EMPLOYMENT TRIBUNALS

SITTING AT: **LONDON CENTRAL**

BEFORE: **EMPLOYMENT JUDGE F SPENCER**

MEMBERS: **MR T HARRINGTON-ROBERTS**
MS M PILFOLD

CLAIMANT **MR D DAWES**

RESPONDENT **ROYAL COLLEGE OF NURSING**

ON: **16 – 26 April 2024 and, (in Chambers) 14 and 15 May 2024**

Appearances:

For the Claimant: In person
For the Respondent: Mr T Coghlin, KC

RESERVED JUDGMENT

The Judgment of the Tribunal is that:

(i) the Claimant was not a worker as defined in Section 230(3) of Employment Rights Act 1996 and extended by section 43K of that Act. His claim for whistle blowing detriment therefore cannot succeed and is dismissed.
(ii) In any event, and for the avoidance of doubt, the Claimant was not subjected to detriments because he had made protected disclosures.
(iii) The Claimant's claim of unjustifiable discipline contrary to section 65 of the Trade Union and Labour Relations (Consolidation) Act 1992 is unsuccessful and is dismissed.

REASONS

Background and issues

1. This is a claim of whistleblowing detriment (contrary to section 47B of the Employment Rights Act 1996) and unjustifiable discipline contrary to sections 64 and 65 of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRA).

2. The Claimant was a long-standing member of the Respondent union. He was elected as Chair of the Council in September 2020. In July 2021 the Claimant was suspended as Chair of the Council and subsequently after two disciplinary processes, each relating to different matters of conduct, he was expelled from the union.

3. The Claimant has presented two claims. The first was presented on 18th February 2022 (after he had been notified of the outcome of the first disciplinary process) and the second on 20 May 2022, after he had been notified of the outcome of his appeals of both disciplinary processes. The claims were consolidated for hearing together.

4. The issues were set out at pages 211 – 218 of the bundle and are reproduced in the schedule to this judgment. At the risk of oversimplification, it was for this tribunal to determine:

    a. Whether the Claimant was a worker such that he was entitled to bring a complaint of whistleblowing detriment
    b. If so, whether the Claimant made any qualifying and protected disclosures. The Claimant relies on 6 disclosures, all of which were made to the Press.
    c. If so, whether the Respondent subjected the Claimant to the pleaded detriments because he had made a protected disclosure.
    d. Whether the Claimant made an assertion as defined in section 65 (2) (c) of TULRA.
    e. Whether he was unjustifiably disciplined because of that or those assertions.

5. There has been a lengthy procedural history prior to this hearing with, we are told, some eight preliminary hearings prior to this hearing. In August 2022 the Respondent applied for an order to strike out the Claimant's claims on the ground that they had no reasonable prospect of success or for a deposit order. That application was heard before Employment Judge Klimov in January 2023 and was unsuccessful.

6. At that hearing Judge Klimov also permitted the Claimant to amend his claim to add two new protected disclosures. These were referred to during this

hearing as PD5 and PD6. The exact content of PD5 and PD 6 was not known to the Respondent until 21 July 2022 when the Claimant released copies of those emails pursuant to an order of the Tribunal.

7. Pursuant to a Rule 50 order made on 22 August 2022 a small part of the hearing (and reference to a small number of documents) was heard in private.

8. While a hearing of this length and complexity would normally be held in person, permission was granted by the Tribunal for the hearing to be by CVP because the Claimant lived in Manchester and has a caring responsibility for his adult son who lives with him. The Claimant had provided evidence from the DWP as to his son's condition, and EJ Clarke was satisfied that his being away from home for over a week would not be conducive to his son's well-being or the Claimant being able to fully focus on his claim.

9. The Tribunal heard evidence from the Claimant on his behalf. For the Respondent we heard evidence from the following:

    a. Stephanie Wilson, Director of Governance for the Respondent.
    b. Patricia Cullen, General Secretary and Chief Executive of the Respondent.
    c. Stephen Mason, Director of People and Organisational development for the Respondent.
    d. Philip Ball, Director of Policy, Communications and Marketing of the Respondent.
    e. Joanna Lewis, Head of Investigations and Complaints at the Respondent.
    f. Alice Mayhew KC, an independent barrister who chaired a disciplinary hearing into allegations against the Claimant,
    g. Adam Ohringer, an independent barrister who chaired a disciplinary panel to hear further allegations against the Claimant; and
    h. Bruce Carr KC, an independent barrister and deputy High Court judge who was appointed by the Respondent to conduct an investigation into the circumstances surrounding the departure of its former Chief Executive, and to hear the Claimant's appeal against the decisions of the disciplinary panel.

10. The Tribunal had a very large number of documents, an open bundle amounting to 2000 pages, as well as a small private bundle, lengthy skeleton arguments and various other documents.

Findings of relevant fact

11. Worker status. The Claimant is a registered nurse. The Respondent is a professional organisation and trade union for nursing staff. The Respondent is a Special Register Body established by Royal Charter. (259). The Charter defines the objectives, constitution and powers of the Respondent and is supplemented by Rules annexed to the Charter, Standing Orders made by

special resolution of the members pursuant to a power granted in clause 15 of the Charter, and Regulations made by the Council pursuant to a power granted in clause 16 of the Charter.

12. The Respondent is run and managed by a General Secretary and Chief Executive, supported by an Executive team comprising 10 senior members of staff. It also has a governing body to whom the Chief Executive reports.

13. The governing body is known as the Council, akin to a non-executive board of directors of a company. It has 17 members. Its members are elected by the membership. It is the most senior body and is accountable to the members. The Chief Executive/ General Secretary reports to the Council.

14. Council members are unpaid positions. They are elected in accordance with the provisions of the Standing Orders. They are not entitled to benefit from their positions (see Article 5 of the Charter and Standing Order 7.6), but may be reimbursed for genuinely incurred out-of-pocket expenses. The Chair of the Council occupies his post as a fiduciary as does the President. Clause 20 of the Standing Orders provides that the Chair of the Council is elected bi-annually by the members of the Council from among their number.

15. As part of its governance, a paper was prepared outlining the roles of each of the Chair of the Council, the President and the Chief Executive (485). It provides that the President is the "spirit of the organisation" whose role is to represent the Respondent and nursing to the membership and externally. The Chair of the Council is accountable to Council and "leads in ensuring that the Council fills its overall governance role." The role of the General Secretary (Chief Executive), which is a paid full-time position, is to facilitate the development of strategic vision for the Council and oversee its implementation. As the most senior member of Council, the duties of the Chair of the Council included the line management of the General Secretary, including approving her leave and expenses.

16. The Respondent also has a Member Resolution Process to be applied where the standards of behaviour and conduct of the members are alleged not to have met the expectations and requirements of the Respondent (301). This is separate from the disciplinary procedure for staff, although the process is similar. The Respondent also has a whistleblowing policy for members of the Council (272). There is no separate process for members of the Council, who are subject to the general policy for ordinary members.

17. The Claimant was elected as Chair of the Council in September 2020 and his term of office ran until 31 December 2021 (as he had been elected partly through a term when the previous incumbent resigned).

18. The role of the Chair of the Council is a busy one. Its principal role is to chair meetings of the Council and to undertake certain functions delegated to the Chair by way of policies adopted by the Council. However, there was no set time commitment for the Chair to devote to Council duties, and different

individuals who undertook the role of Chair would spend differing amounts of time on the role. During his time as Chair the Claimant decided to implement monthly rather than quarterly Council meetings which increased his time commitment, but this was a decision which he took personally and had not been directed by the Executive or the membership.

19. In 2003 it was resolved that the Respondent could reimburse the organisation or entity which employed the Chair of the Council for his or her salary for up to 2 days to reflect the time lost while the Chair was undertaking activities for the Respondent. (483). This reimbursement was not paid to the Chair, but to the employing entity. When the Claimant took up his post as Chair of the Council he was not in employment and was not paid.

20. The system relied on the goodwill of elected officers and their employers to allow them to undertake the work required of them. The system of reimbursement to employers for up to 2 days a week reflected the reality that the Chair might well spend two days a week on Council business, which reflected a loss to their employers of their time. Employers were not routinely reimbursed; some employers did not claim it, and some Chairs undertook the role outside the hours required for their employed position.(527) In 2018 the Respondent had declined to reimburse an employer for time spent by the then Chair on Council business because the Chair of the Council had a significant equity stake in her employer. It was determined that to do so would have benefited the Chair in a way which was prohibited by the Charter. (1677) When the Claimant sought reimbursement for his employment in a way which indirectly benefited him (through a CIC called Angelfish) that payment was refused.

21. There was no contract (express or implied) between the Claimant and the Respondent. He was, as set out above, elected by the members and his role was governed by the Charter. No contract could be implied as the role was fully explained and governed by the Charter.

22. The Claimant suggests that there was an implied contract (see paragraph 11 of his opening skeleton) covering reimbursement to their employer and issues of control and subordination. He refers to the fact that he had the power to suspend the General Secretary, and functioned as her line manager. He said he was subject to disciplinary rules and procedures and that he had specific responsibilities that could not be delegated.

23. We do not accept that those matters require an implied contract. There was no obligation to reimburse the employer – this had been implemented by way of a resolution and could be revoked. There was an express prohibition on the provision of any remuneration directly or indirectly to members of the council including the Chair. All those provisions are perfectly consistent with the role of a fiduciary and a volunteer. The Resolution Policy which set out a process for dealing with misconduct applied to all members regardless of whether or not they were members of Council or ordinary members.

Potential conduct issues relate to membership rather than any specific role or responsibility.

Law relating to worker status

24. In order to qualify for protection as a whistleblower, an individual needs to be a worker. A worker is defined in section 230(3) of the Employment Rights Act as:

> "An individual who has entered into or works under (or where the employment has ceased, worked under)
> (a) a contract of employment or
> (b) any other contract whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by individual;
> and any reference to workers contract shall be construed accordingly."

The ordinary reading of those words requires therefore a contract to perform work or services.

25. Section 43K of the Employment Rights Act 1996 extends the definition of worker in certain circumstances. This, so far as relevant, provides that

> (1) "For the purposes of this Part "worker" includes an individual who is not a worker as defined by section 230(3) but who—
>
> (a) works or worked for a person in circumstances in which—
>
> (i) he is or was introduced or supplied to do that work by a third person, and
>
> (ii) the terms on which he is or was engaged to do the work are or were in practice substantially determined not by him but by the person for whom he works or worked, by the third person or by both of them……

This section is primarily directed at employment agency relationships, although it is not limited to such cases.

26. In *Gilham v Ministry of Justice 2019 ICR 1655* the Supreme Court found that a Judge was a worker and able to bring a whistle-blowing claim notwithstanding that Judges are office holders and do not work under a contract and therefore did not meet the definition of worker under the Employment Rights Act 1996. It held that the exclusion of Judges from the protection afforded by section 47B was in breach of their rights under Article 14, read with Article 10, of the European Convention on Human

Rights (the ECHR). To remedy this breach it found that that the definition of worker in section 230 could be read "to include within limb (b) an individual who works or worked by virtue of an appointment to an office whereby the office holder undertakes to do or perform personally any work or services otherwise than for persons who are clients or customers of a profession or business carried on by the office holder". This is a broad formulation.

27. It is generally accepted that the judgment in Gilham, although its ratio is confined to judges, has potentially wide ramifications and "opens the gate" for other "status" challenges to be made for individuals who do not qualify for rights under the Employment Rights Act 1996 because they are neither employees nor workers. The authors of the IDS Employment Law Brief comment that "*For example there is now scope for volunteers, non-executive directors and other office holders to bring such claims where Article 14 would be breached if status was a bar to the exercise of domestic rights which fall within the ambit of a Convention right*. ((IDS Employment law Brief 2019 1120 3-8)."

28. In Gilham the Supreme Court said that to establish a breach of Article 14 the court should answer four well known questions:

    (1) do the facts fall within the ambit of one of the Convention rights?
    (2) has the Claimant been treated less favourably than others in an analogous situation?
    (3) is the reason for that less favourable treatment one of the listed grounds or "some other status"? and
    (4) is that difference without reasonable justification – put the other way round is it a proportionate means of achieving a legitimate aim?

<u>Conclusion on the worker issue</u>

29. In his skeleton argument the Claimant relies on a number of cases in support of the proposition that he qualifies for worker status. He refers to Catt v English Table Tennis Association Limited (331 2887/20) for the proposition that a Non-Executive Director was a worker. He also refers to The Rev Green v The Lichfield 2020 3240 9635/22 and Moon v Lancashire and South Cumbria NHS Foundation Trust 2020 2241 4248/2021.

30. However the Claimant in all of those cases was remunerated, whether it was called a stipend or a fee. In those cases the Tribunal was able to find a contract. In this case there was no remuneration and there is no reason to imply a contract. None of those cases has facts analogous to the Claimant's situation and, in particular, the payment of remuneration puts all those cases in a different category to that of the Claimant.

31. The Tribunal is satisfied that in this case there was no contract express or implied between the Claimant and the Respondent. The Claimant was elected by the other Council members – a position for which he was elected by the membership as a whole – and the position was unpaid. The Claimant said that he had responsibilities that could not be delegated such as voting at Council meetings, and holding the General Secretary to account but those do not make him a worker. The relationship between the Claimant and the Respondent is explained by the Royal Charter and its Articles and Standing orders. That is fatal to the Claimant's claim to have worker status, unless he can rely on the Gilham extension.

32. We considered whether the existence of a Member Resolution Policy (essentially a disciplinary process) could establish a contract but concluded it did not. The Resolution Policy applies to all members, not just to those on the Council. It applies when there are allegations of poor conduct and the potential sanctions include expulsion and suspension from the union, removal from activist or governance roles and a requirement to undertake training. It is part of the rules of membership, rather than a contract indicating worker status.

33. We do not accept, as the Claimant suggests, that a reimbursement to the employer for the time spent by the Chair of Council on Council business is the same as being paid. No benefit derived to the individual – other than that he or she continued to be paid the salary by the employer, which he or she was enjoying before having to devote time to the council. The payment encouraged employers to permit their employees to spend time away from their usual duties. Where the individual had an interest in the employer the Respondent declined to make the payment to that employer.

34. An individual may nonetheless be a worker in the absence of the contract if the Gilham extension applies. The Claimant says that the extended definition of worker suggested in Gilham applied to him because he was an office holder, his role involved his undertaking two days work a week on behalf of the Respondent (see his particulars of claim), the Chair "is remunerated" and refers to the amounts paid previously to the employer of previous holders of that post. A payment to the employer is not a benefit to the postholder unless that postholder has a financial interest in the employer, and whenever that was the case the payment was refused.

35. The Gilham extension essentially applies where the Claimant does not have a contract but has been treated less favourably than others in an analogous situation i.e. it requires a comparison with others in the workplace – employees and limb b workers. A judge is clearly an analogous to others in the workplace because he or she is paid, is required to work and has all the characteristics of a worker. As I found in Griffiths v The Institution of Mechanical Engineers (22000 23/2020) an unpaid Trustee or, in this case, an unpaid Council member or Chair of Council is not analogous to someone in the workplace. It is an un-paid position, and the Claimant was specifically prohibited from benefiting directly or indirectly from his position.

36. The Claimant also says he can rely on the extended definition of worker set out in section 43K of the Employment Rights Act 1996. However, as Mr Coughlin submits, for the extended definition of worker under section 43K to apply there must be a contract between the putative worker and the employer and there was no such contract here. Nor can the Claimant be said to have been introduced or supplied to the RCN by any entity. He became a member, put himself forward for election, was elected to the Council, and was then further elected as Chair. Being elected by members and/or the Council, cannot be said to be "introduced or supplied to do that work by a third party."

Was the Claimant subjected to a detriment because he made make protected disclosures/ an assertion under section 65 (2) (c) of TULRCA.

37. Given our finding the Claimant was not a worker, it follows that he does not have the rights afforded to whistleblowers in the Employment Rights Act. It is not therefore strictly necessary to consider the above question but, given the ferocity with which this case has been fought, we consider that we should deal with it. Most of the facts relevant the issue of whistleblowing detriment are, in any event, relevant to the Claimant's case that he was unjustifiably disciplined.

Relevant statutory provisions

38. A worker has a right not to be subjected to a detriment by any act, or any deliberate failure to act, by his employer done on the round that the worker made a protected disclosure. (section 47B Employment Rights Act 1996)

39. The term "protected disclosure" is defined in Section 43A of the Act as a "qualifying disclosure" (as defined by Section 43B) which is made by a worker in accordance with sections 43C to 43H.

40. 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 ....

    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" or

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

41. A qualifying disclosure should normally be made to an employer. However a qualifying disclosure will be protected, even if not made to the employer if it is made in accordance with sections 43 F or G.

42. Section 43F provides that a disclosure will be a qualifying disclosure if it is made to a prescribed person**.**

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

(a) makes the disclosure ... to a person prescribed by an order made by the Secretary of State for the purposes of this section, and

(b) reasonably believes—

(i) that the relevant failure *falls within any description of matters in respect of which that person is so prescribed*, and

(ii) that the information disclosed, and any allegation contained in it, are substantially true.

43. Section 43G provides that a disclosure will be a qualifying disclosure if

(1) A qualifying disclosure is made in accordance with this section if—

(b) The worker reasonably believes that the information disclosed, and any allegation contained in it, are substantially true,

(c) he does not make the disclosure for purposes of personal gain,

(d) any of the conditions in subsection (2) is met, and

(e) in all the circumstances of the case, it is reasonable for him to make the disclosure.

(2) The conditions referred to in subsection (1)(d) are—

(a) that, at the time he makes the disclosure, the worker reasonably believes that he will be subjected to a detriment by his employer if he makes a disclosure to his employer or in accordance with section 43F,

(b) that, in a case where no person is prescribed for the purposes of section 43F in relation to the relevant failure, the worker reasonably believes that it is likely that evidence relating to the relevant failure will be concealed or destroyed if he makes a disclosure to his employer, or

(c) that the worker has previously made a disclosure of substantially the same information—

(i) to his employer, or

(ii) in accordance with section 43F.

(3) In determining for the purposes of subsection (1)(e) whether it is reasonable for the worker to make the disclosure, regard shall be had, in particular, to—

(a) the identity of the person to whom the disclosure is made,

(b) the seriousness of the relevant failure,

(c) whether the relevant failure is continuing or is likely to occur in the future,

(d) whether the disclosure is made in breach of a duty of confidentiality owed by the employer to any other person,

(e) in a case falling within subsection (2)(c)(i) or (ii), any action which the employer or the person to whom the previous disclosure in accordance with section 43F was made has taken or might reasonably be expected to have taken as a result of the previous disclosure, and

(f) in a case falling within subsection (2)(c)(i), whether in making the disclosure to the employer the worker complied with any procedure whose use by him was authorised by the employer.

(4) For the purposes of this section a subsequent disclosure may be regarded as a disclosure of substantially the same information as that disclosed by a previous disclosure as mentioned in subsection (2)(c) even though the subsequent disclosure extends to information about action taken or not taken by any person as a result of the previous disclosure

44. In considering the public interest test, the worker's belief that the disclosure was made in the public interest must be objectively reasonable (even if it is wrong), but the disclosure does not need to be in the public interest per se. Nor are the worker's reasons for making the disclosure strictly relevant to the public interest test. A worker making a disclosure can seek to "*justify it after the event by reference to specific matters which the tribunal finds were not in his head at the time he made it."* The necessary belief is that the disclosure is in the public interest. In considering that issue, factors such as the number or workers affected, the nature of the interests affected, the nature of the wrongdoing disclosed and identity of the alleged wrongdoer may all be relevant, (Chesterton Global Limited and anor v Nurmohamed 2017 EWCA Civ 979).

45. In *Eiger Secrities LLP v Korshunova UKEAT/0149/16* the EAT held that those claiming whistleblowing protection will have to identify the obligation

that has or might be breached and show that "The identification of the obligation does not have to be detailed or precise but this it must be more than a belief that certain actions are wrong. Actions may be considered to be wrong because they are immoral, undesirable or in breach of guidance without being in breach of a legal obligation.

Right not to be unjustifiably disciplined.

46. Section 64 of TULRCA provides as follows

> (1) An individual who is or has been a member of a trade union has the right not to be unjustifiably disciplined by the union.
>
> (2) For this purpose an individual is "disciplined" by a trade union if a determination is made, or purportedly made, under the rules of the union or by an official of the union or a number of persons including an official that—
>
> (a) he should be expelled from the union or a branch or section of the union,
>
> (d) he should be deprived to any extent of, or of access to, any benefits, services or facilities which would otherwise be provided or made available to him by virtue of his membership of the union, or a branch or section of the union,
>
> (f) he should be subjected to some other detriment;
>
> and whether an individual is "unjustifiably disciplined" shall be determined in accordance with section 65.

47. Section 65 provides:

> (1) An individual is unjustifiably disciplined by a trade union if the actual or supposed conduct which constitutes the reason, or one of the reasons, for disciplining him is—
>
> (a) conduct to which this section applies, or
>
> (b) something which is believed by the union to amount to such conduct;
>
> but subject to subsection (6) (cases of bad faith in relation to assertion of wrongdoing).
>
> (2)This section applies to conduct which consists in—
>
> (c) asserting (whether by bringing proceedings or otherwise) *that the union, any official or representative of it, or a trustee of its property, has contravened, or is proposing to contravene, a requirement which is, or is thought to be, imposed by or under the rules of the union or any other agreement or by or under any enactment (whenever passed) or any rule of law*;

> (4)This section also applies to conduct which consists in proposing to engage in, or doing anything preparatory or incidental to, conduct falling within subsection (2) ...
>
> (5)This section does not apply to an act, omission or statement comprised in conduct falling within subsection (2), [(3) or (4)] above if it is shown that the act, omission or statement is one in respect of which individuals would be disciplined by the union irrespective of whether their acts, omissions or statements were in connection with conduct within subsection (2) or (3) above.

Relevant facts

48. The Claimant was as we have said elected as Chair of the Council in September 2020. Dame Donna Kinnair (DDK) was the Chief Executive and General Secretary of the Respondent from April 2019. On 14 June 2021, after she had been absent for some time for ill health, she was suspended from her duties pending an investigation into allegations about her conduct. The decision to suspend her was taken by the Council under the Claimant's chairmanship. He was a part of that decision and signed the letter of suspension as well. He also wrote to the senior executive stressing the importance of confidentiality, "Any breach of this, outside Council, will be taken extremely seriously and would seriously damage the RCNs reputation." Ms Cullen took over as Acting General Secretary and Chief Executive. On 15 June the Claimant approved the appointment of Bruce Carr KC to investigate the allegations against DDK.

49. However 10 days later, on 25th June 2021 the Council approved a settlement agreement with DDK and she left the Respondent. At the Council meeting the Claimant voted to approve the settlement. Obligations of confidentiality were contained in the settlement agreement. The Claimant was aware of these and instructed other council members to keep its terms confidential. In particular, the parties agreed to keep the existence and terms of the agreement, and the circumstances concerning the termination of her employment, confidential, and not to make any adverse or derogatory comments about each other - although clause 10.7 provided a carve out for protected disclosures. " Nothing in the agreement shall all prevent you or any of our officers, employees, workers or agents from making protected disclosures under section 43A of the Employment Rights Act 1996 ."

50. The instructions to Mr Carr were then amended on 29 June 2021 to require a "wider organisational review" and he was instructed that "although the circumstances of the Chief Executive's departure are still of relevance and are the catalyst for these instructions, it is the wider culture of decision making within the RCN that requires independent investigation." He was tasked with covering 8 matters. These included the circumstances leading to the departure of DDK, the structure of decision-making at the Respondent, the roles of the Executive and the Council and the relationship between them.

51. On 1 July 2021 the Respondent released an agreed public statement to the effect that, after a period of ill-health, DDK had taken the decision to step down as General Secretary. Neither her suspension nor the Bruce Carr investigation were communicated to the membership.

52. *Q and A session and related matters.* On 7 July 2021 Ms Cullen and the Claimant took part in a virtual Q and A session with staff. It did not go well. Following the session the Respondent received a lot of complaints from staff about Mr Dawes' responses and behaviour at that session. The Executive Team was also very upset by the Claimant's behaviour and comments. The next day Ms Cullen received a letter of complaint from the GMB. Emails of complaint were received from members of the Executive and Regional Officers. The Respondent also received a letter from two RCN student committee members for Scotland which had been posted on Twitter expressing in strong words their dismay at the Claimant's behaviour identifying sexist and racist behaviour. Over the next few days very many complaints were made about the Claimant by those who had been present at the Q and A.

53. On 9th July there was a Council meeting. After the meeting Ms Cullen spoke to the Claimant to inform him of the complaints.

54. Over the weekend there were requests for the Claimant to stand down as Chair. Initially the Claimant resisted but subsequently during a telephone conversation with Ms Cullen, Ms Popplestone (the vice chair), and Mr Thompson, the honorary treasurer, the Claimant agreed that he would step aside as Chair but would remain as a council member for the North West. It was agreed that they would issue a statement to the effect that he was stepping down from his position as Chair pending an investigation, but would remain as council member for the North West.

55. Immediately after the conference the Claimant sent an email to all Council members stating "I am aware that a number of complaints coming about me from staff and from external stakeholders. I feel that these complaints should be independently investigated in line with the member resolution policy and that I should step aside as Chair until the resolution is complete. This will be with immediate effect. I have spoken to Carol, and she is happy to step up as Chair during this process… Nicole will be sending out statements tomorrow."

56. As this communication had not been discussed, Ms Cullen followed this up with another email to members to emphasise that the matter was confidential and should not be shared with anyone. "The only group notified at this point is yourself. We are putting together the communications plan for 9 a.m. tomorrow morning."

57. The Respondent then drafted a statement to be sent to members which they shared with the Claimant. It read

In the past week, the RCN has received complaints about the conduct of the Chair of Council. We take any such complaint extremely seriously and have a robust member resolution policy which allows for independent investigations to be carried out. An immediate investigation will now take place and Dave Dawes has announced that he will voluntarily step down from his role as Chair of RCN Council. The Council's current Vice-Chair, Carol Popplestone, who was elected last year, will act into the role with immediate effect".

Mr Dawes said:

"These complaints must be independently investigated, and it is right that I should step aside as Chair to allow that to happen smoothly.
As a longstanding advocate and representative of our members, I am committed to ensuring that the RCN's own processes are fair and transparent.
Carol is a very steady pair of hands, and her experience will be invaluable to Council and all members at this time. She is a straight-talking defender of members interests and she will hit the ground-running."

Mr Dawes will remain as Council member for the North West region for the remainder of his elected term of office.

58. The Claimant asked for a change in the wording to propose an amendment to make it clear that the "stepping down" was only while the investigation was taking place and to include the phrase "I am optimistic about the outcome of the investigation". Those changes were rejected by Ms Cullen and it was sent as drafted and placed on the website."

59. The following day the Claimant emailed the director of communications expressing disappointment with the statement as it suggested that he had resigned when he had only said that he would step aside during the investigation. He asked for the website to be clarified. In evidence the Claimant said that the announcement came "as a huge shock as I believed that my disciplinary process would be kept confidential" but this seems unlikely given that he had himself emailed Council members, and was aware, as Ms Cullen says, of how much information "leaked out of council." The Certification Officer (TUCO) subsequently ruled that he was aware that the statement would be issued to members and posted on the website.

60. Later on 13 July the Respondent received two further complaints about the Claimant's behaviour. One was from Ms Patrick on behalf of the RCN Feminist network complaining of the Claimant's approach to women's representation and hostility on social media. The other was from Ms Jackson, a nurse. This related to tweets posted between 2011 and 2015, which among other matters made reference to non consensual sexual

encounters with women, jokes about under age sex and using alcohol to influence consent for sex**.**

61. On 13 July just after 10 pm the Claimant emailed a "formal complaint and grievance" against Ms Popplestone and Ms Cullen complaining, amongst other things, "that a false and damaging message was sent to all members stating that I had stepped down from Council." This was passed to an independent investigator from the TCM Group who (in September) found that "The available evidence was weighted towards you knowing this would be published at least to some members. The versions are not dissimilar, the contention is around "stepping down" rather than "stepping aside". The investigator did not consider this to be a false or damaging statement." Mr Mason informed the Claimant in a letter of 16 September 2021 that there was no case to answer in respect of the Claimant's complaints which would not proceed to a Resolution hearing.

62. On 14 July the Claimant was suspended. The Respondent says that as he was already suspended he could not have been suspended again, but without descending into semantics we accept that the letter purporting to suspend him was a detriment.

63. He was informed that his conduct would be investigated by an independent organisation who would look at the complaints received about the Claimant's conduct between 8 and 13 July as well as "financial issues relating to Angelfish CIC". (This related to an allegation that the Claimant improperly sought to obtain payment for his work as Chair via a payment to his son).

64. The Council were informed and voted to support the suspension.

65. On 19 July Claire Fowler of YESS Law was instructed to investigate the six complaints received in July about the Claimant plus the Angelfish complaint. Although the Tribunal heard a considerable amount of evidence about these matters they are not relevant to the matters which we had to decide.

66. On 26 July 2021 the Claimant was referred by Ms Cullen to the NMC.

67. The Claimant says that by 10th August he was "increasingly concerned about the Carr investigation" and was "convinced that the whole issue was being covered up. I began contacting law firms to get legal advice about blowing the whistle on what DDK had done and how the RCN was covering this up". On 16th August the Claimant sought legal advice as he says "to support a press disclosure on what DDK had done and how the RCN was covering this up."

68. On 27 August 2021 the Respondent took the decision to move its annual congress online because of "serious allegations of sexual harassment". The tribunal did not hear what those allegations were or why the decision had been taken to move Congress online. We accept that none of the allegations were about the Claimant and that the press was seeking to link the

suspension of the Claimant with the decision to move Congress online. The Claimant says that the same day he spoke to "sources" in the RCN who told him that the RCN "were going to cover up" the fact that Mr Carr had been investigating DDK, but he could not recall who those sources were.

69. *Disclosures*. On 28 August the Claimant was contacted by a journalist enquiring why Congress had been moved online. The Claimant told him that he and DDK, together with a number of other council members were being externally investigated. While the investigation into the allegations against the Claimant had been announced, the investigation into DDK was subject to confidentiality obligations. He said that the same journalist then told him that the RCN were actively briefing against him in response to his having disclosed the suspension of DDK.

70. On 29th August the Claimant made disclosures to the Information Commissioner (the ICO) and to the Trade Union Certification Officer (TUCO). Both related to the 13 July announcement to members (set out above). The complaint to TUCO was that the 13 July announcement was in breach of its rules, while the complaint to the ICO was that the announcement had breached the Claimant's confidentiality.

71. The complaint to the ICO reads as follows:

"Complaint
That my confidentiality was breached by the RCN

Brief description of why you believe the above rule was breached. ,

On 18th June, the RCN General Secretary Dame Donna Kinnair was suspended by RCN Council members and an external investigation was commissioned based entirely on accusations made by her deputy Pat Cullen. On 25th June, RCN Council approved a settlement agreement and on Thursday 1st July, the RCN released a statement saying that if after a period of ill health Dame Donna Kinnair had taken a decision to step down as General Secretary.

On 30th June, RCN Council met and commissioned an external investigation into Joan Myers and on 6th July, Joan Myers resigned from Council with immediate effect.

At no stage were the suspension or either investigation communicated to the membership.

On 12th July I was informed by Pat Cullen, Rod Thompson and Carol Popple stone that complaints had been received about me regarding social media posts and I was pressured to resign as Chair of Council.

On 13th July, the following was emailed to all 475,000 members:

In the past week, the RCN has received complaints about the conduct of the Chair of Council. We take any such complaint extremely seriously and have a robust member resolution policy which allows for independent investigations to be carried out. As investigation will now take place and Dave Dawes has announced that he will voluntarily step down from his role as Chair of RCN Council. Our current Vice Chair, Carol Popple stone, who was elected last year, will act into the role with immediate effect. Dave Dawes will remain as Council member for the Northwest region.

The RCN's own internal media company (Ricin) also published false and defamatory material claiming that I "had quit amidst complaints about (his)

conduct".

72. The narrative of the complaint to TUCO is in substantially the same terms but makes three complaints (i) a breach of his confidentiality in relation to the July 13 announcement (ii) that Ms Cullen was failing to be impartial and demonstrating bias in breach of the member Resolution Policy and (iii) that a council meeting was called privately on 13th July in breach of its Rules. The Claimant does not claim that he was subject to any detriment for making disclosures to TUCO and IO.

73. Both complaints refer to (i) the suspension of DDK (ii) the commissioning of an investigation into her and (iii) an (untrue) allegation that there was an investigation into another named council member. The central complaint was that, while DDK's suspension and the investigation into DDK and the other council member had not been announced, the 13 July announcement about his position had been sent to all the members. (We note in passing that the Claimant refers to having been pressurized to resign, but he had not resigned.)

74. (On 20th October 21 the information Commissioner upheld his complaint that there had been a data breach in respect of the 13 July announcement. On 21st March 2023, after a hearing, TUCO decided that the Respondent had not breached its rules by issuing the 13 July statement to members and posting it on its website. She found that the Claimant had been aware at the time that the statement would be made and posted on the Respondent's website, acknowledging the difference of opinion between her decision and that of the ICO. She also found that, in any event, the Respondent had been entitled to disclose to members the fact of those complaints, the need for an investigation and the fact that the Claimant had stood aside. The Respondent had not disclosed the nature of those complaints.)

75. In the afternoon of 29 August, immediately after the complaints to TUCO and ICO, the Claimant spoke to a journalist at The Times and informed him that DDK had been suspended and that he (the Claimant) had "made protected disclosures about this". He had not. He had made a complaint about the 13 July announcement.

76. On 31 August the Claimant emailed the Chair of the Audit Committee to say that the had made 2 protected disclosures to the ICO and TUCO, (but not what the disclosures were) but made it clear he was not giving any notice for consideration by the Audit Committee and said that he had "exhausted all internal processes". (By this we assume he meant his grievance.)

77. In the next few days the Claimant spoke to a number of journalists. 6 of those communications are relied on as protected disclosures. In each case they disclosed the suspension of, and investigation into, DDK.

    a. On 30 August 2021 he emailed Mr Jehring of the Daily Mail (355) attaching his complaint to the Information Commissioner, the letter

from the Respondent containing details about the allegations against him (358) and a transcript of his interview with Ms Fowler of YESS Law "to show that there was no link between the allegations against him in July and the sexual harassment allegations of last week". By attaching the complaint to the ICO he revealed that DDK had been suspended and an external investigation commissioned.(PD1)

b. On 31st August he emailed Mr Ellery of The Times attaching details of the allegations against him (to refute the link between those and moving the congress online) and also attaching the letter to the ICO. (PD2)

c. On 2 September the Claimant contacted Matt Bodell of Nursing Notes . (PD3.) This repeated the wording of the complaint to the ICO, save that (i) it did not refer in terms to the fact that his complaint was about a breach of his confidentiality and (ii) he told Mr Bodell that he had a file of evidence and invited contact for further information.

d. On 2 September he contacted Megan Ford and Gemma Mitchell of Nursing Times in the same terms as the email to Mr Bodell (PD4.)

e. On 6 September the Claimant spoke to a journalist for SWNS, Amy Reast, which contained very specific information about the details of the allegations for which DDK had been suspended and stated in terms that she had improperly accepted hospitality and helped another named individual to secure a contract for PPE. The Claimant told the Tribunal that he had also sent her "an evidence bundle" containing a mixture of confidential and public documents to show this. He also sent a copy of the settlement agreement with DDK, and her suspension letter but asked that he not be identified as the source as he was bound by an NDA. (PD5)

f. On 15 September 2021 the Claimant spoke to Ms Mansey of the Mail on Sunday and disclosed similar allegations as to impropriety by DDK (477). PD6. We do not have a copy of the Claimant's email to her, which the Claimant says he could not find. He has provided his "notes" of his phone call with her. The Claimant says that Ms Mansey already had a copy of the evidence bundle, and because of this he thought that there was "a second whistleblower", though given the detail of the disclosures made and setout in his "notes" on the balance of probabilities we are satisfied that the Claimant had sent documents to her himself.

78. In early September the Respondent was contacted by DDK's solicitors reporting that the Claimant had breached the settlement agreement. The Respondent instructed solicitors to send a letter to the Claimant asking for undertakings and threatening injunctive proceedings over his contact with the press. The Claimant responded that, as he had made disclosures to the ICO and TUCO, the information was in the public domain and he had had

legal advice that the confidentiality clause did not apply to protected disclosures.

79. In the evening of 2nd September Mr Bodell forwarded the Claimant's email to the Respondent's media team asking for comments. In this way the Respondent became aware of the Claimant's contact with him.

80. The email to Mr Bodell of Nursing Notes was largely the same as the letter to the ICO. It read as follows

> Dear Matt,
>
> I wanted to let you know that I have now made two protected disclosures under the RCN Whistleblowing Policy and the Employment Rights Act 1996. These are both to qualifying bodies, namely the Information Commissioner's Office and the Trade Union Certification Officer and therefore the following information is now in the public domain:
>
> On 18th June, the RCN General Secretary Dame Donna Kinnair was suspended by RCN Council members and an external investigation was commissioned based entirely on accusations made by her deputy Pat Cullen. On 25th June, RCN Council approved a settlement agreement and on Thursday 1st July, the RCN released a statement saying that if after a period of ill health Dame Donna Kinnair had taken a decision to step down as General Secretary.
>
> On 30th June, RCN Council met and commissioned an external investigation into Joan Myers and on 6th July, Joan Myers resigned from Council with immediate effect.
>
> At no stage were the suspension or either investigations communicated to the membership.
>
> On 12th July I was informed by Pat Cullen, Rod Thompson and Carol Popplestone that complaints had been received about me regarding social media posts and I was pressured to resign as Chair of Council.
>
> On 13th July, the following was emailed to all 475,000 members:
>
> *In the past week, the RCN has received complaints about the conduct of the Chair of Council. We take any such complaint extremely seriously and have a robust member resolution policy which allows for independent investigations to be carried out. As investigation will now take place and Dave Dawes has announced that he will voluntarily step down from his role as Chair of RCN Council. Our current Vice Chair, Carol Popplestone, who was elected last year, will act into the role with immediate effect. Dave Dawes will remain as Council member for the North West region.*
>
> The RCN's own internal media company (RCNi) also published false and defamatory material claiming that I "had quit amidst complaints about (his) conduct". I have a file of evidence alongside the submissions and all of the statements in the complaint are substantiated by emails, text messages, WhatsApp messages and official RCN recordings of meetings.
>
> If you need any further information, feel free to email or ring me and I will have limited internet and phone connectivity for the next week,
>
> Best wishes,
>
> Dave Dawes

81. Stories were published in the Press on 4, 6 and 7 September. The Respondent was accused of "lacking transparency over former CEO's departure". The Claimant was quoted as the source of the allegations about the suspension, investigation and settlement with DDK. Some articles also

referred to the Respondent's spend on financial settlements to ex staff and non disclosure agreements. In one article the Claimant was quoted as saying that he blamed "staff loyal to DDK for orchestrating the complaints against him" as a way of damaging the organisation. He was referred to as blowing the whistle on a breach of his confidentiality.

82. On 17 September Ms Mansey contacted the RCN for comment but did not disclose her source. On 18 September the Daily Mail published an article detailing the specific allegations against DDK.

83. On 22 September (although the Claimant was still suspended pending Ms Fowler's investigation) the Respondent purported to suspend the Claimant and he was told that a second investigation would be undertaken into his disclosures to the media. The suspension letter relates to disclosures to the media (811) his disclosures to Nursing Notes, the Nursing Times, the Times and the Daily Mail regarding the circumstances surrounding the departures of DDK and another Council member.

84. In his emails to Mr Bodell and Megan Ford the Claimant says that, as he had made disclosures to TUCO and the ICO, information about the suspension and investigation of DDK was now "in the public domain" and he could reveal this information to the press. He was aware that the settlement agreement provided that "nothing in this agreement shall prevent you or any of our officers, employees, workers or agents from making a protected disclosure under section 43A of the Employment Rights Act 1996."

85. However it should have been plain that disclosures to TUCO and the ICO did not put these matters in the public domain. Neither body had made any findings or considered the position. In any event the complaint to them was about the July 13 announcement and a breach of his confidentiality and <u>not</u> about the investigation or settlement with DDK. There had been no need to refer to DDK when making that complaint. The Claimant subsequently told Mr Ohringer that this was deliberate: *"*somehow I had to come up with something that I could send to the Information Commissioner and TUCO that disclosed as much of it as I could get into the public domain because I knew at least three legal teams were going to come after me*".*

86. In his claim (and in his skeleton) the Claimant says that by the middle of August he believed that the Bruce Carr investigation commissioned in June had been submitted and was being deliberately suppressed, that the whole issue was being covered up and that was why he made the disclosures about DDK and the settlement to the Press. In his witness statement he said he had spoken to "sources" in the Respondent who told him that they were going to cover up the investigation, though he could not recall who said there would be a cover up.

87. He says that he had a reasonable expectation that the Carr investigation would have been completed within 8 weeks and circulated to members. Previous investigations had taken 8 and 5 weeks respectively. In cross

examination he said he had not been contacted for an interview and, as DDK's line manager, he was the key person to interview. Much of the evidence about her wrongdoing was known only by him and so, if he had not been contacted for an interview, that must mean that there was to be a cover-up. He told the Tribunal that he then began to take legal advice "about blowing the whistle on what DDK had done".

88. The Tribunal does not accept this. The wording of the complaint to the ICO and TUCO does not suggest that at this stage he believed that there was going to be a cover-up. On the contrary, in referring to the suspension of DDK, the Claimant says an external investigation was commissioned "based entirely on accusations made by her deputy Pat Cullen" which suggests that the Claimant was not in agreement with that suspension.

89. It is not an explanation that he gave Mr Qureshi in his investigation. Perhaps more tellingly there are only 6 weeks between 29th June (when Mr Carr was instructed) and mid August, and he can have had no reasonable expectation that the report would have been delivered, and then covered up, in that time. He was suspended and even if it had been delivered it was unlikely to have been shared with him while the allegations in the first investigation were being considered. He did not enquire of Mr Carr or his clerk (or of any member of the Executive) if the report had been completed. It is not credible that he would not remember who told him that there was going to be a cover up, which is a very serious matter. The evidence was also muddled. It was not clear if he believed that Mr Carr had found the allegations to be proven and the RCN was covering that up, or if Mr Carr had not interviewed him because he was party to the cover up.

90. In November there were elections for the Chair of Council. The Claimant says that because the Respondent had extended his suspension beyond the limits set in the disciplinary rules he was unable to stand in the election. The Resolution Policy provides that the normal time limit for suspension is 60 days, and the Claimant was suspended for longer than this. The reason for the lengthy suspension was that numerous allegations against him which were part of the first investigation needed to be dealt with and the fact that his initial suspension in July continued to deal with new and different allegations into the press leaks.

91. *First investigation.* In the meantime Ms Fowler of YESS Law investigated the various allegations against the Claimant arising following the Q and A session, complaints about the Claimant's tweets and the Anglefish complaint. She provided her report in October. She concluded that there was sufficient case to answer in respect of 12 (out of 25) allegations.

92. Ms Mayhew KC was instructed to chair a "Resolution Hearing" in respect of the 12 allegations. The other panel members were Ms Webley Brown a London council member for the Respondent and Lord Victor Adebowale. Ms Mayhew rejected a complaint by the Claimant that Ms Webley Brown had a conflict of interest and so should not sit on the panel. The hearing took place

on 31 January and 1 February 2022. The Claimant attended but, apart from reading a prepared statement, did not take part in the hearing.

93. The Mayhew panel reached a decision in February 2022. They concluded that

    a. the Claimant's tweets amounted to gross misconduct. "the Panel found gross misconduct and expels the [Claimant] from the RCN."
    b. the complaints about his conduct at the Q and A session and the complaint from the RCN Feminist Network were found to be serious misconduct for which "The [Claimant] is to receive a final written warning for 12 months."
    c. the Angelfish complaint –"minor misconduct is upheld with no sanction.".
    d. A further complaint was found not to be misconduct.

94. The Claimant appealed the same day, referring to section 9.4 of the Members Resolution Policy which provides that "Any sanction imposed will not take effect until expiry of the time limit within which the Respondent can submit an appeal or, if an appeal has been submitted, until such time as the appeal has been determined***."***

95. *Second Investigation*. Concurrent with the investigation conducted by Claire Fowler, Mr Qureshi of Irwin Mitchell was instructed to conduct a new investigation under the Member Resolution Policy in relation to breaches of duty and confidence in making disclosures to Nursing Notes, the Nursing Times, the Times and the Daily Mail regarding the circumstances surrounding the departure of DDK. Mr Qureshi wrote to the Claimant to inform him that he had been appointed to investigate on 8 October 2021 (901) and an interview took place with the Claimant on 7 December 2021.

96. When interviewed by Mr Qureshi the Claimant said that although he approved the settlement agreement and the confidentiality clauses, what had changed following that approval was that there had been "an extremely serious breach" of his confidentiality and that it was necessary, as part of his complaint to talk about DDKs departure and the way it was managed, "in direct comparison to the way my suspension was handled. The fact that a disciplinary process against the General Secretary was handled dramatically different with dramatically different standards is entirely relevant. It goes to the heart of the disclosure. If I had been treated the same way that Donna was treated...there wouldn't have needed to be any protected disclosure, everything would have been fine. My confidentiality would have been protected." This explanation is at odds with what he told Mr Ohringer subsequently.

97. He said that, as he had made two protected disclosures to the ICO and TUCO, the disclosures were now in the public domain and could be shared with the press. Clause 10.7 of the settlement agreement explicitly stated that none of the confidentiality clauses prevented the making of a protected

disclosure. He had been advised to tell the press exactly what was contained in his disclosures to the ICO and TUCO.

98. The Claimant did not provide a copy of his disclosure to the press but said that the disclosures to the Nursing Times, the Times, the Guardian and the Daily Mail were "exactly a copy" of the disclosure to Mr Bodell, (which Mr Bodell had forwarded to the Respondent. (966). He also said that he had not had any contact with Kate Mansey of the Mail on Sunday (977) or with Amy Reast of SWNS, though he had had contact with a Ms Elvin of South West news.

99. As has become apparent during the course of these proceedings those statements were untrue. The emails were not all the same. Moreover he had spoken to both Ms Mansey and Ms Reast. The disclosures to Kate Mansey at the Mail on Sunday and to Ms Reast at SWNS disclosed, not just the existence of an investigation and the settlement agreement, but particulars of the allegations against DDK that had led to the settlement agreement. He had also attached a copy of the settlement agreement, thereby revealing the settlement figure (though it was a slightly earlier draft, and the figure was a little off) and other confidential documents relating to DDK.

100. In evidence the Claimant accepted that he had lied to Mr Qureshi and, subsequently Mr Ohringer and Mr Carr, as to what he had disclosed and to whom. He said he had done so because he believed that there was a second whistleblower and he wanted to protect him. He was concerned that if he disclosed those emails (PDs 5 and 6 now in the bundle) it would reveal/ give clues to the identity of a second whistleblower, who he believed to be Mr Benton, another Council member. In support of this he refers to an email from Ms Cullen, disclosed as part of the litigation process, (803), dated 19 September in which she says that "while the suspended member is speaking to the media, the story was also corroborated by at least one other senior elected official."

101. We do not accept that explanation. While Ms Cullen might have believed that there was another source, there is nothing in those emails which suggests a second whistleblower, or would indicate that anyone else was involved and we do not accept that this is the reason why he lied. The fact that the Claimant denied that he was the source was the only thing that did suggest the possibility of another source. The Claimant appeared to believe that if he repeated to the press only what he had said to the ICO he would not be in breach of any obligations under the settlement. Since the disclosures to Ms Mansey and Ms Reast clearly went significantly further he denied having made them.

102. On 26 January Mr Qureshi recommended that there was a sufficient case to answer in relation to the Claimant's disclosure to the press and recommended the matter to proceed to a resolution hearing. He rejected the Claimant's case that he had made protected disclosures. (1007) He had not met the criteria in s43G and his disclosures to the ICO and TUCO were

about his confidential information being revealed and did not relate to the settlement agreement

103. A second Resolution Hearing was therefore convened. Mr Ohringer was instructed to chair the Resolution panel on 21st February. As before Mr Qureshi, the allegations against the Claimant were that he had breached the members code of conduct, brought the RCN into disrepute and committed serious breaches of confidentiality by disclosing the RCN's confidential information to Nursing Notes, the Nursing Times, the Times and the Daily Mail including that he had disclosed details of the circumstances surrounding the departures of DDK and another. The panel members with Mr Ohringer were Mr Appleby and Mr Vaughan.

104. At the hearing the Claimant accepted that he had emailed Mr Bodell of Nursing Notes and Ms Ford of Nursing Times. While he accepted that he had emailed other journalists about the settlement agreement, including Mr Brown of The Times, Mr Campbell of the Guardian and Mr Jehring of the Daily Mail, he did not provide any copies of these communications. The Claimant again said that his communications to the other journalists were essentially identical to his communication with Mr Bodell (which Mr Bodell had forwarded to the RCN).(1155) He said that the legal advice which he had obtained was "simply put what's in the protected disclosure. Nothing more, nothing less" so a very precisely worded email had been sent to the journalists. He denied sending the settlement agreement to the Press and suggested to the panel that this had been sent by another council member. As the Daily Mail article contained information that went beyond the information in the Bodell email the Ohringer panel concluded that there must have been another source. (1405)

105. The Claimant accepted that it was not necessary, when alleging a breach of his confidentiality to IO and TUCO to refer to DDK. He said that the referral to DDK was deliberate, as a way of highlighting that a cover up was happening, and he wanted to generate sufficient journalistic interest for them to investigate. (1197) He believed there had been criminal activity in that DDK had accepted bribes to secure a PPE contract, a breach of GDPR, a cover up and DDK had undermined the Safe Staffing Campaign.

106. The panel concluded that the Claimant had not made any protected disclosures. They concluded he had not been exempted from obligations of confidentiality but had deliberately aired the Respondent's dirty laundry in public in retaliation for the Respondent putting him through a disciplinary process. They considered that the behaviour constituted gross misconduct the sanction applied was to remove the Claimant and disqualify him from any office or other governance role in the RCN for a period of five years.

107. The Clamant was notified of the panel's decision on 3 March 2022 and immediately appealed.

108. The appeals. The Claimant's appeal against both the decision of the Mayhew panel and the decision of the Ohringer panel was heard on 17 March 2022 by a panel chaired by Bruce Carr QC with Mr Benton (a member of the Council) and Ms. Ellis. The Claimant confirmed he was happy with the composition of the panel.

109. Separately Mr Carr had provided his investigation report into the circumstances surrounding the departure DDK and the culture of the Respondent on 11 November 2021.

110. At the hearing the Claimant said that he had evidence which he had not presented to the Mayhew panel because he believed that one of the panel members was biased or had a conflict-of-interest. After some discussion the Carr panel decided that, although they could not determine whether or not there had been bias on the part of one of the members on the Mayhew panel, the appeal panel would proceed as a first instance panel in relation to the allegations that were before the Mayhew panel, and as an appeal panel in relation to the findings of the Ohringer panel. The Claimant was content with that approach.

111. In relation to the disclosures to the press the Claimant

a. accepted that he disclosed information to the press as per the disclosure to Mr Bodell but suggested that he wasn't the only source. (1406) "someone who was at the Council ET meeting had briefed the Daily Mail…but it appeared that there was another source."
b. He said again that his disclosures to the press used "precisely the same wording" as that sent to the ICO and TUCO.
c. He said he was protected from making disclosures about the settlement agreement because there was an exception in the settlement agreement for whistleblowing and the Respondent's whistleblowing policy explicitly stated that settlement agreements made with individuals would not prevent the making of disclosures in the public interest.
d. refused to provide copies of his communications with other journalists
e. was made aware on 30th August that there was going to be a cover up operation in relation to DDK
f. he had disclosed criminal activity to the press. He referred at one stage to PPE corruption, but when pressed as to what he meant by criminality, said he meant a breach of GDPR and the Data Protection Act (1409).
g. his motive was to expose what he believed was a cover up of a very serious matter i.e. the investigation into DDK. He was not seeking to discredit the RCN.

112. The decision of the Carr panel was provided on 4 April 2022. In summary the Carr panel concluded in relation to the allegations which had been before the Mayhew panel that

a. The allegations relating to the tweets were substantiated and amount to gross misconduct and the Claimant was removed from membership
b. the Angelfish complaint was substantiated and amount to gross misconduct and the sanction applied was removal from membership. They concluded that his claim for reimbursement "that so obviously does not withstand scrutiny" amounts to gross misconduct.
c. The allegations relating to the Claimant's remaining communications were minor misconduct.

113. In relation to the appeal against the decision of the Ohringer panel the Carr panel also found that the disclosures to the press were not qualifying disclosures for the reasons explained by the Ohringer panel and also because the disclosures were unreasonable and not protected by s 43G(1)(e). However the Carr panel considered the sanction was too lenient and substituted their own decision that he should be removed from membership.

114. The Tribunal accepts that all those dealing with the investigation and discipline of the Claimant relating to his disclosures to the press (Mr Qureshi, Mr Ohringer and Mr Carr) made their decisions on the basis that all disclosures to the press had been identical to the Matt Bodell email. That was the Claimant's position, and it was accepted.

115. None of them were aware of the disclosures to Ms Mansey or to Ms Reast now referred to as PDs 5 and 6. Mr Ohringer told us that while the panel accepted that the Claimant believed that there were issues around DDK accepting bribes to secure a PPE contract, he had not disclosed those matters. They thought that there might be a second source that led to the press articles which revealed the specific allegations.

116. It follows that none of the sanctions ultimately imposed on the Claimant were done on the ground that he had made the disclosures set out in PDs 5 and 6. Mr Carr says, and we accept, that he was not aware of PDs 5 and 6 at the time the Panel made their decision and took at face value what the Claimant had said to Mr Qureshi and Mr Ohringer that he had not had contact with Ms Reast or Ms Mansey.

117. The Claimant says that despite his denials, those dealing with him had nonetheless concluded that he was the source of the Mansey article and were aware that he had made the disclosures now referred to as PD 5 and 6. He refers to emails at the time (now disclosed as part of the litigation process) from Mr Ball of the Respondent in which it is apparent that the Respondent suspected that the Claimant was the source of the Mansey article (768). He also said that Mr Appleby had been briefed by Ms Mansey that he was the source of her article. However Mr Ohringer denied that Mr Appleby had suggested such a thing to the panel or that it had been part of their discussions.

118. All the documentation is predicated on the basis that the Claimant's disclosures were to Nursing Notes, the Times, the Nursing Times, the Daily Mail and that were in terms identical to the Matt Bodell email which had been forwarded by Mr Bodell to the Respondent's. We do not accept that any of the detriments relied on by the Claimant were made on the ground that the Claimant had made the disclosures now identified as PD's 5 and 6.. Those dealing with the Resolution proceedings against him took what the Claimant said about his disclosures at face value. They only became aware of that the Claimant had made those disclosures as part of this litigation. In each case the conclusions they reach are based only on disclosures to which the Claimant had admitted.

Conclusions- whistleblowing

119. We have already concluded the Claimant was not a worker qualifying for protection under the Employment Rights Act 1996. However for completeness we have considered the position had he been such a worker.

120. The Claimant's disclosures were made direct to the press. He had contacted the Chair of the Audit committee but did not disclose anything to him, and by then he had already gone to the Press. He had not sought to disclose matters direct to members of Council to the Executive.

121. We considered whether the Claimant made a qualifying disclosure when he went to the press. The Claimant was acutely aware of his obligations of confidentiality. In his email to Ms Reast of SWNS he said, "It is really important that documents labelled confidential do not appear in the public domain as they would identify me as the source there is a legal nondisclosure agreement around the disciplinary and removal of DDK."

122. Disclosures to the press require each of the requirements of section 43G(1)(b)-(d) to be satisfied; and one of the conditions in 43G(2) to be satisfied. The requirements of 43G (1) are that

> (b) The worker reasonably believes that the information disclosed, and any allegation contained in it, are substantially true,
>
> (c) he does not make the disclosure for purposes of personal gain,
>
> (d) any of the conditions in subsection (2) is met, and
>
> (e) in all the circumstances of the case, it is reasonable for him to make the disclosure.

123. 43G(2) The conditions referred to in subsection (1)(d) are—

> (a) that, at the time he makes the disclosure, the worker reasonably believes that he will be subjected to a detriment by his employer if he makes a disclosure to his employer or in accordance with section 43F,
>
> (b) that, in a case where no person is prescribed for the purposes of section 43F in relation to the relevant failure, the worker reasonably believes that it is likely that evidence relating to the

relevant failure will be concealed or destroyed if he makes a disclosure to his employer, or

(c) that the worker has previously made a disclosure of substantially the same information—

(i) to his employer, or

(ii) in accordance with section 43F.

(3) In determining for the purposes of subsection (1)(e) whether it is reasonable for the worker to make the disclosure, regard shall be had in particular to -

(a) the identity of the person to whom the disclosure is made,

(b) the seriousness of the relevant failure,

(c) whether the relevant failure is continuing or is likely to occur in the future,

(d) whether the disclosure is made in breach of a duty of confidentiality owed by the employer to any other person,

(e) in a case falling within subsection (2)(c)(i) or (ii), any action which the employer or the person to whom the previous disclosure in accordance with section 43F was made has taken or might reasonably be expected to have taken as a result of the previous disclosure, and

(f) in a case falling within subsection (2)(c)(i), whether in making the disclosure to the employer the worker complied with any procedure whose use by him was authorised by the employer.

124. The allegations contained in the Matt Bodell email and PDs 1-4 were true. We also accept that the Claimant reasonably believed that the allegations in PDs 5 and 6 were true. We are also satisfied that he did not make those disclosures for the purposes of personal gain. The Respondent submits that personal gain does not necessarily mean monetary gain, but could effectively mean for a Claimant's own purposes. A natural reading of the words "for personal gain" suggests a pecuniary gain or, at least, a gain which is more tangible that just a motive (even if it is revenge or retaliation). We considered that the requirements of 43(1) (b) and (c) were met.

125. However the Claimant does not meet the conditions in either (43(1) (d) or (e).

126. As for (d) the Claimant says he satisfies 43(2) (c), namely that he had disclosed substantially the same information in accordance with section 43F. While it is correct that he had disclosed substantially the same information as PDs 1-4 to TUCO and the ICO, Section 43F gives protection only where the relevant failures "fall within any description of matters in respect of which that person is so prescribed". The ICO is a prescribed person in relation to data protection, but this provides no protection for disclosures about a confidential settlement agreement unrelated to a data breach. TUCO is a prescribed person in relation to "fraud and other irregularities relating to the financial affairs and trade unions and employers' associations", but the Claimant did not allege in PDs1-4 fraud or other irregularities. He alleged breach of the rules and inconsistent treatment.

127. We do not consider that the Claimant reasonably believed that he would be subjected to a detriment by the Respondent if he made a disclosure to them, or to a prescribed person, nor was it reasonable for him to believe that it was likely that the evidence relating to the relevant failure would be concealed or destroyed if he made the disclosure to his employer. We have rejected his evidence that he believed that there would be a cover-up. The Claimant says that he received threatening letters from the Respondent's solicitors, but those letters were about making disclosures to the press. They do not suggest that the Claimant would be subject to a detriment for making the disclosures internally. The Claimant was aware of the Respondent's whistleblowing process for members, as his email to the Chair of the Audit Committee makes clear. Relations had by then soured because the Claimant was already on suspension for issues unrelated to any disclosures, but there was no objectively reasonable reason why the Claimant believed he would have been subjected to a detriment for making those disclosures internally.

128. However, at the heart of this matter is whether the Claimant can satisfy the condition in s 43G(1)(e). In all the circumstances of the case was it reasonable for him to make the disclosure?

129. We find that it was not reasonable. The Claimant had himself approved the settlement agreement, with its confidentiality clause. The Claimant had obtained no new information about DDK, or the circumstances surrounding that suspension, since he had given that approval- nothing had changed. He was aware that disclosures to the press were likely to breach the terms of the confidentiality clause in the settlement agreement that he had approved. He was aware that Mr Carr had been instructed to investigate the circumstances of DDK's departure and to make recommendations. The instructions had been given to Mr Carr on 29 June 2021 and the Claimant had not objected at that time.

130. The Claimant's explanation for his change of heart is that he then believed that there was going to be a cover-up. We do not accept that he believed that there was going to be, or had been, a cover-up of that investigation. If he had reasonably believed that he would, at the very least, have raised this with Mr Carr, Ms Cullen, or Ms Galbraith-Marten as the Respondent's in-house legal counsel. He could have used the internal whistleblowing procedure. He did none of those things. If the Claimant had genuinely been concerned only with a breach of his confidentiality when he complained to TUCO and the ICO there was no need to bring DDK or the settlement agreement into the public arena.

131. Like Mr Carr, we find that the disclosures to the press were made as an act of retaliation because he had been suspended and believed he had been unfairly treated . The Claimant was fully aware that these disclosures would damage the reputation of the Respondent, and it seems likely that this was his intention.

132. We conclude that none of the disclosures to the press amounted to qualifying disclosures because it was not reasonable in all the circumstances for him to make those disclosures.

133. For these purposes we have not distinguished between PD 1-4 and PDs 5 and 6, as all of those disclosures were unreasonable in all the circumstances.

134. It is not therefore necessary to consider questions of causation. However, for completeness we accept that both Mr Ohringer and Mr Carr made their decisions based only on the content disclosed in the Matt Bodell email, as they accepted at face value the Claimant's evidence that his disclosures to the press were all in identical form.

135. Unlike PDs 5 and 6, the Matt Bodell email does not, (as pleaded by the Claimant in In his Particulars of claim (para 18) disclose (i) various acts of gross misconduct by DDK or (ii) the fact that there was a cover-up of her suspension and the subsequent investigation by Mr Carr. While the email refers to the fact that DDK's suspension and investigation not been communicated to the membership that is not per se a breach of a legal obligation or a "cover-up" of her suspension or of the investigation.

136. We are left with the claim that the email discloses a data breach and/or contains defamatory information. The Claimant was not disciplined for either of those things - he was suspended and disciplined for leaking confidential information to the press. He had already complained to the Respondent about a breach of his confidentiality and the outcome of that grievance had not yet been delivered when he went to the press. He had no reason to believe that he would be, nor was he, subjected to a detriment for making that complaint. A complaint about a data breach, a breach of confidentiality or defamation did not require the Claimant to disclose information about DDK or the settlement agreement.

137. The Claimant was suspended because the Respondent considered that the Claimant was in breach of the terms of the settlement agreement and the Claimant accepts that if his disclosures were not protected they would amount to gross misconduct. There was to be an investigation by independent lawyers of high repute to establish if that was correct or not. No action was taken at that stage on the ground that he had made protected disclosures because the issue was yet to be determined. In the end it was established that he had not.

138. As Ms Wilson explained, and we accept, the Claimant was not permitted to stand for election as chair in November because he was the not eligible to stand as he was the subject of ongoing disciplinary proceedings. In other circumstances this might be an issue that went to remedy.

<u>Unjustifiable discipline</u>

139. The first question is whether the Claimant asserted that the union or any representative of it had contravened a requirement which was or sought to be imposed by its rules, by any other agreement, by any enactment or any rule of law.

140. We have considered this by reference only to the Matt Bodell email on the basis that those taking action believed that all his disclosures were identical to that email. PDs 5 and 6 are not relevant because we are satisfied that no action was taken by the Respondent on the basis of those disclosures. A suspension does not meet the definition of discipline in section 65(2). Mr Carr and Mr Ohringer accepted the Claimant's assertions in the disciplinary process that all his disclosures to the press were in a form identical to the Matt Bodell email.

141. The Claimant did assert a breach of its rules in terms when he complained to TUCO. It is, just, possible to ascertain that he asserted a breach of the rules, via a breach of his confidentiality when he made a disclosure to the press in terms identical to the Matt Bodell email, although unlike the complaint to the ICO the Matt Bodell email did not state in terms that he was complaining about a breach of his confidentiality.

142. Those assertions, however, were not the, or even one of the, reasons for the decisions made by the Ohringer and Carr panels. He was disciplined for leaking confidential information about DDK to the Press. The reference to DDKs suspension, investigation and settlement agreement does not assert a breach of union rules or any requirement of law. There is nothing unlawful or against union rules about those matters. Nor was it necessary to disclose those matters in order to assert a breach of his confidentiality.

143. All claims are dismissed.

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Employment Judge Spencer
26 July 2024

JUDGMENT SENT TO THE PARTIES ON

31 July 2024
.....

.....
FOR THE TRIBUNAL OFFICE

SCHEDULE
THE ISSUES

A. Status

1. Was C a "worker" such that he is entitled to bring a complaint of whistleblowing detriment under Part IVA ERA 1996?

B. Protected disclosure/s

2. The disclosures on which C relies are his statements to the Press made between 29 August and 15 September 2021 or around that time. The elements of those disclosures on which C relies are set out in the table annexed below.

Qualifying disclosure (s43B ERA 1996)

3. Did C make a qualifying disclosure? In particular:

a. Did C thereby make a disclosure of information?
b. Did the information disclosed have sufficient factual content and specificity such as is capable of tending to show one of the matters listed in s43B(1) ERA 1996?
c. Did C believe that the information disclosed tend to show one or more of the matters:

i. that a criminal offence has been committed, is being committed or is likely to be committed; (s43B(1)(a))

ii. that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject; (s43B(1)(b))

iii. that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed? (s43B(1)(f))

d. Did C believe that the disclosure was in the public interest?

e. Were the above beliefs reasonably held?

f. The Respondent does not dispute that the Claimant reasonably believed that Dame Donna Kinnair had committed a breach of a legal obligation and/or a criminal offence.

Protected disclosure (s43G ERA 1996)

4. If C made a qualifying disclosure, was it a protected disclosure in accordance with s43G ERA 1996? In particular:

a. Did C reasonably believe that the information disclosed, and any allegation contained within it, were substantially true? (s43G(1)(b)) (NB this relates only to allegations of a cover-up as referred to in POC1 paras 18c and/or 18d: see AGOR1 para 43.a)

b. Did C make the disclosure for personal gain? (s43G(1)(c))

c. Did C believe, at the time when he made the disclosure, that he would be subject to a detriment if he made the disclosure to R? If so, was such belief reasonably held? (s43G(2)(a))

d, Alternatively had C made a disclosure of substantially the same information in accordance with s43F ERA 1996 to a person prescribed under the Public Interest Disclosure (Prescribed Persons) Order 2014, namely the Information Commissioner (ICO) and the Trade Union Certification Officer (TUCO)? (s43G(2)(c)(ii)) In particular:

i. Did C believe that the relevant failure falls within any description of matters in respect of which that person is so prescribed?

ii. If the disclosures entailed an allegation of a cover-up (as set out in paras 18c and/or 18d of the particulars of claim), did C believe that the allegation of a cover-up was substantially true?

iii. Were these beliefs reasonable?

e. In all the circumstances was it reasonable for C to make the disclosure to the press? (s43G(1)(e) and s43G(3))

Bad faith (relevant to remedy only)

5. If C made a protected disclosure, did he make it in bad faith?

C. Whistleblowing: Detriment and causation

6. The detriments on which C relies are as follows:

Claim 1

a. suspending C from his role as a Council member from 22 September 2021, a suspension which was ongoing as at 18 February 2022, the date when the Claimant submitted his ET1;

b. making the C the subject of a disciplinary process and a disciplinary hearing with the threat of removal from his role and from membership of the RCN;

c. failing to allow C to apply for a second term as Chair prior to the end of his term of office on 31 December 2021. There is disagreement between the parties

as to whether this is an issue that has been pleaded or is merely a consequence of other acts of detriment which have been pleaded. This will be expanded upon in both parties' submissions;

Claim 2

d. suspending C from his role as a Council member until his expulsion from the RCN on 4 April 2022. Note that the period from 22 September 2021 until 18 February 2022 is already covered by Claim 1 (as captured in paragraph 6a above) and this will be expanded upon in both parties' submissions;

e. the decision to expel the Claimant from membership of the RCN and of Council on 4 April 2022.

7. Did R subject C to the above detriments because he had made a protected disclosure?

D. Unjustifiable discipline (s64 TULRCA 1992): protected conduct

8. Did C, by his communications to the Press referred to at paragraph 2 above, make an assertion that the union, any official or representative of it or a trustee of its property had contravened, or was proposing to contravene, a requirement which was, or was thought to be, imposed by or under the rules of the union or any other agreement or by or under any enactment (whenever passed) or any rule of law? (s65(2)(c) TULRCA)

9. Was the conduct for which the Claimant was disciplined conduct in respect of which individuals would be disciplined by the union irrespective of whether their conduct was in connection with making an assertion of the kind falling within section 65(2)(c) TULRCA? (s65(5) TULRCA)

E. Unjustifiable discipline: detriment and causation

10. The acts of unjustifiable discipline on which C relies are:

a) Being suspended over press disclosures;
b) Being subject to a disciplinary investigation over press disclosures;
c) The finding that he was guilty of gross misconduct;
d) his expulsion from membership of the RCN; and
e) his removal from Office as a Council member.

11. Was the reason, or one of the reasons, for that treatment that he had engaged in protected conduct under s65(2)(c) TULRCA?

12. Were the disciplinary processes used against C flawed? Were the panels that judged the hearings fair, impartial and without bias? Were panel members briefed that C was the source of the Mansey disclosures? There is disagreement between the parties as to whether this is relevant to the claim of unjustifiable discipline.

F. Remedy.