EMPLOYMENT TRIBUNALS

Claimant: Mr C Pennington

Respondent: North West Ambulance Service NHS Trust

HELD AT: Manchester **ON:** 3, 4, 5, 6, 7 and 10 April 2017
15 May 2017
(in Chambers)

BEFORE: Employment Judge Feeney
Ms C S Jammeh
Mr B J McCaughey

REPRESENTATION:

Claimant: In person
Respondent: Miss L Amartey, Counsel

JUDGMENT

The judgment of the Tribunal is that the claimant's claims:

1. that he was dismissed and suffered detriments because of his protected disclosures,

2. that he was discriminated against on the grounds of his disability, and

3. that he was unfairly dismissed,

fail and are dismissed.

REASONS

1. The claimant brings a claim of disability discrimination, detriment and dismissal due to making a protected disclosure and a claim of ordinary unfair dismissal.

2. The claimant's claims as set out in the pleadings, Case Management Orders and further particulars were as follows:

Disability Discrimination

(1) 25 October 2012 – Mr Doolan failing to formally invite the claimant to a performance management meeting (section 15 claim).

(2) 26 October 2012 – Liam Donnelly saying to the claimant in front of other staff "me and you need to talk" (harassment or direct discrimination).

(3) 27 November 2012 – the respondent withholding evidence regarding a patient report (section 15 claim).

(4) The claimant's fourth claim was withdrawn.

(5) Around May 2014 – Mr Tierney informing the claimant of a complaint against him but not giving him all the information about it (direct discrimination, harassment and section 15).

(6) 12 November or December 2014 – Mr Tierney aggressively saying he would be interviewing all the witnesses involved in this incident (direct discrimination and section 15 discrimination).

(7) This claim was withdrawn.

(8) Mr Curry "if we want to get you we can" (direct discrimination, section 15 discrimination).

(9) Mr Dent laughing at the claimant after him saying he had had another sleepless night (harassment, direct discrimination, section 15 claim)

(10) Mr Curry turning his back on the claimant and saying "patients die" after the claimant had informed him about the complaint he was investigating (harassment, direct discrimination, section 15 claim).

(11) 28 October 2015 – deliberately withholding important evidence from Mr Doolan's report, being two NWAS letters dated 4 June 2013 and 6 June 2013 (section 15 claim).

(12) 9 June 2015 onwards – Mr Doolan failing to respond to the claimant's email of 9 June 2015 (direct discrimination and section 15 claim).

(13) This was withdrawn.

(14) This claim was withdrawn.

(15) Failure to make reasonable adjustments, the PCP being the requirement for an Assistance Operations Manager to work on frontline duties.

Not making the following reasonable adjustments

(i) Considering whether the claimant should remain on normal duties, temporary redeployed to other duties or remain with colleagues.

(ii) Reducing or amending working hours or changing base station.

(iii) Considering whether the claimant should remain on duty.

(iv) Not sending the claimant for as psychiatric report.

(v) Giving the claimant a role which did not involve frontline duties.

(16) This claim was withdrawn.

(17) Not taking the claimant's grievance seriously and not hearing it until after the termination of the claimant's employment (direct discrimination and section 15 claim).

(18) 15 October 2015 – not looking at the claimant's grievance at the meeting on 15 October although Mr Doolan had informed him in an email it would be considered at that meeting (direct discrimination and section 15 claim).

(19) 15 October 2015 – asking the claimant to sign permanent redeployment forms or apply for ill health retirement at the final sickness review meeting (direct discrimination and section 15 claim).

(20) During the capability hearing Mr Mulcahy saying the word "bullying" should not be in the dictionary (direct discrimination and section 15 claim).

(21) 12 November 2015 – dismissing the claimant (direct discrimination and section 15 claim).

(22) 12 November 2015 – Mr Mulcahy refusing to look at the grievance written on 24 September 2015 (direct discrimination and section 15 claim).

(23) Undated – letters dated 4 and 6 June 2013 from Donna Marshall to the claimant and other evidence being missed out of the capability pack (direct discrimination and section 15 claim).

Protected Disclosures

3. The protected disclosures were identified at a case management conference on 24 May 2016 as follows:

(1) There was a systems failure in relation to vulnerable adult reporting system. The failure was that the claimant had completed a vulnerable adult referral form at the scene of an incident in 2014. The claimant was concerned he had left a patient in a violent home. He expressed his concern that he had completed a vulnerable report form but this

had not been followed up because his employer said they had no trace of the referral.

(2) In relation to an attendance on an elderly patient in early onset dementia in a care home the claimant had asked the ambulance to wait and had spoken to a GP and referred the patient's care to the GP instead of taking the patient to hospital. The claimant was informed his referral to a GP had been in appropriate. The claimant raised with Mr Khan (of CQC on 29 September 2015) his concern that it was not in the public interest that paramedics should undermine a GP. He stated he considered it was inappropriate to view end of life patients with a "reversible causes" approach. He raised his concern that ambulance staff had been taught to approach all patients in end of life care with pre hospital earning warning ("PHEW") score of more than four to be taken to hospital. He then provided more data on 22 June 2016 to summarise his conversation of 28 September with a CQC worker called Chris. These related to the same incidents referred to above and will be considered in more detail in the narrative below.

4. The detriments the claimant relied on in respect of the whistle-blowing claim were:

(1) Failing to handle the claimant's grievance in a fair and timely manner in that –

(i) The respondent went straight to stage three, denying the claimant an opportunity to appeal.

(ii) The respondent only dealt with the grievance after the termination of the claimant's employment.

(iii) The respondent did not comply with its own policy in that it did not deal with the grievance in 14 days.

(2) Not making the following adjustments –

(i) Considering whether the claimant should remain on normal duties, temporarily redeployed to other duties or remain with colleagues.

(ii) Reducing or amending working hours or changing base station.

(iii) Considering whether the claimant should remain on duty.

(iv) Not sending the claimant for a psychiatric report.

(v) Giving the claimant a role which did not involve frontline duties.

5. Annex B of the second case management discussion on 23 September 2016 set out the legal issues:

<u>"Ordinary" unfair dismissal</u>

(1) Has the respondent shown a potentially fair reason for dismissal?

(2) If the respondent has shown a potentially fair reason for dismissal, did the respondent act reasonably or unreasonably in treating that reason as a sufficient reason for dismissal in all the circumstances (including the size and administration resources of the employer's undertaking)?

"Automatic" unfair dismissal – section 103A Employment Rights Act 1996 (protected disclosures)

(3) Did the claimant make a protected disclosure? (See below for issues as to whether a protected disclosure was made).

(4) If so, was the protected disclosure the reason or main reason for the claimant's dismissal?

Detriment on the ground of making a protected disclosure

(5) Did the claimant make a protected disclosure? (See below for issues as to whether a protected disclosure was made).

(6) Did the respondent subject the claimant to a detriment?

(7) If so, was this on the ground that the claimant had made a protected disclosure? **The respondent did not concede that it knew the claimant had made the alleged protected disclosures to the care Quality Commission**.

Whether the claimant made a protected disclosure

(8) Were the alleged disclosures, disclosures of "information"?

(9) Did the claimant have a reasonable belief that the disclosures tended to show at least one of the six "relevant failures" set out in section 43B(1)(a)-(f) Employment Rights Act 1996 ("ERA")?

(10) Did the claimant have a reasonable belief that the disclosures were made "in the public interest"?

(11) Were the disclosures made to the Care Quality Commission as alleged and, if so, were they made in accordance with section 43F (disclosure to a prescribed person) or otherwise in accordance with any of sections 43C to 43H ERA?

Direct disability discrimination

(12) Did the respondent subject the claimant to a detriment?

(13) Did the respondent treat the claimant less favourably than it treated or would have treated others in the same material circumstances?

(14) If so, was this less favourable treatment because of the protected characteristic of disability? **The respondent did not concede that it knew the claimant was disabled**.

Discrimination arising from disability

(15) Did the respondent subject the claimant to a detriment?

(16) Was the claimant treated unfavourably because of something arising in consequence of his disability?

(17) If so, can the respondent show that the treatment was a proportionate means of achieving a legitimate aim?

(18) Did the respondent know or could they reasonable be expected to know that the claimant had a disability?

Harassment

(19) Did the respondent engage in unwanted conduct related to the protected characteristic of disability which had the purpose of effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant? **The respondent did not concede that it knew the claimant was disabled**.

Failure to make reasonable adjustments

(20) Did the PCP of the respondent's put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled?

(21) Could the respondent reasonable be expected to know that the claimant had a disability and was likely to be placed at the disadvantage?

(22) If so, did the respondent fail to take such steps as it would have been reasonable to take to avoid that disadvantage?

Time Limits

(23) Does the Tribunal have jurisdiction to consider all the complaints having regard to the relevant time limit? There appears to be no issue that the complaint relating to dismissal were presented in time but there may be an issue in relation to earlier acts, which may require consideration of whether the acts form part of a series of acts of discrimination or detriment on the ground of making protected disclosures.

Witnesses

6. The Tribunal heard from the claimant himself and for the respondent Michael Forrest, Director of Organisational Development and Chair of the Stage 3 grievance

panel; Graham Curry, Sector Manager for the Fylde Coast and West Lancashire area, and manager of the claimant's manager; Mr Joseph Dent, Advanced Paramedic who dealt with a complaint involving the claimant; Mr Peter Mulcahy, Head of Service for Cumbria and Lancashire who held the capability hearing; Mr Shaun Tierney, Advanced Paramedic who dealt with one of the complaints against the claimant; Liam Donnelly, Assistant Operations Manager and colleague of the claimant; Michael Doolan, Operations Manager and manager of the claimant at the relevant time; and for the claimant, the claimant himself.

7. We noted that the claimant's witness statement did not address the issues that had been identified in the previous case management discussion. After some discussion about this, which included whether or not a postponement was required in order to give the claimant the opportunity to submit a relevant witness statement it was agreed, the claimant understanding the position, that Miss Amartey would cross examine on each of the issues thereby affording the claimant the opportunity to give the relevant evidence in cross examination. Whilst not ideal, all parties agreed that it was preferable to postponing the matter, which may have costs implications for the claimant.

The Bundle

8. There was an agreed bundle to which some emails were added during the course of the hearing.

Findings of Fact

The Tribunal’s findings of fact are as follows:

9. The claimant, who had a background in the Armed Services, began working for the respondent on 6 May 1989 following a period of part-time work. He was promoted to Assistant Operations Manager in 1996. His manager was Mr Michael Doolan who had worked with the claimant since 1988. Mr Doolan was managing the claimant at the relevant time.

10. In February/March 2012 the claimant stated that he had had an acute episode of depression and had been admitted to the Taylor Ward at St Helens Hospital. This was following his marriage breaking down. We accepted Mr Doolan’s evidence that he and no-one else in the Trust knew he had had a hospital admission at the time or at any time before the claimant submitted a disability impact statement. The claimant did not dispute that the respondent was unaware of this.He had a period of sickness absence in February/March 2010 but Mr Doolan stated there was no suggestion he was suffering from a long-term mental impairment at the time, but he understood it was a reaction to the breakdown of his marriage and the loss of his mother.

11. The first matter the claimant relies on in these proceedings related to a performance management meeting on 27 October 2012 and the complaint that Mr Doolan had failed to formally invite the claimant to this. This concerned the claimant's failure to engage with the learning and development programme which he was required to carry out, and in which he was behind in completing the modules.

12. Mr Doolan had written to him on 25 October about this matter and they had had an informal meeting on 27 October. The claimant did not express at the time any

concerns about this meeting taking place and the Trust's policy allowed an informal stage before a formal procedure was started. It was Mr Doolan's intention this would be an informal stage. The meeting was amicable and no concerns were raised by Mr Pennington until his grievance in September 2015. Mr Doolan believed it was less stressful to use the informal stage before moving on to a formal stage.

13. Also in October 2012 the claimant had attended an incident and treated a patient for a considerable period of time following which Mr Donnelly had taken over. Mr Donnelly was not happy with what the claimant had undertaken while looking after the patient and felt that some basic tests had not been done, in addition the claimant had left the incident without completing a handover. The claimant said later Mr Donnelly had said to him, aggressively, " we need to talk" . Mr Donnelly said when he saw the claimant later he did say to him something along the lines of that that he needed to talk to the claimant. Mr Donnelly stated he did not say this aggressively and said it to the claimant in exactly the same way he would have said it anybody else, we accept Mr Donnelly's evidence; he was clear and confident witness. He had spoken to his manager about the incident at the time and explained it was a one off and he had not had a problem with the claimant before or since. He believed the claimant just could not accept any criticism.

14. This incident was then the subject of an anonymous complaint to the respondent which was dealt with by the "making experiences count" team who grade complaints and pass them on to be investigated. It was graded as level 4, which is serious and requires the paramedic to be interviewed. Such an interview is normally carried out by an advanced paramedic and Mr Dent was to lead on the interview. As the claimant was worried, Mr Doolan attended with the claimant. Mr Doolan was not attending in any investigatory capacity but to support the claimant. The patient report form (PRF) was faxed through to Mr Dent by the "making experiences count" team but he had not received the whole of it and it was a poor copy. This was outside of the control of Mr Dent and Mr Doolan, and the claimant was apologised to because of this. But he did not say he wanted to wait until they had the complete form or complain about it until near the end of his employment.

15. The claimant then had two periods of approximately six weeks' absence in 2012/2013. The first was in relation to a knee injury unrelated to work; and the second one was for stress following the patient related complaint referred to above. The complaint had also been referred to the HCPC, a regulatory body. This absence began on 22 November 2012.

16. An Occupational Health report dated 6 December 2012 was obtained which stated that:

> "His current absence seemed to relate to interpersonal difficulties compounded by criticisms of his professional performance and this anonymous report to the HCPC. He seems to have had difficulty finding out precisely what the nature of the complaint is and that makes it difficult to deal with uncertainty. He is not unfit for work in general terms but he is certainly anxious and distracted and I think it would be inappropriate for him to be on the road although these interpersonal and professional matters are resolved. I think he is too anxious and distracted to be 'safe' in the acute clinical work, but he would be well enough to do a non operational role away from the sector where these complaints have been generated."

17. On 19 April HR wrote to the claimant reminding him that he needed to submit medical certificates, and that Mr Doolan had tried to contact him several times regarding his welfare and offering support, but none of his calls had been returned. She noted there was a referral to Occupational Health.

18. In a further report dated 15 May 2013 the Occupational Health doctor stated that:

> "His symptoms of anxiety and depression are resolving. I don't have any particular concern about his fitness to drive or fitness to practice in relation to his medication as long as he times his doses appropriately in relation to shifts. He needs a phased return to work…I don't think he should be responsible for all the clinical decisions until his confidence is back…He is obviously still exorcised by the HCPC complaint and will be glad when that has been resolved. He will need support from senior management over this and during his re-integration into the team."

19. A letter of 4 June 2013 reflected a meeting on 10 May 2013 regarding his return to work which he had with Graham Curry. It was noted in the letter of 4 June that Graham Curry had expressed concern that he had not discussed his feelings with anybody and that he had not supplied sick notes. He said the GP had recommended he did not have contact with work but it was recorded that he needed to explain this.

> "He had explained that he had received the letter from HCPC about the panel hearing on the day he reported sick and was distressed as he thought the situation had been resolved. He had also had a conversation with a fellow paramedic who said to him, 'if you go off sick with work related stress again you will be redeployed'. I explained this would only be the case if medical evidence from Occupational health indicated you were unfit to continue in your AOM duties and at no point has this ever been asked."

20. A further meeting was held on 24 May recorded in a letter of 6 June which discussed the report from Occupational Health stating that:

> "His symptoms of anxiety and depression were resolving and he did not have any concern about his return to work."

21. It recorded that Mr Curry had said:

> "They needed to be assured that he was fully fit and 100% ready to return to work, and you previously returned and then said it was too soon."

22. They discussed a phased return and this was agreed. He stated he was no longer experiencing sleepless nights due to the investigation and that his current medication was working. Regarding his feelings towards Mick Doolan and Joe Dent, who in his view were involved in the initial complaint's investigation, (Mr Doolan was not in reality) it was suggested that this needed to be resolved, and he confirmed that he was ready to begin rebuilding the relationships and learning lessons from the incident. It was confirmed that the claimant would sit down with Mr Doolan on his first day back in work and discuss all the issues, and that the same would happen with Joe Dent.

23. There was also a discussion regarding the fact that the claimant had outstanding modules from his CIM management qualifications which were required following his promotion, and that deadlines had been flexible due to his absence but that Mr Curry needed a reasonable date by which the modules would be completed. He noted that the initial Stage 1 sickness policy hearing which had been postponed at the claimant's request had not been set up again but would be picked up on his return to work and would be undertaken by Mark Lewis as the claimant felt this would be more appropriate, but the claimant stated that he was happy for Mick Doolan to do it. He repeated he was 100% ready to go back to work and this was supported by Occupational Health.

24. Donna Marshall, the writer of the letter, stated that:

> "Both Graham and I reiterated that support is always available if it is needed and Graham emphasised the need for open communication and you need to speak with someone about something that may be bothering you before it becomes an issue for you."

25. It was also added that the performance management review which Mr Doolan had commenced the year before would be suspended allowing him the opportunity to improve within his role without formal monitoring.

26. Mr Curry was the subject of a complaint by the claimant that on 4 June 2013 he denied him a transfer away from Preston station or out of section. The documentation shows that he did not deny any such request and that the claimant had never made such a request and had stated he was happy to return to the Preston station. The claimant then withdrew this complaint. Mr Curry said apart from the sickness absence meeting he held with the claimant in May 2013 he was unaware the claimant had any continuing health problems. He had been off with stress since the end of March 2013 and attributed this to the anonymous HCPC report and the investigation by Mr Dent and Mr Doolan the previous year. The pursuing of this complaint which was withdrawn by the claimant when in cross examination he was referred to the relevant documents, documents he well aware of, was an example of the claimants lack of perspective and skewed perception.

27. On 6 July there was a letter recording the outcome of the second sickness absence review which stated that it had been decided not to issue him with a formal written warning but to extend his first stage review for a further 12 months until 27 May 2014 based on mitigating circumstances, which were "that it was connected with your previous absence due to stress".

28. Nothing further happened until May 2014 when Mr Tierney, another advanced paramedic informed the claimant of a complaint raised on 30 April but did not give him all the information about this complaint. The complaint was that the ambulance crew had failed to transport a patient to hospital. The incident, however, had occurred in October 2013 and came to light when another paramedic (Mr Tierney himself) attended the same patient following an emergency call on 25 April. Mr Tierney, was tasked with investigating the October 2013 complaint. When Mr Tierney had attended an emergency call on 25 April 2014 the partner (AW) of the patient (NW) complained about a previous occasion when the patient had not been taken to hospital. Initially NW had not been taken to hospital but afterwards a second ambulance had attended and he was taken to Royal Preston Hospital where he had

had emergency brain surgery. The claimant and his colleague had attended NW on the first occasion in October.

29. Mr Tierney relayed the concern to the patient experience team who contacted the patient's partner AW. She then confirmed she wished to make a formal complaint regarding the failure to take him to hospital originally. Mr Tierney interviewed the claimant amongst others and during the interview the claimant was supported by his trade union representative, Mr Parkinson, an experienced trade union representative who was familiar with the procedures. While we felt it odd that Mr Tierney should investigate this incident the claimant did not complain about that and in any event Mr Tierney was not looking at the incident he had personally been involved in, in April.

30. The claimant complained that Mr Tierney did not give him all the information about the patient's complaint. Mr Tierney said that was standard practice and that as far as Mr Dent had deviated from this in the previous complaint, he felt that Mr Dent should not have done so. He felt that it was more objective if the documentation was looked at afresh so that it could not be said the respondent was providing leading questions to the paramedic in order to assist them defending their conduct. He also felt it provided a genuine recollection of events rather than one affected by the knowledge of what the complaint was about. He said this was how he always approached complaints. He stated that he was not aggressive at the interview as alleged by the claimant and that if he had been Mr Parkinson would have intervened. He agreed he probably did say he would be interviewing all the witnesses involved in the incident, but there was nothing unusual in that. There was some doubt as to when this interview took place. Mr Tierney's record stated it was in June so we accept that that is when it took place.

31. The claimant expressed that he had concerns around the safety of patient NW at the time and believed he was the subject of domestic abuse. He said he had completed a vulnerable adult referral in order to provide a safeguarding safety net. During Mr Tierney's investigation, however, he did agree that the patient did not wish to go to hospital as contended for by the claimant, and that he had insisted on returning home. It was also clear he had the clinical capacity to make that decision and therefore Mr Tierney concluded that the decision not to convey NW to hospital was correct. He also considered that NW did not raise any issues or concerns about his partner when he (Mr Tierney) attended in April 2014, even though the partner left the room. The second crew who had attended in October 2013, and taken NW to hospital, also did not notice any safeguarding issues.

32. Mr Tierney also listened to the 999 calls and felt there was nothing to support the claimant's view that the patient was a victim of domestic abuse. He agreed the investigation took time to complete as he attempted to obtain statements from NW and AW but it was not possible. He completed his report in October 2014 and sent a copy of it to Peter Mulcahy who confirmed his recommendations, which were simply that the claimant should engage in reflective practice. Mr Tierney was satisfied that the decision not to take the patient to hospital was correct, but the claimant's documentation did not formally set out the claimant's decision making process. Mr Tierney said he did explain the contents of the report to the claimant and allowed him to read it off the computer screen as it appeared he had not yet seen it (he believed Mr Mulcahy would show him it), and he sent the relevant recommendations to him in an email of 20 October 2014.

33. Mr Tierney recalled the claimant asking him if he thought a crime had been committed, and he informed him that he had no evidence that was the case. He also stated that his investigation had been reviewed later by Consultant Paramedic Matt House who found it to be entirely appropriate. In addition it is important to note that Shaun Tierney's report acknowledged that the claimant had completed a Local Authority referral to ensure that there was "a safeguarding safety net". This is corroborated that at the time it was known that the claimant had made a referral and there was no negative response to this whatsoever.

34. A further complaint involving the claimant was received in July 2014 in relation to a patient who had died due to a sigmoid perforation of the bowel and upper respiratory tract infection. The family were angry about how the situation was handled. The complaint related to an incident on 23 June 2014 at a nursing home when the ambulance service attended but did not convey the patient; they attended the next day and did not convey the patient and when requested to attend a third time took five hours and 36 minutes to respond. It was stated this was a two hour GP urgent admission request and the patient died on 24 June in hospital. The respondent was criticised as well as the GP who had attended after the first ambulance attendance. The complainant felt there could have been a more proactive approach towards hospital admission. It was reported the patient had diarrhoea and vomiting.

35. This was investigated again by Mr Dent, and an interview with the claimant was took place on 18 November 2014 with the claimant's union representative Mr Parkinson attending. There was a delay in the claimant approving his statement and this resulted in a delay in the production of the report.

36. The claimant later complained that sometime in November,in tribunal he said it was before his interview on 18th November, he had told Mr Dent he was having sleepless nights and that Mr Dent laughed. Mr Dent denied this and he struck us as a credible witness. From his conduct of the investigations he was involved he appeared to be supportive of the claimant, giving him for eg more information about the complaint than Mr Tierney would have done. He did not know the claimant had any disability at this point or symptoms of any disability such as stress or depression. It is also implausible that the claimant would attend an interview a few days later with his union representative and not refer to this or refuse to attend.

37. The claimant also complained that when he complained to Mr Curry about the complaint Mr Dent was investigating he was supposed to have turned his back on the claimant and stated "patients die". Whilst Mr Curry did not recall making this comment we believe in the context he did but that it was not a negative comment it was a supportive one,patients do die and in the circumstances of a non admission to hospital it was likely there would be a complaint. He was not suggesting that the claimant was responsible – quite the opposite.. Mr Curry denied that he turned his back on the claimant, and as we found him a credible witness we accepted his evidence. He had been supportive of the claimant during his earlier absence so we find it inherently unlikely he would have behaved at all negatively to the claimant.

38. It was recorded that clinical concerns were raised in relation to the actions taken by the paramedic (the claimant) following a review of the incident by an advanced paramedic, but the member of staff was off sick for the foreseeable future. An interim review by a consultant paramedic confirmed the need for a review. There

was no concern regarding the conveying ambulance. It was stated that any perceived reluctance to convey the patient must have been unusual as the assessment was not normally done by the paramedic but would already have been predetermined by another clinician. It was commented that the matter had been at one point managed incorrectly by the dispatcher. It was stated that:

> "Clinical concerns have been raised in relation to the attendance of the RRV paramedic on the first attendance, however these cannot be addressed until he returns from long-term sickness."

39. The claimant began a period of absence on 26 November 2014. It was stated that this was "after having to deal with complaints made against him from patients". A referral was made to Occupational Health and a report was produced on 10 December 2014. This stated:

> "I understand Carl is currently on sickness absence due to symptoms of stress. I had an in depth discussion with Carl regarding his stress and it appears the main driver relates to workplace circumstances. Carl mentioned that he has had a number of complaints made against him and has felt the way management has dealt with these has contributed towards his stress. He also finds the work environment unsupportive and describes a breakdown in relationship with management. Carl has experienced significant psychological symptoms and therefore at present I would advise he is not fit to return to work. I would advise he accesses counselling at present and I enclose a leaflet with this letter explaining how he can do this. It is difficult to predict when Carl will be able to return to work due to his perceived difficulties within the workplace environment. Once he has made an improvement in his mental wellbeing he should be fit to attend meetings as long as he has appropriate support. Clearly the workplace circumstances need to be resolved satisfactorily before any return to work can be considered."

40. On 6 January 2015 the claimant was invited to attend a formal review meeting to take place on 22 January 2015, but this was cancelled and rearranged for 6 March 2015.

41. On 16 March 2015 Mr Doolan reported on the meeting, stating that:

> "You explained the reason for your absence is regarding complaints not being investigated as you feel they should resulting in you feeling that you are unable to trust the advanced paramedics in your sector; that you felt you were bring singled out, set up to fail and not provided with any support to appropriately deal with these issues at work."

42. Mr Doolan said he would approach Matt House, Consultant Paramedic, to review the case as an independent party and provide feedback to the claimant, and then that this discussion with everybody.

43. On 23 April 2015 Matt House reported as follows. He felt that Shaun Tierney had done a thorough investigation into the second complaint, where he had simply asked the claimant to do a formal reflective piece of work; Mr House felt that this was appropriate and that his findings were appropriate. In respect of the care home issue, which was in effect the third complaint but only the second that Mr House was

dealing with, he felt that it appeared to be an inappropriate non-conveyance but until Mr Pennington confirmed his witness statement he could not say anymore than that and sought advice on what the next step was.

44. Mr Doolan then had a meeting with the claimant on 11 June 2015, prior to which the claimant sent him an email on 9 June asking him to bring some patient referral forms with him to this meeting, giving some details of the meeting. Mr Doolan said he was unable to locate the incidents that the claimant was referring to, and told both Mr Pennington and Mr Parkinson,t he claimant's trade union representative, of this at the next meeting. This was never raised again, which suggested to Mr Doolan that his recollection would have been correct. We accept Mr Doolan's evidence on this.

45. Mr Matt House also attended the meeting on 11 June to give feedback on the two investigations. At the meeting the claimant submitted two lengthy lists of questions headed up "Questions from C Pennington regarding his current sickness absence 11 June 2015 – Complaint 1: Mr Tierney, Complaint 2: Mr Dent". Mr Tierney's complaint had 31 questions; Mr Dent's had 24 questions. He requested an answer within 28 days from Mr Doolan. At the meeting he also stated that he had lost faith in the police as a result of the 23 October incident because the police had not interviewed him or asked him for a statement. He also felt he was being blamed for the incident because of the recommendation he conducted a reflective piece of work. Mr House explained that as the complaint was an external one from the patient's family they had to investigate, and that Mr Tierney had upheld his actions. He had only been asked to prepare a reflective piece of work because there was information missing from the PRF and no blame was placed on the claimant.

46. In respect of the second incident, again it was external. It was agreed the PRF should have been provided and the claimant expressed the view that withholding that information was a form of bullying and he felt he was being intimidated. He was told that the investigation was still open because he had not approved his statement and he a full opportunity to review it and sign it, following which the investigation would be completed. One outcome of the meeting was that a further copy of his statement would be sent to him.

47. There was also a discussion that Mr House agreed to raise some of the issues at the next advanced paramedic meeting and that he understand the claimant's point that the advanced paramedics were too close to some of the people they investigated, but Mr House said whilst ideally the plan had been to have advanced paramedics from out of the sector to investigate, due to the volume received it simply was not possible.

48. Regarding promoting a "no blame" culture, Mr House explained a bullet point in a report he sent to all operational staff explaining that "if you follow all the correct procedures the Trust will fully support you", but there was a duty to investigate matters raised by service users and that the investigation was required as a way of collecting facts.

49. The claimant submitted a number of questions or complaints to this meeting which we passed on to HR to answer.

50. On 13 July 2015 the claimant sent an email to Mr Doolan, Mr Parkinson, Donna Marshall, Joseph Dent and Graham Curry stating that he disputed the contents of the interview notes from Mr Dent regarding the third complaint. He stated that he went into the interview terrified as:

> "Mr Dent had already reached his conclusion when he first informed me of the concern complaint. 'The patient died four days after my referral'. Mr Dent's note is not a true and accurate account of the events that occurred. Mr Dent failed to mention my chest examination during the interview. Mr PRF clearly stated this at the bottom, 'chest clear', therefore your notes and investigation are inaccurate.
>
> Also during this interview you stated you believed the patient was suffering from a chest infection. Your expression of your clinical opinion clearly had a coercive effect on my conduct in this interview. I would like Mr Dent to explain why he failed to include my chest examination during his interview.
>
> I refuse to sign your written statement. I would like Mr Parkinson and the MEC representative to make a statement of the events that occurred during Mr Dent's interview."

Then to Mr Doolan:

> "Many thanks for delivering my fit notes. Sadly your last letter dated 29 June 2015 you too have failed to note the discussion that took place regarding the meeting you had previously arranged on 29 May."

51. This was an issue regarding a letter being lost in the post, and he stated he wanted a further Occupational Health referral. Mr Doolan simply replied saying he would arrange that and arrange a further welfare meeting. A formal review meeting was arranged for 2 September.

52. Further, in order to bring the second investigation (the care home complaint) to a close a review panel meeting took place on 27 August 2015 which concluded his actions were justified and that the appropriate outcome would be a one to one reflection with an advanced paramedic.

53. The Occupational Health report of 10 August stated:

> "Unfit for work at present (please detail expected return date below)." Below it was stated :
>
> "Regarding his stress, he reports many years of accumulating workplace issues involving several colleagues and what he perceives as a culture of bullying. He says that as soon as he expresses his feelings he feels undermined and unsupported. He feels that complaints which were raised were not genuine but were based on historical conflict with colleagues. At recent meetings he reports that he feels unsupported and that his concerns and feelings are not being addressed. He feels he is not wanted back at work and feels that they criticise his conduct. He reports that he does not agree with the minutes of the meeting from June last year and that the meeting did not go well and he felt there was a lack of empathy. He explains he feels the

> solution is an independent enquiry. He has completed CBT therapy and I understand his CBT therapist confirmed depression and anxiety."
>
> Clearly the claimant's perspective was skewed as there was no evidence at all that the complaints were not genuine. They were all from third parties and were referred through the Making Experiences Count team which was completely separate from the claimant's area of work.

54. There was then some comment in the report about his Achilles tendon, his mood is still variable, his sleep is broken, and confirmed "ongoing marked situational anxiety regarding the workplace". It also stated,

> "He reports flashbacks and nightmares regarding incidents he had attended over the years and this cam wake him up and he also has intrusive daytime thoughts. He and his partner wondered if he was suffering from post traumatic stress. He is unfit to return to work."

55. The doctor stated it was important his concerns were addressed at work to try and achieve reconciliation as best as feasible and assurances regarding the future through appropriate mediation:

> "This would be a very important process before any return to work is contemplated. He reports he has lost trust totally and cannot see himself coming back to the same workplace at this place in time. There is a risk of his condition worsening due to his current psychological vulnerability and therefore a supportive approach would be advised. Due to his potential post traumatic stress symptoms I have asked him to see his GP in a timely manner in order to consider onwards referral to psychiatry to confirm a diagnosis and prepare the plan or treatment accordingly. During the interim if NWAS are able to commission a psychiatric opinion please let us know and we will arrange this."

56. On 2 September the claimant met with the respondent again and it was noted in a letter that:

> "You also advised Occupational Health has confirmed, as you have reiterated also, that you cannot return to any form of role within NWAS due to lack of trust and feeling of vulnerability on your part. Bob Parkinson also confirmed there was no likelihood of a return to NWAS. Occupational Health have recommended that you should undergo a psychiatric assessment and your GP thinks that it is an NWAS responsibility to complete a referral. We explained redeployment and gave you the forms asking if you can sign and return them as soon as possible."

57. The next referral stated:

> "Can Carl be reviewed by a doctor? At a meeting yesterday Carl and his union agreed he was unable to return to his duties as an AOM paramedic because of his feelings of vulnerability. As there is no improvement in his condition and Carl's statement that he can't return to his current role would you support this information?

> We have given Carl paperwork to sign and return so he can receive notification of alternative roles. At this time we have not had sight of the last report. Carl said he would call so it could be released."
>
> The respondent explained at tribunal that NICE guidelines were that referrals for a psychiatric assessment should always be done through the individual's G.P. which is why they declined to become involved in commissioning such an assessment. We accepted that explanation.

58. On 11 September 2015 Mr Doolan arranged a final sickness review meeting for 23 September, advising the claimant that this would discuss his ongoing sickness absence and advice from Occupational Health, exploring the potential to return to work and how this could be supported. It was rearranged for 15 October.

59. In the meantime Becky Powell from HR wrote to Mr Pennington on 18 September 2015 to respond to the written questions he had presented at the earlier meeting in June.. The letter confirmed that no blame had been attached to the claimant in relation to Mr Tierney's investigation. She confirmed that a police forensic opinion had not been sought and there was no evidence of any contact from Lancashire Police on the complaint file, and that it was closed on 13 October. She confirmed that:

> "It was permissible to complete a vulnerable adult referral without the consent of the adult when you deem the person to be in immediate risk of harm. Social Services are under no obligation to provide feedback on adult referrals. If feedback is available a safeguarding team would be aware and would pass this on to the staff member concerned."

60. Although the comment was supportive of the claimnat's position she went on to say that there was no adult safeguarding referral made for patient NW. She explained in full the safeguarding process.

61. The reference to there being no referral form for patient NW set off alarm bells for the claimant as he formed the view that something untoward was going on as he still had a copy of that referral, (which was odd but he was not questioned as to why he might have it, particularly whilst he was off work sick). It was later found by the respondent and ,as referred to earlier, in Mr Tierney's interview with the claimant he had accepted a referral had been made. Ultimately the claimant in these proceedings expressed his suspicion that the respondent was hiding the referral form so that they would not be accused of sending a domestic violence victim back to his abusers.

62. Regarding Mr Dent, she confirmed that:

> "The review panel supported the findings of the investigation and concluded the recommendations reached were reasonable, fair and justified. The investigation report did not find evidence of negligence and no blame was apportioned to the claimant or other colleagues. It had identified a number of points to be taken from the incident: one relating to how you managed the PHEW score on this particular occasion and the second being the sensitivity pathfinder has sepsis and therefore an internal systems review was recommended."

63. She stated there was no evidence it was inappropriate for Mr Dent to conduct the investigation and that, "the complaint was from a senior social worker at Lancashire County Council in relation to the care provided by you on 23 June and that external complaints are not usually shared with the person or persons they concern and have to be investigated".

64. He had asked the question, amongst the many others he had asked, about allowing patients to die with dignity, and she answered how this was to be achieved:

> "If there is no end of life plan clinicians are expected to work with other professionals and seeks advice support within the clinical leadership structure to ensure patients are treated with care and dignity and in accordance with policy and procedure."

65. Regarding management support she recorded:

> "(1) You claim that Mr Dent had laughed at you in response to your disclosure that you had a sleepless night. While I would not advocate such behaviour I am unable to substantiate this claim.
>
> (2) You refer to a response you received from Mr Doolan after you sent him a text. From the information you have provided it would seem that Mr Doolan later contacted you back. Mr Doolan's response may not have been to your satisfaction but it does not appear to be unsupported. Mr Doolan signposted you to the person he felt had the information you required.
>
> (3) You referred to an approach you made to Mr Curry and were unhappy with the response received. I cannot detect offence in the response you received and note that you did not make it clear that you were seeking support.
>
> It is clear your perception of events has caused you much distress and I understand that your management team are keen to address those issues through the welfare formal review process and support you back into the workplace."

66. Overall she could not find evidence to substantiate that the two investigations were conducted inappropriately, unfairly or unjustly. Both had confirmed there was no negligence on his part and had identified learning points that were reasonable against the findings obtained. She appreciated he found the investigation process difficult but his sickness absence had contributed to some of the delay and much activity had taken place.

67. The claimant indicated on 20 September to Mr Doolan that he intended to deliver a formal grievance after he had received the response from Becky Powell, and he filled in the formal grievance form on 24 September 2015. This said that:

> "Q: How would you like the grievance to be resolved?
>
> A: Satisfactory redeployment within the NHS on the band and salary following an independent investigation that seeks the truth. Ill health

> retirement from my current role due to my medically documented work related mental health issues. I also want a psychiatric assessment for potential PTSD,"

68. He attached to the form 47 grievance points which had some similarity to the matters he had raised before. Mr Doolan confirmed he had received the email on 30 September and suggested they discussed it in their next meeting. The claimant replied, stating:

> "Thank you for your response. I am not sure whether my final sickness review meeting is the appropriate time to be discussing my grievance. I will seek further advice from my union representative to establish when my grievance needs to be addressed. I understand that a grievance has to be responded separately for a sickness review in accordance to the NWAS grievance policy and procedures.".
>
> The claimant never got back to Mr Doolan to confirm how he wanted the matter to be handles so Mr Doolan assumed he did not want to discuss it at the meeting.

69. The grievance covered the majority of the matters which are now subject to this claim, although in more detail. It had 47 points and then a further copious number of bullet points in relation to complaint AP, Mr S Tierney and the Becky Powell answers, plus grievance appendix 1 which was four pages long. Grievance appendix 2, which was a letter of 1 May 2013 to "Rebecca" relating to one of the complaints. Appendix 3 was an email; and appendix 4 related to one of the other complaints (the elder care one). Appendix 5 contained some facebook posts. Appendix 6 included some matters relating to the claimant's current sickness in relation to Mr Tierney and Mr Dent comprising in total 55 questions. Appendix 7 was some medical information. Appendix 8 was Becky Powell's response to the original grievance letter. Appendix 9 was an executive summary in relation to whistle-blowing. Appendix 10 was the claimant's safeguarding report dated 21 October 2013, regarding the patient the claimant believed to be at risk of violence at home detailing this.

70. Of particular relevance is a comment the claimant makes at pt 44 on page 5 of the grievance: " I am aggrieved at having to safeguard other staff from such conduct and I will have to disclose to the Head of service (Peter Mulcahy) HCPC,CQC/Monitor the contents of this grievance/whistle-blowing"

71. A further Occupational Health report was received dated 30 September 2015.This said there has been no change since the last review……..he feels work are trying to find things against him… he has ongoing marked situational anxiety regarding the workplace…flashbacks ,intrusive thoughts and nightmares" (check with previous report not mixed up)

72. The final sickness review took place on 15 October. The claimant was represented by his union representative, Neil Cosgrove. It was at this meeting that Mr Doolan advised the claimant that he could not deal with his grievance at stage one; he had looked at it briefly and felt that it was too complicated. He went on to consider the claimant's current health and the claimant confirmed there was no change since the last meeting, which was confirmed by his GP and Occupational

Health. Mr Doolan asked the claimant whether he had completed the redeployment forms and the claimant replied he needed to seek legal advice before making any decision. He confirmed he agreed with the recent Occupational Health report. Following that Mr Doolan explained that the current policy as recommended by NICE, which they followed, was that the GP should make the referral for a psychiatric assessment for the post traumatic stress disorder and not the respondent.

73. HR explained at this meeting that as the claimant had been absent for 12 months with no likelihood of a return to duties the next step would be to refer him to a capability hearing with the Head of Service and the Head of HR. The possibility of redeployment was reiterated again and there was a discussion about ill health retirement benefits. Mr Doolan said it was normal practice to investigate redeployment at the final sickness review meeting. Redeployment and ill health retirement are options which the Trust is required to consider under its policy and the national terms and conditions of employment, and they are usually to the advantage of the employee, for example, as they can avoid termination of employment if redeployment is successful.

74. Regarding not having informal welfare meetings every four weeks, Mr Doolan said that unfortunately it was not practicable to hold these meetings every four weeks due to his availability and workload, and also that the claimant and the trade union representatives were unavailable and at times the claimant did not want contact. He stated he was in regular contact with the claimant, either in meetings or by telephone, and was up-to-date with health situation.

75. Mr Doolan compiled a management report for the capability hearing. There were two letters that he did not include in his report: 4 June 2013 and 6 June 2013. Mr Doolan stated, and we accept his evidence, that he did not think these were relevant as they related to an entirely separately period of sickness absence, and there was nothing stopping the claimant referring to those letters himself and taking them to the capability hearing if he felt they were relevant. Mr Doolan took the view that it was this current period of absence that he was required to report on as that was the absence that was leading to the capability hearing.

76. On 28 and 29 September the claimant alleges that he has made protected disclosures to Chris at the CQC and Omar Khan of the CQC. We know that the claimant did make those contacts with CQC on those dates, but the knowledge the respondent had of this will be tracked below. He certainly did not mention it at his final sickness review meeting on 15 October.

77. The minutes received from the CQC regarding the claimant's disclosures were available to the Tribunal. The first on 28 September stated that:

> "A member of North West Ambulance Service had been off sick for 10 months. Caller has come back and found that he dealt with prior to leaving was unsafely discharged into an unsafe environment despite a referral to safeguarding. He feels the Trust may be withholding evidence as they claim they can't find the caller's referral which he made. Caller advised the patient he attended had taken a fall in the street and he made the disclosure of domestic abuse when in the ambulance. The patient refused any hospital treatment and insisted he was taken home. When home the service user's

> partner states they were going to breathalyse him and that they have power over the service user. (Note that the claimant says this is what the patient told him at an earlier stage)
>
> The caller advised that the injuries documented on the second ambulance call were not compatible with a fall. He advised with a fall you would not get injuries on both sides of the head. The called advised during the disclosure this service user made to him: it was advised that not only has his partner been beating him but also the partner's brother had been kicking him.
>
> There was another ambulance call later than day and the service user needed neurosurgery on both sides of his brain. It is being alleged that the injuries were probably already there when the caller attended him. The caller advised he himself made a referral to safeguarding yet the service had no evidence of this. The called advised he has a hard copy of the referral he made. This is made to a contact centre and due to the service stating there is no evidence of him contacting them, it is unclear if the LA were ever notified. The caller feels the Trust have allowed this service user to be discharged back into a violent environment and that they are now trying to cover this up.
>
> Second patient: 89 years old and vomiting blood. He was in a nursing home. When the caller examined him he wasn't vomiting blood he was bringing up bile. Caller advised he had discussion with the carers who he described as very attentive and due to the service user's age he felt it would be better to stay at the home. He also spoke with an out of hours GP who agreed this was the way to go and they would follow up with the service user. The service user died.
>
> The caller advises he has acted within the scope of the Health and Care Processionals Council. The caller has all of the paperwork relating to the patients and the referrals made; however he is reluctant to send them in as he stated the details are personal and it wouldn't be secure. He would like to open dialogue with a member of the inspection team as his line manager won't accept his grievance."

78. On 16 October 2015 Mr Doolan summed up the last sickness review meeting which took place on 15 October 2015. He confirmed that the claimant had said there had been no improvement in his health to a stage where a return to work could be attempted. He went on to say:

> "I queried whether you had completed the redeployment form that was given to you at our last meeting. You stated that you need to seek legal advice before you can any decision on that point, adding that you will not make a rash decision or give up your role lightly. However, you further added that you do not feel that you are going to recover enough to make a decision on another role."

79. The claimant's capability hearing took place on 12 November 2015 with Mr Peter Mulcahy as the Chair. The claimant attended with his union representative. Mr Thompson suggested that the capability hearing should be adjourned until the outcome of the grievance was known. He also advised that the claimant may consider ill health retirement and wanted to see the figures first. Mr Mulcahy advised

that the pensions matter was not something that the respondent could get involved in; it was a matter between the claimant and the NHS Pension Agency and they would have to approach them, and that HR advised the respondent had no control over whether the Pension Agency would accept an application for ill health retirement, but even if he was dismissed on the grounds of ill health that would not prevent him obtaining his ill health pension, and he had been given the documentation at the final sickness hearing. Following a discussion Mr Thompson asked for clarification when the grievance was submitted and Ms McConnell thought it was 24 September.

80. Following discussion the hearing resumed and it was confirmed the grievance would be heard separately. Whilst Mr Thompson was of the view it should be heard first, Ms McConnell advised the Trust policy did not require a grievance to be heard first, and having looked through the grievance there did not appear to be any significant reason why the capability hearing could not proceed.

81. The claimant believed that there was some connection between this and his disclosures. However, it was clear that this decision was made before the claimant mentioned his disclosures. Mr Mulcahy had made it clear what was going to happen following which the claimant said:

> "I submitted a grievance because the lies in the letter Becky Powell sent me I had to go to the CQC because of it."

82. Following this Mr Mulcahy just reiterated what had already been made clear and he said:

> "We will set up a grievance hearing separately as soon as possible."

83. He also indicated that it may be appropriate to hear the claimant's grievance at stage 3 which is the highest level it can be heard at, and Ms McConnell confirmed that that would be arranged as soon as possible. They then commenced the capability hearing. Mr Mulcahy said to the Tribunal he was not aware before this comment that the claimant had contacted the CQC and no further detail was provided regarding what had been discussed with the CQC.

84. Mr Mulcahy was told that the claimant did not want to complete the redeployment forms as he wanted to take legal advice. Those forms were never completed and therefore opportunities for redeployment were limited. The claimant had been sent vacancy bulletins despite his failure to complete the redeployment form. Mr Mulcahy also sought clarification of the outcome of the complaints against the claimant, which included reflective practice which was not a disciplinary sanction. In relation to the second complaint, it was closed without any further action.

85. The claimant's union representative did not agree that support had been provided to the claimant especially in relation to the complaints from patients, and there was no discussion about the level of work the claimant could do. He suggested that had the Trust provided proper support in the early days this may have resulted in a return to work. The only suggestion had been that mediation should have been offered.

86. The claimant said he had been caused stress by the fact Mr Dent only brought with him half a PRF form and had withheld evidence. He said he was made to feel like a criminal in relation to the second complaint. He stated Mr Denton had turned his back on him and laughed at him. Also Mr Curry had made the comment "patients die". The claimant suggested the root cause of his illness was the dreadful management practice. Mr Thompson suggested that the claimant would like to build relationships and "for us to consider alternatives to dismissal". Ms McConnell asked whether it was being suggested the claimant could return to work with mediation, but the claimant said he was too frightened to return as a clinician. The union representative suggested that he may consider redeployment to a different part of the service.

87. Mr Mulcahy said he was getting mixed messages. The claimant had been offered redeployment but had not filled in the forms; Occupational Health said he was not fit; and both himself and Mr Thompson were saying he could not do the job, but at the same time they were saying he would consider redeployment even though he had not engaged with that process. Mr Mulcahy asked the claimant did he want to be employed as a paramedic in the Trust. If yes, what could they do to make that happen? The claimant said he was "not exactly sure where the future lies". His trade union representative suggested that with mediation and reasonable adjustments there may be other roles that the claimant could consider. Mr Mulcahy said 90% of the Trust roles were clinical roles and the claimant had just said he did not want to consider them. He also repeated he did not want to be involved with the 111 service.

88. The claimant said that during the hearing Mr Mulcahy had said the word "bullying" should not be in the dictionary. Mr Mulcahy said he did not remember making that comment and there was no reason why he would make it. The claimant did not have any evidence from his trade union representative to back this up, but neither did Mr Mulcahy have evidence from Ms McConnell to support the fact that he did not say it. In cross examination the claimant added some detail and context to this comment saying that Ms McConnell had put her head in her hands at this point in time.

89. On balance in relation to this issue we prefer the claimant's version of events and find that Mr Mulcahy did make this comment.

90. Mr Mulcahy and Ms McConnell went on to decide that it was clear the claimant was not fit to return to his role as a paramedic and that he had indicated he did not want to return. He felt it was not practicable to wait any further to see if a return to a non clinical role was likely. The claimant was in a supervisory role and there was a strain on the service by his absence. There was no indication of a return to work in the near future. There was no sense that he wished to return to work having refused to engage with the redeployment process. Reasonable adjustments had or should have been made but given that the advice from Occupational Health was that the claimant was not capable of any duties there was nothing which could be done, and the claimant himself had not raised anything that he wished the service to consider. Mr Mulcahy in his decision suggested that redeployment could be looked at during the notice period.

91. Regarding the psychiatric report, regarding post traumatic stress disorder, this had arisen during the later stages of his sickness absence. However, Mr Mulcahy felt it did not make any difference as the claimant was absent due to genuine illness;

whether it was post traumatic stress disorder or stress and anxiety did not add much to the consideration of the factors. He concluded it was appropriate to terminate the claimant's employment on the ground of ill health. This would be on notice and not a payment in lieu of notice. He would be encouraged to complete the redeployment form so this could be investigated during the 12 week notice period and it would also be arranged he could meet the consultant paramedic, Matt House, to receive further feedback on the complaints made about him. He also said if he felt able to return to work in the notice period he could facilitate a redeployment to Fylde region in a Band 6 role and confirmed he would return to full pay during his notice period. He was advised of his right to appeal and stated that the stage 3 grievance would also take place.

92. On 17 November 2015 the claimant contacted the Trust and spoke to Ms McConnell. He confirmed he intended to apply for ill health statement and said he wished to receive a payment in lieu of notice as a lump sum and not have to work out his notice. This was approved and the payment in lieu made and confirmed by a letter on 20 November 2015. He did not appeal against the decision to terminate his employment and it was not possible to pursue any redeployment due to the payment in lieu of notice. Further, it was not possible to hear the grievance during the notice period as originally envisaged because that notice period was truncated.

93. The respondent continued to arrange a grievance hearing and it was arranged for 15 December 2015. It was made clear it was to be heard at stage 3 and there was no complaint from the claimant. Mr Forrest who heard the grievance, who was Director of Organisational Development, stated that it was at stage 3 because, as far as he understood, it had been agreed with Mr Pennington and his trade union representative at the capability hearing. All the invitation letters said it was at stage 3 and no complaint was received. The claimant presented an additional response at the actual hearing and no complaint was in that.

94. Mr Doolan called two witnesses who were involved in the investigation who would be able to ask questions. The claimant said he had no witnesses. The claimant said that the outcome he wanted was the truth and appropriate be taken for dishonest conduct. There was a discussion about the fact that Mr Thompson had wanted the grievance to be heard before the capability hearing, but it was pointed out that the claimant had then terminated his employment early and this had affected when the grievance could be heard.

95. In relation to the claimant’s complaints which centred on the two investigations against him, it was confirmed that one outcome was a reflective blog and the other was informal. Mr Forrest considered those were normal outcomes for paramedics’ practice. The claimant had disagreed that no blame was allocated to him but accepted that there were no formal sanctions. Mr Doolan confirmed he had not received details of the patient complaints as the Making Experiences Count team do not normally share details of any complaints.

96. The claimant complained that his interviews amounted to an interrogation and Mr Doolan could not comment on that, but he had the two advanced paramedics waiting outside, Mr Dent and Mr Tierney, but the claimant said he did not want to question them. There was a further discussion about the response letter provided by Becky Powell. It was confirmed that Matt House had also reviewed the two investigations into the patient complaints. It appeared that the claimant had received

a three year warning from the HCPC regarding one or other of the complaints, but Mr Doolan confirmed he was unaware of that. There was also a discussion of the safeguarding concerns of the claimant in relation to the patient he felt was a victim of domestic violence and had been returned home placing him at risk. He questioned whether or not the safeguarding of vulnerable adults form could be found on the system of Lancashire Care NHS Foundation Trust, but Mr Doolan could not comment because that was an outside organisation.

97. The claimant suggested that an error in the dating of a letter from Mr Mulcahy was dishonest conduct. He complained the grievance was not heard at the sickness review meeting. He complained that Mr Doolan had been dishonest in inviting him to a meeting in 2012 to discuss a lack of progress on the CMI management course. Mr Forest felt that the claimant was quite accusatory and Mr Thompson stepped in and decided it would be appropriate to sum up. Ms Ward (attended from HR) asked some questions of Mr Doolan. Mr Doolan pointed out that after the discussion about the lack of progress on the CMI there was a period of secondment in acting up for the claimant; he was given six months' acting up into the Operation Manager's role and he had not had to apply for that, and it showed that there were no detrimental consequences to that discussion.

98. The decision of the panel was contained in a letter dated 19 February. They took into account that of the 47 detailed points in the claimant's grievance they related to broadly five areas:

(1) The application of the performance management policy;

(2) Conduct of investigations into complaints;

(3) Management of his sickness;

(4) General management and support;

(5) The impact this had on him which he considered to be bullying.

99. There seemed to be a number of key events:

(1) The October 2012 performance management meeting;

(2) The October 2013 PRF and subsequent investigations;

(3) The June 2014 PRF and subsequent investigations;

(4) Sickness from November 2012 to January 2013 and March 2013 to May 2013;

(5) The sickness starting November 2014 resulting in the dismissal in November 2014;

(6) The questions raised by Mr Pennington in June 2015.

100. Mr Forrest did not believe that management had decided to manufacture the dismissal of the claimant. He had been given the opportunity to act up in the role of Operations Manager for six months. The outcomes had been reflected practice.

There was no formal sanction. It was normal practice for paramedics. The performance management issue was perfectly in order and was dealt with informally. If there was some campaign to get rid of the claimant they would have felt that the episode would have resulted in greater sanctions against the claimant. The Trust had no alternative but to investigate external complaints; neither did they believe that because of a second page of a PRF meeting that there was dishonest conduct on the part of Mr Doolan and Mr Dent, and nothing was raised about it at the time. There was no dispute that he was not completing the CMI course properly and therefore a performance management discussion was entirely correct. They noted that two investigations had been independently reviewed by Matt House, a consultant paramedic, and whilst such investigations do cause distress there was no inappropriate conduct in the way in which they were carried out. They were entirely consistent with how investigations were normally carried out. There was no evidence of any bullying or undermining of the claimant. They believed the two investigations were appropriate, fair and just.

101. Regarding the sickness absence, they considered that there could have been more meetings, but again there was no evidence of bullying or harassment, withholding of evidence or dishonesty on the part of those involved. Overall the management of the sickness absence was sufficient, complicated by the claimant's own wish not to engage at certain times. They agreed that it might be better in the future if there was a greater level of feedback once a case had been closed; neither did they believe that discussions regarding redeployment were evidence of bullying and harassment. It was an inevitable part of the discussion where the management of sickness absence was involved and is required by Trust policies; therefore they decided that the grievance should not be upheld. No issues of disability discrimination were raised, even though the dismissal was because of ill health.

102. The claimant did make passing reference in his documentation to the fact he had made a complaint to the CQC. It only related to one small evidence of the grievance; that is his belief that a patient had been the victim of domestic violence, and did not impinge on the decision making process.

103. Regarding whether the grievance should have been heard before the capability hearing, had he not sought a payment in lieu of notice and remained in employment then the grievance could have taken place while he remained an employee. This also deprived him of the opportunity to see redeployment and he had never appealed the decision to dismiss him.

104. We note in evidence that when the claimant was pressed about why he did not fill in the redeployment forms he said he had been advised by the Occupational Health doctor not to do so, but he also indicated that had he filled in the forms he would not be able to bring a Tribunal claim and get ill health retirement.

105. The claimant would complained about a number of other incidents The claimant said that Mr Curry had said to him “if we want to get you we can”, and the claimant linked this to a survey. A survey undertaken by Zeal Solutions who were an external independent company who were asked to interview approximately 100 staff. This was carried out confidentially and a report was produced the Chief Executive, and Mr Curry was unaware of what the report said. The claimant had claimed that Mr Curry had made a note of the people who were interviewed. Mr Curry denied this and said that all staff were afforded complete confidentiality. He was unaware of any

criticisms of the Zeal process and he had no recollection of saying to the claimant, "If we want to get you we can". The claimant believed there was some link between the comment the Zeal process. We find this entirely unconvincing and inherently improbable. The claimant could not say when this had happened or in what context.

106. Mr Curry struck us as an astute witness and when he said in his witness statement that he could have been sacked for making such a comment we were convinced that his self awareness was such that he would know not to make such a comment, and further that given the explanation of the circumstances surrounding the Zeal survey there would be no information received by Zeal on which management could act, and indeed there was no evidence that any actions were taken against the claimant because of this. The allegation arose in September 2015 following the claimant's grievance and it was mentioned in his claim form. The claimant could put no date on when this occurred in any event.

107. The claimant also complained that the respondent had failed to undertake a stress risk assessment. The respondent explained that this process for use where someone was in work when they were aware they were suffering from stress. The respondent said they were not aware of this following the claimant's successful return to work in 2013. We accept this was the respondent's understanding and this was the position as the claimant failed to discuss with anyone any issues of rising stress, even though he had been encouraged to do so following his absence in 2013.

The Law

Disability Discrimination

Disability Status

108. The respondent disputed that the claimant was disabled from any point earlier than November 2014 but accepted he was disabled by reason of stress, anxiety and depression from then onwards. However, they did not accept knowledge of disability at any time.

109. Disability status is determined by reference to the information available at the relevant time i.e. when the alleged acts of discrimination took place.

110. Section 6 defines a disabled person as a person who has a disability, and a person has a disability if:

> "He or she has a physical or mental impairment which has a substantial and long-term adverse effect on his or her ability to carry out normal day-to-day activities. The burden of proof is on the claimant to show that he or she satisfied this definition."

111. "Substantial is defined in section 212(1) of the 2010 Act as meaning more than minor or trivial, and the effects of any treatment must be discounted in considering whether there was a substantial adverse effect. The EHRC Employment Code states that:

> "Normal day-to-day activities are activities that are carried by most men or women on a fairly regular and frequent basis: walking, driving, typing and forming social relationships…"

And adds:

> "The term is not intended to include activities which are normal only for a particular person or group of people, such as playing a musical instrument. However, they are effected in that way but are also effected in other normal day-to-day activities. They could be covered by the definition."

112. "Long-term" means has lasted for at least 12 months, is likely to last for at least 12 months or is likely to last for the rest of the life of the person affected.

113. The House of Lords in **SCA Packaging Limited v Boyle [2009]** stated that "likely" meant "could well happen".

114. A person can also be disabled if they have a recurring condition. The Tribunal must decide whether the substantial adverse effect of the impairment is likely to recur. In deciding this, the Tribunal should disregard events taking place after the alleged discriminatory act but prior to the Tribunal hearing (**Richmond Adult Community College v McDougall [2008] Court of Appeal**).

A. Direct Discrimination

115. In accordance with section 13 of the Equality Act 2010 direct discrimination is less favourable treatment because of a protected characteristic, disability being a protected characteristic. Section 13 states:

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

116. When deciding whether less favourable treatment has occurred, section 23(1) requires that:

> "On a comparison of cases for the purposes of section 13…there must be no material difference between the circumstances relating to each case."

117. This goes on to say at section 23(2):

> "The circumstances relating to a case include a person's abilities if –
>
> (a) Are comparisons for the purposes of section 13 and the protected characteristic is disability…"

118. The protected characteristics must be the effective cause of any less favourable treatment (**O'Neill v The Governors of St Thomas More Roman Catholic Voluntary Aided School & another**). It is not normally possible to bring a direct disability discrimination claim if the employer was unaware of the disability at the time of the act complained of took place. In order to determined whether

unfavourable treatment has taken place the Tribunal must look towards a comparator, whether actual or hypothetical.

Burden of Proof

119. In **Glasgow City Council v Zafar**, the House of Lords commented that:

> "In discrimination cases those who discriminate do not generally advertise their prejudice and therefore the burden of proof rules as set out under section 136 of the 2010 Act are more favourable, in that once a claimant shows prima facie evidence from which the Tribunal could conclude in the absence of any other explanation that an employer has committed an act of discrimination the claim will be upheld unless the employer can show it did not discriminate."

120. A Tribunal can draw conclusions from inferences regarding the construction of a prima facie case; however Tribunals must be careful not to conclude because an employee behaves unreasonably that there has been discrimination. Inferences can be drawn from a failure to follow procedures and actions tainted by discriminated, etc. Inferences can point to subconscious motivation.

121. In **The Commission of Police of the Metropolis v Maxwell EAT 2010** it was emphasised that:

> "Particularly in cases where there are a large number of complaints the Tribunal is not obliged to go through the two stage approach in relation to each and every one."

122. Similarly, in **Pnaiser v NHS England [2016] EAT** stated that:

> "Whilst Tribunals might find it helpful to go through the two stage suggested in **Igen v Wong**, it is not necessarily an error or law not to do so and in many cases moving the second stage is sensible. In deciding whether there is enough to shift the burden of proof to the respondent, it will always be necessary to have regard to the choice of comparator, actual or hypothetical, and to ensure that he or she has relevant circumstances which are "the same or not materially different" as those of the claimant having regard to section 20(3)."

B. <u>Discrimination arising from a disability</u>

123. Section 15 of the Equality Act 2010 provides that:

> "A person (A) discriminates against a disabled person (B) if A treats B unfavourably 'because of something arising in consequence of B's disability' and A cannot show that the treatment is a proportionate means of achieving a legitimate aim."

124. The case of **T-Systems Ltd v Lewis EAT [2015]** was relied on by the respondent. The EAT explained that:

> "Unfavourable treatment is that which the putative discriminator does or says or omits to do or say which places the disabled person at a disadvantage."

125. Langstaff P in **The Trustees of Swansea University Pension and Assurance Scheme v Williams [2015]** the EAT stated:

> "It is distinct from 'a detriment' or 'less favourable treatment', rather to assess whether something is unfavourable there must be a measurement against an objective sense of that which is adverse as compared to that which is beneficial."

126. Section 15(2) goes on to state that:

> "Section 15(1) does not apply if A shows that A did not know and could not reasonably have been expected to know that B had the disability."

127. There is no need for a comparator in order to show unfavourable treatment under section 15. It is rather that the Tribunal should look at whether the claimant was put under a disadvantage.

128. The example in the EHRC Employment Code is that of where a disabled worker with multiple sclerosis is dismissed on account of having taken six months' sick leave. The Code states:

> "In considering whether this amounts to discrimination arising from disability it is irrelevant whether or not other workers would have been dismissed for having the same or similar length of absence. It is not necessary to compare the treatment of the disabled worker with that of her colleagues or any hypothetical comparator. The decision to dismiss her will be discrimination arising from disability if the employer cannot objectively justify it." (Paragraph 5.6)

129. The words "because of" requires a Tribunal to ask "what was the alleged discriminator's reason for the treatment in question?" If it is not obvious the Tribunal must enquire into the mental processes, conscious and subconscious, of the alleged discriminator; or alternatively what is "the reason why"? The consequences of a disability include anything which is a result, effect or outcome of a disabled person's disability, for example the inability to walk. An example given in the Code is:

> "A woman is disciplined for losing her temper with a colleague. However this behaviour was out of character and as a result of severe pain caused by her cancer of which the employer is unaware. The disciplinary action is unfavourable treatment. The treatment is because of something which arises in consequence of the worker's disability."

130. It does not matter that the respondent does not know that "the something arising" is a result of the disability, but the employer must know or be expected to know that the individual was disabled.

131. Detailed guidance is given in **Pnaiser vs NHS England (2016) EAT** which we do not recite here but we have taken in to account.

C. Harassment

132. Section 26 of the 2010 Act defines "harassment" as:

> "Unwanted conduct which is related to a relevant characteristic and 'has the purpose or effect of creating an intimidating, hostile, degrading, humiliating or offensive atmosphere of the complainant or violating the complainant's dignity'."

133. "Purpose" requires an analysis of the alleged harasser's motive or intention. "Effect" is both objective and subjective and requires a Tribunal to consider the effect of the conduct from the claimant's point of view, but must also ask whether it was reasonable of the complainant to consider the conduct had that effect, that being the objective element.

D. Failure to make reasonable adjustments

134. Section 20(3) of the 2010 Act requires that:

> "Where a provision, criterion or practice of A's puts the disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled then they take such steps as it is reasonable to avoid the disadvantage."

135. Section 21(1) provides that:

> "A failure to comply with section 20(3) is a failure to comply with the duty to make reasonable adjustments."

136. Schedule 8 Part 3 paragraph 20 of the 2010 Act states that:

> "A is not subject to a duty to make a reasonable adjustment if A does not know and could not reasonably be expected to know that a disabled person has a disability and is likely to be placed at the substantial disadvantage."

Jurisdiction/Time Limits

137. Section 123(1)(a) provides that:

> "Complaints ought to be presented within a period of three months starting with the date of the act to which the complaint relates."

138. Section 140B of the Employment Act 2010 provides for extensions to the time limit to facilitate early conciliation prior to the commencement of proceedings and that the time limits are extended accordingly.

139. The claimant completed early conciliation notification on 11 February 2016 and was issued with a certificate on 2 March 2016. He presented his complaint to the Tribunal on 30 March 2016. Therefore every complaint relating to events which occurred prior to 11 November is prima facie out of time (respondent's submissions). This, the respondent submitted, included allegations 1-19, 23 and allegation 2 in relation to protected disclosures.

140. In relation to reasonable adjustments section 123(3)(b) provides that:

> "A failure to do something is treated as occurring when a person decided upon it, and it requires the Tribunal to decide when something should have been done and the claimant has to bring his claim within three months of that date."

141. The respondent submitted that the claimant considered the reasonable adjustments ought to have been made prior to his dismissal on 12 November 2015 and accordingly allegation 15 is also out of time.

142. Where a matter is ostensibly out of time a Tribunal can find that there has in fact been a continuing act of discrimination. This is set out in section 123(3)(a) of the Equality Act 2010 which provides that:

> "An act of discrimination which extends over a period shall be treated as done at the end of that period."

143. The leading case on this issue is **The Commission of Police for the Metropolis v Hendricks [2003] Court of Appeal**. In **Hendricks** the Court of Appeal made it clear it was not appropriate for a Tribunal to take too literal an approach to the question of what amount to continuing acts by focussing on whether the concept of policy/rule/scheme/regime or practice fit the facts of the particular case. In **Hendricks** the claimant made 100 allegations of discrimination against some 50 colleagues. The Court of Appeal held that it was not necessary to discern a policy. The focus should have been on whether the Police Commissioner was responsible for an ongoing situation or continuing state of affairs in which female ethnic minority officers were treated less favourably, or was it an act extending over a period or a session of unconnected or isolated specific acts for which time would begin to run from the date when each specific act was committed.

144. The Court of Appeal, however, in **Robertson v Bexley Community Centre** took a different approach, but Hendricks was then confirmed in **Lyfar v Brighton & Sussex University Hospital Trust [2006]** Court of Appeal. It was said that:

> "The claimant must have a reasonably arguable basis for the contention that the various complaints are so linked as to be continuing acts or to constitute an ongoing state of affairs."

Just and Equitable

145. If a claim is out of time the Tribunal has a broad discretion to extend the time limit where it is satisfied that it is just and equitable to do so under section 123(1)(b) of the Equality Act 2010. The burden is on the claimant to establish that it would be just and equitable.

Protected Disclosures

146. The Public Interest Disclosure Act 1998 came into force on 2 July 1999 and includes a right not to be subjected to a detriment, enacted by section 47B of the Employment Rights act 1996, and the right not to be dismissed, section 103A of the 1996 Act, because of a protected disclosure.

147. Section 43A says that:

> "A protected disclosure means a qualifying disclosure which is made by a worker in accordance with any sections 43C to 43H."

148. Section 43B states that:

> "(1) In this part a 'qualifying disclosure' means a disclosure of information which in the reasonable belief of the worker making the disclosure is made in the public interest and tends to show one or more of the following –
>
> (a) That a criminal offence has been committed, is being committed or is likely to be committed;
>
> (b) That a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject; and
>
> (c) That a miscarriage of justice has occurred, is occurring or is likely to occur;
>
> (d) That the health and 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 the information tending to show any matter falling within any one of the preceding paragraphs has been or is likely to be deliberately concealed."

149. Whilst there are provisions about who disclosures can be made to, currently in the Health Service no point is taken regarding who the disclosure is made to and the disclosure can be made to an outside body without challenge from the respondent.

150. In addition, section 103A states that:

> "An employee who is dismissed shall be regarded for the purposes of this part as unfairly dismissed if the reason (or if more than one the principal reason) for the dismissal is that the employee made a protected disclosure."

151. There must be a disclosure of information. This was pointed out in **Cavendish Munro Professional Risk Management Limited v Geduld EAT**. It is not sufficient that a claimant has simply made allegations about the wrongdoer, especially where the whistle-blowing occurs within the claimant's own employment as part of a dispute with his or her employer. It was stated that, "the ordinary meaning of giving information is conveying facts. In the course of the hearing before us a hypothetical was advanced about communicating information about the state of the hospital. Communicating information would be, "the wards have not been cleaned for the past two weeks. Yesterday sharps were left lying around". Contrasted with that would be a statement that, "you are not complying with health and safety requirements". In our view that would be an allegation not information. "

152. However, since then in **Western Union Payments Services UK Limited v Anastasiou EAT [2013]** it was said that:

> "The distinction can be a fine one to draw and one can envisage circumstances in which the statement of a position could involve the disclosure of information and vice versa. The assessment as to whether there has been a disclosure of information in a particular case will always be fact sensitive."

153. In **Kilraine v London Borough of Wandsworth** Langstaff J said:

> "I would caution some care in the application of the principle arising out of Cavendish Munro. The particular purported disclosure that the Appeal Tribunal had to consider in that case is set out at paragraph 6. It was in a letter to the claimant's solicitor to her employer. On any fair reading there is nothing in it that could be taken as providing information. The dichotomy between information and allegation is not one that is made by the statute itself. It would be a pity if Tribunals were too easily seduced into asking whether it was one or the other when reality and experience suggest that very often information and allegation intertwine. The decision is not decided by whether a given phrase or paragraph is one or rather the other, but is to be determined in the light of the statute itself. The question is simply whether it is the disclosure of information. If it is also an allegation, that is nothing to the point."

154. The treatment of course has got to be because of the act of disclosure. In **Panayiotou v Chief Constable of Hampshire Police [2014]** the EAT upheld the decision that a police officer's dismissal was because of his long-term sickness absence and his obsessive pursuit of complaints and therefore was not connected with the public interest disclosure that he had certainly made earlier. Lewis J stated:

> "There is in principle a distinction between the disclosure of information and the manner or way in which the information is disclosed. An example would be the disclosure of information by using racist or otherwise abusive language. Depending on the circumstances it may be permissible to distinguish between the disclosure of information and the manner or way in which it was disclosed."

155. In **Norbert Laboratories GB Limited v Shaw EAT** it was established that it is acceptable to aggregate information received separately to combine to be one disclosure.

A Qualifying Disclosure

156. The claimant has to establish that he or she has a reasonable belief that the disclosure is in the public interest and tends to show one of the six statutory categories of failures set out in section 43B(1) of the 1996 Act. It is not necessary for the information to be actually true (**Darlington v University of Surrey [2003] EAT**).

157. It is a subjective test, therefore it is the reasonable belief of the worker making the disclosure and the individual characteristics of that worker need to be taken into account. It is not whether a hypothetical reasonable worker would have

held such a belief. This was confirmed in **Korashi v Abertawe Bro Morgannwg University Local Health Board**.

158. It is on the employee to establish the relevant failure. The employee must identify to the employer the breach of the legal obligation concerned, although it need not be in strict legal language (**Fincham v HM Prison Service EAT [2001]**).

159. In terms of "likely", the claimant has to show the information disclosed tends to show that it is probable or more probable than not that the employer is failing or will fail to comply with a relevant legal obligation (**Krause v Penna PLC [2004]**).

160. In **Babula v Waltham Forest College [2007]** the actual misdeed need not have existed, only that the claimant reasonably believed that it did.

161. In respect of detriment, generally the definition of discrimination law is adopted and it is not necessary to show some physical or economic consequence flowing from the matter complained of (**Shamoon v Chief Constable of the Royal Ulster Constabulary (Northern Ireland) [2003] UKH House of Lords**).

Burden of Proof

162. In respect of detriment cases, section 48(2) states that:

> "On such a complaint it is for the employer to show the ground on which any act or deliberate failure to fact was done."

163. However, it has also been held that there is an initial burden on the claimant to show on the balance of probabilities that there was in fact:

(a) a legal or other relevant obligation on the employer or other relevant person;

(b) the information disclosed tended to show that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject.

Automatic unfair dismissal

Section 103A of the 1996 Act states that an employee will be regarded as unfairly dismissed if the reason or the principal reason for the dismissal is that the employee made a protected disclosure.

As in a discrimination caser it is necessary to consider uncounsious motivation and to look to draw inferences from primary facts.

The burden of proof is on the employer to show the reason for dismissal as with any unfair dismissal case. Usually one of the potential fair reasons under section 98 of the 1996 act will be advanced. The claimant advances the protected disclosure as the real reason, if the claimant establishes a potential case,or a prima facie case the burden then is on the employer to show their reason is the real reason for dismissal.

The burden of proof is not on the claimant to prove the reason for dismissal is the protected disclosure (**Kuzel vs Roche Products Limited 2008 CA)**

Unfair Dismissal

164. Section 98 of the Employment Rights Act 1996 states that:

"(1) In determining for the purpose of this part whether the dismissal of an employee is fair or unfair it is for the employer to show –

(a) The reasons or (if more than one the principal reason) for the dismissal; and

(b) That it is...a reason falling within subsection (2)…

(2) A reason falls within this section if it –

(a) relates to capability…of the employee performing work of the kind which he is employed by the employer to do…

(3) ..

(4) Where the employer has fulfilled the requirements of subsection (1) the determination of the question of whether the 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 sufficient reason for dismissing the employee, and

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

Capability Dismissal

164. The respondent should consider whether the employer can be expected to wait longer for the employee to return (**Spencer v Paragon Wallpapers Limited [1977] EAT** and **S v Dundee City Council [2004]** Court of Session. The Tribunal must balance the relevant factors and the circumstances of an individual case, such as whether other staff are available to carry out the absent employee's work, the nature of the employee's illness, the likely length of his or her absence, the cost of continuing to employ the employee, the size of the employing organisation and balance against these considerations the unsatisfactory situation of having an employee on very lengthy sick leave.

165. If an employee concludes following consultation with the employee and a medical investigation that a condition is unlikely to improve and there is no prospect of a return to work in the foreseeable future even if adjustments are made dismissal may be fair. Full consideration must be given to any recent improvement in the employee's condition or attendance record.

166. If the employer reasonably reaches the conclusion that the employee will not be fit for work for a prolonger period of time, the fact that following his or her dismissal he or she recovers more quickly than anticipated will not render the dismissal unfair.

167. It is also relevant to consider whether sick pay is still being provided or has ceased to be payable, and it may be unfair to dismiss without first considering whether the individual is contractually entitled to be medically retired and granted an ill health pension.

168. Similarly, the fact that an employee's incapacity arises from a disability for the purposes of the Equality Act does not mean that a dismissal for a reason related to this must be unfair (see **Royal Liverpool Children's NHS Trust v Dunsby [2006] EAT**) which said that disability related absences can be taken into account for these purposes provided that any required defence for justification under the Equality Act is made out.

169. The Tribunal must consider whether the decision to dismiss was within the range of reasonable responses of the reasonable employer (**British Leyland UK v Swift [1981]** as applied in **Iceland Frozen Foods Limited v Jones [1983] EAT**). A Tribunal must not substitute its own opinion for the objective test of the band of reasonable responses. The reasonable responses test also applies to the procedure by which the decision is reached (**J Sainsbury's PLC v Hitt [2003] EAT**).

170. Finally, defects in the original disciplinary hearing and pre dismissal procedures can be remedied on appeal (**Taylor v OCS Group Limited [2006] Court of Appeal**), whether it is a re-hearing or a review of the original decision. In addition, if an appeal is carried out unfairly it could make an otherwise fair dismissal unfair (**Western Midlands Co-operative Society Limited v Tipton [1986]**). However there was no appeal in this case.

Submissions

Respondent's general submissions

Time Limits

171. The respondent on time limits stated that the claimant was out of time in relation to allegations 1-19, 23, allegation 2 (whistle-blowing) and allegation 15 in relation to reasonable adjustments. They stated that treatment should not be considered to be a continuing act because:

(i) There was a gap of one year and seven months between allegations 1 and 2 and allegation 5;

(ii) There was a gap of five months between allegations 5/6 and 8/10;

(iii) There was a gap of six months between allegations 6 and 12; and

(iv) A gap of four months between allegations 12 and 18.

172. Further that the complaints fall into distinct categories which were entirely unrelated:

(i) Performance management;

(ii) An incident the claimant attended before Mr Donnelly

(iii) The investigations;

(iv) The capability hearing; and

(v) The grievance.

173. Further, many of the matters were one off comments or actions and related to numerous different people arising from entirely unrelated factual circumstances. Even where there was one person involved, for example MC and MD, this is just one factor and not necessarily a conclusive factor.

174. In respect of "just and equitable", the respondent stated that the claimant had not provided any reasonable explanation for why his complaints were presented out of time, and as far as his ill health impacted on his ability to present a complaint he presented his current complaint during a period following his dismissal when he stated he was particularly low. He also had the assistance of his trade union representative throughout the period.

175. The respondent stated that it had affected the cogency of the evidence which the respondent's witness could give as they struggled to recall the details of circumstances going back to 2012.

176. The claimant also gave evidence he was aware of the time limit and either sought advice and did not follow it or failed to seek advice from his trade union representative in respect of this.

Disability status

177. The respondent accepts that the claimant was disabled by reason of stress, anxiety and depression from November 2014 onwards. It does not accept knowledge of disability. It submits that on the basis of the claimant's medical evidence, as there was no other evidence led by the claimant (only his disability impact statement) that there was no evidence that the claimant was suffering from any mental illness as of October 2012; he had mental health issues February to March 2010 for one month. By the time of his first complaint the respondent was only aware of one episode of stress, anxiety and depression which had lasted for just over one month and had occurred nearly two years and seven months earlier.

178. Prior to the claimant's first absence from 22 November 2012 to 24 May 2013 he did not discuss his feelings with anyone. His first period of absence was for six months. Following his return to work he had 1½ years without any report of stress, anxiety or depression, and indeed described himself as fully recovered (see page 138).

179. Prior to November 2014 the total amount of time the claimant had been off with similar symptoms was seven months, with a significant period between the two episodes. There was no evidence suggesting he had a propensity to mental illness or that there was a likelihood of a reoccurrence or anxiety, stress or depression that

he had suffered in February 2010 or the second episode between November 2012 and May 2013.

Knowledge

180. The respondent denies knowledge of disability at any stage, but particularly prior to November 2014. It did not know nor could it be reasonably expected to know that the claimant's disability would:

(i) Affect him in the way alleged; or

(ii) That they had any knowledge at all.

The Claimant's Submissions

181. The claimant being a litigant in person obviously struggled to make submissions. The claimant asked us to rely on his disability impact statement. He was a different person now although he was still sensitive and easily depressed.

182. The claimant referred to the failure of Mr Doolan to find two issues he had referred to. He said it would have been easier to get the PDFs even now.

183. The claimant also relied on the respondent's failure to utilise the NWAS work related stress procedure (page 510A). He believed the respondent had not complied with their sickness absence procedure.

184. The claimant also raised a number of new issues in his submissions and he was advised that he could not now raise new issues.

185. In respect of his whistle-blowing claim, the claimant stated that he gave Mr Khan his NWA incident numbers for the two incidents which would have revealed his identity.

Credibility

186. We did not find the claimant a very credible witness. We found that in some instances it was his perception which led to a skewed view of matters but in other instances it was quite clear from the documentation that some of the claimant's claims were simply unsustainable and his persistence with them until the start of the Tribunal suggests to us a fixed will view that did not alter when diametrically opposing facts were available. This was exemplified by the fact the claimant withdrew several of his complaints during cross examination when presented with clear evidence that either something had not happened or he had not been treated unfavourably. As a result of this we felt we could not rely 100% on the evidence he gave us and in general preferred the respondent's evidence to that of the claimant.

Conclusions

Time Limits

187. We find that the issues the claimant raised up to number 11 which took place on 28 October 2014 are out of time as they encompass many disparate one-off incidents involving different people with no common thread running through them.

We accept, however, that there was a continuing course of conduct from when the claimant went off sick in November 2014 as two main issues arise throughout this period - dealing with the grievance he raised and dealing with his sickness absence. We think that is sufficient to form a continuing course of conduct ending arguably with an “in time” issue i.e. his dismissal.

188. In respect of whether it would be just and equitable to allow the claimant to proceed out of time with his earlier claims, we find that it would not be. The claimant was assisted by his union throughout and there was no cogent reason why he could not bring a claim earlier regarding the individual matters he complained of. Although he had been ill he had also been back at work for a considerable period close to the earlier matters he complains of.

189. Nevertheless we have gone on to consider all of his claims.

Protected Disclosures

190. In respect of the protected disclosures, we find that the first disclosure regarding the domestic violence was sufficient to meet the test in, it was reasonable for him to believe that it tended to show concealment in the light of Becky Powell not being able to find his referral form. He did not trust the system and this was just grist to the mill. In addition, the concealment was potentially of a legal obligation or health and safety matter. It was reasonable for the claimant to believe that in not ensuring that his referral was passed on to the Local Authority that there was such a breach, albeit it appears in reality that the failure to pass on the referral, which in fact had not happened, would not have been any breach of a legal obligation. This was also clearly in the public interest – to ensure an efficient safeguarding system across agencies.

191. In relation to the elderly patient who was not conveyed to hospital, the claimant's actual complaint here was hard to understand. It appeared to be that he felt it was unreasonable or inefficient for the respondent to have a policy that is if somebody met the “phew” score of 4 they should be conveyed to hospital. The claimant did not explain what breach of section 43B he alleged had occurred here, and therefore we find that this information did not tend to show any breach of section 43B; it was simply the claimant's personal opinion that somebody should not necessarily be conveyed to hospital and this may be a breach of their dignity in dying.

192. The next question is whether the claimant has suffered a detriment in relation to the matters he complains of; first of all in relation to handling the claimant's grievance in a fair and timely manner, specifying three particular matters referred to earlier.

193. We find that the respondent dealt with the claimant's grievance in a fair and timely manner. It is always very difficult to deal with grievances quickly, particularly the claimant’s which, as we have seen, was extremely complex and raised multiple questions, possibly up to 100 questions. It was reasonable of the respondent to go to stage 3. They explained why they did this. The claimant and his union representative, who was extremely experienced, did not complain at the time and therefore we do not believe that the claimant viewed it as a detriment at the time, and whilst the claimant said this denied him the opportunity to appeal, the fact that

he did not appeal his dismissal suggests to us he would not have appealed this in any event.

194. In respect of the respondent only dealing with the grievance after the termination of the claimant's employment, this was entirely the claimant's responsibility and not the respondent's, as he chose to end his employment early, and on the balance of probabilities it seems likely to us the respondent would have dealt with the grievance within the three month notice period, even though ultimately that did not occur: it was meant to originally take place on 17 December which was within the notice period. Consequently whilst it was potentially a detriment as it was the claimant's choice it could not be a detriment.

195. Although we have rejected the detriments we have gone on to consider whether the detriments arose as a result of the claimant making a protected disclosure.

196. Despite our repeated exhortations to the claimant to state on what basis, including whether he asked us to draw any inferences, he was arguing that the alleged detriments were due to the protected disclosures, the claimant really in essence relied on the fact that the respondent would have known the complaints were from him because he had given the CQC the incident numbers. Whilst he had no evidence that these numbers were ever passed on to the respondent when the CQC asked the respondent about these complaints we accept it is likely but there was no evidence that any of his colleagues making the decisions he complains of knew of the CQC enquiry.

197. Accordingly we find there was no evidence whatsoever that the decision to take the grievance to stage 3, to only deal with it after termination, and the delay in dealing with it within 14 days had any connection whatsoever with the fact that he had made disclosures to the CQC on 28 and 29 September.

198. The only reference to the CQC before the issues regarding the grievance were decided on or occurred was the reference in his grievance that he was going to have to go to the CQC not that he had gone. In addition, it was buried within a grievance that included over 100 points. We find it was insufficient to establish any causal connection. The next time he mentioned any disclosure was at the disciplinary hearing with Mr Mulcahy and the decisions regarding the grievance of which he complains had already been made.

199. The second detriment was not making adjustments. However, the claimant was never fit enough to return to work and therefore there was no question of making reasonable adjustments. Therefore we do not accept there were any detriments. If we are wrong on this, in respect of whether the respondent should have obtained a psychiatric report we have accepted their explanation that the NHS Choices guidelines state this must be done by a GP and not by the employer. Regarding redeployment, the respondent would have been happy to consider redeploying the claimant but he refused to fill in the relevant forms and therefore the failure to redeploy him onto other non-frontline duties was a result of his own actions.

200. Again if we are wrong on this there is nothing from which we can conclude that there was any connection with his complaints to the CQC. The psychiatric report decision was made before anyone knew of any disclosures. The redeployment issue

arose because the claimant failed to fill in the relevant forms and asking him to complete them was a normal procedure in an ill health situation. There was nothing to draw an inference from; nothing to suggest anything unusual happened to suggest a causal connection. Therefore again we find there was no connection with the complaints to the CQC.

Disability

1. Status

201. In relation to disability status we find that the claimant was not disabled until November 2014. The claimant's first absence in 2010 was relatively short (5-6 weeks). His second absence was not until November 2012. It was clear, however, that he was diagnosed with anxiety/stress/depression in this period; however he was confident he was fully recovered when he returned to work and that he had 18 months without any further symptoms; neither had the illness lasted for one year by that stage. We have considered whether it should be considered to be a recurring illness, albeit the claimant did not specifically argue this. However the second incident was two years and seven months after the first incident and we feel this is too long to establish that it was recurring and that the absences were in relation to specific issues such as the breakdown of his marriage in 2010 and a complaint in 2012 rather than an underlying condition .. By the time the claimant went off sick again in November 2014 it is established that the claimant was suffering from a recurring illness; the triggers could be in his personal life and/or complaints as this third episode was triggered by complaints again.

2. Knowledge

202. In respect of knowledge, the respondent had reports from Occupational Health. However, at no time did they say that the claimant was disabled. In December 2012 the Occupational Health stated that he was not unfit in general terms but just anxious and distracted. In May they said his symptoms of anxiety and depression were resolving and that it was all related to the HCPC complaint. He confirmed he was 100% fit to return to work after this absence.

203. In the next absence there was an Occupational Health report on 10 December which said that he was on sickness absence due to stress due to workplace circumstances and said he was experiencing psychological symptoms and was not fit to return to work.

204. The August OH report stated that the CBT therapist confirmed depression and anxiety and that he was attending a sleep hygiene clinic, and it was confirmed he had marked situation anxiety regarding the workplace: “His mood is still variable and he also reports flashback and nightmares”. We find from this point that the respondent ought to have reasonably known that the claimant was disabled on a recurring depression basis. Even with the gaps between the incidents it is clear he was reacting to the complaints situation and to being put under pressure. These were last straws that were triggering a deterioration in his mental health and from the Occupational Health report, so although they do not use the word “disabled” from August 2015 we find the respondent did have constructive knowledge of the claimant's disability.

205. Accordingly the incidents the claimant relies on where the respondent does have knowledge and he had disability status and are in time are 15, 16, 17, 18, 19, 20 and 21.

Something arising from disability

206. The claimant relied on being vulnerable as the "something arising" from his disability. We found it very difficult to understand the construct of the claimant's claims here as vulnerability. We proceeded to consider it in the round and we believe what the claimant was attempting to describe was the feeling of fragility and sensitivity to matters which another person without his disability would not have been so vulnerable to. There was no evidence that the alleged vulnerability in any event arose in consequence of his disability. Further the respondent was unaware of his vulnerability.

207. In respect of sleeplessness and absence we accept these are something arising from the claimant's disability.

208. We agree with the respondent that this would mean that all the claimant's section 15 complaints which rely on vulnerability fail.

209. Nevertheless, we have gone on to consider each complaint under section 15 and the other bases on which he brought each disability claim.

(1) Allegation 1: Failing to formally invite the claimant to a performance management meeting (section 15)

(a) The respondent's policy provided for an informal stage. Mr Doolan was acting under this stage and was seeking to support the claimant in not making the matter formal. The claimant accepted in cross examination that he was not being treated differently to the procedure set out in the policy. The claimant was asked, after accepting this, to withdraw this claim but declined. Accordingly there was no unfavourable treatment of the claimant. He was not put at a disadvantage in any way by being talked to about his failings, which were genuine failings, in an informal way.

(b) The respondent had no knowledge of the claimant's disability at this point. The only absence prior to this was February to March which was clearly described as the result of his marriage breaking down and therefore there was no basis for Mr Doolan to conclude the claimant was disabled or vulnerable. There was no Occupational Health report which would fix the respondent with knowledge.

(c) The claimant was not disabled at this point on our findings above.

(2) Allegation 2: Liam Donnelly stating “me and you need to talk”: (harassment or direct discrimination)

(a) We accept Mr Donnelly’s evidence that this was a legitimate comment in the light of the fact that the claimant had not completed the handover of this incident and he needed to catch up with him about it. Whilst he might have been direct he denied that he was aggressive. He said he would have spoken to anybody in a similar way and we accept that the comment was innocuous. The claimant may have perceived it to be more aggressive than it was because of his state of mind, however it was not reasonable to do so as there was a legitimate reason for the comment of which the claimant was aware.

(b) There was no intention of creating an intimidating, hostile, degrading, humiliating or offensive atmosphere and it was not reasonable to consider that it was related to a relevant characteristic in the light of the fact that at the time there was nothing to suggest the claimant was ill or disabled (26 October 2012).

(c) The claimant accepted in cross examination that Mr Donnelly was not aware of the reasons for his absence in 2010 and therefore could not have been reasonably expected to have knowledge of the claimant’s condition, and the respondent did not have knowledge at this stage.

(d) In addition we found that the claimant was not a disabled person at the material time.

(e) Accordingly this issue cannot be harassment or direct discrimination.

(3) Allegation 3: Deliberately providing the claimant with only half a PRF (section 15):–

(a) The facts of this were accepted and Mr Dent stated this was all he had. He supported in that by Mr Doolan. There was nothing deliberate about it: that was just what the Making Experiences Count team had faxed through. The claimant did not complain about this at the time and the meeting could have been stopped. We accept the respondent’s explanation.

(b) This was simply a random event. It was not motivated by any disabling illness on the claimant’s part or any vulnerability arising from a disability.

(c) In addition we found that at this point the claimant was not disabled.

(4) Allegation 5: Not giving the claimant all the information about the second complaint (direct discrimination, harassment and section 15):-

(a) This was a complaint about Shaun Tierney not telling the claimant in full about the complaint. We accepted Mr Tierney's evidence that this was the standard procedure in order to not taint the information provided on the interview, and whilst it was different from Mr Dent's practice we find it was Mr Dent who was likely to be deviating from the norm and being too helpful to the claimant in the information he gave him when investigating the previous complaint.

(b) Accordingly we find there was no unfavourable or detrimental treatment of the claimant.

(c) It cannot be harassment or a section 15 or direct discrimination claim as the claimant was not only not disabled at this point in time but we find that it was reasonable of the respondent not to know the claimant was disabled. Certainly Mr Tierney had no idea and the claimant did not suggest that he did, neither did the respondent as a corporate organisation have knowledge.

(d) In respect of harassment, in addition to all the matters referred to above, having accepted Mr Tierney's evidence there was no purpose to create a hostile or intimidating environment and if the claimant perceived it as such i.e. it had the effect, this was unreasonable of him to do so in all the circumstances; he was simply investigating the matter in the manner he normally did so.

(5) Allegation 6: Shaun Tierney's investigation interview (direct discrimination and section 15):-

(a) The claimant alleged that this was aggressive and that he stated he would be interviewing all the witnesses involved in the incident. This was really symptomatic of the claimant's perception. Mr Tierney accepted he would have made such a comment but he would not have done it aggressively. It was just a normal comment as it would have been normal for him to interview everyone involved in the incident. It would just simply be an indication that there would not be an outcome until this had happened. No conclusions would be made before obtaining all the information.

(b) On the basis of accepting Mr Tierney's denial he was aggressive in saying this was nothing detrimental about this, and it cannot meet the definition of harassment.

(c) We have accepted that the claimant was disabled at this time but that the respondent only had knowledge of his disability from August 2015, therefore the claim would fail on that ground.

(6) Allegation 8: Mr Curry saying "If we want to get you we can" (direct discrimination, section 15 discrimination) -

(a) We have found that this comment was not made as the information the claimant provided to try and provide context to this regarding the Zeal survey was just not credible, and Mr Curry was a credible witness.

(b) There was also evidence that Mr Curry had been supportive to the claimant when he returned to work and the claimant accepted that he had been, which is reflected in the outcome letter from their meeting on 24 May.

(c) In these circumstances we find it is inherently improbable that Mr Curry would have made such a comment.

(d) Further, of course, we found the claimant was not disabled at this point in time and the respondent did not have knowledge of the disability.

(7) Allegation 9: Mr Dent laughing at the claimant's sleeplessness harassment, direct discrimination section 15 claim):-

(a) We accept that for the purposes of a section 15 claim sleeplessness was a something arising from the claimant's disability.

(b) However Mr Dent, who had a good recall of events, and we found a credible witness denied this event. The claimant could not provide any detail regarding the circumstances in which this arose; in fact he did not have a date for this. He said it took place a few days prior to the interview with Mr Dent on 18 November 2013, which we accept on the balance of probabilities. It is implausible that if Mr Dent had done this the claimant would have attended the investigation interview without raising the matter; he could have easily raised it with his union official.

(c) In addition, whilst we have found the claimant was disabled at this point and we have also found the respondent was, reasonably, unaware of it and Mr Dent did not have personal knowledge of it.

(8) Allegation 10: "Patients die" (harassment, direct discrimination, section 15):-

(a) We found on the balance of probabilities that Mr Curry did make this comment . We find he did not turn his back on the claimant. Accordingly part of the factual basis of this allegation falls away.

(b) In relation to patients die – we find this was a supportive comment and the claimant was unreasonable in view it has having the effect of creating a hostile etc environment. It certainly did not have that purpose.

(c) Again the claimant was disabled at this stage but the respondent, reasonably, had no corporate or Mr Curry no individual knowledge of any disability. Which means that the direct discrimation and harassment fail in any event.

(9) Allegation 12: Failing to respond to the claimant's email of 9 June 2015 (direct discrimination and section 15 claim):-

(a) The claimant accepted in evidence that Mr Doolan did respond to the claimant's request and that he told him at the meeting on 11 June that he had looked for the documents but had been unable to locate them.

(b) We accept his evidence on this and therefore no detriment arose.

(c) If it did there was no evidence this was direct discrimination. There was nothing to draw inferences from and in any event the respondent had no knowledge that the claimant was disabled at this time.

(d) In respect of section 15, we have not accepted the "something arising" arose because of the claimant's disability.

(e) There was no evidence to suggest Mr Doolan's failure to find these documents was because of the "something arising".

(10) Allegation 18: Not looking at the claimant's grievance on 15 October (direct discrimination and section 15):-

(a) The reason it was not looked at on 15 October is that the claimant had previously stated he was seeking union advice about whether it should be discussed as he was not sure it should be discussed at a sickness review meeting. He never got back to Mr Doolan and this is why his grievance was not discussed.

(b) There was no evidence he ever changed his position on that and Mr Doolan just assumed that he did not want it discussed on that date, therefore this is not a detrimental action by Mr Doolan.

(11) Allegation 19: Asking the claimant to sign redeployment forms on 15 October 2015 (direct discrimination and discrimination arising from being vulnerable):-

(a) We find this was not a detriment. It was in the claimant's interest to sign the redeployment forms. He was not forced to sign them or badgered into signing them. He simply said he wanted to take legal advice and did not sign them.

(b) It is the standard procedure in any event in an ill health situation to ask the person to consider redeployment and to not do so

unless they sign the relevant form, so this was not to the claimant's disadvantage and it cannot be a detriment or unfavourable treatment.

(c) It cannot be direct discrimination as any other employee in the same situation would have been treated the same.

(d) While being asked to sign the redeployment forms did arise from something in relation to the claimant's disability i.e. the fact that he was off work sick, this was not a "something" that the claimant relied. Nevertheless, even if he had relied on that it is clearly objectively justified as part of the process of considering reasonable adjustments and attempting to maintain the employment of somebody who is on long-term sick.

(12) Allegations 11 and 23 – deliberately withholding two letters from the capability pack (section 15 claim):-

(a) We accepted Mr Doolan's evidence that he felt these were not relevant as they related to a much earlier period of absence which was not being considered at the capability hearing. His evidence was credible and plausible and therefore there was no less favourable treatment.

(b) There was no disadvantage and we do not believe the claimant perceived this at the time as neither he nor his union ever complained or sought to have the letters included.

(c) The claimant did not say what the "something arising" was in relation to this claim.

(13) Allegation 22 – refusing to look at the claimant's grievance in the capability hearing (direct discrimination and section 15 claim):-

(a) We agree that this is not in fact correct and that Mr Mulcahy was willing to look at it, but that the claimant and the union representative wanted it dealt with separately, albeit they wanted it dealt with before the capability hearing. On the basis that Mr Mulcahy's decision was not to do that, the respondent was adopting the claimant's position of hearing them separately so on our understanding of the evidence that would not be a disadvantage.

(b) However, even if there was a disadvantage it is plainly reasonable to deal with it separately, not only because the claimant's representative asked for it but because it was an extremely complicated grievance and would have required more research than would have been possible within the meeting so it would not have been concluded in that meeting in any event.

(c) There was no evidence it was because of the claimant's disability that this course of action was follows. In fact it was

followed initially because the union suggested it be dealt with separately; and neither was there any evidence that it arose from something connected with the claimant's disability other than because of the matters raised by the union.

(d) In relation to direct discrimination there was nothing to suggest a comparator would have been treated any differently.

(14) Allegation 20 – The word "bullying" should not be in the dictionary (direct discrimination and section 15 claim):-

(a) We do find that on the balance of probabilities Mr Mulcahy said this. We do not feel he was lying to us but that it is just something he would not remember after the period of time involved, and we preferred the claimant's recollection given the detail he gave us; neither do we accept the construction that counsel put on it, namely that he meant bullying was so bad the word should not be in the dictionary. We think rather it was a criticism of individuals bringing bullying complaints as the claimant was doing.

(b) It was a detrimental and ill advised comment; however it was not because of something arising from the claimant's disability or direct discrimination but a general antipathy to claims of bullying however they arose,hence a non disabled person would have been treated the same.

(15) Allegation 15 – Failure to make reasonable adjustments:-

(a) We entirely reject the claimant's claim here. The PCP would have to be the requirement for an Assistant Operations Manager to work frontline duties. We find no such PCP was applied by the respondent as until the claimant was fit for work it could not be considered and the fact that the respondent wished the claimant to fill in a redeployment form if he wanted redeployment showed that there were potentially other positions available for him.

(b) In our view the duty to make reasonable adjustments was not triggered as the claimant was not fit to return to work, and the thing that was preventing a return to work was a breakdown in trust and confidence between himself and the respondent, and none of the adjustments the claimant suggested would have alleviated that disadvantage.

(c) It is possible if the claimant was transferred to another area that may have been resolved. However, he was very clear himself that he felt he was unable to return to work, and in those circumstances there were no reasonable adjustments which would have enabled him to return to work.

(16) Allegation 21 – Dismissal (direct discrimination and section 15 claim):-

(a) The direct discrimination claim fails because an individual who had been off sick for 12 months but not disabled would have been treated in exactly the same way.

(b) In respect of a section 15 claim, the claimant was treated unfavourably because something arising from his disability, namely his absence.

(c) Nevertheless, accepting that was the reason for his dismissal the respondent objectively justified their position. The claimant was unfit for any work. He would not apply for redeployment or at that point ill health retirement.

(d) He stated in evidence to us that the reason he did not apply for redeployment was because:

(i) He had been advised not to by Occupational Health; and

(ii) More significantly that he would not be able to bring this claim if he had applied for redeployment.

(e) We find, therefore, that the claimant wholly manipulated the situation and a consideration of the minutes of the capability meeting support our view in this in that he was contradictory and completely lacking in any engagement with a process that might have brought him back to work. He was indicating he wanted to be dismissed on the grounds of capability.

(f) It was objectively justified in any event in that it was the consistent and fair application of the sickness absence management policy, and that the respondent needed to make sure they had sufficient numbers of employees in substantive posts, not acting up or temporary for long periods of time, to enable the effective running of the business and to ensure and promote patient safety.

(17) Allegation 17 – Not taking the claimant's grievance seriously (direct discrimination and section 15 claim):-

(a) The claimant accepted that Mr Forrest had dealt with his grievance properly in cross examination and that his complaint was about how it was dealt with before then.

(b) We have already found that the respondent dealt with the claimant's grievance in a reasonable manner as can be seen from the investigation and its conduct. Ms Powell answered the initial complaints and a local review panel considered the second investigation. There was no unfavourable treatment of the claimant.

(c) There was no evidence a hypothetical comparator would have had such a complex grievance treated any differently or that the

way the grievance was handled had any connection with the claimant's vulnerability or absence from work.

Unfair Dismissal

1. Automatic unfair dismissal due to protected disclosures

210. The claimant's case is that he was dismissed because of his disclosures to the CQC. We reject this contention on the basis that the respondent did not know what the claimant had informed the CQC of, and that he was never asked to expand on these matters at the capability hearing. Mr Mulcahy was not interested or concerned about his reference to this.

211. The claimant was plainly dismissed by reason of capability, having been absent for 12 months. He was absent for a considerable period of time before any disclosure and the matter was proceeding to a final sickness review hearing which would, in all circumstances, inevitably lead to a capability hearing under the respondent's procedure. He had been informed on 15 October his case was being referred to a capability hearing and that a potential outcome was dismissal. Whilst he had delivered his grievance by then, his grievance did not say that he had spoken to the CQC only that he would have to do so in the future.

212. There was no actual knowledge that he had gone to the CQC until the disciplinary hearing with Mr Mulcahy and there was no evidence to suggest that Mr Mulcahy's decision to dismiss had any connection with this matter as he plainly had an abundance of material on which to decide to dismiss the claimant.

213. The claimant relied on the fact that he had given the CQC the incident numbers which were likely to identify him as the whistleblower particularly as he had been investigated in respect of these two matters. We agree with that but the claimant had no evidence or matters from which we could draw an inference that Mr Mulcahy had had any involvement with the respondent's response to the CQC in order to establish causative link.

214. Accordingly the claimant's complaint that he was dismissed for making protected disclosures fails and is dismissed.

2. Section 98 unfair dismissal

215. In respect of the claimant's general unfair dismissal claim, the respondent complied with a fair procedure in that he was referred to Occupational Health throughout; there were a number of meetings; that the respondent sought to resolve the matter by having Mr Matthew House review the situation and meet with the claimant to explain his findings in an effort assuage the claimant's concerns about this (11 June 2015). There were several sickness review meetings (March, June, August and September) with a final review meeting on 15 October. The prognosis was that he was not fit to return to the same place of work and the claimant agreed with this. He was given warnings that he could be dismissed for his absence. There was copious medical evidence and there was no prognosis of a return to work. The claimant at no point said that he could return to work but to a different depot which would have been a logical response on his case that his condition/problems were caused by the individuals he worked with.

216. Insofar as the claimant said the dismissal was unfair because his grievance was not dealt with before the capability hearing, many of the issues relating to his grievance had been responded to by Ms Powell in her letter of 16 September 2015. It was reasonable for Mr Mulcahy on 12 November not to deal with the grievance first as it was exceedingly complex. We consider he acted correctly in going on to consider the relevant issues to a capability dismissal and that he address the correct issues.

217. The respondent of course could not consider redeployment because the claimant did not cooperate with that process, and the claimant had confirmed that he was not well enough to return to work.

218. The claimant did not intend to return to work with the respondent. It appeared that what he wanted was ill health retirement and then redeployment in a non frontline role with another NHS employer on the same terms and conditions. It is clear he wanted to be dismissed from the minutes of the capability hearing.

219. In the circumstances it was clearly within the range of reasonable responses of a reasonable employer to dismiss for capability at this juncture.

220. Accordingly we find that the respondent complied with the requirements of a fair capability dismissal and it was reasonable to dismiss Consequently the claimant's claim of unfair dismissal is dismissed.

Employment Judge Feeney

Date 14th June 2017

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

21 June 2017

FOR THE TRIBUNAL OFFICE