Case Number: 2302564/15

THE EMPLOYMENT TRIBUNAL

SITTING AT:	**LONDON SOUTH**	
BEFORE:	**EMPLOYMENT JUDGE MARTIN**	
Members	**Ms C Edwards** **Ms C Bonner**	
BETWEEN:	**Mr Nasser Arjomand-Sissan**	**Claimant**
	AND	
	East Sussex Healthcare NHS Trust	**Respondent**
ON:	**2, 3 6-10 and 13 - 16 June 2016, 25 July 2016 and 26 – 29 July 2016 in chambers**	

APPEARANCES:

For the Claimant: **Mr Mitchell - Counsel**

For the Respondent: **Ms Azib – Counsel**

RESERVED JUDGMENT

The unanimous decision of the Tribunal is that the Claimant's claims are dismissed

RESERVED REASONS

1. By a claim presented to the Tribunal on 7 March 2015 the claimant brought claims of race discrimination, unfair dismissal and whistleblowing. These were defended by the Respondent in its response presented on 4 April 2015.

The hearing

2. The Tribunal heard from the Claimant and on his behalf from Ms Vicky Rose (workplace companion), Ms Jane Darling (Radiology General Manager) and Ms Lisa Hemmingfield (Programme Manager)

3. For the Respondent, the Tribunal heard from: Ms Stephanie Innes (Employee Services Advisor); Mr David Baker (the Claimant's previous manager); Mr Les

Saunders (General Manager (Estates and Projects Planning)); Mr Nick Turner (Head of Clinical Information Systems); Mr Andrew Bailey (Head of Information Management); Mr James Gibbons (Previous Director of Performance and IT); Ms Nicola Walker (General Manager A&E Services); Ms Sarah Goldsack (Associate Director of Knowledge Management); Ms Jane Rademaker (nee Morris) (Assistant Director of Operations (Cancer and Surgery); Ms Monica Green (Director Human Resources); Ms Jane Dudley (investigator); Ms Deirdre Daly (Lead Cancer Manager); Ms Moira Tenney (Director Human Resources); Ms Lesley Walton (Improvement Programme Manager) and Ms Stella Goddard (Theatre Practitioner).

4. The Tribunal had before it six full lever arch files

5. At the start of the hearing the issues had not been finalised. The parties were given time to finalise them while the Tribunal read the papers with agreed issues being emailed to the Tribunal on the afternoon of the first day. This was done, and the issues were noted as being the final issues. However, during the course of the hearing, the Claimant's representative sought to change and expand on the issues saying for example that the detriments were a summary only. The Tribunal was clear that the issues had been agreed and that those were the issues it was to determine and no others. Accordingly, this judgment is limited to those issues pleaded and agreed in the final list of issues which is appended to this judgment.

6. An application was made on Friday, 22 July, 2016 by the Claimant to disclose a document written by Ms Noakes dated 3 September, 2007 after the evidence had concluded which he said he had passed to his solicitor for the purposes of disclosure, but for some reason or other was not disclosed. The Claimant had this document in his possession throughout the hearing, which lasted for 11 days, yet only disclosed it after the evidence had concluded.

7. The Respondent objected on the basis that it is not in the interests of justice as it did have not have the opportunity to cross-examine the Claimant about this email or put this letter to any of their own witnesses by way of challenge or explanation. Ms Noakes, who wrote the email has long since left the trust and is not available to give evidence.

8. The Tribunal considered the application and the Respondent's objections bearing in mind the overriding objective. The Tribunal concluded that it was not in the interests of justice for this document to be produced at this late stage. The evidence had been completed and there was no opportunity for the Respondent to challenge the document. Whilst the Tribunal accepts that the Claimant may well have given the letter to his solicitor, and that for some reason, this was not disclosed, it finds that the balance of prejudice falls on the Respondent and the Tribunal did not consider it to be in the interests of justice to admit another document at that late stage. The Claimant could have produced this document at any stage during the hearing.

The issues

9. The issues were agreed by the parties and set out in a schedule. These are set out below in the body of this judgment. The Tribunal has only considered those issues that appear in this schedule as it was expressed to be a final schedule of issues.

10. There were 19 matters relied on by the Claimant as being protected disclosures spanning about seven years and 33 detriments.

The law as relevant to the issues

Both parties gave detailed submissions on the law which were considered by the Tribunal. Below is a brief summary.

<u>Protected disclosures</u>

11. The principal definition is in section 43A Employment Rights Act 1996 which refers to other sections.

    43A Meaning of 'protected disclosure'

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

    Section 43B(1) is as follows:

    43B Disclosures qualifying for protection

    (1) In this Part a “qualifying disclosure” means any disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show one or more of the following—

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

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

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

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

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

12. The Claimant must therefore prove as a first step that there has been a disclosure of information. The Tribunal will have to find that the Claimant actually believed that that information tended to show one or more of the matters set out in paragraphs (a)-(f), and also that it was reasonable for that belief to be held.

13. If it is found that there had been a qualifying disclosure then the next stage is to ascertain whether any of sections 43C-43H apply. The parties did not raise this as an issue and therefore these sections are not specifically set out.

14. If there has not been a protected disclosure, then of course the claims under section 47B and 103A of the Employment Rights Act 1996 must fail. If there was one or more protected disclosures then the Tribunal will consider the claims of having suffered detriments. Section 47B(1) of the 1996 Act is as follows:

    47B Protected disclosures]

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

15. The enquiry of the Tribunal will therefore initially be whether there was in fact any detriment, and then whether that detriment was 'on the ground' of a protected disclosure having been made. Section 48 provides so far as is relevant:

    48 Complaints to employment tribunals

    (1) – (1ZA) . . . .

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

    (1B) . . .

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

16. The Tribunal considered the case of **Fincham v HM Prison Service EAT 0925/01,** which held that where a worker relies of the breach of a legal obligation, the disclosure should identify *"albeit not in strict legal language, the legal obligation on which the (worker) is relying".* The Tribunal also considered Bolton School v Evans 2006 IRLR 500, EAT, which held that the disclosure can still amount to a qualifying disclosure, even if the Claimant did not "*in terms identify any specific legal obligation, and no doubt he would not have been able to recite chapter and verse at the time. But it would have been obvious to all that the concern was that private information, and sensitive information about pupils, could get into the wrong hands, and it was appreciated that this could give rise to a potential legal liability*".

17. The Tribunal also considered <u>Western Union Payment Services UK Ltd v Anastasiou</u> EAT 0135/13 where the claimant made a disclosure in the course of

an internal investigation regarding misleading information provided to potential investors. The employer argued that the disclosure did not qualify for protection because the legal obligation had not been identified. However, the EAT held that the obligation in question - that a company describing its prospects to potential investors should describe those prospects accurately - was apparent to all as a matter of common sense.

18. The EAT in Kilraine v London Borough of Wandsworth 2016 IRLR 422 considered the words 'information' and 'allegation' finding that is not one made by the statute itself and Tribunal's should guard against asking whether an alleged disclosure was one or the other, given that the two are often intertwined. The correct question is whether a purported disclosure is a disclosure of information. The fact that it might also be an allegation does not prevent it from amounting to a qualifying disclosure.

19. In Norbrook Laboratories (GB) Ltd v Shaw 2014 ICR 540 it was held that two or more communications taken together can amount to a qualifying disclosure. The employee had sent three emails to two different managers, concerning the danger of expecting his sales team to drive in snowy conditions. Read together, it was clear from the emails that the employee was communicating information that the health and safety of other employees was being endangered. This amounted to a qualifying disclosure (s.43B(1)(d) ERA), notwithstanding that read individually, each email did not.

Unfair dismissal

20. s95 Employment Rights Act 1996 provides that an employee is dismissed by his employer if the contract under which he or she is employed is terminated by the employer (whether with or without notice) or the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice, by reason of the employer's conduct.

21. ***Western Excavating (ECC) Ltd v Sharp*** **[1978] ICR 221 CA**, held that an employee would only be entitled to claim that he or she had been constructively dismissed where the employer was guilty of a 'significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract'. It was not sufficient that the employer was guilty of unreasonable conduct - he must be guilty of a breach of an actual term of the contract, and the breach must be serious enough to be said to be 'fundamental' or 'repudiatory'.

22. ***Woods v WM Car Services (Peterborough) Ltd*** **[1981] IRLR 347** held that to constitute a breach it is not necessary that the employer intended any repudiation of the contract: the issue is whether the effect of the employer's conduct as a whole, judged reasonably and sensibly, is such that the employee cannot be

expected to put up with it.

23. ***Lewis v Motorworld Garages Ltd*** **[1985] IRLR 465** held that significant breaches by an employer of express terms of an employment contract, although waived by the employee, can still form part of a series of actions which cumulatively breach the implied obligation of trust and confidence.

24. The Claimant is alleging that the dismissal was automatically unfair under section 103A of the 1996 Act on the basis that the principal reason for the dismissal was that he had made a protected disclosure. He is also alleging that the dismissal was unfair irrespective of that point.

25. The Tribunal must find as a fact what was the principal reason for the dismissal. If we were to find that it was the Claimant had made a protected disclosure then that is an end of the matter as far as a finding of unfair dismissal is concerned. If the Tribunal finds that either there had not been a protected disclosure, or that the principal reason for the dismissal was not the making of a protected disclosure, then the Tribunal must consider the provisions of section 98 of the 1996 Act.

98 General

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) relates to the conduct of the employee,

(c) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(3) . . . .

(4) In any other case where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

(5) – (6) . . . .

On the assumption that the Respondent has established that the principal reason for the dismissal was one which was potentially fair within subsections (1) and (2) then the Tribunal must consider whether it was actually fair taking into account the provisions of subsection (4). There is no burden of proof placed upon either of the parties in that respect. In carrying out that exercise the Tribunal must at all times consider whether the Respondent acted reasonably. It is not the function of the Tribunal to decide what it would have done in the circumstances.

Overview

26. Given the number of disclosures and detriments and the number of years which this case spans, the Tribunal sets out an overview of its findings with the detail being set out below.

27. The Tribunal has found that there were two disclosures out of the Claimant's list of 19 which are protected disclosures. These are disclosure 3 (dated 3 May 2007 to Mr Lippiat) and disclosure 18 (dated 5 February 2014 to Mr Bailey and Ms Goldsack). The reasons for these findings are set out below.

28. Given the period of time between these disclosures and taking into account where the Claimant was working at the time they were made (he was working for the Therapies Department when the first disclosure was made and under different management in the Operations Department when the second disclosure was made) the Tribunal does not find that them to be part of a continuing act. The time span is too great to make any meaningful link between them. The Tribunal finds that once the Claimant moved from the Therapies department in January 2010 all matters that happened before this time ceased in that the new management team he was working under were unaware of the protected disclosure or his complaints of race discrimination. This is considered further below.

29. The Tribunal has found that Ms Noakes was aware of both protected disclosures throughout, however given the period of time between the two disclosures the Tribunal does not find that she was motivated to act in any particular way because of either the protected disclosures or the Claimant's complaint of race discrimination. There was no direct evidence that Ms Noakes was so motivated and the Tribunal was unable to draw any inference from the evidence before it.

The Tribunal's findings

30. The Tribunal has come to the following findings having heard the evidence and considered the documents. It has taken into account the submissions made by both parties. These findings of fact are confined to those which are necessary to explain the decision reached and which are relevant to the issues. All evidence was considered even if not specifically noted below.

31. This is a very complex case. The particulars of claim run to 47 pages and 101 paragraphs. The Claimant's witness statement comprised 278 paragraphs and there were numerous witnesses as set out above. The Tribunal has dealt with each disclosure and detriment in turn as they appear in the list of issues. To give context the Tribunal has set out an overview of the Claimant's employment. The Tribunal then considered whether the disclosures as set out in the appendix to this judgement, were protected disclosures pursuant to the relevant legislation as set out above, whether the relevant personnel had knowledge of the disclosures which the Tribunal find to be protected, whether the detriment occurred and if they did occur whether they happened because of the protected disclosure or for some other reason.

An overview of the Claimant's employment

32. The Claimant was employed by the Respondent from 5 December 2005 to 24 February 2016 when he resigned without notice. The Claimant was initially employed as an IM&T manager. The Respondent is a Trust which went into special measures following a report by the Care Quality Commission (CQC) in 2015. Clearly it was a very difficult time for the Trust and there were many serious issues across the whole organisation. The Claimant seeks to rely on this report and set out in his submissions various parts of the report. It is not intended to reproduce them in this judgment save to say that the report showed the Trust was about the bottom 20% of all Trusts in England for staff engagement; there was a culture whereby staff were afraid to speak out to share their concerns openly; staff were worried about the consequences of speaking out; the data shared with external stakeholders and the board was criticised; there were fears of reprisal; staff were unclear about lines of accountability; concerns about the quality of support from HR and challenging relationships with senior staff with styles of communications being inappropriate in a professional arena. Following the report, the Respondent went through a major reorganisation.

33. During his employment the Claimant worked in various departments with different managers. In each department there was a separate management structure and once the Claimant had moved to a different department any involvement with his previous managers ceased. The tribunal has found that there was no collusion between the management of the different departments.

34. During the course of his employment there were many detailed investigations both done internally and externally with South Coast Audit (SCA).

The disclosures

35. The Tribunal has relied on the final version of the disclosures relied on produced by the Claimant on 7 June 2016. The Claimant submitted that the Tribunal should consider many of these disclosures, not in isolation, but as a whole and in his submissions grouped various of the disclosures together, saying that whilst individually they may not have the necessary elements for a protected disclosure, together they do. The Claimant referred to **Norbrook Laboratories (GB) Ltd v Shaw ICR 540**. The Tribunal has considered the disclosures in the way set out by Mr Mitchell so that it can consider this aspect of his submissions.

36. In considering each disclosure, the Tribunal referred to the references to the paragraphs of the particulars of claim, further and better particulars of the Claimant's claim, the Claimant's witness statements and the pages in the bundle as set out in the Claimant's final schedule of disclosures, although not all references are referred to in the narrative below.

Disclosures 1 and 2

37. Both of these disclosures relate to ***"inaccurate reporting of data re. patient referrals and the true waiting list figures for Therapy Services"***. They were made on 20 February, 2007 and 9 March, 2007 to South Coast Audit ("SCA") which is a not for profit consortium hosted by South Downs Health NHS Trust providing internal audit and counter fraud services to the NHS across the South of England. The Claimant relies on *"(a) fraud, (b) breach of a legal obligation, (d) health and safety of patients ultimately affected and (f) deliberate concealment".*

38. There are three relevant emails which the Claimant says together comprise a protected disclosure. The header for all the emails is "*Therapy Services Tiara system*"

39. The first email is 20 February, 2007 and is sent from the Claimant to Ms Scully of SCA:

> *"I need to know if in the physiotherapy services we are going to need to register all referrals, regardless of patients having therapy or not.*
>
> *As it stands in my team we only get the slips come through for patients that have had their treatment started. and those patients that have been referred by GP, consultant or any other source that do not make appointment or don't get reply to letters sent out to them do not get registered, hence this does not show the true figure of referrals and also I'm not able to give report on what number of patients not ever attending.*
>
> *I need you to let me know that we should be registering all patients, so I can get the department to listen to me".*

40. In isolation, the Tribunal does not find this to be protected disclosure because this is a request for information and clarification and does not give information that tends to show a breach of legal obligation, that the health and safety of patients will ultimately be affected or deliberate concealment.

41. The second email was sent on 9 March 2007 at 12:04 by the Claimant to Ms Scully.

    "Kathryn this email is absolutely confidential to you only.

    I believe you are meeting Robert Jones on Monday 12th.

    As IM&T manager of therapy services I do strongly believe that all referrals therapy services received should be recorded on to tiara in-house system, regardless of if any appointment with first contact comes out of it or not, I have already set up data integrity for capturing all correct data and separating referrals with appointments and ones that never do attend.

    This will allow main I -house system (Tiara) provide all information that will be needed by all directorates of the trust, i.e. finanace reasons or legal reasons.

    My feeling is that Robert and Paul will resist this as they may not want the true figures to be known for some reasons,

    If you do get any time after your meeting, come and see me fin my office.

    Please keep this email is private and confidential to your self". (sic)

42. Ms Scully replied:

    "*Thanks for this - I have said it as part of the report that all referrals should be recorded and that clarification has to be provided on this as both a patient and a financial requirement*

    I'm bringing one of my managers with me and I believe he will want to have all referrals recorded also like me. Would you be happy if he came with me to see you after or would you prefer he would not?".

43. In isolation the Tribunal does not find this to be a protected disclosure as the Claimant is giving his opinion as opposed to information which in his reasonable belief tends to show the breach of health and safety, legal obligation fraud or concealment.

44. The third email was sent 9 March, 2007 at 3:12 PM by the Claimant to Ms Scully:

    "*Hi Kathryn,*

    Thank you for your reply.

    Yes I have seen it on your recommendation and agree totally with it. But as I said, they don't seem to want to keep proper and correct (accurate

information on number of referrals that is received also which will end up showing how long it has taken form patients referral received to patient having had their first appointment (treatment). (Sic).

If you feel what we may discus can stay confidential, than I don mind if one of your managers comes as well". (sic)

45. In isolation the Tribunal finds that this is not a protected disclosure. The Tribunal's finding is that it makes an allegation that managers do not want to keep correct and accurate information with no actual examples or facts set out. There is no explicit or implicit mention of fraud, a breach of legal obligations, health and safety or deliberate concealment.

46. Having found that individually these disclosures were not protected disclosures the Tribunal considered whether these disclosures taken together could amount to a protected disclosure. The Tribunal first looked to see if there is anything in any these emails which would tend to show fraud, breach of legal obligation, that the health and safety of patients would ultimately be affected or deliberate concealment. The Tribunal does not find that the emails show this either explicitly or implicitly and therefore find that these emails whether taken individually or collectively cannot amount to a protected disclosure.

Disclosure 3

47. This disclosure was made on 3 May, 2007 orally by the Claimant to Mr Christian Lipiatt (HR) in a meeting. The disclosure is ***"Robert Jones developing Activity Sample Database for personal gain"***. The Claimant relies on fraud, breach of legal obligation, that the health and safety of patients would be ultimately affected, and deliberate concealment.

48. The only evidence in relation to this meeting is contained in Mr Lippiatt's notes of the meeting. As relevant, the notes state:

"The issues Nasser had to raise were that he had been asked to develop a database system by Robert in Microsoft Access. Nasser was led to believe that this was for the Trust use. Programme development was not part of his job description but Nasser had the IT skills and was willing to use them. Nasser stated he had spent a lot of time in extra hours in work and at home as well as at the weekends working on the database development. Nasser was under the impression he would be remunerated for the amount of time he had spent working on the programme and had logged the hours. It would apparently not have been possible to take the time back as Nasser has his normal duties to undertake on top of the programming.

It later became apparent that he would not be remunerated for his time and that he was told that he should take some time back which amounted to a considerable amount of time and would not be possible to carry out his normal duties and reports that are required by the trust on a regular basis.

Robert asked that Nasser share his work with another Trust Physiotherapy

Department where the lead happened to be a colleague of Robert's in a private company they apparently run. Nasser had been asked to also provide an "IT helpdesk" type service to them for any queries they had regarding the database.

Nasser was very concerned that he was being asked to undertake work whilst being paid by East Sussex Hospitals NHS trust another NHS trust and also for the benefit of Roberts private company. Nasser was extremely uncomfortable that he was spending all of this working time and a good deal of private time on this work which was not in the best interests of the Trust he was employed by. Nasser was concerned that if anyone found out conducted any sort of audit he would be in serious trouble for this.

Nasser had already tried talking to Robert about his concerns, but Robert had apparently been insistent on what Nasser should and should not be doing. Nasser wanted advice as to how he might resolve these issues without causing trouble for himself with Robert or causing trouble for Robert. Robert had told Nasser that the Trust Board were aware of the work Nasser was doing and had sanctioned it and that he should complete it. When Nasser asked for any sort of meaning confirmation from a board member, Robert was apparently reluctant or unable to produce anything.

Nasser had already tried all he could with Robert to resolve the issues informally, but had not achieved anything. He now needed a different approach.

…"

49. The Tribunal finds, as accepted by the Respondent, that the Claimant had disclosed information about his work on the Activity Sample Database. The Respondent's position is that the information provided did not show tend to show fraud, breach of legal obligation, breach of health and safety or deliberate concealment. The Respondent submitted that the Claimant's only real concerns were that the Claimant would be in serious trouble for it and that he was spending a lot of time on this work, which he would not be remunerated for. Whilst the Tribunal accepts that the Claimant was concerned for his personal position, the Tribunal finds that the information given to Mr Lippiatt also highlighted his concern that the Respondent's resources were being utilised to work for the benefit of Mr Jones's private business and also for the benefit of another Trust. This would be, as a matter of common sense, a fraud on the Respondent in that the Respondent was funding this work, whereas another other beneficiaries, namely Mr Jones's private business and the other Trust, were gaining the benefit without paying for it. The Tribunal's finding is that this disclosure reveals a failure to comply with legal obligations (contractual relationship with the Respondent), fraud and that the health and safety of patients ultimately affected as funds would not be available for their benefit.

50. The Tribunal is satisfied that the Claimant made this disclosure in good faith, having exhausted his efforts to discuss the matter with Mr Jones. The Tribunal is also satisfied that this disclosure was made in the public interest as it related to the utilisation of funds made available for the Respondent and those who

required treatment there.

51. The Tribunal therefore finds that this was a protected disclosure.

Disclosure 4

52. ***"Exaggeration of business case for Consultant Physiotherapist at Conquest Hospital".*** This disclosure relates to an email the Claimant sent to Mr Paul Phillips and copied to Ms Jane Morris on 25 July, 2007. This reads:

    *"Jane, you had asked for the number of contacts by our **Physio consultant at Eastbourne** for the period of year. Your number of patient contacts for 01/04/2006 to 31/03/2007 one full financial year were **677 contacts** And for the current financial year 01/04/2007 to 30/6/2007 contacts have been **97 contacts**.*

    Ps: as the IM&T manager for therapy services, if you need any data with regard to activities you can contact me directly as all data will come from me.

    Please do don't hesitate to ask if you need any further information".

53. The Claimant's case is that as this tends to show fraud, breach of legal obligation, that the health and safety of patients were ultimately be affected and deliberate concealment.

54. The Claimant's position is that there was an exaggeration of the business case for an extra Consultant Physiotherapist, which could adversely affect the Respondent because of the financial constraints that they were working under which could ultimately affect the treatment that patients received. The Respondent's position is that there is no disclosure of information or any qualifying disclosure that showed tended to show a breach of legal duty. The Respondent submitted that the Claimant's witness statement says that "*it became apparent,"* that the case was exaggerated but it does not say that he made a specific disclosure to this effect to Ms Morris or Mr Phillips. The Respondent also notes that the email the Claimant sent was copied to Robert Jones which it says would have been surprising if the Claimant was making a disclosure of this nature alleging that Mr Jones was exaggerating the business case so as to be able to employ an extra consultant.

55. The Tribunal does not find this to be a protected disclosure in that it does not provide information tending to show fraud, breach of legal obligation, that health and safety of patients may be affected or deliberate concealment. It simply provides figures being asked for by Miss Morris. The Tribunal notes that Miss Morris's response to the Claimant states that she was *"slightly confused*" because the business case which she had been sent before gave much higher patient figures and did not correspond to the figures the Claimant had given her. It appears from this that it was Miss Morris who picked up that the business case may be exaggerated based on the figures given by the Claimant and other information she had. The Tribunal does not find this to be a protected disclosure.

Disclosure five

56. This relates to "***disclosures 1,3 & 4 above"*** made to Ms Green, Ms Darling and Mr Simkins. On 30 August, 2007 the Claimant had a meeting with them in which he says he repeated disclosures one, three and four. The Claimant's case is that it tends to show fraud, breach of legal obligation, that the health and safety of patients would ultimately be affected and deliberate concealment. No notes were taken of this meeting and therefore the Tribunal had to consider what the various witnesses had to say about the meeting. The only relevant documentation is a series of emails to set up the meeting and a series of emails confirming that the meeting happened. There is nothing reflecting what actually happened or what was said in the meeting.

57. The Tribunal first considered the Claimants particulars of claim (paragraph 11.5) in which he said he was asked to attend a confidential meeting with Ms Green, Ms Darling and Mr Simkins on 30 August, 2007. His particulars of claim say that the meeting was to discuss a number of his disclosures and after that he was thanked for his openness (this is recorded in an email after the meeting). The Claimant's witness statement at paragraph 52 repeats what is said in his particulars of claim. It does give any information about what he actually said during the meeting.

58. The Tribunal then looked at the witness evidence of Ms Darling who was at the meeting. This witness statement says.

"*The meeting on 30th August was indeed a confidential meeting, the Claimant and he was given the opportunity to speak openly and frankly about his concerns, treatment etc. It is possible that we said we were treating the meeting informally to give them time to consider whether he wished to take forward the whistleblowing procedures, but in any case, any allegations made would have been acted upon. In my view, the Claimant was clearly acting in the whistleblowing capacity and deserved our support as a consequence.*

…..

Following the meeting, I do recall chatting to Monica Green and James Simkins after the Claimant had left the room, and it was felt, given the nature of the concerns relating to Robert Jones and the investigations already under way, that Graham Griffiths would have a view on how the issue should be taken forward and what further investigations would be appropriate."

59. The investigation underway was an investigation being carried out by David Phylliskirk.

60. Ms Simkins did not give evidence. Ms Green does not set out what was said at the meeting in her witness statement, although she confirms by reference to page 214 in the bundle that she did attend the meeting. In cross examination, Ms Green did not give any detail of the conversation simply saying she did not consider what was said to be a protected disclosure at the time. She could not recall what was said at this meeting when interviewed by Ms Dudley on 30 November 2015 as part of Ms Dudley's investigation which is not surprising given

the passage of time.

61. The Tribunal has no evidence either from the Claimant or from the Respondent witnesses about what the Claimant actually said at the meeting, save for the fact that he was thanked for being open and honest. This could mean anything. Without any evidence as to what was said at the meeting the Tribunal is unable to make a finding that the Claimant made a protected disclosure at this meeting.

Disclosure 6

62. **"Disclosure 3 above"** made to Mr Butler (SCA) on 30 August 2017. This disclosure was in relation to Dr Jones developing the activity sample database for personal gain as set out above. The Claimant's case is that it tends to show there was fraud, breach of legal obligation, that the health and safety of patients was ultimately affected and deliberate concealment. The Claimant's list of protected disclosures refers to paragraph 11.3 of his particulars of claim. The Tribunal therefore turned to this paragraph, which whilst it sets out the details of the Claimant's position with regards to the activity sample database, does not refer to any disclosure being made to Mr Butler.

63. The Claimant's witness statement at paragraph 53 says: "*On 6 September, 2007 I reported this issue to John Butler, local counter-fraud specialist at SCA. I was also asked by him to supply data concerning registrations and appointments in the Department (as well as other information) on an ongoing monthly basis".* The matter that the Claimant "*reported*" was about the activity database and the involvement of Mr Jones. This does not assist the Tribunal in establishing what the Claimant actually said to Mr Butler and whether what was said, could amount to a protected disclosure. Therefore, the Tribunal looked to see if there was any other documentary evidence which could shed light on what was said during the Claimant's meeting with Mr Butler.

64. The Claimant refers to the investigation report compiled by Mr Butler. The introduction to the report states that on 3 September, 2007 complaints were raised under the Trust's whistleblowing policy relating to Mr Jones and that Mr Phylliskirk was investigating disciplinary issues such as staff bullying and other behavioural concerns and that Mr Butler was investigating other matters which could be of a criminal nature.

65. In the report, Mr Butler records an interview with the Claimant on 4 September, 2007. He records that the Claimant said that he was asked to develop an activity sample database to track clinical activity. It records that the Claimant said that his proposed database was overruled by Dr Jones because the system was required by a Devon PCT and that he was going to undertake a joint venture with the Trust. The Claimant told Mr Butler that he had been told it had been agreed with senior management, although he had not seen written confirmation, that he was tasked with its development. The Tribunal carefully read this section of Mr Butler's report and whilst the Tribunal accepts that there is a disclosure some

information there is nothing in the report itself, that would suggest that the Claimant said, either explicitly or implicitly, that there was fraud, breach of legal obligation, that the health and safety of patients was ultimately affected or deliberate concealment.

66. The Tribunal considered Mr Butler's finding which was that advice was to be sought by the local counter-fraud specialist regarding criminal action in connection with Mr Jones's private use of intellectual property by way of the Trust's developed database and/or abuse of position. However, this does not assist the Tribunal in establishing what the Claimant said to Mr Butler and whether that amounted to a protected disclosure. The Tribunal does not find this to be a protected disclosure.

Disclosure 7

67. "***Disclosure 4 above***." This disclosure relates to the exaggeration of business case for an additional post of Consultant Physiotherapist at Conquest Hospital as referred to above. This disclosure was said to be made to Mr Butler by email on 6 September, 2007. The Claimant's case is that this suggested fraud, breach of legal obligation, health and safety of patients ultimately affected and deliberate concealment. The Claimant says this is referred to in paragraph 11.4 of his particulars of claim which states "*on 6 September, 2007 I reported this issue to John Butler, local counter-fraud specialist at SCA. I was also asked by him to supply data concerning registrations and appointments in the Department (as well as other information) on an ongoing monthly basis*."

68. The email states:

"Hi John, As I mentioned in our meeting the other day, there was a query from Jane Morris with regard to business case Robert Jones has put forward for consultant physiotherapist (conquest Hospital proposal), with regard to number of patients and number of contacts that are Eastbourne physiotherapist consultant has seen number of patient and number of contacts, this I believe was in order to justify the need to have the same for Hastings (conquest hospital).

I am forwarding you my reply to Jane Morris query.

Ps: my last reply to her where she has asked can you please advise, I don't seem to have it in my mailbox anymore, I may have deleted it by accident. I am sure she would still have that, therefore maybe you should ask you to provide it to you, (I did reply to her very shortly after last email from her)."

69. The Tribunal considered the contents of Mr Butler's report under the heading "*Consultant Post Proposal*". However, this did not take the Tribunal any further in establishing whether a disclosure was made. The only conclusion reached on this by Mr Butler was that the figures provided by Dr Jones appeared to be factually incorrect as the true figures were less than half of those stated but no reason for this was attributed i.e. fraud, breach of legal obligation, that the health and safety of patients was ultimately affected or deliberate concealment.

70. The Tribunal's finding is that on the evidence before it, it cannot conclude that this was a protected disclosure. The email to Mr Butler of the 6 September, 2007 is simply supplying information making no assertions of fraud legal obligation, and safety of patients being ultimately affected or deliberate concealment. The Claimant disclosed the email he had sent to Jane Morris (disclosure four), which the Tribunal has found is not a protected disclosure. It was also not a protected disclosure when he sent it to Mr Butler.

Disclosure 8

71. "***Risk to patient clinical data by restructure of TIARA".*** This disclosure was said to have been made by email on 7 January 2009 to Ms Noakes, Ms Nock, Ms Darling and Mr Baker. The Claimant relies on fraud, breach of a legal obligation and that the health and safety of patients was ultimately affected.

72. This email was in relation to a proposed change to the administration and clerical support structure of the TIARA team. In essence, the email says that the proposed structure as it stood at that time had inherent dangers because there was no direct link between the new team and the Claimant.

73. The Tribunal considered paragraph of the Claimant's particulars of claim where this disclosure is set out. Throughout this paragraph is refers to the Claimant *"expressing concern"* in the email.

74. The emails says:

"To whom it may concern

Although I have recently relocated to the Clinical Support Division Management Office, I am the IM & T manager for the Therapy Services with overall responsibility for the TIARA system. A vital part of my work is ensuring the accuracy and integrity of the system. This work has legal implications for the trust - there are many legal requirements that must be taken into account and fulfilled in this area. I am currently the only member of staff within the Therapy Department that has the expertise, training, experience and qualifications to carry out the duties my position requires and who has a comprehensive understanding of the tiara system.

The system has a large number of users, especially since the introduction of data collection in "real-time". Every user carries out additions or alterations to the system, and this applies in particular to staff working in reception and with data entry, as they have extensive user rights including functionality changes to the system. It is essential that I am fully aware of any system changes that any user undertakes and that my instructions regarding working procedures are carried out.

I note that under the proposed new admin and clerical support structure I would have no input whatsoever on the new Therapy Services Administrative Support team's work, nor on their appraisals; their work, however, directly affects the functioning of the TIARA system and therefore my work. I am not referring to the

secretarial staff here, as they do not work on TIA in the and that you you wanted isn't on the for any RA. There is a real danger that if there is no direct link within the structure between this team and me, there will be a negative impact with unnecessary delays, misunderstandings and mistakes. I would have responsibility for a system, could be held accountable for any aspect of this, yet its main user group whose work directly impact on many aspects of this, would be in no way accountable to me. The directorate administrator is currently charged with facilitating communication that her experience and training do not include IM and T all the TIARA system.

Furthermore, I consider it important, with the changing work requirements within the TIARA system, that I should be consulted regarding any redistribution or delegation work, bearing in mind that usually, at least initially, there is training and supervision required (which is my remit). Again, if staff carry out work without my knowledge or mistakes are made due to insufficient knowledge about the system, and I am unable to guarantee the system's accuracy and efficiency.

In short, I would like to put on the record that, if the new structure was to be implemented as proposed, and if I am increasingly removed from many decision-making processes affecting the TIARA system, I have serious concerns about the effect on the functioning of the TIARA system overall and on my ability to deliver my duties with regard to integrity, accuracy, reports and any other function necessary to maintain the system for the ESHT."

75. A summary of the situation at that time was that senior management were of the opinion that it may be beneficial to change the way the data was dealt with within the Trust and put forward proposals which were disseminated to staff for consideration. Several staff, including the Claimant, raised concerns about these proposals and because of those concerns the proposed changes were not put in place.

76. The Tribunal has considered this email carefully and has come to the conclusion that whilst this email contains a lot of information about why the Claimant does not consider the proposals to be workable for a number of reasons, the focus of the email is about how it would affect the Claimant personally in his role. The Tribunal accepts that the problems identified could create issues for the Respondent itself. The Clamant does not cite either explicitly or implicitly health and safety issues relating to the proposed structure, or that the Respondent would be failing in its obligations (even though he refers to legal requirements in the email itself). As the Respondent submitted, the references are to "*unnecessary delays, misunderstandings and mistakes'* which are internal work related matters and not public interest issues.

77. The Tribunal has considered the Claimant's witness statement and even here he makes no mention of health and safety implications, legal issues or fraud concerns. The Tribunal considered the Claimant's evidence in cross examination on this point and he accepted that a major concern was the effect of this proposed restructure on his own position and that it may affect the accuracy of data. He conceded that within the body of this email did not say that health and

safety would be compromised or that there was a breach of any legal obligation or fraud.

78. In light of this, on the evidence before it, the Tribunal finds that this is not a protected disclosure.

Disclosure 9

79. This disclosure relates to ***"access rights to TIARA, access to a delete button, manipulation of waiting list figures, accuracy of data inputted, Therapies Services Unit not working in real-time & bullying in dept***". The disclosure is said to have been made to Mr Les Saunders on 10 August, 2009 and to show fraud, breach of legal obligation, health and safety of patients ultimately affected and deliberate concealment.

80. This disclosure is contained in a letter written on behalf of the Claimant by Ms Vicki Rose to Mr Saunders. It is a long letter comprising six pages. The catalyst for this letter was an impending disciplinary hearing against the Claimant following complaints made by members of his team.

81. There is a heading in this letter of *"whistle blowing"* and narrative following this. The Tribunal has considered this part of the document:

"Nasser first raised concerns to management of the access rights to all users of the Tiara system. all users of the Tiara system have total access to the system which can lead to an abuse of the system whether deliberate or unintentional. This concern has been ignored.

NASA has tried to raise a concern with the management team that he had about the Tiara team having access to a delete button on their screens when data inputting. The organisation needs to ask ETHITEC whether there are any deleted patient data files. The need to understand this is that the patient data is being lost, which may impact on full patient history being recorded incorrectly. This may have an impact should there be a complaint or litigation. It has been ignored.

NASA has informed management that the waiting list figures have been manipulated. The impact of this is not only is this masking the length of the waiting list, but there is a potential loss of income. This can be explained further but in principle it is where a patient has been seen, the correct procedure to process the payment has not been completed. No action or explanation has been given to Nasser as to why this is not being addressed.

[the next few lines are not legible]

Nasser believes that the unit is not working in 'real-time' as required and therefore an unnecessary backlog has been created, which again is impacting on the income that is due to the Trust and unnecessary overtime payments being made. This has been ignored.

…

We will provide a number of people who are prepared to provide statement regarding the issues we are raising, but it has to be said that some may be resistant to come forward in a hearing as there is fear that Senior Management will reprimand them in some way. Some fear that this could lead to them losing their jobs. This suggests that bullying and harassment are systemic within the department at a number of levels. There needs to be investigated. We feel that all these issues raised against Nasser is a demonstration of this behaviour.

We think that until all these issues were investigated it would be grossly unfair to progress for the disciplinary hearing. We are happy to provide any information investigating team.

…."

82. The letter raised concerns about the behaviour towards the Claimant of David Baker, Robert James, Nicky Clarke and Diane Billeness. The Claimant's schedule of disclosures refers to his paragraph 11.7 of his particulars of claim. The other disclosures as set out in paragraph 11.7 particulars of claim are

    (a) That the widespread nature of the access rights of all users of the TIARA system could lead to abuse of the system and data protection breaches. I was told by David Baker to "leave it".

    (b) That the users of the system would have access to a delete button when inputting data, which could result in crucial patient history being lost.

    (c) That waiting list figures were being manipulated with the impact that not only was this masking the length of the waiting list but also giving rise to a potential loss of income.

    (d) That the accuracy and relevance of data being inputted into the system was questionable, for which many staff were being paid an additional amount of over time due to a backlog, which had an adverse impact on the accuracy of the reports that I then had to produce.

    (e) That the unit was not working in real time as instructed, which had created an unnecessary backlog, which impacted on the Trust's income figures and unnecessary overtime payments being made.

    (f) That staff who could support these concerns were unlikely to come forward due to bullying and harassment being a systemic within the department at various levels, which needed to be investigated".

83. The Tribunal has considered the relevant part of this letter of 10 August, 2009. In particular, the narrative above under the heading "*whistleblowing*". The Tribunal accepts the Respondents submission in this regard. The relevant part is set out below (paragraphs 41 – 43 Respondent's submissions):

41 The context of the Claimant's comments are within his own personal grievance submitted within this document, as a direct response to a finding against him under Anne Cowley's investigation that he breached the Dignity at Work Policy and would be required to attend a disciplinary hearing. The dominant or predominant purpose of raising these concerns was to supplement his own grievance complaints and to avoid disciplinary action. The comments were not made in good faith or in the public interest.

42 Further, it is denied that this is a qualifying disclosure. The concerns are set out at [403-4]. The Claimant makes reference to concerns about potential loss of income, unnecessary backlog of work and inefficient use of resources. Paragraph 72(a) of his WS claims that he referred to data protection breaches – this is wholly inaccurate as there is no such reference at all within the document itself. This document does not make any references to health and safety, fraud or specific legal obligations and neither are these issues set out at paragraphs 70-72 of his witness statement.

43 It was not reasonable for the Claimant to believe that patient data would be lost or the full patient history would be recorded incorrectly. The actual patient information about treatment, medication, etc was contained in the patients' clinical notes which were held separately and the Claimant was at all times aware of this.

84. The Tribunal considered whether this was the type of case where a Claimant need not set out the legal obligation on which he or she relies. These cases apply as set out in above, where it is clearly apparent from reading the document what is being alleged. In particular, the Tribunal notes that there is no reference to data protection within this letter and nothing within the letter which could lead the reader of the letter to appreciate that this is what was being said. In the Claimant's witness statement paragraph 72 he says that the letter raises a protected disclosure, including "*that the widespread nature of the access rights of all users of the Tiara system could lead to the abuse of the system and data protection breaches*". The Tribunal accepts that the letter does refer to potential abuses of the system. However, it does not refer explicitly or implicitly to breach of data protection legislation. For example, the Claimant doesn't say that the users of the system are not authorised.

85. The Tribunal also referred to the witness statement of Ms Rose. However, as with the Claimant's witness statement, although she makes mention of various breaches, on a reading of the letters itself the Tribunal does not accept that the Claimant has raised issues of fraud, breach of legal obligation, health and safety of patients being ultimately affected or deliberate concealment.

Disclosure 10

86. ***"Manipulation of data within Urgent Care (A&E) for national benchmarking statistics."*** This disclosure is contained in a succession of emails between the Claimant, Jane Darling, Andy Horne, Nicky Walker, James Gibbons and Nick

Turner on 4 and 5 January 2012.

87. This disclosure was made at a time when the Claimant was no longer working within the TIARA team . This disclosure was made to new individuals who had no dealing with any previous disclosures or issues within the TIARA team save for Ms Darling who does not mention it in her witness statement.

88. This disclosure relates to the reporting of '*breaches'* of waiting times. There was a disagreement as to how this should be calculated. The Claimant reported what he considered to be a breach as part of his job, highlighting an issue with one patient at Eastbourne. He is simply supplying the information with no other narrative. On receipt Ms Darling asks Ms Walker to review this apparent breach and Ms Walker responds setting out why she believes this particular patient should be excluded from the breach analysis process. The Claimant does not agree but does not suggest anything remiss. The case is reviewed by Jane Darling, Nicky Walker and Nick Turner, none of whom agree with the Claimant. The Claimant queried this and was told it had been reviewed and validated.

89. The Respondent submits that this cannot amount to a protected disclosure as *"the Claimant makes no reference whatsoever within these emails to any breach of a legal obligation, data manipulation or impropriety and does not even suggest the same at paragraph 131 of his witness statement. There is no public interest element to this disclosure. It is no more than the Claimant simply doing his job, and the Respondent responding to the query by requiring this case to go through a query and validation process".*

90. The Tribunal has considered the submissions by made by the Claimant at paragraph 86 to 91 of his written submissions. Essentially, the submissions say that the Claimant was ultimately proved right and the system of recording data and recording breaches was changed. However, this does not affect whether or not the disclosure relied on by the Claimant contained in this succession of emails amounted to a protected disclosure as defined by the legislation.

91. The Tribunal does not find this to be a protected disclosure.

Disclosure 11

92. ***"Disclosure 10 above".*** This disclosure also relates to the manipulation of data within urgent care and is said to be made sometime in February 2012 at a Foundation Trust Network ("FTN") meeting. There are no documents in the bundle which are stated to be relevant. The FTN meeting was a meeting between various Trusts. The Claimant and Miss Walker attended that meeting. The Tribunal therefore also considered Miss Walker's statement to see what light it could cast on what was said at that meeting.

93. The Claimant's witness statement paragraph 133 states:

> *"Nicky Walker and I raised the legitimacy of the practice of validation when we attended a meeting of the FTN in London. They appeared concerned and said they would look into it. They emailed back to Nicky Walker and myself,*

stating the practice of validation was unacceptable and should not be happening because there was a margin of error already built in the targets. I refer to the email from Sivakumar Anandaciva, Benchmarking Manager of the Foundation Trust Network dated 28 February, 2012."

94. Whilst this email refers to the issue that the Claimant says was the subject of the disclosure, it does not cast light on what was actually said at the FTN meeting. There is another email dated 24 February, 2012 from Mr *Anandaciva*, which starts *"in the data collection workshop, we had a conversation about the four-hour standard in general. As discussed, we are informally touching base with some colleagues in the DH knowledge, intelligence and performance branch review.*" Again, this does not refer to what the Claimant said at the FTN meeting.

95. Ms Walker's witness statement states:

"*There was a conference in London where experiences of other NHS Trusts involved in this program were shared with us. The idea was to compare what we were doing with that of other trusts and see if there was room for improvement. Specifically, general managers and data analysts were invited to attend. At that conference, I became aware that some of our practices differ to those of other trusts. This involved the capture of certain data in A&E departments. The Trust's target was to see 95% of patients within four hours.*

When I came back from the conference. I spoke to my manager Flowie Giorgiou and explained the findings to her. She asked me to write a paper about it and an action plan to support improvement."

96. The Tribunal does not find that this to be a disclosure. The Tribunal does not know what was said at this meeting. Clearly there were discussions about the use of data in urgent care – this was the subject of the conference. As set out above, the conference was to discuss what other Trusts did to see if individual Trusts could improve. Miss Walker's evidence was that after the conference she wrote a report which was accepted by the Respondent and some changes were made. The Tribunal has heard no evidence of what was said at the FTN meeting or whether the Claimant raised breaches of the procedure in the context whistleblowing i.e. that there was a breach of any legal obligation, for the health and safety of patients was ultimately affected or deliberate concealment. Given that this is a disclosure which is not in writing the Tribunal would have expected the Claimant's witness statement to set out in some detail what he said at the meeting and how this fell into a particular category of protected disclosure, but it fails to do so, and Ms Walker's witness statement similarly gives no detail. The Tribunal also considered its note of the cross examination of the Claimant and Ms Walker's on this issue, and again there is no evidence there which could assist the Tribunal in finding that this was a protected disclosure.

Disclosure 12

97. ***"Disclosure 10 above"***. This disclosure also relates to the manipulation of data within urgent care (see disclosure 10) and is said to be made sometime in

February 2012 at the FTN meeting referred to in detriment 11. There are no documents in the bundle which are stated to be relevant.

98. The Claimant refers to paragraph 134 of his witness statement. This states:

> "*I spoke to Nicky Walker about this and raised my concern. She, in turn, told me that she would report the matter to senior management, with a recommendation that the practice had changed.*"

99. The relevant part of Miss Walker's statement is set out above in paragraph 95.

100. Nowhere the evidence before the Tribunal is anything that sets out what the Claimant told Miss Walker and there is no evidence that the Claimant was mentioned in the report Ms Walker wrote. On the Claimant own case, it was Miss Walker who provided the report to management. Unfortunately, that report was not before us despite the very large number of documents we had before us.

101. In his own witness statement, the Claimant says he raised his "*concerns*" but does not say that he said or indicated that there was any breach of a legal obligation, fraud, that the health and safety of patients would be affected or deliberate concealment. As said in relation to the previous disclosure, where a disclosure is said to be oral, the Tribunal would expect the Claimant's witness statement to set out in some detail exactly what was said. Without this evidence the Tribunal is unable to make a finding that this was a protected disclosure.

Disclosures 13 - 18

102. This disclosure relates to manipulation of accelerating stroke improvement data, direct access and CT scan data for the Stroke Department. It is contained in an email dated 13 August, 2013 from the Claimant to Gemma Baldock, Nick Turner, Andy Bailey, Sandra Field, Sue Field, and Sara Goldsack.

103. This email which appears at page 696 in the bundle has the Claimant's comments in relation to an email sent by Gemma Baldock to the Claimant, Nick Turner and Andy Bailey. In this she writes, "*Please can you have a look at this spreadsheet. Information from Nasser shows 2 patients missing the 24-hour CT scan target for July 2013. However, the first patient X430714 is out on your daily output sheet (see attached)-so why is this showing is a fail on NASSER's information.*"

104. The Claimant's comment *is "there was no difference in daily output sheet information and information I provided for the 24 hour CT scan, the above patient is showing having breached 24-hour CT scan on both mine and the daily output."*

105. The second query in the email is "*and XE 70545 was admitted on the 21/07/2013 at 18:43 and had a CT scan at 19:33 - 50 minutes later - so should show as achieving 24-hour".*

106. The Claimant's comment is:

"- I have looked into this patient CT scan history, I have found that there is new CT scan code that we were not aware of at all, which is for Head and Neck CT scan and hence the code for this was not imbedded in any of our lookups queries, we have added the new RIS CT scan code to our quires now.

- On our RIS CT scan system. This patient is showing as have to have had three CT scan between 21/07 213 and 23/07 213 as follows…"

107. The Tribunal's finding is that this email does not refer to the manipulation of accelerating stroke improvement data, direct access or CT scan data generally for the stroke department but is specific to a particular patient.

108. The Tribunal notes that it is part of the Claimant's day to day activities highlight data in respect of a particular patient and in this instance is providing information requested by Ms Baldock-Apps about a particular patient rather than him raising a particular concern. The Tribunal finds that there is no reference to manipulation of data, fraud, impropriety, deliberate concealment or any health and safety concerns within this email. The Tribunal also considered the Claimant's witness statement at paragraph 158 where he simply says *"I raised concerns about two stroke patients missing the 24 hours CT scan target".*

109. The Tribunal does not find this to be a protected disclosure

Detriment 14

110. ***"Disclosure 13 above".*** This is an email sent on 24 September, 2014 by the Claimant to Andy Bailey, Ms Goldsack, Ms Sandra Field, Ms Giorgio and Mr Sunley. This email reads:

"To whom it may concern,

It has been brought to my attention that Stroke Unit are very unhappy with the support they believe they receive from information dept, due to the fact that their Stroke ASI data (achieved or breached) are not agreed between the Stroke unit and information dept.

This needs to be look at with matter of priority before we get audit to find out where and what part of recording of patient clinical pathway is not been carried out at accurately".

111. Clearly, the Claimant is raising a concern. He says that the stroke unit are unhappy with the support they are receiving from the information Department. However, the Tribunal does not find that this is a protected disclosure in that it does not state explicitly or implicitly that there is a breach of a legal obligation, or that the health and safety of patients was the affected or deliberate concealment. Understandably, if another department was unhappy with the support given by the Information Department it is correct and proper to raise this. This does not, however, put it into the category of a protected disclosure.

Disclosure 15

112. ***"Disclosure 13 above".*** This disclosure is contained in an email dated 2 October, 2013 from the Claimant to Sarah Goldsack. The text of the email reads. "*Sarah, please see below rerun of stroke this morning, we are still failing on ASI 2 direct access as well as ASI4b CT scan 24 hrs*". There is then set out data relating to this.

113. The particulars of claim and the Claimant's statement both say "O*n 2 October, 2013 I emailed Sarah Goldsack to say that the Stroke Unit's data on direct access, as well as CT scan timings were failing target.*"

114. The Tribunal does not find this to be a protected disclosure. The Claimant is highlighting some inaccuracies and that targets were being missed. There is no reference to any breach of legal duty, breach of health and safety or concealment.

Disclosure 16

115. ***"Disclosure 13 above".*** This disclosure is contained in an email from the Claimant to Ms Goldsack on 16 October, 2013. This email reads:

"So sorry to be troubling you, I wanted you to know that, this patient has had stroke while in TIA clinic at conquest site, hence they had sent patient immediately for head CT scan. Therefore, this makes patient survival to hospital from the point TIA clinic, and that where the clock would start for stroke.

I don't want to be seen as someone who is putting up obstacle, if to the best of my knowledge I see that patient's data is incorrectly being looked at in terms of information, then I should and do want to feel that I can high light it to management without getting crucified".

116. The Claimant added a further document to the list of disclosures in his submissions, namely an email dated 15 October, 2013 from the Claimant to Ms Carter, Andy Bailey and Sarah Goldsack which related to the patient in the previous email. This email gives detail about the patients' time at Conquest Hospital and why he says that this patient was a breach in terms of waiting times. This email was written following a request by Ms Carter for further information about this patient. It concludes "*In my view, what management need to ask A&E is why this patient that was rushed from conquest TIA clinic for head CT scan was then kept in A&E for few hours and sent for a chest CT scan, when by the time that that result of head CT scan would have shown patient has had stroke. I hope the above information is of some help.*".

117. The difficulty the Tribunal has is that the email of 15 October, 2013 was not on the list of protected disclosures which the Claimant provided at the start of the hearing. As set out above, this was a final list and not surprisingly and reasonably the Respondent relied on this list this when preparing for the hearing and cross-examining witnesses. It was only in submissions that the Claimant

suggested that this also was a protected disclosure.

118. The Tribunal has however read this disclosure as it is part of the sequence of events leading up to the disclosure on 16 October 2013. Even if the Tribunal had accepted this as another disclosure relied on by the Claimant, the Tribunal does not find the email of 15 October, 2013 to be a protected disclosure in any event as whilst it provides information, it does not show information that tends to show breach of a legal obligation, that health and safety is being compromised or concealment. It is simply highlighting a problem which needs to be investigated. Similarly, the email dated 16 October, 2013 (which was identified as a protected disclosure on the Claimant's schedule) does not refer to any breach of legal duties, fraud, health and safety issues or concealment. As the Respondent submits this is just a narrative of stroke patient data. The Claimant does not expand further in his witness statement about this disclosure and the Tribunal finds that it is not protected.

Disclosure 17

119. ***"Disclosure 13 above".*** This disclosure was made on 22 October, 2013 by the Claimant to Ms Goldsack. Again it relates to data regarding stroke patients (see detriment 10 above). There is no document in relation to this disclosure and therefore the Tribunal has considered the witness statement evidence of the Claimant and Miss Goldsack.

120. During submissions, the Claimant sought to add page 731 as being relevant to this disclosure to his list of protected disclosures. Again, the Respondent reasonably did not cross examine on the basis that it was alleged to be a protected disclosure although the Claimant and Ms Goldsack were taken to this document in cross examination.

121. The Tribunal considered the disclosure which was in the list of disclosures, namely the conversation between the Claimant and Sarah Goldsack. The Tribunal has considered paragraphs 165-166 of the Claimant's witness statement as set out in his schedule of disclosures however these two paragraphs do not detail what the Claimant said to Ms Goldsack.

122. There is no information in the Claimant's witness statement as to what was said at the meeting, and in particular whether what he said was a protected disclosure. There is nothing which could suggest breach of a legal obligation, that health and safety was compromised, fraud or concealment.

123. The Tribunal considered the witness statement of Ms Goldsack. This also does not give any detail of what the Claimant said to her during this meeting. The only evidence about what might have been said at the meeting is in the email of 13 November, 2013 (this is the document, the Claimant wished to rely on as a protected disclosure in submissions). This says:

"Discussion regarding stroke.

Nasser had raised the issue with particular patient within the validation

process. Guidance was reviewed and checked to ensure compliance with rules by Andy. Sue Carter and Sandra Field had also reviewed the case to ensure compliance from a clinical perspective.

Nasser and/or Andy would continue to attend the weekly validation meeting.

The guidance will continue to be followed in any query or challenge from that clinical team would be escalated to Andy and Sarah. Daily/reports developed to assist in contemporaneous review of patients.

General discussion

It was agreed that Nasser would make the best use of his skills by communicating in person where possible and to spend more time in the division to be able to assist them with an increased understanding of issues within the division".

124. This does not assist the Tribunal in determining what was said during the meeting, and whether any protected disclosures were made. There is no evidence before the Tribunal from which it could conclude that the Claimant made a protected disclosure during this meeting.

Disclosure 18

125. ***"Disclosure 13 above".*** This is a disclosure made in an email from the Claimant to Andy Bailey and Sarah Goldsack on 5 February, 2014. This email says:

"Andy,

You did say to me, I was off stroke as it was an executive decision had been made. Secondly, you are copied into the email form (sic) Sandra.

On when I was dealing with stroke, on two occasions I had formally requested from the management that we do need request for external auditors and CQC to come in and carrying out for auditing for patients that have been for stroke, at the least for past two years.

Sarah, can we have meeting as matter of urgency with director of HR been present" (sic).

126. The matter raised in this letter is the Claimant's request to have external auditors, which he had previously raised and which Sandra Field had said on the 24 September, 2013: "*If this is the way forward. I welcome approach as we have demonstrated we are excluding 60% less patients on previous validation processes. Which demonstrates that we have improved our validation process and our pathway while improving ASI's targets*".

127. The Tribunal does not find that the Claimant is suggesting that there is a breach of a legal obligation, fraud, that health and safety is compromised or that

there has been concealment. He does not use this language and it is not obvious from the text of this email that that is what he is referring to.

128. A further email is referred to by the Claimant in the list of disclosures. This is another email dated 5 February, 2014 from Andy Bailey to Ms Goldsack. In this email he refers to a telephone conversation he had with the Claimant on 5 February, 2014, in which the Claimant said that the Respondent was "*still cheating the figures for stroke*". The Claimant refers to this in his witness statement. Clearly there is an allegation that the Respondent is *"cheating figures*" however, the Claimant does not go on to explain, either in his witness statement or in the record of the conversation Andy Bailey in this email any information to back this allegation up although the Tribunal accept that the word "*cheating*" would denote fraud or breach of a legal obligation on a common sense basis.

129. In the Claimant's oral evidence, he said that there was a "middle database" which was where the concealment occurred and that the middle database was not audited. However, this was not part of the disclosures cited by the Claimant in his schedule of disclosures and which are set out above. The Tribunal has therefore not considered this as part of its decision as to whether the disclosures were protected.

130. The Tribunal has found that individually disclosures 13 to 18 are not of themselves protected. Having found this, the Tribunal then stood back to consider whether the disclosures taken together could amount to a protected disclosure as provided for by ***Kilraine v The London Borough of Wandsworth*** *and* ***Norbrook Laboratories (GB) Ltd v Shaw*** referred to in the law section above.

131. The last disclosure contains an allegation of *"cheating the figures"*. The Tribunal has stood back and considered all the documents referred to in the schedule of disclosures from disclosure 13 through to disclosure 18 excluding disclosure 17 which relates to a conversation which the Tribunal does not have any evidence for. The Tribunal finds that the earlier emails, particularly those of 13 August, 2013 (disclosure 13); second of October 2013 (disclosure 15); 6 October, 2013 (disclosure 16) contain information about where the Claimant believes the Respondent is failing in its data reporting. Those emails do not suggest breach of legal obligation, health and safety, fraud or concealment, but the final email relied on 5 February, 2014 refers to cheating and taking the principles from the ***Norbrook Laboratories*** case, the Tribunal finds that disclosures 13, 15, 16 and 18 taken together amount to a protected disclosure.

Disclosure 19

132. This disclosure relates to all the disclosures on the Claimant's list of disclosures up to the 27 March, 2015. The Claimant's case is that he made all these disclosures to Geraldine Wilkinson, (CQC) and the NHS Protect as part of the investigation undertaken by them, which led to the Respondent being placed in special measures. The Claimant's witness statement says he made "*various*

protected disclosures" on two occasions to Geraldine Wilkinson. He does not detail what he said to her. Given the findings of the Tribunal has made so far, the Tribunal could set off on a sea of speculation as to what it believes the Claimant may have said that but this goes beyond the Tribunal's remit. The Tribunal must make its decision on the evidence it has before it and the Tribunal has no evidence showing what the Claimant said to Ms Wilkinson or NHS Protect. The CQC report is damning of the Respondent. Details are set out above in the introduction. The Claimant's witness statement says. *"In the months leading up to the publication of the Care Quality Commission inspection report, 27 March, 2015 about the Respondent (please see CQC report) I was interviewed on two occasions by the inspector, Geraldine Robinson and made various protected disclosures. Although the detail of what I said was confidential, the fact that I was cooperative when interviewed was widely known by the Respondent's senior management".*

133. The Tribunal does not find that this was a protected disclosure.

Conclusions on protected disclosures

134. The Tribunal has therefore found that there were two protected disclosures made by the Claimant on **3 May, 2007** and **5 February, 2014**. The other disclosures in the Claimant's list of disclosures are not protected.

135. The Tribunal then went on to look at the detriments as set out in the Claimant's schedule of detriments to consider if they were detriments and if so whether they were caused by the two disclosures the Tribunal has found to be protected.

<u>Detriments</u>

Detriment 1

Failing to discipline Nicky Clarke for breaching the Respondent's dignity. The policy - December 2009 onwards

136. The Claimant was the IM&T manager for the Therapies Services Department. He managed a number of staff including Ms Nicky Clarke. In 2007 the Claimant was nominated as employee of the year - he was told he had been shortlisted on 12 June, 2007. He was nominated by his colleagues and was the runner-up. The Tribunal therefore infers that at this time the Claimant was a well-regarded and liked manager.

137. Ms Clarke made sexist and racist comments to the Claimant as found in an investigation conducted by Mr Tony Deal Head of IM&T. Mr Deal's report following his investigation was that:

"In conclusion there is no evidence to support the allegation of harassment and bullying against Dave Baker, Robert Jones or Diane Billeness.

There is however, evidence to support the allegation that Nickky Clarke may

have breached the Dignity at Work Policy and Disciplinary standard.

138. By this time, Mr Saunders was the Claimant's line manager and managed the department. The background to the allegation of race discrimination against Miss Clarke was that another employee, Ms Billeness had made a complaint about the Claimant and his management style. This led to an investigation by Ms Anne Cowley resulting in disciplinary action being proposed against the Claimant. The Claimant then raised a complaint alleging harassment against the people set out in Mr Deal's report above.

139. It is perhaps worth noting that the allegations were that Miss Clark had called him "*a rent boy*"; "*why does our government allow foreigners like you to be employed in this country and why do they not give it to English people*" and "*you need to learn English*". The investigation conducted by Mr Deal found that these things had been said and that they had been corroborated by others. These comments are clearly offensive. The report did not contain any specific recommendation that Miss Clark should be disciplined. There is no evidence before the Tribunal that the Respondent did anything in relation to the serious allegations against Miss Clark whether by way of instituting disciplinary proceedings or even just having a firm word. It appears that nothing was done which in the light of the nature of the comments is very surprising.

140. By this time in 2009, the relationship between the Claimant and his team had broken down. This was highlighted in Mr Deal's report. In June 2008 Ms Billiness made a complaint against the Claimant and at that time there was an attempt to achieve a facilitated outcome which was mutually acceptable to all concerned as an alternative to a formal investigation process. Miss Clarke then made a formal statement of complaint in July 2008. As an interim measure the Claimant was physically moved away from his team and whilst he technically still managed them, he had no day-to-day personal contact with them. The Claimant has issues both with those who he managed and with those who managed him. The complaint by Ms Billiness which led to the disciplinary action being taken was made at a time when the Claimant had had no face-to-face contact with his team for some time and indeed, at a time when he had recently returned from an extended period of sick leave and the Tribunal does not know why a complaint was made at that particular time.

141. Both the Claimant and Miss Clarke were found by their respective investigations to be in breach of the Dignity at Work Policy. The Tribunal notes that the specific allegations were quite different even though falling under the same policy, with the Claimant's complaint being of race discrimination and the complaint by Ms Billiness, which Ms Clarke supported relating to his management style with no taint of discrimination.

142. Rather than initiate the two separate disciplinary processes as would be expected, Mr Saunders sought to resolve the matter by moving the Claimant to a different job in a different area with the two disciplinary matters being dropped. He saw this as a way to resolve the operational problems he had. It is Mr Saunders case that the Claimant agreed to this and in so doing, agreed to the

disciplinary matter against Ms Clarke also being dropped. The Claimant's case is that he had not agreed to the disciplinary matter against Ms Clarke being dropped, but had agreed to move on the basis that the disciplinary charge against him only would be dropped. The Tribunal finds this situation to be a detriment to the Claimant and find that the communication between the Claimant and Mr Saunders was lacking so they believed different things had been agreed. There is no written evidence which resolves precisely what was said and agreed.

143. One of the questions the Tribunal has to determine is whether Mr Saunders had knowledge (actual or constructive) of the protected disclosure the Claimant made to Mr Lippiat on 3 May, 2007. Mr Saunders says he did not have this knowledge.

144. The chronology is that the Claimant met with Mr Lippiat on 3 May, 2007 and the outcome was that Mr Lippiat assisted the Claimant in writing a letter to Graham Griffiths, who had previously worked at another trust with the Claimant (he was now working for the Respondent) and with whom the Claimant felt comfortable talking to. Mr Lippiat's note says that this was the only involvement he had as the Claimant did not come back to him save for being copied into the email which was sent to Mr Griffiths.

145. The note by Mr Lippiat was made sometime later on 3 September, 2007. The reason he wrote the note at that time was that he been asked by HR about the meeting because the Claimant complained about the extra hours that he was working on the database for Dr Jones for which he was not remunerated and which also took him away from his NHS duties. He told this to Ms Monica Green, (HR Director), Jane Simkins and Jane Darling (Mr Saunders's manager) on 30 August, 2007, mentioning that he had spoken to Mr Lippiat the previous May about this issue. This prompted them to ask about this and Mr Lippiat then wrote this note. (214). Mr Saunders was not directly involved. The Tribunal has looked to see if there was any written evidence that Mr Saunders was told about this, but could not find any.

146. In cross-examination, Mr Saunders said that he had no recollection of the Claimant making any whistleblowing complaints or complaints of race discrimination. Mr Saunders had recently taken over responsibility for the physiotherapy Department. When he was appointed into this role he was told that there was a disciplinary matter pending with counter allegations being made, which is why he commissioned the investigation by Mr Deal.

147. Having said this, and bearing in mind the tenor of Mr Saunders evidence, which was in the large part unconvincing, the Tribunal accepts that when Mr Saunders took over responsibility for the Therapies Department he was faced with a very difficult situation which had been ongoing for about 18 months by that time. Much of his evidence was not convincing, however the Tribunal did find his evidence convincing where he said he wanted to find an easy way out of what was a complicated and difficult situation and he thought that that moving the Claimant on to a different department and dropping the disciplinary matters was a way to achieve this quickly.

148. It is clear that the Claimant's ongoing relationship with the department was causing difficulties within the Department with Dr Jones sending an email to Ms Noakes, (which was copied to Mr Saunders) on 13 October, 2009. In this email. Dr Jones says. *"I believe that Mr Sisson's behaviour is out of order and making it very difficult for me to manage certain aspects of the service - I still have not received the correct report".*

149. When Mr Saunders was taken to a letter dated 10 August, 2009 written to him by the Claimant and Ms Rose, he accepted that he must have seen this letter and said that it jogged his memory. In this letter the complaints about Robert Jones were set out. "*His personal attitude toward Nasser since 2007, where Nasser was instrumental in providing key information, as IM&T manager is a whistle blowing case brought about by others against Robert Jones."* The letter goes on to detail what the Claimant sees as a consequence of the whistleblowing, namely being humiliated in a meeting and having to endure verbal abuse. Specific examples were given. The Tribunal finds, both in the context of this letter and in the context of Mr Saunders, managing the a department where serious allegations have been made against a senior manager that he thought this was the best course of action. The Tribunal notes in Ms Rose's letter of 10 August 2009 that there are complaints being made about Mr Baker, Dr Jones, Nikky Clarke, Dianne Billiness and "*others within Therapy Services*." This indicates a wholesale breakdown in relationships with those who managed the Claimant and those he managed.

150. This prompted Miss Noakes to initiate an off the record meeting with Ms Rose, following which Miss Noakes sent an email to Mr Saunders on 19th November 2009, saying, *"Les, I have managed to have an "of the matter record" meeting Vicki. Although she thinks Nasser will be disappointed with the outcome she thinks that if a solution means he will not go through disciplinary hearing he would find it acceptable, although it would depend on where and what the redeployment opportunity will be*".

151. This prompted a series of emails which the Tribunal were taken to where options for redeployment were being sought.

152. Taking this factual matrix into account, the Tribunal's conclusion is that whilst Mr Saunders may have known that the Claimant made complaints in the past, there is no evidence to suggest that he knew of the discussion the Claimant had with Mr Lippiat on 3 May, 2007 or of the details of that disclosure. The reason the Tribunal say this is that the subject matter of the protected disclosure was about the database the Claimant had been asked to create for Dr Jones, whereas the letter from Miss Rose as quoted above, does not give this as an example of the information that the Claimant gave in respect of whistleblowing against Mr Jones.

153. Even if the Tribunal found that Mr Saunders did have knowledge of this, the Tribunal finds that the reason that Miss Clarke was not disciplined for her discriminatory comments to the Claimant was because Mr Saunders wanted an easy way out of what was a very difficult situation and in his mind he believed

that dropping the disciplinary matter against both the Claimant and Miss Clarke was the way to achieve this with the Claimant being redeployed to another area of the organisation and not because of any protected discourse the Claimant made. It was a detriment to the Claimant that Ms Clarke was not disciplined and the Tribunal cannot understand why this happened given the seriousness of the comments she made.

154. The Tribunal reject the Respondent's argument that both the Claimant and Ms Clark were treated equally as they were both alleged to have breached the dignity at work policy. The nature of the allegations against them were completely different even if they fell under the same policy, with no allegation of discrimination being made against the Claimant whereas there were clear allegations and findings of discrimination made against Ms Clark. The Tribunal is concerned that given the outcome of the investigation that no action was taken against Ms Clark. However, notwithstanding this, the Tribunal cannot make a causal link with this decision and the protected disclosure made to Mr Lippiat.

Detriment 2

Uncertainty as to role in Therapy Services from 12 September 2007

155. Paragraph 19 of the Claimant's particulars of claim says "*as early as September 2007, I expressed concerns to David Townsley that I was unsure of what my role was any longer within Therapy Services, as it seemed that whatever proposals, suggestions and recommendations I put forward, were not considered, yet this was an integral part of an IM&T Manager's role*". This is set out in an email to Mr Townsley. This email was written at the time Mr Butler, was conducting his investigation into the complaints the Claimant had made relating to Dr Jones.

156. It was from this point that the evidence suggests that the relationships between the Claimant and Dr James started deteriorating rapidly. The Claimant is named throughout the report and no doubt Dr Jones was well aware that the Claimant had made a complaint.

157. The Respondent submits that this detriment is insufficiently particularised and as such, it cannot be properly understood. The Tribunal set out the extent to which the Claimant has referred to it in his particulars of claim but this does not clarify matters for the Tribunal. In view of the lack of particulars the Tribunal is unable to come to any view on this detriment. It is for the Claimant to put his case forward. The Tribunal does find that this is a detriment or that even if it was a detriment it was caused by the disclosure to Mr Lippiat which is the only disclosure made upto this point which Tribunal has found to be protected.

Detriment 3

Hostility from staff in Therapy Services including race harassment from Nicky Clarke and failure of David Baker to investigate C's complaint of 8 April 2008 (culminating in erosion of C's duties).

158. The Tribunal first considered the detriment in relation to hostility from staff in Therapy Services and in particular Nicky Clarke. The Tribunal referred itself to the minutes of the meeting with the Claimant, Ms Darling and Ms Noakes on 9 May, 2008. This meeting was called to discuss problems within the Department in order to try and find a solution. It states that the team were *"having problems with Nasser's management style. The team did not feel in a position to make a formal complaint that it is just general unhappiness throughout."* The Claimant is recorded as having saying, *"NS stated that he was still not aware of what the problem was and that it would be nice to know what the concerns of the team were. NS found it strange that all of a sudden they don't like his management skills after two and a half years. NS felt the problem started in April when he came back from leave and saw annual leave forms that needed to be signed off and realised they were all booked for the same week in August. NS had refused the leave and explained to the staff it was in order to meet the needs of the service. NS felt everything changed after that.".*

159. Ms Darling considered the issues went back further than April because the Claimant had been meeting with Dave Baker and Sarah Morgan from HR before then.

160. There is reference to concerns by Jane Darling that staff are getting mixed messages from the Claimant and they felt that been a breakdown in trust. This was when Ms Darling decided that the Claimant needed to be removed from day-to-day management of the team to concentrate on his role which she hoped would help everything to settle down.

161. The Tribunal is of course aware of the comments made by Miss Clarke which were the subject of the Deal investigation and report. The Tribunal notes that the Claimant has some disagreement with the notes of this meeting, however this is the best evidence the Tribunal has of what was going on in the Department at that time.

162. The Tribunal is satisfied that there was hostility from staff towards the Claimant - that much is evident from the comments Ms Clarke made and the intervention of Ms Darling in May 2008 taking the Claimant away from direct line management of his team. She must have felt that the situation was serious to take this step. The Tribunal accepts this was a detriment.

163. The question is whether this can be attributed to the protected disclosure the Claimant made to Mr Lippiat on 3 May 2007. The issues refer to the period between 8 April, 2008 until September 2009 as being the relevant time period for this detriment.

164. On 8 April, 2008 the Claimant had a meeting with Mr Baker and Ms Morgan. There are no records or minutes of that meeting.

165. In August 2009 Ms Rose wrote a letter to Mr Saunders. In this letter she writes *"Dave Baker and Sarah Morgan (HR adviser) spoke to Nasser after a meeting on 8 April, 2009 and asked him for further information about a comment*

that Nasser had made in the meeting about inappropriate use of language. He advised them that he could no longer cope with remarks of "rent boy" and "why were foreigners working in this country?" They did nothing to support Nasser investigating this further. Therefore, discriminating against his dignity".

166. Mr Baker was unable to recall the meeting on 8 April 2008. The meeting was some time ago and in addition, his has a medical condition which has impaired his memory in certain respects. However, although Mr Baker's memories are impaired in that there are certain events that are missing from his memory, if he does remember an event then he has a very clear recollection of it. Mr Baker was very clear that he did not know about the disclosure the Claimant made to Mr Lippiat in 2007. The Tribunal accepts his evidence. Therefore, if he failed to investigate the Claimant's complaints, this was not because the Claimant had raised a protected disclosure but for some other reason.

167. The question is what the Claimant actually told Mr Baker and Miss Morgan during this meeting. The Claimant's particulars claim (paragraph 20) simply say "*failing to investigate concerns raised about racial abuse when I raise them initially with Dave Baker, in a meeting on 8 April, 2008".*

168. Sarah Morgan did not attend the Tribunal to give evidence. The Tribunal considered the notes of her interview with Tony Deal in October 2009:

> *"I attended the team meeting with DB, this meeting had been arranged so myself and DB could meet all members of the TIARA team (from both sites) and help address some issues which we had been made aware of, namely annual leave and flexible working. The atmosphere was uncomfortable and some members of the Eastbourne team became very upset and tensions were running high. At one point member of staff Nikky Clark (NC) was talking when suddenly NS interrupted and said that he felt he was being subjected to 'sex discrimination' myself and DB were both taken aback when NS said this and told him what he was saying was very serious and that we would discuss it in more detail after the team meeting had finished. At this point one member of the Eastbourne team, Diane Billiness (DB) left the room in tears.*
>
> *I can remember this meeting very clearly and can confirm 100% that no statements about 'rent boys' or any racist comments/allegations of racism were mentioned at any point after this meeting.*
>
> *NS has never brought any allegation of racial discrimination to me at any time".*

169. in his interview with Mr Deal, Mr Baker stated:

> *DB said he had a vague recollection of a meeting 18 months ago with NS, the Tiara team and Nicky Morgan. He said he remembered there were tensions between NS and the Tiara team and he and Sarah had had to calm things down during the meeting. He remembered speaking to NS with Sarah Morgan after the meeting re inappropriate comments but said that NS has never raised a formal complaint regarding this".*

170. The Tribunal notes that the racist and discriminatory comments made by Ms Clarke were made before the Claimant made a complaint of race discrimination and the comments themselves were therefore not connected to any protected act. The Tribunal has found that Miss Clark was unaware of the protected disclosure made to Mr Lippiat in May 2007 and this disclosure was not the cause of the remarks she made.

171. In terms of the meeting at 8 April, 2008, the only clear evidence we have is a letter from Miss Rose to Mr Saunders. In this letter she referred to "*inappropriate use of language."* And then goes on to cite "*rent boy"* and *"why were foreigners working in this country?"* The evidence available to the Tribunal from Miss Morgan accepts that the Claimant referred to inappropriate language, but disputes any reference to specifics.

172. The Tribunal turned to the Claimant's witness statement (paragraph 56), in which he said *"During this time I was being subjected to a great deal of unpleasantness from the Data Entry staff in the TIARA team. Much of this related to racially discriminatory remarks made by one member of the team in particular, Nikky Clarke. I did not raise a formal complaint about this at the time the sake of team cohesion, although I did raise it informally with David Baker, in a meeting on 8 April, 2008, in the hope and expectation that he would be able to stop the continuing".* He goes on to say that Dave Baker was the cause of many of the issues.

173. The Tribunal finds that when the evidence is considered as a whole the Claimant did not make a formal complaint in April 2008. The evidence we have from Miss Morgan indicates that they asked <u>if</u> he wanted to make such a complaint, but that he chose not to. On balance, the Tribunal finds that whilst the Claimant may have referred to inappropriate comments being made that he did not spell out exactly what he meant. This view is supported by his evidence when this was put to him in cross-examination. The Claimant was asked about the letter Ms Rose wrote and it was put to him that it was a request to ask that the disciplinary hearing be suspended pending investigation into other issues in that he had his own complaints to make about individuals. The Claimant said this was correct. The Claimant was asked: *"so the first time you raise complaints about Nicky and Diane is after you were told you being called to a DH"* Claimant responded, "*I would not say this is true, spoken to Sarah Morgan from HR in the past".*

174. The next question was *"what you are doing, your complaint included issues happening in 2008, so taking you a year to complain about Nicky Clarke's behaviour towards you*" the Claimant said that that was correct.

175. Even if the Claimant had brought a formal complaint in April 2008 this claim is substantially out of time. The events took place eight years before the Tribunal and it is a meeting which was not minuted. This would cause anybody difficulty in remembering the detail what was said and in particular Mr Baker, who now has his own medical issues to contend with, which make recollection of events even more difficult. The Tribunal does not find that this is a continuing act. What the

Claimant is alleging is a failure to act and as such should have been dealt with at the time that failure occurred as set out in the section on law above.

Detriment 5

Redeployment from TIARA team

176. The Tribunal has dealt with the background to this in its analysis of detriment one above.

177. To recap, the chronology is that the Claimant was nominated as employee of the year. In June 2007. He made his first complaint against Dr Jones in May 2007 and followed this up in September 2007 which resulted in the investigation by Mr Butler of SCA. In 2008, Ms Billiness made complaints against the Claimant which resulted in the Claimant's physical removal from the Tiara team whilst remaining a manager. Ms Billiness and Miss Clark then made further complaints against the Claimant in 2009, which resulted in the Claimant counter-complaining that Miss Clark had made discriminatory comments to him. Those led to the investigations by Miss Cowley and Mr Deal with the recommendations that both the Claimant and Miss Clark should be disciplined. At about this time Mr Saunders assumed responsibility for the Department and proposed the relocation of the Claimant out of the department as a way of resolving the operational difficulties he had.

178. The Claimant submits that Mr Saunders and Miss Noakes were instrumental in engineering his exit from the Therapies Department. In submissions, he also mentions Mr Turner and Mr Gibbons. They were managers in the Department that the Claimant went to and not the Department which the Claimant was leaving. The Tribunal has already found that Mr Saunders had no knowledge of the disclosure that the Claimant had made to Mr Lippiat although he was aware that some sort of complaint had been made. The Tribunal has already accepted Mr Saunders evidence that he was faced with a very difficult operational situation which he wanted to sort out quickly. Both parties accept that by this time there was an irretrievable breakdown in relationships between the Claimant and the team in therapies.

179. The Claimant in a letter dated 21 December, 2009 says "*I see this as a positive step forward and "way out" of the present situation"*. The Tribunal's finding is that the deterioration in relations within the therapies team was the reason that the Claimant was moved not because he had made a protected disclosure to Mr Lippiat on 3 May, 2007.

180. The Tribunal heard evidence that Dr Jones was a difficult person who had an abrasive management style. This is supported by the investigation conducted by Mr Phylliskirk :

> *"In my interview with Robert, he did acknowledge some of the things he may not have handled well and the possible areas of friction between him and other staff highlighting past or present issues with Nasser, Paul and Chris.*

Action: Robert needs to understand that his perception of his management style and that experienced by others differs greatly, and he needs to reflect and build on the feedback given within this investigation. He is aware of individual staff with which relationships have not been good at times. He now needs to focus on the feedback given and use it as constructive criticism and as a platform to build team relationships in order to move the department forward."

181. Later, under the heading "*findings*" he says: "*Based on my investigation I have not found evidence to suggest that Robert acted inappropriately in managing the Physio team, or that generally he did not treat individuals appropriately. There are five examples of where he could manage things differently and where relationships have become strained needs to recognise and learn from this. In my view it is not possible for managers to be the friend of everyone, as an occasion difficult decisions have to be made, you cannot necessarily please everyone. Whilst Robert appears to be able to make the difficult decisions. His relationship with certain individuals in his management team has meant that the reasons some actions have not been communicated as well as they could have been, and openly best that should ideally be in place is not. This results in a loss to both the individual who does not feel empowered and part of the decision-making team, and for Robert who by default loses the support and contribution of a team member."*

182. Under the heading "*recommendations*" Mr Phylliskirk said:"*Action five: "it will be very difficult for the whole physio team to put this investigation behind them and to move forward. It essential that this is a priority for department and it is recommended that facilitated teambuilding sessions are investigated as a way of clearing the historical baggage and moving forward from this investigation."*

183. Another example is the witness evidence in appendix G of the Phylliskirk report in which witness G says in response to a question "*do you have any examples of nonprofessional conduct by Robert*" "*very short with Nasser and vindictive. Spreading misinformation about people outside of meetings to undermine them"*. In answer to a question "*have you witnessed him using an inappropriate tone of voice*" it is said, *"does not shout - more manipulative. You can sense when he's feeling crossed, he then cuts you out"*. In response to "*do you have any examples of nonprofessional conduct by Robert"* the answer is "*no - but I was not surprised to hear about investigation. I have seen others wound up about Robert's behaviour*". And finally, in relation to the question *"please describe Robert's management style."* The answer is *"very dominant and controlling. Strong views and strong leadership."*

184. Tribunal's conclusion is that this detriment is not made out. The Claimant's evidence is lacking in particularity and there is no evidence to support the particular complaints he makes against Dr Jones which can link Dr Jones's behaviour to him having made a protected disclosure or that his move from the TIARA team was because of the protected disclosure. It is apparent that Dr Jones's behaviour towards various members of the team left a lot to be desired as can be seen from the Philliskirk Report.

185. In any event, even if the Tribunal had found this detriment to be made out and had found there was a causal connection between it and the protected disclosure made to Mr Lippiat, the last date on which this behaviour could have happened was on 4 January, 2010 when the Claimant left the Therapies Department and moved to the Information Department. The Claimant's claim was not presented until 27 August, 2015, and therefore is well outside the primary limitation period of three months.

Detriment 6

Delay in making an appointment/lack of clarity in role from 4 January, 2010 onwards

186. The Tribunal is unsure what is referred to by the delay in making the appointment as the Claimant took up the role in the information Department on 4 January, 2010 initially on a trial basis, as had been agreed.

187. The Tribunal heard a substantial amount of evidence as to what the Respondent believed the Claimant's role was in the information Department was and what the Clamant said his role was. It is apparent that the Claimant's perception and that of the Respondent were fundamentally different. Having heard the evidence and considered the documents, the Tribunal attributes this to unclear communication from the Respondent to the Claimant and perhaps an expectation and assumption from the Claimant about what had been offered which went beyond the actual terms put forward.

188. The Tribunal finds that there was a lack of certainty and a lack of clarity around the Claimant's role, which is perhaps not surprising as nothing was clearly set out in writing. The Claimant was not given a job description. The Claimant in his submissions pointed out that there was correspondence in the bundle between HR and managers confirming that there was uncertainty and lack of clarity to do with his role. Even if the Respondent says it was certain what the Claimant's role was. For example, on 16 June, 2011 Claire Parnell (HR) "*I met with Nasser today - it appears his idea of what was agreed upon his transfer differs to my understanding of the arrangement as we have previously discussed, I'm arranging to see James to find out what James agreed with Nasser - my feeling is it was all left a bit vague, in which case it is probably better to sort it out for the future?"*

189. Tribunal finds that lack of clarity in one's role at work is a detriment. The Tribunal then went on to consider if there was a causal link between this lack of clarity and the disclosure which the Tribunal found to be protected of 3 May, 2007.

190. Mr Turner told the Tribunal that he was unaware of the disclosure to Mr Lippiat. The Claimant submitted that he must have known about it because Mr Turner wrote to Mr Gibbons on 2 December, 2009: "*The other thing is, would Les be happy for him to become their Analyst (CSD) or would he insist on him covering a different area to the one he has come from as he might come into*

contact with people he has fallen out with?" The Claimant referred in submissions to Mr Turner's exchange with Mr Deal regarding the Claimant's interest in project management work in which Mr Turner sought to reassure Mr Deal "*to mitigate the risk, we could ensure that we have some controls in place."*

191. The submission is that Mr Turner would not have felt the need to provide this reassurance unless he was seized of knowledge of Mr Deal's investigation. However, the Tribunal notes that in November and December 2009 after Mr Saunders had had his off the record chat with Miss Rose and there was agreement in principle that the Claimant could transfer to another department. Mr Saunders sent emails to several managers in other areas asking if they could take the Claimant on stating *"I have a systems manager Nasser Arjomand-Sissan that I need to move quickly as his working relationships within the Tiara team have completely broken down - that is, by all parties, not just him. I need to redeploy him – he is a band 6…….Can you help please."*

192. The Tribunal does not read these emails to mean that Mr Turner and Mr Gibbons knew of the protected disclosure. They had been told by Mr Saunders that there had been a general falling out and breakdown in relationships within the Tiara team (without blame being attached to the Claimant) and therefore their query was legitimate in that some of their work necessitated direct contact with that team.

193. On balance, the Tribunal finds that Mr Turner and Mr Gibbons were both unaware of the disclosure made to Mr Lippiat although they were aware that the reason the Claimant was being redeployed was because the breakdown of relationships within the Tiara team. Therefore, the Tribunal does not find there is any causal connection between this detriment and the protected disclosure that predated it.

Detriment 7

Failure to provide job description

194. This detriment relates to failing to provide a job description to the Claimant from 8 April, 2010 onwards. It is accepted by the Respondent that when the Claimant transferred to the information department he was not given a formal job description. Mr Turner told the Tribunal that the reason he did not get a job description was down to his own *"inefficiencies and lack of time"*. He explained the large amount of work he was doing in both his substantive role and in his acting up role. There was some confusion in the evidence presented to the Tribunal as initially it appeared that Mr Turner had to write a job description and that was the problem. However, it later transpired that there was a job description in existence which could simply have been sent to the Claimant. However, whether Mr Turner was aware of that at the time was not clearly established and the Tribunal accepts his evidence that the reason the job description was not given was not because the Claimant had raised protected disclosure (which Mr Turner denied he had any knowledge of) but because of Mr Turner's inefficiencies and workload. There was nothing to suggest Mr Turner

was aware of the protected disclosure that predated this detriment.

Detriment 9

Failure to conduct annual appraisals

195. The detriment the Claimant relies on here is the failure to conduct annual appraisals from 2008 onwards. There was no dispute between the parties that annual appraisals had not been done. The Respondent's evidence was it was not just the Claimant's appraisal which was not done but there were several appraisals outstanding. The Tribunal had evidence before it, for example, that Mr Saunders had been written to by HR in relation to a number of outstanding appraisals in the team that he managed. There is an email in the bundle dated 22 September 2009 from Ms Noakes to Mr Saunders showing that six appraisals were overdue including the Claimant's and Mr Jones.

196. Mr Turner, who was the Claimant's manager in the Information Department accepted that he did not do appraisals for the Claimant but said that he also did not do appraisals for other members of staff in his team. His explanation was that his time was very limited as he was covering his role as Information Manager as well as acting up as Head of Performance and Information and training a new member of staff in the technical team and supporting the Claimant. He also had a member of staff on maternity leave. Instead of the formal appraisal he had regular informal one-to-ones with his staff, including Claimant. His evidence was that the Claimant was getting regular feedback about performance although not in the form of a formal appraisal. He accepts that the Claimant did email requesting appraisals and his evidence was that he told the Claimant the situation and why they were not happening.

197. The Tribunal notes that the last appraisal the Claimant had was in 2008 which after the protected disclosure made to Mr Lippiat in May 2007 and before the second disclosure the Tribunal found to be protected of February 2014. The Tribunal's finding is that the issues regarding appraisals not being done was a Trust wide issue. The Tribunal therefore concludes that the failure to conduct a formal appraisal amounts to a detriment but that the failure was not because he had made protected disclosures as the failure was part of wider failures within the Trust.

Detriment 10

Transferring/demoting C from IM&T Manager to Analyst and fostering uncertainty about C's role by ignoring his concerns

198. The personnel identified in relation to this detriment are Mr Gibbons, Mr Turner, Mr Saunders and Miss Noakes. The Tribunal has found that Mr Gibbons, Mr Turner and Mr Saunders did not know of the Claimant's 2007 disclosure and therefore any action they took could not be because of that disclosure. The Tribunal considered the involvement of Miss Noakes, and in particular what her knowledge was of the 2007 protected disclosure.

199. Miss Noakes did not give evidence as she is no longer working for the Respondent. At the time the Claimant made the disclosure to Mr Lippiat on 1 May, 2007, Ms Noakes was not involved. The Tribunal has found that there was a meeting between Mr Lippiat and the Claimant, after which Mr Lippiat assisted the Claimant in drafting a letter to Mr Griffiths but that nothing further was done at that time. The issues contained in this disclosure were then raised in a meeting with human resources at the end August or beginning of September 2007. Miss Noakes was not involved in that meeting.

200. Miss Noakes was HR business Partner and as such was likely to have been aware that there was an ongoing investigation regarding the allegations against Dr Jones. However, there is no evidence to say that Miss Noakes was aware of the particular allegations and in particular the disclosure made to Mr Lippiat. If that is the case, then as with Mr Gibbons, Mr Turner and Mr Saunders, the actions the Claimant complains regarding this detriment, even if taken at their highest, were not done because he had raised protected disclosures. Ms Noakes was involved in the Investigation related to Ms Billineness and Ms Clarke's complaints against the Claimant. She was also involved in the Philliskirk investigation. This investigation was in relation to Dr Jones management style, relationship with people within the department generally (not just the Claimant). As the HR advisor to Mr Philliskirk Ms Noakes was aware of the issues related to this investigation. In the introduction to his report there is reference to the issues being those between the Claimant and Dr James.

201. It is likely, that Miss Noakes would have had knowledge of the parameters, at least of the South Coast Audit investigation and most likely of the detail of it, given her position as HR manager and her involvement in this part of the investigation. Ms Noakes was not present to give evidence to rebut this and therefore on balance, the Tribunal finds that Miss Noakes did know of the disclosure.

202. The Tribunal then looked to see how instrumental Miss Noakes was in this detriment. Miss Noakes was the HR business manager who gave advice to the Therapies Department. She was not a decision maker. Ms Noakes was interviewed by telephone by Jane Dudley on 4 November, 2015. This interview is not of any assistance to the Tribunal that it does not cover the issues raised by this detriment. It does however clarify Tribunal's view that Miss Noakes was aware of the disclosure made Mr Lippiat in 2007.

203. The Tribunal then looked at the evidence given by Mr Saunders, both in his written witness statement and cross examination. In his evidence he makes it quite clear that it was his decision in conjunction with Ms Rose and the Claimant that the Claimant should transfer to another area of the organisation. He was not asked in cross-examination whether he sought advice from Miss Noakes specifically, or what the nature of that advice was if he had. He said that he sought advice and HR gave advice but said that the decision was his.

204. Taking all this into account the Tribunal's finding on the balance of probabilities is that Miss Noakes did not take part in the decision to move the

Claimant, and even if she did, it appears that the ultimate decision always rests with the managers who in this instance was Mr Saunders. Therefore, the decision to move the Claimant was not because of the protected disclosure that predated this detriment.

Detriments 8, 11 and 12

Lack of support/training/opportunities

James Gibbons misleading C regarding opportunity to become Endobase Systems Manager

James Gibbons providing C with no choice but to accept Senior Analyst post in Urgent Care Division based on false assurance he would support C to move into general management.

205. The Tribunal has already found that neither Mr Turner and Mr Gibbons knew of the protected disclosure made to Mr Lippiat.

206. The Claimant submitted that Mr Gibbons would have had knowledge of the 2007 protected disclosure on the basis that Mr Gibbons is a Board Director and this matter would have been reported to the board. Mr Gibbons both in his witness statement and in cross examination stated that he was not aware of the disclosure and that as far as he was aware, this matter was not reported to the board.

207. The Tribunal considered the evidence of Ms Green (HR director), who also sat on the board and had the ultimate responsibility for the whistleblowing policy. Her evidence was that not all whistleblowing matters are referred to board and if they are it is in terms of reporting trends or statistics but not individual cases. She said names were not mentioned as board members had to keep themselves neutral and available to sit on disciplinary and appeal panels as required. Ms Green was clear that the 2007 disclosure was not reported to the board.

208. The Claimant has provided no evidence that the matter was reported to the board save for his unsupported assumption that it was. The evidence the Tribunal has before it from Mr Gibbons and Miss Green is that the matter was not reported and that it is not normal practice for individual whistleblowing matters to be reported to the board as the Claimant suggests. Therefore, on the balance of probabilities the Tribunal finds that Mr Gibbons was not cognisant of the 2007 protected disclosure.

Detriment 14,

Les Saunders rejecting C's application for quality Innovations & Change Facilitator (Programme Manager) within Programme Management Office ("PMO")

209. The Tribunal has found that Mr Saunders did not have knowledge of the 2007

protected disclosure. This detriment specifically against him and therefore, the rejection of the Claimant's application for this position was not because he had made a protected disclosure.

Detriment 12 A, 13,

Removal of A&E data reporting

Criticism of C by Andy Bailey for attending meeting concerning IT issues concerned with transfer of Endoscopy Dept.

210. The Claimant's particulars of claim say that Mr Bailey removed A&E data reporting from the Claimant's sphere of responsibility. Therefore, this allegation is against Andy Bailey only.

211. Mr Bailey joined the Respondent in 2011, and therefore was not there when the South Coast Audit report was produced or when the first protected disclosure to Mr Lippiat was made. Mr Bailey accepts that he knew that there had been difficulties between the Claimant and his team in the Therapies Department and that as a result he had been moved to the Information Department. His evidence was that he did not know the nature of the difficulties - only that some sort of investigation had taken place.

212. In any event, even if Mr Bailey did have this knowledge, the Tribunal would not have found that the removal of the Claimant from A&E data reporting was related given that Ms Walker was also removed from having this responsibility. The Tribunal finds that on balance that Mr Bailey whilst as knowing that there had been some issues in Therapies was unaware of the 2007 disclosure and the reason for removing the Claimant from this role was unrelated.

Detriment 15

Andy Bailey disparaging C's attempts to gain Patient Tracking experience followed by HR warning off Queen Victoria Hospital from offering C the post of Patient Access and Performance Manager

213. The Tribunal has found that Mr Bailey did not know of the 2007 disclosure. Miss Rademaker (Nee Morris) is also implicated by the Claimant. By this time Ms Readmaker had moved to another Trust which had the vacancy which the Claimant applied for. The Claimant's case is that she told him that she had been warned off him by HR from the Respondent. Her evidence is that she did not have any contact with the Respondent about the Claimant's application. Additionally, the decision to appoint or not appoint was not her decision alone as she was part of an interview panel. The Claimant has not identified who from the Respondent's HR allegedly contacted her.

214. Ms Rademaker's evidence in cross-examination was that references were not asked for and previous employers were not contacted unless a candidate has been successful at interview and was to be offered the position. The Tribunal finds that her explanation of her contact, or lack of contact with HR at the

Respondent is plausible given its own industrial experience. It is common for employers not to contact a previous employer unless a candidate has been successful. The Tribunal accepts Ms Rademaker's evidence that she was not contacted by anyone from HR. The Claimant has been unable to put forward any evidence from which the Tribunal could conclude this was the case. It is not the Claimant's case that Ms Rademaker was personally aware of the disclosure in 2007.

Detriment 16

Theresa Noakes thwarting C's application for Business Support Manager

215. The Tribunal has already found that Ms Noakes had knowledge of the protected disclosure. Therefore, the Tribunal went on to consider her involvement in the Claimant's application for Business Support Manager. This was an application where the Claimant was shortlisted for interview but was not successful. Ms Noakes was not on the interviewing panel but was asked for feedback by the Claimant which although offered was not taken up. There is no evidence to suggest that Ms Noakes any involvement in the recruitment decision. The Tribunal notes the submissions put forward by the Claimant in this regard, which simply say *"influentially, Noakes was behind this lost opportunity. Given the inimical influence she practised on C's career at every stage of his employment by R"*. The Claimant has not provided any evidence to suggest that Ms Noakes was involved save for offering to provide feedback when requested. This detriment is not made out and even if it were, there is nothing to suggest a link between it and the 2007 protected disclosure.

Detriment 17

Lack of career development and failure to comply with assurances

216. This detriment runs from 21 January 2013 onwards. The personnel involved are said to be Mr Gibbons, Mr Bailey and Ms Green. The Tribunal has found that Mr Gibbons and Mr Bailey did not have knowledge of the 2007 disclosure. The Tribunal considered whether Ms Green had knowledge and finds that she did know about the disclosure to Mr Lippiat because she was the person who met with the Claimant on 30 August, 2007 and the next day the Claimant sent an email to Ms Green: *"I forgot to mention that around 3rd of May 2007 I had a meeting with CHRISTIAN LIPPIATT at conquest site, with regard to my issue with Robert Jones and the Activity Sample Application (database), as I needed some advice. If you like, you can speak to him with regard to this matter. Apologies for forgetting to say this yesterday."*

217. Following on from this, the two investigations by Mr Butler from South Coast Audit and Mr Phylliskirk were commissioned and Mr Lippiat wrote his note recording what was said at the meeting with the Claimant.

218. The question therefore is to what extent Ms Green was personally involved in the Claimant's career development going forward. Ms Green is a very senior member of staff reporting to the board and her evidence to the Tribunal was that

whilst she has overall responsibility human resources and organisational development, she delegates operational matters to her deputy, Ms Tenney and other members of the HR staff. Apart from the meeting that the Claimant had with Miss Green on 30 August, 2007, Ms Green does not seem to have been personally involved in matters relating to the Claimant until 27 November, 2013 when she received an email from Mr Durairaj who at the time was Head of Equality and Human Rights at the Trust. Ms Green did have some involvement in the Claimant's move from Therapies to the Information Department as there is an email from Ms Noakes to Mr Saunders dated 2 December, 2009 which says that Ms Green had informed Ms Simpkins, who in turn informed Ms Noakes that Mr Gibbons had three vacancies and it might be worth checking whether the Claimant could be utilised in his department. This led to Mr Saunders contacting Mr Gibbons and the Claimant ultimately transferring to that department.

219. In her interview with Ms Dudley, Ms Green said that she did not have any recollection of any formal meeting with the Claimant following the meeting in 2007 although she was copied into various emails which she passed to her deputies as they concerned day-to-day operational matters.

220. The Respondent submits that this allegation is insufficiently particularised and does not identify any discernible detriment. The Tribunal finds that even had Mr Gibbons and Mr Turner failed comply with assurances and gave the Claimant a lack of career development, as they did not know of the 2007 disclosure anything they did could not be because of it. Ms Green did have knowledge of the 2007 disclosure however the Tribunal's finding is that she was not involved day-to-day HR advice and was not involved in decisions pertaining to the Claimant's career development, or any assurances given to him.

Detriment 17a

Sarah Goldsack seeking evidence against C

221. The date of this detriment is 18 October, 2013. The Tribunal first looked to see whether Ms Goldsack had knowledge of the 2007 disclosure. Ms Goldsack did not join the Respondent until April 2013 and was therefore not employed when the disclosure was made or when the Claimant was working in the Therapies Department. There was no evidence that she knew of the 2007 disclosure. Therefore, even had she sought evidence against the Claimant this would not be because he had made a protected disclosure but for another reason. The evidence was that she had received concerns about the Claimant from certain individuals, and she asked for evidence of those concerns in order to establish whether they were legitimate or not as she was new to the Trust. No action was taken against the Claimant in relation to these concerns in any event. The Tribunal does find that this was a detriment. It may well be that Mrs Goldsack went about this in a clumsy way but the Tribunal does not find this to be connected to the 2007 disclosure.

Detriment 17b

Removal of responsibility from C for ASI & stroke data

222. It was not apparent to the Tribunal precisely against whom this detriment was levied. The Tribunal considered the particulars of claim, the Claimant's witness statement and the parties' submissions. The Respondent's submissions noted that "*Pauline Butterworth is not someone who the Claimant accuses of subjecting him to a detriment result of disclosures all race complaints*". Mr Mitchell on behalf of the Claimant went through the Claimant Respondents submissions in some detail, pointing out areas where he considered the submission were incorrect. This was not one of submissions which he identified as being incorrect and therefore the Tribunal takes it that Ms Butterworth was not being accused of subjecting the Claimant to a detriment. The only other person named was Mr Bailey who the Tribunal has found did not know of the 2007 disclosure. Therefore, taking the Claimant's case at its highest, any treatment he was perceived to be a detriment was not done because he made a disclosure in 2007.

Detriment 18

Rejection of applications project managers' vacancy within PM following interview on 19 December, 2013.

Ms Walton had been employed by the Respondent since March 2013. She interviewed the Claimant for the role of project manager in 2013. Ms Walton was not in employment when the Claimant made his 2007 disclosure and not part of the Tiara team when issues relating to Ms Clarke and race discrimination were raised.

223. There is no evidence that Ms Walton was aware of the protected disclosure or the allegations of race discrimination which the Claimant made.

224. The Tribunal notes the comments the Claimant makes about the scoring at the interview with him and the person who got the job. However, unless the Claimant can show a causal link between the protected disclosure he cannot show that what happened was because of the 2007 disclosure or complaints that he made even if what he says happened was correct. Indeed, the Claimant highlights in his submission *"It is therefore more likely than not that she said to C, "I do not know what happened to you in the past, but you will not move up."* Ms Walton denies she said this, but if she did, it tends to show that she did not know what happened to him in the past although she may have been aware that people were not favourable to his career progression within the Trust. This however is pure conjecture; the Claimant has failed to provide any information to show that she was aware of the 2007 disclosure.

Detriments 19 and 21

Lack of progress regarding concerns to do with role and career development - 31 January, 2014 onwards.

Failure to investigate C's concerns - 27 October onwards

225. These allegations are against Ms Tenney who was Miss Green's, deputy and Ms Goldsack. Ms Goldsack was not aware of the protected disclosure made to Mr Lippiat in May 2007. Ms Tenney says in her witness statement that she was aware of an investigation into matters pertaining to Dr Jones but not that the Claimant had been the person who had brought this to the attention of the Respondent. However, her witness statement goes on to say that she received an email communication from the Claimant saying that he had made a complaint against Dr Robert Jones and that he still had not heard about the outcome of any action taken by the Respondent against Ms Clarke following his complaint of race discrimination.

226. The Tribunal is satisfied Ms Tenney knew both about the 2007 disclosure and the complaint of race discrimination. Indeed, she told Ms Dudley when was interviewed that she knew the Claimant had made protected disclosures to the Trust. She said that although she knew there were complaints made by the Claimant about Ms Clarke she did not know the complaints were of race discrimination.

227. In relation to the 2014 disclosure, it is clear that Ms Tenney knew about it as she was part of the process.

228. The Respondent submits that these claims are insufficiently particularised to indicate a discernible detriment. The Claimant's submissions do not assist in articulating the details of this detriment. The Claimant in his list of issues, states that the detriment started on 31 January, 2014. This date relates to a letter the Claimant wrote to Ms Kelly. However from reading this letter the Claimant's complaint went back at least several months before the date of this letter and this letter is asking for an update of the matters and concerns he had raised previously.

229. The Tribunal looked to see what steps Ms Tenney took after the 2014 disclosure. Ms Tenney assured the Claimant's representative Mr Durairaj that she would review the Claimant's file. She met with Ms Goldsack and Ms Walton and then had a meeting with the Claimant on 4 March 2014. The Claimant wrote to Ms Tenney on 28 April regarding the same matters. Ms Tenney met with the Claimant on 23 May 2014 when the Claimant thanked her for her help and support. She provided the Claimant with responses to his request under the Freedom of Information Act on 12 August 2014. There was a further meeting in November 2014 when Ms Tenney agreed to talk to Ms Rennie about a possible secondment to the Project Management Office ("PMO"). Ms Rennie spoke to the Claimant about this on 3 December 2014.

230. The Tribunal considered whether there was lack of progress and finds that there was progress albeit probably progressing more slowly than the Claimant would have wanted but notes that at this time the Respondent was going through a major restructure which inevitably would have held matters up. The Tribunal finds that Ms Tenney was aware of the 2007 disclosure, but these events occurred some seven years after it. The Tribunal finds that it is highly unlikely that the 2007 disclosure was in Ms Tenney's mind at this time given the passage

of time.

231. Tribunal finds no detriment and even if there was a detriment it was not casually linked to the protected disclosure.

Detriment 20

Rejection of application for Cancer Tracking Manager

232. This detriment relates to an application made by the Claimant on the 22 May, 2014. This is shortly after the 2014 disclosure. The person involved is Ms Daly. Ms Daly is lead Cancer Manager at the Trust and had been employed for 19 years. At the time in question she was Cancer Services Development manager. There is no evidence that she was aware of the 2007 or 2014 disclosure.

233. The Claimant submits that the interview was geared towards someone who had oncology experience and they asked questions about management. It is submitted that this was an ongoing detriment as he had been removed from his management responsibilities. Ms Daly gave evidence that the Claimant was appointable to the position but the other candidate had more experience in oncology and particularly of waiting times which was a large part of the job, and therefore was considered to be the better candidate. .

234. This is a perfectly plausible explanation and the Tribunal does not find that it was causally linked in any way to the Claimant's protected disclosures. Additionally, Ms Daly said that she makes a decision on how the candidates perform on the day and what they can bring to the role and also that she does not ask for references or seek any further information about the candidates prior to the interview and making a decision. Her evidence also was that the HR representative on the interview panel takes more a back seat and the actual decision is made and the questions asked during the interview by her.

235. The Tribunal does not find this detriment to be casually connected to either protected disclosure.

Detriment 22

Failure to shortlist for project manager's role and awarding position to Gemma Lawrence on 17 December, 2014.

236. The person involved is Ms Rennie. The Tribunal has found in the general narrative above, that the procedure for getting approval for training is that the employee says what they need and source the appropriate course. Management say if they support particular item of training and then it is up to the employee to complete the nomination form which can be obtained from the Internet and give it to the managers to countersign. The Claimant accepts he did not do this; his argument is that it was the manager's responsibility to do this. The Tribunal heard from several witnesses who said what the process was which was not what the Claimant said it was. The Tribunal notes that Dr Jones agreed that the Claimant could do the PRINCE 2 training in the Claimant's 2007 appraisal. Mr

Bailey, once the Claimant had moved to the Information Department also agreed that the Claimant could do this training. On both occasions the Claimant did not complete the requisite nomination form for Dr Jones or Mr Bailey to countersign and therefore did not do this training.

237. The person appointed to this role was Gemma Lawrence who did have PRINCE 2 qualifications. The Claimant's assertion that Sarah Goldsack approached Ms Rennie to warn her about him, as set out in his witness statement is only speculation on his part. There is no evidence to substantiate this. In any event, the Tribunal has found that Miss Goldsack did not know about the 2007 disclosure but did know about the 2014 disclosure as she was copied in on the emails. However, she denies approaching Ms Rennie in the manner suggested by the Claimant in the interview with Jane Dudley. The Tribunal accepts her evidence.

238. The Tribunal does not find that the failure to shortlist the Claimant was connected to either protected disclosure. The Tribunal does not accept that Ms Rennie was warned off the Claimant. The Claimant did not have the PRINCE2 qualification which was a requirement for this role and the person who was appointed did. This is a rational explanation as to why Ms Lawrence was appointed.

Detriment 23

Withdrawing proposed secondment in PMO and replacing with offer of Change training

239. The Tribunal finds that there was no promised secondment in PMO, which is borne out by the Claimant's wording of this detriment - "*proposed*". It is clear that a secondment in PMO was discussed with Jane Rennie when options for redeployment were being explored. The Respondent submits that the Claimant did not take this as a formal offer as he says in an email to Ms Tenney on 15 December, 2014:"*…..Last Tuesday I met with Jane Rennie to discuss informally opportunities that may become available within PMO in the near future. If felt that the meeting was positive, and we parted having discussed my applying for the permanent Project Manager position that is currently advertised and that a 3-month secondment to PMO could be explored………should I therefore be unsuccessful in securing this substantive position and the secondment is offered, I feel that a 3month period may not be sufficient for anyone to make a substantial contribution to a project….*"

240. Ms Rennie was clearly considering this as she told the Claimant on 22 December, 2014 that she would let the Claimant know what she had in mind in the New Year. At about the same time, Ms Rennie also suggested to the Claimant that it would be beneficial to him to look at change facilitator roles whilst doing his Prince2 training.

241. On 14 January, 2015 Ms Rennie informed the Claimant that his proposed move to PMO was going to be delayed. She followed this up on 18 January,

2014, saying, "*my advice to you is to get some real change management experience under your belt as this can be a good career development path to bigger and better things - a lot of existing project managers have gone that way while undertaking Prince 2 training at the same time, which takes them one step closer to PM status. If you don't feel that is of interest I cannot see how I can help at this moment in time, which I think is a real shame if you are serious about being PM in this organisation.'*

242. Clearly there was no formal offer of any secondment and the discussions were only about opportunities to be explored. Ms Rennie made the position quite clear - that there was a role in change management, and that he did not take that there was little more she could do.

243. The Tribunal accepts that the decision not to proceed with the proposed second was to the Claimant's detriment, however there was no promised secondment a suggested by the Claimant. Even if there was the Tribunal does not find it to be casually connected to the protected disclosures.

Detriment 24

Reneging on agreement to move C to PMO and instead, ultimately requiring his to return to an Analyst post at the end of a secondment.

244. Given that there was no agreement that the Claimant was to move to PMO on secondment as found in detriment 23 above, there can be no agreement for the Respondent to have reneged on. In any event, at the end of any secondment (unless this secondee is taken on by that department) there would be a return to the secondee's substantive post.

245. There is an issue as to what the Claimant's substantive post was. When the Claimant was working with Tiara team he was working as an IM&T manager. When he moved to the Information Team the Respondent considered that he had moved as an analyst as the IM&T management role did not exist in that department. The Claimant's position is that he retained his job title of IM&T manager. This is exemplified by an email from Mr Bailey to the Claimant dated 7 April, 2015 when the Claimant was recuperating from an operation.

"Just to recap our conversation regarding your secondment. There seems to be some areas where your expectations were outside what I know to have been agreed so have set these out as clearly as I can below. Moira will also be in touch today to confirm a meeting:

- *your secondment will start on 6th May and will initially last six months.*
- *The secondment will be within Chris Bullimore's team as a change trainer.*
- *Your secondment role will not be physically located at your current desk as this will need to be used for your backfill.*
- *Your current IT equipment (laptop, monitor, docking station, et cetera) will*

need to remain for use by the KM debt.

- *There is an option for you to extend this to 12 months, but you have confirmed that you do not wish to take up this opportunity.*
- *You have confirmed that you expect to be "redeployed" to the PMO following your six month secondment. To my knowledge, a "redeployment" was not part of this agreement, which remains a temporary secondment, I have confirmed this with Moira Tenney and Sarah Goldsack.*
- *Following your secondment you will return to your substantive post as Senior Business Support Analyst. I have confirmed this with Moira Tenney and Sarah Goldsack. You maintained today that you do not recognise this is your substantive post and stated there are no circumstances where you will return to this position following your secondment.*

Please let me know if you disagree with any of the above".

246. The Tribunal's finding is that this misunderstanding arose because of lack of clear communications from Mr Saunders when the Claimant was moved from the Tiara team to the Information Department in January 2010 as discussed above.

247. The Tribunal does not find that the Respondent reneged on an agreement as alleged. The Tribunal finds that the Respondent did not promise or agree to anything permanent as set out above. Therefore, this cannot be a detriment and if it was, it is not causally connected to the protected disclosures.

Detriment 25

Andy Bailey informing C that he would not ever be part of PMO, to accept the secondment offered or take R to an Employment Tribunal and telling C that because he had made noise in the past he would not "see" his pension.

248. The date attributed to this detriment is 7 April 2015.

249. The Tribunal has found that Mr Bailey did not know of the 2007 disclosure. He was *aware the 2014 disclosure as the email dated 3 February, 2007 was sent to him.*

250. *On 7 April 2015 Ms Tenney sent an email to Mr Bailey*

"I have found email trail from Feb which indicates that Nasser accepts that his secondments starts in May and you were advising changes to the department from 1st April.

In this, he is still claiming that his job is IM&T manager, however we maintain that he transferred to his current post and we consider this suitable alternative employment. He maintains that he never formally accepted, however he has worked in the role for a significant length of time and has not taken steps to take formal action against the Trust.

251. Mr Bailey had a meeting with the Claimant on 7 April 2017. The Claimant wrote his notes of the meeting and gave them to Ms Tenney who in turn sent them to Mr Bailey. Mr Bailey responded to Ms Tenney on 17 April, 2015. Therefore, this is a document which is contemporaneous to the events in question. In this letter Mr Bailey put his comments to each point made by the Claimant.

252. The relevant part of this letter is set out below. The italics are the Claimants comments.

- *"Andy returned awhile later on and came in to my office and closed the door.*
- *Andy said he has had conversation with Sarah Gold Sack (sic) and Moira Tenney and that they have both confirmed to him what they had told me earlier and Andy also said that Moira Tenney told him that to tell me I only have two option A) secondment and then rerun this this post or B) take trust to tribunal.*

  I did indeed confirm that both Moira and Sarah had agreed the secondment was for 6 months, and was not a re-deployment. I confirmed that if the secondment was not extended then on 6th November Nasser would return to his role as Senior Business Support analyst. Nasser stated that he would not do this. I asked him to confirm, and he again said he would not return to this role and would only return as an IM&T manager.

  I stated to him that Moira's continued view (which to my understanding had been verbally spoken to Nasser on a number of previous occasions) and mine, was that if he disagreed with this position, then he would have to take legal action.

  On reflection I can see how immediately returning from a phone-call with Moira and then stating the above could be interpreted as Moira passing and indirect message to Nasser. This was not my intention. As in the rationale above I simply want to clarify the situation for everyone's sake and it certainly is the case that these scenarios are really the only ones available.

  ……..

- *I said to Andy, my move to this department was on specific agreements to which to this date none has been delivered from trust management side, I also said that I have done all I can to stay proactive and deliver what has been asked of me so far, but I not willing to carry on much longer and would like what had been agreed with me when I moved to this department to be provided to me too.*

- *Andy B, replied these are all irrelevant and if I don't like it take trust to tribunal.*

  I replied that I agreed that he had continued to undertake his role as Senior Business Support Analyst over the past 4 years but that wasn't relevant to the

current discussion of what the terms of the secondment were.

I also reminded Nasser that a number of meetings had been had with him in recent years, the outcome of which was to confirm that his substantive post was Senior Business Support Analyst.

I categorically did not use the words "if you don't like it, take the trust to tribunal". I again laid out the scenarios available to Nasser if no the 6th November (End of secondment) there was no extension or conversion to a substantive post".

253. Mr Bailey denies telling the Claimant that he would never be part of PMO and that because he made "noises in the past" he wouldn't see his pension. Mr Bailey was forthright in his denial of using these works both in the letter, 17 April, 2015 and to the Tribunal and in his interview with Ms Dudley.

254. The Tribunal finds that Mr Bailey in all probability was becoming slightly frustrated with the Claimant as from his perspective, the Claimant was not responding well to suggestions which they made that he considered to be helpful suggestions. Additionally, the Respondent was running out of options particularly given the difficulties the trust was experiencing at that time.

255. Given that Mr Bailey has accepted that he did mention Employment Tribunal's albeit not in the context the Claimant suggests, the Tribunal finds on balance at the Claimant has (quite innocently) taken this out of context. The Tribunal has come to this view because Tribunal knows that the Claimant was taking legal advice at this time about his employment issues during which no doubt the question of an Employment Tribunal claim would have been discussed. On balance, whilst the Tribunal accepts there was mention of Employment Tribunals by Mr Bailey, but that it was not said in the context that the Claimant has suggested.

256. In relation to the comments about pensions the Tribunal has the Claimant's evidence that it was said and the Respondent's that it was not - Mr Bailey vehemently denies it. There's no corroborating evidence either way. The Tribunal has not been able to reconcile this. Therefore, the Claimant has not shifted the burden of proof and for this reason does not find this detriment to be made out.

Detriment 26

Moira Tenney's letter failing to investigate C's complaints and advising him if he was not successful in securing a different role, he would need to consider his position

257. The letter that the Claimant is referring to is dated 22 April, 2015 and sent to him by Ms Tenney. Because of the particular nature of this complaint, the Tribunal is setting out this letter in full (the paragraphs at the end of the first page in the bundle at page 957, were very faint and the Tribunal has

done its best in deciphering them).

"Dear Nasser,

Further to our recent meeting on Tuesday 14th April, I would like to confirm the details of our meeting.

You advised me that you had returned from a period of sick leave on 7th April as you had undergone elective surgery. You said you were still suffering some pain as a result of this and I advised that I thought you should return to your GP and discuss if it would be appropriate for you to have a follow up appointment with your Consultant Surgeon.

You raised concerns in relation to your return to work, in that you did not have a formal Return to Work interview and comments about your secondment made to you by Andy Bailey your line manager. You had put your concerns in writing as requested by me the previous dy. I agreed that I would meet with Andy Baily and Sarah Goldsack to share your concerns and to seek his view on these matters.

We discussed your proposed secondment. I understand that you met with Jane Rennie in December and from this meeting you had understood you would be offered a six months secondment to the Project Management Office (PMO), but subsequently Jane had felt it would be more appropriate for you to undertake a secondment as a change facilitator reporting to Chris Bullimore. During this tie you would undertake your Prince II training and you confirmed that this has been booked. You suggested that at the end of the tie you would then be re-deployed to the PMO; however, I stated that no such assurance has been given and you would need to apply for any such posts. We have offered you the opportunity of a secondment and have arrange d for you to undertake the Prince II Project Management Training to provide you with additional skills and experience to support your development and increase your career opportunities.

We also discussed the length of the secondment and you stated that you did not want to undertake the secondment for more than six months.

We also dissed your location and IT equipment. You will need to move out of your current location and have pro-actively looked for alternative office accommodation on the EDGH site and this will need to be agreed with Chris Bullimore and Les Saunders. In terms of your IT equipment, I agreed it would be usual practice to retain your current laptop and this should be agreed between Sarah Goldsack and Chris Bullimore.

We discussed the options available t you once your secondment comes to and end these were:-

(1) That you seek a role within the change facilitation team if the secondment proves successful from Chris Bullimore's perspective and that there is an appropriate vacancy.

(2) that having gained further experience and undertaking your PRINCE2 training that a further secondment is considered within the PMO this would need to be approved by Jane Rennie and Sarah Goldsack.
(3) Should there be any vacancies in the PMO at that time you apply for them
(4) You return to your current role within Business Intelligence as an analyst.

I reiterated the Trusts position in terms of your employment status in that you are employed as a Senior Analyst having been re-deployed from the position os IMAT Manager in December 2009. For clarity the Trust considers that you post is Senior Analyst and if at the end of secondment you have not been successful in securing another post within the Trust you will return to and will continue to be employed in this post.

I understand that you do not agree with the Trusts position on this and if you're not successful in securing a different role you will need to consider your position at that time.

I hope that this is a reflection of our meeting, if not please let me know. I will send confirmation details of the secondment under separate cover.

I have subsequently met with Andy baily and Sarah Goldsack and i suggest that a way forward would be to have a meeting together with Sarah and Andy to discuss your concerns could you please advise if you are agreeable to this".

258. In the Claimant's particulars claim (paragraph 81), he says. *"Moira Tenney prepared a letter dated 22 April, 2015, which set out all of my previous concerns are singularly failed to deal with or address the serious allegations that are raised against Andy Bailey, nor his response to my allegations. There was no indication whatsoever that my allegations would be investigated, or that Mr Bailey would be suspended. Moira Tenney's letter essentially, refuted the very clear assurances that I had previously given about my career and stated if I was not successful in securing a different role, then I would need to consider my position".*

259. The Tribunal has considered this letter in some detail. Quite clearly, Ms Tenney has considered the allegations made about Mr Bailey in that she starts a letter by saying, *"You raised concerns in relation to your return to work, in that you did not have a formal return to work interview and comments about the secondment made to you by Andy Bailey your line manager you your concerns in writing as requested by me. The previous day, I agreed. I would meet with Andy Bailey and Sarah contact to show your concerns and seek his view on these matters".* The letter concludes, "*I have subsequently met with Andy Bailey and Sarah Goldsack, and I suggest that a way forward would be to have a meeting together with Sarah and Andy to discuss your concerns, could you please advise if you are agreeable to this."*

260. The Tribunal finds that Ms Tenney had considered what the Claimant had said and having spoken to Mr Bailey was suggesting a possible way forward, subject to the Claimant's approval.

261. In relation to other matters, Ms Tenney is setting out what the options were which were available to the Claimant at time (which the Tribunal note included Prince2 training which had been booked) and confirming the Respondent's position that the Claimant had transferred from being an IM&T manager therapy to being a Senior Analyst in the Information Department. As the Tribunal has already found, there is confusion between the parties about what the Claimant's role was. The Tribunal has found that the Respondent genuinely believed that he had transferred as an analyst but did not communicate this well to the Claimant, who in turn genuinely believed that he was an IM&T manager notwithstanding that the Claimant did accept the position of the analyst in writing, there is not job title of IM&T manager in the Information Department and the Claimant continued to work as a Senior Analyst for a number of years. The Tribunal also notes the Claimant's email of 7 October 2011 to Mr Gibbons where he says *"With reference to our meeting this morning where Claire Parnell (HR Business Partner) was also present. I would like to confirm to you that I will be accepting the role of Senior Analyst, supporting the Urgent Care Division*". In cross examination the Claimant confirmed he accepted the role in this email but said he did so as he was forced to with no choice. He accepts this is not what this email says. The Claimant later in his cross examination said he accepted the position as a temporary measure, however he accepts this is not what this email says.

262. The Tribunal accepts the Respondents submission that this letter is not a detriment but a statement of fact as this was what the Claimant would have to do if he was happy with the suggestions put forward by the Claimant. In any event, even if this was a detriment the Tribunal does not find it was casually linked to the protected disclosures.

Detriment 27 and 30

R's refusal; of C's suggestion of mediation and external investigation

Failure to mediate

263. This detriment relates to a letter from the Respondent's solicitors, Bevan Brittan to the Claimant solicitors Gaby Hardwick. The contents of this letter is clear on the face of it. The Claimant had, by his solicitors, suggested that an external investigator should be appointed to look into his complaint and that they would arrange mediation at the Respondent's expense. The Claimant had sent the Respondent a draft of the particulars of claim he intended to present to the Tribunal. This ultimately formed the basis for the investigation.

264. The Claimant says that the Respondent refused mediation however the Tribunal does not consider that this letter contains any refusal. Rather, this letter

suggests a different way of moving forward, which did not preclude an external investigation or mediation.

265. Detriment 30 is expressed as "*failure to mediate*" from 10 September 2015 onwards. Following the letter of 10 June, 2015, the Claimant by his solicitors wrote to the Respondent on 15 June, 2015, in essence accepting the suggestion put forward by Bevan Brittan. The Tribunal has considered the correspondence it was taken to passing between the solicitors, culminating in the Claimant's solicitors letter of 28 September, 2015. There is communication about the Claimant's subject access request and the Respondent's solicitors asking in a letter dated 25 September, 2015 "*we would request again an indication from you as to what your client is seeking is 'mediation. Your response to this is very important, which is why we have requested the information several times".* The Claimant did not say what he was seeking by way of mediation, and after the report by Miss Dudley the Claimant resigned rather than progress mediation. There is no evidence that the Respondent refused to mediate but were making legitimate enquires to be able to progress this.

Detriment 28

Invoking sickness management with effect C on half pay from 22.09.15

266. The Claimant had been absent for the requisite period to be put on half pay under the Respondents sickness absence policy. The Claimant's argument is that it was the actions of the Respondent, which meant he was on sick leave and therefore they should not have invoked this part of the procedure. Mrs Goddard was managing the Claimant's absence as Mr Bailey was too busy. She did not know the substance of the issues as she had not specifically been not been told about them by Mr Bailey and the Claimant did not volunteer this during his meetings with her. The Tribunal is satisfied that Ms Goddard did not know of the disclosures.

267. The correspondence shows that Ms Goddard wrote to human resources following a meeting with the Claimant in September, 2015, asking if they could exercise discretion when considering moving the Claimant to half pay given the ongoing problems he was having and that he was still very stressed. Ms Goddard was being supportive.

268. HR did not exercise their discretion and acted in accordance with the policy and the Claimant's contractual entitlement which gave six months' full pay and six months half pay in any rolling 12 month period. The Claimant started half pay from 22 September, 2015 and was due to go down to nil pay on 22 March, 2016.

269. The Respondent acted in accordance with the policy and that the Claimant was not subjected to any detriment. The Claimant has not shown any differential treatment with other employees who have been absent from work for a similar period of time. There is no evidence that the reason he was moved to half pay was because of any protected disclosure.

Detriment 29

Failure to deal with Data Subject Access Request

270. The Claimant submitted a request for data subject access request on 29 May, 2015. The Respondent asked for the Claimant's signed authority confirming consent to provide copies of his personal data on 10 June, 2015. The Claimant's consent was provided on 1 July, 2015 and the Respondent submitted its response on 6 August, 2015.

271. The Respondent's argument is that the 40-day period ran from the date the Claimant provided his consent on 1 July, 2015, and therefore they complied within the relevant time period. The Claimant's case is that there was a delay.

272. Whether or not the Respondent technically needed the Claimant's written consent is in the Tribunal's view immaterial. The fact is, they asked his consent, and once they received it they dealt with his subject access request without delay. The Tribunal does know not know what detriment the Claimant would have received even if he was right and the time ran from 29 May 2015, which would have meant that the Respondent should have complied by 7 July 2015. The delay (if any) is not in the Tribunal's view, substantial. There is no evidence to suggest that the reason for the delay was because the Claimant made protected disclosures. The Tribunal does not find this detriment to be made out.

Detriment 31

Summary outcome of Jane Dudley's report (failure to properly investigate C's complaints/reaching conclusions without evidential basis and biased)

273. Ms Dudley was engaged by the Respondent at its own expense as an external investigator. She did not work Respondent and had no previous dealings with it. The Claimant had no objection to her appointment. The object of her investigation was to investigate the matters which were in the Claimant's draft claim form for the Tribunal to see if matters could be resolved before proceedings were initiated.

274. The terms of reference were from the claim form with the Claimant providing Ms Dudley with a list of witnesses he wanted her to interview - most of whom were interviewed. After Miss Dudley had started her investigation the Claimant's solicitors requested that the banding issue should be added and it was. Notwithstanding the Claimant's dissatisfaction with Miss Dudley's report he did not appeal the outcome even though he was given the right to do so. Although the report was sent on 16 December 2014, the Claimant was not sent the appendices which accompanied the report until 18 January and he argued that he was unable to appeal until he had received them.

275. The Respondent submits that it extended the period of time the Claimant to appeal. However, the Tribunal has been through the correspondence quite carefully and cannot see that there is an extension of time given after the Claimant received all the appendices on 18 January, 2016 although some previous extensions had been given. The last of these was to 8 January, 2016. Although the Respondent said it would extend the deadline further there is no

correspondence in the bundle which expressly gave a further extension although the further extension was expressly granted although there is reference to an email from the Respondent to the Claimant dated 4 February, 2016, asking for the Claimant's detailed grounds of appeal within a stipulated time frame. The Tribunal therefore suspect there is a missing correspondence in the bundle and that this letter shows that an extension of time was in fact granted.

276. The Claimant describes the report as a "whitewash" pointing out defects in the investigation, which are set out in the Claimant's resignation letter (1162). He describes the report as "*self-serving; superficial; lacking in any rigour, analysis, probing or challenge; in large swathes of findings unsupported by specific evidence; major internal inconsistencies have been left unanswered and a number of key witnesses was not interviewed. Worse still, witnesses such as James Gibbons and Les Saunders have been able to indulge in character assassinations of me with impunity, even though, on the face of the available evidence, they are blatantly untrue. Nevertheless, they been allowed to go unchallenged by the investigator. Jane Dudley herself seems to have concluded that many of my allegations of fabricated which, given what other witnesses say about my honesty and motivation. I find deeply troubling and upsetting."* The Claimant goes on to make criticisms of Ms Dudley's report.

277. Although Miss Dudley had had no previous dealings with the Respondent the Claimant has raised questions about Ms Tenney's involvement in the terms of reference. The Tribunal do not find this to be significant. Having read the report and heard the evidence of Miss Dudley, the Tribunal's finding is that Ms Dudley was overwhelmed by the extent of and the nature of the investigation. The Tribunal accepts what the Claimant says in relation to the degree of questioning from Miss Dudley of the witnesses. It is clear from the interviews that she took what was said at face value without any probing or further enquiry.

278. Clearly, Miss Dudley knew what the disclosures which the Tribunal have found to be protected were and knew of the race discrimination complaint. These were of course part of the investigation. However, the Tribunal does not find that the disclosures or the complaint of race discrimination made against Ms Clarke were what motivated her. Sadly, the defects in the report to the Tribunal which the Tribunal accept exists are more to do with her inability to grasp and analyse the complex issues and the volume of information given to her.

279. Whilst the Tribunal accepts that the quality of Ms Dudley's report amounts to a detriment, the Tribunal does not find that the deficiencies were because the Claimant had made protected disclosures or complaints of race discrimination.

Detriment 32

Failure to provide full report

280. The Respondent did provide a full report to the Claimant as set out above under detriment 31, even though it was sent out in two parts. This detriment is not made out.

Detriment 33

Providing no option but to accept substantive post as information analyst with 12-month secondment to the change team.

281. The Respondents evidence was that the Claimant was employed as an information Analyst when he moved from Therapies. As set out above, there is a difference in view as to what the Claimant substantial post was and the reasons have already been rehearsed.

282. The Respondents evidence also was that there was no other employment for the Claimant and that it had no power to arrange secondment to an external body. The position that the Respondent was offering in February 2016 was the same as been offered before. There is no suggestion that the Respondent was withdrawing any offer that they had made previously. The Tribunal notes that the offer also included the Prince 2 training which the Claimant wanted to do and which was necessary to do if he wanted to progress in project management.

283. Taking all of the matters above into account, the Claimant's claims detriment for making protected disclosures (whistleblowing) are dismissed.

Race Discrimination

284. Although there is a race discrimination case before the Tribunal this was not the focus of the submissions made by the parties. The focus was on the whistleblowing claims, unfair dismissal and breach of contract. The Claimant's case on race discrimination is set out in the agreed list of issues.

In the period prior to July 2008 when C was managing the TIARA team was he subjected to abuse because of his race by Nikky Clarke, a data entry clerk?

285. The Tribunal has found that the Claimant was subjected to abuse on the ground of his race by Ms Clarke.

Did the Claimant complain about this treatment to David Baker on 08.04.08 and Tony Deal on 16.09.09 and 24.09.09?

286. The Tribunal has found that the Claimant did make complaints about this treatment which were investigated. Mr Baker denies the Claimant made complaints to him.

Was the Claimant subjected the detriments (as set out above for the protected disclosure claims) supposing those detriments took place, because of these protected Acts.

287. The Tribunal's finding is that the issues relating to Ms Clarke were discrete issues limited to that period in time. The Tribunal does not find that the detriments after the Claimant moved from the Tiara team on 9 December 2012 were related to this matter. The Claimant moved to a new team. No one in the new team knew what had happened in the Tiara team, although they knew there

had been a break down in relations generally which led to the Claimant being redeployed.

288. The Tribunal finds that the failure to discipline Ms Clarke in light of the findings made in the investigation was an act of race discrimination. However, this was in 2009, some seven years before the Claimant made his claim to the Tribunal. Clearly this claim is out of time. The Claimant has not put forward evidence as to why it would be just and equitable to extend time. The Tribunal therefore is unable to exercise its discretion to extend time and the Claimant's claims of race discrimination are out of time.

Unfair dismissal

289. The Claimant resigned by letter dated 24 February 2016. As already said, this is a detailed letter which goes through the deficiencies of the Claimant saw it in Ms Dudley's report and concludes *"it is become abundantly clear to me that the trust does not and has never valued me as an employee and is not prepared to acknowledge any failings towards me at all. All the time. The current personnel remain in the HR department; the culture of the trust will not change. Consequently, despite my very best efforts, I have to resign for the sake of my health, my family."*

290. In order for the Claimant to show he was dismissed he has to show that the Respondent has committed a fundamental breach of contract, that he resigned in response to that breach, and he did not affirm the contract (i.e. wait too long).

291. The Claimant's argument is that the period of time between the Claimant's receipt of the Respondent's letter of 15 February, 2016 and this resignation on 24 February, 2016 did not amount to a waiver of the Respondent's breach or affirmation of his contract of employment.

292. The Respondent submitted that the Claimant was contemplating resignation and a Tribunal claim from May 2015. The first mention of resignation and a potential claim of unfair dismissal is in a letter from the Claimant's solicitors to the Respondent's solicitors dated 25 September, 2015. The Claimant had by this time presented his claim on 27 August 2015 bringing claims of whistleblowing and race discrimination. The letter concludes, "*This letter is deliberately written on an open basis. We look forward to your response or more before close of business on 6 October, 2015. If a suitably positive response is not received by that date, it will confirm our client's belief that the trust has no intention of addressing his concerns or protecting him in the future, and he will have to give serious but reluctant consideration to resigning and pursuing a claim for (automatic) constructive dismissal."* The Claimant was therefore contemplating resignation some five months before he actually resigned.

293. The Respondent submits that the Claimant's resignation was not related to the protected discloses or victimisation because of his race complaint, but that the real reasons for the resignation were that the Claimant could not force the Respondent to redeploy him or second him into a project management role.

They submitted that he did not want to go back to his substantive role as an information analyst and he realised he could not get the Respondent to pay compensation and therefore chose to pursue matters in the Tribunal to force the Respondent make compensation.

294. The Tribunal finds that the issues in relation to his time in the Tiara team concluded on 4 January, 2010 when he moved to the Information Department. In October 2011 the Claimant accepted he was working as a Senior Business Analyst in urgent care, even though the back of his mind, it appears he still thought of himself as an IM&T manager.

295. The Tribunal has not found that the Claimant was subject to any detriment because he made protected disclosures or made complaints of race discrimination. The Tribunal considers the matters relating to Ms Clarke and the Claimant's race discrimination claim to be too remote in terms of time having occurred so many years earlier.

296. The Claimant says that the last straw was the Respondent's letter dated 15 February, 2016 which said that there were no other suitable redeployment opportunities as set out above. The Tribunal accepts that the Claimant resigned within a reasonable period after receiving this letter however the Tribunal does not find that this letter in itself amounts to a breach of the implied term of mutual trust and confidence. In this letter the Respondent is looking at how to get the Claimant to return to work and is still considering the Claimant's request to work in project management. Respondent had suggested a route by which they hoped that this may be achieved. Given that the Tribunal has not found the other matters which the Claimant has complained up to be detriment, this cannot be a final straw (the Tribunal recognises that a final straw in itself doesn't have to be a breach of contract).

297. Accordingly, the Tribunal finds that the Claimant was not dismissed and that he resigned. The Tribunal takes note that the Claimant had been contemplating resignation for some considerable time and had posited this in correspondence with the Respondent's solicitors.

Breach of Contract

298. This relates to the issues the Claimant has raised about his banding. The Claimant's initial role as IM&T Manager for Therapy was advertised as a Grade 6 role. The Claimant was offered the role by letter dated 31 October 2005 by which time it had gone through the Agenda for Change process and been graded at a Band 6. The Claimant's contract of employment and offer letter states that he is a Band 6 and he signed and agreed the contract. There is no breach of contract. Further, the Claimant accepted the role in the Information Department in December 2009 at Band 6 level. This reaffirmed his contract of employment.

299. The Tribunal accepts the Respondent's submission that the Banding issue only relates to the Claimant's role within the TIARA team and that once he had moved out of that role from 4 January 2010, the time limit for the breach of

contract claim started. The claim is out of time and the Claimant has not advanced any reason why it was not reasonably practicable for him to have brought his claim in time.

300. Even had the Tribunal found this claim to be in time the Tribunal would not have found a breach of contract. The Tribunal heard evidence about the banding process which relates to the job and not the person who is the job holder. The Tribunal is satisfied that the correct process was adopted by the Respondent in putting the Claimant's job into band 6. The Claimant's predecessor Margaret Martin prepared the job description for the role that was sent for evaluation – she was in the best position to do this, being the current post holder at the time.

301. At the time the banding was carried out the job description could not be matched to a National Profile job description. Therefore, a local evaluation process was conducted. Stephanie Innes' unchallenged evidence is that the local process would often result in a more generous banding decision as it was more detailed. The outcome of the local evaluation process was to match the job at a Band 6.

302. The Respondent admits that the Claimant was not given a right of appeal. In its submissions it says this was because there was no post-holder in place to send the appeal letter/banding outcome to as this took place prior to the Claimant's start date. However, in order to lodge an appeal or request a re-banding, the Claimant would have to set out in writing where his job description or duties justified a higher score or banding or where they disagree with the job match, and the job description would go back to a local evaluation panel for review. The Claimant has never done so and he accepted in cross examination that there was no guarantee that either the appeal process or a re-banding request would have resulted in a higher banding.

303. The Claimant has never made any formal request to HR or his manager for a matching review or a re-banding of his role.

304. There have been no unauthorised deductions from wages under section 13 of the ERA 1996 as the Claimant has signified his written agreement to the alleged deductions by signing his contract of employment for a Band 6 role. Any such claim should have been brought within 3 months of 4 January 2010 – the last date when the Claimant was paid at a Band 6 rate for his IM&T Manager role. The claim is significantly out of time and no grounds have been put forward to extend time on the basis that it was not reasonably practicable to have brought the claim in time.

Employment Judge Martin

Date: 23 January 2017