Fecitt***:

"41…The fact that it was the claimants, the victims of harassment, who were redeployed was obviously not a point lost on the tribunal. It was evidence from which an inference of victimisation could readily be drawn. But the tribunal was satisfied that the employer had genuinely acted for other reasons. Once an employer satisfies the tribunal that he has acted for a particular reason - here, to remedy a dysfunctional situation - that necessarily discharges the burden of showing that the proscribed reason played no part in it. It is only if the tribunal considers that the reason given is false (whether consciously or unconsciously) or that the tribunal is being given something less than the whole story that it is legitimate to infer discrimination in accordance with the principles in Igen Ltd v Wong.

…51.... I entirely accept that, where the whistleblower is subject to a detriment without being at fault in any way, tribunals will need to look with a critical—indeed sceptical—eye to see whether the innocent explanation given by the employer for the adverse treatment is indeed the genuine explanation. The detrimental treatment of an innocent whistleblower necessarily provides a strong prima facie case that the action has been taken because of the protected disclosure and it cries out for an explanation from the employer."

278. In a detriment claim, it is for the employer to show the ground on which any act, or deliberate failure to act, was done, section 48(2). Where a claim is brought against a fellow worker or agent of the employer under section 47B(1A), then that fellow worker or agent is treated as the employer for the purposes of the enforcement provisions and accordingly bears the same burden of proof as the employer.

279. Respondents' Counsel highlighted in his written closing submissions that section 48(2) does not mean that, once a claimant asserts that he or she has been subjected to a detriment, the respondent (whether employer, worker or agent) must disprove the claim. Rather, it means that once all the other necessary elements of a claim have been proved on the balance of probabilities by the claimant — i.e. that there was a protected disclosure, there was a detriment, and

the respondent subjected the claimant to that detriment — the burden will shift to the respondent to prove that the worker was not subjected to the detriment on the ground that he or she had made the protected disclosure. This was addressed during the oral closing submissions of Claimant's Counsel and we were referred to ***Chatterjee v Newcastle Upon Tyne Hospitals NHS Trust-UKEAT/0047/19/BA***, in particular paragraphs 33 and 34 of the Judgment of His Honour Judge Auerbach:

"33. There was no disagreement before me today as to the salient propositions that can be extracted from this body of authority, and I would summarise them as follows. Firstly, it will not necessarily follow, from findings that a complainant has made a protected disclosure, and that they have been subjected to a detriment, alone, that these must by themselves lead to a shifting of the burden under Section 48(2). The Tribunal needs to be satisfied that there is a sufficient prima facie case, such that the conduct calls for an explanation.

34. Secondly, if the burden does shift in that way, it will fall to the employer to advance an explanation, but, if the Tribunal is not persuaded of its particular explanation, that does not mean that it must necessarily or automatically lose. If the Tribunal is not persuaded of the employer's explanation, that may lead the Tribunal to draw an inference against it, that the conduct was on the ground of the protected disclosure. But in a given case the Tribunal may still feel able to draw inferences, from all of the facts found, that there was an innocent explanation for the conduct (though not the one advanced by the employer), and that the protected disclosure was not a material influence on the conduct in the requisite sense."

280. As explained by the EAT in ***Ibekwe v Sussex Partnership NHS Foundation Trust EAT 0072/14***, if an employment tribunal can find no evidence to indicate the ground on which a respondent subjected a claimant to a detriment, it does not follow that the claim succeeds by default In that case the EAT concluded that there were no grounds for interfering with the tribunal's unequivocal finding that there was no evidence that an unexplained 'managerial failure' to deal with an employee's grievance was on the ground that the grievance contained a protected disclosure.

281. The EAT summarised the proper approach to drawing inferences in a detriment claim in ***International Petroleum Ltd and ors v Osipov and ors EAT 0058/17***:-

a. the burden of proof lies on a claimant to show that a ground or reason (that is more than trivial) for detrimental treatment to which he or she is subjected is a protected disclosure that he or she made

b. by virtue of S.48(2), the employer (or worker or agent) must be prepared to show why the detrimental treatment was done. If it (or he or she) does

not do so, inferences may be drawn against the employer (or worker or agent) — see *London Borough of Harrow v Knight 2003 IRLR 140, EAT*

c. however, as with inferences drawn in any discrimination case, inferences drawn by tribunals in protected disclosure cases must be justified by the facts as found.

d. (There was an appeal to the Court of Appeal in the *Osipov* case — *Timis and anor v Osipov (Protect intervening)* 2019 ICR 655, CA — but the EAT's guidance on the drawing of inferences was not challenged.)

282. We note that detriment has been broadly interpreted in the whistleblowing and discrimination context and will be made out if a reasonable worker would or might take the view that the treatment had been to their detriment; it does not require a physical or economic consequence (***Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337***).

Time limits

283. Of relevance to the question of time limits are the provisions in relation to section 48 ERA 1996.

284. Section 48(1A) of the ERA 1996 confers jurisdiction on claims pursuant to section 47B to the employment tribunals, and section 48(3) provides that 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. Section 48(4) says 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.

285. Time will start to run for a detriment claim from the date of the act (or failure to act) on which the complaint is based, not from the date the employee becomes aware of that act or failure to act (***McKinney v Newham London Borough Council 2015 ICR 495).***

Reliability of evidence based on recollection

286. Generally in respect of our factual determinations in this case we were directed to note the widely cited guidance of Leggatt J. (as he then was) in ***Gestmin SGSP S.A. –v- Credit Suisse (UK) Ltd & Anor [2013] EWHC 3560*** on the fallibility of evidence based on recollection unsupported by any contemporaneous written record, and the caution that judges should exercise

when evaluating the dependability of such evidence. The guidance was reproduced by Respondent's Counsel in his written submissions. We note from that … "… the best approach for a judge to adopt … is, in my view, to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts. This does not mean that oral testimony serves no useful purpose – though its utility is often disproportionate to its length. But its value lies largely, as I see it, in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events. Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth.".

The Decision

287. As the seven alleged disclosures are in dispute, we need to determine whether the Claimant made one or more qualifying disclosures as defined in section 43B of the Employment Rights Act 1996.

288. We remind ourselves that relevant factual considerations as to whether something amounts to a qualifying disclosure are whether:

a. there has been a disclosure of information;

b. the worker believes that the disclosure is made in the public interest;

c. If the worker does hold such a belief, is it reasonably held;

d. the worker believes that the disclosure tends to show one or more of the matters listed in sub-paragraphs (a) to (f), which in this case is that a person had failed, was failing or was likely to fail to comply with any legal obligation; and/or the health or safety of any individual had been, was being or was likely to be endangered.

e. if the worker does hold such a belief, is it reasonably held.

289. Also, that the statement relied on 'must have a sufficient factual content and specificity such as is capable of tending to show that a person had failed, was failing or was likely to fail to comply with any legal obligation; and/or the health or safety of any individual had been, was being or was likely to be endangered. Also, disclosures must be viewed in the context in which they are made, and any context relied on as forming part of the basis on which the Claimant says they made a protected disclosure should be set out in the claim form and clearly in evidence.

290. The focus is on whether in the reasonable belief of the Claimant (at the time) the information provided tended to show that a person had failed, was failing or was likely to fail to comply with any legal obligation; and/or the health or safety of any individual had been, was being or was likely to be endangered. They must also believe at the time that the disclosure is made in the public interest.

291. Considering each of the alleged qualifying disclosures in turn:

292. Disclosure 1 - on 7 March 2019 a verbal disclosure to Janice McKenzie.

293. Considering the contemporaneous documents, the fact the Claimant raises concerns, and the content of those concerns does not appear to be in dispute between the Claimant and JM. The concerns the Claimant raises are also consistent with the matters raised by MH and the Claimant on the 1 March 2019. We therefore accept what the Claimant says he said to JM on the 7 March 2019. In broad terms the information is about staffing levels/morale issues and its decision-making structure that has a detrimental impact on patient safety. This in our view does amount to a disclosure of information which tends to show that the health or safety of any individual had been, was being or was likely to be endangered. Further, we accept that he reasonably believed this was so and in the public interest as he says, in his witness statement (paragraph 6), him having … "… a professional responsibility and legal duty to voice my concerns related to patient safety and to represent the views of my colleagues.".

294. Disclosure 3 - on 4 September 2020 a letter to the Second Respondent.

295. Within the letter the Claimant is referring to having made protected disclosures to HG and JM in the Spring of 2019, them not having been addressed and that being in his view gravely concerning for the service, staff and patients. Within the letter the Claimant asserts victimisation. We note that the Claimant asserts he feels victimised, linking that to previous disclosures he says he made. He also refers to the investigation process being protracted in contravention of guidelines.

296. There is no articulation or clarification as to the specific legal obligations that are in issue for the Claimant in what the Claimant has set out in his witness statement. Potentially it could be asserted there was a breach of the Employment Rights Act itself in the treatment of whistle-blowers, but that is not what the Claimant is telling us he believes he disclosed at that time.

297. As to health and safety the Claimant states in his witness statement that he has disclosed in his letter that the original issues that he had raised with JM in March 2019 had not been addressed, posing ongoing risks to patient safety and staff well-being. That is not what is expressly stated in the letter, it being … "I am also aware of the meeting held 2 weeks ago, during which on-going staffing, morale and patient safety concerns were, again, raised by my senior Labour Ward Midwifery colleagues with the Trust's Chief Nurse and the current Senior

Midwifery Management Team. The nature of these discussions and the concerns raised tragically leave me with no doubt whatsoever that none of my protected disclosures, raised with both Hilary Goodman and Janice McKenzie in the Spring of 2019 (later accepted and discussed by you, Nicki Hutchinson and the Chief Nurse in the emergency Consultant meeting on Tuesday 24th September 2019) have ever been appropriately addressed. This is unacceptable and gravely concerning for our service, our staff and, most importantly, our patients.".

298. It may have been the intention of the Claimant to state that a failure to appropriately address his disclosures to HG and JM posed ongoing risks to patient safety and staff-well-being, but that is not what is written.

299. For the purposes of our decision (i.e. the subsequent detriment causation determinations) we have taken the Claimant's case at its highest that this is what was intended to be communicated, accepting therefore that when he writes "This is unacceptable and gravely concerning for our service, our staff and, most importantly, our patients, it is his belief it tended to show the original issues that he had raised with JM in March 2019 had not been addressed, posing ongoing risks to patient safety and staff well-being. We accept that the reasonable beliefs associated with disclosure 1 would apply here also. We note that the Claimant does in his asserted disclosure acknowledge that his concerns have been accepted and discussed. Also, we note that an unclear "disclosure" would make it harder to conclude that it was that "disclosure" that was the grounds for what then happened.

300. Disclosure 4 - on 26 February 2021 an email to Steve Erskine, Jane Tarbor and Gary McRae.

301. This is a request for a meeting to then share information, it is not a disclosure of information that would in our view be sufficient to satisfy the relevant tests.

302. Disclosure 5 - on 7 April 2021 a verbal disclosure to Jane Tarbor.

303. The Claimant is recorded as saying that he wants to highlight problems with the Trust's disciplinary processes which he and others had experienced in order to prevent these from being perpetuated. The notes do not record him describing what they are. The Claimant does not set them out in paragraph 29 of his witness statement either.

304. We note that the Claimant's witness statement and the meeting note record do say … "All the deficiencies which he raised then [asserted to be 2019] had since become worse, including poor staffing levels, low morale, lack of consultant leadership and deteriorating clinical standards, which he felt might have contributed to a recent maternal death". We can appreciate how this, in the context of the previous disclosures (1 and 3) could be seen to be a disclosure of information that tends to show health and safety matters, if taken at its highest. Again, as with disclosure 3 we would note that the Claimant does at this time acknowledge that his concerns are being addressed. Also, as already observed

an unclear “disclosure” would make it harder to conclude that it was that “disclosure” that was the grounds for what then happened.

305. Disclosure 6 - on 20 May 2021 his written grievance sent to both Respondents.

306. We can see how taking what the Claimant asserts at its highest that it is possible to distil out a potential qualifying disclosure as we have done in respect of disclosures 3 and 5, particularly when considering the opening paragraphs to the grievance letter (page 514), where the Claimant writes … “that the concerns of significant public interest that I initially raised had been ignored … and that this negligent omission of managerial responsibility had further jeopardised patient safety and staff wellbeing.”.

307. It is clear though that making such a qualifying disclosure is not the primary purpose of the grievance letter, which is to raise a grievance as the Claimant says within his document (page 515) … “My decision to submit this grievance is to highlight the deficient and inhumane manner in which my disciplinary investigation has been managed by the Trust. I also seek some degree of Managerial accountability for this, to seek acceptance address of the Managerial incompetence and dishonesty that was demonstrated repeatedly throughout the process, to provoke a truly Independent, thorough and detailed review of the Trust’s handling of my and other’s Disciplinary Investigations and, ultimately, to prevent other employees from being treated in the same way that I have.”.

308. Disclosure 7 - on 10 June 2021 a verbal disclosure to Alex Whitfield.

309. Again, we can see how taking what the Claimant asserts at its highest that it is possible to distil out a potential qualifying disclosure as with disclosures 3, 5 and 6. The Claimant asserts in his witness statement … “I stated that failure to address my initial whistleblowing concerns had led to further deterioration in staff and patient safety.”. The Claimant repeats that failure to address his initial whistleblowing concerns had led to further deterioration in staff and patient safety.

310. Disclosure 8 - on 27 July 2021 an email with enclosures to Alex Whitfield and Kieron Galloway.

311. By taking what the Claimant asserts at its highest it is possible to distil out a potential qualifying disclosure similar to as we have done in respect of disclosures 3, 5, 6 and 7. As the Claimant states in his witness statement … “I again highlighted the ongoing patient safety and staff wellbeing concerns that failure to act on my initial whistleblowing protected disclosures had caused.”. We can see these matters are raised in his appeal … ““I initially raised with Janice Mackenzie in the Spring of 2019… deteriorating clinical standards and potential avoidable tragedies”. … “None of the concerns that I raised in 2019 have been appropriately and properly addressed”… “Concern 11: Failure to respond to safety concerns raised” … “7th Regarding my protected disclosure declaration in my meeting with Janice Mackenzie on March 2019 … were completely ignored”.

312. For disclosures 1, 3, 5, 6, 7 and 8 we accept that the Claimant's evidence taken at its highest shows disclosures of 'information' that tend to show the health or safety of any individual had been, was being or was likely to be endangered in that he raises concerns in disclosure 1 about staffing levels/morale issues and its decision-making structure that has a detrimental impact on patient safety. Then he reminds of those in disclosures 3, 5, 6, 7 and 8 and that not acting on them originally and subsequently maintains or enhances those concerns. Owing to the nature of what we find he disclosed we accept that he believed his disclosures tended to show this and with a patient safety concern it was in the public interest. We also accept they were reasonably held beliefs, because the Claimant, albeit acknowledging that matters were being accepted and discussed, and being addressed, it does not stop his core message being sustainable as he does not accept the Respondent addressed his concerns at the time, nor subsequently resolved his original concerns.

313. However, for disclosures 3, 5, 6, 7 and 8 which are also asserted tend to show that a person had failed, was failing or was likely to fail to comply with any legal obligation, we do not find that the information disclosed as has been presented to us, together with the Claimant's evidence about what was disclosed and why, does tend to show this, nor a reasonable belief in that or the public interest. As we have noted although potentially it could be asserted there was a breach of the Employment Rights Act itself in the treatment of whistle-blowers, that is not what the Claimant is telling us he believes he disclosed at the time, nor why be believes that to be in the public interest. The Claimant's evidence on these matters focuses on how he perceived at the time that he had been impacted on a personal and professional level and how he believed that the Trust had breached numerous local and national guidelines throughout their handling of his case. Then in view of that, how he has suggestions where things could be improved. The Claimant's references to breaches of such guidance are very much focused on the impact on him.

314. We also note from the closing written submissions of the Respondents in respect of the Claimant's assertions around legal obligations and the status of guidance documents that reliance … "is placed on the Baroness Harding guidance as giving rise to a legal obligation. Beyond the repeated (and inaccurate) attempts to characterise the Harding letter as a 'directive', it is not explained in Mr Pitman's case why this is alleged." … "Even if the Harding guidance comprised a governmental directive, it would not gain the contractual status unless it was formally adopted by the Trust's Board, following its own collective consultation process *via* its JNC (joint negotiating committee]. This was explained by the High Court (Swift J. at §§29-35) in *Jain v Manchester University NHS Foundation Trust [[2018] EWHC 3016]* a case which considered whether, by virtue of a governmental direction, NHS Foundation Trusts were contractually bound to implement the MHPS framework into its own local procedures." … "Even if that process of adoption at Board level had taken place, there would then arise a question of whether any particular feature was '*apt'* to be given contractual effect." (paragraphs 49, 50 and 51 of the Respondents' submissions).

315. We accept what the Respondents submits about this.

316. As is noted in the agreed list of issues (paragraph 2.2) where we have found that the Claimant has made a qualifying disclosure, then it was a protected disclosure because it was made to the Claimant's employer pursuant to section 43C(1)(a) of the Act.

317. With the findings we have made it is necessary for us to consider each of the alleged detriments and whether they are a detriment as alleged and if so whether we are satisfied that there is a sufficient prima facie case, such that the conduct calls for an explanation. Then if so, it is for the Respondents to advance an explanation and for us to consider whether they have proven that the Claimant was not subjected to the detriment on the ground that he had made the protected disclosure. We also note that if we are not persuaded of the Respondents' explanation, that may lead us to draw an inference against them, that the conduct was on the ground of the protected disclosure. But we may still feel able to draw inferences, from all the facts found, that there was an innocent explanation for the conduct (though not the one advanced by the Respondents), and that the protected disclosure was not a material influence on the conduct in the requisite sense.

318. For the purposes of our determinations, we address the alleged detriments in the order that they arise chronologically.

319. We also note the following:

320. We have noted from the contemporaneous account around disclosure 1 that JM refers to pre-existing concerns about the Claimant and that she does not hide that the Claimant raises concerns with her … "I let him talk and share all of his concerns". It is the manner of the Claimant that she complains about.

321. This is completely consistent with the evidence of MH in support of the Claimant (at paragraphs 13 to 15 of his statement). As is stated in paragraph 13… "Martyn sees himself as an advocate for high standards and can be singly minded in ensuring that others receive the message, however difficult they find it. This was not a problem in a clinical setting [page 296- 297] but became a huge issue when it was directed at the SMT, who found the conflict unacceptable. They felt that he was being antagonistic, and sometimes, he was. It wasn't personal from Martyn's perspective, but the individual members of the SMT clearly felt that it was.". Then at paragraph 14 … "There were many meetings where it was clear that the SMT were genuinely distressed by the tone and criticism they were receiving, with some occasions of them walking out of a meeting". And at paragraph 15 … Janice was deeply upset by whatever was said.".

322. We have also noted from the Claimant's timeline document dated 4 July 2019 at pages 277 to 278 of the bundle, that the Claimant observes JM at the start of the meeting "is unusually subdued". This is consistent with what JM articulates in her email sent on 7 March 2019 (page 1092). Also … "… After the third point she interjected saying 'You are doing this to get back at me due to you feeling that I did not support you over your diathermy injury.'. JM does not appear to view what the Claimant is doing as being motivated by any form of

"whistleblowing". It also records that … "… it became clear that she was becoming emotional and started to cry.".

323. Considering the contemporaneous documents, the fact the Claimant raises concerns, and the content of those concerns does not appear to be in dispute between him and JM. The issue for JM is the way the Claimant does it. We would also observe that no issue is raised about MH's conduct when he relays the same concerns that the Claimant relies upon on the 1 March 2019.

324. Detriment 12 – with regards to the 2020 MHPS investigation the First Respondent, Alex Whitfield, Kevin Harris, the members of the PSAG (with the exception of Ben Cresswell) and Julie Dawes continued with a vindictive investigation process against the Claimant as compared with others such as Gary Dickinson in 2019 and Avideah Nejad in 2021/2 who were treated in a supportive manner (said to be on the grounds of Disclosures 1).

325. If we find as the Claimant asserts, then continuing with a vindictive investigation process against the Claimant would be to his detriment.

326. We accept what the Second Respondent says about the comparators. She was not involved in managing the GD matter, so has not personally treated him differently to the Claimant. It is the Second Respondent that is overseeing the MHPS process involving the Claimant. The situation of AN is different to the Claimant's, hers arising out of the performance of a specific clinical procedure, which is no longer performed either by AN or the First Respondent.

327. The outcome letter states that the investigation is now concluded. It is also clearly articulated in the letter from the Second Respondent that … "Firstly, I would like to reiterate that the IRC recognise that you are a respected clinician and that you had genuine concerns, which are being addressed outside this process. As I explained, while they considered there is a case to answer, they did not feel that that you intended to cause harm but that your style of communicating could be, and was, perceived as such by the recipients, and that this had caused harm to their health and wellbeing. To be clear, it is your communication style, not the message you are trying to convey, that is at variance with what is expected of doctors in GMC Good Medical Practice.".

328. Having considered the investigation report and the conclusions reached, in the context of the background facts we have already noted, we accept the evidence of the Respondents on this matter. Based on these facts we do not find that the Respondents continued with a vindictive investigation process against the Claimant as compared with others such as Gary Dickinson in 2019 and Avideah Nejad in 2021/2. What has been presented to us factually does not support that, and neither is there anything to infer that what we have found has happened to this point was on the grounds of disclosure 1.

329. Detriment 11 - from September/October 2020 to date the First Respondent, Fay Corder, the Second Respondent Nicky Hutchinson, and Avideah Nejad behaving prejudicially towards the Claimant in that they

arranged for him to be monitored and colleagues were invited and encouraged to complain about him (said to be on the grounds of Disclosures 1 and 3).

330. If we find as the Claimant asserts, in that they arranged for the Claimant to be monitored and colleagues were invited and encouraged to complain about him, that would be to his detriment.

331. About this we accept what the Second Respondent says as to the setting up and role of the PSAG.

332. We note that the Claimant acknowledges that clinics were not done, but he asserts others were done in their stead. This is an issue therefore it appears reasonably explored by NH and an explanation provided. We also note that no allegations of detriment are now pursued against NH.

333. The Claimant does not present evidence to say he responded to AN's email, which is sent to him, dated 23 March 2021 (page 479), either to challenge what is said or confirm his decision on matters as requested.

334. Considering paragraph 31 of the Claimant's witness statement, the Claimant himself links what is happening here (if it did as he says) to being provoked by him raising concerns about the management of the intrapartum maternal death, so not because of any of the alleged protected qualifying disclosures he makes.

335. About detriment 11 the Respondents submit in their written closing submissions (paragraph 154) … "This allegation is without foundation. There is clear evidence that C was refusing to engage with his managers over the agreement of his job plan; attendance at pre-arranged clinics; non-adherence to leave notification; refusal to engage in necessary retraining; slamming the door at a departmental meeting and demonstrating an antagonistic attitude towards his managers at all levels. There is no evidence that reporting of such conduct was encouraged. It was clearly conduct with potential implications for patient safety and service delivery and was properly escalated."

336. Based on the evidence we have considered and the facts we have found we accept what the Respondents assert. The Claimant has not proven an inference of a link between any particular alleged disclosure, and this alleged detriment.

337. Detriment 1 - on 25 May 2021 both Respondents convening an extraordinary PSAG meeting to discuss performance issues relating to the Claimant (said to be on the grounds of Disclosures 1 to 6 inclusive).

338. Detriment 2 - on 25 May 2021 the First Respondent, and the PSAG meeting personnel (including the second respondent but not Mr Ben Cresswell) criticising and managing the performance of the Claimant (said to be on the grounds of Disclosures 1 to 6 inclusive).

339. Detriment 3 - on 25 May 2021 the First Respondent, and the PSAG meeting personnel (including the Second Respondent but not Mr Ben Cresswell) conducting the PSAG process which was put together with the intention of managing the Claimant and was not objective (for example the chair of the process Dr Alloway had been named in the Claimant's grievance and should not have chaired the PSAG process, and that process did not have a clear remit or process and was used as a vehicle to make decisions about the claimant's management, which included inappropriate findings about patient safety which the claimant was not afforded the opportunity to address or to challenge) (said to be on the grounds of Disclosures 1 to 6 inclusive).

340. Detriment 4 - on 25 May 2021 during the PSAG meeting the First Respondent, and the PSAG meeting personnel (including the second respondent but not Mr Ben Cresswell) the Claimant alone was blamed for continuing communication issues (said to be on the grounds of Disclosures 1 to 6 inclusive).

341. We consider these four detriments together as they are all connected.

342. It does not appear to be in dispute that the convening of the PSAG would be to the detriment of the Claimant (it is not raised as being so in the Respondents' written closing submissions) as it is to consider management concerns raised about the Claimant and how those should be addressed. The Respondents' case is that the Claimant has not shown that that decisions to do so and as to matters considered at the PSAG were tainted by any of Claimant's purported disclosures. Further, that it is denied that the Second Respondent should have regarded herself as conflicted from chairing the PSAG.

343. We find that that the diverse expressions of concern about the Claimant that we have referred to in our fact find above, relayed it appears independently of any particular asserted qualifying disclosure said to have been done by the Claimant, would be the influence on what the Second Respondent and the PSAG personnel does in calling the meeting and deciding what they do at that meeting.

344. There is an independent verification of matters in the form of BC who attended the PSAG meeting, gave evidence to this Tribunal and stood by what was decided at that meeting when cross examined about it. BC is not accused of acting to the Claimant's detriment on the grounds of any alleged qualifying disclosure.

345. It was also confirmed what internal legal advice was given at that PSAG meeting; privilege being waved in respect of that particular aspect (page 561) … "LW advised that the PSAG was being consulted. If the PSAG is of the view that the employment relationship with MP is untenable, and that there is no realistic prospect of it being restored, then the next step would be for LA, as Chair of the PSAG, formally to outline that view to the Chief Executive.". This is what the Second Respondent then does.

346. It was also confirmed at the conclusion of the cross examination of NH that no detriment claims would be pursued against her as an individual (being alleged detriments 2, 3 4, 12, and 13). Therefore, we can accept that NH's views as to the way the Claimant is perceived, were contributed independent of any alleged protected qualifying disclosure.

347. Both BC and the Second Respondent were cross examined about conflicts at the PSAG and whether the Second Respondent should have chaired the PSAG process in view of the Claimant's grievance. They did not accept that. The Second Respondent was the CMO for the First Respondent, is the responsible officer and it is her role to manage issues such as those raised about the Claimant. Both the Second Respondent and BC confirmed that through their responsible officer training the existence of a grievance would not be a basis to recuse oneself from this process. We accept what they say which is consistent with paragraph 4 of the Responsible Officer training document (page 1146 (or page 8 of that document)) which notes the situations where it may not be appropriate to appoint an alternative responsible officer giving the example of where there is an ongoing disciplinary process or a grievance that has been raised by the doctor against the responsible officer that has not concluded.

348. We do not find anything to infer a prima facia case, but even if there were we accept the reasons expressed by the Respondents for what they did and that they have proven that the Claimant was not subjected to these detriments on the ground that he had made the protected qualifying disclosures or any particular disclosure for that matter.

349. Detriment 5 - on 9 June 2021 the First Respondent by the hand of the Second Respondent wrote a letter to Alex Whitfield raising the possibility of the Claimant's dismissal acting as chair of the PSAG meeting when she should not have been acting as chair (said to be on the grounds of Disclosures 1 to 6 inclusive).

350. It does not appear to be in dispute that the writing of such a letter would be to the detriment of the Claimant (it is not raised as being so in the Respondents' written closing submissions). The Respondents' case is that it was done in response to the Second Respondent's genuine perception that 'there was a persistent and intractable breakdown which is unlikely to be recoverable' (page 579).

351. We do not accept what the Claimant submits about this. As we have set out above, we find that the Second Respondent does what she does based on her concerns as to the Claimant's working relationships with colleagues, PSAG input and internal legal input. This is then recorded in her subsequent letter. What is stated by the Second Respondent about the grievance in her letter is a matter of fact, and not the significant influence on why she did what she did. We accept what the Second Respondent says.

352. As already noted, BC, who is not accused of any act of detriment, in his oral evidence stood by the course of action implemented by the letter.

353. Detriment 6 - on 10 June 2021 Alex Whitfield of the First Respondent should have recused from chairing the Claimant's grievance hearing following that letter from the second respondent and should have communicated to the second Respondent that the PSAG's recommendation to terminate the claimant's employment was entirely inappropriate (said to be on the grounds of Disclosures 1 to 6 inclusive).

354. It is not in dispute that AW chaired the Claimant's grievance hearing. As to this being a detriment to the Claimant or not, that is intertwined with what we find as to whether AW should have recused herself.

355. On this matter we accept what AW says. We also accept the submissions made in the Respondents' written closing submissions at paragraphs 144 and 145. In view of the grievance raised and the seniority of AW, it was properly part of her role to address the Claimant's grievance.

356. Detriment 7 - on 9 July 2021 the first respondent and Alex Whitfield not upholding the Claimant's grievance and continuing to make unsubstantiated allegations of concerns over patient safety (said to be on the grounds of Disclosures 1 to 7 inclusive).

357. It is submitted in the Respondents' closing written submissions that as the grievance process was detailed and closely reasoned following a full and fair hearing and confirmed at an outcome meeting, both of which the Claimant attended with representation, it is not understood how the Claimant claims to have suffered any actionable detriment (paragraph 146). In the Claimant's closing written submissions it is asserted that there was a complete failure of AW to undertake an investigation and conclude there was "no evidence" that establishes … "the appalling and wholly in appropriate approach by AW to C's grievance" (paragraph 309) and … "AW did not uphold C's grievance…" (paragraph 310). Therefore, as with detriment 6, as to this being a detriment to the Claimant or not, that is intertwined with what we find about the grievance process and outcome, and whether AW said what the Claimant alleges she said.

358. Having considered what AW submits in evidence and her responses to cross examination we accept that what AW finds as set out in her grievance outcome letter (pages 629 to 642) is detailed and reasoned and does reflect on the questions posed by GH. What she finds is for those reasons and cannot be inferred to be significantly influenced by any particular asserted disclosure or protected qualifying disclosures made by the Claimant.

359. As to AW continuing to make unsubstantiated allegations of concerns over patient safety, these are reflective of what is communicated to her by the Second Respondent in the letter dated 9 June 2021 (page 578).

360. The Claimant asserts (in paragraph 40 of his statement) that AW said to him at the meeting on the 9 July 2021 … "To my consternation AW also claimed that she (and the PSAG) believed that my return to my previous role could pose a potential significant risk to patient safety.".

361. AW did not accept this was said and confirmed that it is not referred to in the minutes of the meeting (pages 622 to 626). She also felt confident this was the case in view of the way the Claimant raised the matter at appeal and in her oral evidence referred us to page 828 of the bundle which records the Claimant saying about the meeting on 9 July 2021 … "To have your CEO announce that the senior members of your organisation want your employment terminated was devastating.".

362. We also note that DP although present at that meeting does not say what the Claimant says was said to him was said.

363. We accept the evidence of AW on this matter.

364. Detriment 13 - from July 2021 onwards the First Respondent, the Second Respondent, Alex Whitfield, the PSAG, Kieron Galloway, Avideah Nejad and Renee Behrens placing the Claimant on special leave despite the accusations of patient safety concerns being unsubstantiated and not supported by evidence (said to be on the grounds of Disclosures 1 to 7 inclusive).

365. We find that the reason the Claimant is on special leave is it is offered and then accepted by the Claimant, with the support of Dr Spenceley and DP. This is what the Claimant wants so it is unclear how it is to his detriment. In his statement at paragraph 41 the Claimant explains that he views it as enforced exclusion from his clinical role. However, even accepting that, there is nothing to infer that what happened was because of any alleged disclosure or disclosures the Claimant says he made.

366. Detriment 8 - on 20 July 2021 the first respondent Alex Whitfield and Steve Erskine commissioned an external report from Mr Hay, but he was known to the First Respondent and its chair Alex Whitfield and he was not independent, and they deliberately restricted the terms of reference to the claimant's disadvantage. The Claimant subsequently wrote to the Respondents challenging the factual findings as being inaccurate (and the claimant has agreed to supply a copy of this letter to the respondent within 14 days (all said to be on the Disclosures 1 to 7 inclusive).

367. The focus in the Claimant's written closing submissions about the commissioning of GH is on the evidence of SE. Therefore, as to this being a detriment to the Claimant or not, again we would note that this is intertwined with what we find about the commissioning of GH.

368. We accept what SE says about the commissioning of GH.

369. As is highlighted in paragraph 150 of the Respondents' closing submissions and which we accept the GH report is commissioned because of the Claimant asking for a review of the case. It is agreed to by the First Respondent despite no obligation to do so, and by doing so it is subjecting its own procedures to external scrutiny. We do not find the Claimant has proven the detriment he alleges.

370. Detriment 9 - from July 2021 onwards the First Respondent, Alex Whitfield and Kieron Galloway unreasonably delaying the process of the Claimant's appeal for several months (said to be on the grounds of Disclosures 1 to 8 inclusive).

371. Detriment 10 - from 3 August 2021 the First Respondent, Alex Whitfield and Kieron Galloway unreasonably delaying the completion of the Claimant's DSAR and FOIAR requests, particularly in excess of the 28 days allowed under the relevant procedures (said to be on the grounds of Disclosures 1 to 8 inclusive).

372. There does not appear to be a dispute between the parties that the delay in the appeal process at the Claimant's request is because the Claimant wants the responses to his FOIAR and SARs.

373. The Claimant addresses this allegation in paragraph 43 of his witness statement. The Claimant asserts detriment because the delay in providing the requested information delayed his appeal.

374. Detriment 9 therefore requires a finding that detriment 10 as alleged is proven.

375. The witness statement of AW confirms that her involvement in the DSAR and FOIAR requests was to suggest ways of speeding up the process. There is no evidence to show she was involved either directly or indirectly in any delay. AW maintained this position in cross examination, and we accept what she says.

376. In relation to detriments 9 and 10, it has not been shown that what KG does is influenced in any way by any particular disclosure or disclosures by the Claimant. In cross examination it was put to KG that he was motivated by the knowledge of the Claimant's whistleblowing claim, and to time the Claimant out, rather than any particular alleged disclosure or disclosures. Considering the facts we have found, KG has no involvement in any "delay" in the SARs and his input as to the delay of the appeal is to respect the Claimant's requests to delay the process, but highlighting the importance of trying to avoid further delays in the process.

377. The documents presented to us (such as the emails at pages 790 to 797) do not show the Claimant has concerns as to the conduct of the Data Protection Officer. No allegations are raised against them.

378. Having considered each of the alleged detriments, there is in our view an overarching reason for what has happened to the Claimant that is not on the grounds of any of the alleged or proven protected qualifying disclosures. In short, it is the Claimant's communication style and not the message he was trying to convey. This is confirmed by MH in support of the Claimant as stated in paragraphs 13 to 15 and 21 of his witness statement. It was confirmed in the investigation report arising from the MHPS. The Second Respondent confirms this in her letter dated 4 November 2019 (pages 379 to 380). Issues with his

communication and engagement continue leading to an escalation of matters to a PSAG meeting and the conclusions as then communicated by the Second Respondent. AW reaches the same conclusions in determining the Claimant's grievance.

379. As we have set out above, we do not find that, even if a detriment is proven, that it is on the ground that the Claimant had made a protected qualifying disclosure. We accept the reasons presented to us by the Respondents for what happened.

380. We would note though that as MH observes … (paragraph 11 of his witness statement) … "I worked very closely with Janice McKenzie when I was Clinical Director and I hope she would agree that we had a sound and respectful working relationship. We both identified that there were communication issues between the obstetricians and the SMT and both therefore must take responsibility that the issues that have led to this Tribunal were not resolved on our watch.". Also, as noted in the MHPS investigation report conclusions (page 358) … "The overall culture of team-working and leadership within the SMT was observed to be disconnected from staff working 'on the shop floor' leading to a sense of disengagement and disempowerment in staff working at band 7 and below. This has also affected the relationship between the SMT and the obstetric consultant body. Team-working behaviours have altered as a consequence of this resulting in further damage to professional relationships. …There is potential reputational damage to MP, the department as a whole, and to HHFT as a result of these observed occurrences.". Also, … "It is suggested that a more formal approach at an earlier stage might have helped to mitigate some of the effects observed during this investigation". In short, it would appear there was more the First Respondent could have done at an early stage to potentially resolve these working relationship issues. It is a real shame that was not done.

381. For these reasons we do not need to go on and consider the time limit jurisdictional issues.

382. It is the unanimous judgment of the Tribunal that the Claimant's complaints of detriment on the grounds of whistleblowing, fail and are dismissed.

Employment Judge Gray
Date: 26 October 2023

Judgment sent to Parties: 27 October 2023

FOR THE TRIBUNAL OFFICE