



EMPLOYMENT TRIBUNALS

Claimant: Mr Mark Hemphill

Respondent: Great Western Hospitals NHS Foundation Trust

Heard at: Bristol **On:** 11, 12, 13, 14 and 15 December 2023

Before: Employment Judge Street

Appearances

For the Claimant: in person
For the Respondent: Mr D Isaacs

JUDGMENT having been given orally and sent to the parties on 9 January 2024 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. Background

- 1.1. This is a claim of unfair constructive dismissal. The claim follows the resignation of the Claimant in July 2022 after a course of events extending back to late 2017, when the Trust took on responsibility for the management of the KERI door security system from Carillion. A series of allegations are made of breach of contract and bullying. All claims are denied by the Respondent.
- 1.2. The hearing had been listed for consideration of the merits only. Remedy is adjourned to 15 May 2024.

2. Evidence

- 2.1. The Claimant gave evidence on his own behalf from a written witness statement.
- 2.2. The respondent called 4 witnesses, who gave evidence from written witness statements. They were Rupert Turk, Director of Estates and Facilities, Kevin McNamara, Director of Strategy and Community Services, Suzanne Allison-Green, HR Business Partner and Johanna Bogle, Deputy Chief Financial Officer and appeals officer.
- 2.3. The parties presented an agreed bundle of documents of some 700 pages of which I read those pages to which I was directed. Numbers in brackets in these reasons are references to the page numbers in the agreed bundle. References to witness statements use the abbreviation “ws”.

3. Issues

- 3.1. The issues were discussed at a preliminary hearing on 9 May 2023 and are agreed as follows, using the numbering in the case management order for consistency of reference.

1. *Constructive Unfair Dismissal*

1.1. The Claimant claims that the Respondent acted in fundamental breach of contract in respect of the express terms of his job description and/or the implied term of the contract relating to mutual trust and confidence.

The breaches were as follows;

1.1.1 From November 2017, failing to increase the Claimant’s wages when responsibility for “KERI ” became part of his remit. The Respondent denies that there was any enforceable agreement to increase the Claimant’s wages and avers that a job re-evaluation was proposed.

1.1.2 Failing to remove responsibility for KERI from the Claimant’s remit in July 2018.

1.1.3 Amending the Claimant’s 2015 job description without his agreement to include responsibility for KERI . The Claimant refers to a meeting on 9 August 2018, following which the amendment to his job description was imposed. The Claimant relies on this as a fundamental breach of contract of itself.

1.1.4 The loss of the Claimant’s appraisals and notes from his personal file, which the Claimant found out about in or around December 2018. 1.1.4 The loss of the Claimant’s appraisals and notes from his personal file, which the Claimant found out about in or around December 2018.

1.1.5 On 21 December 2018, calling the Claimant to a meeting to discuss performance improvement (and other matters discussed at the meeting are also relied on).

1.1.6 Failing to uphold the Claimant's grievance in April 2019. The Claimant alleges the grievance process was biased and the evidence was not properly reviewed.

1.1.7 Between April 2020 and April 2021, Kevin McNamara bullying the Claimant by asking for a multitude of reports or investigations with, the Claimant avers, impossible timescales and without consideration for his workload;

1.1.8 In June 2021, refusing the Claimant's request to "retire and return";

1.1.9 Not dealing with the Claimant's 10 March 2022 retire and return request in a timely manner. The Claimant alleges that this amounts to bullying.

1.1.10 Failing to provide confirmation of when the Claimant's 10 March 2022 retire and return request would be dealt with. The Claimant alleges that this amounts to bullying.

1.1.11 Engaging an Estates Consultancy firm (with no Health and Safety experience) to review the team structure, which impacted on whether the Claimant's retire and return request would be approved and which was also a way of bullying the Claimant;

1.1.12 On 24 May 2022 rejecting the Claimant's 10 March 2022 retire and return request, which was a way of bullying the Claimant;

1.1.13 In or around June 2022, rejecting the Claimant's Freedom of Information request;

1.1.14 On 11 July 2022, rejecting the Claimant's appeal against the decision to refuse his 11 March 2022 retire and return request, which was also a way of bullying the Claimant. The Claimant notes that in a three year period, 127 employees applied for retire and return and only one person (the Claimant) was rejected.

1.1.15 Following the appeal outcome, in July 2022 and prior to the Claimant's resignation, failing to amend an affordability statement following the Claimant highlighting what he considered to be wrong information within the statement.

(The last of those breaches was said to have been the 'last straw in a series of breaches, as the concept is recognised in law).

1.2. The Tribunal will need to decide:

1.2.1 Whether the Respondent fundamentally breached the Claimant's contract in or around August 2018 by amending his job description without his agreement; and/or

1.2.2 Whether the Respondent:

1.2.2.1 behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent; and

1.2.2.2 had reasonable and proper cause for doing so.

1.3 Did the Claimant resign because of either of the above the breaches? The Tribunal will need to decide whether the breach was so serious that the claimant was entitled to treat the contract as being at an end. The Respondent denies breaching the Claimant's contract. The Respondent says that it was a term of the Claimant's contract that the job description was "not exhaustive" and was subject to "continual review" and further avers that the Claimant accepted the amendment to his job description. The Respondent denies any bullying or breach of trust and confidence.

1.4 Did the Claimant tarry (delay) and affirm the contract before resigning? The Tribunal will need to decide whether the breach of contract was a reason for the claimant's resignation.

1.5 In the event that there was a constructive dismissal, was it otherwise fair within the meaning of s.98 (4) of the Act?

4. Findings of Fact

4.1. The following sets out the Tribunal's primary findings of fact. Comment, interpretation, inference and analysis are left to the Reasons.

Mr Hemphill's employment and roles

4.2. Mr Hemphill was employed by the Respondent from 14 July 2008. He was the Health and Wellbeing Advisor and from 2015 the Head of Health and Safety, Fire and Security. From 2015 onwards, he also had the security role of "Local Security Management Specialist" ("LSMS"). managing violence and aggression risks to staff across the Trust.

4.3. His contract identified that his line manager, then the Director of Workforce and Education, would outline his main duties, and that he would have objectives agreed on an annual basis.

4.4. He later came under Human Resources.

4.5. His manager for the most part had been Oonagh Fitzgerald, Director of Human Resources until 2018. There was a two year period when Colette Priscott, Deputy Director of Human Resources, was his manager, and then Oonagh Fitzgerald resumed the role.

4.6. He received a pay rise in April 2012, "in recognition of your contribution over the last year to the Trust."

4.7. In April 2015, he was placed on the NHS Agenda for Change pay scale. (Agenda for Change is a framework within the NHS to ensure a fair and uniform approach to pay.) Colette Priscott, on Oonagh Fitzgerald's behalf, negotiated a salary review with him which he agreed at 8b banding with 2 increments, [up to point 42], backdated to August 2014 (218, 224). His job description was reviewed by the job evaluation panel. That brought his pay in line with others under the NHS Agenda for Change, save that Ms Priscott agreed an additional on-call payment of £5,000 per year. He was not working on call; this was a way to boost his remuneration while remaining within Agenda for Change, granted on a fixed term basis.

“It was a way of bumping up my salary while still maintaining the illusion that I am on the Agenda for Change programme” (Mr Hemphill, oral evidence).

4.8. He continued to be well regarded. In his 2016 appraisal Colette Priscott reported that he was a well-respected member of the team, a sound and balanced manager with a genuine passion for his subject area, a pragmatic can-do approach (106), and

“Excellent feedback from Fire Officer – to name just one.”

4.9. Equally, he got on well with her:

“Very happy with my manager's management style and willingness to support and advise whilst providing clear direction” (107).

4.10. He does not have copies of all his appraisals, but he says that they were always in similar terms to the 2016 one (104 to 109), nor is that challenged.

4.11. On 6 September 2017, Colette Priscott wanted to stand him down from on-call duties. There had been health concerns and she wanted to support him (112). Mr Hemphill corrected her impression in reply on 8 September 2017,

“Many thanks for your concern around my welfare but as you are aware and negotiated personally with me on Oonagh's behalf, the on-call payment was agreed as part of the remuneration for taking on the operational security responsibilities of the Trust and managing the violence, aggression risk to staff and other service users whilst maintaining a band 8B reporting structure” (112).

4.12. It was however a temporary provision, and by September 2017, he was concerned at losing it without any reduction in his responsibilities or work load.

KERI

4.13. Carillion had been managing and maintaining the Trust's door security management system, known as "KERI ". KERI controlled all security door access and staff authorisations across Trust sites (177). Carillion wanted to transfer that responsibility to the Trust, saying that they were not legally responsible for it under the PFI contract.

4.14. KERI was not functioning well. It had not performed as per specification (176). A software upgrade had not resolved matters. Issues included reliability and efficiency, the absence of a remote lockdown button function and the absence of remote access for management overview. There had been several incidents where staff were unable to access authorised doors or storage areas with the system freezing and failing over a period of hours.

4.15. The contract with Carillion did not confer on them a requirement to maintain or manage the KERI system (177). There was no formal planned maintenance programme in place.

4.16. Carillion now intended to transfer:

- Any ownership of the KERI security system and its maintenance contract and managing all future breakdowns
- managing all KERI system software activities and issues including security access groups, time zones and lockdown etc
- management and coordination of all future security system work requests, such as installing KERI card reader access to new doors etc
- responding to all security complaints and change requests – in effect, the Trust taking on the Carillion help desk role for KERI security issues. (110, e-mail from Mr Hemphill, 13 September 2017)

4.17. On 8 September, Mr Hemphill wrote to Colette Priscott saying that if that transfer was to proceed, and if his Health and Safety team were to take it on, more time and resource would be required to manage the risk appropriately:

"If this increased security remit is to come in the Trust's direction and it is deemed that H & S should take this on, then I wish to discuss further remuneration commensurate to the additional activities and responsibilities to be taken on.

I certainly do not wish to continue with this exceptionally difficult Security Management burden for a lesser salary if on-call payment were removed and if necessary I am happy to discuss any thoughts you might have around reallocation of Trust Security elsewhere and realignment of my role to an 8A H&S/ Fire management post." (112)

4.18. He was however pitching for his team to take over the management of KERI , with additional staff and capital resource, and, for him, a higher rate of pay, given the complexity and weight of additional responsibility (110/112, 13 September). In making that pitch, he presented himself as confident that he and his team could do a good job and that they would be able to achieve markedly better outcomes than hitherto. He was looking for a remuneration package in the region of band 8D, increment 3 (oral evidence, 221, 227). He was not looking to take on the additional role on the same – or lower – salary.

4.19. Oonagh Fitzgerald, Head of Human Resources, was briefed by Mr Hemphill on 22 September 2017, and wrote to Rupert Turk and Kevin McNamara about KERI , saying that,

“He (Mark Hemphill) explained that the new system purchased by Carillion is not fit for purpose, that the right labelling has not been put in and the system has no maintenance contract.

Mark added that his view is that Carillion want GWH to operationally manage the system as it is not in the DSLS contract as a savings programme. My view is that they have always managed the system so custom and practice should prevail and we do not have the capacity to manage this complex system. I have been clear with Mark that he has no authority to take on responsibility for this poorly functioning system.” (114)

4.20. Mr Hemphill was starting on steroids and chemotherapy for kidney failure, in October 2017 (266). Occupational Health recommended that he did not take on responsibility for KERI at this point.

4.21. Colette Priscott left the Trust in October or November 2017.

4.22. Mr Hemphill worked with Oonagh Fitzgerald to present a paper to the Executive Committee in respect of the transfer of KERI (232).

4.23. In October 2017 it was agreed by the Committee that the KERI system would be moved to the Trust and handed to the Health and Safety team under Oonagh Fitzgerald,

“Oonagh to draft business case about appropriate management of the system going forwards, whether system is fit for purpose, etc”

4.24. In November 2017, Mr Hemphill’s annual appraisal was due and he prepared some preliminary notes (224). In those he ticked “yes” against a question,

“Are any amendments needed regarding the job description?”

4.25. He added an annotation “New KERI Security System Maintenance Responsibilities” (224).

4.26. He included amongst his personal objectives KERI related work, including to take responsibility of the new Trust owned system and improve efficiency / reliability and resilience (228).

4.27. Asked what he saw himself doing in the future, he said,

“It appears that I take on additional responsibilities as and when necessary from Fire Safety and Security to LSMS security and now KERI Maintenance

In a non-Agenda for Change pay review category it is essential that reward and recognition is agreed” (227).

4.28. KERI was discussed. What is not recorded is what the proposals were for staffing and budget, including as to any pay increases or what was agreed. Mr Hemphill explains that his notes for this appraisal were directed at making sure the outcome would be clear and precise as to pay, resource and responsibilities for KERI :

“Oonagh Fitzgerald made a pitch to the board, and there was an agreement that Health and Safety would take it on. It never came back to me or my team so we were in darkness waiting for some direction as to what we would be taking on, how, what arrangement, what resource etc, so ... I used the appraisal at end November 2017 to make sure we highlighted all the points we needed to get documented so when the full appraisal came out it would be clear and precise as to who would do what, when and for how much.” (oral evidence 11/12/23)

“You are saying this is aspirational? But on page 228 you put down as a personal objective KERI maintenance management. This was part of your role.

“I was pitching for this to be part of my role.” (oral evidence referring to 228)

4.29. Mr Hemphill was happy to take on the management of that system if it was suitably funded, resourced and of financial benefit for himself and the team. He was seeking to avoid a drop in salary with the loss of the on-call allowance, and for additional remuneration in respect of the complex and underperforming KERI system he was willing to take on. He was also looking to be promoted to Associate Director level.

- 4.30. The appraisal itself has not been produced. Oonagh Fitzgerald's notes, or part of them were found but not until 2019.
- 4.31. Mr Hemphill was confident enough after that meeting the proposal for sufficient resources, capital funding and remuneration would be met that he started the selection process for interviewing and seeking a KERI maintenance contractor in late 2017. It is his view of the meeting that he had been promised both additional remuneration for undertaking the management of KERI and additional resources, staff and funds, to facilitate that.
- 4.32. Mr Hemphill was undergoing chemotherapy and steroid treatment from November 2017 but remained at work throughout as he had intended.
- 4.33. The Trust, and Mr Hemphill took over KERI in November 2017.
- 4.34. Mr Hemphill obtained a quotation for the remedial works. They involved rewiring the system with fibre optic cabling. The direct costs were £50,000 with some £37,000 for materials. In April, that sum was allocated, but without any additional staff resource. Before the work was commissioned, in May or perhaps June 2018, the capital sum allocated was halved to £25,000.

2018

- 4.35. The system continued to suffer failures. As Mr Hemphill described it in December 2018,
- “The KERI system... has been scored at Risk level 20 for nearly a year since the last major meltdown in January 2018. There have been several less major meltdowns since...”
- 4.36. Oonagh Fitzgerald formally left the Trust in July 2018. Mr Rooney's understanding was that she actually left in May. Her room, where Mr Hemphill's personal file, appraisals, one-to-one notes etc were kept, was locked.
- 4.37. In July 2018, Mr Hemphill's medical treatment came to an end, and was deemed to have been successful.
- 4.38. By July 2018, Mr Hemphill was saying he had not had any confirmation or acknowledgement regarding his proposed KERI management, salary and banding uplift and on 2 July, he emailed Sally Fox, Interim HR Director, copying in Kevin McNamara, then Director of Strategy and Community Services, and Rupert Turk (Director of Estates and Facilities from August 2018).

“It appears that this issue is not moving forward despite my best efforts to get the management of the additional KERI security responsibilities appropriately budgeted for H & S to manage.

4.39. He said,

- He had kept the KERI system afloat for the past eight months
- he had not been paid for the additional work
- His team were already stretched to breaking point before that
- KERI takes up 25% of his daily work load with frequent evening and weekend calls
- he had been promised a pay rise and additional staffing
- Carillion had released three members of staff when handing over KERI and Trust Estates had not replaced another member of staff who would have been involved (page 236 2 July 2018)

4.40. He expressed his intention to pull out of the arrangement and hand over the KERI responsibility to the Trust Estate department. The tone of the email is forceful and assertive.

4.41. There was a meeting between Sally Fox and Mr Hemphill on 18 July 2018 and he wrote a further e-mail to her on 19 July, again copying in Mr McNamara and Rupert Turk, in more forceful terms (235). He said it was,

“Abundantly clear that you have no intention of progressing the agreement made with Oonagh and Colette to provide adequate remuneration and resource in order for H & S to take on the management responsibility for the KERI facilities security system which I have been doing in good faith since November 2017.”

4.42. He expressed his disappointment, referred to the fact that he had given notice of his intention to hand over KERI management to Estates and raised again the question of remuneration for the additional workload.

4.43. Kevin McNamara replied that he was unaware of any agreement reached between Mr Hemphill and Oonagh Fitzgerald. He did not allow Mr Hemphill to step back from the KERI management responsibility,

“I think I need to be very clear in that the KERI system will not be transferring to estates - I won't comment on what you feel has been promised previously but the KERI system is a security system and that therefore must remain with the team with responsibility for security. If the whole team then transfer then ultimately responsibility will move with you.” (234 – 23 July 2018, McNamara to Hemphill, Fox, Turk)

4.44. He said that the Executive Committee had approved funds for recruitment to a post within Health and Safety to manage the KERI system at the end of 2017, and therefore that recruitment should have been achieved, led by the line manager

4.45. Mr McNamara added,

“I can see you are frustrated by some of this, but I think it is worth you reflecting on the tone of the e-mail”.

4.46. That is the only record of a concern about Mr Hemphill’s manner or communication style being put to him contemporary with events that has been produced.

4.47. Kevin McNamara arranged a meeting on 9 August 2018 between himself, Sally Fox and Mark Hemphill to discuss handing over responsibility for Health and Safety from HR to Estates (126). Issues were arising – cladding, theSw!CC fire assessment, Entonox, and it was not clear where the Health and Safety Committee reported to.

4.48. There are detailed notes of that meeting because Mr Hemphill recorded it, not having sought authority to do so (125 – 136).

4.49. Mr Hemphill asked if they could talk about KERI . Mr McNamara said,

“Yes we can talk about KERI KERI is a security system and sits wherever security goes.....The bit about recruiting, have you recruited to that post that you have got funding for?

Sally Fox said, “Band 3”

Mr Hemphill said “Never had any funding or anything”

Mr McNamara said, “So forget the actual funding, that was approved centrally, how that that appears in budgets is a technical thing that we can always manage and make sure that finance get it in at the right sort of time but where did that conversation sort of get to – to go out and recruit to that band 3 because I think that it was September or October last year when it came to the Executive Committee?”

Mr Hemphill’s response was that he could not recruit until the post was in the budget,

“I have been to a VRP and I know that the first question is always – is this budgeted and when you say no....

Sally Fox,

“Did you take that post to VRP? The band 3?

Mark Hemphill,

“No, it’s not been budgeted.”

4.50. Mr McNamara was dismissive,

“For me, if I were that manager I would take that and say you know what, the people above you have said I can crack on and do this so I’m going to do it and I would have email evidence from wherever I needed email evidence from and the budget would just get worked out.”

4.51. Mr Hemphill said he had never until very recently had any such email – only in the recent email from Mr McNamara.

4.52. The capital allocation was discussed: £50,000 had been allocated (in April) but £25,000 withdrawn (in May, possibly June), with the costs of the physical changes required having been estimated at around £37,000 plus VAT.

4.53. Mr McNamara was dismissive of the suggestion that there should be pay rises attached to the additional responsibilities being taken on by Mr Hemphill and his team (129). That was not reflected in what had been put before the Executive Committee, so “it’s never been part of the conversation”. He said the job should go through evaluation, to be properly banded.

4.54. The exchanges in July and August crystallise the different positions. Mr Hemphill wish to withdraw from managing KERI on the basis that he hadn’t had the financial package he had wanted, including as to the funds for resourcing it. Mr Mcnamara was not allowing him to withdraw, did not accept any conditionality to his involvement and was dismissive of any difficulty in relation to budget and the allocation of funds that any competent manager could not resolve.

4.55. Mr Hemphill says that it was from this point that Kevin McNamara began a bullying campaign (ws paragraph 14).

4.56. Mr Hemphill was notified on 10 August 2018 that Health and Safety would transfer to Estates from 20 August 2018. His job description was to be the subject of evaluation.

4.57. There is a disagreement over the way that job evaluation works. It was put to Mr Hemphill that a job evaluation would establish a fair salary for the job. Mr Hemphill disagreed. A manager would sponsor a particular role and make sure the job evaluation was shaped to attract the salary that he held to be appropriate for it. That is the system described in the policy. Mr Hemphill says this,

“If a job has been evaluated correctly in accordance with the policy and there is a sponsor and the job lands as per the sponsor’s requirements then that is suitably evaluated, but if a job is evaluated by a member of HR without a sponsor it is like setting a ship out without anyone at the tiller to decide where it needs to be.”

“When I was asking for a job evaluation to be done, I was dictating the salary banding I wanted it to be and I was asking HR to determine what level of responsibility needs to be phrased within the job description so it could be evaluated at the level I had the budget for and wanted the individual to be at.

“It cannot be the other way around. It cannot just float.”

- 4.58. On 10 August, 2018, KM emailed Mark Hemphill following up discussions the previous day. He attached the paper Mr Hemphill had drafted for the Executive meeting in October 2017.

“Whilst the record of the meeting doesn't confirm explicitly resource, the paper list a number of actions and recommendations made to the committee including a review and audit of the system, assessment of resource required and a subsequent business case.” (231)

- 4.59. He wanted all the recommendations lined up so that within a couple of weeks, they could pin down funding (231).

- 4.60. The record of the Executive Committee meeting the previous October confirms the decision for the Trust to proceed with plans to take over responsibility for the KERI system, its future maintenance and an initial system audit. Oonagh Fitzgerald was to draft a business case about the appropriate management of the system going forward, “whether the system is fit for purpose, etc...” (233)

- 4.61. There is nothing to show that Mr Hemphill’s recommendations had been adopted by the meeting, or what report or instructions or budget were given, if any, to Mr Hemphill by Oonagh Fitzgerald after it, from then until she left.

- 4.62. Mr Hemphill denies ever before having been given the outcome of the October 2017 Executive Committee meeting or asked to follow up those recommendations.

“He was saying I should have known and run with this without any clear direction or agreement.”

“I am being asked to do something that I have not seen in the first place and when it is reiterated that is bullying.” (oral evidence)

4.63. Sally Fox had taken over from Oonagh Fitzgerald, and in Mr Hemphill's view, that was where the senior management responsibility for this lay at that point.

4.64. On 10 August, Mr McNamara wrote to Mr Hemphill attaching the record of the Executive Committee of October 2017, with the paper drafted by Mr Hemphill and Ms Fitzgerald (231).

“Whilst the record of the meeting doesn't confirm explicitly resource, the paper list a number of actions and recommendations made to the committee including a review and audit of the system, assessment of resource required and a subsequent business case.

4.65. Mr Hemphill is asked if those recommendations have been carried out and if not to do so. Rupert Turk was to look at both the Health and Safety budget and Estates budget to see where funds could be identified for a post or at least a contribution towards the post. Did it need to be full or part time?

4.66. These were matters that Oonagh Fitzgerald had been specifically tasked with. Mr Hemphill says he had not seen these documents before.

4.67. Also on 10 August 2018, Mr McNamara wrote to Mr Hemphill setting out a number of decisions and processes including the commissioning of external reviews, including the management of COSHH (“Control of Substances Hazardous to Health) and Health and Safety and the new line management arrangements, ensuring that issues were properly visible at Board level (239).

4.68. It was the action of a senior manager in anticipation of the transfer date on 20 August 2018. Mr Hemphill had throughout been resistant to Health and Safety transferring to Estates and remained so.

4.69. The letter covers KERI and funding, with reference to a fund of £50,000, later cut to £25,000 (240) and that “there may be potential” to secure an extra £25,000.

4.70. Mr Hemphill did not think the work could be done in stages, using the funds that remained,

“You cannot complete the quote. If you halve the money, the plan cannot go ahead.

There was no money for the contractors to commission the plan and buy parts and schedule work.” (oral evidence)

4.71. There was not at this stage a criticism for failing to use the £25,000 available for commencing the work in stages. Mr Hemphill was asked for a plan. He responded,

“Yes, but if you can’t do the whole job you can’t screw them down on deliverables.” (135)

4.72. In terms of staff recruitment, Mr McNamara saw a quick short-term solution as a bank worker (135). Mr Hemphill was to contact Sally Fox to identify the brief. Mr Hemphill again agreed, but was disappointed,

“Mr McNamara did not understand the complexity of what he was suggesting, you could not get bank staff to undertake the complex work of a KERI co-ordinator

I had been asking for a budget for the additional resources since the start of the project” (oral evidence)

4.73. Mr Hemphill wasn’t getting anything that he wanted to support this task.

4.74. There was to be a job re-evaluation to include the KERI responsibilities but with no commitment to support a case for an upgrade.

4.75. Mr Hemphill was deeply disappointed.

Job Evaluation

4.76. The Trust has a job evaluation policy (322). The purpose is to provide a means of fairly rewarding employees of the Trust by measuring their job-related skills, knowledge and responsibilities. It is initially a desktop exercise. The line manager submits new posts for evaluation or existing posts for re-evaluation. An HR representative scores the job description person specification and supporting information against a national profile and checks that the final score is within the required banding.

“If it needs strengthening to achieve the required banding the information on areas that need work will be passed to the submitting manager.” (324)

4.77. That is a recognition that the evaluation is not simply neutral or exploratory. It is a managed process. The manager sponsors the role being evaluated, given that the manager needs to recruit or retain the post holder, and will have a required level of seniority and responsibility in mind. It is a targeted process – if the proposed role will not merit the proposed banding, the manager can rework it until it does.

- 4.78. What Mr Hemphill says about the proposed job evaluation is that it had been agreed with Oonagh Fitzgerald that his role when the KERI responsibility was added would attract promotion to Associate Director Level with a salary uplift. But, that would need a manager driving the evaluation to achieve the required banding and title. She had not dealt with that, although on the hand-over to Sally Fox, she said she had agreed to look at it.
- 4.79. In August 2018, Mr Hemphill thought that an impromptu assessment of the job description was being promised, not a full evaluation. That would be consistent with his expectation that the process was manager driven.
- 4.80. On 14 August he sent his current job description and details of his additional duties incorporating the KERI responsibility and other changes to Sally Fox (374).
- 4.81. Mr Turk became Mr Hemphill's line manager on 20 August. He and Mr Hemphill had known each other for fifteen years. They got on well, regarding each other with mutual respect.
- 4.82. Mr Hemphill was still reluctant to see the job description go through formal evaluation.
- 4.83. There was a discussion between Mr Turk and Mr Hemphill on 15 October 2018. Mr Turk consulted Mr McNamara after it; both agreed formal evaluation was necessary, contrary to Mr Hemphill's preference (137). Mr Turk wrote to Mr McNamara after that.

"I discussed Mark's job description with him today, with a view to putting it through Job Evaluation so we can all be clear about his banding and job role/ duties.

Mark was of the view that Sally had made a commitment to giving an informal view on the likelihood of the banding being uplifted ahead of any formal process. Was this your understanding?

Regardless of the above, I have told Mark the Job description needs to go through Job Evaluation anyway but he seems reluctant to "go down this path" if it's unlikely to materialise in a re- banding.

Just keen to know what has been agreed previously." (137)

- 4.84. Mr McNamara 's reply was,

"Hi. I don't think she did but do check direct. Regardless we should get the new Job description evaluated once and for all to save further uncertainty for all down the line".

4.85. On 18 October, Mark Hemphill emailed Claire Warner to ask whether in her view, his updated job description would warrant a pay increase at a different pay scale for taking on the KERI responsibility (373). She said not in her view, but if he disagreed he could seek a formal re-evaluation.

4.86. On 23 November 2018, Mr Hemphill wrote to Kevin McNamara, copying in Sally Fox and Rupert Turk, expressing deep concern over the absence of agreement about the management of the KERI system. He said,

“I obviously and absolutely will never sign up to any new job description which significantly increases my responsibility and workload for no financial benefit to myself.

Can we please all confirm that since this “proposed way forward” has not achieved an agreeable solution that I am currently operating to and continue to be measured against my current and legally agreed job description of 2015.

I consider myself to be a person of utmost honesty and integrity and as all my previous appraisals confirm I consistently operate in accordance with Trust values at an “very good” performance level.

I currently feel that I simply cannot continue to be used in this way without honouring the verbal agreement made with Oonagh and Colette for agreeing to take on this significant additional responsibility and workload.

My feelings of anger, foolishness, stupidity and shame at being “duped” in this way are affecting my mental health...”. (139)

4.87. Rupert Turk responded on 22 November 2018 (139). The informal job evaluation did not support a different banding. A formal evaluation could be carried out, but Mr Hemphill had not wanted that. It was his understanding that the job description as submitted for evaluation was the current one which applied,

“As mentioned on Monday, it is my understanding that your revised JD, which includes the duties and responsibilities you have been fulfilling for some time now, is now your current JD.”

4.88. He offered to work with him to find a way of managing some of the day to day KERI workload. Securing an additional resource would be difficult but he would support a strong enough case (139).

4.89. On 26 November 2018 Mr McNamara wrote to Mr Hemphill,

“I understand the concerns you've raised. The difficulty we have is that there is no evidence of a promise or a guarantee that your role would be upgraded made to you by anyone previously....

You have had responsibility for KERI for over a year and therefore this change is not new or recent.

This also can't stand in the way of the fixes to KERI that are badly needed and that you have secured £50,000 of capital funding for and for which there has been plenty of time to plan..." (143)

4.90. This is the earliest confirmation of the availability of the full £50,000 being communicated to Mr Turk.

4.91. On 27 November 2018, Mark Hemphill responded, reiterating that he took on KERI on a temporary basis, and needed funding and resource including for himself. He was offended by any suggestion that he would jeopardise the completion of the forthcoming KERI capital works. He wanted to turn KERI from a failing, inefficient and unstable process into one which was efficient and an effective tool for the business (142).

November 2018 Appraisal

4.92. On 29 November 2018 Rupert Turk undertook Mark Hemphill's annual appraisal (145).

4.93. Mr Turk had not seen earlier appraisals and did not seek feedback from colleagues nor does he say that any concerns had been raised with him. The appraisal makes it clear that he had only been the line manager for a matter of months.

4.94. The appraisal included a review of the previous year's personal objectives, taken from the business plan objectives.

4.95. The objectives set were of a general nature but specifically included KERI,

"Conclude the KERI upgrade works and access group changes"

"Review the entire team structure & resource levels...."

"Review the governance arrangements for the various HSF&S (Health and Safety, Fire and Security) functions in order to ensure clear lines of communication."

4.96. Improvement work on KERI needed a final push.

4.97. No concerns were identified about Mark Hemphill's performance or conduct. It includes the comment that, "Clearly Mark has strong knowledge in all matters HSF&S"

4.98. It was not sent to Mr Hemphill until well into 2019, probably between March and May when Mr Hemphill returned it with annotations (603).

4.99. In those, there is a disputed reference to taking ownership of remedial actions, which Mr Hemphill says was not discussed and was put in in an attempt to support the action that followed.

4.100. There is a disputed reference to owning and leading on the recommendations highlighted in the “December 2018 “Empathy” H & S audit”. That report had been published after the appraisal in November 2018, and Mr Hemphill’s comment was,

“We did not agree this - difficult to lead on governance issues which H & S have no put input into (Capitec Audit)”

4.101. The original read,

“Mark’s job description has been updated in the last year to reflect the additional KERI responsibilities identified in his last appraisal”.

4.102. Mr Hemphill in May 2019 wrote,

“My job description remains February 2015 version- no formal agreement reached as yet regarding the addition of KERI duties.”

December 2018 – KERI failure

4.103. There was a serious incident on 5 December when the KERI door access system failed (153). Doors to drug rooms, kitchens, main doors, wards, the main building security control room were affected. Some offices were only accessible through a rear window.

4.104. There had been other breakdowns since the major breakdown in January,

“It is a broken system that had been playing up all through the year, it is no more serious, it needed investment and management control, and I was treading water over that.” (Mr Hemphill, oral evidence).

4.105. On 7 December, Kevin McNamara wrote to Mr Hemphill, asking if there was a written plan in place for the £50,000 capital money allocated to upgrade the KERI system,

“There’s been plenty of time to line that up until now.... Please make this your top priority and when incidents like this do occur, ensure that you are on site to lead the co-ordination of this.

Leaving aside this immediate incident, can you confirm the program and timescales for when ASG will be on site working on the permanent fix and when we expect that to be complete?” (152)

4.106. Mr Hemphill replied by email on 11 December, pointing out the long-standing risk level of 20 and again saying that KERI had been “forced on Health and Safety and myself in particular with no reward, recognition or resource”. if there was no intention to resource the system, it should be allocated away from him to Estates (151). He pointed to incidents at another Hospital Trust, with an anticipated 10 improvement notices and prosecutions.

4.107. He was angry because he had not been able to address the failures. He was still clear that, absent the resource package he had relied on, his acceptance of the management of the system was only temporary.

4.108. Mr McNamara responded, on 12 December

“The problems we have experienced with KERI this week have been a long time coming and are indicative of the need to have resolved these a year ago and not let them get to this point. Funding has been made available to invest in the capital requirements for KERI for many months but you have not developed a clear plan for how that money will be used and we now find ourselves in a position where we are having to play catch up at the most difficult time of the year following a critical incident.

In effect Rupert has had to take on the response to the current KERI situation to escalate the waiver and agree with ASG when they plan to start the permanent fix on site. All because of a lack of previous pace. Because of this lack of action, patients have been exposed to unnecessary risk and I cannot allow it to continue.” (151)

4.109. The management of KERI , he said, was clearly within Mr Hemphill’s job description and the responsibility for the delays in investing in KERI , which had put patients at risk, was Mr Hemphill’s. Mr Hemphill, he said had not set out the resource requirement. He went on to say that he had a number of concerns that they now needed to discuss formally and would like to meet to discuss them.

4.110. Mr McNamara had consulted Sally Fox and Rupert Turk. He wanted a formal discussion to discuss concerns over Mr Hemphill's position. He asked for a breakdown of issues about which Sally Fox had expressed concern. He

proposed a performance improvement plan whereby Mr Hemphill would be required to accept the responsibility for KERI (149).

- 4.111. On 17 December 2018, Mr Hemphill raised a grievance in respect of Mr McNamara's conduct (167). The covering letter accused Mr McNamara and also Sally Fox of bullying conduct in trying to get him to "shut up and accept that I am to take on this significant additional KERI workload with no resource and no agreed reward or financial recognition, as previously agreed by others." (207)
- 4.112. Mr Hemphill was called to a meeting on 21 December 2018.
- 4.113. The e-mail identified the purpose of the meeting as being to discuss current issues and next steps. Mr Hemphill was asked to bring along the resource requirement and details of how the staff would be used, ("of what activity the proposed resource would be expected to undertake") (151)
- 4.114. The e-mail invitation did not say that this would be a meeting about conduct or performance. Mr Hemphill had expected to be presenting the data about what his team were doing with regards to KERI, the workload demand and the role of the new staff member at band 3. He also expected to get approval for additional resource. Instead he found it was a performance improvement meeting.

Performance Management Policy

- 4.115. The Trust has a performance management policy.
- 4.116. It contains a flow chart, for quick reference (330). Where a manager has concerns regarding an employee's performance, an informal conversation is to take place and to be documented on a file note or a 1one-to-one template. The employee should be notified of concerns, informed of expectations and set goals. If the performance concerns continue, the manager is to implement an improving Performance Action Plan ("IPAP").
- 4.117. If the employee's performance improved during the IPAP, the employee is to be informed of the outcome, ensure that the conversation is documented and no further action is required.
- 4.118. The fuller text sets out as follows:

"Performance management relates to the employee's capability to fulfil their role to the standards contained within their job description. Many issues of performance can and should be resolved through informal discussion and without recourse to the formal performance procedure. With continued support, monitoring and review over an agreed period (minimum one month) it is anticipated that in most cases the employee will meet the required standard. Failure to meet the agreed standard of the review will automatically lead to the formal stages of this procedure being used (332) ...

It is key that managers and teams deal with any concerns early where needed, so the issues aren't left unresolved. If managers are able to provide coaching or facilitating to employees/ teams to provide support, it may prevent issues escalating into formal grievances or disciplinary action being taken and the employment relationship breaking down or suffering as a result (333)....

Managers should give their employees regular, specific and constructive feedback on both positive and less than satisfactory aspects of performance during the normal recourse of scheduled one to one meetings...

Performance reviews also allow managers to discuss and agree SMART (Specific, Measurable, Achievable, Time bound) objectives with the employee, ensuring clarity on the expectations and standards required of them in their role. A personal development plan will also be discussed and agreed during the performance review to support the employee in meeting their SMART objectives (333).

- 4.119. Formal steps are to be taken if an IPAP approach is not successful. Sanctions including eventual dismissal on capability grounds or demotion (down banding).

21 December 2018

- 4.120. Kevin McNamara, Rupert Turk and Mr Hemphill attended the meeting. Mr Hemphill recorded the meeting, privately and without authority. It was extremely challenging.
- 4.121. Immediately before that meeting, there had been a meeting between Rupert Turk, Mr Hemphill and the external Health and Safety Audit Consultancy company Empathy, who presented the results of the recent Health and Safety and COSHH audits ordered by Mr McNamara. Both audits confirmed an excellent safety management system (oral evidence and 282).
- 4.122. There had been no performance concerns raised by Mr Turk. The concerns Mr McNamara had previously raised related to the failure to upgrade the KERI system, using the funds he said were available.
- 4.123. Mr Turk opened the meeting, presenting it as informal, referring to the performance improvement policy and the requirement that concerns should be picked up early. He added that, "By the end of today I will have totally taken some notes that build up a performance improvement plan so that we can progress in the coming weeks."
- 4.124. Mr Hemphill asked why there was no reference to any performance concerns in the appraisal conducted two weeks earlier (172).
- 4.125. He also asked about the meeting they had just had about the safety management system, with everything appraised as good, "Why then are we going down a performance improvement route?". He referred to his ten excellent or very good appraisals, and asked what the personal performance issue was.
- 4.126. Mr Turk agreed that the Empathy audit had gone well, saying,
"It's really clear, you heard it today that you have clearly and personally got the knowledge and you've got the process is in place and all that good stuff."
- 4.127. He went on to say that some of this had come up since the appraisal. He admits he perhaps didn't have the information to start some of those conversations until now.

4.128. Mr McNamara took over, saying this was not about the technical knowledge, it was about attitude, about behaviour and team culture. He spoke about a lack of pace, lack of action a year down the road. It was a pattern of behaviour, not just KERI : a lack of engagement and ownership, a failure to plan properly, playing catch-up on issues, attitude, behaviour, failure to keep to STAR values. He expressed a lack of confidence in how the team was being run and over creating the right sort of environment so that they are a responsive team (158).

4.129. He then itemised three areas of concern (SwiCC fire, Entonox and ventilation and KERI). Mr Hemphill responded by saying that if he had been asked what his three biggest strengths were this year, it would have been those.

4.130. Both managers then pressed Mr Hemphill on a failure to present a plan for KERI referring back to the serious issue in January 2018 and lack of progress. Mr Hemphill said the issue was resource. Mr McNamara broke in,

“No Mark, the question is have we ever seen a plan? And we’ve had meetings before and I’ve said can I see a plan and you haven’t set out a plan of what you are going to do including what your resource ask is.”

MH “You asked me to bring that to the meeting today,”

KM “But I have asked you previously, what’s the resource ask and what’s the plan and I’ve got emails, Mark where I have asked this”

4.131. Mr Hemphill was resistant, on the basis that he had been asking all year for the resources, both capital and the band 3 staff member.

“And the evidence trail all the way from that is...please can we have some resource, please can we have some money... Silence!”

“Please can we have, please can we have, please can we have...breakdown....please can we have, please can we have, breakdown...It’s ineptitude or incompetence or a combination of both..” (159)

4.132. He added that Sally Fox should have dealt with this, she knew the resource and capital requirements.

4.133. The discussion was heated.

KM – “Well you have got the capital money

MH “Yes in the last few weeks. “

KM “No, no, since April, it’s been in the capital plan since April.

Mr Hemphill referred him to the Trust Risk Register, which sets out the history.

RT "It was put in in April

MH "yes and then it was halved by May

KM "And was that half then spent?

MH "No because you've got to go through the whole quotation period again, and you've got to try how you can half do a job that gives you some sort of credibility and outcome. It's an impossible task that I was given... and now you come out with what I thought was the most basic and stupid thing to do which was to try and PIP it."

- 4.134. He invited them to make the procedure formal.
- 4.135. Mr McNamara raised points about Mr Hemphill's attitude and behaviour. The points raised related to a meeting in June and some recent complaints of remarks made in the summer. One related to a meeting, unrecorded, at which Mr Turk had been present. Memories differed as to what had happened and it had not been followed up as a concern at the time. Mr Hemphill pointed out that he had been going through chemotherapy and was not at his best but that he was standing up for his guy who was being bullied. One possibly related to an unidentified incident in May, about which Sally Fox had reported that she had spoken to Mr Hemphill.
- 4.136. Mr McNamara commented that there was frustration "in a number of quarters of how people have felt that you've left them alone to fix things", and moved the conversation back to the SwICC fire risk question. The issue was about how far local managers had to take responsibility for their own Health and Safety regimes. Mr Hemphill was saying they had no safety management system in place and he had had to be forceful over it. Mr McNamara refused to accept that local managers had been reluctant to take that responsibility; Mr Hemphill should have been more supportive.
- 4.137. Mr McNamara moved to the KERI system saying it was clear that Mr Hemphill had responsibility for it. He relied on what he understood to be Oonagh Fitzgerald's appraisal as showing that. It is now accepted that he was instead looking at Mr Hemphill's 2017 pre-appraisal notes, in which he was setting out a case for taking KERI on, with proper resources (224).
- 4.138. The meeting ended with Mr Hemphill saying he needed to leave because he felt ill.
- 4.139. Mr McNamara repeated an extended list of concerns, SwICC fire evacuation, insults, KERI, Entonox, attitude and behaviour, e-mails, concerns raised by staff at Orbital about behaviour of colleagues.

- 4.140. Insofar as they can be identified, these are matters that arose in the summer of 2018 or earlier – the SwICC fire meeting, for example, was on June 2018 (160). Mr McNamara said that the bigger issues, “SwICC fire, Entonox and ventilation and the KERI stuff” had arisen during the year and should never have got to current level of difficulty had there been the ownership and engagement from Mr Hemphill (158).
- 4.141. Mr Hemphill was not allowed to comment - Mr McNamara said, “No, it needs to go on a performance improvement plan” (166).
- 4.142. This was not a coherent meeting. The allegations were ill thought out, sometimes vague or inaccurate, stale, unsupported by records or investigation. They are not reflected in the appraisal. No one-to-one notes have been presented to show that these issues had ever been discussed with Mr Hemphill. He was not allowed to respond.
- 4.143. They had not been raised with Mr Hemphill before, save for a comment in Mr McNamara’s email of 19 July 2018 about the tone in which he wrote his email and possibly the unspecified incident in May 2018 about which Sally Fox had reported she had spoken to him. He was told he had failed to respond to comments before but not what.
- 4.144. While Mr Turk in the most recent appraisal had not sought feedback, he had also not referred to any concerns having been brought to him. There is no reference to the successful audits that had been discussed immediately prior to this meeting or the previous, sound appraisals; it is unlikely that these managers had seen them. Neither of those are irrelevant to the question of leadership culture.
- 4.145. Mr Hemphill saw it as a witch-hunt.
- 4.146. Mr McNamara had decided before the meeting that there must be a performance improvement plan and that was the outcome.
- 4.147. The meeting did not establish when Mr Hemphill had been notified that the original £50,000 had been restored or that there was a budget for a band 3 worker so that he could recruit. Mr McNamara had been willing, again, to criticise on the basis that Mr Hemphill had failed to use funds available since April. Mr Turk thought it possible that Mr Hemphill was right in saying he had not known of the reinstatement of the full amount until 26 November (oral evidence).
- 4.148. Mr Hemphill saw himself as being deliberately targeted because he had put in a grievance against Mr McNamara.

- 4.149. Mr McNamara was aware of the grievance but says he did not know the content.
- 4.150. Mr Hemphill had not been invited to share the details he had brought to the meeting about the planned resources.
- 4.151. Mr Hemphill asked Nerissa Vaughan, to whom he had sent his grievance in December, to treat this as part of his grievance, evidencing bullying and victimisation (167, 23 December 2018). He challenged issues about his conduct or performance being raised in this way and referred to blatant bullying and victimisation.
- 4.152. He had at the time of the meeting said that he regarded SwICC, Entonox and ventilation and KERI as amongst his proudest achievements that year. In that email, he added the context that his team had identified the ventilation issues with Entonox of which the estates management had been unaware and pointed out that the Trust had the lowest RIDDOR accident rates in the south west, year on year, with no improvement notices served during his tenure.
- 4.153. After the meeting, at Mr McNamara's invitation, a manager sent an account of the SwICC fire risk meeting on 8 June, a meeting Mr Turk had also attended (169). That email contains more detailed allegations of an incident mentioned in the meeting. It was not shared with Mr Hemphill, did not inform the performance improvement plan and was not part of the documents before Mr Rooney in considering Mr Hemphill's grievance.

The Performance Improvement Plan

- 4.154. The performance improvement plan was sent by Mr Turk with a covering letter of 4 January 2019 (243 and 245). The key points raised in the covering letter were Mr Hemphill's attitude and behaviour, his responsiveness, in that he had failed to formulate and implement a plan to upgrade the KERI system (an appraisal objective from November 2017) and a lack of engagement and ownership.
- 4.155. The specific allegations referred to, from the covering letter with the personal improvement plan,
- 8 June 2018, conduct seen as antagonistic and disrespectful of colleagues
 - A number of emails are unprofessional in tone, citing an email to Sally Fox in July 2018
 - A comment in the course of a discussion (summer 2018) about ventilation referring women giving birth as "chugging on Entonox"
 - Concerns about Mr Hemphill's general manner not being in keeping with that of a senior manager

- His having made derogatory remarks about colleagues.

4.156. There is no fuller detail, although Mr Hemphill had understood from the discussion what at least some of the incidents referred to were. The only account of the reference to Entonox is Mr Hemphill's, referring to an issue with ventilation,

"I was asked about how much Entonox falls on the floor, this is about occupational health, so when being asked in that meeting, how is on the floor, it depends on whether the mother is taking it in sparingly through the nozzle or in the full throes of labour, and chugging on it. That is the context."

4.157. Not included is a complaint raised at the meeting of a misogynistic comment or comments, a complaint Mr Hemphill had found particularly upsetting.

4.158. The plan included 3 SMART objectives:

- Reflect and improve emails and communication style in line with Trust STAR values
- To have full responsibility for the KERI system
- To change the culture of the team from one of advising to one of engagement and support

4.159. The plan was to be reviewed fortnightly, through monthly- one-to-one meetings and additional intervening meetings. Success was to be measured against criteria within time frames ranging from immediate (three), January 2019 (five) and February 2019 (one). Rupert Turk was to collect 360 degree feedback. Mr Hemphill was to write a reflective piece on communication and its importance. Mr Hemphill was to accept immediate and full responsibility for KERI. He was to provide greater oversight and support for managers with Fire Risk Assessment action plans.

4.160. The SMART objectives had not been discussed or agreed with Mr Hemphill during the meeting. He did not engage with the plan.

4.161. Mr Hemphill referred the issue of the performance improvement plan to Mr Rooney, who had been appointed to consider his grievance, as an instance of ongoing harassment (171, 7 January 2019),

"My first appraisal with Rupert was only a few weeks ago (before I raised the grievance) and nothing of my conduct or performance was raised or discussed.

I am very proud of my work at this Trust and my team. My professional reputation is of utmost importance to me personally and until now 10

years of excellent or very good appraisals work I thought a good personal indicator of my drive and determination to maintain and improve the safety culture of our Trust.

Please can we ensure that this ongoing 'harassment' after raising the original grievance is also included in the forthcoming investigations.”
(171)

- 4.162. The contract work, using the full £50,000, was underway by 10 January 2018 (268).
- 4.163. Mr Turk threatened to progress to a formal disciplinary if Mr Hemphill did not engage. Mr Hemphill did not, expecting formal escalation.
- 4.164. Mr Turk raised it again in July 2019. Mr Hemphill thought the plan had been abandoned, having heard nothing for six months. He challenged the allegations, requested clarification and evidence (602).
- 4.165. The plan was dropped. There is no record of that nor was Mr Hemphill told. Mr Turk justified it in his oral evidence saying that there had been no repetition of the behaviours.

Grievance

- 4.166. The Grievance was allocated to Mr Guy Rooney, Medical Director and Deputy Chief Executive.
- 4.167. The opening page of the Grievance form shows the grievance to be about bullying and harassment in being bullied into accepting the KERI door maintenance responsibility and job description. Mr Hemphill's email of 17 December submitting the grievance had referred to “a collusion of bullying and harassment”, (207) his letter of 23 December adding a complaint about the meeting on 21 December to his grievance referred to bullying and victimisation (167) and his letter to Mr Rooney of 7 January (171), when writing about the conduct of the 21 December meeting had referred to ongoing harassment.
- 4.168. The Grievance investigation meeting with Mr Hemphill was held on 10 January 2019.
- 4.169. Mr Hemphill set the scene, to demonstrate that he was not someone predominantly motivated by money, but that he had not wanted to take on KERI, this “exceptionally difficult security management burden” for a lesser salary if his temporary on call payment, which had boosted his salary before, was to be removed (266). Ms Fitzgerald had promised £50,000 by way of capital funding because of the scale of the work, involving rewiring with fibre optic cabling, and a band 3 co-ordinator (270). He had taken it on given that Carillion were

handing the system over imminently (“this was coming over the wall instantly”), on that basis.

4.170. He described how shocked he had been not to have funds committed even in the March 2018 budget.

4.171. The grounds for the grievance were discussed and included:

- Mr Hemphill’s relied on agreements that he would be remunerated in due course for taking on KERI , and that he would have capital and staff resources; those agreements were breached. Mr Hemphill regarded those as contractual commitments;
- That additional responsibilities had been added to Mr Hemphill’s job description without his consent;
- That Sally Fox, acting director of HR, led Mr Hemphill to believe that detailing his full responsibilities in the job description could lead to an increase in pay and that there would be an informal assessment;
- That Kevin McNamara had acted in a bullying way by imposing a new job description without taking the facts fully into consideration;
- that Sally Fox should have found previous one-to-one and appraisal records in Oonagh Fitzgerald’s office;
- That Kevin McNamara had implemented a performance improvement plan as a direct result of Mr Hemphill’s grievance,
- That Kevin McNamara had made false and unsubstantiated allegations within the performance improvement plan (182).

4.172. That list was sent to Mr Hemphill on 11 January 2018 (209). Although a headline basis for the grievance had been bullying and harassment, and that had expressly been the reason for drawing in the meeting of 21 December, this list does not rely on that other than in relation to the imposition of the job description. Mr Hemphill did not challenge it.

4.173. Mr Rooney, having taken advice, declined to listen to the unauthorised recording of the discussion on 21 December 2018, having concluded that it would not clarify the facts (182).

4.174. Mr Rooney interviewed Mr Hemphill, Mr McNamara, Mr Turk and Ms Fox.

4.175. In his interview, Mr Turk confirmed that he had had HR advice that the updated job description, including responsibility for KERI, was Mr Hemphill’s job description although it had not been through evaluation; that was based on Ms Fitzgerald’s November 2017 appraisal notes, now found (299).

4.176. Mr Turk’s account shows that the confusion remained over Mr Hemphill’s responsibility for failing to upgrade the KERI system,

“Mark had had quite a bit of time to upgrade the KERI with the investment that we had and it's just hadn't moved forward and we found ourselves obviously towards the end of last year, where the system just crashed, so there was a performance issue there in my book.” (298)

4.177. He did not put that in the context of the funding, or when Mr Hemphill knew he had the funding, although now agreeing it was probably 26 November.

4.178. With regard to the performance improvement plan, Mr Turk explained to Mr Rooney,

“So based on the job description that I was being advised I could follow the KERI performance by Mark, you know needed addressing, so that's where the PIP originated. But it did then include a few other things, which admittedly pre-date my line managing Mark, but they came to the fore...”

4.179. For Mr Turk, the KERI system crashing and the failure to upgrade it was central to the performance improvement plan. He acknowledged that Mr Hemphill had had no warning of the content of the meeting, save that Mr McNamara had highlighted some concerns in an email. He acknowledged that the meeting was a “bit of a shock” to Mr Hemphill (300).

4.180. Mr McNamara viewed the capital as having been available in full from September (308).

4.181. Mr McNamara explained the reference to misogynistic comments as coming from a senior manager, referring to inappropriate and disrespectful language, talking over or down to women, and speaking in derogatory terms to senior managers. She blamed both Mr Hemphill and older men in his team.

4.182. That email was not shared with Mr Hemphill. The allegation had only been referred to in passing during the meeting of 21 December and not more fully explained or addressed.

4.183. Sally Fox confirmed that she and Oonagh had discussed the question of additional remuneration for Mr Hemphill for taking on KERI. Oonagh had said “We will look at it”, without making any commitment. Ms Fox had reported that to Mr Hemphill during their later one-to-ones, when she took over as his line manager in 2018 (287).

4.184. No conduct or communication issues were discussed with Ms Fox.

4.185. The grievance outcome was discussed at a meeting on 23 April 2019 with Mr Hemphill and the full report issued on 23 April 2019 (180- 201). There was a recommendation that Mr Hemphill's job description be reviewed to

include responsibilities in accordance with service needs, and submitted for job evaluation (191).

- 4.186. The grievance was not, for the most part, upheld, save in respect of Mr Hemphill's awareness of funds available for KERI (370).
- 4.187. While the capital investment had been secured, and reinstated to £50,000 in October 2018, Mr Rooney found that it was not clear how this was communicated to Mr Hemphill and there was no evidence to confirm that he knew the process to access it. There had also been discussions about an additional staff member. Due to the changes in his line management, he had not been provided with clear guidance or support to implement the resources available.
- 4.188. In relation to an increased pay award, Mr Rooney saw the notes Oonagh Fitzgerald had made – or those that had been found – for the appraisal in November 2017, which made no reference to additional remuneration for Mr Hemphill for undertaking the management of KERI (184)
- 4.189. He commented that the Job Evaluation process is weighted on the level rather than the amount of responsibility. Mr Hemphill had confirmed that if he had had a KERI Co-ordinator, his role would have been overseeing only.
- 4.190. Mr Rooney noted that the Trust was entitled to impose changes to the job description, did not accept that Mr Hemphill's acceptance of the responsibility for KERI was conditional, finding instead that he only objected when it became clear that there would be no additional remuneration. There was no corroboration for the suggestion that a higher pay award had been agreed.
- 4.191. He did not accept that there had been any promise of a change of banding on submitting the job for evaluation and it was appropriate to do that.
- 4.192. There had been no bullying in imposing the job description.
- 4.193. Mr Rooney accepted that there had been a failure to find relevant documents. During the investigation, Ms Fitzgerald's PA had found Mr Hemphill's personnel file and a secondary file. That contained documents up to and including 2017. He found that this failure was not intentional.
- 4.194. He dismissed a further complaint that Health and Safety should not have transferred to Estates.
- 4.195. He dismissed the allegations that Mr McNamara had implemented the performance improvement plan in response to the grievance and that he had made false and unsubstantiated allegations within it. In so doing, he relied on

the allegations having been outlined in an email from Mr McNamara on 12 December 2018. That email is substantially quoted above. It refers to the difficulties with KERI and “other concerns” which they needed to discuss “formally”. “Other concerns” represents the outline referred to save as to KERI.

- 4.196. Mr Rooney was wrong to rely on that email as outlining the concerns raised on 21 December 2018 or in the performance improvement plan. He did so, not having heard the recording or seen a transcript. He did not know of the wide-ranging allegations thrown at Mr Hemphill or how far the content of the meeting differed from the covering letter with the performance improvement plan.
- 4.197. In relation to reference to false allegations, he accepted that some of the matters raised were old, arising in June, but that more recent concerns had been raised relating to similar conduct. It is not clear on what he based that conclusion; it seems clear that all the concerns related to the summer of 2018 or earlier.
- 4.198. Mr Rooney accepted Mr Turk’s outline of the concerns on 4 January 2019 as sufficient.
- 4.199. He goes on to refer to the seriousness of the concerns relating to KERI (198). He knew the history regarding capital funding, including that Mr Hemphill had not known of or how to access the funding when eventually it became available, and that there was still no staff resource authorised. He did not attempt to reconcile that history with the account of performance failures.
- 4.200. He made recommendations directed at ensuring that Mr Hemphill was aware of the governance procedures and securing funding and for mediation.
- 4.201. Mr Hemphill appealed, the grounds for the appeal being that the grievance investigating officer had not taken into account all the evidence and the decision was unreasonable (377). The appeal hearing took place on 23 May 2019 and the outcome was given on 10 June 2019 (376).
- 4.202. The appeal was unsuccessful. The allegation of bullying or retaliatory behaviour was dismissed. The question of a contract relating to KERI work or resources was dismissed. The question of additional remuneration was one that had to go through the formal job evaluation process. The structural proposals – whether Health and Safety should be within Estates - were outside the scope of the appeal. The handling of the personal improvement plan had been properly dealt with in the grievance by the grievance officer
- 4.203. The grievance appeals officer refused to listen to the covert recordings as that was against Trust policy. She proposed to pass the information about

covered recordings to the commissioning manager for the appeal for a decision as to whether that was a conduct matter to be taken forward (382).

- 4.204. The job description went through the formal process of job evaluation in spite of Mr Hemphill's continuing protests, and on 22 July 2019, Mr Turk emailed him to say that the job evaluation panel had confirmed his post with all the additional workload and responsibility as at the same 8b banding, and that, "This is the job description to be used going forward." (doc 50 393 – 396).
- 4.205. Point 17 of the job description was "to develop an improvement plan for the KERI Integrated Access Control system to ensure it is robust and meets the Trust's requirements. The tasks of managing KERI and ensuring its maintenance with supporting administration and emergency call-out were also included. These are the terms of the job description Mr Hemphill had drafted in August 2018 (399 and 118).
- 4.206. Mr Hemphill did not appeal the banding or ask for it to be reviewed.

Workload 2020/2021

- 4.207. Kevin McNamara became Acting Chief Executive in June 2019. It was his practice to delegate matters, not necessarily only to those whom he directly line managed.
- 4.208. Two doctors died at the Trust in March and April 2020 due to COVID-19 exposure.
- 4.209. The Health and Safety Executive ("HSE") position was that unless fatalities could be confirmed as "occupational", so, for example, the unavailability of correct PPE or some other management failure that probably caused the COVID-19 exposure, they were not reportable under RIDDOR [Reporting of Injuries, Diseases and Dangerous Occurrences Regulations 2015].
- 4.210. There was a consensus amongst Hospital Trusts not to reporting Covid staff deaths under RIDDOR.
- 4.211. The guidance Mark Hemphill circulated on 7 April 2020 was that diagnosed cases of Covid-19 were not reportable under RIDDOR unless a very clear work-related link was established.
- 4.212. Different advice was given to the Trust by legal advisors, who advised that fatalities from exposure at work to Covid-19 should be reported (Mr Turk, ws para 39). Mr Turk noted that that differed from other advice, including advice from the HSE regional representative. Mr Hemphill took the view that the Trust should not be reporting such deaths under RIDDOR; there was no merit in an

unnecessary report and it would lead to investigation, with its additional demands. Mr Turk agreed to prepare a paper for the Board (404).

- 4.213. In April 2020, Mr McNamara directed Mr Hemphill to report both of the doctor's deaths as RIDDOR fatalities.
- 4.214. Mr Hemphill reported as directed on 15 May 2020. After the subsequent investigation, which continued for most of a year, it was held that neither staff fatalities were reportable under RIDDOR.
- 4.215. The HSE then carried out a full Covid-19 Trust compliance investigation, for which Mr Hemphill had to provide evidence and information.
- 4.216. Mr McNamara also instructed Mr Hemphill to see that a full internal investigation of the two doctors' deaths was carried out. He was to find another Health and Safety manager from a different Trust for the investigation. Mr Hemphill identified a colleague at a different NHS Foundation Trust who would be willing to do this. Mr Hemphill worked closely with his colleague on the draft reports. Mr McNamara required meetings to report on progress. This was a high priority task. Mr Turk, as line manager was not involved. The reports were submitted to Mr McNamara who raised various points for correction. The final reports were requested by the HSE and submitted on 8 July 2020.
- 4.217. The reports concluded that there were no identified causes for the deaths that implied any management failing.
- 4.218. Mr Hemphill complained that he had, as a Chartered Health and Safety practitioner, never before been ordered to carry out an investigation which he felt was both unnecessary and required for a false motive ("impure" or "bogus" reasons). The use of a colleague from another Trust to front the investigation he said was to give it an impression of external independence. He was unhappy at changes being made by Mr McNamara before the reports were submitted under the name of the external consultant.
- 4.219. He says he was asked to undertake other areas of work, so, for example, to draft complaints to the CEO regarding patient/visitor security incidents together with car park catalytic convertor thefts, previously been dealt with directly by SERVO under the PFI contract.
- 4.220. He says his priorities and workload were disregarded, timescales were impossible and his line manager excluded.
- 4.221. He agreed that he had not raised issues over workload or timescales with Mr Turk.

Retire and Return: the policy

- 4.222. The Trust has a flexible retirement policy (694). Consideration by managers of flexible retirement applications has to be fair, reasonable and consistent. Each case is to be considered on its merits taking into account the business case.
- 4.223. Criteria to be considered when making a decision include:
- the employee's roles and tasks
 - the effect the requested change would have on department and service provisions
 - whether the change proposed is operationally viable
 - workflow and the complexity of tasks
 - the scope for redistribution of work
 - the level of supervision necessary to cover the new arrangement
 - impacts on colleagues
 - cost
 - other issues including skill sets and recruitment restrictions
- 4.224. A line manager can refuse a flexible retirement request if they consider one of the following grounds apply:
- the burden of any additional costs is unacceptable
 - there will be a detrimental impact on the quality of service
 - there will be a detrimental impact on the ability to meet service needs
 - an inability to reorganise work amongst existing employees
 - an inability to recruit additional employees
 - detrimental impact on service performance
 - insufficient work available for the proposed hours
 - planned structural changes where the flexible working may not fit in.
- 4.225. The employee has the right of appeal. The grounds must be either that the decision was unreasonable, the manager did not take into account all the evidence or there is further evidence which may affect the outcome.
- 4.226. Where the application is for retirement and then a return to work, there must be a break in service. Continuity of service is not carried forward.
- 4.227. The manager must consider the application against service requirements. The policy allows for the request to be granted or a compromise to be reached.
- 4.228. There is to be a meeting within 28 days of the application and an decision within a further 14 days. The outcome, including any appeal, is to be

considered within three months of the complete request. That can be extended by agreement with the employee.

4.229. As a manager, Mr Hemphill's evidence was of familiarity with such applications, dealing with them routinely and swiftly. He granted them. He did not himself know of any that had been refused.

First Retire and Return request 2021

4.230. By April 2021, Mr Hemphill had decided to request retire and return. He would be 60 in November. He felt he was working in a continual bullying culture. He wanted to step down from an increasingly stressful role.

4.231. The request was submitted for a contract for 2 days per week at band 6 on 27 April 2021 (504).

4.232. Mr Hemphill was on band 8B, and he had not in fact lost his "on call" allowance.

4.233. His proposal was for his deputy to step up to the Head of Department role and for the Senior Health and Safety Advisor and Manual Handling Lead to step into the Deputy role. He would support both. He costed the proposal as potentially saving £40,000, including the ending of his on-call allowance which would not pass to his deputy, and the removal of the post currently occupied by the current Senior Health and Safety Advisor, who was part-time.

4.234. He listed the proposed benefits as:

- Retention of a chartered safety practitioner within the team
- retention of my Health and Safety competence regarding knowledge/ experience and advice
- mentoring and training of staff as required
- retention of team harmonics with a strong internal succession plan
- flexibility and the ability to provide interim cover for sickness etc (506).

4.235. He pointed out that succession planning and recruiting from within the team where candidates are suitable helps to maintain a strong team culture and maintain/improve standards.

4.236. The Trust is required to have a Chartered Health and Safety practitioner and that requirement being met by him being engaged on a part-time basis, would allow time for his current deputy to gain the necessary qualification.

4.237. Mr Turk met with Mr Hemphill and his deputy on 17 May to talk through the proposal. He gave early encouragement.

4.238. Mr Hemphill, in his letter of 1 July 2021 (516) refers to being told on 25 May that the proposal was acceptable. He says that Mr Turk progressed the proposals at formal meetings with the Deputy who would become Head of Department on 17 May and at other meetings.

4.239. On 9 June 2021, Mr Turk emailed Mr Hemphill explaining that it needed to be discussed with his line manager, Simon because,

“This ties into a wider conversation about the Health and Safety team structure going forward. He’s broadly aware of the situation and options, but I need a final chat to get his support.” (508)

4.240. Simon Wade was the recently appointed Director of Finance and the Executive responsible for Trust Health and Safety.

4.241. Mr Hemphill found the delay while waiting for the outcome punishing.

4.242. Mr Hemphill was told that his application was rejected in a call with Mr Turk on 29 June 2021(509). Rejection was unexpected and he was deeply upset. He went off sick during the conversation, following up with a text message. He referred to this as “messing up his mental health” and that he would need to take some time on sick leave, saying,

“I will respond to your e-mail letter when I feel more capable, but the shock is still overwhelming, especially after our previous one to one, when you said that my flexible retirement request was acceptable but most likely adjusted with (my deputy) appointed on an interim basis.

4.243. He said he would be taking out a grievance against Mr Turk and also claiming constructive dismissal.

4.244. Mr Turk explained his decision on a fuller basis in a letter emailed on 2 July 2021,

“The interim proposal would have been an acceptable solution to me yes but it would have come with some compromises which I was able to discuss with Simon on the 18 June 2021. Simon never objected to the interim solution, but on discussion we agreed we would look to re-appoint to your role on a like for like basis. I appreciate it has an impact on your own preference, but it was reassuring to hear Simon support a direct replacement of your post as it demonstrated a commitment to maintain resource levels... and of commitment to reappoint to the same calibre/ banding as yourself.” (512)

4.245. He went on to explain that he must work within the funds available. That was only the on-call payment Mr Hemphill had earlier secured, now amounting

£7,437 per annum. The band 6 role proposed for Mr Hemphill would cost £15,605.

“Whilst your retire and return application was unsuccessful in its specific request, I do appreciate our conversation on Tuesday was somewhat cut short when you advised me that you needed to go off sick and I would really appreciate the opportunity to now have another conversation with you to see how we might be able to make an alternative solution work best for both parties.

Please let me emphasise, I value the knowledge and experience you bring to your current role and it would be great if we could continue to harness some of that in a new way after your retirement.” (512)

4.246. Mr Turk reported to Mr Wade that Mr Hemphill had not liked the outcome and had gone off sick. He asked in return,

“Thanks for letting me know Rupert. On what basis is Mark off sick? Is it purely because he didn’t get what he wanted re: the retire and return. Need HR to look into this as that isn’t acceptable.

Probably proves why the R&R isn't the best option for us.”

4.247. There is something of a contrast between the warm terms of Mr Turk’s email to Mr Hemphill and the internal exchange of messages. Simon Wade did not know Mr Hemphill but seemed to have a strongly negative view of him.

4.248. Mr Turk says that he offered alternatives, including a role working one day a week and a fixed term contract, both rejected.

4.249. Mr Hemphill was deeply disappointed for himself and for his colleagues. From his own and his deputy’s dealings with Mr Turk, it had seemed that the proposal was acceptable.

4.250. He saw this as vindictive and a decision that only Kevin McNamara could have made. He challenged the outcome with detailed questions and rebuttal, asking, for example, why the funds allocated for an apprentice, an appointment not likely to be progressed in the near future, had not been taken into account as available (516).

4.251. He questioned who Mr Turk had consulted saying,

“I have had next to no interaction with Simon as yet as he is new to the Trust and I understand that H & S Fire and Security have never previously been within his portfolio.I cannot imagine that Simon

would have any objections to retaining a highly professional and registered chartered safety practitioner within his team”

- 4.252. He pointed out that any recruitment would only start on his own retirement and would probably then create a period of some six months at best without any Head of Department leaving the Trust exposed and, he said, at extreme risk.
- 4.253. Mr Hemphill copied in a number of people to that e-mail including the Freedom to Speak Up Guardians (517).
- 4.254. He hoped to be back at work by 20 July 2021 (520).
- 4.255. Mr Turk issued a further letter on 7 July, setting out two key reasons for the rejection, reiterating the commitment to maintain staff levels and structure, and that there were then insufficient funds to create the new proposed band 6 and no other vacancies available or that could be adapted. The burden of additional costs was unacceptable. He had previously denied that there were funds available for an apprentice (513).
- 4.256. Mr Hemphill asked HR how many retire and return requests had been made across the Trust over the past three years and how many had been rejected, with the staff member being unable to serve within the NHS in some capacity afterwards. The immediate response was that the information was not held (Mr Hemphill ws para 69 and 582).
- 4.257. Mr Hemphill asked Mr Turk whether Mr McNamara had been involved in the decision making. Mr Turk said he had mentioned it in passing, given that it related to the retirement of the Head of Department (514).

Second Retire and Return request

- 4.258. Mr Hemphill submitted a second Retire and Return request on 10 March 2022 (525, 706). It was made in relation to the planned retirement of a member of the team, Mandy, due at the end of June 2022. She had confirmed to him her intention to retire when she reached state pension age (66) on 1 July 2022. He asked for that or a similar Health and Safety officer role.
- 4.259. He wrote,
- “I am hoping that this will be a successful application in that this request is to back fill the part time post of a retiring H & S Team member and does not involve any of the succession planning proposals which were considered but unsuccessful when I applied last year leading up to my 60th birthday.

- 4.260. The existing post was 0.6 WTE at band 5. Mr Hemphill sought 0.4 WTE at band 6; that would reflect the experience he could bring to the role. The three months' notice that he had to give could be used to advertise and recruit a replacement Head of Department. His Charter status might be useful if the new Head of Department was still working towards this membership.
- 4.261. The benefits to the organisation were put as
- The retention of a chartered safety practitioner within the team
 - The retention of his knowledge and experience
 - His ability to mentor and train staff as required
 - The flexibility and ability he could offer, to provide interim cover for sickness etc
- 4.262. His team were aware of the impending retirement and of his plans and were happy with it.
- 4.263. He calculated savings of £8,000 from the change, including his on-call allowance, which might contribute to funding an apprentice.
- 4.264. He asked for the consideration of alternatives if the application was not successful (706).
- 4.265. Mr Hemphill sent his application by e-mail to Mr Turk on 10 March 2022.
- 4.266. The following day Mr Turk forwarded it to Simon Wade.
- 4.267. On 14 March at 11.25, Mr Wade responded, copying in the HR advisor, Claire, the subject line reading "Re Mark Hemphill R and R request 10.03.22,
- "As we have discussed the direction Health and Safety may move in the forward (*future?*) is likely to be different from a single Trust approach. As such any changes in the structure will not be recruited to on a "like for like" basis. We will need to discuss with HR... and system partners but as it currently stands the position is not as clear as Mark indicates it is. The need to build resilience and consistency across the system will be the key driver in how we progress the function and the GWH roles are likely to change, potentially significantly (524).
- 4.268. The response from Claire to Rupert and to Simon, at 11.45 on 14 March, still headed "Mark Hemphill retire and return request 10.3.22 was this,
- "Hi Rupert,

My advice is that you review the structure and develop a business case for the long term structure of H & S (considering the system requirements) which has been in discussion for several months. This will impact the outcome of this application and the longer term structure of the H & S team.

I have attached a restructure presentation we did for resourcing. You can amend to reflect what you need from an H & S structure - this will then transfer to a business case, which will need presenting at epf...” (523)

4.269. She suggested that they could present it at the April meeting, if Mr Turk was quick.

4.270. On 24 March, Mr Hemphill suggested he was paid at Band 8a rather than as a Band 6 officer when his Charter Member Status was being used and explained that he was currently completing Health and Safety objectives for 2022/23 and that he might be able to contribute in relation to best practice for cross Trust partnerships between the RUH, Salisbury and the GWH¹ (531).

4.271. A response was due under the Trust’s policy by 21 April.

4.272. On 21 April, Mr Hemphill met Mr Turk on Teams (527). He had had an indication about the likely outcome the previous week. Mr Turk read him a letter explaining that a decision on the application would be deferred;

“Unfortunately for the reasons described below the Trust needs to defer a final decision on your application until a full review of the team structure has been completed. As you know I secured support from the Executive Committee in March 2022 to undertake a full review of the current Estates and Facilities and Health, Safety Fire and Security structure. This will be a complex review potentially needing to consider wider collaboration across BSW². The Trust has recently commissioned external consultants (Provelio) to support this piece of work and the initial findings and recommendations are anticipated in early May 2022” (527, 534)

4.273. Mr Turk went on to say that final recommendations for executive consideration were anticipated in July 2022.

4.274. The officer Mr Hemphill hoped to replace had not yet given notice, a point Mr Turk acknowledged to be minor and capable of resolution (527). Mr Hemphill was not impressed,

¹ Royal United Hospital, Bath, Salisbury Hospital, Wiltshire, Great Western Hospital, Swindon

² BSW – Bath, Swindon, Wiltshire

"I know my team, I know their children's names, we were arranging a party." (oral evidence)

4.275. Mr Hemphill asked,

"So to me this seems like a straight forward replacement of a member of the Health and Safety team that I am asking to retire and return into so why has that concept been rejected?"

4.276. The answer was,

"Because I'm being asked to undertake a full review of the structure first."
(521)

4.277. Mr Hemphill asked if there was a recruitment freeze. Mr Turk said not:

"Recruitment freeze is a strong word because clearly if someone retires or leaves or whatever then we have to think about that at that moment in time but this is where I'm being asked by the executive to review the full estates and H & S structures and it would be a little bit remiss to not do that before I'm in a position to consider instruct, agree any changes so that's why I need a few more months to do that piece of work first."
(527)

"If a post becomes vacant and we must fill it instantly then clearly we will do so but if a post becomes vacant and we can take that opportunity to consider it in the round as part of a structured review then that is what I'm being asked to do."

4.278. Mr Hemphill questioned how a structure review could affect normal daily requests for retire and return.

4.279. He asked about the Provelio consultancy (528). The answer was,

"So, they are being asked to support me and provide some independence to understand what are the gaps in the structure, what are our opportunities and where could we collaborate a little bit, maybe with BSW but fundamentally it's about getting the structure right for Great Western both for the now and for the future as well. It does relate to Fire because of the capital works we've got going on etc so I only spoke to them for the first time yesterday but Connor has been talking to them for some weeks and hoped to come up with something to help us on our journey."

4.280. Mr Hemphill,

“This is boxes on some structure chart, it should have no bearing whatsoever about the name of the person in those boxes on that structure chart.... This should be surely nothing to do with the individuals named within that box.”

4.281. Mr Turk’s justification was did until he got the review he didn't know whether the structure or banding would change.

4.282. Mr Hemphill protested: his earlier proposal was rejected because they did not want to shrink the department and they were recruiting like for like. Now, with a vacancy coming up, his request was being rejected to await the outcome of a review.

4.283. He was angry, calling it “an absolute stitch up”.

4.284. On 22 April, Mr Hemphill wrote to Mr Turk, copying in HR. He sent his notes from the meeting, a Google transcription (536).

4.285. He asked why, in relation to the possible restructure of the Trust Health and Safety department, there had been no request for input from him as Head of Health and Safety and a Chartered member of the Institute of Occupational Safety and Health. He was the one with the understanding of the complexities of the HSE HSG65 model and the building and maintaining of a strong safety culture within an NHS Trust.

4.286. He had looked at the Provelio website. This is a strategic project management consultancy, Estates based, offering “Business Management advice – ie a clear picture of where you are now, where you want to be and how to make changes”. Its health projects include “Transforming patient experience and Improving business building efficiencies.”

4.287. None of these consultants, said Mr Hemphill, have any qualifications or experience whatsoever in setting up or delivering a robust safety management system.

“Why would such a review delay my request to retire and return?”

4.288. He pointed out the toll that this was taking on his mental health. He asked to discuss help from the Trust in regards to an Occupational Health management referral and the completion of a stress risk assessment (536).

4.289. There was a meeting on 26 April, when Suzie from HR attended with MR Turk. Mr Hemphill was only willing to take part if the meeting was recorded.

4.290. The discussion went over similar ground. Mr Hemphill again asked why as Head of Department, he was not being consulted on any restructure. He

could not see the logic of deferring a decision on a part-time safety officer role. He stressed the merits of the Trust policy on retire and return -

“We have a very active Retire and Return policy, which keeps the expertise in the business whilst the new person comes in. Very commendable.” (541)

- 4.291. He asked what the terms of reference were for the Provelio review. That went unanswered.
- 4.292. He spoke plainly of his stress and distress and need for the sake of his mental health to reduce the pressures he faced. That was the reason for pursuing this request.
- 4.293. Mr Hemphill was not by now presenting the proposal as long term. He had suggested a fixed term post, or that he might only be there a matter of months (543).
- 4.294. Suzie explained again that there was not yet a vacancy. Mr Turk added that if the post holder had given in her notice, he still would defer a decision pending the review.
- 4.295. Mr Turk confirmed that there was no recruitment freeze, although there might not be an immediate reappointment if the retirement took place.
- 4.296. Suzie suggested as an alternative for Mr Hemphill the option to retire and return on a bank contract (544). That would not of course guarantee him any work. He did not respond.
- 4.297. On 28 April 2022, Mr Turk sent an email offering Mr Hemphill an Occupational Health referral and the opportunity to discuss options with another manager, in case he would find it easier (594). He replied that he was, “shocked and hurt when I read this response to think that you don’t want to help me with any support now that I am effectively “broken” and would prefer that I be simply passed over to another Manager to be dealt with!” He reiterated that waiting for an outcome on this application had been “absolute torture for many months” (593).

The Provelio Report

- 4.298. The Provelio report is dated 20 May 2022 (553). It sets out,
- “The purpose of this report is to make a series of recommendations to Great Western Hospital NHS Foundation Trust regarding their Estates and Facilities team.” (556)

4.299. In six years time, the Trust's current PFI contract would come to an end as would the non-PFI Financial Management contract. Estates management, compliance and the upkeep of the main hospital would revert to the Trust. The Trust would need either to take the running of the estate in-house or to outsource both the PFI and non-PFI services.

4.300. The report compared the Trust with others, comparing, for example the physical estate and annual capital programme.

4.301. Three areas had been highlighted as requiring consideration and perhaps improvement:

- compliance management
- knowledge and visibility of the power and utilities infrastructure, its condition and resilience
- internal resources - a holistic review of resources, processes and procedures with an eye to creating a strategic approach for the present and future.

“The focus of this review is to ensure that the Trust have an adequate number of key people within their estates and facilities team and that those people have clarity on their roles, do not have an unrealistic workload and have a clear career path to aid staff retention.” (556)

4.302. The review expressly encompassed the roles of Fire Engineer and Advisor, this being a complex area and a specialist field. Comparisons were made with the Fire Safety Management structure in other Trusts (558).

4.303. The report addressed the need for additional fire safety expertise (559) recommending an increase in the current team by two. One would be a new fire advisor that would shadow the incumbent with a view to succession on retirement; the other would be a new internal fire advisor, bolstering internal expertise associated with fire compliance.

4.304. The Estates Management recommendation was for at least four staff for the direct maintenance responsibility and substantially more if the Trust moved to direct maintenance of the whole estate. Other recommendations related to delivery of capital projects, building information management and space management and PFI change management.

4.305. This is a high level report. While addressing the expertise in Fire Safety, the report does not discuss the make-up of the Health and Safety team or address the role of a part-time Health and Safety officer.

The decision on the second application

- 4.306. On 5 May, Mr Turk made a referral to Occupational Health, without Mr Hemphill's consent. Mr Hemphill had been off sick since 21 April 2022.
- 4.307. On 6 May 2022, Mr Hemphill encouraged Mr Turk to make a decision on his application (593) saying that it did not need to go to the Executive Committee in July with the higher level Estates/ H & S structure change recommendations.
- 4.308. On 13 May, Mr Hemphill's GP issued a sick note on the basis of work-related stress, backdated to 20 April (592).
- 4.309. On 24 May, Mr Hemphill put in a grievance claiming bullying and victimisation by Mr Turk (565).
- 4.310. On 24 May verbally and on 25 May by email, Mr Turk rejected the Retire and Return application (572).
- 4.311. At the meeting, Mr Turk again referred to the Provelio review, that being a part of the restructure conversation, and that was coming to a conclusion. He would then be asking Mr Hemphill and his deputy for their input.
- 4.312. Mr Hemphill protested at deferral, apparently indefinitely.
- 4.313. At that point, Mr Turk proposed an alternative. He said he was "under pressure to write that rejection letter because right now, based on all the facts, I am not in a position to accept your retire and return application". He could reject the application and that would give Mr Hemphill the right of appeal (570).
- 4.314. He was still relying on the fact that Mandy had not yet put in her notice of resignation: "I still don't have anyone in the team retiring that I am aware of..." (570)
- 4.315. If he issued a rejection now, that was not because of a reorganisation that was underway, but because there was no vacancy to put Mark Hemphill in before restructuring (571).
- 4.316. Mr Hemphill pointed out that that had been agreed to be a minor consideration, and that Mandy had expressed willingness to put in her retirement notice early. Then the only reason to reject would be waiting for a re-organisation that might be months or years in the future (571).
- 4.317. In the letter confirming the outcome, Mr Turk agreed that indefinite deferral was not an acceptable solution.

4.318. He referred to an Executive Committee instruction issued in March 2022 to undertake a full review of the current Estates and Facilities and Health, Safety, Fire and Security structure. He explains that in his witness statement; they had just received some last minute in year funding for such a review. There were potential options to be explored, including the portion (“provision?”) of shared services across multiple Trusts.

“This will be a complex review ,potentially needing to consider wider collaboration across BSW.

“It has become increasingly clear that the current review of the Estates and Facilities and Health Safety, Fire and Security structure is going to take time.”

4.319. The structure review needed to precede any subsequent decisions that might affect the structure of the team, he said.

4.320. He confirmed that there had as yet not been the resignation referred to.

4.321. The letter did not address the loss of Mr Hemphill’s Charter status. Mr Turk in discussing the 2021 refusal said,

“The important point was that FD did not want to compromise the Chartered status.” (oral evidence)

4.322. Were there to be a resignation following the refusal of retire and return, the Charter status would be lost.

4.323. There had been no consideration of alternatives. Mr Turk did in his rejection letter express a willingness to look at alternative solutions (572).

4.324. The grievance was investigated by Julian, The Way Forward Programme Director. During the grievance hearing, in relation to the relevance of the Provelio report, he agreed the Provelio review was not addressing Health and Safety (601), and

“But actually I know why Provelio were appointed, and it has got nothing to do with your particular role (600)

4.325. Mr Hemphill had sought information about the number of Retire and Return applications that had been rejected. He was initially, and very swiftly told that HR did not hold that information (581, 1 July 2021) He renewed the request on 10 June 2022 with a further request on 16 March 2023. The information given on 5 April 2023 was that 127 had been granted, but HR only kept information on rejected applications that they were aware of. They were aware of one (683).

4.326. It was a reasonable request. There is for example an escalation procedure which must involve HR, where the request cannot be met within the immediate team, so it is reasonable to consider that HR would learn of at least some cases where the initial request was refused - if there were any (617).

Appeal

4.327. Mr Hemphill appealed the decision to refuse the retire and return application on 30 May 2022.

4.328. The appeal meeting was heard on 20 June 2022.

4.329. Mr Hemphill's sick note ended on 1 July. This was the date he had hoped the retire and return application would have been resolved. He felt unable to go back to ask for another sick note, but equally unable to return to work,

“I feel I am in no condition to even consider any phased return conversations whilst all of this indecision continues to weigh heavily on my mental health.

I really thought that I would return from leave and that there would be some progress with either or both of the appeal or grievance procedures.”

4.330. Mr Turk required a sick note.

4.331. On 11 July 2022 the appeal was rejected by Johanna Bogle, Deputy Chief Financial Officer, and new to the Trust (643).

4.332. It was agreed that Mandy had now retired and so there was a vacancy. That was 0.6 WTE of a band five. Mr Hemphill's request was 0.4 WTE of a band six. Ms Bogle made the comparison between two 0.4 WTE posts and concluded that Mr Hemphill's proposal was unaffordable (644).

4.333. She added,

“I am advised there is that there is still a likely restructure to come, as well as departmental efficiency targets to meet as part of the Trust wide 11.1 million pound savings plan. Therefore, 0.4 WTE post will be either frozen until the restructure is complete or removed as part of the efficiency programme.”

4.334. The post was not frozen, as Ms Bogle now agrees. She confirms that there was an expectation that it would be frozen if savings targets had not been met or there was a restructure.

4.335. In relation to alternatives, Ms Bogle decided that Mr Turk had not thought alternative options would be welcome, based on the application and discussions the previous year. Mr Hemphill had not responded to the suggestion of a bank contract. She said Mr Turk's concern for Mr Hemphill's wellbeing had led him not to push on other options. In addition, although Mr Hemphill now presented the application as essentially temporary, Mr Turk had seen it as permanent.

4.336. Mr Hemphill pointed out the error over the 0.6 WTE. Ms Bogle replied on 13 July, having sought advice from HR, saying that,

"To clarify, the Trust is required to make savings of £11.1 million in this financial year. The retirement post has been frozen for non-recurrent savings in this financial year and will be either repurposed or recurrently released following the restructure of the department."

4.337. Mr Hemphill did not feel he could return to the Trust (650). He resigned on 15 July with immediate effect. He made it clear that he considered himself to have been constructively dismissed.

"Since I was transferred into the Estates Department and forced to take on additional duties added into my job description against my will over three years ago ,I have been working under protest and have suffered an ongoing bullying and victimisation campaign culminating most recently in two rejected requests to retire and return into an available role of less stress and pressure.....

You rejected the appeal hearing for my second retire and return request on 11/ 7/ 22 which failed to acknowledge any of the bullying and victimisation actions by my line manager and sets out the basis on which I believe you have seriously breached my contract. The justification for this rejection was also factually incorrect and I have asked the investigator twice now to correct and then re-justify....

I now consider that my position at Great Western Hospitals NHS Trust is untenable and my working conditions within a bullying environment as intolerable, leaving me no option but to resign in response to your breach."

4.338. He points out that his recordings had not been listened to but, he says, clearly confirm his accusations against Mr McNamara.

4.339. On 18 July 2022, Ms Bogle issued a corrected letter. She now made the comparison between the vacancy of 0.6 WTE of band 5 and Mr Hemphill's 0.4

of band 6. The proposal was unaffordable. The 0.6 post would be frozen or removed given a likely restructure to come as well as efficiency targets to meet.

4.340. Mr Hemphill's original application made that comparison. A band 8b budget was set for his replacement. Mandy was on £16,700. His proposal was for £15,600 for himself. In addition there would be the removal of the on-call payment he had enjoyed, which would not pass to the next Head of Department. The total savings he put at £8,000 (708).

4.341. The grievance was dismissed.

4.342. Mr Hemphill reports that the Trust has advertised three times for a replacement Head of Health and Safety, Fire and Security with Chartered membership of IOSH to act as the Trusts "competent person" under the Management of Health and Safety at Work Regulations 1999 and had been unsuccessful. There has been an open Risk added to the Trust Risk Register during that period. The most recent advertisement offered pay at a higher band, band 8c. The Respondent confirms that an appointment has now been made.

4.343. The claim was notified to ACAS on 18 July 2022 and the certificate was issued on 28 August 2022. The claim to the Tribunal was submitted on 12 September 2022.

5. Law on Constructive Dismissal

5.1. A termination of the contract by the employee will constitute a dismissal within section 95(1)(c) of the Employment Rights Act 1996 ("ERA 1996") if he or she is entitled to so terminate it because of the employer's conduct. That is a constructive dismissal.

5.2. For the employee to be able to claim constructive dismissal, the employee must establish that the following four conditions are met:

- i) There must be a breach of contract by the employer.
- ii) That breach must be sufficiently important to justify the employee resigning, or else it must be the last in a series of incidents which justify his leaving.
- iii) The employee must leave in response to the breach and not for some other, unconnected reason.
- iv) The employee must not delay too long in terminating the contract in response to the employer's breach, otherwise he or she may be deemed to have waived the breach and agreed to the variation of the contract or affirmed it.

- 5.3. A repudiatory breach of contract is a significant breach, going to the root of the contract (*Western Excavating (ECC) Ltd v Sharp [1978] ICR 221*). It is to be decided objectively by considering its impact on the contractual relationship of the parties (*Millbrook Furnishing Industries Ltd v McIntosh (1981) IRLR 309*). What might amount to repudiatory conduct was described in general terms as any conduct which is “so intolerable that it amounts to a repudiation of the contract” (*British Aircraft Corporation v Austin [1978] IRLR 332*.) The fact that the employer may genuinely believe that the breach is not repudiatory is irrelevant.
- 5.4. It also follows that there will be no breach simply because the employee subjectively feels that such a breach has occurred no matter how genuinely this view is held. If, on an objective approach, there has been no breach, then the employee's claim will fail (see *Omilaju v Waltham Forest London Borough Council [2005] EWCA Civ 1493, [2005] IRLR 35*).
- 5.5. Employment contracts contain an implied term of mutual trust and confidence. The parties to the contract will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust which should exist between employer and employee (*Malik v BCCI SA (in liq) [1998] AC 20 [1997] ICR 606; Baldwin v Brighton and Hove City Council [2008] ICR 680*).
- 5.6. It is not simply about unreasonableness or unfairness. The question is whether the conduct complained of was likely to destroy or seriously damage the relationship of trust and confidence; and there must be no reasonable or proper cause for that.
- 5.7. Whether a breach is sufficiently serious to be repudiatory is a question of fact and degree (*Croft v Consignia [2002] IRLR 851*). The test is objective,
- “Whether, looking at all the circumstances objectively, that is from the perspective of a reasonable person in the position of the innocent party, the contract breaker has clearly shown an intention to abandon and altogether refuse to perform the contract,”
- 5.8. It is not necessary in each case to show a subjective intention on the part of the employee to destroy or damage the relationship, a point reaffirmed by the EAT in *Leeds Dental Team Ltd v Rose [2014] IRLR 8, EAT*. As Judge Burke put it:
- “The test does not require a Tribunal to make a factual finding as to what the actual intention of the employer was; the employer's subjective intention is irrelevant. If the employer acts in such a way, considered objectively, that his conduct is likely to destroy or seriously damage the

relationship of trust and confidence, then he is taken to have the objective intention spoken of..."

5.9. The Court of Appeal in *Lewis v Motorworld Garages Ltd [1986] ICR 157* held that a course of conduct can cumulatively amount to a fundamental breach of contract entitling the employee to resign and claim constructive dismissal following a "last straw" incident, even though that incident by itself does not amount to a breach of contract. In *Omilaju* (above) it was stated that the last straw does not need itself to be a breach of contract and it does not have to be of the same character as the earlier acts in the series, but it must be an act in a series whose cumulative effect is to amount to a breach of the implied term and to contribute something, even slightly, to the breach of trust and confidence.

5.10. An employee who is the victim of a continuing cumulative breach of contract is entitled to rely on the totality of the employer's acts, notwithstanding a prior affirmation: the effect of the final act is to revive the right to resign. (*Kaur v Leeds Teaching Hospitals NHS Trust, [2019] ICR 1, CA*) ("*Kaur*").

5.11. In that case guidance is given on the approach for Tribunals:

- i) What is the most recent act (or omission) triggering resignation?
- ii) Has he or she affirmed the contract since that date?
- iii) If not, was that act or omission itself a repudiatory breach of contract?
- iv) If not, was it part of a course of conduct which viewed cumulatively amounts to a repudiatory breach of trust and confidence?
- v) Did the employee resign in response – or partly so – to that breach?

5.12. The general principles of contract law applicable to a repudiation of contract are that if one party commits a repudiatory breach of the contract, the other party can choose either to affirm the contract and insist on its further performance or he can accept the repudiation, in which case the contract is at an end. The innocent party must at some stage elect between these two possible courses: if he once affirms the contract, his right to accept the repudiation is at an end, but the election to affirm is not required within any specific period.

5.13. The resignation must be because of the breach, albeit it need not be the sole cause (*Nottinghamshire County Council v Meikle [2004] EWCA Civ 859*).

5.14. In *Colomar Mari v Reuters Ltd [2015] 1W:UK 712*, the summary of His Honour Judge Jeffrey Burke QC summarised the position with regard to

affirmation as follows, describing this as a summary built upon *WE Cox Toner* (below) and other case law and noting that the doctrine of affirmation is applied more liberally in the case of an employee who is the victim of a fundamental breach than it would be in the case of most other (commercial) contracts.

“The essential principles are that:

- (i) The employee must make up his [her] mind whether or not to resign soon after the conduct of which he complains. If he does not do so he may be regarded as having elected to affirm the contract or as having lost his right to treat himself as dismissed (*Western Excavating, above, as modified by WE Cox Toner (International) Ltd v Crook, [1981] IRLR 443, and Cantor Fitzgerald International v Bird [2002] EWHC 2736 (QB) [2002]*)
- (ii) Mere delay of itself, unaccompanied by express or implied affirmation of the contract, is not enough to constitute affirmation; but it is open to the Employment Tribunal to infer implied affirmation from prolonged delay (*Cox Toner, above*)
- (iii) If the employee calls on the employer to perform its obligations under the contract or otherwise indicates an intention to continue the contract, the Employment Tribunal may conclude that there has been affirmation (*Fereday v Staffs NHS Primary Care Trust UKEAT/0513/ZT [2011] paras 45/46*)
- (iv) There is no fixed time limit in which the employee must make up his mind; the issue of affirmation is one which, subject to these principles, the Employment Tribunal must decide on the facts; affirmation cases are fact sensitive (*Fereday para 44*).

5.15. Delaying too long or, by conduct, indicating acceptance of the change, can point to affirmation. It is not simply a matter of time, in isolation. In *WE Cox Toner (above)*, it is established that mere delay by itself (unaccompanied by any express or implied affirmation of the contract) does not constitute affirmation of the contract; but if it is prolonged it may be evidence of an implied affirmation. Simply continued working and the receipt of wages points towards affirmation. Nevertheless, if the innocent party further performs the contract to a limited extent but at the same time makes it clear that he is reserving his rights to accept the repudiation or is only continuing so as to allow the guilty party to remedy the breach, such further performance does not prejudice his right subsequently to accept the repudiation.

5.16. The limitations on that are addressed in *Bournemouth University Higher Education Corp v Buckland [2010], CA, IRLR 445 para 44*,

“That does not mean, however, that tribunals of fact cannot take a reasonably robust approach to affirmation: a wronged party, particularly if it fails to make its position entirely clear at the outset, cannot ordinarily expect to continue with the contract for very long without losing the

option of termination, at least where the other party has offered to make suitable amends.”

- 5.17. The exercise of a contractual grievance or appeal procedure in an attempt to give an employer an opportunity to resolve the issues that give rise to the breach of contract is not likely to be treated as an unequivocal affirmation of the contract (*Kaur v Leeds Teaching Hospitals NHS Trust* [2018] EWCA Civ 978 [2018 IRLR 833]).
- 5.18. A constructive dismissal is not automatically unfair. As explained in *Upton-Hansen Architects Ltd v Gyftaki* ([2019] 5 WLUK 701), If a dismissal is found, then fairness has to be considered applying s98 of the ERA 1996. The employer must show the reason for the dismissal, which is the reason for the which the employer breached the contract of employment and that it is a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee of the position the employee held. If the reason is a potentially fair reason, the question is whether the dismissal was fair within section (4), having regard to the reason shown and all the circumstances including the size and administrative resources of the employer: did the employer act reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, having regard to equity and the substantial merits of the case.

Bullying

- 5.19. I am referred to *Mullen v Accenture Services Ltd* [2010] EWHC 2336 (QB). 2010 WL 3580821 (“*Mullen*”) in respect of bullying in the context of a civil claim. This is not a discrimination case so there is no statutory claim for harassment which can be brought. In *Mullen*, at paragraph 38, the words of Wright J in *H v Isle of Wight Council* (High Court 23 February 2001) are cited with approval,

“The criterion of what does or does not amount to bullying in any given circumstances is not to be judged solely by the subjective perception of the victim himself, but involves an objective assessment of the observed behaviour taken in conjunction with any apparent vulnerability in the target of the behaviour complained of.”

- 5.20. What is required is to assess the facts as objectively as possible. A particular vulnerability due to mental health problems, including where the employee is already suffering from illness due to stress at work, is a relevant factor.
- 5.21. The cases of *Green v D B Services UK Ltd* [2006] EWHC 1898 (“*Green*”) and *Veakins v Keir Islington Ltd* [2009] EWCA Civ 1288 (“*Veakins*”) were also

cited, in a discussion of the nature of bullying and harassment. The Court of Appeal in *Veakins* considered the nature of harassment in section 11 of the Protection of Harassment Act 1979, and accepted that the test that harassment involved conduct that was “oppressive and unacceptable” as opposed to merely unattractive, unreasonable or regrettable. The presence of malice makes satisfaction of the “oppressive and unacceptable “ test easier to achieve. In relation to how that applies to bullying is less clear but the approach suggested by Lady Hale in *Majowski v Guys and St Thomas NHS Trust* [2007] 1 AC 224 at paragraph 66 is adopted:

“A great deal is left to the wisdom of the courts to draw sensible lines between the ordinary banter and badinage of life and genuinely offensive behaviour.”

- 5.22. In *Green*, a relentless campaign of mean and spiteful behaviour designed to cause the victim distress was accepted as a deliberate and concerted campaign of bullying. It amounted to harassment and was oppressive and unreasonable. That is seen by HH Clark in *Mullen* as an instructive example of what may constitute bullying in the ordinary meaning of the term.

Repudiatory breach and non-contractual terms

- 5.23. In an employment contract, a duty is implied into the employment contract, on the employer not, without reasonable and proper cause, to conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between the employer and employee; the implied obligation of good faith. The question is what amounts to a breach of that duty, in relation to the exercise of a discretion. It must be reasonable, but what does that mean?
- 5.24. In the employment context, the question was considered by the Supreme Court in *Braganza v BP Shipping Ltd and anor*, [2015] UKSC 17, [2015] IRLR 487.
- 5.25. The background is that an employment contract is of a different character from an ordinary commercial contract. Any decision-making function entrusted to the employer has to be exercised in accordance with the implied obligation of trust and confidence. (para 32).
- 5.26. The court applied the *Wednesbury* test (*Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1947] 11 WLUK 26 (CA)). The *Wednesbury* case is one of reasonableness, requiring the decision maker, at the date of the decision:
- to take into account all relevant matters and exclude all irrelevant matters, and

- to reach a decision which is not so unreasonable that no reasonable decision-maker could have come to it.

5.27. That is a much higher test than simply reasonableness.

5.28. The case of *IBM United Kingdom Holdings Ltd v Dalgleish* [2017] WL 03252485 [2017] considered the application of that to the duty of mutual trust and confidence.

5.29. Cases concerning the denial of pay increases to particular employees were discussed, for example, *Transco v O'Brien, CA*, [2002] ICR 721. An employee had not been given a pay increase given to all others in the same category. Pill LJ said,

“To single out an employee on capricious grounds and refuse to offer him the same terms as were offered to the rest of the workforce is, in my judgement, a breach of the implied term of trust and confidence. There are few things which would be more likely to damage seriously (to put it no higher) the relationship of trust between an employer and employee than a capricious refusal, in present circumstances, to offer the same terms to a single employee.” (paras 16 and 17).

5.30. That was to apply a test of arbitrariness or capriciousness, as an aspect of the duty of trust and confidence.

5.31. In *IBM United Kingdom Holdings Ltd*, the comment was that,

“In cases of that kind, concerning pay rises, the employer is not exercising an express or implicit discretion under the employment contract, but they show that the court’s approach to the employer’s freedom of operation in relation to the contract may be constrained by the implied duty so as to require the employer to act in a manner which is not arbitrary or capricious. Such cases may not be susceptible to the full application of the *Wednesbury* test.

5.32. The judgment continues,

In cases which do involve the exercise of an employer’s discretionary powers, whether express or implied, then, in our judgement, the effect of the recent case law is that, in order to decide whether the employer’s act is or is not in breach of the implied duty, a rationality approach equivalent to the *Wednesbury* test (including both its limbs) should be adopted, taking into account the employment context of the given case. Such an approach is required because the court does not and must not substitute its own decision for that of the decision maker, in these cases the employer.” (para 45)

5.33. A test of capriciousness, perversity or arbitrariness is close to the rationality test.

5.34. In such a case as this, the legal burden of proving a decision to be in breach of the rationality test is on the Claimant, although the evidential burden may shift to the employer if the Claimant shows a prima facie case (57).

6. Submissions

6.1. Both parties gave valuable oral submissions and Mr Isaac provided a written submission which was helpful.

7. Reasons

- 7.1. Formal written reasons always present as different from the oral judgment, delivered less formally on the day, typically without the same level of detail or the agreed facts.
- 7.2. In this case, the evidence overran, as does sometimes happen. Time for deliberation and judgment fell short of what had been intended. Rather than reserving the decision and keeping the parties waiting, Mr Isaac suggested that a full “Jarndyce and Jarndyce” judgment was perhaps not necessary. I welcomed that, concerned to avoid the delay for everyone involved in the preparation of full reasons. The oral judgment was necessarily briefer than it might have been. This is not a straightforward case, and I have found it necessary to set things out in detail. The present judgment plainly errs in the opposite direction but I hope it is not ‘so complicated that no man alive knows what it means’ – to quote the opening to Dickens’ “Bleak House”, the source, of course, of the Jarndyce and Jarndyce reference.

The failure to award a pay increase in respect of KERI

- 7.3. There is no doubt that Mr Hemphill had a good record as a competent and effective H & S manager. He was well regarded. In his 2016 appraisal Colette Priscott reported excellent feedback, that he was well respected as a member of the team, a sound and balanced manager, with a pragmatic can-do approach. His department came through well over two audits that Mr McNamara commissioned that reported in December 2021. On the evidence, he had a good relationship with his managers, at least up until 2017.
- 7.4. When Carillion said they wanted the Trust to take over the problematic KERI system, Oonagh Fitzgerald’s first response was to avoid it,
- “I have been clear with Mark that he has no authority to take on responsibility for this poorly functioning system.” (114)
- 7.5. Mr Hemphill pitched for it. He felt he and his team had the capabilities to turn it around, and he looked for the budget to do it, capital and staff, and some additional reward for taking on what was seen as a poisoned chalice.
- 7.6. Here we come to the first of the management failings. There is no record of what Mr Hemphill was asked to do and the terms on which it had been agreed he would do it, before and after the Executive Committee meeting of October 2017.
- 7.7. I am confident that the discussions he refers to with Oonagh Fitzgerald took place. They jointly prepared the paper for the Executive Committee. She was reluctant to see him take it on and would have wanted to see it properly

resourced. The resources eventually committed echoed those he says were identified at the time as necessary – the band 3 staff member and the capital to repair the failing system.

- 7.8. It was not unreasonable for Mr Hemphill to be looking to increase his salary towards the end of his career or to seek some reward for taking on an essential, but failing system.
- 7.9. It is likely that she was sympathetic to his request for financial recognition for himself. Sally Fox confirmed to Mr McNamara in August 2018 that Oonagh Fitzgerald had agreed to look at Mr Hemphill's pay (240).
- 7.10. I do not consider that he is a man who would manufacture and then consistently hold to the account that he gives of those discussions. Oonagh Fitzgerald knew of the urgency; the system was unreliable and there were serious breakdowns. Carillion were handing the project over: it was a matter of urgency to install management and embark on maintenance and upgrade. He was willing to take it on, trusting that the necessary resources would follow.
- 7.11. I am satisfied that when Oonagh Fitzgerald agreed to him taking on the management of KERI, they discussed a package that he felt would allow him to do the job well and would recognise the effort that he and his team were putting in. For him, it was a route to improved pay and pension, and he was satisfied that properly resourced, he and his team could make a success of it.
- 7.12. It is a serious management failure that there is no record of that discussion.
- 7.13. I do not accept his contention that there were contractual agreements reached. Ms Fitzgerald would have had to obtain authorisations before committing to a revision of the pay and resource sufficient to cover the capital and ongoing expenditure. He acknowledges that no figure for any increased pay for him had been agreed.
- 7.14. The consequence was there was a lack of clarity and a lack of agreement about what Mr Hemphill's job description was as well as over his pay. For him, the job description was conditional on the pay. The Respondent never accepted that.

KERI Funding

- 7.15. There was delay over funding. Mr Hemphill was disappointed that no funding for KERI appeared even in the March 2018 budget. Funding was allocated in April for the capital works but halved in around May. There was no progress on the staff member.

- 7.16. The delay no doubt reflects urgent pressures of work elsewhere, but the consequence was that Mr Hemphill stepped up to take on the KERI system, without a conclusion being reached on his pay, without the funding to make it work and without the staff to operate it. He did so in good faith.
- 7.17. He is very clear about the heavy additional workload being bolted on to existing demands without extra staff and with a failing system.
- 7.18. I want to acknowledge to that that period from 2017 November to the following summer on was an extremely difficult time for Mr Hemphill personally. He was undergoing chemotherapy therapy and steroid treatment. He continued to work, to his credit, but it must have sapped his energies and resilience.
- 7.19. Matters were compounded by the later confusion over the November 2017 appraisal notes, notes Mr Hemphill prepared for the appraisal. There, he was making his pitch to take on KERI, so he incorporated duties and responsibilities relating to Keri. In 2018, those were taken to be Oonagh Fitzgerald's notes after the appraisal. The Respondent's view, including the view taken by HR, was that he had unconditionally undertaken to be responsible for KERI and that KERI had been included in objective setting for him since November 2017 (155).
- 7.20. It is not clear when Ms Fitzgerald stopped work - she formally left in July. When Sally Fox took over line management, she did not address the issue of pay, while knowing that Oonagh Fitzgerald had agreed to look at it. That would have been a moment to explore with Mr Hemphill what had been agreed, what his expectations were and to see what the blocks were on progress. Sally Fox acknowledged being too busy to give Health and Safety much attention.
- 7.21. There is another breakdown here. Mr Hemphill speaks of trying to get funding all through 2018 but getting no response. The outcome of the Executive Committee in October 2017 had been non-specific in terms of funding. It was for Oonagh Fitzgerald to put together the business case. No doubt she might have worked with or delegated to Mr Hemphill. The initial capital funding was secured before she left, but then reduced. Mr Hemphill was not clear about how to get things moving, and there was a lack of management input from his line managers to address that.
- 7.22. No discussion is recorded as to how he might be able to use the £25,000 available from May, when the costings were based on the re-cabling the whole door system. Mr Hemphill says it was not something that could be done in stages – "You can't pin them down on deliverables." In other words, the contractors would not commit to making it work:

“If you kill half the project, you kill the whole project, you can't do it in bits, it won't work.”

- 7.23. Mr Turk now disagrees, saying it was always going to be done in stages. That is something that needed resolution at the time.
- 7.24. Mr Hemphill was challenged at the August 2018 meeting over failing to recruit the proposed band 3 staff member, and could only say he had pressed and pressed for funding. After that meeting, Rupert Turk was to look to see how funds for that could be identified.
- 7.25. In his interview with Mr Rooney about Mr Hemphill's grievance on 6 March 2019, Mr Turk, speaking about the administrative support role for KERI said,
- “As far as I am aware, that doesn't feature in any budgets yet, possibly because a process hasn't been followed to say you've definitely got the money and here it is.”
- 7.26. Mr Turk had had line management of Mr Hemphill since August 2018. He had himself been charged by Mr McNamara in August 2018 to see where funds could be identified for a post or a contribution to a post (240).
- 7.27. There is a lack of clarity as to when and how Mr Hemphill knew of the reinstated £50,000 – Mr McNamara saw it as available in September, Mr Turk agreed Mr Hemphill may well only have known in late November.
- 7.28. The impression is of Mr Hemphill's managers being too busy to support and manage effectively.
- 7.29. Mr McNamara saw the failures very plainly as Mr Hemphill's. But the lack of clarity about role and funds are a management responsibility to address.

Keeping KERI

- 7.30. By July, Mr Hemphill was proposing that KERI be transferred away from him and to Estates. His emails in July 2018 are forceful and assertive, (234 – 238). Mr Hemphill made it clear that he did not want this role without the resources to carry it through.
- 7.31. He said that it was, “Abundantly clear that you have no intention of progressing the agreement made with Oonagh and Colette to provide adequate remuneration and resource” for KERI.

- 7.32. Mr McNamara did not allow Mr Hemphill to step back from KERI management, did not accept any conditionality to his involvement and was dismissive of any difficulty in relation to budget and the allocation of funds that any competent manager could not resolve.
- 7.33. Mr McNamara was entitled to refuse to remove responsibility from the Claimant's remit if it was properly included. The contract authorised the managers to determine the duties included in the job role.
- 7.34. However, it was germane to make proper provision for the project to be adequately resourced and it would have been sensible to try to understand and address Mr Hemphill's resistance to accepting it as part of his role. Mr Hemphill had not solely been seeking higher pay. He had been seeking the capital and staff resource to make a success of this failing system. He did not have that.
- 7.35. Mr McNamara himself might well have been able to cut through the difficulty and secure funding for the expenditure he wanted but there are procedures to be followed. Mr Hemphill was asking for the funding, and neither getting it, or clear guidance as to how to get it, as Mr Rooney found in the grievance outcome. There needed to be clear leadership from his line managers.
- 7.36. Mr Hemphill also had a very substantial increase in his workload and that of his team.
- 7.37. What mattered was to work with Mr Hemphill to see what needed to be done, and the approach to be taken instead was to blame him for a lack of progress, without understanding the context.
- 7.38. The importance of the 9 August meeting is that it is from this date that Mister Hemphill says that Mister McNamara began a bullying campaign.

The Job Description

- 7.39. It was after this meeting that the job description was redrafted, as Mr Hemphill thought, informally. Mr McNamara thought it was important for clarity.
- 7.40. The difficulty here is that the policy on job evaluation allows for a manager to design a role to attract what the manager sees to be the appropriate grading. The alternative approach was to see what banding the post attracted, as defined. In Mr Hemphill 's expectation, Oonagh Fitzgerald would have been the sponsor for a revised job description when he was given responsibility for KERI. With that sponsorship and HR advice, the policy permitted the role to be defined in a way that would attract the banding she thought appropriate, provided funds could be found.

- 7.41. Notwithstanding the lack of records, I don't doubt that there had been those discussions, including that Mr Hemphill hoped for promotion. That is not to say that Oonagh Fitzgerald had undertaken to sponsor it, or to what level: it had been left open. Since she left, no manager had seen either merit in pursuing it or the need. Without that sponsorship, the job evaluation would be likely to come out as requiring no change to the banding level and that is what happened.
- 7.42. With no-one sponsoring the job description through the evaluation process, Mr Hemphill did not want a formal evaluation because he did not want to have his job description crystallised into one that incorporated the KERI responsibility. That remained a stumbling block for him throughout and is what lies behind his anger at the job evaluation proceeding.
- 7.43. Management faced with his reluctance to commit to responsibility for KERI were not wrong to seek confirmation by way of job evaluation. They thought they had a documentary basis, in the 2017 appraisal notes, to think that he had accepted that responsibility. It was a long time before anyone realised that they did not have Oonagh Fitzgerald's notes.
- 7.44. The Respondent was entitled to accept the desk-top evaluation based on the inclusion of the KERI responsibility, and the later full evaluation. They were not required to support an uplift to a higher banding. Under the terms of his contract, they were entitled to define his duties.
- 7.45. Mr Hemphill continued to resist accepting that job description long after his managers told him he was bound by it. He did however continue to discharge his responsibilities for KERI over the following years.
- 7.46. It was a subject of considerable disappointment to Mr Hemphill that he got the burden of the job but not the benefits either professionally, in a well-functioning system, for his team or personally.
- 7.47. The stage set for him to feel targeted by Mr McNamara having been faced with criticism for failing to take steps in respect of KERI that he did not see that he was in a position to take. And he was very resistant to this kind of direct management by Mr McNamara which began before Mr McNamara was in the direct line of management.
- 7.48. Mr Hemphill was feeling duped, put upon, let down. He was not proving to be an easy man to manage. He shows resentment and intransigence. But the confusion about his role, what the funds were, how to access them reflects a failure of management.

7.49. The situation relating to KERI and its funding had been urgent since November 2017 and was unresolved in December 2018.

21 December 2018

7.50. In the 29 November 2018 appraisal, there is no criticism of Hemphill's performance and no indication that a performance review was required. It is agreed that a last push on KERI was needed.

7.51. It did not help that Mr Hemphill's files were not passed to his line managers after Oonagh Fitzgerald left. Nor were they found promptly. I accept Mr Rooney's conclusion that that was not deliberate, although it was unhelpful; the documents were important and they were all there to be found.

7.52. There was another major breakdown of the KERI system on 5 December. This was not new.

7.53. On 21 December, Mr Hemphill faced an extremely challenging meeting. He faced two managers, one senior, having thought he was attending a meeting about resources for KERI, finding himself unexpectedly facing criticisms of his performance and behaviour. KERI resources were not discussed.

7.54. He had no warning that this was a meeting about his performance or of the issues to be raised.

7.55. The meeting is described as informal. The performance management policy envisages an informal approach being taken first, with a manager raising matters by having a quiet word, an informal conversation. This was far from that. The involvement of the Mr McNamara, the Director of Strategy and Community Services, and Mr Turk's line manager, made it immediately more serious and formal. Mr McNamara had wanted a formal meeting. While Mr McNamara was said to be present in a supportive role, he quickly took over the meeting. These were his concerns being voiced, not Mr Turk's.

7.56. The points raised against Mr Hemphill were sweeping – performance failures, lack of pace, lack of action, failure to plan, his attitude, behaviour, rudeness, insults, failing to establish the right team culture in terms of attitude and responsiveness.

7.57. The policy is directed at resolving matters quickly, with the employee having the opportunity to address matters over time, at least a month. The issues in relation to behaviour related to the summer of 2018 or earlier. Some if not all related to incidents when managers were present. Mr Turk had himself been present at least once.

- 7.58. They had not been seen as meriting intervention at the time. They had not been raised during the appraisal. They were not matters that had arisen since the appraisal.
- 7.59. Some concerns were said by Sally Fox to have been raised with Mr Hemphill in May (155). It is not clear what, or in what terms, it is unrecorded and it was not followed up if the discussion did not achieve its objective. The policy envisages continuing support, monitoring and review. That had not happened. If there was unhappiness after such a conversation, it should have been followed up at the time.
- 7.60. This was not a basis which justified progression in December in relation to attitude or behaviour. The first stage of the policy was skipped. It was the more important because the wide range of the allegations: it was not going to be fair to produce that list without warning.
- 7.61. At the least, it would have been fair to look in detail at the allegations and to allow discussion.
- 7.62. No attention was paid to Mr Hemphill's reminder that he had been working throughout the first half of 2018 while undergoing treatment with chemotherapy and steroids.
- 7.63. The performance failures in relation to the SwICC fire and Entonox and ventilation are not identified and are not included in the performance improvement plan. Mr Hemphill saw those as successes. There is some clarification in the interview between Mr McNamara and Mr Rooney, but that discussion was not had with Mr Hemphill.
- 7.64. In relation to KERI, the approach taken was that Mr Hemphill was responsible for the failure to upgrade the KERI system, without any assessment of whether he had had the resources to do that or of the role of his managers in relation to securing resources. The failure was based on a statement that Mr Hemphill had been asked to formulate and implement a plan to upgrade the KERI system in November 2017. There is no source for that, but he had obtained the advice and quotations for the upgrade. In his book, that was the plan; but it stalled in the absence of capital funds.
- 7.65. There was no discussion in the meeting in December 2018 of the resource question, even to pin down what Mr Hemphill knew or should have known and when.
- 7.66. There is a stark conflict between Mr McNamara's negative judgment of Mr Hemphill's performance and Mr Hemphill's record as shown for example in

audits, appraisals, the RIDDOR record, the absence of improvement notices.

- 7.67. Mr Turk then issued the performance improvement plan. It had not been discussed with Mr Hemphill because the meeting had closed when he felt ill. It was not more fully discussed because he refused to engage.
- 7.68. The plan was abandoned in July 2019.
- 7.69. In my judgment the meeting on 21 December 2018 and the issue of a performance improvement plan were unfair. There were issues over KERI, but it is not established that or how far Mr Hemphill was the cause. It is obviously unfair to blame him for not producing a plan in November 2017, in the absence of evidence that he had been asked to do more than he did, in obtaining a quotation for the necessary works and appointing contractors. It was unfair to blame him for not progressing the scheme given evidence that he had not had the resources. It is very plain that he had been pressing for those resources.
- 7.70. KERI had been raised in correspondence and in meetings since August 2018. Mr Hemphill knew that it would be discussed. The concerns Mr McNamara had over lack of progress were justified. This might have been a moment to establish what had gone wrong. There was no open exploration.
- 7.71. As regards the references to insults, concerns raised by staff at Orbital about the behaviour of colleagues, derogatory remarks about colleagues, these are old incidents, only now being brought forward with few specifics for inclusion in a performance improvement plan. They could have been addressed in the informal way the policy envisages, but no manager saw that as appropriate or necessary at the time. If there was any discussion, there was no follow-up, no taking stock, no record of further failure following such discussion.
- 7.72. Other allegations are vague and generalised – the claimed lack of engagement and ownership, failure to keep to STAR values, Mr Hemphill's general manner.
- 7.73. It is hard to see this as anything but misconceived and ill-founded. Whatever the concerns, this was an approach that was likely to be destructive of good working relationships.
- 7.74. It was Mr McNamara who called the meeting on 21 December, who had decided prior to the meeting that there was to be a performance improvement plan and who took over the meeting over to itemise his complaints. The approach was bullying, given the manner in which the

meeting was held – with two senior managers, a string of negative comments all at once, without warning, with wide-ranging but vague allegations, raising matters belatedly, that had not merited action at the time, without context or investigation, refusing an opportunity to respond. The plan itself did not reflect the discussion at the meeting. The challenge was to Mr Hemphill's professionalism, competence, working relationships, leadership and communication skills, all, save the KERI issues, out of the blue.

- 7.75. The quiet abandonment of the plan is itself evidence that it was ill founded. It is not evidence that it achieved its aim.
- 7.76. This was not done at the initiative of Mr Turk. He did not bring forward the allegations, or discuss them with Mr Hemphill during their regular meetings or appraisal, and he did not present them at the meeting. It was Mr McNamara's initiative. He had not listened to Mr Hemphill earlier or made proper enquiry before launching on this raft of allegations. The approach taken did not reflect the Trust's policy.
- 7.77. Mr Isaac makes the point that there is evidence that the allegations were well-founded. That is not the issue I have to decide. What was put to Mr Hemphill was inadequately and incompetently presented. There was a discussion to be had, in particular about the delays in upgrading KERI, but the opportunity even for that was missed.
- 7.78. It is clear that Mr Hemphill can be brusque, abrupt, challenging, intransigent at times. There is no history of performance issues under his previous long service but if those issues were arising now, the Respondent could not be criticised for raising them. It is the approach taken that was unhelpful: it was misguided, brutal and bullying and calculated to put him on the defensive, without exploring the facts or encouraging change.

The Grievance

- 7.79. Mr Rooney gave Mr Hemphill time to explain his grievance fully and explored it with care. He worked carefully through what the complaints were. He conducted the relevant interviews. He had the benefit of Oonagh Fitzgerald's (very limited) notes on the November appraisal. He was entitled to find, as I do, that there were no contractual commitments made in respect of the funding of KERI or Mr Hemphill's remuneration (or that of his team) for taking it on. Mr Hemphill having managed KERI for a number of months, with the history of discussion in November 2017, in his view justified the inclusion of those responsibilities in his job description: there was a basis for finding that it was not imposed in a bullying way.

- 7.80. He did not listen to the unauthorised recording of the meeting of 21 December, having decided it would not clarify the facts. That was unfortunate. Listening, or reading a transcript, would have disclosed the way that Mr McNamara presented a string of wide-ranging and vague allegations, the majority not mentioned in the email of 12 December or in the performance improvement plan or covering letter. The manner in which those issues were presented is germane to the question of whether there was bullying and bullying was the headline issue in the grievance. Deciding not to listen to the tape prevented Mr Rooney from making a full assessment.
- 7.81. When the issue is bullying, it may well not be capable of being fully explored on the basis of contemporary documents and that was the case here. To establish the facts, Mr Rooney did need to hear the recording, unauthorised though it was.
- 7.82. Mr Rooney did not get to grips with the bullying and harassment Mr Hemphill had complained of. I accept that in part that is because of the way the grounds were formulated; that was done by Mr Rooney following the investigation meeting, but sent to Mr Hemphill. Mr Hemphill did not identify any omissions.
- 7.83. He accepted that there was little to establish when Mr Hemphill had known there were funds for the KERI upgrade. He did not explore how far the allegations of performance failure on his part were related to the lack of funds.
- 7.84. He accepted that the allegations made were not false and represented genuine concerns, based on the interviews with Mr Turk and Mr McNamara.
- 7.85. What Mr Hemphill had said in his letter bringing the meeting of 21 December into the grievance was,
- “I asked why none of the performance or behaviour issues raised had ever been brought to my attention in any way previously, so that we could discuss, investigate and understand rather than even attempting a disciplinary measure as a first course of action.”
- 7.86. Even though Mr Rooney did not accept that the performance improvement plan was imposed in relation to the grievance, Mr Hemphill here raises an important question, going to the fairness of the procedure. Mr Rooney may have been satisfied that there were genuine concerns, but he did not look at how they were presented to Mr Hemphill. As but one example, Mr McNamara had explained to him that there had been a misogynistic element seen in the way Mr Hemphill spoke to female colleagues. That was referred to in the meeting, albeit only in passing (it is not in the transcript,

but Mr Hemphill remembers it) and was not in the plan or covering letter. It was not possible for Mr Hemphill to understand or address any such concerns on that basis. He said himself he would have expected someone to have a quiet word with him about any of the comments now relied on. Instead, he was left hurt and bewildered.

- 7.87. Insofar as it was put to him that the concerns had been raised before and he had not changed his approach, he asked, fairly, if that was the case, give him details. They were not given.
- 7.88. The way the concerns were put to him at that meeting merited fuller consideration, as did the departure from the policy, in failing to deal with the matters raised promptly and informally. For Mr Hemphill, with an excellent record, as confirmed in the recent audits, to be faced with allegations challenging his professionalism, competence, relationships and communication skills, without notice, was harsh, as was not being allowed to comment or question.
- 7.89. The appeal upheld the approach and decisions of the grievance officer.

Bullying by Mr McNamara 2020/2021

- 7.90. Mr Hemphill was unhappy with getting directions direct from Mr McNamara, without the involvement of his line manager. He was already very stretched. The additional investigations he was involved with, under RIDDOR, at the direction of the HSE and at the direction of Mr McNamara were time consuming and had priority over the many other demands on his time that he faced, and were in his view unnecessary. He doubted the approach taken by Mr McNamara, seeing the “independent” investigation as bogus, a sham.
- 7.91. The pandemic was a period of extreme demands on everyone involved with the work of the Trust. Mr McNamara was entitled to delegate and direct as he thought fit and it was not unreasonable to go directly to his Head of Health and Safety, rather than go through the line manager. It was reasonable to err on the side of caution in making the RIDDOR report, given the public interest and the pressure coming from colleagues, even though that departed from the HSE view and the consensus view. Refusing to make the report in respect of the deaths of the two doctors would have risked a charge that the Trust had something to hide, that there was a cover-up. The evidence does not show that the use of an external consultant was a sham, although Mr Hemphill’s comments show scepticism.
- 7.92. Mr Hemphill saw the directions he was getting from Mr McNamara as bullying. He had of course lost any confidence in Mr McNamara after the events of December 2018 and the performance improvement plan.

However, the things he complains of fell within his remit and he does not establish that it was unreasonable for Mr McNamara to give those directions or that the motivation for doing so was other than a professional response to the needs of the Trust.

- 7.93. He did not take his concerns about his workload or the timescales in which he was having to work to his line manager, Mr Turk. To his credit, he juggled and coped without complaint at the time.

The first retire and return request

- 7.94. The Claimant complains of the refusal of the first retire and return request.
- 7.95. Mr Turk had initially been encouraging, Mr Hemphill said he had gone some way to adopting it.
- 7.96. This was a plan that had been talked through with the team. It had merits, as outlined by Mr Hemphill at the time. It safeguarded the Trust's position immediately as to the retention of the Charter status within the team. Mr Hemphill was proved right over the difficulty in recruiting someone with that status. The proposal dealt with the succession and provided a source of support and guidance to the new Head and Deputy. It retained Mr Hemphill's undoubted knowledge and expertise within the team.
- 7.97. There were some downsides to the proposal. It meant the loss of 0.6 WTE in staff resource to the team - although the funds "saved" could have been allocated to a new post. Although the new Head was likely to gain Charter status, that could not be guaranteed.
- 7.98. Given that this involved a change in the Head of Department, it was inevitable that Mr Turk would consult more widely.
- 7.99. There is a certain lack of clarity about the funding – Mr Hemphill was clear that there were funds available that would have gone to fund an apprentice. It is surprising that he and Mr Turk had a different understanding of that.
- 7.100. However, the decision not to proceed on the basis of the promotion of the two subordinate staff with no certainty about the new Head obtaining Charter status and a reduction in the workforce was certainly one the Respondent was entitled to make.
- 7.101. The refusal was unexpected and a crushing disappointment to Mr Hemphill, who had taken care to put forward a good proposal, supported by his colleagues. Mr Turk's management of the application, clearly difficult for him given that he had initially been encouraging, was sympathetic.

7.102. It is not clear why Mr Wade gave such a negative comment in relation to Mr Hemphill's disappointment and illness. It speaks of mistrust, and it could not have come from his own engagement with Mr Hemphill, since they had had little to do with each other.

The second retire and return request

7.103. In relation to the 2022 application for retire and return, the application went in on 10 March 2022. This is made specifically in relation to the proposed retirement of Mandy on her state pension age of 1 July 2022.

7.104. Mr Turk decided to defer a decision on it and told Mr Hemphill that on 21 April, the day the decision should have been made under the policy. On 24 May, Mr Turk was offering further deferral, or an immediate rejection. If deferred, the decision would take time, a few more months, possibly an indefinite deferral. Mr Turk did not dissent from the timescale Mr Hemphill referred to at the meeting of 24 May, that the outcome of any review was months or even years into the future, and in the rejection letter of 25 May he adopted it, referring to an indefinite deferral.

7.105. That does contrast markedly with the way Mr Hemphill said he dealt with such applications, dealing with them promptly, even on the day, and with a view to retaining skills and creating a contented team.

7.106. What is clear is how very distressed Mr Hemphill had been by the refusal of the earlier application, how much he wanted to step down from a stressful role and how difficult he found the delay. The policy proposes that the consideration should be complete within 42 days.

7.107. What is not clear is why Mr Turk deferred the decision and would have continued to defer on 24 May.

7.108. He says that he had been authorised by the Executive Committee to conduct a review in March. This he presented as a complex review, potentially including cross Trust collaboration. It was not a purely internal matter. It must represent longer-term planning.

7.109. He had not in that time consulted Mr Hemphill about such a review, for his input, nor did he during the balance of Mr Hemphill's employment.

7.110. Mr Turk also said he was being asked to undertake a full review of the structure before giving a decision (521). That does not seem to have been an instruction from the Executive Committee. It is not said that recruitment was frozen pending that review being carried out. Mandy's resignation was not being considered then, March 2022 – Mr Turk denied knowledge of her plans in April 2022.

- 7.111. Who was asking him to defer a decision until the outcome of the review?
- 7.112. It is also not clear why Mr Hemphill's proposed retirement post would be affected by such a review. Mr Turk said that the structure review needed to precede any subsequent decisions that might affect the structure of the team. Mr Hemphill's point is that this application did not affect the structure of the team. That must be right. The review could go ahead whoever held that post.
- 7.113. Mr Turk relied on the fact that Provelio had been commissioned to produce a report and that that would support his review.
- 7.114. That report was commissioned elsewhere, for other purposes. Mr Turk had had no part in commissioning it – he only spoke to Provelio on 20 April.
- 7.115. Provelio do strategic project management. It is hard to see anything in the Provelio brief that has any bearing on recruitment into or retention of a part-time Health and Safety officer role. Provelio was charged with conducting a broad strategic overview with a view to long-term planning, focused on Estates save for the specific brief to address Fire Officers. It looked ahead to the ending of the current estate management contracts in six years time, and at the scope for cross Trust collaboration.
- 7.116. Provelio did not have Health and Safety expertise, and were not briefed to look at the Health and Safety team structure or individual roles within it.
- 7.117. If Provelio were to be asked to comment on the Health and Safety team structure, someone with Mr Hemphill's experience was needed to write the brief.
- 7.118. I reject the idea that because it talks about Fire Officers it might address the structure of the Health and Safety team and affect who did a part time H &S role, because the Health and Safety team is not within the Provelio brief.
- 7.119. Mr Turk introduced the reference to Provelio on 21 April. That must be a number of weeks after the review was authorised by the Executive Committee. Provelio were due to report in May. It is hard to understand why Mr Hemphill remained unaware of Provelio if that report would have a role in relation to his team and responsibilities. The natural course would have been to consult him.
- 7.120. Mr Hemphill's disbelief is very clear: what had replacing a minor part-time role in Health and Safety to do with any long-term structural review – one on which he, as Head of Department, had not even been consulted? That

applies in respect of the internal review authorised by the Executive Committee as to the Provelio review; the internal review also looked ahead to cross-Trust collaboration; both are longer-term projects.

- 7.121. The alternative Mr Turk offered on 24 May was a rejection of the application; he was “under pressure to write that rejection letter right now...”
- 7.122. It is not clear where that pressure came from.
- 7.123. Mr Hemphill gives an illustration of how he would handle his own application if it were his Deputy applying. It would have been signed off quickly and he would have mentioned it elsewhere only because the Deputy role would need filling. In his experience, his application did not merit the approach being taken.
- 7.124. He is a respected Health and Safety manager of long standing. The Respondent recognised his skills and experience. He had dealt with these applications before. I can attach some weight to those comments.
- 7.125. The previous Retire and Return application was rejected in order to recruit like-for-like attaching weight to the retention of Charter status on succession. That does make it less likely that a restructure was planned nine months later that Mr Hemphill as Head of Department was not being consulted on.
- 7.126. During both meetings, 21 and 26 April, there is some reliance on the fact that Mandy had not yet given notice. Her Head of Department was telling Mr Turk that she had a clear plan to retire. Mr Turk could expect to be confident of that information. She might of course change her mind, but it is not clear why Mr Turk took the stance that until she resigned, he could not take into account a clear possibility that the Head of Department was confident of.
- 7.127. The Trust’s retire and return policy would not work if there was no willingness to look ahead at possibilities – four months’ notice was required by the Pension Trustees, Mr Hemphill was on three months’ notice, Mandy on one month. There is no evidence that the Retire and Return consideration had to wait until all those notices had been given. Senior staff would be unlikely to commit to retiring in reliance on Retire and Return if they could not get a decision on their application before burning their boats. There would be a difficulty for managers if they could not recruit for vacancies immediately arising while the necessary notices were given.
- 7.128. That Mandy had not retired was relied on 24 May as a reason for rejecting the application. It comes across as disingenuous. Mr Turk had already said

it was a minor matter and one that could be resolved and also that it was not decisive.

- 7.129. Mr Turk was clear that there was no freeze on recruitment. If she retired in a few months time they would continue to defer and might not recruit but there was no freeze.
- 7.130. He said at the hearing that they actually absorbed the role and did not reappoint. That was not the reason for rejecting the application.
- 7.131. There is a central question about why Mr Turk did not decide the application until being pressed to do so on 24 May. What was the purpose in deferring the decision?
- 7.132. It is submitted that the Respondent was wanting to defer the decision as a means of supporting the Claimant's application in the hope that in the future it could be agreed. That is not what was said to Mr Hemphill at the time and it is not what I have found to be the case.
- 7.133. In any event, any restructuring could proceed with Mr Hemphill in post, as it would with all the staff who were currently in post. Retire and return as a matter of fact gave the Respondent more flexibility. The Trust policy made it clear that retire and return did not preserve continuity of employment. The Respondent had ensured it had that additional flexibility.
- 7.134. Mr Turk, in assessing this application, took into account the possibility of restructuring and the possibility of a vacancy arising. What he did not do was make a full assessment of the situation.
- 7.135. It was clearly a possibility that Mr Hemphill might retire, whatever the outcome of this application. The previous year, weight had been attached to retaining Charter status within the team. There was no evaluation of the possibility that the Trust might be – as it was – left unable to meet their statutory requirements. Mr Hemphill's proposal would have provided that cover during recruitment while retaining valuable knowledge, skills and experience.
- 7.136. It is by no means unusual for managers to seek to protect jobs within their team by filling them internally, avoiding a vacancy that might be cut. A reason for the previous year's decision had been that it led to a possible reduction in the staff resource. It was open to Mr Turk to safeguard his staff numbers by agreeing this proposal. The post was not frozen.
- 7.137. Considerations that had counted in 2021 were disregarded in 2022.

- 7.138. Mr Hemphill could not obtain figures on how many retire and return applications had been refused. On the other hand, in my judgment, the figures finally produced by HR, showing 127 granted and 1 refused, are likely to be close to the true picture: where there is a policy encouraging retire and return - where appropriate and affordable - and a procedure that involves HR directly in some aspects, it is likely that they will be aware of those where there is disappointment and perhaps dispute.
- 7.139. Some might be refused on budgetary grounds, but here there was a direct saving.
- 7.140. The other evidence is that of Mr Hemphill, who simply did not know of any such applications that had been refused.
- 7.141. The handling of the second retire and return application raises questions.

Appeal

- 7.142. By the time of the appeal, Mandy had retired. There was no review or invitation to reapply from Mr Turk, confirming that he was now not relying on lack of knowledge of Mandy's plans as a basis for rejection.
- 7.143. A significant reason for rejecting the appeal was that the proposal made by Mr Hemphill was unaffordable.
- 7.144. It is agreed that Johanna Bogle made a mistake at that point; she was costing on the basis of two 0.4 WTE contracts, and Mr Hemphill's was more expensive, at band 5. She should have been comparing his application for a 0.4 WTE at band 6 with Mandy's 0.6 contract at band 5.
- 7.145. Instead of correcting her report and reconsidering, she said the post had been frozen. In oral evidence, she agreed it had not been frozen when she wrote the report.
- 7.146. Mr Turk had been clear, even careful, to say that the post had not been frozen.
- 7.147. In her witness statement, she said that the post had been frozen at the time of the appeal, which again she agreed was an error.
- 7.148. She was also wrong over her assessment of the failure to consider alternatives. Mr Hemphill had asked for alternatives to be considered and that had not been explored.. Mr Turk had offered to consider alternatives, albeit only in general terms; he did not reject the possibility or give reasons as to why they would not be appropriate.

7.149. A bank contract is not an equivalent to an employment contract. That was not a suitable alternative. It would not give Mr Hemphill a secure role or use his skills. It would also not secure his Charter status for the Trust.

7.150. Sadly, Mr Hemphill doubted that if he chose the bank option, he would ever get work. Given the context, that was not unreasonable.

Evaluation

7.151. Mr Turk claims constructive dismissal on the basis of a cumulative series of breaches of contract, including of the express terms of his job description and of the implied term of the contract relating to mutual trust and confidence.

7.152. The issue relating to the job description continued to rankle for Mr Hemphill. However, it was clear at the very latest by mid-2019 that the Respondent was insisting that his duties included responsibility for KERI. He never ceased to protest, but he worked under that job description for nearly three years more.

7.153. I have not accepted that there was bullying breaching the implied term of trust and confidence in 2020 and 2021.

7.154. I have not accepted that the refusal of the retire and return application in 2021 was irrational or malicious or otherwise breached that term.

7.155. I find the points made by Mr Isaac at paragraph 103 of his submission to be persuasive. There was a substantial period between the refusal of Mr Hemphill's first application, at the end of June 2021 and the concerns beginning to arise on the handling of his second application, between March and April 2022. During that period, he said he had put the first refusal behind him. The very fact that he was seeking a retire and return outcome implies a degree of confidence in the employer.

7.156. He was devastated by the refusal of his carefully put together succession plan in 2021, but I have found that decision to have been one the Respondent was entitled to make.

7.157. Mr Hemphill is therefore in difficulty in establishing a continuing cumulative breach of contract before 2022. That is because of the gap since the unfair and frankly bullying conduct in 2018 and 2019 and the start of the period in 2022 when Mr Hemphill questioned the handling of his second application. That is even accepting that a later breach can revive an earlier breach that has been affirmed: the length of the gap in my judgment is too long for this to be classed as a continuing cumulative breach.

7.158. I therefore have to focus carefully on the handling of the 2022 application for retire and return.

7.159. I have to be extremely careful not to substitute my view of what should have happened for the employers.

7.160. I am mindful that there is no contractual entitlement to retire and return.

7.161. That it was not offered is not of itself grounds for claiming constructive dismissal.

7.162. I do however have concerns about the reasons given for the decisions made.

7.163. This was an apparently straightforward application to step down from a stressful role, with a vacancy arising in the near future. It was naturally attractive as a way of retaining skills and experience and the Charter status. It was affordable on the basis of comparative costs. Faced with forthcoming cuts, a cautious manager, anxious to protect his staff resource, might be glad of an application to be appointed to a forthcoming vacancy internally. If recruitment is likely to be suspended, filling a post quickly, before it is vacant, is a way to avoid losing it. Mr Hemphill's health was a valid consideration if there were not reasons against his proposal.

7.164. The immediate response from Mr Wade is discouraging. He is talking about the direction Health and Safety might move in the future being unlikely to be a single Trust approach. The evidence certainly points to that being a future direction, but over the longer term – collaborative developments take time. That is what the Provelio report was addressing with regard to Estates, looking ahead six years.

7.165. The immediate response from HR appears to propose a way of dealing with the application. The writer does not refer to an existing structural review, or to the recent Executive Committee decision. She says, under the heading "Mark Hemphill retire and return request 10.3.22",

"I suggest you review the structure and develop a business case for the long term structure of H & S...."

7.166. On the face of it, she is proposing a review as a way of affecting the outcome of the application: I adopt her words - "This will impact the outcome of this application....". It came with the suggestion that it could be done quickly.

- 7.167. It is odd to suggest such a review without proposing the involvement of the Head of Health and Safety, perhaps more so when the previous application he made had been rejected on the basis that the Trust wanted to retain the previous structure and appoint like-for-like, only ten months earlier.
- 7.168. That review did not take place. Mr Hemphill was unaware of any review while he remained in post. This is a specialist area. It must, reasonably, have involved him. Had there been any structural review under consideration, Mr Hemphill as Head of Department, would have been contributing to it. To conclude otherwise would be to suggest that he was being deliberately excluded. The Trust could not with integrity interfere with areas that were within his proper field of expertise and responsibility, behind his back.
- 7.169. Mr Turk relied on the Provelio review. The brief did not include anything that would affect health and safety in the short to medium term, if at all. Provelio are a strategic project management consultancy. The brief was primarily looking ahead over a period of six years, to when the Trust would be having to make new arrangements for Estates maintenance. It was to aid in establishing the strategy for those changes. That is a long-term project.
- 7.170. The brief did include Fire, and the Trust was held to be under-staffed and without a succession plan. That does not persuade me that they were considering the structure of the Health and Safety team; they were not briefed to do so and they did not have the expertise to do so.
- 7.171. The Provelio brief did not and was never likely to make recommendations at the granular level of who was doing a part time Health and Safety job this year or next, looking at the day to day safety considerations such as screen safety.
- 7.172. I have heard very little about the internal review that Mr Turk was authorised to carry out. Again, it would naturally be something shared with or tackled jointly with Mr Hemphill. The two reviews are mentioned in April, at the end of the period when a decision should be made. Work had not begun on the internal review during that time: Mr Hemphill would have been involved; he was not then off sick. Mr Turk said it would look at collaboration between trusts. This too looks like a review that would be addressing the medium to long term, not the immediate future.
- 7.173. Mr Turk said that the structure review needed to precede any subsequent decisions that might affect the structure of the team. This application, if successful, did not affect the structure of the team.
- 7.174. Any changes to the structure of the Health and Safety team could have been made regardless of who the post holder in the proposed position was.

If there was a restructure, it could have taken place with Mr Hemphill in post.

- 7.175. The application was not refused because it was frozen. Mr Turk was clear it was not frozen. Granting the application might save the vacancy from being frozen or cut, given future demands for cost savings.
- 7.176. It was not refused because notice had not been given by Mandy. There was frequent reference to there being no vacancy because she had not given notice. That is odd: why would there be any doubt that Mandy's Head of Department knew her plans? But in the end, that was not the reason, albeit expressly relied on – Mr Turk said he would have deferred anyway, there was no invitation to reapply, or reconsideration when, as planned, she gave in her notice.
- 7.177. The proposal was not unaffordable; there was a modest cost saving.
- 7.178. It did not bring with it any reduction in the size of the team, something the Respondent had said it was anxious to avoid in July 2021.
- 7.179. It overcame the risk of the Trust failing to recruit someone with a Charter qualification quickly on Mr Hemphill's full retirement.
- 7.180. It retained valuable skills and experience.
- 7.181. There was in addition a health reason for finding a solution: Mr Hemphill had been clear that he needed to stand down from a stressful post. He was off sick, and not for the first time. That is a legitimate consideration for a fair minded employer, albeit not expressly referred to in the policy.
- 7.182. This looks like a strong, albeit routine, application for retire and return.
- 7.183. It is important to remember that Mr Turk did not choose to make a decision, at least not until 24 May. He chose to defer.
- 7.184. Provelio had reported, but he still chose to defer.
- 7.185. The question is why – what was the purpose behind Mr Turk's decision to defer?
- 7.186. If the reviews relied on were longer-term structural reviews, looking at collaboration between Trusts and the time-scale for the Provelio strategic proposals, there was no merit in deferring this decision.

- 7.187. Mr Hemphill did not understand the logic, and he was right. It did not make sense in relation to filling a forthcoming vacancy with a post-retirement part-time Health and Safety officer given the strong positives in favour of it.
- 7.188. I have the emphatic evidence of Johanna Bogle. This post would be frozen, or there would be no recruitment to it. That had not happened, but major cuts were known to be coming.
- 7.189. Johanna Bogle was very clear: the outcome of deferral would be that the post would be frozen. There would be no recruitment.
- 7.190. The decision Mr Turk made, up to 24 May was to defer.
- 7.191. It was never suggested to Mr Hemphill that deferral might lead to a better post for him to retire and return into being identified.
- 7.192. There is no perceptible advantage to deferring the decision on this application. Deferral would lead to the application being rejected.
- 7.193. The only inference I can draw is that the Trust did not want to appoint Mr Hemphill on a retire and return basis, even to a part-time safety officer role. Mr Turk was charged with making sure that did not happen.
- 7.194. Relying on the Provelio review or the internal review was an excuse.
- 7.195. That is consistent with the first reaction from Simon Wade, which was not positive. It is consistent with the response from HR that the way to deal with the application was to embark on a review that would affect the outcome of it. It is consistent with the unpersuasive attempt to rely on the Provelio review which cannot be seen to have relevance. It is consistent with the failure to take an overall view and assess the merit of retaining Mr Hemphill's skills, experience and status against the risk of losing them. It is consistent with the awkward prevarication over whether or not Mandy was going to resign and whether that was a reason for refusing.
- 7.196. There had been a negative attitude to Mr Hemphill amongst senior managers. That is evidenced in Simon Wade's response in 2021. It had been plainly Mr McNamara's attitude in 2018/19 and Mr Hemphill saw it continuing since. The responses of Mr Wade and Claire from HR in March 2022 are consistent with reluctance to see the application succeed.
- 7.197. The background is that the Trust sees merit in retaining skills and many, apparently a substantial majority, are granted.
- 7.198. For the Trust, the difficulty is that it is hard to see the reasons for not agreeing this application. It was a strong case.

- 7.199. Mr Turk did not reject it. He deferred the decision, and that must have been in the expectation that if the post fell vacant, it would be frozen.
- 7.200. Mr Hemphill was very clear when he got the decision that no matter what he proposed, the Trust would not grant a retire and return application from him. He had swallowed his disappointment over the first rejection, but saw the handling of this decision as an absolute stitch-up.
- 7.201. He appealed. The appeal was dismissed on grounds that were erroneous, in the approach to the absence of alternatives and above all on the errors over affordability. I accept that it was the last straw; but the damage was done before the appeal.
- 7.202. While he named the appeal outcome as the last straw, he had felt unable to return to work after 1 July, when he had no sick note and was refused garden leave. It was the subterfuge that he saw as underlying the handling of the second application that destroyed any remaining confidence that he had in the employer.
- 7.203. On 15 July 2022, Mr Hemphill resigned. He resigned because he felt unable to return to work, given what had happened. He had wholly lost trust in his employer.
- 7.204. In my judgment, the handling of the second application for retire and return was dishonest. There was a lack of integrity in evaluating it. What underlay the various contentions put forward by the Respondent was, in my judgment, a decision not to grant an application from Mr Hemphill for retire and return. The reliance on the lack of a vacancy and the reliance on a structural review were not the true reasons. They were put forward as the reasons but don't stand up to scrutiny; they were not the reasons for refusing this application. Nor was it because Mr Hemphill pressed for an outcome before the reviews could be carried out.
- 7.205. Mr Hemphill identifies a number of his 2022 complaints as instances of bullying. He is not a lawyer. In my judgment, he is saying that he was being unfairly treated and that that was deliberate. I do not accept Mr Isaac's contention that because of the way the issues were framed, for those allegations to succeed,
- "It must therefore be shown that the reason for rejecting the Claimant's case was bullying
- 7.206. In any event, if, as I find, the reasons for the treatment were not genuine, that can be legitimately described by a layman as bullying.

- 7.207. The Claimant's case is that failing to deal with this retire and return application in a timely manner amounted to bullying as did failing to provide confirmation of when the application would be dealt with. Those delays and that uncertainty relate to the Respondent's reliance on the longer-term reviews. On their own, they would not amount to a breach of the implied term of trust and confidence, but they are part and parcel of the dishonest way the application was handled.
- 7.208. Mr Hemphill did not establish that there was bullying over the period after the performance improvement plan was dropped, but I do accept that Mr Hemphill believed that there was, and I draw from that that he was aware of a negative attitude towards him. His perception is not always reliable, as in his response to the handling of his requests for information about retire and return applications being rejected or Mr Turk's offer that he might find it easier to deal with another manager. There were times when he saw malice or unfairness without good cause. But there is direct evidence of a negative attitude and I do not dismiss his perception as wholly ill-founded. Nothing else explains the course taken on the 2022 application. With hindsight, it may of course have affected the handling of the 2021 application, which Mr Turk had been minded to grant.
- 7.209. Mr Hemphill had not been easy to manage, once he felt himself to be unfairly treated, but no case has been put forward that he was not competent for the job he was doing or the job he was seeking and there were real advantages for the Trust in his proposal. It has not been said that he would not adapt to a subordinate role. There was no complaint about effective working relationships after the refusal of the first retire and return: Mr Turk said the relationship was professional. There was no renewal of the allegations of poor communication, attitude or behaviour.
- 7.210. I am satisfied that the approach underlying the handling of the second application for retire and return was that it should not succeed.
- 7.211. In my judgment, there was an element of capriciousness in the refusal of this retire and return application, given the evidence that where affordable and appropriate, applications from other people succeeded.
- 7.212. This however is more than that. This was a lack of integrity, the use of subterfuge to avoid an unwelcome outcome, in putting forward reasons that were not genuine.
- 7.213. It necessarily therefore fails the Wednesbury test: irrelevant matters - the negative attitude - were relied on in substitution for a fair assessment, with a failure to take into account the relevant considerations. No reasonable decision-maker would, in my judgment, have made this decision.

- 7.214. This was a breach of the implied term of trust and confidence. The Respondent behaved in a way that was likely to destroy or seriously damage the trust and confidence between the claimant and the respondent and had no reasonable and proper cause for doing so.
- 7.215. The Claimant did resign because of the breaches around the handling of the second retire and return application and was entitled to do so. There was no delay or affirmation.
- 7.216. To be clear, the claimant establishes the facts underlying issues numbered 1.1.12 in particular, 1.1.9 and 1.1.10 contributing as part of the picture. The dismissal of the appeal was ill-founded, issue 1.1.14, Ms Bogle did fail to amend her affordability statement before his resignation, issue 1.1.15, and in any event the correction did not go far enough. He establishes a breach of the implied term of trust and confidence in the handling of the meeting of 21 December 2018 and the performance improvement plan, but that, and the dispute over the job description are too remote in time to be regarded as part of a continuing cumulative series of events, even having regard to the principle that earlier breaches can be revived after affirmation by later breaches.
- 7.217. What matters is whether the breaches found meet the very high test of irrationality or perversity, and it is the refusal of the second retire and return request, for what I have found to be false reasons, that does.
- 7.218. I find a constructive dismissal.
- 7.219. The question is then whether it is fair. The reason for the dismissal is the reason for which the employer breached the contract of employment. Here, that is the decision not to grant Mr Hemphill retire and return on any basis, which must be born of the negative attitude towards him. That is not a reason falling within subsection (2) of section 98. It is not a potentially fair reason.
- 7.220. The Respondent pleaded that if there were a breach of the implied term, the reason for the dismissal was “some other substantial reason”, namely the breakdown in working relationships.
- 7.221. I cannot so find. Mr Hemphill put behind him his disappointment at the refusal of the previous retire and return application. He continued to work until he met with the decision to defer the decision in April when he went off sick with work-related stress. Mr Turk did not at any stage indicate that the working relationship had broken down – he continued to express willingness to find alternatives, albeit unspecified and described the relationship as professional.

7.222. Mr Hemphill was unfairly constructively dismissed.

Employment Judge Street

Date 8 February 2024

Reasons sent to the Parties on 20 February 2024

For the Tribunal Office