EMPLOYMENT TRIBUNALS

Claimant: Ms N Beere

Respondent: Bolton Hospitals NHS Foundation Trust

Heard at: Manchester **On:** 9-13 & 16-20 September 2024

Before: Employment Judge Phil Allen
Mr A J Gill
Ms S Howarth

REPRESENTATION:

Claimant: In person (assisted by Mr Slater, a retired solicitor)
Respondent: Ms R Levene, counsel

JUDGMENT

The unanimous judgment of the Tribunal is that:

1. With the exception of detriment D14, the Tribunal did not have jurisdiction to consider the complaints brought, as the claim was not brought within the time required under section 48(3) of the Employment Rights Act 1996.

2. The claimant did not make a protected disclosure to the respondent as alleged as PD1 or PD4.

3. The claim for being subjected to detriment for making protected disclosures is not well-founded and is dismissed.

REASONS

Introduction

1. The claimant is employed by the respondent and has been since 15 April 1996. The claimant is a registered orthoptist and is the Principal Service Lead for Orthoptics and Optometry. The claimant alleged that she made protected disclosures and has been treated detrimentally as a result. The respondent denied the allegations.

Claims and Issues

2. The precise complaints being pursued and the issues in them were not immediately obvious from the claim issued. However, prior to this hearing, there had been a number of hearings and considerable efforts made to establish the issues. Four preliminary hearings had been conducted in this case, on 16 September 2022, 3 January 2023, 8 March 2023 and 15 May 2023. The claimant provided extensive further particulars of her claim following the first preliminary hearing (83). Following the second and third preliminary hearings, the issues in the claims being pursed were listed and appended to the case management orders made. Following the third preliminary hearing, the only claim remaining and being pursued was a claim for detriment as a result of having made a protected disclosure, the only disability discrimination claim identified having been dismissed. The protected disclosure detriment complaints were allowed to be amended at the third preliminary hearing, but further applications to amend were refused at the fourth preliminary hearing. A final list of issues was appended to the case management order prepared following the fourth preliminary hearing.

3. At the start of this hearing, the respondent's position was that the list of issues appended to the case management order prepared following the fourth preliminary hearing was the final list of issues, save that in fact they contended an amendment was required to it to ensure that all the required legal questions were asked (see the elements in square brackets in the attached list at 2.1.6).

4. The claimant confirmed that she was no longer relying upon what had been PD2 and PD3 in the list of issues, as being protected disclosures, and it was agreed that they would be crossed out in the list of issues (and accordingly they are not included in the attached amended list of issues). The claimant explained that the date of PD1 was not correct because the alleged disclosure to Dr Wood was made later (albeit the claimant maintained that she had disclosed the issues to others on the date recorded in the list of issues). She was otherwise unable to say on the first morning of the hearing whether the list of issues was agreed or, if it was not, what amendments she said were required to it. The claimant was asked to confirm the position on the second morning of the hearing after the Tribunal had taken the time required for reading.

5. When the parties returned on the second day, the claimant provided a letter containing the amendments which she said she was seeking to make to the list of issues. That referred back to an application the claimant had made on 31 July 2024, to which the respondent had objected (on 16 August 2024), but which had not previously been determined. Some of what was said in the letter addressed issues which were already before the Tribunal and were included in the list of issues, including contentions around whether the matters were a continuing series of events which ended in time. However, for the parts not already pleaded, the Tribunal considered that the claimant was making an application to amend her claim. The claimant also sought to amend her claim to add Mrs Inkster to the people she alleged had subjected her to detriment D4, and that was also considered as part of the application to amend.

6. As is recorded below, after the application was heard, a decision was reached. The claimant was granted leave to amend her claim to rely upon section

43B(1)(f) of the Employment Rights Act 1996 for her existing disclosures, in addition to the subsections previously relied upon (subsections (b) and (d)) and she was granted leave to amend PD1 so that she was relying upon a disclosure made to Dr Jeremy Wood on 17 or 18 January 2017 rather than 22 February 2016 as had been said in the list of issues. Her other applications to amend (including adding to the people alleged to be responsible for D4) were refused. The reasons as provided orally on the morning of the second day of hearing, are set out below.

7. During her cross-examination, the claimant confirmed that she wished us to cross out what had been detriment 17 in the list as she did not want us to determine that claim.

8. The list of issues (as amended and incorporating both the amendments the respondent said were required and the amendments to the claim which were granted) is appended to this Judgment. The remedy issues have been removed from that list, as it had been decided at the fourth preliminary hearing that this hearing would determine only liability issues and not remedy issues.

Our decision on the application to amend

9. In determining the application to amend, we considered the matters set out in the well-known decision of **Selkent Bus Company Ltd v Moore** [1996] IRLR 661 and also in the Presidential Guidance on general case management (as it relates to amendments). We noted that this was a claim where the original claim was unclear and had required significant clarification over four preliminary hearings and where the claimant had been ordered to provide further particulars of her claim (and had done so).

10. The respondent agreed to the claimant amending the date upon which the claimant made PD1 to Dr Wood, to be 17 or 18 January 2017 rather than 22 February 2016. We noted that the claimant did say that she made a disclosure to others on the original date, but the amendment sought and granted was to the date of the disclosure relied upon which was made to Dr Wood.

11. For the other amendments sought, we noted that the disciplinary decision following the investigation was made on 4 October 2021. The resolution appeal outcome had been on 16 November 2022. The application to amend was being considered on 10 September 2024. The issues raised by the claimant related to Dr Kwartz's actions up to a change of policy which occurred during 2020. The Timing of the application was that it had been made on 31 July 2024 at the earliest and 10 September at the latest. That was after the case had been fully prepared for hearing, with witness statements having been prepared and exchanged. We did not recap in full the details of the process followed in the case being prepared, but we noted there had been four preliminary hearings, the claimant had provided further particulars, and there had been previous applications to amend which had been determined at preliminary hearings. The reason for the application being made now was, in summary, that the claimant had now received better advice.

12. The claimant wished to rely upon section 43B(1)(f) of the Employment Rights Act 1996 for her existing alleged disclosures, as well as subsections (b) and (d) of that section. We considered that to be in practice a technical amendment which was

unlikely to require additional evidence. We were due to hear from the claimant, the person about whom the disclosure had been made, and the person to whom the disclosure was allegedly made. We considered that there might be prejudice to the claimant if we were later to establish that the alleged disclosures relied upon would have been protected disclosures had they been considered under subsection (f) (but not subsections (b) or (d)). The prejudice of allowing the amendment for the respondent would be limited. We considered the timing of the application to be unfortunate and it should have been made earlier. We found that it was in the interests of justice to allow that amendment sought (to also rely upon subsection 43B(1)(f)) for the existing pleaded disclosures. The list of issues required amendment as a result (see issue 2.1.5.3). We also noted that the list of issues had already been amended as a result of the respondent's request and, whilst it was not a significant factor in our decision, did accept that it illustrated that the list of issues is not set in stone (and must not be followed by us slavishly).

13. The claimant sought to add Mrs Inkster to those who she contended had treated her detrimentally in issue D4. That amendment, if granted, would require new evidence inasmuch as the respondent said that it would need to call Mrs Inkster. That might mean that this hearing could not proceed as listed. It would be the addition of someone new who was now alleged to have treated the claimant unlawfully, added late to a list of issues which had resulted from, or been considered at, four preliminary hearings. Notably what was sought now had not been included in the claimant's letters of 31 July or 10 September. We also noted that the application to include Mrs Inkster was not made in the claimant's further particulars (107) or the previous applications to amend which the claimant had made. Witness statements had been exchanged in June. The respondent would be prejudiced as a result if the amendment was granted. There might be prejudice to the claimant if the application was refused as she would not be able to pursue D4 on the basis that she suffered a detriment from Mrs Inkster, but she would still be able to pursue her many existing allegations and would be able to proceed with arguing alleged detriment D4 with those previously named by her. The amendment would be significantly out of time because the alleged detriment is alleged to have occurred on 3 August 2020, when the application to amend has been made four years later. The relevant test for an extension of time is one of reasonable practicability (not the more flexible just and equitable test which applies for discrimination claims). Based upon those factors, we refused the claimant's application to amend to include Mrs Inkster as someone who was named as having treated the claimant detrimentally as part of issue D4.

14. Many of the same considerations applied to the claimant's other applications to amend her claim as set out in her letter of 10 September (and to amend the list of issues). We did not repeat those factors. Most of what the claimant wished to allege related to the investigation which concluded in October 2021 (at the latest). Some related to what the claimant was informed in October 2020. Some related to the resolution investigation in 2022. Some of what was alleged was undated. The prejudice to the respondent of granting the amendments sought would potentially be significant where the case is fully prepared and ready for hearing and we accepted that, if the amendments were granted, the hearing would be unable to proceed as listed and would then be significantly delayed. The claimant was able to rely upon the many allegations already listed and therefore, whilst there is a potential prejudice to refusing the application, that prejudiced was lessened by the fact that the

complaints previously identified are able to proceed. Balancing the relevant factors, it was our decision that those applications to amend were refused.

Procedure

15. The claimant represented herself at the hearing. She was supported by a retired solicitor, Mr Slater. At the start of the hearing Mr Slater explained his past experience in Employment Tribunals and that he was a retired solicitor and also made clear that, having retired some time ago, he was not able to represent the claimant for the hearing or as he once would have done. He supported the claimant throughout and occasionally spoke when he was allowed to do so. He also prompted the claimant during her cross-examination of other witnesses. He did not, however, represent the claimant, she represented herself. The two exceptions where Mr Slater did take on the role of representative were: that he asked questions of the claimant in re-examination at the end of her own evidence, it having been suggested that was a way in which he could helpfully assist the claimant (who would otherwise have to re-examine herself); and he made oral submissions on her behalf. It had been made clear that each witness could only be cross-examined by one or the other person and, as a result, the claimant herself cross-examined each of the respondent's witnesses.

16. Ms Levene, counsel, represented the respondent. At the start of the hearing, she provided a document which set out the position in the case and set out the relevant law.

17. The hearing was conducted in-person with both parties and all witnesses attending at Manchester Employment Tribunal.

18. A very significant and lengthy agreed bundle of documents was prepared in advance of the hearing, which ran to five lever arch files and 2450 pages. Where a number is referred to in brackets in this Judgment, that is a reference to the page number in the bundle. We read only the documents in the bundle to which we were referred, including in witness statements, or as directed by the parties. Many of the pages in the bundle were not referred to at all during the hearing.

19. In the course of the hearing, some pages were added to the bundle. The parties agreed that the respondent's resolution procedure should be added. The respondent objected to two documents which the claimant wished to add which contained triage guidance and a GMC guidance document, but after consideration of the parties' brief submissions on the morning of the second day, we agreed that the documents (and an email referred to by the respondent) could be added. In reaching our decision, we explained that we thought that the respondent had a potentially valid point when the relevance of the documents was questioned, in that the documents did not appear to address the issues. We highlighted that we did not need to decide whether the things about which the claimant made her alleged protected disclosures were in fact actually correct. However, we were mindful that there was a dispute about whether the claimant's belief was reasonably held. In those circumstances, we accepted that the documents might possibly be relevant and therefore decided that it was in accordance with the overriding objective and being appropriately flexible in proceedings, to allow the documents to be added to the bundle. We confirmed that if it transpired that they needed to be considered, the

parties were free to make submissions about them and their relevance at the end of the hearing. Subsequently further documents were added to which the respondent did not object. On the sixth day the claimant sought to add a document to which the respondent objected, but after hearing brief submissions and taking a brief adjournment, we agreed it could be added. Later that day the respondent sought to add a further document, which was added to the bundle as the claimant did not object. Whilst those pages were added to the bundle, the pages in them were not separately numbered.

20. On the morning of the ninth day, just before submissions after all the evidence had been concluded, the claimant produced a further document. In practice that was a copy of an email already in the bundle, but which appeared to show an attachment when the copy in the bundle had not. She said she had taken it from the respondent's system. We heard submissions about whether it should be seen by us, as the respondent, not unsurprisingly, contended that so late in the day it should not be considered. After hearing what both parties had to say and a brief adjournment, we agreed to add the document to the bundle and to consider it. When we explained our decision to do so, we explained that we would admit the document as a pragmatic decision applying the overriding objective and, in particular, avoiding unnecessary formality and seeking flexibility in proceedings. However, we did so with the caveat that we would take into account that it had been submitted so late, which concerned us significantly, and (perhaps most importantly) that Dr Wood had not had the opportunity to give his evidence about it. In the element of the Judgment below which explains our decision, we have addressed the weight we gave the document when determining whether a protected disclosure had been made.

21. We were provided with witness statements from each of the witnesses called to give evidence at the hearing. On the first morning, after an initial discussion with the parties, we read the witness statements and the documents referred to in them. We also read a limited number of documents which the parties requested that we read.

22. The respondent applied for a short section of the claimant's witness statement to be redacted as they said it was irrelevant and included highly personal information about an individual who was not a witness to these proceedings. Very sensibly and pragmatically, the claimant agreed to have that section removed. It was accordingly redacted and not considered by us. We heard evidence from the claimant, who was cross examined by the respondent's representative, before we asked her questions and Mr Slater asked her some questions in re-examination. She gave evidence from late morning on the second day of hearing until the middle of the fourth day.

23. The claimant also provided us with a statement from Dr Simon Wallis, as evidence given on her behalf. The statement was in the form of an unsigned letter from Dr Wallis. We gave his statement less weight as he did not attend the hearing and the respondent was not able to cross examine him.

24. For the respondent, we heard evidence from each of the witnesses listed below. They gave evidence from lunch time on the fourth day until late morning on the eighth day. Each witness was cross-examined by the claimant, we asked questions, and they were re-examined. A few questions from issues arising were

also asked of some of them by the respondent's counsel. The witnesses called by the respondent were:

a. Dr David Haider, consultant ophthalmologist and chief clinical information officer;

b. Ms Susan Tracey Garde, Freedom to Speak Up Guardian;

c. Mr Jeffrey Kwartz, consultant ophthalmologist and (joint) clinical lead;

d. Ms Lianne Robinson, who is no longer employed by the respondent, but who was divisional nurse director from 2016 to 2019, director of operations for anaesthetics and surgery from November 2019, and deputy chief nurse from December 2021;

e. Ms Gillian Childs, divisional HR manager for the elective care division from August 2018 to April 2020 (now the anaesthetics and surgery division);

f. Ms Carol Sheard, deputy director of people; and

g. Dr Jeremy Wood, consultant in anaesthesia and critical care, and from 2013 to 31 December 2019 (he also continued to undertake some of the role's duties until 31 March 2020) divisional medicial director of elective services.

25. We should highlight that we did not hear from a number of people who are referred to in the facts below and whose evidence might have illuminated some elements of the evidence. Importantly, that included: Nadine Caine, the disciplinary investigator; Mrs Clare Inkster, the joint departmental clinical lead with Mr Kwartz; Ms Sonia Nosheen, operational business manager; and Ms Cara Burns, the specialist optometrist who it appeared was (at least in part) the source of the complaints raised. The claimant had sought witness orders prior to the hearing, but those had been refused (by another Employment Judge and before the hearing commenced).

26. We were provided with a cast list prepared by the respondent. We were also provided with two chronologies: one prepared by the respondent; and one containing the claimant's amendments to the respondent's chronology, with which the respondent did not agree.

27. At the start of the hearing, we did ask whether any adjustments were required to assist the claimant in giving evidence and/or presenting her case. It was agreed that breaks would need to be taken, and a number of additional breaks were taken (over and above those normally taken) during the hearing (including at the claimant's request). The claimant also identified heat as an issue and, as far as we were able, we kept the heat down by opening windows and using air-conditioning during breaks to reduce the temperature in the room (it not being possible to use the air-conditioning when evidence was being heard due to the noise). During the cross-examination of the claimant, the claimant asked to finish early on one day and we did so. On two occasions, the claimant raised the number of attendees from the respondent and their presence in the room. On the second occasion, the claimant

requested that the room be cleared of attendees from the respondent for a period of her evidence. We refused that request (the respondent having objected and it not being in accordance with the overriding objective or consistent with rule 50(2) to do so) and the claimant was able to complete her evidence.

28. After the evidence was heard, each of the parties was given the opportunity to make submissions. We agreed to allow an extended overnight break between the end of the evidence and submissions, at the request of the claimant. Submissions were heard on the morning of the ninth day. Ms Levene provided a lengthy written submission document upon which she relied and she only added to that document with brief verbal submissions. Mr Slater made submissions on behalf of the claimant orally (the claimant having chosen that he should do so, rather than making the oral submissions herself). Mr Slater's oral submissions were lengthy, unique, wide-ranging and his style of delivery was discussive rather than specifically focussed on the issues in dispute. Following his submissions, Ms Levene responded to some of the points made. In her submissions in response, Ms Levene submitted that the submissions made by Mr Slater should be taken into account when assessing the credibility of the claimant's evidence. Whilst we understood the submission made, we declined to do so in this case and assessed the credibility of the claimant based upon her own evidence.

29. As a result of the limited time left at the end of the hearing for us to both reach a decision and inform the parties, we reserved our decision. Accordingly, our liability Judgment, and the reasons for it, are set out in this document.

Facts

30. The claimant has worked for the respondent for a very long time. Her continuous employment dated from 15 April 1996. She is a registered orthoptist. For many years she has also held a managerial role in which she has also been responsible for the orthoptists and orthoptics services, as well as having some responsibility for ophthalmology services. We were not provided with the claimant's contract of employment nor were we provided with any formal documents which set out the claimant's job title or titles. The claimant said her contract was outdated (and no witness from the respondent explained how the documents provided accorded with the obligation to provide a written statement of any changes to an employee's terms and conditions of employment). It appeared to be common ground that she was the Principal Service Lead for Orthoptic and Optometry Services. From some point it was also common ground that the claimant took on the role of Non-Medical Glaucoma Clinical Lead (although as set out below there was some dispute about whether that was part of the claimant's role or an additional separate role). The claimant did not apply for the latter role, nor was she interviewed for it. No documents were provided which related to it (save for the two job descriptions prepared for the job evaluation process undertaken at the claimant's request). It was the claimant's evidence that she took on the responsibilities as part of the same job which expanded as a result. There was no evidence that specific times or parts of the week were identified as being when the claimant would undertake either part of her role or, as the respondent contended, of her two roles.

31. The respondent has a number of procedures and policies, many of which were referred to during the hearing. They include: a disciplinary policy and procedure

(951 and 1260); a resolution procedure (1022) (which was, in practice the grievance procedure); an incident reporting policy (274); and the freedom to speak up – raising concerns (whistleblowing policy) (added to the bundle).

32. The disciplinary policy and procedure included a section on suspension which said that: all suspensions would be reviewed on a four weekly basis by the commissioning manager; the offer of an appropriate buddy during the suspension should be made in addition to a trade union representative; patient safety was the key driver for any decisions relating to suspension of staff; and that a manager was required to document the decisions they made in relation to the suspension of a member of staff (with reference to a risk assessment which was available to do so). The policy also stated "*All investigations will be reviewed at four weeks by the Commissioning Manager, in conjunction with the HR Business Manager. All investigations should be completed within 8 weeks. Where this is anticipated not to be achieved a full chronology and revised completion date must be submitted to the Deputy Director of Workforce and reported through Workforce Assurance Committee to Trust Board*". It said that a disciplinary hearing was to be arranged to take place within 28 working days of the investigation being completed. An appeal hearing "*wherever possible*" was to be arranged within 28 working days of receipt of the request for the appeal and the outcome was to be provided within five working days of the appeal hearing.

33. The whistleblowing policy stated that the respondent is committed to an open and honest culture. It acknowledged that fear of being victimised is one of the main reasons why workers do not speak up. It said that if someone raised a genuine concern under the policy, they would not be at risk of suffering any form of reprisal as a result and the respondent would not tolerate the harassment or victimisation of anyone raising a concern. We heard evidence from Ms Garde, who is the respondent's freedom to speak up guardian and to whom the claimant spoke on a number of occasions. We accepted her evidence about her role and the people to whom she speaks in the Trust on a regular basis.

34. An incident occurred on 22 February 2016 in which the claimant and Mr Kwartz spoke to each other about a patient who had been referred to Mr Kwartz's general clinic. In summary, the claimant's view was that as Mr Kwartz was the consultant conducting a general clinic at the time, it was his responsibility to see the patients referred to him by members of the team (including orthoptists and including squint patients, which was not Mr Kwartz's specialism). In her evidence, she emphasised the patient care aspect to being seen by a consultant, particularly if the Trust had undertaken certain tests which required a consultant to interpret them and/or the patient was present in the department at the time. Mr Kwartz did not agree (there was one condition he accepted required urgent care, but that was not what he believed was in issue). His view was that squint patients should be referred to a clinic to be conducted by his colleagues who were experts in squint care, not his own, and he explained that was urgent patient care in this context where, for example, such a colleague was conducting a clinic the following day. In his view, that applied even where the patient was present on-site and would need to return. It was clear that this was a fundamental point of difference between the claimant and Mr Kwartz and the 2016 incident was not the first time it had arisen. Both held entrenched and passionate views about the particular issue, as was evident from the evidence which we heard. We would add that the way the clinics were operated, and

referrals were made, changed early in the Covid pandemic in 2020, which meant that patients are now referred to clinics based on expertise not availability, and therefore the particular issue of contention ceased to arise following the change. It was stated in evidence by Mr Kwartz, that there was no squint surgery that was an emergency (save for an acute vascular event, which it was common ground would be identified by Dr Kwartz where it occurred and was not what was in issue for the patients about which we heard).

35. The claimant had made a note of what occurred shortly after the event in February 2016 (327). In the note the claimant recorded that she had spoken to Mr Singleton and Dr Wallis at the time of the disagreement because she was shaking and close to tears. At the end of that note, she said the following:

> "*I have been upset and worried by what has happened, not sleeping well, waking in the night and early in the morning thinking about how I have been made to feel by the actions of a consultant ophthalmologist – who has behaved in an extremely unprofessional way.*
>
> *The orthoptists are asked to see extra patients, difficult patients with potential serious conditions, I have instilled in my orthoptists that every patient gets seen – as soon as we can manage it, they work over lunch and stay late – No other consultants have ever refused to see these urgent patients in their clinics, and indeed the general clinic is for general nonspecific patients as far as I have been instructed over the twenty years I have worked in the eye unit.*
>
> *I think it is disgusting that a consultant can set such a terrible example of quality patient care, whilst at the same time insulting and abusing the people who aspire to provide it"*

36. It was Dr Wood's undisputed evidence that he did not receive any complaint at that time.

37. We heard evidence from both the claimant and Mr Kwartz, that Mr Kwartz subsequently stopped sending private patients to the claimant. There was no contention that he was obliged to send private patients to the claimant. It was, however, clear that the decision not to refer was a deliberate decision by Mr Kwartz not to do so. That was dated by the claimant as having occurred within three months of 22 February 2016 and Mr Kwartz did not disagree. We noted this occurred before any alleged protected disclosures were made and appeared to show that the relationship between the claimant and Mr Kwartz had soured before an alleged protected act (albeit after the first of the events about which an alleged protected disclosure was made).

38. In her witness statement, the claimant stated that Dr Kwartz can be very domineering and arrogant, and he was always sure he was the boss. She described him as having an abrupt and argumentative demeanour which was sewn into his professional DNA. She also said that the orthoptists at Bolton did not refer a patient to Mr Kwartz's clinics, because they all knew that he didn't like it "*simply because it's a referral from an orthoptist*". The claimant also said that having prepared her statement she believed that what she described as the bullying and harassment had arisen out of disdain for her profession and a view that "*we are not worthy*".

39. On 16 January 2017, a meeting took place which was attended by Dr Wood and the claimant. The two of them spoke briefly. The following day the claimant sent an email to Dr Wood (331). It was Dr Wood's evidence that the allusion in the email was the first time he was made aware of the 2016 incident. In that email the claimant said (with our emphasis added):

> "*I'm not sure if this was touched upon after I left but we have been having ongoing problems with one of the consultants who feels strongly that his "general" clinic should reflect his specialism and this has led to some conflict – In deed last week one of the orthoptists was questioned again by this consultant virtually infront of the patient as he was deciding if he should see the patient or not.*
>
> *I had an unpleasant incident last year which I did report to HR and to Kath Smyth, and the current OBM who was present at the time as a witness.* ***I have included my report.*** *I have had no recourse from this complaint and indeed the consultant has never apologised to me for his behaviour. I wouldnt have mentioned it unless it was an ongoing issue which it is.*
>
> *Unfortunately at the time I didnt feel that the incident was dealt with very well, and still remains unresolved – this in turn puts stress on the orthoptists who are often shaking in their shoes if they need to take a patient down to his clinic"*

40. Dr Wood replied on 18 January 2017 (330). He said in that email that the last section of the meeting had alluded to the issue which she had raised in an anonymised way, that is that there was tension and behavioural issues with one consultant. He went on to say that "*I will keep a copy of your complaint at this stage*" and that he would "*attempt to address as part of an overarching action plan*".

41. The claimant responded briefly to Dr Wood on 23 January 2017 (329). The copy of the email provided to us did not show any attachment and no attachment was referred to in it. The claimant thanked Dr Wood, said she was happy with his suggestion, but went on to say "*Orthoptics is a particular bug bear for this consultant*".

42. The claimant contended that she had emailed her note of what occurred on 22 February 2016 to Dr Wood in January 2017, but could not recall exactly when she had done so. No other email was provided, other than those referred to above. Dr Wood did not recall receiving a written complaint and said that, based upon the absence of an email, he did not believe that the claimant had provided the written complaint to him. He told us he had looked for the email, but when asked about it, it appeared that his search had been limited to things which he had retained in email folders, he did not describe an exhaustive or thorough search or one undertaken by the respondent's IT department.

43. In his witness statement, Dr Wood said that he could not specifically remember if he had told anyone else about what he described as the disclosure, however he said he did not believe he had done so, as he viewed the interaction with the claimant as essentially being confidential and he could find no record of him having raised it with anyone else in 2017. We would note that Dr Wood had told the

claimant that he would attempt to address it (as part of an overarching action plan), when in fact there was no evidence that anything had been done about it at all.

44. Mr Kwartz's evidence was that he was not made aware of the complaint at the time.

45. The claimant did not believe that she had clarity about her role or the pay for her role, something which the list of issues stated had occurred from 2017 onwards and the claimant's chronology dated as being from January 2017 due to expansion of her role in 2015. As we have recorded, the claimant had taken on additional duties over time with responsibility for the glaucoma service. Those additional duties were not confirmed or recorded in any documents provided to us (as, of course, they should have been). The claimant sought re-banding of her role so that she could receive higher pay, as a result of her additional duties.

46. On 24 August 2018 the claimant requested to work to her substantive job description (337), saying that she would return to a role which was purely orthoptics, ceasing to be involved in glaucoma service management. On 28 September 2018, in a letter which clearly followed a meeting held in response to the claimant's statement (339), Ms Currie, the operational business manager for ophthalmology at that time, told the claimant that there was no negotiation to be held and "*it was essential that you continue to undertake your full role, including all elements of the Glaucoma Lead role with immediate effect*". The claimant was told that:

> "*if you did not resume your full duties, I would be seeking to pursue a more formal process for this misconduct through managing the situation in line with the Disciplinary Policy.*"

47. In the letter of 28 September, Ms Currie recorded that, on 24 September, the claimant had told her that she wished to step away from the glaucoma team role because of the fact there was a bad culture in the glaucoma team environment. There was an email exchange between the claimant, Ms Childs, and Ms Currie on 8 October 2018 (345). The email exchange referred to a separate job description having been prepared for the glaucoma lead part of the role (or roles) to which the claimant had objected.

48. In early 2019 the claimant's role or roles was/were put forward for job evaluation by the relevant panel. However, the two elements to her role (or roles) were recorded in two separate job descriptions as if they were two entirely separate and distinct roles. The effect of that was that the two job descriptions were considered by the job evaluation panel separately. The role of Principal Service Lead for Orthoptic and Optometry Services was banded as 8a. The role of Non-Medical Glaucoma Clinical Lead was banded 7. This was confirmed in a letter of 14 June 2019 (2288). The claimant's whole job was paid at 8a. The claimant asserted that the use of two separate job descriptions was done deliberately to sabotage the process, something which Ms Robinson and Ms Childs denied. Unfortunately, the job evaluation panel who considered the job descriptions on 11 April 2019 considered only one of the job descriptions at that panel meeting, and the other was considered later. That meant that the same panel did not consider them both. However, whenever it would have occurred, it appeared clear that the result of recording the claimant's role or roles as two separate job descriptions would always have been

that each job description was considered separately, as nobody was considering whether the additional responsibilities from the combined roles would have resulted in a grading of 8b for the roles/job descriptions combined.

49. The claimant appealed the job evaluation outcome on 18 June 2019 (382). There was a submission made on 21 June (403). The claimant asked Ms Sheard why her job description had been matched to an occupational therapist. The claimant was supported in her appeal by her trade union official. The claimant also raised with Ms Garde her unhappiness with the job evaluation process and the support which she had received.

50. We were provided with an email from the claimant to Ms Childs sent on 22 July 2019 in which the claimant confirmed that the job descriptions and person specifications which had been included in the job evaluation process had been agreed by her (405).

51. In September 2019, the claimant failed to maintain her professional registration and it lapsed. On 5 September Ms Robinson wrote to the claimant about her lapsed registration (2175). The letter followed a conversation. The letter confirmed that it had been agreed that the claimant would be temporarily redeployed from her qualified role as an orthoptist to the role of health care support worker (at band 3) as a temporary change. It was stated that it was imperative that, during the time, the claimant worked in a role which did not require registration and the claimant was instructed that she must not see patients independently in clinics or contribute to the assessment and diagnosis of any conditions. The claimant renewed her registration within a short period and returned to her orthoptist role. No action was taken against the claimant at the time for letting her registration lapse (save for the need to act in the alternative role on lower pay whilst unregistered).

52. On 31 December 2019 a further disagreement took place between the claimant and Mr Kwartz. Mr Kwartz was looking for another member of staff who had referred a patient to his clinic. The colleague was not available, but he instead spoke to the claimant. A disagreement took place, reflecting the fundamental disagreement we have already described. The claimant provided us with a note she made of that event, in which she said (after describing the issue) (437):

> "*Jeff explained how he would expect the orthoptist in question to look up what day this follow up had been booked and if it was his clinic then to move it to another consultant.*
>
> *I explained that if it wasn't a part of the orthoptists responsibility to micro manage his general clinic, he then asked me what he should be doing with his patient? to which I replied, I didn't know as I hadn't seen the patient myself, had not absorbed the full contents of his notes from a brief summary and that as he was the DR he could decide what needed doing from a medical point of view – he said again shall I just give the results of the MRI scan, I replied if that is what you think you should do and unless there was anything else from a medical point of view he wanted to do then go ahead.*
>
> *I felt that Jeff was trying to make a point and shift responsibility to me for this patient as he wasn't prepared to see them himself. He was pedantic, angry,*

> *patronising and rude. He intimidated and embarrassed me infront of my colleagues and patients. I felt bullied and flustered and it made it very difficult to go back to my consultation with my patient and concentrate on what the mum had been telling me and to examine the child.*
>
> *After the Christmas break I thought about how this had affected me and decided that I would report it as a contraindication to the privacy and dignity policy as an instance of bullying. Due to other factors I reported it outside of the eye unit the divisional medical director Mr Wood"*

53. On 17 January 2020 the claimant asked to speak with Dr Wood regarding the incident.

54. On 21 January 2020 the claimant emailed Ms Shears and Ms Childs (448). She said that she had taken advice from her union representative and had been advised to stop proceedings regarding her job evaluation. She addressed the process and the use of two job descriptions when she said she had one contract with the Trust and one job title. She ended the email by stating that she did not wish to take her grievance forward.

55. We were provided with an email from the claimant to Dr Wood sent on 22 January 2020 (2333). The claimant said that she was sending the attachment on ahead and asked Dr Wood to read it as it would provide context for the meeting which had been arranged. It was not disputed that what was attached was the claimant's full account of what had occurred on 22 February 2016. Dr Wood forwarded the email to Ms Childs on the same day and in the email referred to a discussion, and said it was an enclosed historical complaint which it was stated the claimant had said was not actioned departmentally as far as she was aware. The email also said that the separate incident of 31 December 2019 discussed at the meeting, had no written record at present. Dr Wood's evidence was that he copied the complaint to Ms Childs to have HR guidance on the best way forward.

56. On 22 January 2020, the claimant spoke to Dr Wood about the incident on 31 December 2019. It was Dr Wood's evidence that "*from memory*" he was "*not aware*" at the time of the claimant's written account of what occurred on 31 December 2019. It was his evidence that he had only seen the written account when reviewing the bundle for the Tribunal hearing.

57. On 24 January 2020 Dr Wood emailed the claimant (450). Dr Wood said "*I initially suggested that I meet JK on an informal basis to bring your concerns to his attention, there would be a written record of this meeting. You felt this was an acceptable initial approach*". The email referred to the claimant's concerns about Dr Kwartz's behaviour in an interaction surrounding a clinical appointment on 31 December 2019 and also to a historical incident along the same lines from February 2016. No documents were explicitly referred to in the email.

58. Dr Wood also exchanged emails with Ms Childs about the conversation and the proposed course of action on 22 and 24 January 2020 (451). Ms Childs confirmed that Dr Wood's email was ok to send.

59. Dr Wood spoke to Mr Kwartz on 22 January 2020. An email was sent which confirmed what had been discussed (460). The email said that the purpose of the meeting had been to ensure that Mr Kwartz was aware of the perceptions of his behaviour and the email referred to two matters, one being those involving the claimant. It was said that Mr Kwartz would be willing to apologise to the claimant for the incident on 31 December 2019 and it said in no way had it been intended to cause upset. There was no explicit reference to the 2016 incident and there was no mention of any written complaints at all. It was Dr Wood's evidence that, at the meeting, they had spoken about the incident on 31 December 2019. It was Mr Kwartz's evidence that he was unaware of any written complaint and that no written complaint had been provided to him.

60. In an email of 23 January 2020, Mr Kwartz responded to Dr Wood and copied his response to Mrs Inkster. He said (459):

> "*The matter relating to Nikki Beere is different. I am happy to put this behind and for the sake of departmental peace and apolgise as necessary and keep the process informal. I do however find Nikki Beere uncooperative aggressive and antagonistic and she has been like this for years. I know there are several other dept members that feel the same. Her complaint, I feel is unfounded and because of my longstanding knowledge of this I am 100% sure I know how I handled the problem and therefore the complaint is vexatious and unfounded. The in house resolution however has to be done along with your excellent suggestion of a SOP or process to stop the orthoptists putting in unnecessary inappropriate patients into my general clinic"*

61. The SOP was a standard operating procedure. It would appear that what was discussed and agreed between Dr Wood and Mr Kwartz, was that a procedure would be introduced that would ensure that patients were not referred to Mr Kwartz's clinic of the type and in the way about which he had objected. Whilst Mr Kwartz had said he would apologise, the claimant did not receive any apology from him. Dr Wood did not check or ensure that he had done so. Dr Wood ceased to have responsibility for the division from the end of March 2020 (and had only continued to cover the role after December 2019 on a temporary basis).

62. Dr Wood forwarded the email received from Mr Kwartz to Ms Childs, copied to Dr Francis the Trust Medical Director, on 29 January 2020.

63. On 29 January 2020, Mrs Szekely, the deputy divisional director of operations (interim) for the anaesthetic and surgical services division, wrote to the claimant confirming discussions of the same day (503). The meeting that day had also been attended by Ms Nosheen, Ms Childs, and Ms Podmore, the claimant's trade union representative. Amongst other things, she stated that the claimant had confirmed that she did not wish to proceed with the job evaluation appeal process (because of the use of two job descriptions) and she also referred to the claimant having mentioned concerns that she had about the behaviour of Mr Kwartz which were being dealt with by Dr Wood.

64. On 30 January 2020 Mrs Inkster emailed Dr Wood (511). The email provided to the Tribunal appeared to have been sent as a response to the forwarded email

which Mr Kwartz had sent to Dr Wood on 23 January which had been copied to Mrs Inkster. In that email, Mrs Inkster said:

> "*Just to let you know that Sonia, our OBM, has just had a similar experience with Nicola. She went to ask her if she was ready to attend a planned and agreed meeting, and Nicola got angry and started escalating and saying that the conversation shouldn't be taking place in front of the other orthoptists. It's the second time she has lost her temper and been rude to Sonia, and she will be bringing it up with Gill Childs. It just struck me that Sonia's description matched Jeff's almost exactly"*

65. Dr Wood forwarded the email to Ms Robinson on 2 February and said "*not for wider sharing but background awareness – looks like a bit of a gathering situation as we know"*. In his witness statement, Dr Wood said that he did so, not for wider sharing, but so that she was aware that a situation appeared to be potentially gathering in the eye unit.

66. Carol Saunders was employed by the respondent as Head Optometrist. Her role (when Ms Saunders fulfilled it) was graded 8b rather than 8a, which meant Ms Saunders was paid more than the claimant. Ms Saunders retired in 2020. When she retired, the claimant prepared a business case proposing that the role not be re-filled, and identifying financial savings for the Trust. In part, this proposal arose because there were overlaps between the claimant's role as principal service lead orthoptics and optometry, and the role of head of optometry. The respondent chose to advertise the role and fill the post which had been made vacant by the retirement of Ms Saunders. Ms Robinson signed off the recruitment and explained that she did so on the recommendation of the recruitment panel. The role was recruited at 8a rather than 8b (that is at the same grade as the claimant). It was filled, following a process, by Daniel Crown. It was clear that conflict subsequently arose between the claimant and Mr Crown regarding the parameters of the two roles. The claimant believed that arose because of the decision to advertise and fill what she contended to be part of her job (or on occasion she referred to it as being her job).

67. On 5 June 2020, Mrs Szekely wrote to the claimant following discussions on 27 May 2020 (570). Ms Szekeley agreed that the line management and reporting lines of the orthoptic and optometry teams needed to be made clear as (following the appointment of the Head Optometrist) there appeared to be an ambiguity and an issue with the job descriptions. It was acknowledged that further clarity of the roles was required and a process for doing so was outlined.

68. On 9 June 2020, the claimant asked Dr Haider to provide a statement in support of her request for the Trust to look at her banding (579). He initially indicated that he was happy to help. He later declined to do so, on 17 July 2020 (595). It was his evidence that he declined to do so because he was aware of cases when the claimant had upset others within the team, and he gave evidence about those occasions to us. In his evidence, he also said he was aware of a disciplinary case, albeit that was not consistent with any other evidence which we heard. Dr Haider denied any knowledge of the claimant's written complaints about Mr Kwartz.

69. On 29 July 2020, Ms Sonia Nosheen, the Operations Business Manager at the time for the claimant's part of the Trust and the claimant's line manager, sent an

email raising concerns about the claimant (602). We will not reproduce the lengthy email in this Judgment, but she referred to historic concerns and issues relating to the claimant, before saying a number of concerns and allegations had arisen relating to the claimant over the past month which were said to "*warrant a formal investigation due to the nature of the concerns and the seriousness of the allegations*". The email referred to two members of staff who had asked to remain anonymous who had provided statements, as well as two unnamed Doctors who had expressed concerns, and two unnamed members of staff who had left. She went on to say "*I myself am not comfortable in allowing Nicola to continue within the department without an investigation as some of the allegations are extremely serious*" and she then listed a number of very broad allegations as bullet points which included: fraudulent behaviour of taking annual leave and not recording it and claiming extra sessions when not in work; clinical negligence; aggressive and bullying behaviour; neglecting safe practice; accusing a Doctor of bullying her (as allegedly a dishonest accusation); and harassment of staff. We did not hear evidence from Ms Nosheen.

70. In our bundle of documents was a page which it appeared had not been made available at the time (at least to the claimant) which contained an anonymous complaint (1850). Within the document, the writer stated that she wished to remain anonymous. The claimant is not named within it. It was the claimant's case that the complainant was Ms Burns and it was her understanding that it was the complaint which, at least in part, led to Ms Nosheen's email. In her witness statement, the claimant asserted that Ms Burns was prone to malicious gossip and that the claimant being suspended was substantially down to others relying upon what Ms Burns told them without checking the facts first. We did not hear evidence from Ms Burns.

71. The following day, Mrs Inkster, the department joint clinical lead, sent an email to Ms Nosheen, Ms Robinson, Ms Childs, and Clare Williams with her own concerns (602). She stated that this type of behaviour had been going on for years. She agreed that a formal investigation was now required and listed reasons why she said that was the case. She also stated that she believed the claimant should be excluded with immediate effect. On the same date and time, Mrs Inkster copied her email to Mr Kwartz. It was Mr Kwartz's evidence that he had agreed to be joint clinical lead only on the basis that he was not responsible for some elements of the role such as the touchy-feely stuff, and therefore Ms Inkster took responsibility for HR matters.

72. The claimant took annual leave on 31 July 2020 at late notice. She also took annual leave on 3 August. There was a dispute between the parties about when that was booked. The claimant's evidence was that it had been booked for some time. Ms Robinson's evidence was that it had not. In any event, Ms Robinson's evidence was that there was some confusion about the claimant's whereabouts on 3 August and she believed she was working from home. She telephoned the claimant to discuss the allegations which had been raised. The claimant answered from home and informed Ms Robinson that she was on annual leave.

73. There was a dispute about what exactly was said by Ms Robinson to the claimant in that first telephone call of 3 August. The claimant denied that she was told to keep matters confidential. She relied upon a note she made and included in the bundle (2282). Ms Robinson's evidence was that she told the claimant to keep

matters confidential. Ms Robinson took no notes of the call. It was also Ms Robinson's evidence that the claimant had refused to talk to her on the day as she was on annual leave and she had said that she would not meet her the following day as she was likely to be or intending to be absent on ill health grounds (something the claimant denied).

74. The claimant telephoned a colleague and asked her why Ms Robinson had been calling the claimant. The claimant's evidence was that she phoned the colleague on her personal mobile when she was at home, although the claimant did not know that at the time she was not in work. During the investigation of the resolution the claimant was recorded as having told the investigator (1357):

> "*Between half past 9 and 10.35 am I called my colleague in the Eye Unit to see what at had happened because at this point I didn't know I was being suspended. I didn't know what was going on so I called my friend and said what's going on and she didn't know. I thought something terrible had happened … It was only on the second call that I was told that there had been serious allegations made against me and that I was being suspended"*

75. Ms Robinson became aware from Ms Nosheen that the claimant had phoned a colleague. The evidence suggested that she believed that the claimant had phoned more than one person and that was certainly Ms Childs' perception, but in her evidence to the Tribunal Ms Robinson said that it was only about the claimant calling the one person.

76. Ms Robinson spoke to Ms Childs. Ms Robinson decided to suspend the claimant. She also spoke to Ms Forshaw, the deputy chief nurse at the time. In her witness statement, Ms Robinson emphasised that, upon receiving the complaints, her first and foremost need was to ensure the safety of patients and the clinical treatment they were receiving, so the allegations were taken seriously. In her evidence, Ms Robinson placed reliance upon the claimant contacting others as explaining the decision to suspend, in circumstances where Ms Robinson understood others were concerned about engaging in the investigation and what she described as a level of fear from those concerned. Ms Robinson emphasised that she would not normally take the decision to suspend somebody by telephone.

77. Ms Robinson and the claimant spoke on the telephone for a second time on 3 August. Ms Childs was also part of the conversation. The claimant was informed that she was suspended. A letter dated that day was also sent to the claimant (1387). The letter explained that suspension was a holding measure to protect the wellbeing of the claimant and her colleagues whilst the investigation was being conducted. The claimant was provided with the name of a person who had been appointed to be the support point of contact outside the process and the claimant's trade union representative was referred to. In that letter Ms Robinson said:

> "*I informed you that, in view of the nature of these allegations and that following my request for you to attend a meeting with me, you then made direct contact with some staff in the Ophthalmology Department, I have made a decision to suspend you from duty".*

78. In her witness statement, the claimant asserted or speculated that Mrs Inkster and Mr Kwartz were behind the decision to suspend her. She said that Mrs Inkster and Mr Kwartz would normally have ignored Ms Burns as they had done on previous (unexplained) occasions, but on this occasion they chose to validate her claims. We did not find that Mr Kwartz was behind the decision to suspend the claimant. Mrs Inkster (from whom we did not hear evidence) was, to the extent that her email was one of those which led to the decision (alongside the email of Ms Nosheen). We accepted Ms Robinson's evidence that she personally took the decision to investigate the allegations and to suspend the claimant, and we accepted that she did so for the reasons which she explained in evidence.

79. The disciplinary investigation was commissioned on 3 August. Ms Robinson was the commissioning manager and Ms Nadine Caine was appointed the investigator. There was no dispute that, contrary to the respondent's policy, Ms Robinson did not review the suspension every four weeks. We were not provided with any evidence that the documents set out in the policy for an extended investigation were ever produced or that any report was provided to the respondent's Trust Board. It was the respondent's evidence that Ms Caine kept the claimant (and her trade union representative) informed about the progress of the investigation.

80. As part of the disciplinary investigation, the claimant (supported by her trade union representative) was interviewed by Ms Caine on 24 September 2020 (1873). When she was asked about the January 2020 issue (1883), the claimant said that she raised it with Dr Wood. She was then asked, "*Have you had an outcome*" and she was recorded in the notes as having replied "*We had a conversation but that was it. There was a conversation between Jeff and Jeremy but that was it*". She was than asked "*So you didn't submit anything formal?*" and was recorded as replying "*I thought that was formal, I went to see him and followed up with an email. I copied in the written complaint from the 2016 element as well*".

81. During the investigation, including in the interview on 24 September, the claimant raised concerns. Amongst other things, she asserted that the complaint had been made maliciously. She also asserted that the person who had made the complaints about the claimant taking unrecorded leave and not working when she had been granted additional hours, had done so following unauthorised access to the roster. This latter matter was added to the investigation undertaken by Ms Caine and was addressed in her investigation report.

82. On 13 October 2020 Dr Rajeev Daniel spoke to Mr Kwartz. It was Mr Kwartz's evidence that Dr Daniel said he had seen the claimant on the respondent's premises, and Mr Kwartz told him that he should report it to Ms Nosheen. The claimant disputed this account and also raised issues about how it was that Dr Daniel knew about her suspension and contended that Mr Kwartz must have told him, when he should not have done so. We were provided with an email from Dr Daniel to Ms Nosheen (610) in which it was said "*As requested by Jeff Kwartz I am writing to confirm that Lovina and myself saw Nicci Beere in the hospital premisis approximately 3-4 weeks ago on a Saturday morning when we doing the extra clinic*". That was subsequently added to the matters being investigated. We were shown no evidence that the claimant was on Trust premises when suspended and she denied that she was. We did not hear any evidence from Dr Daniel.

83. We heard in evidence from Mr Kwartz that he suffered an injury whilst skiing in early 2020 and therefore did not attend work for a long period of time as a result of the injury, subsequent operations, and the impact of Covid. We were provided with an email which he sent to Ms Wilkinson (the HR support to the investigator) on 7 January 2021 (2160). In it he clarified that, from an orthoptic point of view, he had no evidence or issue that the claimant was anything but competent. However, he did express his view of her and her management style in fairly strident terms, describing her management style as "*combative, non collegiate and sometimes down right antagonistic*". He made no reference to a complaint in 2016/17 (his evidence to us being that he was not aware of such a complaint). He detailed the incident in December 2019 and described the claimant as having "*put in a formal complaint against me*" and described it as "*a vexatious lie*" and said, "*I told Dr Woods this was an uncalled for vexatious lie from someone who may have had some historical axe to grind*". He said "*In summary my main issues with Ms Beere has been her unpleasant, aggressive and uncooperative behaviour. This finished off with a complaint in January 2020 which was a vexatious lie*". Mr Kwartz's view of the claimant expressed in the email, and of her approach to patients being placed in his clinics, was reinforced and expanded upon in the evidence which we heard from him. Indeed, in the evidence we heard, he asserted that she had deliberately placed patients into his clinics (being those which he did not believe should be placed there) to antagonise him and had encouraged or arranged for others to do so as well.

84. On 27 January 2021, Ms Robinson informed the claimant that her suspension had been lifted. It was confirmed in a letter of 28 January (1395). The claimant was also informed that the investigation had almost been completed. At approximately the same time, although Ms Robinson denied that it was at the same time, a further allegation was added to the investigation arising from a contention that the claimant had treated a patient at the time when her professional registration had lapsed. That allegation related to September 2019. As we have already recorded, Ms Robinson had been fully aware of the claimant's lapsed registration at the time, and it had been rectified relatively quickly. It was Ms Robinson's evidence (which she acknowledged was hazy as a result of the length of time since it happened), that the concern/issue arose in 2021 because on 11 January 2021 Ms Nosheen had highlighted a concern that the claimant had participated in a clinic on the 6 September 2019 whilst her registration had lapsed (we were not provided with a copy of that email).

85. On 1 February 2021 Mrs Inkster emailed Ms Robinson copied to Ms Nosheen about the claimant's proposed return to work (2368). She expressed concern. Ms Robinson responded.

86. The claimant did not immediately return to work following the lifting of the suspension, as she had a period of ill health absence. Emails were exchanged in which the claimant asked to be allocated her own private office in which to work on her return (and said she had been offered an alternative location by Ms Nosheen). In evidence, the claimant explained that she had previously worked out of a shared office but did not wish to do so on her return. A private office for the claimant was not arranged. In her response of 24 March 2021 (1403) Ms Robinson said:

> "*With regards to office accommodation, I know how difficult it is to find suitable accommodation at present. However I do not have oversight on which members of staff are located where, therefore I really need you to work with*

> *Sonia on this. If you are unable to reach an agreement, please can you escalate this to Julie Pilkington as the Assistant Divisional Nurse Director for the Department. I understand your anxieties regarding going back into a shared office so we will do everything we can to support your requests. If this cannot be accommodated then it may be that we will need to find accommodation outside the Ophthalmology unit, but this may well be a shared office. If we cannot reach a reasonable compromise then we may have to look at a continuation of working from home until we have an outcome of the investigation … I am pushing to get this drawn to a conclusion asap"*

87. The respondent's annual leave year runs from 1 April to 31 March each year. In the last week of the annual leave year, the claimant emailed the workforce department about her annual leave dates for the year (621). She copied the email to Ms Nosheen. The email related to a large number of dates she was asking to be corrected, some of which the claimant was trying to correct to the Trust's benefit. She said she was trying to establish her leave position for the year end and concluded the email by saying that she was doing this because "*it may be necessary for me to apply to take some leave over*". Two of the dates were those being considered as part of the disciplinary investigation. That was raised with the claimant by Ms Robinson in the email of 24 March 2021 (referred to in the previous paragraph) when Ms Robinson said:

> "*I do not think it is appropriate for you to be going through your historical eroster data and requesting workforce to make changes when this is the subject of an ongoing investigation. Therefore I would like to request that you do not access historical data and information. There will be no retrospective changes made to the rota until the outcome of the investigation has been finalised"*.

88. In a subsequent email of 26 March to Ms Robinson (623) the claimant said, "*Looking back I can see that it was probably unwise to ask for changes to be made to the historical roster in view of the current investigation*".

89. On 29 April 2021, the claimant was due to have a meeting with Ms Nosheen. The claimant declined the meeting and took annual leave at short notice.

90. We were provided with the lengthy investigation report compiled by the investigator Ms Caine (624). It is not necessary for us to repeat what was said in that report in this decision.

91. Ms Robinson sent the claimant a letter which provided the outcome of the disciplinary investigation on 12 May 2021 (660). The letter followed a meeting on 6 May 2021. Many of the matters investigated were not taken forward. Ms Robinson identified three things for which she had concluded that there was a case to answer which would proceed to a disciplinary hearing to be heard by an independent panel. Those were:

> "*1. Taking annual leave and not recording it on the roster system.*
>
> *2. Claiming for extra sessions when not in work.*

> *3. Saw patients in clinic whilst unregistered on 6 September 2019; having been informed that she should not undertake any clinical practice until her registration was renewed by the Health and Care Professionals Council (HCPC)"*

92. The letter went on to state that there was one other allegation which had caused Ms Robinson to be duly concerned which was "*Example of behaviours that are not in line with the Trust values 'VOICE' or the ABC framework*". Even though it was stated that there was nothing specific enough regarding times and dates of incidents that would warrant the matter being addressed under the disciplinary policy, Ms Robinson nonetheless stated that there was concern and went on to say "*I want to manage this concern within the supportive framework of the Capability policy which will set out the expectations in relation to your performance in this area and look at ways to support a sustained improvement. I need to be clear that if there are reoccurences in related to unwanted behaviours in the workplace then I will need to consider the possibility of moving this under the disciplinary policy*".

93. At the end of the same letter, Ms Robinson also set out three other concerns that had been raised during the investigation process. She stated they had raised a red flag in terms of the claimant's behaviour which would be managed under the capability procedure. Those were (in summary): the claimant booking annual leave and not attending the meeting arranged; the content of an email; and asking for the leave roster to be corrected at the end of the leave year 2020/201.

94. On 18 June 2021 (669) Ms Robinson emailed the claimant. The claimant had requested patient information and had done so from a private email address. Ms Robinson said that she had been made aware of the request and had a number of concerns about it (which she listed). She went on to say:

> "*I must make you aware that this is the second time now that you have tried to access/alter information linked to your disciplinary case and this causes me significant concern. As the HR office is now closed for the day I will have to discuss how to manage this with them on Monday"*

95. The disciplinary hearing took place on 24 September 2021. It was chaired by Mrs Michalea Toms, the divisional director of nursing for integrated community services, supported by Ms Dawn Murray, divisional nurse director for AACD and Ms Jenny Holding, HR Business manager. The claimant attended and was supported by her trade union representative. Save for the claimant, we did not hear evidence from anyone who attended the disciplinary hearing. The outcome was provided in a letter of 4 October 2021 (680).

96. For allegation one, the disciplinary hearing considered three dates which were in question regarding the claimant's annual leave. One date (31 July 2020) was an omission by the individual who approved the claimant's leave, and not the claimant. The claimant was on leave on 22 July 2020, the decision letter recorded that the leave went "*unrecorded*" and that the panel accepted it was an "*oversight*". For 29 June 2020 the panel recorded that a reasonable belief had been formed that the claimant did not attend work although it appeared on the roster as a working day. The decision letter recorded that the panel felt that the latter two dates should be

recorded as unauthorised unpaid leave in retrospect and, due to what was said to be mitigating factors presented, there was no sanction applied.

97. The second allegation related to the additional hours claimed for 14 and 21 May 2020, when the claimant had not logged on to clinical systems at those times. On 14 May, in the afternoon, it was established that the claimant had logged on to the network when she had remained in work. On 21 May the claimant provided a piece of work she said had been completed at home. The panel did not uphold that there was any disciplinary policy breach in this instance but noted that the process for approval of working from home and additional hours was vague and they made a request of the department to review the processes.

98. The third allegation arose from the period when the claimant was unregistered. That was recorded in the decision letter as having been the allegation which most concerned the panel. The claimant had not seen a patient whilst unregistered on 6 September. However, the claimant had retrospectively typed a clinical letter onto a template which populated to include that date. The claimant had also made contact with a patient and referred them onto a clinic during the unregistered period. The panel suggested the date of the letter potentially left the "*Trust open to scrutiny*" and expressed the view that "*a clinician contacting patients as follow-up to a clinic would at least have led to the potential for you to act outside the scope of your practice*". The decision was that "*In the absence of further information, and also due to the lapse of time since this incident occurred (since which there have been no further concerns), the panel feel that a breach of disciplinary rules cannot be upheld in this case*".

99. The respondent's disciplinary procedure says that the investigation should take no more than eight weeks. In fact, from the start of the investigation until it concluded took at least nine months. To the disciplinary decision, it took just over fourteen months. Whilst there were some reasons why the investigation might have taken longer than initially expected, we would observe that an employer exceeding its own timescales by seven months or twelve months (depending which date is used) was clearly acting well-outside the periods which could be considered appropriate or reasonable.

100. On 15 November 2021, the claimant submitted a grievance (685). The lengthy letter containing the grievance said that the claimant's concerns went back as far as 2015. The letter related the 2016 incident and concluded that section by saying "*My concern in respect of this matter is that it was not investigated adequately or at all. I also have concerns that the perpetrator was not punished for his actions and as a result was never made aware that his actions were unacceptable and was thus allowed to continue to behave in this manner*". The letter addressed the job evaluation issues and those arising from the recruitment into the Head Optometrist role. The December 2019 incident and process was explained, and the claimant said "*It is clear that as Jeff has never been reprimanded for his actions he is unaware that his behaviour is unacceptable and as a result continues to behave in the same/similar manner causing upset and hurt to myself and possibly others. I would like this concern to be looked into and a response provided as to why no appropriate action was taken in 2016 to prevent this perpetrator from imposing further harm*". The claimant also addressed her suspension and the process followed in some detail. She asked that the person who had made the allegations should be

addressed and subject to a disciplinary process, explaining that the allegation could only have arisen from unauthorised access to the claimant's data/information. She said that she believed that the Trust's intention had been to make her suffer and resign from her post. She referred to attempted constructive dismissal and widespread bullying and harassment. She did not explicitly relate the treatment to having made public interest disclosures. The claimant informed us that she had sought advice from a solicitor, who assisted her in writing her grievance.

101. It was the claimant's evidence that she was supported by her professional union representative from the British Orthoptic Society, Ms Podmore, throughout the investigation and that Ms Podmore had advised the claimant not to make any counterclaims or start an internal grievance until the process against the claimant had ended. She said she thought that this was to protect herself from what was described as further backlash and to give her the best chance of keeping her employment. The claimant said that once she had been given the formal outcome of the disciplinary process on 4 October 2021, that was when she contacted ACAS. The claimant entered into ACAS Early Conciliation for the period from 15 November 2021 until 26 December 2021 (1). The claim was entered at the Tribunal on 14 January 2022.

102. The grievance was considered under the respondent's resolution policy. Joanne Street, deputy director of operations, was appointed to oversee the process. Lisa Rushton, operational business manager, was initially appointed to investigate on 2 December 2021. The investigator changed to Ms Rosie Connor, operational business manager, on 10 February 2022.

103. The resolution investigation report was concluded on 28 June 2022 (710). That was a lengthy and detailed report. In its analysis and conclusions about the suspension, the report stated (725) that "*there is no evidence to suggest that the method and speed of escalation to suspension were appropriate*" and that there was "*no evidence to support full exhaustion of alternative options to suspension*". The investigator listed a number of points regarding the suspension which led to those conclusions, including that the claimant was not on duty on the day she was contacted, she was not provided with the opportunity of support from a union representative or fellow member of staff, there was no time afforded to fact-finding prior to the move to suspension, and a suspension rationale form was not completed and alternatives to suspension were not meaningfully exhausted. The report further found that a fact-finding exercise was not undertaken and that a year had passed between the initial commissioning of the investigation and the conclusion of the investigation.

104. Included in the appendices to the resolution investigation report were the records of interviews undertaken by the investigator. In the record of her interview with Ms Robinson on 23 March 2022 (1375), Ms Robinson was recorded as saying that she would never normally suspend someone over the phone as that was not best practice. In terms of the delays in the disciplinary investigation and in answer to a question about whether it had been completed in a timely manner, Ms Robinson said:

> "*No, there was definitely more we could have done. Nicky was out of the workplace for far too long and I recognise the impact that had on Nicky. The*

> *investigation should not have taken as long as it did and we just have to hold our hands up and say that's not acceptable"*

105. In contrast, Ms Caine (the investigator from whom we did not hear evidence) said (1418) (rather surprisingly) "*I personally believe for every action that fell within my jurisdiction that it was timely*". She also stated that she updated the claimant on a weekly basis.

106. On 15 June 2022, David Mulligan, the Head of Workforce Systems and Deployment, emailed various people regarding access to rosters (1446). That email was used as part of the resolution process. He said it was not possible to answer the questions asked about who had had access to the claimant's rosters in a specific period and when they had done so, because viewing or accessing was not audited (and even where it was, it was only retained for a finite period), and the available data would show only actions taken on the roster, not simply who had viewed it,

107. A formal resolution meeting was chaired by Ms Street on 7 July 2022, attended by the claimant, a representative, Ms Lowe (Head of HR), Ms Connor (the investigating officer), and Ms Everall (HR Advisor) (1457). None of the attendees at that meeting (besides the claimant) gave evidence to us. A further meeting took place the following day and additional terms of reference were agreed for a further investigation, as the claimant did not believe that all of her issues had been investigated.

108. During the period of the further investigation under the resolution procedure, further information was identified about who could access the roster. It was identified that Ms Burns had authority to access the optometry roster, something which had not previously been identified during the previous investigation. This supported what the claimant said had occurred. In an email of 7 August 2022 from Ms Coleman (1474) to the investigator, it was confirmed that Ms Burns had been given access to the optometry roster from 10 March 2016 (and that she had also had access to a number of other rosters).

109. A second formal resolution report was provided dated 26 August 2022 (1477). In relation to the access issue for Ms Burns, the investigator recorded (1486) that

> "*Ultimately there is no proof that any colleague directly accessed Ms Beere's personal information, only that there was the possibility that it could have been accessed. As such, it is not possible to conclude that there has been a breach of information governance requests*".

110. The report also addressed the appointment of the Head Optometrist and the concerns which the claimant raised and concluded:

> "*The current investigating officer has not been able to find evidence that there was a prior discussion with Nicola relating to the process around the recruitment of the Head Optometrist … there are key aspects of the two job descriptions that appear to overlap … there was ongoing ambiguity between the line management responsibilities of the Head Optometrist and the PSL for Orthoptics and Optometry … there is no evidence of sufficient discussion with Nicola Beere as postholder for the Principle Service Lead for Orthoptics and*

Optometry prior to the recruitment of the Head Optometrist to clarify the impact upon Nicola Beere's job description. As such, there is no evidence that Nicola Beere was appropriately engaged in the process relating specifically to the appointment to the post of Head Optometrist"

111. The claimant met again with Ms Street on 7 September 2022 regarding the resolution outcome and findings. The outcome of the formal resolution process was provided in writing on 14 September 2022 (1607). Within that letter (amongst other things) Ms Street said:

"*I have accepted the conclusion of the investigating officer that, given the apparent severity of the allegations – allegations relating to fraud, inappropriate practice, acting contrary to Trust values – it is right and correct that those allegations were treated seriously, and that suspension may have been the appropriate ultimate action to have been taken. However, I also accept the findings about the method and speed of escalation to suspension … It is difficult to conclude absolutely on whether suspension was the appropriate action, given that there was no fact find exercise, and no documented risk assessment/suspension checklist to evidence full exhaustion of alternative options … I am sorry for the impact on you personally that the speed and method of placing you on suspension had…*

It is clear that this was a complex investigation and would have taken time to complete, however it is my view that this took too long, I acknowledge and I am sorry for the impact this protracted investigation has had on you. I accept the recommendations made by the investigating officer that investigations should be undertaken in a timely manner …

As noted by the Investigating Officer, there is no proof that any colleague directly accessed your personal information, only that there was a possibility that it could have been accessed, and as such it is not possible to conclude that there was a breach of information governance requirements. I believe we have taken reasonable steps to investigate whether there was any inappropriate access, but we have not been able to find conclusive evidence of a breach …

I accept the Investigating Officer's findings that the initial investigation did not fully investigate the process around the appointment of a head Optometrist … We have not been able to find evidence of you being sufficiently engaged ahead of the appointment of a Head Optometrist. I believe you should have been engaged at this point, given the overlap of duties and I am sorry if this did not happen …

The investigation and formal resolution meeting have identified some aspects of the process that could have been improved. In particular, the time the investigation took, and that it would have been helpful for a fact find and suspension checklist to be completed. I would like to apologise on behalf of the Trust for the impact this lengthy process has had on you"

112. On 26 September 2022 the claimant appealed against the findings of the formal resolution process (1613). The resolution appeal panel hearing took place on

8 November 2022. It was chaired by Rae Wheatcroft, the Chief Operating Officer (at the time), and the panel included James Mawrey, the director of people. The panel was supported by Ms Sheard, the deputy director of people (from whom we did hear evidence). Ms Street and Ms Lowe presented the management statement of case. The claimant was accompanied by John McBride of the British Orthoptists Society. An appeal outcome was provided on 16 November 2022 (1644) (which was notable for being brief and lacking detail). The appeal was not upheld. A further letter was sent by the Chief Operating Officer on 13 January 2023 about something outstanding at the end of the resolution appeal which was not relevant to the issues in this case.

113. In the documents which were added to the bundle during the hearing was the General Medical Council guidance on Good Medical practice. We were provided with the 2024 version so it was not what would have been in place at the relevant time, albeit there was no issue that equivalent guidance would have been in place. Amongst other things, the guidance stated that medical professionals registered with the GMC must: respect every patient's dignity and must treat patients fairly; must treat colleagues with kindness, courtesy and respect (including communicating clearly, politely and considerately); and help to create a culture that is respectful, fair, supportive, and compassionate by role modelling behaviours consistent with the values.

114. All of the respondent's witnesses denied that the alleged protected disclosures had any impact upon the matters which the claimant asserted were detriments which she had suffered.

115. We heard a lot of evidence. This Judgment does not seek to address every point about which we heard or about which the parties disagreed. It only includes the points which we considered relevant to the issues which we needed to consider in order to decide if the claims succeeded or failed. If we have not mentioned a particular point, it does not mean that we have overlooked it, but rather we have not considered it relevant to the issues we needed to determine.

The Law

116. Section 43A of the Employment Rights Act says:

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

117. Section 43B says:

> *"(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following –*
>
> *(a) …,*
>
> *(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)…*
>
> *(d)that the health or safety of any individual has been, is being or is likely to be endangered,*
>
> *(e)…*
>
> *(f) that information tending to show any matter falling within one of the preceding paragraphs has been, or is likely to be deliberately concealed"*

118. Section 43C provides that a disclosure to a worker's employer is a qualifying disclosure. It was not in dispute in this case that if the claimant made a qualifying disclosure, it was made to her employer and was a protected disclosure.

119. The word "*likely*" in section 43B requires more than a possibility or a risk that a person might fail to comply with a legal obligation or that health and safety is endangered, the information had to show that it was probable or more probable than not (**Kraus v Penna PLC** [2004] IRLR 260).

120. The necessary components of a qualifying disclosure were summarised by HHJ Auerbach in **Williams v Michelle Brown AM** UKEAT/0044/19/OO:

> "*It is worth restating, as the authorities have done many times, that this definition breaks down into a number of elements. First, there must be a disclosure of information. Secondly, the worker must believe that the disclosure is made in the public interest. Thirdly, if the worker does hold such a belief, it must be reasonably held. Fourthly, the worker must believe that the disclosure tends to show one or more of the matters listed in sub-paragraphs (a) to (f). Fifthly, if the worker does hold such a belief, it must be reasonably held. Unless all five conditions are satisfied there will not be a qualifying disclosure.*"

121. The first stage involves a consideration of whether there has been a disclosure of information. The respondent referred to the leading case of **Cavendish Munro Professional Risks Management Ltd v Geldud** UKEAT/0195/09 and that the ordinary meaning of giving information was conveying facts. The correct approach to the disclosure of information was set out in the decision of the Court of Appeal in **Kilraine v London Borough of Wandsworth** [2018] ICR 1850 when it was said that there was not a rigid dichotomy between information on the one hand and allegations on the other. What was said was:

> *"I agree with the fundamental point made by Mr Milsom, that the concept of "information" as used in section 43B(1) is capable of covering statements which might also be characterised as allegations. … Section 43B(1) should not be glossed to introduce into it a rigid dichotomy between "information" on the one hand and "allegations" on the other ...*
>
> *On the other hand, although sometimes a statement which can be characterised as an allegation will also constitute "information" and amount to a qualifying disclosure within section 43B(1), not every statement involving an*

> *allegation will do so. Whether a particular allegation amounts to a qualifying disclosure under section 43B(1) will depend on whether it falls within the language used in that provision …*
>
> *The question in each case in relation to section 43B(1) (as it stood prior to amendment in 2013) is whether a particular statement or disclosure is a "disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show one or more of the [matters set out in paragraphs (a) to (f)]". Grammatically, the word "information" has to be read with the qualifying phrase, "which tends to show [etc]" (as, for example, in the present case, information which tends to show "that a person has failed or is likely to fail to comply with any legal obligation to which he is subject"). In order for a statement or disclosure to be a qualifying disclosure according to this language, it has to have a sufficient factual content and specificity such as is capable of tending to show one of the matters listed in subsection (1) …*
>
> *Whether an identified statement or disclosure in any particular case does meet that standard will be a matter for evaluative judgment by a tribunal in the light of all the facts of the case."*

122. It is necessary to consider whether the employee holds the belief that the disclosure tends to show one of the relevant forms of wrongdoing and whether that belief is reasonable. This involves subjective and objective elements. The test of what the claimant believed is a subjective one. Whether or not the employee's belief was reasonably held is an objective test and a matter for us to determine. The test is what the disclosure "*tends to show*" (**Babula v Waltham Forest College** [2007] ICR 1026).

123. In **Chesterton Global Ltd v Nurmohamed** [2018] ICR 731 Underhill LJ held that the same approach, involving both the objective and subjective elements, applies to the requirement that in the reasonable belief of the worker making the disclosure, it is made in the public interest. Underhill LJ considered the situation in which a worker discloses information that relates to his or her own contract of employment and whether that precluded the employee also holding a reasonable belief that the disclosure was made in the public interest:

> "*The statutory criterion of what is "in the public interest" does not lend itself to absolute rules, still less when the decisive question is not what is in fact in the public interest but what could reasonably be believed to be … in my view the correct approach is as follows. In a whistleblower case where the disclosure relates to a breach of the worker's own contract of employment (or some other matter under section 43B(1) where the interest in question is personal in character), there may nevertheless be features of the case that make it reasonable to regard disclosure as being in the public interest as well as in the personal interest of the worker. Mr Reade's example of doctors' hours is particularly obvious, but there may be many other kinds of case where it may reasonably be thought that such a disclosure was in the public interest. The question is one to be answered by the tribunal on a consideration of all the circumstances of the particular case*"

124. The mental element required imposes a two-stage test: (i) did the clamant have a genuine belief at the time that the disclosure was in the public interest; if so (ii) did she have reasonable grounds for so believing? In relation to motivation, in **Chesterton**, Underhill LJ said:

> "*while the worker must have a genuine (and reasonable) belief that the disclosure is in the public interest, that does not have to be his or her predominant motive in making it: otherwise… I am inclined to think that the belief does not in fact have to form any part of the worker's motivation – the phrase "in the belief" is not the same as "motivated by the belief"; but it is hard to see that the point will arise in practice, since where a worker believes that a disclosure is in the public interest it would be odd if that did not form at least some part of their motivation in making it"*

125. For subsection (b) of section 43B(1) it is broadly drawn. **Blackbay Ventures Limited v Gahir (trading as Chemistree)** [2014] ICR 747 highlighted the need for each breach of a legal obligation asserted, to have identified the source of the legal obligation and be capable of verification by reference, for example, to statute or regulation. The respondent's representative also relied upon **Eiger Securities LLP v Korshunova** UKEAT/0149/16.

126. We emphasised at the start of the hearing that it was not our role to determine whether or not the matters about which the claimant alleged she made protected disclosures were themselves true or correct (and we have not done so). We did not need to decide who was "right" between the claimant and Mr Kwartz in their disagreement. That only needed to be considered to the extent that it shed light on the decisions which we did need to reach about whether the disclosure was genuinely made with the relevant belief (including in the public interest of the disclosure) and whether those beliefs were reasonable. The respondent placed reliance upon **Twist DX Limited v Armes** UKEAT/0300/20 and **Babula v Waltham Forest College** [2007] IRLR 346 and acknowledged that as long as the worker subjectively believed that the relevant failure had occurred or was likely to occur and their belief was, in our view, objectively reasonable, it did not matter that the belief subsequently turned out to be wrong, or that the facts alleged would not amount in law to the relevant failure relied upon.

127. Section 47B of the Employment Rights Act 1996 provides that a worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by her employer done on the ground that the worker has made a protected disclosure. Under section 48(2) it is for the employer to show the ground on which any act, or deliberate failure to act, was done (where it is asserted that it was on the ground of having made a public interest disclosure). The employer must prove on the balance of probabilities that the act, or deliberate failure, was not on the grounds that the employee had done the protected act.

128. In determining whether a claimant has suffered a detriment as a result of having made a public interest disclosure, we must focus on whether the disclosure had a material influence, that is more than a trivial influence, on the treatment - **NHS Manchester v Fecitt** [2012] IRLR 64.

129. The correct approach is to place the burden of proof on the claimant in the first instance to show that a ground or reason (that is more than trivial) for detrimental treatment is a protected disclosure; then by virtue of 48(2) Employment Rights Act 1996 the respondent must be prepared to show why the detrimental treatment was done and if they do not do so adverse inferences may be drawn against them.

130. In a detriment case, determining whether a detriment is on the ground that the worker has made a protected disclosure, requires an analysis of the mental processes (conscious or unconscious) of the employer acting as it did (the respondent relied upon **Chatterjee v Newcastle Upon Tyne Hospitals NHS Trust** [2019] 9 WLUK 556 on this point). It is not sufficient to demonstrate that 'but for' the disclosure, the employer's act or omission would not have taken place. The protected disclosure must have materially influenced the employer's treatment of the worker.

131. In his submissions, Mr Slater referred to the recent Judgment in the case of **Nicol v World Travel and Tourism Council** [2024] EAT 42. Mr Slater submitted that the witnesses did not need to think what had been disclosed was whistleblowing, if it was whistleblowing it did not matter whether the respondent didn't consider it to be whistleblowing. **Nicol** was a case which looked at what knowledge by a decision-maker was required of the content of a protected disclosure. The Employment Appeal Tribunal confirmed that the question to be determined was not whether a respondent believed that what had been disclosed at the relevant time was a protected disclosure, but rather whether the reason for a detriment was the fact that an employee had made a protected disclosure; and then the question of whether the disclosure was protected falls to be determined objectively by the Tribunal (the EAT relied upon the decision of the Court of Appeal in **Beatt v Croydon Health Services NHS Trust** [2017] IRLR 748 on that point). What the Judgment in **Nicol** said about the knowledge of the content of the disclosure required by the decision-maker was:

> "*Ms Greenley contended on behalf of the claimant that the judgment of Underhill LJ in Beatt stood for the proposition that a dismissal is automatically unfair under section 103A of the ERA if the reason for dismissal is that a disclosure has been made, and that the disclosure is a protected one, even where the decision-maker does not know the content of the disclosure. I do not accept that contention … I do not consider that the decision in Beatt is of any real assistance in determining the question … The premise of Ms Greenley's arguments would be that the content of the disclosure is entirely irrelevant to the decision-maker; the only question is whether a disclosure has been made. It does not matter to the decision-maker if the disclosure was a qualifying disclosure or protected disclosure or not. It seems to me that this interpretation involves a purely mechanistic application of the statutory wording, without properly appreciating that whistleblowers are intended to be protected because they have raised something of substance which Parliament has decided merits protection. For employers to be fixed with liability, therefore, they ought to know at least something about the substance of what has been made: that is, they ought to have some knowledge of what the employee is complaining or expressing concerns about*"

132. We also heard submissions from both Ms Levene and Mr Slater on the broader question of required knowledge of the protected disclosure. The seminal

case on the issue is of course **Royal Mail v Jhuti** [2018] ICR 982, to which Ms Levene referred. Having looked at the authorities referred to, we would observe that the law in this area is neither clear nor easy to apply to genuine factual circumstances.

133. What Ms Levene said in her opening skeleton argument was:

> "*Whether the person responsible for the detriment knew of the protected disclosure is critical in whistleblowing detriment cases. In the recent case of* ***William v Lewisham and Greenwich NHS Trust*** *[2024] EAT 58, the EAT upheld the dismissal of an employee's whistleblowing claim, brought under s47B ERA. The ET held that the employee had made a protected disclosure and been subjected to a detriment. However, it also held that the detriments were not motivated to an extent by the protected disclosure. The EAT held that if the person who makes the decision that subjects an employee to detriment did not know that the employee had made a protected disclosure, then it could not have been materially influenced by the protected disclosure, thus following* ***Malik v Centors Securities PLC*** *EAT/0100/17. The knowledge and motivation of another person, who influenced the decision-maker, could not thus be attached to the decision-maker. The decision in* ***Royal Mail v Jhuti*** *[2018] ICR 982 did not apply to causation for a whistleblowing detriment claim.*"

134. She also stated in her closing submissions, relying upon the **William** decision, that unless the decision-maker for the detriment knew of the protected disclosure, they could not have been influenced by it. We considered the Employment Appeal Tribunal's decision in **William** and, in particular what was said at paragraphs 82-84. That Judgment did support the respondent's submission as the EAT decided that the principles in **Jhuti** applied to dismissal claims only under section 103A of the Employment Rights Act 1996 not claims for detriment.

135. In his submissions, Mr Slater observed how complex the law was in this area (he described it as vast) and he (perhaps understandably) did not address the issue in straightforward terms. During the hearing, whilst discussing a particular document which the claimant sought, the claimant referred to the case of **First Great Western Limited v Ahmed Moses Moussa** [2024] EAT 82 and Mr Slater placed reliance upon it in his submissions. We understood the claimant's case to be that Ms Levene's analysis of the cases was not correct, and the respondent could be found to have subjected the claimant to a detriment even where the decision-maker for the detriment was not themselves aware of the protected disclosure itself. A part of the claimant's argument was about the culture and the influence it was contended that Mr Kwartz had on the other employees of the respondent (in submissions Mr Slater contended that he was a demagogue).

136. We considered carefully what was said in the **Moussa** decision and noted what the EAT had to say, in particular, at paragraphs 105-115 and 118-166. In that Judgment the Employment Appeal Tribunal said that labels were not helpful in identifying cases as every case is different. Nonetheless the EAT identified what it described as a collusion case. In support of that being a possibility, when reviewing the authorities relevant to knowledge of the protected disclosure and a decision, the EAT quoted the following passage from the decision of HHJ Eady QC in **Western Union Payment Services UK Ltd v Anastasiou** UKEAT/0315/13:

> "*hypothetically – there may be cases where there is an organisational culture or chain of command such that the final actor might not have personal knowledge of the protected disclosure but where it nevertheless still materially influenced her treatment of the complainant. In such cases, however, it would still be necessary for the ET to explain how it had arrived at the conclusion that this is what had happened"*

137. In **Moussa** the EAT upheld a decision in which the Tribunal had found that the malign influence on a decision maker was exerted by a management culture which permeated the approach of HR and, in turn, those advised by HR including one of the decision-makers (see paragraph 160).

138. What was submitted on the respondent's behalf (supported by **William**) and what was argued by the claimant (supported by **Moussa**) was not consistent. As a result, we approached our decision-making (as set out below) initially taking the approach contended for by the claimant. That is, we considered what we found on the basis that a management or organisational culture, or malign influence, could result in a finding of protected disclosure detriment even where the decision-maker themselves was not aware of the disclosure itself. As a result of the findings we made, as explained below, it was then not necessary for us to determine legally which of the parties' contentions was correct. It did appear to us that there is currently some uncertainty in the law on this issue.

139. A worker is subject to a detriment if she is put at a disadvantage, as confirmed in **Jesudason v Alder Hey Children's NHS Foundation Trust** [2020] IRLR 374:

> "*It is now well established that the concept of detriment is very broad and must be judged from the view point of the worker. There is a detriment if a reasonable employee might consider the relevant treatment to constitute a detriment."*

140. The respondent relied upon **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] IRLR 285 and said that it held that a worker suffers a detriment if a reasonable worker would or might take the view that they had been disadvantaged in the circumstances in which they had to work.

141. On time and jurisdiction, the starting point is the wording of section 48(3) of the Employment Rights Act 1996. That section provides:

> *"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 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.*

142. The period is, of course, extended by any period of ACAS Early Conciliation.

143. 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 is decided on;*
>
> *and in the absence of evidence establishing to the contrary, an employer … shall be taken to decide on a failure to act when he does an act inconsistent with doing the failed act or, if he has done no such inconsistent act, when the period expires within which he might reasonably have been expected to do the failed act if it is to be done"*

144. Whether it was not reasonably practicable for the claim to be entered in time, is a question of fact for us to decide. Key to the question is why the primary time limit was missed. We must apply the words of the statute, that is whether it was not reasonably practicable. That does not mean: whether it was physically possible; or (simply) reasonable. Asking whether it was reasonably feasible to present the claim in time, is an alternative way of expressing the test.

145. **Dedman v British Building and Engineering Appliances Ltd** [1973] IRLR 379 said:

> *"In my opinion the words 'not practicable' should be given a liberal interpretation in favour of the man. My reason is because a strict construction would give rise to much injustice which Parliament cannot have intended."*

146. Underhill LJ provided guidance in **Lowri Beck Services Ltd v Patrick Brophy** [2019] EWCA Civ 2490 where he summarised the essential points in the correct approach to the test of reasonable practicability.

147. In her opening skeleton argument, Ms Levene submitted that we must focus on the date of the act giving rise to a detriment, not the consequences that followed from it (placing reliance upon **Unilever UK plc v Hickinson** UKEAT/0192/09).In her closing submissions, she also said that for a series of similar acts there must be some relevant connection between the acts, relying upon **Arthur v London Eastern Railway** [2006] EWCA Civ 1358. As she quite correctly stated in her closing submission, for acts to form part of such a series they must be found to have been unlawful (**Oxfordshire County Council v Meade** UKEAT/0410/14).

148. In his submissions, Mr Slater placed reliance upon the decision of the EAT in **Ikejiaku v British Institute of Technology Ltd** UKEAT/0243/19. In that decision the EAT said that it is necessary to distinguish between the act (or failure to act) and the detriment (albeit in reality they are often the same thing). It was confirmed that time runs from the date of the act, regardless of whether the claimant has any knowledge of the detriment that the act produces. We must not confuse a detriment with a continuing act.

Conclusions – applying the Law to the Facts

Time limits and jurisdiction

149. Issue one in the list of issues addressed time and jurisdiction. We considered those issues first, although in practice some decisions regarding time could only be reached once what has been found to have occurred had been determined. Issue 1.1 recorded that, for the allegations included in the original claim form, given the date the claim form was presented and the effect of early conciliation, any complaint about something that happened before 16 August 2021 may not have been brought in time. That date applied because the claim was entered at the Tribunal on 14 January 2022 and ACAS Early Conciliation took place between 15 November 2021 and 26 December 2021. We then considered the issues set out at 1.3 as they applied to the detriments relied upon which had been pleaded in the original claim form.

150. We considered the dates of the alleged detriments (which were included in the original claim). The dates of those detriments ranged from 1 October 2018 which was the date when D10 was alleged to have occurred, through to October 2021. The vast majority of the dates of the alleged detriments occurred before 16 August 2021 and initially we did not focus upon those dates. The alleged detriments which it appeared might have occurred in the latter half of 2021 were D6, D12 and D14.

151. For D6, what was alleged was that there was a lack of investigation into the alleged malicious intent of the allegations raised towards the claimant during the initial investigation. In the list of issues that was stated to have been between 3 August 2020 and 4 October 2021. The respondent submitted that the alleged detriment in fact last occurred on 6 May 2021. The reason why that date was identified was because that was the date when Ms Robinson met with the claimant at the end of the disciplinary investigation. What was discussed and agreed was recorded in a letter of 12 May 2021 (660). As what was alleged was a lack of investigation as part of the disciplinary investigation (that was clear from the dates identified and relied upon in the alleged detriment in the list of issues), the last date when the claimant could possibly have been subjected to a detriment by a lack of investigation would have been 6 May 2021 when the investigation concluded. Accordingly, whilst on the face of what was recorded in the list of issues the claim for alleged detriment D6 would have been entered in time, when we considered exactly what was said, we accepted the respondent's submission that the last date upon which the claimant could have been subjected to the detriment was in fact 6 May 2021 and therefore (subject to issues 1.3.2-1.3.4) the claim was not entered within the time required.

152. The position for alleged detriment D12 was the same as for D6. The alleged detriment was a failure to investigate an alleged breach of the claimant's data by Lianne Robinson and the disciplinary investigation. The list of issues recorded the alleged detriment as occurring from 24 September 2020 to 4 October 2021. We did not find that the later of those two dates was right. The investigation was concluded on/by 6 May 2021. As a result, the last date upon which the claimant could possibly have been subjected to the detriment alleged by Ms Robinson and the disciplinary investigation was 6 May 2021. We found that the claim was not entered within the time required (subject to issues 1.3.2-1.3.4).

153. That left only alleged detriment D14. That alleged detriment was the claimant being subjected (by Ms Robinson) to a fourteen-month disciplinary process between 3 August 2020 and 14 October 2021. Importantly, this alleged detriment was the length of the entire disciplinary process and not just the investigation. On that basis, and as the respondent's counsel accepted when she was asked during her submissions, the last date upon which the claimant could have been subjected to the detriment alleged was 14 October 2021 and not an earlier date. As a result, that meant of all the detriments relied upon, D14 alone was a detriment relied upon for which the claim had been brought in time. In the event that we did not find that detriment had occurred and was on the grounds that the claimant had made a protected disclosure, the claims were not brought within the time required (subject to issues 1.3.3 and 1.3.4).

154. We then considered issue 1.3.2, which asked whether there was a series of similar acts or failures and was the claim made to the Tribunal within three months (allowing for any early conciliation extension) of the last one? That was the question which needed to be asked when applying section 48(3)(a) of the Employment Rights Act 1996. When considering the detriments relied upon, we accepted that (if found) many of the other detriments could be found to have been part of a series of similar acts or failures with D14 (if found). In broad terms, any of the allegations which related to or arose from the disciplinary process or its conduct, would arguably be part of a similar series or failures. However, there were some of the detriments relied upon (included in the claim form) which we did not find were part of a series with D14. Those alleged detriments were D1, D2, D3. Those alleged detriments were not part of a series with the other detriments and with D14 in particular (if found). D1, D2 and D3 were all detriments arising from and relating to the banding and clarity of the claimant's job, the re-banding process, and recruitment to the Head Optometrist role when it became vacant. We did not find those alleged detriments to be part of a series with D14 (if found) and therefore the claim was not entered in time for those detriments, and we would not have jurisdiction to consider those alleged detriments even if D14 was found. D11 was a detriment where it was not entirely clear whether (if found) it could have been found to have been part of a series with D14, but we did not decide that it clearly was not in the light of the connection between Dr Haider not supporting the claimant's job evaluation appeal and the possibility for disciplinary action which he explained in evidence.

155. Issue 1.3.3 asked whether it had been reasonably practicable for the claimant to have entered the claim within the time required? We found that for all of the detriments it would have been reasonably practicable to have entered the claim in time and therefore for all (except D14) time was not extended on the basis that it had not been reasonably practicable to do so. The claimant is an intelligent individual able to research time limits. She had access to a trade union representative throughout the respondent's procedures. She sought and received legal advice when she entered her grievance (albeit when she received advice may have fallen outside the primary time limit for those detriments). To the extent that there was any reason given for not claiming earlier, that would appear to have been the trade union representative's advice to wait for the end of the disciplinary process. There was no genuine reason why it was not practicable or feasible for the claim not to have been entered earlier. We would highlight that we were applying the more stringent reasonably practicable test and not the just and equitable test (where the balance of prejudice may have resulted in a different outcome), but applying that test it was

reasonably practicable for the claimant to have entered her claim in the time required for all detriments (except D14).

156. We then considered the detriments referred to at issue 1.2. Detriments D7, D8, D20 and D21 were detriments added by way of an amendment following an application made on 3 January 2023. The dates of the alleged detriments were 6 May 2021 and (for D21) 17 October 2019. The application to amend was not made within three months of the act complained of. It was reasonably practicable for the claim including those detriments to have been made in time for the reasons explained for the detriments included in the claim form. It was Mr Slater's contention they (or some of them) were also included in the grievance and, if correct, that would show that it had been reasonably practicable for the matters to have been raised earlier and included in the claim when entered at the Tribunal (albeit that would have been out of time in any event unless part of a series). If Mr Slater was arguing in his submissions that we should revisit whether the detriments were included in the original claim form because the grievance document was appended to the claim form (and it was not clear that he was), we were bound by the decision of Employment Judge Slater who identified that leave to amend was required and that those were the detriments for which leave should be given (at the third preliminary hearing). We would also add that for D21 we would also not have found that it was part of a continuing series of events with D14 (even had that been possible), D21 being an alleged detriment arising from a meeting about the restructure of the department and the claimant's exclusion from it.

157. As a result, and for the reasons given, we found that we did not have jurisdiction to consider the following detriments because the claim was not entered within the time required: D1, D2, D3, D7, D8, D20 and D21. For all the other detriments, we would only have jurisdiction to consider them if they were part of a series with D14 and therefore they could only succeed if D14 also succeeded. Whilst we have made those findings, when considering and determining the subsequent issues we nonetheless reached a decision on what we would have found had we had jurisdiction to consider those complaints.

Alleged protected disclosures

158. We then considered issue two, whether the claimant had made protected disclosures as defined by section 43B of the Employment Rights Act 1996 in the ways alleged and recorded at PD1 and PD4 in the list of issues? When considering the protected disclosures relied upon, we thought it important to review the history of the claims and how those alleged protected disclosures recorded in the list of issues had been identified and recorded. In the original claim form entered by the claimant, she referred to having whistle blown to the Trusts' Freedom To Speak Up Guardian (8) but she did not explicitly refer to either PD1 or PD4 or what she alleged she disclosed. In a document prepared by the claimant in which she provided further particulars of her claim (49) the claimant said that she made a protected disclosure in a complaint made in 2016 regarding the treatment of a vulnerable patient by a lead consultant ophthalmologist and in her complaint made in January 2020 regarding the treatment/future investigation pathway of a patient by the same consultant ophthalmologist. Following the first preliminary hearing, the claimant provided a lengthy document containing further particulars of her claim, which addressed the qualifying disclosures relied upon (107). The claimant included in that

document, as descriptions of the disclosures, exactly the wording now included in the list of issues as the quotes in PD1 and PD4. Under a heading asking when the complaint was made and how was it conveyed (109), the claimant said of PD1 "*written complaint made 22nd February 2016*" and of PD4 "*written complaint 31st December 2019*". That is that the dates, details, and the fact that PD4 was recorded as a written disclosure in the list of issues, were all taken from a document prepared by the claimant in which she provided further particulars of her complaints (as she had been ordered to do).

159. The wording included in the list of issues which recorded the protected disclosures relied upon, was taken from the further particulars and included in the lists of issues appended to each of the orders made following the second, third and fourth preliminary hearings. On 22 February 2023 (150), the claimant wrote and identified some errors or amendments she believed needed to be made to the list of issues, but none of the points raised related to the alleged protected disclosures. On 28 March 2023 (198) the claimant sought to address the subsections of section 43B upon which she relied, and which were referred to, and she sought to rely upon later alleged disclosures, but she did not seek to amend PD1 and PD4. That application to amend was rejected at the preliminary hearing on 15 May 2023. As already recorded, at the start of this hearing the claimant was granted leave to amend the date relied upon for PD1, but she was not granted leave to amend anything else about the alleged protected disclosures relied upon.

160. We, accordingly, considered it important and appropriate to determine whether the claimant made protected disclosures on the dates identified, to the person identified, and in the manner identified, as recorded at PD1 and PD4 in the attached list of issues. That was the claim which the respondent had understood it was defending and that had been the case advanced. It was not appropriate for us to decide whether disclosures had been made (or might have been made) on other dates, to other people, or in other ways.

The alleged protected disclosure PD1

161. The first alleged protected disclosure relied upon (PD1), had originally been alleged as having occurred on 22 February 2016. At the start of the hearing, the claimant confirmed that on that date her disclosure had been to Mr Singleton and Dr Wallis not Dr Wood (the person to whom the disclosure relied upon had been made). As already explained, we granted an application to amend, so that the first alleged protected disclosure relied upon (which I will refer to as PD1 as it was referred to in the list of issues) was alleged to be a disclosure made to Dr Wood on 17 or 18 January 2017.

162. There was a document which contained the information relied upon (327). The email to which the claimant contended the document had been attached, was dated 17 January 2020 (331) and importantly included the words "*I have included my report*". We found that to be supportive of the claimant's evidence and argument that the document had been attached. In his response (331), Dr Wood said that he would keep a copy of the complaint. We found that wording lent some weight to the argument that the document had been attached to the earlier email, because what was said in the text of the email appeared unlikely to be read as a complaint (or at least, one for keeping) and the contended attachment was headed "*formal*

complaint" which would appear to be consistent with the words used in Dr Wood's email. As a result, we found that on balance the claimant did provide Dr Wood with her written complaint (327) as an attachment to her email of 17 January 2017 (331). We would highlight that we did not find that Dr Wood misled us when he gave evidence that he could not recall receiving it and could not find it when he looked for it, but nonetheless on balance we have found that it was sent to him.

163. On the ninth day of the hearing, after all the evidence had been heard and concluded, the claimant provided us with an additional copy of her email of 17 January 2020. We decided that we would admit it and look at the document. It appeared to show an attachment to that email when the previous copies in the bundle had not. We had a five-volume bundle of documents and other documents had been added to the bundle throughout the hearing. Due to the late presentation of it, there was no opportunity to hear Dr Wood's response, his evidence having been that he did not believe he had received the contended attachment to the email at the time. He told us that he had undertaken an email search (albeit we would observe that the search he described was not the most extensive). As a result, we decided that we would give no weight to the document presented to us on the ninth/last day of hearing (prior to our time in chambers) and we reached our decision, as we have described, on the basis of the documents included in the bundle prior to the ninth day and the evidence which we heard.

164. We then considered the other questions in the list of issues as they applied to PD1. Issue 2.1.2 asked did she disclose information? We looked at what the claimant said in the document (327). We found that clearly and unequivocally the claimant's account contained information about what had occurred.

165. Issue 2.1.3 required us to consider whether the claimant believed that the disclosure of information made was in the public interest? The claimant said that it was. The respondent denied it was. We had no doubt that the claimant thought that disclosing what had occurred was in her own personal interest and a large part of the document focused upon the claimant and her team. However, the fact that it did so did not mean that the claimant could not also believe that what she was disclosing was also in the wider public interest. We found that the claimant did believe that what she was disclosing was in the public interest, based upon what she said about the approach to patients and clinics. We found that she believed that the position which she was taking was in the best interests of patients (and therefore the public interest generally). In particular, we considered that the three paragraphs at the end of the document (327) which we have quoted in the facts section above, and found that demonstrated that the claimant believed at the time that what she was saying was in the interests of patients.

166. We did not accept Mr Kwartz's contention in evidence that the sole reason why the claimant (and others) placed in his general clinic those patients who he did not wish to see, was to get at him. We accepted that there was a patient-focussed reason for doing so, which was therefore in the broader public interest.

167. In considering issue 2.1.4, we found reasonable the claimant's belief that what she was disclosing was in the public interest. We did not accept the respondent's submission that the information disclosed was solely and objectively about only the population of clinics. It was about the best way for patients to be seen by a

consultant and we found that a belief that was in the public interest was a reasonable one.

168. Issue 2.5.5.1 was whether the claimant believed that PD1 tended to show that a person had failed, was failing or was likely to fail to comply with a legal obligation. That is, whether the claimant satisfied the test in section 43B(1)(b) of the Employment Rights Act 1996? We did not find that the claimant made the disclosure with any belief about legal-obligations, her focus was on patient-care. She did not express herself at the time with reference to legal obligations and, more importantly, based upon her evidence at this hearing, we did not find that she believed that legal obligations were not being complied with. During cross-examination the claimant said that she did not consider whether there was a legal obligation at the time. During the hearing, it appeared that the claimant's case was pursued in reliance upon the obligations of consultants and the GMC guidelines produced during the hearing, albeit that was not entirely clear. However, we did not accept that at the time she made the disclosure, the claimant had any legal obligations which might arise from such obligations in mind, including based upon what she actually said as recorded in the document (328).

169. Issue 2.1.5.3 asked the question required under section 43B(1)(f) of the Employment Rights Act 1996, whether the claimant believed that PD1 tended to show any matter falling within any of section 43B(1)(a)-(e) had been or was likely to be deliberately concealed? We heard no submissions from either party about this subsection. There appeared to us to be nothing in the evidence or the facts which appeared to allege that Mr Kwartz's approach to patients placed in his clinics was about concealment. It was the claimant's own case that it was common knowledge that Mr Kwartz did not want orthoptic patients placed in his general clinic. During her cross-examination, the claimant said that she was not saying that anything was being concealed. We did not find that this subsection applied to PD1.

170. The strongest case for the claimant in relation to PD1, was her reliance upon section 43B(1)(d) of the Employment Rights Act 1996, which is included in the list of issues as 2.1.5.2. What needed to be considered was frequently paraphrased by the claimant and Mr Slater during the hearing and during submissions, as being a disclosure which was about patient care. That is not what subsection (d) says and we ensured that we considered carefully the actual words of that subsection which required a belief that PD1 tended to show the health or safety of any individual had been, was being or was likely to be endangered. We particularly noted that the word used is "endangered". We considered what the claimant herself said about the disclosure. In what is recorded in the list of issues for PD1, the claimant said that she did not know what the patient's condition was or how urgent it was. The claimant in her witness statement did not tell us that she thought the patient was endangered (or any words to that effect). She did refer to the patient as having double-vision and it being an acute situation but did not describe endangerment. Notably, when she gave evidence, the claimant highlighted that she believed this was a terrible example of patient care. As a result, we found there to be no evidence that the claimant believed that the information disclosed showed that the health and safety of a patient was endangered. We understood why she raised the information and, as we have said when considering whether she believed it was in the public interest, we accepted that she believed it showed sub-optimal patient care, but we did not find that what the claimant believed fitted the test set out in 43B(1)(d). Had we done so, in the

context of patient treatment, we would have accepted that such a concern held by a medical professional would have been reasonably held (but we did not find that such a belief was held in this case).

171. As a result of our decisions on issue 2.1.5, we did not find that the claimant made a public interest disclosure when she sent the account of events of 22 February 2016 to Dr Wood on 17 January 2017.

172. In relation to PD1 we also considered (if we had found that it was a protected disclosure) more broadly what happened to it and who knew about it. We accepted Dr Wood's evidence that, as far as he could recall, he did not tell anyone else about it at the time, supported by the absence of any email or document which showed that he did. We also accepted Mr Kwartz's evidence that he did not know about it at the time. Therefore, even had we found that the email of 17 January 2017 and attachment had been a protected disclosure, we found that the only people who were aware of it were the claimant and Dr Wood, and Dr Wood took no further action as a result.

The alleged protected disclosure PD4

173. PD4 was alleged to be the claimant's written account of what occurred on 31 December 2019. Whilst PD4 recorded the disclosure as having been made on that date, that was not in fact the claim advanced and considered, as the claimant contended that the account was sent to Mr Wood on or around 22 January 2020. What was relied upon was a written disclosure being made. Based upon the documents and emails provided to us, we found that there was no written disclosure sent by the claimant to Dr Wood. There was no documentary evidence that the account (437) was sent. We accepted Dr Wood's evidence that he did not receive the document and noted that the claimant's own evidence about whether she sent it was in practice uncertain. There was no email trail equivalent to that provided for PD1. There was an email which recorded the claimant sending Dr Woods an email about the events which were the subject of PD1 in advance of the meeting on 22 January 2020, but not one which showed him being sent PD4.

174. We did go on to consider the other issues as they applied to the information (437), as if we had found that there had been a disclosure made:

a. Applying issue 2.1.2, the document did disclose information;

b. Considering issues 2.1.5.1 and 2.1.5.3, for similar reasons to those outlined for PD1 but considering PD4, we did not find that the claimant believed that the information she was providing contained information which showed what is required for section 43B(1)(b) (legal obligations) or (f) (concealment); and

c. For both issue 2.1.3 and 2.1.5.2, when looking at what was actually said, the information disclosed was all about the claimant and interaction between staff, it was not (unlike PD1) addressed to patients or the public interest. As a result, and in the absence of any other evidence that it was, we did not find that the claimant believed that the

information she disclosed in PD4 was in the public interest or that it was about health and safety at all (so 43B(1)(d) was not satisfied).

175. As a result, we did not find that PD4 was disclosed in writing to Dr Wood at all, and even had we found that it had been, we would not have found that it was a public interest disclosure, because the claimant did not believe it was in the public interest and did not believe that the information which she was disclosing showed that the health and safety of any individual had been, was being, or was likely to be endangered.

Alleged protected disclosures (summary)

176. Having found that the claimant did not make protected disclosures when she made the alleged disclosures relied upon (PD1 and PD4), we did not need to consider the remaining issues in the claimant's claim as the claimant could not succeed in a claim for detriment on the grounds of having made a protected disclosure, where no protected disclosure had been found. Nonetheless we felt it appropriate to go on and consider the other issues as we had heard evidence about them over two weeks of hearing, to the extent that we were able to do so having not found a protected disclosure.

The alleged detriments

177. We considered the alleged detriments in chronological order, rather than in the order in which they were included in the list of issues.

D1

178. Alleged detriment D1 was that from 2017 onwards the claimant did not have clarity about the banding for her role and this subsequently affected her pay. This allegation arose from the duties which the claimant had taken on as the Non-Medical Glaucoma Clinical Lead. They were duties for which we were told the claimant had volunteered and which had meant that her role and responsibilities had been extended.

179. The Employment Rights Act 1996 requires every employer to produce a statement of terms and conditions of employment which includes the title of the job for which the worker is employed to do or a brief description of the work for which she is employed. When there is a change to any such matter, the law requires that there is a written statement of the change. Within a public sector employer such as the respondent, we would also normally expect to see a job description for any role which has been created before it is filled (or before it is materially amended/expanded). In this case, based upon the evidence, the lack of pre-existing clarity about the claimant's job title or titles and the role which she was in fact fulfilling, adversely impacted upon her ability to have her role appropriately evaluated and her pay fully and fairly assessed. We have set out in the legal section above what is required to establish a detriment and will not reproduce it when considering each of the detriments. We found that the lack of clarity about the claimant's role or roles, looked at from the claimant's point of view whilst considering the view of a reasonable employee, constituted a detriment for the claimant.

180. This alleged detriment occurred before any of the alleged protected disclosures had been made. As a result, the ground for the detriment could not possibly have been either of the alleged disclosures. Therefore, we would not have found that the claimant was subjected to a detriment as a result of D1 in breach of section 47B(1) of the Employment Rights Act 1996 even had we found that PD1 and/or PD4 were protected disclosures (and had been made).

D10

181. Alleged detriment D10 was that on 1 October 2018 Ms Currie and Ms Childs refused the claimant's request to return back to the original role. This related to the claimant's request to return to her original/substantive role as Principal Service Lead for Orthoptic and Optometry Services only and to cease undertaking the duties of Non-Medical Glaucoma Clinical Lead which her role had been expanded to include. The decision made was set out in Ms Currie's letter of 28 September 2018 (339) which followed a meeting held with the claimant and Ms Childs.

182. We agreed with Ms Levene's submission that it was unreasonable for a worker to expect to be able to abandon their duties at will. However, in this case, the claimant wished to stop undertaking duties which were additional to her role and which she had voluntarily taken on. There were no documents shown to us which recorded otherwise. We considered carefully what was said in the letter and in particular focussed upon what the claimant was told about what would occur if she reverted to her original role. We found that what was said to the claimant by Ms Currie in that letter and the threat of disciplinary action made, looked at from the claimant's viewpoint and considering it as a reasonable employee, was a detriment.

183. We heard no evidence that, as at 1 October 2018, Ms Currie or Ms Childs knew anything about the disclosure which the claimant had made to Dr Wood the year earlier. We did not find that the ground for the detriment was that the claimant had made the disclosure relied upon as PD1 (even had we found that PD1 had been protected disclosure).

D2

184. Alleged detriment D2 was that the claimant's re-banding application was subject to an unfair process and, as a result, was refused. In determining whether the claimant was treated detrimentally, we were not assessing the decision made by the job evaluation panel as such and that was not what was addressed by the evidence which we heard during the hearing. The detriment alleged was focussed on the use of two separate job descriptions for the evaluation undertaken of the claimant's role or roles.

185. There was no evidence that, as the claimant contended, the use of two job descriptions was a deliberate attempt to sabotage the job evaluation process. We did not find that it was. That was not least because it appeared that the claimant had herself agreed the two job descriptions during the lengthy process undertaken.

186. We had no understanding whatsoever of why it was that the respondent thought it was an appropriate way to assess one person's role by splitting their duties into two separate job descriptions and then evaluating them separately. We accept

that there will be circumstances where an employee genuinely has two distinct roles which can be assessed separately, where the two parts of their work are clearly and distinctly defined (which was not the case for the claimant). An employee might obtain two jobs through undertaking an additional recruitment process for an additional job. The claimant's position was completely different. We were baffled by the insistence that the claimant's role as it had developed had to be assessed using two separate job descriptions, and found that to be entirely inconsistent with the stance taken by the respondent in the 28 September 2018 letter (339) in which the claimant was threatened with disciplinary action if she wished to cease to undertake some of her duties (which were contended to be a separate role for the job evaluation). We found that the approach taken to the job evaluation process was unfair. We do not know, of course, whether a single consolidated job description which recorded all of the claimant's duties and responsibilities would have resulted in the claimant's role being evaluated at a higher band, but nonetheless applying the test in considering detriment which we have set out in the law section of this Judgment and looking at matters through the eyes of a reasonable employee in the claimant's position, we find that the process followed was a detriment for her.

187. The reason for this detriment was not, however, the disclosure which the claimant had made to Dr Wood in January 2017. We accept that disclosure had no influence upon the approach taken by the decision-makers at the time, albeit that the approach taken was wrong. We think that the respondent's decision-makers lacked common sense when considering this issue, or at least the application of common sense was certainly not evidenced to us, but the reason was not a disclosure made by the claimant to Dr Wood. We also noted that the claimant withdrew her appeal against the job evaluation decision and therefore stopped it from being considered further.

D3

188. Alleged detriment D3 in the list of issues was that Ms Nosheen, Ms Currie and Ms Robinson advertised in January 2020 part of the claimant's role and recruited for that role in April 2020. In cross-examination the claimant accepted that Ms Currie was not involved in this decision. What occurred was not accurately recorded by what was alleged in the list of issues. The respondent decided to re-recruit to fill an existing role for which the incumbent had retired. The role overlapped with the claimant's as was established in the internal resolution outcome, which also determined that the claimant should have been more engaged in the process. It was not accurate to record this allegation as advertising part of the claimant's role. The claimant's dissatisfaction, as was clear from the evidence that she gave, was that she thought that the retirement was an opportunity to redesign the jobs in the team and to save the respondent money.

189. We did not find that the respondent recruiting to fill an existing vacancy following the retirement of the jobholder was a detriment for the claimant. We did not find that the respondent's rejection of, or lack of interest in, the claimant's proposals about how things should be done, were a detriment for the claimant either.

190. In any event, based upon the evidence which we heard, the disclosure which the claimant had made to Dr Wood did not have any influence on the decisions made about the recruitment (which was a decision to fill an existing vacancy).

D11

191. Alleged detriment D11 was that on 17 July 2020 Consultant David Haider withdrew his support for the claimant's re-banding application following a request by Consultant Mr Kwartz and Ms Nosheen. In the emails which were provided to us, Dr Haider initially agreed to provide a statement in support of the claimant and then, subsequently decided not to. We found that the claimant having support withdrawn from her, was a detriment for her. That was particularly the case where Dr Haider had initially agreed to provide a statement which would have supported what she wished to say.

192. We did not find that Dr Haider withdrew his support following requests by Mr Kwartz or Ms Nosheen.

193. We found Dr Haider to be a genuine and credible witness. We had no reason to doubt what he told us in evidence. It was his evidence that he changed his mind about providing the statement, because of things which he was told by other employees about their interactions with the claimant, concerns about the claimant's behaviours, and the impact which that had on staff in the department. Those people did not include Mr Kwartz or Ms Nosheen. It was also his evidence that he was unaware of either PD1 or PD4 and, on that basis, those alleged disclosures did not have any material influence upon his decision not to provide a statement in support.

D4

194. Alleged detriment D4, was that Ms Robinson and Ms Childs failed to investigate the allegations made against the claimant and immediately moved to the claimant's suspension on 3 August 2020. This was an allegation that Ms Robinson and Ms Childs failed to undertake an initial fact-finding into the allegation (or, at least if they did, it was an insufficient investigation) and they moved to suspension on 3 August without such an investigation.

195. In the submissions made on behalf of the respondent, it was submitted that there clearly was such an investigation. However, we noted what was decided (on the respondent's behalf) by Ms Street in her decision in the stage one resolution (the claimant's grievance). In her decision letter of 14 September 2022 (1607), as we have recorded above, she found that there was no fact-finding investigation and apologised for the speed and manner of the suspension. We agreed with what Ms Street said and considered her right to have apologised on the respondent's behalf. On that basis we found that D4 was a detriment for the claimant, evidenced by the respondent's own findings in its internal resolution proceedings.

D9

196. Alleged detriment D9 was that Ms Robinson contacted the claimant on 3 August 2020, whilst the claimant was on annual leave and without trade union representation, and suspended the claimant. In submissions, the respondent accepted that a reasonable worker could perceive that to have been a detriment and we agreed.

D5

197. Alleged detriment D5 was recorded as being a detriment that Ms Nosheen, Ms Robinson and Ms Childs, did not investigate the allegations of fraudulent leave taken on 22 July 2020 and 29 June 2020 (the latter date being corrected during the hearing). In cross examination, the claimant confirmed that Ms Childs was not someone who had subjected her to the detriment alleged and she apologised to her for including her in that detriment. The claimant also said that the detriment should be read as alleging that there was not an accurate and complete investigation. The allegation was not about the person who undertook the disciplinary investigation, but the commissioning manager who oversaw the investigation and one of the people who made the allegations which led to the investigation.

198. There was not an initial fact-finding investigation undertaken into the allegation regarding fraudulent leave before the claimant was suspended and the formal investigation was commenced. As part of the full investigation undertaken by Ms Caine, the allegation was fully investigated. It ultimately was considered as part of the disciplinary hearing. We have already found for allegation D4 that the claimant suffered a detriment based upon the lack of a fact-finding investigation and the suspension decision. To the extent that alleged detriment D5 arose from that lack of a fact-finding investigation, the detriment was found. However, beyond that, we did not find that there was any detriment as a result of the investigation of that particular allegation.

D13

199. Alleged detriment D13 was that on 13 October 2020 at the behest of Consultant Mr Kwartz, allegations of the claimant's unauthorised site visit whilst suspended were added to the disciplinary investigation. This allegation arose from Dr Daniel's email to Ms Nosheen when he told her that he had seen the claimant in the hospital a few weeks before. That was added to the matters considered as part of the disciplinary investigation but was not included in the matters which proceeded to a disciplinary hearing after the investigation was concluded. The fact that the allegation was added to those under investigation was, obviously, a detriment for the claimant looked at from her perspective.

200. We did not find that it was at Mr Kwartz's behest that this allegation was added to the investigation. Mr Kwartz's evidence was that he had told Mr Daniel to inform Ms Nosheen, the claimant's line manager, of what it was he said he had seen. That advice was correct. Mr Kwartz was aware that the incident of 2019 had been raised by the claimant with Mr Wood, but not that the incident of 2016 had been raised with him in 2017. Mr Kwartz's advice to Mr Daniel was nevertheless appropriate and we did not find that the advice which he gave was because of the alleged protected disclosures even to the extent that he was aware of them. The decision to include it as part of the investigation was a decision of Ms Robinson, not Mr Kwartz, and we did not find that she did so because of any concerns which the claimant had raised about Mr Kwartz.

D6 and D12

201. We considered alleged detriments D6 and D12 together as they appeared to raise common or overlapping issues. Alleged detriment D6 was that there was a lack of investigation into the alleged malicious intent of the allegations raised towards the claimant during the initial investigation between 3 August 2020 and 4 October 2021. The dates in the alleged detriment referred to the disciplinary investigation and therefore it was Ms Caine, the disciplinary investigator, who had been the person who had undertaken the investigation which lacked the thing alleged, and Ms Robinson (who commissioned the investigation). In answer to an earlier question from the Tribunal, the claimant had asserted it was Ms Street who had undertaken the investigation, but that was the person who commissioned the resolution investigation, which did not fit with the dates of what was alleged. Alleged detriment D12 was that from 24 September 2020 to 4 October 2021 there was a failure by the respondent to investigate an alleged breach of the claimant's data, by Ms Robinson and the disciplinary investigators.

202. The claimant's contention was that Ms Burns had made the initial anonymous allegation. She contended the allegation had been made maliciously. She contended that Ms Burns had acted in breach of data protection obligations by accessing the document which recorded when the claimant had taken annual leave, and which recorded additional shifts. As the claimant accepted and as was highlighted in the respondent's submission, what was contended was not that there had been no investigation, but rather that the investigation had been inaccurate or incomplete. We found that the matters were investigated and there was no lack of, or failure to, investigate as alleged in the detriments recorded. It was correct that subsequent information was identified at a later stage after the disciplinary investigation had concluded, but nonetheless and even though that was the case, we did not find what was alleged in these detriments to have been the case.

D15

203. Alleged detriment D15 was that on 27 January 2021 Ms Robinson added an allegation that the claimant had been unregistered for a period of 21 days to the terms of reference. In addition, in March 2021 Lianne Robinson added an allegation that during this period the claimant had seen a patient. There was an allegation added to the investigation in 2021. The additional allegation was not simply that the claimant had been unregistered. It was added when it was identified that the claimant might have seen a patient during the period when she was unregistered. This was an allegation which ultimately was addressed by the disciplinary panel following the disciplinary hearing, when it was identified that the claimant had written to a patient using a templated letter which defaulted to include a date when she was unregistered, and she had telephoned a patient during the same period. The disciplinary panel, in its decision, identified it as a concern, but ultimately found there was no disciplinary case.

204. The respondent accepted in submissions that facing an additional allegation could be seen as disadvantageous as viewed by the worker and therefore this was a detriment. We found that it was not added, however, because the claimant had made an alleged protected disclosure, it was because it was believed the claimant had seen a patient whilst not registered.

D7

205. Alleged detriment D7 was that Ms Robinson failed to investigate the extra hours allegation despite the claimant providing evidence to the contrary in March 2021. The extra hours allegation was investigated by Ms Caine as part of the disciplinary investigation. Based upon the investigation, it was pursed to a disciplinary hearing. The explanation which the claimant gave for the two days when she was recorded as working but had not accessed the patient system, was considered and accepted at the disciplinary hearing. We were not provided with any particular evidence which the claimant provided which was contrary to this allegation, her explanation at the disciplinary hearing was that she had logged on the Trust systems on one of the days and had worked from home on something else on the other. We did not find that there had been a failure to investigate, so did not find this alleged detriment.

D19

206. Alleged detriment D19 was that on 24 March 2021 Ms Robinson emailed the claimant inferring that the claimant was trying to deceive the respondent by requesting details of her annual leave in an effort to alter information during the disciplinary investigation. The matters addressed in this allegation were recorded in emails. In those emails, Ms Robinson did not allege or infer that the claimant was trying to deceive the respondent. Ms Robinson said (1403) that she did not think it was appropriate for the claimant to be going through her historical eroster data and requesting workforce to make changes. In response (623) the claimant accepted that she had probably been unwise. We did not find that what was said to the claimant by Ms Robinson was a detriment to her (particularly in the light of the claimant's own response). We understood why the claimant was trying to clarify her annual leave position at the end of the annual leave year, but we did not find Ms Robinson's response to be a detriment.

D16

207. Alleged detriment D16 was that, on the claimant's return to work on 9 April 2021, Ms Nosheen and Ms Robinson failed to provide the claimant with a private office. The claimant told us in evidence that prior to her suspension she had not had a private office. She had a shared office. When the claimant asked for a private officer on her return, the possibility was considered and alternatives were put forward, but unsurprisingly in the post-Covid NHS a private office which suited the claimant could not be provided.

208. We did not find that this was a detriment, for someone who had not had a private office previously to not be found a private office on her return from suspension. In any event, even had we found this allegation to have been a detriment, we would not have found that the non-provision of a private office was because of any protected disclosures, it was because there was no private office available (and we noted that the respondent did try to explore alternative options).

D20

209. Alleged detriment D20 was that on 29 April 2021 Ms Nosheen and Ms Robinson alleged that the claimant had taken unauthorised leave and on 6 May 2021 the claimant was put on a performance review by Ms Robinson. We were not provided with any evidence that Ms Nosheen or Ms Robinson alleged that the claimant had taken unauthorised leave. In the letter of 6 May 2021 (661) Ms Robinson did address a day of leave which the claimant had taken at short notice. We therefore focussed upon the performance review which the claimant was informed by Ms Robinson on 6 May she would be subjected to, as one of the reasons given for that review was the short-notice leave taken. That was clearly a detriment. Placing somebody on a capability process is clearly a detriment for them (even where the process is contended to be one which is intended to help them improve).

210. We did find Ms Robinson's decision to place the claimant on a capability process on 6 May 2021 to be one which appeared particularly unfair. The claimant had been the subject of an investigation for far longer than she should have been, nine months at that point, when the respondent's disciplinary procedure said that all investigations should be completed in eight weeks. At the end of the investigation, the vast majority of things investigated were not taken forward to a disciplinary hearing. Three things were to proceed to the disciplinary hearing. However, despite recording that there had been nothing specific enough regarding times and dates of incidents that would warrant the matter being addressed under the disciplinary policy, the claimant was informed that she would be subject to capability proceedings for her unsubstantiated and undefined failure to abide by Trust values. In addition, the claimant was told that the capability proceedings were to follow three things which had not been investigated, one of which was taking leave at short notice. We thought that Ms Robinson's decision was outside what would have been expected. It was clearly a detriment from the viewpoint of a reasonable employee in the claimant's position, to be placed on a capability process and told that disciplinary action could be taken as a result.

D8

211. Alleged detriment D8 was Ms Robinson's decision to pursue the extra hours allegation to a disciplinary hearing on 6 May 2021. As the respondent accepted in submissions, the decision to pursue an allegation to a disciplinary hearing must be a detriment.

D18

212. Alleged detriment D18 was that on 18 June 2021 Ms Robinson emailed the claimant with threats that she would be subject to further disciplinary action. The letter of 18 June 2021 (669) expressed significant concern about the claimant's request for patient records. We did not find that Ms Robinson expressly threatened the claimant with disciplinary action in that letter. We did find that the reference made to HR being closed and the mention of disciplinary action in the letter, carried the veiled threat of action. We found that the veiled threat, in and of itself, was a detriment for the claimant.

213. However, we found that what was said in the letter of 18 June was clearly said because of the claimant's request for patient information, sent from a private email address. A response was justified, and we found that the threat in the letter was not made because of alleged protected disclosures, but rather as a response to what the claimant had done.

D14

214. Detriment D14 was that Ms Robinson subjected the claimant to a fourteen-month disciplinary process between 3 August 2020 and 4 October 2021. The respondent accepted that this was a detriment. Clearly it was. The length of time taken by the respondent to conduct the investigation, and thereafter to hold a disciplinary hearing, was completely and utterly unacceptable. The respondent fundamentally failed to comply with its own procedure. Where eight weeks was exceeded, the policy had a built in process but there was no evidence it had been complied with. Ms Robinson failed to undertake the reviews required under the procedure. This was a fundamental failing by the respondent.

215. During the hearing there were some explanations provided for the length of the process. We found that the explanations provided in no way explained why it had taken so long and it should have been completed much earlier.

216. However, we also found that the length of the disciplinary process was as a result of poor management and shambolic conduct of the procedure. We did not find that it was because the claimant had made alleged protected disclosures about Mr Kwartz (or her dealings and disagreements with him). We found that the time taken reflected incompetence and was not deliberate. It was not because of any protected disclosures made.

217. In considering the length of time taken, we did acknowledge the impact which the Covid-19 pandemic had on the NHS. We took account of the timing of the events and noted that things had not returned to normal at the time. However, we did not find that explained the enormous disparity between the time which should have been taken under the respondent's procedure and the time which was actually taken.

218. We were aware that we did not hear evidence from Ms Caine, the investigator. We considered what she said when interviewed as part of the resolution procedure. We fundamentally disagreed with what she said. The investigation undertaken was anything but timely. Ms Robinson, as the commissioning manager, was responsible for ensuring that the investigation was conducted timeously and in accordance with the Trust procedure. She did not.

D21

219. What was said in the list of issues about alleged detriment D21 was that sometime in the period from 17 September 2019 to 17 October 2019 the claimant was excluded from a meeting by Ms Nosheen at the behest of the Consultant Mr Kwartz or the Senior Management Team. When we asked the claimant about this allegation during her final submissions, she pointed us to a specific paragraph in her grievance (689) which related to a meeting in October 2019. It was for the claimant to prove that her not being invited to, or attending, a specific meeting was a

detriment for her. In the absence of any evidence, we found that she had not done so and the claim therefore did not succeed.

220. For D21, we also noted that the meeting took place in October 2019. That was before PD4. There was no evidence that PD1 had any material influence on her attendance or non-invite to any such meeting, even if PD1 had been found to have been a protected disclosure.

Was it on the ground that the claimant had made a protected disclosure?

221. Issue 3.2 was whether any specific detriment was done on the ground that the claimant had made a protected disclosure? In considering the detriments above, we have already specifically addressed this question for some of the detriments. For others, we have above only addressed whether they were detriments, rather than whether it was/they were on grounds of any protected disclosure. We have found that the claimant suffered a detriment in D1, D10, D2, D11, D4, D9, D5 (to an extent), D13, D15, D20, D8, D18 and D14. For the following detriments, we have addressed issue 3.2 when addressing the individual detriment: D1, D10, D2, D11, D13, D15, D18 and D14. What is set out below applies to the remaining detriments found, as well as applying to D14 (and in practice it also applied to the things not found to have been a detriment, if they had been found as detriments).

222. The remaining detriments were collectively all detriments which arose from, or were related to, the disciplinary investigation and process. For reasons which we have already explained, we did not find that the length of the investigation and some of the decisions taken related to it, placed the respondent in a good light. The claimant made many valid criticisms of the process. The outcome to the first stage of the respondent's own resolution procedure also acknowledged some of those failings. However, we did not find that any of the issues that the claimant may have raised about Mr Kwartz had any influence whatsoever on the disciplinary investigation process followed or the outcomes of it, including any of the detriments found. The two things/matters were simply unrelated.

223. It was certainly the case that the allegations and investigation show that some of the claimant's colleagues had issues with her and what she did, but there was no evidence that the driving factor behind the issues, or a material influence on them, was the claimant's complaints about Mr Kwartz.

224. In this Judgment we have not needed to refer in any detail to the burden of proof. We did not find that the claimant proved the case from which we could conclude that she had suffered the detriments found because of protected disclosures (had we found that protected disclosures had been made).

225. The claimant pursued an argument that Mr Kwartz was a demagogue and the driving force behind the investigatory processes (as well as the approach taken to the job evaluation). The respondent's witnesses, in summary, denied that was the case. We found the vehemence of Mr Kwartz's view of the claimant, as expressed in his evidence to us, to be surprising and unusually forcefully expressed. We had no doubt that in a work context he is not backward in expressing his views. However, we also accepted his evidence that, beyond the specific disagreements about which we heard, he was not overly focussed on or interested in the claimant. There was no

genuine evidence before us, save for the claimant's assertions (or speculation), that Mr Kwartz was behind, involved in, or in any way had an influence on, the processes followed, or the detriments found. We did not find that he was the reason for the detriments which we found. We did not find that a culture resulting from the claimant's disclosures or which was influenced by them, was in any way the reason for the detriments which we found.

226. We would also observe that the claimant herself attributed the detriments to a variety of factors including an adverse view of orthoptists generally and a lack of respect for the standing of orthoptists (she referred to the denigration of orthoptists). We have entirely accepted that any potential protected disclosures may have had a material influence on the detriments even if that was the case, as a detriment can be materially influenced by a number of factors. However, we did note that the claimant herself did not consistently assert that the protected disclosures relied upon were the reason for the detriments. She did not, for example, do so in her own grievance. On occasion, her case was also confused between asserting that the kernel of the issues which led to the detriments was her dispute with Mr Kwartz (as for example in 2016), rather than any disclosures she made about the dispute.

227. The claimant was understandably confused by the way she was treated by the respondent, and she has clearly been affected by it. As we have said, that confusion to some extent arises from the respondent's actions and many of the things alleged were detriments for her, but we have not found that they were because of any protected disclosures.

Summary

228. For the reasons explained above, we did not find that the claimant made any protected disclosures. We found some of the detriments alleged were detriments. We did not find that the grounds for any of those detriments was that the claimant made protected disclosures (even had we found that she made protected disclosures as she alleged). Only the claim for alleged detriment D14 was brought within the time required. That was a detriment but was not because of any protected disclosures. As that claim failed, none of the claimant's other claims could have been brought in time, as it would have been reasonably practicable for the claimant to have brought her other claims in time. For some of the alleged detriments, we would not have found them to have been part of a continuing series with D14 even had we found they were a detriment as a result of a protected disclosure, so the claims for those detriments would not have been brought in time in any event.

Employment Judge Phil Allen
30 September 2024

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON
1 October 2024

FOR THE TRIBUNAL OFFICE

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Annex
Final list of complaints and Issues

1. Time limits

1.1 Given the date the claim form was presented and the effect of early conciliation, any complaint about something that happened before **16 August 2021** may not have been brought in time.

1.2 In relation to the complaints of detrimental treatment identified as D7, D8, D17, D20 and D21, added by way of amendment, the relevant date deemed to be the date of presentation for time limit purposes, is the date of the application, which is **3 January 2023**.

1.3 Was the detriment complaint made within the time limit in section 48 of the Employment Rights Act 1996? The Tribunal will decide:

1.3.1 Was the claim made to the Tribunal within three months of the act complained of?

1.3.2 If not, was there a series of similar acts or failures and was the claim made to the Tribunal within three months (allowing for any early conciliation extension) of the last one?

1.3.3 If not, was it reasonably practicable for the claim to be made to the Tribunal within the time limit?

1.3.4 If it was not reasonably practicable for the claim to be made to the Tribunal within the time limit, was it made within such further period as the Tribunal considers reasonable?

2. Protected disclosures

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 says she made disclosures on these occasions:

PD1 [**17 or 18 January 2017]** disclosure to Trust Medical Director Dr Jeremy Wood: “he opened the notes and pointed out that the patient was an orthoptic patient, I pointed out that the previous report was written by a doctor (I am unsure which) and had recorded that the patient needed orthoptic assessment and a clinical appointment, which he was having – Jeff thrust the note at me and asked me to rebook the patient to a more appropriate appointment. He wanted me to ask

the patient to leave. I refused to do this, although I didn't know what the condition of this patient was or how urgent – I presumed, as I had heard Katy talk about double vision, that the doctor had wanted a two week appointment and that there was a good reason for the patient to be in this ARC".

PD2 N/A

PD3 N/A

PD4 **31 December 2019**. A written complaint to the Trust Medical Director Dr Jeremy Wood as follows: "I felt that Jeff was trying to make a point and shift responsibility to me for this patient as he wasn't prepared to see them himself. He was pedantic, angry, patronising and rude. He intimidated and embarrassed me in front of my colleagues and patients. I felt bullied and flustered and it made it very difficult to go back to my consultation with my patient and concentrate on what the mum had been telling me and to examine the child".

2.1.2 Did she disclose information?

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

2.1.4 Was that belief reasonable?

2.1.5 Did she believe it tended to show for PD1 and PD4 that:

2.1.5.1 a person had failed, was failing or was likely to fail to comply with the legal obligation;

Did she believe it tended to show for PD1 [and] PD4 that:

2.1.5.2 the health or safety of any individual had been, was being or was likely to be endangered;

[Did she believe it tended to show for PD1 and PD4 that:

2.1.5.3 information tending to show any matter falling within any of the preceding paragraphs had been or was likely to be deliberately concealed.]

2.1.6 [and was that belief reasonable?]

2.2 If the claimant made a qualifying disclosure, it was a protected disclosure because it was made to the claimant's employer.

3. Detriment (Employment Rights Act 1996 section 48)

3.1 What are the facts in relation to the following alleged acts or deliberate failures to act by the respondent? (Relevant PD in brackets)

D1 From 2017 onwards the claimant did not have clarity about the banding for her role and this subsequently affected her pay. (PD1)

D2 On 11 April 2019 and 21 June 2019 the claimant's re-banding application was subject to an unfair process and as a result was refused. (PD1 and PD2 in so far as D2 relates to 21 June 2019)

D3 Sonya, Lucie and Lianne advertised in January 2020 part of the claimant's role and recruited for that role in April 2020. (All PDs)

D4 Lianne Robinson and Jill Childs failed to investigate the allegations made against the claimant and immediately moved to the claimant's suspension on 3 August 2020. (All PDs)

D5 Sonya, Lianne and Jill Childs did not investigate the allegations of fraudulent leave taken on 22 July 2020 and 29 July 2020. (All PDs)

D6 That there was a lack of investigation into the alleged malicious intent of the allegations raised towards the claimant during the initial investigation between 3 August 2020 and 4 October 2021. (All PDs)

D7 That Lianne Robinson failed to investigate the extra hours allegation despite the claimant providing evidence to the contrary to in March 2021. (All PDs)

D8 Lianne Robinson pursuing the extra hours allegation to a disciplinary hearing on 6 May 2021. (All PDs)

D9 Lianne Robinson contacting the claimant on 3 August 2020 whilst the claimant was on annual leave without trade union representation and suspending the claimant. (All PDs)

D10 On 1 October 2018 Lucie Currie and Jill Childs refused the claimant's request to return back to the original role. (PD1)

D11 On 17 July 2020 Consultant David Hayder withdrew his support for the claimant's re-banding application following a request by Consultant Mr Kwartz and Sonya. (PD1 and PD4)

D12 From 24 September 2020 to 4 October 2021 there was a failure by the respondent to investigate an alleged breach of the claimant's data by Lianne Robinson and the disciplinary investigators. (All PDs)

D13 On 13 October 2020 at the behest of Consultant Mr Kwartz, allegations of the claimant's unauthorised site visit whilst suspended were added to the disciplinary investigation. (PD1 and PD4)

D14 Lianne Robinson subjected the claimant to a 14 month disciplinary process between 3 August 2020 and 4 October 2021. (All PDs)

D15 On 27 January 2021 Lianne Robinson added an allegation that the claimant had been unregistered for a period of 21 days to the terms of reference. In addition, in March 2021 Lianne Robinson added an allegation that during this period the claimant had seen a patient. (All PDs)

D16 On the claimant's return to work on 9 April 2021 Sonia and Lianne Robinson failed to provide the claimant with a private office. (All PDs)

D17 N/A

D18 On 18 June 2021 Lianne Robinson emailed the claimant with threats that she would be subject to further disciplinary action. (All PDs)

D19 On 24 March 2021 Lianne Robinson emailed the claimant inferring that the claimant was trying to deceive the respondent by requesting details of her annual leave in an effort to alter information during the disciplinary investigation. (All PDs)

D20 On 29 April 2021 Sonia and Lianne alleged that the claimant had taken unauthorised leave and on 6 May 2021 the claimant was put on a performance review by Lianne. (All PDs)

D21 Sometime in the period from 17 September 2019 to 17 October 2019 the claimant was excluded from a meeting by Sonia at the behest of the Consultant Mr Kwartz or the Senior Management Team. (PD1, PD2 and PD3)

3.2 If so, was it done on the ground that she made a protected disclosure?

4. Remedy for Detriment

4.1 N/A