EMPLOYMENT TRIBUNALS

Claimant: **Mr D.M.S. Bakht**

Respondent: **Barts Health NHS Trust**

Heard at: **East London Hearing Centre**

On: **6-9 and 13-14 February 2024; and in chambers on 15, 19-20 and 26 February, and 18 March 2024**

Before: **Employment Judge Massarella**
Members: **Miss S. Harwood**
Mr M. Wood

Representation
Claimant: Represented himself
Respondent: Ms L. Robinson (counsel)
Bengali interpreter Mr Hasan

RESERVED JUDGMENT

The judgment of the Tribunal is that: -

1. **the Claimant's claims in relation to holiday pay and sick pay are dismissed;**

2. **the Claimant made two qualifying public interest disclosures: PD2 on 19 September 2021 (in relation to the 'albumin incident' only); and PD3 on 3 November 2021;**

3. **the Claimant's claim that he was subjected to detriments because he had made the protected disclosures succeeds solely in respect of the Respondent's decision not to permit him to return to work from sickness absence in December 2021 (D28);**

4. **the whistleblowing detriment claim D3 is dismissed because the Tribunal lacks jurisdiction in respect of it; the whistleblowing detriment claim D35 is dismissed because it is excluded by operation of s.47B(2) ERA; the remaining whistleblowing detriment claims are dismissed because they are not well-founded;**

5. the claim that the Claimant was automatically unfairly dismissed for making protected disclosures is not well-founded and is dismissed.

REASONS

Procedural history

1. The first claim form was presented on 10 April 2022, after an ACAS early conciliation period between 15 February and 28 March 2022. The second claim form was presented on 21 May 2022 after an ACAS early conciliation period between 22 and 25 April 2022.

2. A preliminary hearing for case management took place before EJ Russell on 13 June 2022. The Judge recorded that the second case was a duplicate of the first; the files were linked and no further action would be taken on the second case. The Judge set out a detailed list of issues.

The hearing

3. We had a bundle of 1,344 pages; the Respondent provided an (unagreed) chronology and cast list; both parties provided their own reading lists.

4. We heard evidence from:

    4.1. the Claimant;

    and on behalf of the Respondent from:

    4.2. Dr Suzanne Forbes (consultant nephrologist/renal physician; education lead for renal 2016-2023);

    4.3. Dr Sajeda Youssouf (consultant nephrologist; departmental lead for audit and governance, including patient safety);

    4.4. Dr Heike Bojahr (consultant anaesthetist);

    4.5. Dr Andrea Cove-Smith (consultant nephrologist; clinical lead for renal inpatient and ambulatory care);

    4.6. Dr Karl Metcalfe (consultant physician; clinical director for specialist medicine at the Royal London Hospital);

    4.7. Mrs Lesley Coman (HR);

    4.8. Mr Muhammad Khurram (consultant in transplant and vascular access; surgical lead for the MSW program).

5. We also had a statement from Mr Cassim Schott (physician associate). We did not hear live evidence from him because he was on holiday in Australia. It had been assumed that he could give evidence remotely. However, witnesses who are not resident in Australia are not permitted to give evidence in UK proceedings.

6. Although the Claimant speaks English, he had asked for a Bengali interpreter; Mr Hasan was present throughout the hearing. The Claimant said at the

beginning of the hearing that he did not need Mr Hasan to translate everything for him, only to help him when he was having difficulties. Later in the hearing I encouraged the Claimant several times to make greater use of Mr Hasan, particularly when trying to frame his questions for witnesses; he generally chose not to do so. Occasionally, when we were concerned that there might otherwise be a misunderstanding as to what was being said, the Tribunal insisted that the Claimant go through Mr Hasan.

7. The Tribunal reviewed the timetable at the beginning of the hearing. Originally it was to include evidence and submissions, deliberations and oral judgment; that was unrealistic. It was agreed with the parties that our focus would be on completing the evidence and submissions within the time available. The judgment was reserved and additional days listed for deliberation. A revised timetable was agreed, which assigned two days for the Respondent to cross-examine the Claimant; and two and a half days for the Claimant to cross-examine the Respondent's witnesses.

8. I explained to the parties at the beginning of the hearing that the Tribunal could not, in the time available, read all the documents in the bundle; they must take us to the documents they wanted us to consider.

9. The Claimant's evidence took slightly longer than was anticipated - even after Ms Robinson (Counsel for the Respondent) cut down the number of her questions - partly because he had a tendency not to listen to questions, frequently interrupting before Counsel had finished asking them.

10. The issue of time limits arose in relation to detriments 1-19. The Claimant had not led evidence in his witness statement about this. Without objection from the Respondent, I asked some open questions to elicit his explanation as to why he had issued his claim when he did and not earlier, and what he knew about time limits.

11. At the beginning of the hearing, I asked the Claimant whether he had prepared his questions for the Respondent's witnesses. He first told me that he had not; he then corrected himself and said that he had. Because he would be giving evidence first, and because there was a three-day gap between the fourth and fifth day of the hearing, he had additional time for preparation. I urged him to write his questions down, explaining that he would probably find it difficult to improvise them. The Claimant's questioning of witnesses on the first day progressed slowly but later it was clear that he had prepared his questions, and that he was able to locate relevant documents and put them to witnesses; his questions were appropriately focused on the matters set out in the list of issues.

12. The underlined subheadings below replicate the agreed list of issues, finalised by EJ Russell. Ms Robinson provided written closing submissions; the Claimant invited us to take into account the contents of his witness statement.

Findings of fact

13. The following findings of fact are unanimous and made on the balance of probabilities. In a judgment which is already very long, we cannot refer to each and every point made by the parties; the absence of a reference to a specific matter should not be taken to mean that we did not consider it.

14. The Respondent is an NHS trust based in London, providing healthcare services in five hospitals across the City of London and East London, including the Royal London Hospital, where the Claimant worked.

15. The Claimant began his employment as a medical support worker ('MSW') on 14 June 2021. He was initially employed on a three-month fixed term contract; the contract was later extended for six months; it terminated on 31 March 2022.

16. In the list of issues, the Claimant made allegations of detrimental treatment against many different individuals, not all of whom were called to give evidence. We accept the Respondent explanation that many of them were no longer employed by the Respondent; some no longer worked in the UK.

The impact of the pandemic on the renal ward

17. The Covid-19 pandemic had dominated the work of the hospital and led to backlogs in other work which needed to be cleared. In April 2021, when the Claimant was interviewed for the MSW role, the hospital was still emerging from the first waves of Covid and was preparing for a further wave expected later in the year. Meetings were taking place about reopening the Covid intensive care unit.

18. The hospital was under great pressure; everybody was working very hard. Some staff were in a fragile mental state, given their harrowing experiences during the pandemic when, as Dr Bojahr put it, they might go to work in the morning and 'everyone was dead who had been there the day before'. Senior management were more than usually alive to any signs of mental health issues, including stress. There was a team of psychologists on hand to provide support to any member of staff experiencing difficulties; their services were accessed by many members of staff.

19. The renal ward, where the Claimant worked, was a busy ward at the best of times, as the inpatients were usually seriously ill. The ward had an excellent reputation and a good training record; the consultants working on it were some of the most recognised in their field.

The Respondent's medical support worker (MSW) scheme

20. In the second wave of the Covid pandemic around December 2020, there was a high level of staff sickness absence, especially among junior doctors; because they cover so much of the daily work, the Respondent urgently needed additional assistance on the wards.

21. In April 2020, the Respondent introduced the MSW scheme. International doctors who had qualified outside the UK could apply to work as MSWs for a temporary period, initially for three months. MSWs worked in a supportive, supernumerary capacity; their presence was intended to reduce the workload on existing staff members. In return, MSWs gained clinical experience in the NHS, which might eventually help them achieve registration by the General Medical Council (GMC), allowing them to practice in the UK.

22. Although many MSWs had had considerable experience as qualified doctors outside the UK, they were restricted to being dependent practitioners, with limits on the duties they could perform; they were responsible at all times to a

registered doctor. Inevitably, this required MSWs to be able to put to one side the status which they may have held in their country of origin, and accept the fact that they might be asked to perform more menial tasks in this context.

23. The Respondent first employed MSWs in November 2020. Many of the clinicians involved in the scheme were refugees, including a significant number from Ukraine. The Respondent successfully integrated most of its MSWs into the work of the hospital; many of them went on to achieve registration. This was a new scheme; it was a work in progress; there was no formal rulebook in relation to it.

24. Dr Bhojar and Dr Metcalfe led the MSW programme for the Respondent. The two MSWs working on the renal ward (one of whom was the Claimant) were informally supervised by the two physician associates working on the ward, Mr Cassim Schott and Ms Katie Price.

The assessment process for MSWs

25. In order to be eligible for GMC registration, an MSW had to obtain adequate clinical experience, subject to set criteria, and successfully complete three exams. The first was an occupational English test, which tested listening, writing, hearing and reading medical content. The second was the Professional and Linguistics Assessment Board 1 exam ('PLAB1'), a multiple-choice exam which tested the ability to apply knowledge to patient care; and PLAB2, a practical role-play test, in which candidates were required to demonstrate their skills in clinical examinations or simulated surgeries, with a particular emphasis on communicating effectively with patients.

26. Candidates were permitted four attempts to pass PLAB2. If they were still unsuccessful, they might be permitted a fifth attempt, at the GMC's discretion, but there had to be at least twelve months of clinical practice between the fourth attempt and requesting the fifth attempt, as well as support from senior clinicians.

27. The Claimant had practised as a qualified doctor in Bangladesh. He had not been working as a doctor for about 12 years. During that time he had been working in the UK in a GP practice, mostly reviewing discharge summaries.

28. The Claimant passed the occupational English test on 16 June 2018. He passed PLAB1 on 6 September 2018. He failed PLAB2 three times between January and December 2019; he failed for the fourth time on 19 May 2021. On his fourth attempt, there were seven stations involving patient role-play; he scored zero on all seven.

The start of the Claimant's employment

29. The Claimant attended an interview for an MSW post on 29 April 2021. He told the panel that his career goal was to work in general medicine and that he was due to sit his PLAB2 exam on 19 May 2021. He did not mention that he had already failed it three times, nor was he asked about his progress with the exams.

30. The Claimant was successful at interview and started work on 14 June 2021. He was assigned to the renal department of the Royal London Hospital. Dr Forbes was his line manager.

31. Renal medicine is a complex specialism. The Claimant said at the interview that he had done some renal work but a long time ago. He appears quickly to have formed the view that his knowledge was on a par with that of senior clinicians who had been practising in the field for many years. Dr Forbes' assessment, as explained to the Tribunal, was very different: that the Claimant had some theoretical, textbook knowledge of renal medicine, but that he struggled to translate that into patient care, in part because the NHS was very different from the context in which he had previously practised as a doctor, in part because medicine had progressed since he was in practice, and in part because he struggled to understand the nuances of clinical decisions made by specialist, qualified colleagues on the ward.

32. Dr Forbes gave the Claimant his local ward induction, which was an informal process. Although the Claimant denied doing so, we think it probable that he also attended the corporate induction, which all new staff had to attend, at which specific information was given about raising clinical concerns by way of incident forms on the DATIX system. He plainly knew about incident forms because he referred to them in one of his emails (para 57).

33. There were two renal wards. Dr Forbes explained that initially the Claimant would be working on ward 9F, where the less complex cases were, to allow him to gain confidence, to learn about the department and to familiarise himself with the basics of renal medicine.

34. As well as the two physician associates on the ward, who provided informal supervision, Dr Forbes also asked Dr Barian Mohidin (registrar) to act as a supervisory support (or buddy) for the Claimant.

35. The GMC wrote to the Claimant on 16 June 2021 to inform him that he had been unsuccessful in his fourth attempt at PLAB2. Over the next few days there was an exchange of emails between him and the GMC. He asked how he might be eligible for a fifth attempt at PLAB2; the GMC explained about the 12-month waiting period; the Claimant explained about his post as MSW with the Respondent. The GMC replied that they were unable to assess any evidence relating to that post until he had completed a minimum of 12 months' clinical practice; further, given the time since he had passed his PLAB1 exam, he would need to re-sit that before he could re-sit his PLAB2 exam. The Claimant asked that the GMC waive that requirement, because he had been prevented from taking PLAB2 sooner because of the pandemic; the GMC said they could not do so. In a detailed email of 6 August 2021, the GMC explained that any application for permission to make a fifth attempt at PLAB2 would have to be 'supported by structured reports from senior doctors responsible for your work, to show satisfactory completion'.

36. On 7 July 2021, the Claimant approached Dr Bojahr asking for her signature on a letter from the Respondent so that his eligibility to sit a further PLAB2 could be assessed. He said that he had failed the permitted number of attempts and had been told by the GMC that he could have one final attempt, provided he worked in the NHS full-time for one year and had a favourable report from his

supervising consultants. Dr Bojahr asked him when he had received the letter from the GMC. Although her evidence on this issue was somewhat confused, it is clear that she was concerned that the Claimant may have already failed his fourth attempt when he started his employment with the Respondent, or indeed when he was interviewed, and may not have disclosed the fact. She asked to see the correspondence from the GMC.

37. For whatever reason, the Claimant forwarded the relevant email without the date on it. That was a misjudgement on his part. If he had forwarded the correspondence transparently, the Respondent would have seen that he had not taken his fourth attempt at the time of the interview and did not know that he had failed it when he started his contract. Nonetheless his lack of transparency itself became a cause of concern for the Respondent.

38. Notwithstanding this, Dr Bojahr wrote to the GMC, explaining that he had started his position as a MSW and asking whether the GMC could give him another chance.

Performance issues raised about the Claimant

39. On 17 July 2021, the Claimant wrote to his supervising registrar, Dr Mohidin, asking for his work to be given to him according to his own quite strict conditions. For example, he asked that:

> 'Some patients (specific beds) must be allocated for which I would be solely responsible for the entire management while working within the limit of the MSW role during my stay in the ward. This must be solely supervised and supported by you so that patient safety will not be compromised.'[1]

40. The Tribunal was surprised by both the suggestion itself, which appears to us to be obviously impractical for a dependent practitioner, and by the mandatory language in which it is couched. Dr Mohidin replied:

> 'It's a team game and we are responsible for all the patients on the ward, but within that we can allocate you 2-3 of the more interesting patients to study in greater detail and you can present them on the ward round, which will be a good learning opportunity for you. There will be opportunities to do various procedures on the wards under supervision including removing tunnelled lines and inserting the vascaths. Be keen and watch a few before attempting.'

41. Colleagues soon began to have concerns about the Claimant. In mid-July 2021, Ms Price told Dr Forbes that she felt that the Claimant was struggling to learn; she was also having to spend a disproportionate amount of time helping him to do basic practical things, such as logging into the computer.

42. Dr Forbes encouraged the Claimant to attend her regular teaching sessions for junior doctors, but he only did so on one or two occasions. He asked questions which were far removed from the subject she was discussing. She found that she had to simplify things to a level she thought he would understand.

43. The Claimant was also encouraged to attend ward rounds, to engage with cases and to try to present them. He often did not attend at all or, if he did, would present one patient out of 30 (the expectation being after a month on the ward,

[1] Quotations from contermporaneous documents are given without correcting errors of spelling or grammar.

that a practitioner would be able to present most patients) and that to a very basic standard. On one occasion, when he attempted to present a case to Dr Forbes, he simply read the ward round entry from the previous day.

44. The Claimant often wanted to assist by using his knowledge of Bengali. On one occasion, Dr Forbes was discussing a Bengali-speaking patient whose kidneys had failed. The Claimant could not understand why she was not going to put the patient on dialysis. Dr Forbes explained that this might not be the right course of action for a patient who was so frail. Notwithstanding this, at the end of the conversation, the Claimant said 'so we will start him on dialysis'. Dr Forbes was not confident that the Claimant would communicate accurate information to the patient; she decided to liaise directly with a family member.

45. On 22 July 2021, Dr Forbes emailed Dr Metcalfe with some feedback about the Claimant. She wrote that, nearly six weeks in, she did not feel he had made much progress; she felt that he created work for the rest of the team, who had to support and check up on him; she asked what would happen if, after several months, he was still not making progress; was there an end date to the contract? Dr Bojahr replied, suggesting that the Claimant might be rotated to another ward at the end of three months.

46. On 15 September 2021, Dr Forbes wrote to Dr Bojahr and Dr Metcalfe again about the Claimant. She explained that they had set a work schedule for him, but he was often late and was seldom on the ward before mid-morning. As a result, he missed the 8.30 a.m. handover from night to day staff, as well as half of the ward round (which began at 9 a.m.), and so did not know what was going on. She said that he waited to be asked to do anything and did not take much initiative. She pointed out that he already had a senior registrar as a buddy; she did not know what else to do. Dr Metcalfe replied saying that he was happy to arrange a meeting and that Dr Bojahr had plans to have a one-to-one meeting with all MSWs.

47. We are satisfied that there were already very significant concerns about the Claimant's capability in the early weeks of his contract before he made the first of his alleged protected disclosures.

PD1: '16 September 2021, via WhatsApp to Dr Forbes, in respect of the treatment of a patient that same day.'

48. The Claimant says that he made his first protected disclosure in a WhatsApp message sent to Dr Forbes on 16 September 2021. The message reads:

> 'I saved one of your patient in the ward today. Very poor MSW. I am crying now and tell you my life history one day.'

49. The Claimant accepted in cross-examination that the message was vague: it did not identify the patient, nor in what way they had been at risk, nor how he had saved them. The Claimant agreed that the message did not suggest that there had been a mistake or any form of wrongdoing.

50. Dr Forbes did not mention this message to anyone else.

D1: '17 September 2021 insulted by Dr Kenki Matsumoto (Foundation year 2) unnecessarily saying, "you are not allowed to say doctor to others"'

51. The Claimant alleges that, on 17 September 2021, Dr Kenki Matsumoto (junior doctor, foundation year 2 ('FY2')) insulted him by saying that he was not allowed to describe himself as a doctor to others. It is correct that MSWs were not allowed to identify themselves to patients or staff as doctors, whatever their status had been in their country of origin. The Claimant says that Dr Matsumotu made this remark because, when he gave an incorrect history of a patient to a doctor, the Claimant had corrected him. The Claimant denied having referred to himself as a doctor.

52. Dr Matsumoto did not attend to give evidence, but we think it likely that the remark was made in response to the Claimant referring to himself as a doctor. The Claimant regarded himself, and frequently referred to himself, as a doctor both during his employment and at the hearing. For example, in oral evidence, the Claimant said that Ms Price should not have made a particular remark to him because he was 'a doctor, the highest position in the hospital'.

PD2: '19 September 2021, by email to Dr Forbes, in respect of the patient treatment incident above and that on 17 September 2021 wrongly-prescribed medication was provided to a patient. The Claimant said that both tended to show that the health and safety of an individual was endangered'.

53. On 19 September 2021, the Claimant sent an email to Dr Forbes. Its main focus was on his perception that he was not treated with due respect by other members of staff. He wrote about the status of MSWs as follows:

> 'It is to be understood by my colleagues that we are foreign doctors (some are postgraduate doctors although are not registered by GMC yet) who are overqualified for this post and we are here to help and support them while continuing our learning process. Moreover, it is for their best and also to get maximum benefit and support from us, we MSW, should be appropriately respected by them.'

54. In the email, the Claimant referred to two matters, which he now relies on as the second protected disclosure: the first in relation to prescribing medication ('the medication incident'); the second in relation to the failure to give albumin during a procedure ('the albumin incident').

The medication incident

55. The Claimant wrote:

> 'Now I am going to tell one incident that I feel I should inform you. Dr Chen prescribed injection Glaucagon IM to a wrong patient drug chart which was identified by one of the nurse.'

56. Dr Chen was a FY1 junior doctor. The Claimant agreed in oral evidence that the system was designed so that when medication was prescribed, it would always be checked by somebody else and any errors picked up, in this case (on the Claimant's own account) by a nurse. Despite this, the Claimant asserted that this was a 'near miss', and the mistake put the patient in danger.

The albumin incident

57. The Claimant deals with the albumin incident as follows:

> '8. I feel my colleagues have still unaware of our role as a medical support worker and always reluctant to communicate with me exactly how they communicate with other docors to get my support properly and to provide high standard and safe delivery of care

> to the patient. For instance, couple of days back one incident happened where abdominal paracentesis was performed in a cirrhosis patient without giving Colloid (Albumin) solution prior to the procedure of peritoneal fluid draining although this patient has been presented by me to Prof Yaqub and I mentioned this very clearly in the nephrology ward round documents as I know this Cirrhosis case very well. Also, when one of the medical student, Jodi, asked me about this case during ward round I only mentioned this (giving albumin solution) as a safety for the patient as I know if we do not give albumin before the procedure the patient would definitely undergo hypovolumaemic shock. I am assuring you that I will not tell anything to anybody which am not sure of. I am telling this incident to explain you how poor communication with me and ignoring me can affect the safe delivery of care to the patient. If I would have been informed prior to the procedure and my knowledge has been respected I would have supported them to prevent this from happening. Subsequently, I identified that the patient was in severe hypovolumaec shock (BP was around 73/40) and asked one of the nurse to call Dr Kink. Dr Kink came and started 0.9% saline which is another mistake in managing such patient at this stage as albumin and hyperosmotic saline are the first choice in this situation. I was still observing what Dr Kink was doing as I have limitation to talk about treatment from my MSW post. Then, Dr Kink came to doctors room and was discussing with Dr Daniel that he was not understanding what was happening to the patient because the patient was completely alright before the procedure which was overhearded by me and I could not stop my mouth as I know what was happening to the patient and I am part of the team. Moreover, I could not stop my mouth where patient safety is compromised and where I have knowledge about this. I asked Dr Kink whether patient had been given Albumin prior to the procedure or not. He said "no". Then I explained to him what was happening and requested to call registrar Goblet (Gabi) as soon as possible. Gabi came in thereafter and patient was managed accordingly. I also tell one of your medical student, Jodi, to observe the patient and learn what I told her during the ward round in the morning regarding the safety of this procedure.
>
> 9. So far, I know there are some system in place in the NHS to prevent such above mentioned incidents by filling up the incident form.'

58. The Claimant explained to us that this was the same incident that he had alluded to, albeit vaguely, in his message of 16 September 2021 (para 48 above). The incident happened on that date. The clinicians involved were Dr Matsumotu (referred to in the passage above by the Claimant as 'Dr Kink') and Dr Gabrielle Goldet (registrar).

59. Some time after the incident, Dr Goldet went to speak to Dr Forbes to say that she was finding it increasingly difficult when the Claimant was on the ward because, in her view, he did not understand what was happening with the patients. She mentioned this incident; Dr Forbes told her that the Claimant had raised it with her. We think it likely that Dr Forbes told Dr Goldet that the Claimant had been critical of the treatment of this patient.

60. The Claimant did not fill out an incident form for either incident. He said he did not know how to do so; we find that implausible. He also suggested that Dr Forbes ought to have filled it out on his behalf; we accept Dr Forbes' evidence that she could not have done so; clinicians are not permitted to fill out incident forms on behalf of others.

<u>D2: '21 September 2021 Renal Specialist Registrar Gabrielle Edith Goldet improperly used the Claimant's CRS card to enter a note on a patient record'.</u>

61. There was a limited number of computers on the ward which were passed between clinicians during ward rounds. The correct procedure was for each person to use their own computerised record system ('CRS') card when entering

information into a computer, so that any change they made to a patient's record could be traced back to them.

62. On 21 September 2021, during the ward round, Dr Goldet took a computer from the Claimant and, without logging him out and herself in, made a note on a patient's record.

63. The Claimant raised this in an email to Dr Forbes on the same day. He did not say in that email, as he now asserts, that Dr Goldet inserted a Do Not Resuscitate ('DNR') document into the patient's record, which was something that the Claimant would not be allowed to do, and that this was an attempt to get him into trouble. Nor did he mention this in his later email to Mr Khurram on 2 January 2022. We reject that evidence as improbable; if it were true, we think the Claimant would have mentioned it straight away.

64. We have already found (para 59) that Dr Forbes told Dr Goldet that the Claimant had raised the albumin incident with her; we think that conversation probably took place soon after the albumin incident and before this incident. Thus, Dr Goldet knew that the Claimant had already made one complaint. In his witness statement, the Claimant's evidence was that Dr Goldet was also not permitted to make a DNR note on a record; had she done so, she would have known that the Claimant might report that conduct as well. We consider that makes the Claimant's evidence all the more implausible.

D3: '21 September 2021 Dr Daniel Miranda (Foundation Year 1) restricted the Claimant's work on patient care by shouting "go home and take rest" in reception. Renal Specialist Registrar Dr Gabriella Goldet heard and said, "do not talk to him, the senior management will deal with it"'.

65. The Claimant alleges that, towards the end of a shift Dr Miranda shouted at him 'go home and take rest', and that Dr Goldet heard this and said do not talk to him, the senior management will deal with it.

66. By this stage, we think that some staff on the ward were probably frustrated by the Claimant, by his belief in his own superiority as a clinician, which they did not share, and by the amount of support he required from them.

67. Dr Goldet knew that the Claimant had complained about the albumin incident. The Claimant says that Dr Miranda must also have known about it. There is no evidence that he did, beyond the Claimant's assumption; we find, on the balance of probabilities, that he did not.

68. We reject Mr Khurram's explanation that Dr Miranda was simply being caring by encouraging the Claimant to go home and that Dr Goldet was simply reminding Dr Miranda of the line of supervision. That explanation ignores the the tone Dr Miranda is alleged to have used; and it makes no sense that Dr Goldet would have intervened, if Dr Miranda was speaking to the Claimant in a caring way.

69. We did not hear from Dr Goldet or Dr Miranda. We considered the plausibility of the allegation. We think it likely that Dr Miranda expressed his frustration and spoke to the Claimant, if not by shouting, then at least in a sharp and unpleasant tone. We also think it credible that Dr Goldet intervened, not to side with the

Claimant, but rather to tell Dr Miranda effectively not bother with him. We accept that this incident occurred and we accept that it was upsetting to the Claimant.

The Claimant's bullying allegation

70. On 24 September 2021, Dr Daniel Richardson (Education Academy Fellow) passed on concerns the Claimant had raised about bullying to Dr Bojahr:

> 'He describes multiple members of his team from senior registrars have been demonstrating bullying behaviours, specifically delegating menial tasks such as all of the phlebotomy and cannulation work, thus, excluding him from the ward round, not allowing him to be involved in clinical discussions and decision making. He describes them treating him as the bottom rung on the ward hierarchy i.e. below FY1 and that the FY1s are therefore responsible for supervising him and supporting his learning. He states that he has had panic attacks as a result of this and on one occasion had to be taken to ED with a tachycardia of >130bpm though was released without admission.'

71. Again, we note that the thrust of the complaint relates to the Claimant's sense that he was not being treated according to his status; there was no suggestion that the alleged treatment was retaliatory because he had made disclosures.

72. We pause to note that it is correct that there had been an occasion towards the end of a shift when the Claimant was observed by two colleagues, Mr Schott and Dr Mohadin, sitting on a chair in the doctors' office. When they encouraged him to leave, he said he could not move. He was talking to them coherently. Mr Schott describes the Claimant's body language as 'exaggerated' and recalls that 'he started to briefly roll his eyes back in his head, which appeared voluntary'. Nonetheless, they checked his heart rate and blood pressure, which were within normal limits. They asked him to take a few steps, but he said that he could not do so. They told him that if he was not feeling well, they should take him to A&E, where he would receive proper care. The Claimant believes that he had had a panic attack. It is clear from Mr Schott's account that he suspected the symptoms were not genuine.

D4: '24 September 2021, in the staff room, Andy (a female consultant believed to be Dr Andrea Cove-Smith) asked the Claimant what he was doing and, when told he was preparing to present a case, said "not to take too long"'.

73. The Claimant alleges that, on 24 September 2021, in the staff room, Dr Andrea Cove-Smith asked him what he was doing and, when told that he was preparing to present a case, said 'not to take too long'. There is no suggestion that it was said in a critical or unpleasant manner.

74. We accept Dr Cove-Smith's evidence that she knew nothing about the alleged protected disclosures; she only found out about them in the course of these proceedings.

D5: 'On or around 28 September 2021, Dr Jian Peng Kieran Chen (FY1) shouted at the Claimant when the latter asked for a second opinion as to whether a patient required IV cannulation'.

75. On around 28 September 2021, an incident occurred which the Claimant described in an email to Dr Forbes on 3 October 2021:

> '4. To evaluate the requirement of IV recannulation and fluid replacement, I need to view CRS record of the patient. I have been asked by Dr chen to do IV recannulation to

> a patient with DKA and renal failure (GFR is less than 10) and subsequently started to view the CRS record and found that the patient has been on IV fluid for four days. Patients hyponatraemia has been corrected and blood sugar has gone down. Then I went to see her physically and patient was able to eat and drink. There was also no more vomiting.Pt was not dehydrated(tongue was wet). Threfore, my opinion was not to recannulate and continue with IV fluid as there is also a risk of fluid overload and pulmonary oedema considering her quite low GFR. Therefore, I went to discuss this with DR chen and I explained everything to him and asked to take a second opinion. Then he shouted with me to recannulate and I went to recannulate and then patient refused. Then Dr chen said that if the patient had refused, no need to recanulate.'

76. Dr Chen was a FY1 junior doctor. It was he who had made the prescribing error the Claimant refers to in PD2 (paras 55-56 above). We accept the Claimant's evidence that Dr Chen shouted at him, or at least spoke to him in a sharp tone.

77. The Claimant alleges that Dr Chen shouted at him because he had reported the error to Dr Forbes. There was no evidence that Dr Chen knew that the Claimant had done so, other than the Claimant's assumption, based on the fact that Dr Chen 'had never shouted to me before I made the first protected disclosure' (witness statement, paragraph 36). We are not satisfied that he knew about it.

D6: 'On or around 30 September 2021, during a ward round, Ms Katherine Price (Physician Associate) asked how Dr Forbes could remember all the patient information in order to undermine the Claimant by inferring that he could not'.

78. During a ward round at the end of September, Ms Price (physician associate) asked Dr Forbes how she could remember all the patients' details. The Claimant asserts that this was a detriment to him because 'I was compared unnecessarily with my line manager, who has had significant experience in renal medicine being the renal consultant'. The Claimant accepted in cross-examination that Ms Price did not say anything about him; he simply inferred that she was making a comparison between him and Dr Forbes.

D7: '3 October 2021, Dr Suzanne Forbes (Renal Consultant and Claimant's line manager) refused to permit the Claimant to view patient records to which he needed access for the performance of his duties'.

79. The Claimant then complains about an exchange with Dr Forbes on 3 October 2021. We find that Dr Forbes did not 'refuse to permit the Claimant to view patient records', as he alleges. She had encouraged the Claimant to attend ward rounds and to present cases. During the ward round, the Claimant began to present a case, while referring to the patient's records on the computer. Dr Forbes suggested that he try presenting the case from memory, rather than relying on the computer.

80. The Claimant took exception to this in an email with her. She replied, explaining why she had done what she did:

> 'When we ask the juniors to present without reading straight from the computer it is to encourage them to have the details of the case fully prepared. By knowing a patient so well that you can talk about them without referring to notes this helps in understanding and remembering their case. In my own experience, talking through a case out loud helps me realise where my knowledge gaps are, or where any discrepancies line. I am not at all suggesting that the details you mention below are not important, more that you should research them and thought about them in advance of presenting on the ward round […] All of this is to aid learning, and in doing so to improve patient care.'

81. We find that there was nothing inappropriate, either in Dr Forbes' original suggestion to the Claimant or in her thoughtful explanation of it, which was self-evidently given to help him. We are surprised that the Claimant took exception to it, and even more surprised that he referred to Dr Forbes' advice in the course of cross-examination as 'childish talk'. On 4 October 2021, the Claimant emailed Dr Forbes again, setting out at some length 'why I need computer to present a case to a consultant'. There is no sign that he had taken Dr Forbes' advice on board.

D8: '4 October 2021, Ms Katherine Price (Physician Associate) said to the Claimant "make sure you do not copy and paste my writing" in respect of a discharge summary'.

82. The Claimant alleges that Ms Price said to him 'make sure you do not copy and paste my writing' into a discharge summary.

83. In his witness statement at paragraph 40, he alleges that it made no sense for her to say this to him because (1) he had not previously done so and (2) it was 'impossible for me to copy and paste a discharge summary writing from others, being a qualified foreign doctor (although unregistered in the UK), the highest position in the hospitals in dealing patients [*sic*].' We understand him to be saying by this that a person of his status could not possibly need to rely on material produced by someone of a lower status, such as Ms Price.

84. Ms Price gave an account of what she had said (and why) in the course of the internal investigation into the Claimant's later complaints:

> '[I and others] have explained to him multiple times that last day's ward round is not totally copy and pasted for the current ward round. He would complain that everyone else does the same but not registering the fact that others are only copy pasting the background and presentation part of the ward round from the last day and updating the current issues on the ward round. It was very difficult to explain a simple task as this and for example printing of the blood labels (done multiple times) without his getting frustrated, annoyed and defensive.'

85. In our judgement, that is the likely explanation of the context for her comment to the Claimant; there was nothing improper or undermining in it.

86. In the same paragraph of his statement, the Claimant alleged that Ms Price must have known about his protected disclosure (he does not say which one) on the basis that she had sent him a pleasant WhatsApp message before he made the disclosure, but no such message afterwards. He alleges that Dr Forbes must have told Ms Price about the disclosure and then instructed her to undermine him in this way.

87. There is no cogent evidence, beyond the Claimant's assumption, that Ms Price knew about any of the Claimant's disclosures (let alone that Dr Forbes gave such an unlikely instruction to her). We find, on the balance of probabilities, that she did not.

Emails in October 2021

88. On 6 October 2021, Dr Bojahr emailed Dr Metcalfe:

> 'I think we need to meet up rather urgently with [the Claimant]. We need to discuss the bullying allegations he has made and see if he could be moved into another department to give Suzanne a rest.'

89. It is evident that, by this stage, the Claimant was increasing the burden on the workload of the renal department, rather than reducing it.

D9: '7 October 2021, Dr Seline Dilmec (Senior House Officer) prevented the Claimant from doing patient care work by asking him to do tasks which were not part of his duties, namely speak to a nurse about a skin rash'.

90. The Claimant alleges that on 7 October 2021, Dr Dilmec asked him to speak to a nurse about a skin rash. The Claimant regarded the task as inappropriately menial for him and a distraction from his other work.

91. The only evidence the Claimant pointed to in support of his allegation that Dr Dilmec was motivated by the Claimant's whistleblowing was that Dr Chen (who had made one of the mistakes which the Claimant disclosed) was standing next to Dr Dilmec when the latter asked him to speak to the nurse.

92. There is no cogent evidence, beyond an assumption on the Claimant's part, that Dr Dilmec knew about any of the Claimant's disclosures. Absent such evidence, we find that she did not.

Events in October 2021

93. On 8 October 2021, the Claimant emailed Dr Bojahr, saying 'I am writing to let you know that it is much better compared to past in terms of working environment'. In oral evidence he sought to distance himself from this, saying that the improvement was short-lived and there had been no detriments in October. That was inconsistent with his own case in these proceedings, which is that he was subjected to three whistleblowing detriments in the first week of October alone (D7, D8 and D9).

94. On 12 October 2021, the Claimant's contract was extended by six months. We note that this decision was taken after the Claimant had made the first two of his three alleged protected disclosures, and after he had raised allegations of bullying.

95. On 15 October 2021, Dr Forbes emailed Dr Bojahr and Dr Metcalfe:

> 'I continue to have concerns about how he interacts with the team and fail to see any real progress into any sort of independent role in the future I'm afraid.'

96. Dr Bojahr arranged to meet the Claimant on 19 October 2021. On the day of the meeting the Claimant asked for it to be postponed, as he had other commitments, but Dr Bojahr said that the meeting needed to go ahead and the Claimant attended.

D10: '18 October 2021, Ms Katherine Price (Physician Associate) interrupted the Claimant's conversation with Renal Specialist Registrar Raja Muhammed Kaja Kamal, saying "registrars can break the queue", thereby undermining the Claimant by suggesting that he could not whistle blow against a Registrar'.

97. The next allegation is that, on 18 October 2021, Ms Price 'interrupted the Claimant's conversation with renal Specialist registrar Raja Muhammed Kaja Kamal, saying "registrars can break the queue", thereby undermining the Claimant by suggesting that he could not whistleblow against a registrar'.

98. The Claimant explained in his statement (paragraph 48) that he was having a conversation with Dr Kamal, when Ms Price came in and interrupted the conversation and, rather than saying 'excuse me', she said 'registrars can break the queue' and took the registrar away. Asked what he thought that meant, the Claimant said in cross-examination: 'registrars can whistleblow, I cannot'. Asked whether Ms Price used the word whistleblowing, the Claimant said that she did not. He went on to explain: 'because I blew the first whistle when the mistake was done by the registrar, I went above the registrar and told my line manager, that is breaking the queue, I broke the queue actually.' He alleged in his witness statement (paragraph 48) that Ms Price said this deliberately to undermine him, on the instruction of Dr Forbes. There is no evidence that Dr Forbes knew about this interaction, let alone had any involvement in it.

D11: 'At some point in October 2021, Ms Katherine Price (Physician Associate) said "are we all bad" indicating that they were all involved in the poor treatment of the Claimant'.

99. At some point in October 2021, the Claimant alleges that Ms Price said to him 'are we all bad?' The context is entirely unclear. In his witness statement at paragraph 49, the Claimant explained that she was 'suggesting I was bad as I had made the protected disclosures and they were all involved in the poor treatment of me'.

D12: 'From 16 October 2021, Dr Mark Blunden (Renal Consultant) ignored the Claimant's request to work on a project on complications of kidney biopsies'.

100. In July 2021, Dr Mohidin and suggested that the Claimant get involved in at least one project while he was working for the Respondent. The Claimant says that he approached a consultant, Dr Mark Blunden, in the staff room in the first week of September 2021, and that Dr Blunden 'happily accepted my interest to participate in the project "complications of renal biopsies" run by him'.

101. On 16 October 2021, the Claimant sent Dr Blunden an email as follows:

> 'Dear Mark, Further to our face-to-face conversation last month, I am contacting you to let you know my email address. Please contact me when you are ready to discuss further about the project. Thanking you and looking forward to hearing from you.'

102. The Claimant accepted in cross-examination that there was no evidence that Dr Blunden knew about his protected disclosures. He relied on the fact, in the first week of September (before the protected disclosures), Dr Blunden had agreed to his being involved in the project, but he then did not reply to this email which postdated the protected disclosures. He assumed from this that Dr Blunden must have known about the disclosures and must have ignored his email because of them. There is no cogent evidence that Dr Blunden knew about the disclosures; we find that he did not.

D13: 'At some point in October 2021, Renal Professor Magdi Yaqoob referring to the Claimant said, "he is going to be a nurse soon"'.

103. The Claimant alleges that, on an unspecified date in October 2021, Professor Yaqoob said about the Claimant: 'he is going to be a nurse soon'. In his statement (paragraph 50) the Claimant interpreted this as 'suggesting the imminence of my job dismissal'. That interpretation makes no sense: the Claimant's dismissal would not lead to his becoming a nurse.

104. The Claimant did not make this allegation in his internal complaint; he made a different allegation (see below at para 137 onwards). His explanation for this was that 'the human brain cannot remember all the details', which we find unsatisfactory, given the Claimant's many contemporaneous complaints. Absent any contemporaneous record, we are not satisfied that the remark was made.

The meeting on 19 October 2021

105. The Claimant attended a meeting by Teams with Dr Bojahr on 19 October 2021. The Claimant asserted that the transcript was 'fabricated and manipulated'. He based this on the fact that some of the transcript was 'gobbledygook'; and the transcript identified Jens Rhubach as being one of the participants, when he was not present. However, the explanation for this is straightforward: the transcript was automatically generated by Teams and the software had 'misheard' some of the conversation (hence the gobbledygook); and Mr Ruhbach is Dr Bojahr's husband, who had previously logged into their computer, (hence his name appearing on the screen and then the transcript).

106. If this meeting was intended as a supportive meeting to listen to the Claimant's concerns about bullying, it fell short of its purpose. So far as we can tell from the poor transcript and the perfunctory summary, prepared by Ms Janet Bradford, little time was spent during the hearing listening to the Claimant's perspective. The focus was on raising concerns about his performance and attitude. This included timekeeping, not attending the ward rounds, not working in a collaborative way and lack of understanding that the patient was the focal point of the work on the ward.

107. It also focused on reminding the Claimant that the ward had an excellent reputation and was staffed by very skilled individuals, the implication being that he should be careful before criticising them. In her statement Dr Bojahr wrote:

> 'Mr Bakht ignored our advice and continued to criticise senior medical staff for their clinical decisions, which he seemed to monitor on CRS (our Trust digital patient note system). Other junior doctors had complained that Mr Bakht would sit long periods during the day in front of the computer, apparently looking for mistakes in patient care. It seemed that when someone disagreed with Mr Bakht, he would accuse this person in turn as a bully.'

D15: '20 October 2021, Consultant Karl Metcalfe, one of the leads for the Medical Support Worker project, on WhatsApp commented about the Claimant's failure to pass the PLB2 on a couple of occasions'.

108. This allegation relates to a thread in the MSWs' WhatsApp group on 20 October 2021. Dr Bojahr congratulated two MSWs who had passed their PLAB2 exams and commented that it was 'not the end of the world if you don't pass; I don't want any of you [to] feel under pressure!'. Ms Bradford wrote a similar message, also wishing luck to 'all who are yet to pass'. Dr Metcalfe then wrote a message echoing Dr Roja 'on all fronts', saying:

> 'but if I may just fess up here - (but I am I fully admit still a useless driver) but then failed MRCP only thrice'.

The Claimant commented on that message, saying:

> 'Doesn't matter Dr Metclefe [*sic*]. Failure is the pillar of success. You are still at the top in our views.'

Ms Bradford then replied saying that she failed her driving test three times; Dr Metcalfe commented: 'hopefully we don't run into each other on the road anytime soon!', followed by a laughing emoji.

109. The Claimant now alleges (statement, paragraph 54) that, by making these remarks, Dr Metcalfe was undermining him 'suggesting I should admit myself a useless medical practitioner'. On the other hand, he alleges that Dr Metcalfe mentioned the MRCP 'because he knew I have had very good medical knowledge'. He interprets the exchange between Dr Metcalfe and Ms Bradford about not running into each other on the road as suggesting 'that I should not go above my colleagues as I failed my PLAB2 four times and this detriment supports that he was aware of the first protected disclosure'.

[D16: 'Between 19 October and 22 October 2021, Dr Metcalfe posted on the WhatsApp Group about the Claimant's work on the Renal Ward']

110. This issue was withdrawn by the Claimant in his email to the Tribunal dated 31 October 2023.

Dr Bojahr's communication with Ms Croft

111. On 29 October 2021 Dr Bojahr emailed Ms Carla Croft (consultant clinical psychologist service lead):

> 'We have one MSW in medicine who we are concerned about on many levels. In a nutshell he is underperforming to a degree that all consultants who came into contact with him don't think he'll ever be a doctor in this country. Couple this with a superiority issue (he gives advice to one of the renal professors), and a poor work ethic (never attends handovers). Karl and I had a meeting with him already, and he has no insight; indeed, thinks that he is bullied and it's other people's fault. So we need to terminate his contract, especially as our funding has been cut and we have more MSWs working than we have funding for. Is there any way you can advise us how to proceed, or could your team see him to help pick up the pieces? We would be very grateful for your thoughts on this.'

112. We note that although Dr Bojahr continued to raise the issue of the Claimant criticising colleagues, she made no reference to the albumin incident; her only specific allusion is to the Claimant giving advice to a renal professor, who had no involvement in that matter. It is also correct that the Claimant repeatedly referred to his superiority as a clinician; that was a real concern for the Respondent, given that he had been absent from practice for over ten years.

113. It is clear from this email that Dr Bojahr and Dr Metcalfe already wanted to terminate the Claimant's contract before the cardiology incident referred to below (para 147 onwards).

114. Ms Croft replied sympathetically. She confirmed that the Claimant could contact her service at any point for support or guidance; she commented that it was now common practice for managers to provide contact details for her service when discussing concerns with individuals. She also advised that they should seek HR advice, especially as the Claimant has suggested he was being bullied, and make notes about the conduct that worried them.

115. We reject the Claimant's theory that management was referring him to Ms Croft to draw her into a conspiracy to dismiss him. Had he engaged with Ms Croft (which he did not) those interactions would have been confidential.

PD3: '3 November 2021, by email to Dr Forbes, stating that a patient had been discharged with the wrong diagnosis and their care improperly managed by Dr Osborne and Dr Mahrukh.'

116. By an email to Dr Forbes (copying in Dr Metcalfe and Dr Bojahr), dated 3 November 2021, the Claimant described an incident which happened on 29 October 2021 as follows.

> 'The day before yesterday (29/10/2021) there has been a mistake in the way we discharge a patient. I am explaining the mistake below.
>
> I wrote a discharge letter with ESRF who was admitted in the hospital with aches and pain. I wrote the diagnosis as medication related iatrogenic hypercalcaemia as PTH level was low and serum calcium level was high. It is to be mentioned here that the patient has been taking Vit D and Calcium for a long time. The management of this case is to stop vitamin D and calcium.
>
> Dr Harry amended my discharge summary and wrote hypercalcaemia due to ESRF. I could have accepted this diagnosis if both PTH and serum calcium level were high. That means tertiary hyperparathyroidism due to ESRF where hyperplastic parathyroid gland is autonomously secreting parathyroid hormone causing both high PTH and serum calcium. Here the management is to apply medication to stop the secretion of hormone by the parathyroid gland.
>
> After that, I went to our register SpR Dr Mahrukh to read my discharge letter. Subsequently, the patient was discharged with calcium and vitD though the patient had hypercalcaemia that caused both arm and leg pain. It is to be mentioned here that this patient admitted to the hospital for bone pain affecting his sleep and it was patient's main concern.
>
> I would be happy to present this case to my fellow colleagues provided you allow me to do so as this seems to me a very good case for junior doctors as well as junior registers and prevent such medical error in future.'

117. The Claimant relies on this email as Protected Disclosure 3. We will refer to it as 'the calcium incident'.

118. In his witness statement (paragraphs 56 and 57), the Claimant wrote that his objection was not listened to but that subsequently a consultant acted consistently with what he thought should have happened. That is not correct. The consultant had stopped calcium on admission, not on discharge when the position may have been different.

119. Dr Forbes later asked Dr Kamal (senior registrar) about this incident. He gave his account in an email of 19 December 2021.

> 'Dewan came to me and made a complaint about a fellow Registrar who was in the ward previously. He said there was a haemodialysis patient who was admitted with hypercalcemia due to the recent start of alfacalcidol and the alfacalcidol was not stopped and that a junior wrote the discharge summary wrong not mentioning the alfacalcidol. He also showed me a discharge summary which he has written and stated this is the correct way of writing the discharge summary. He also mentioned that he raised this issue with Registrar who didn't listen to him. As a Senior Registrar, I did discuss the case with my fellow registrar who said that hypercalcemia was caused due to alfacalcidol and the dose was reduced. She has also organised a follow-up appointment in the renal assessment unit and on follow up the calcium levels have normalised. The patient is aware of what

> has happened. I did discuss the plan and outcome of the case with Dewan but he would go into the same case a few times a day with me stating the patient was not managed well, the Registrar was not listening to him and the junior has made a big mistake in spite I have explained alfacalcidol can cause hypercalcemia, the patient is aware, the outcome was good. Dewan would focus on one particular cause of a condition but when asked about other causes he would not know.'

D14: 'Dr Suzanne Forbes (Renal Consultant and the Claimant's line manager) failed to deal with the Claimant's protected disclosure complaints'.

120. It is correct that Dr Forbes took no formal action in relation to any of the Claimant's alleged disclosures. She explained that she did not regard them as disclosures. She noted, in particular, that the Claimant did not use the formal escalation or governance pathways. She believed the Claimant knew from his induction that clinical incidents should be reported through the DATIX system.

121. Although reporting a clinical incident through the DATIX system was the most common way of doing so, the Respondent's whistleblowing policy is clear that, if an employee has a concern in the public interest, they may simply inform their line manager, their line manager's line manager or any appropriate manager within the service.

122. With regard to PD1, Dr Forbes' evidence, which we accept, was that it did not occur to her that this WhatsApp message constituted a serious disclosure of a clinical incident. There was no identifiable detail about the patient or the event. She did not speak to anybody about it; she simply regarded it as 'just another message from Mr Bakht that did not really make sense'.

123. With regard to PD2, the two incidents which the Claimant now relies on as protected disclosures were part of a much longer email, the main focus of which, Dr Forbes believed, was on how he was treated by other members of the team. She spoke informally to Dr Goldet (para 59 above), but took no further action; she did not go back to the Claimant with her thoughts; he did not pursue the matter further.

124. At paragraph 32 of her statement, Dr Forbes wrote:

> 'He went on to make the point that Professor Yacoob and Dr Goldet were the senior clinicians involved in the patient's care. These are both highly qualified and experienced doctors and I trust their judgement. Professor Yaqoob is the departmental senior academic clinician; he has published many papers and written textbooks, and is internationally renowned as a Professor of Nephrology. Dr Goldet is a senior registrar in nephrology with several years of experience and who had been working in the department for some time with excellent feedback. Mr Bakht writing this email made me think he did not understand what the consultant had been doing, and also made me think he was trying to show off his theoretical knowledge about albumin use. Without knowing the patient details or full clinical situation I could not (and did not) make any comment, but from experience this is often an area of medicine where there are contrasting opinions with little evidence to support practice either way (ie in determining fluid resuscitation). I do not believe that it would be in the public interest to know that one solution is being used in preference to another, where many are available. I cannot see how Mr Bakht would think that was in the public interest, either.'

125. As for the medication incident, Dr Forbes' evidence was that the information provided by the Claimant was so brief that she did not regard it as a disclosure of a clinical concern. She wrote:

> 'Fundamentally, if Mr Bakht was informing me that if there had been prescribing error, it had been appropriately corrected (using the good and safe established practice of double-checking prescriptions to mitigate against such human errors). The mistake had been corrected, the patient had not been administered the incorrect drug and I did not consider that there was a health and safety concern.'

126. As for the calcium incident, Dr Forbes wrote (paragraph 42 of her statement):

> 'From his email I believed that his concern was that he had written the discharge letter which was then amended by a junior doctor and that he did not agree with the description of events on the amended letter. Again he had already raised this to Dr Ali, a senior registrar on the ward, He went on to offer to use this case as a learning event for him to teach other junior doctors. It was not clear to me that any error had, in fact, been made. I did speak to Dr Kaja Kamal, one of the other ward registrars, about this as he came to me to share his concerns about Mr Bakht and his inability to function on the ward. Dr Kaja Kamal explained to me that he had already spoken to Mr Bakht about the discharge summary and reassured him that no harm had been done. I also spoke to Mr Schott about the incident, although do not remember the context. At no point did I consider this a clinical incident or believe that any mismanagement had taken place, or harm to any patient.'

D17: 'In the first week of November 2021, a SPR Doctor called Harry approached the Claimant aggressively, saying "where, where, where" in relation to a murmur on a patient which the Claimant had diagnosed'.

127. The Claimant alleges that in the first week of November 2021, he was presenting a case with a murmur in the patient's axillae. He says that an individual whom he refers to as 'Renal Specialist Registrar Dr Harry' approached him aggressively saying: 'where, where, where?'. The Respondent assumed this related to Dr Harry Osborn. In oral evidence the Claimant said that it was not him, but a different person, whose name he did not know.

D18: '12 November 2021, Dr Peter Johnston (Senior House Officer) improperly blamed the Claimant for delaying a patient discharge'.

128. The Claimant alleges that Dr Peter Johnston (senior house officer) improperly blamed him for delaying a patient discharge. On the Claimant's own evidence, he had ordered an ECG on his own initiative on a patient who was about to be discharged. The Claimant accepted in cross-examination that this had delayed the patient's discharge. Dr Johnston did not consider the ECG to have been necessary and said to the Claimant: 'you have made the decision and now the patient's discharge has been delayed'.

D19: '13 November 2021 at 11:15, Mr Ahlam Muthanna (one of the MSWs), on WhatsApp, sarcastically wrote in the MSW WhatsApp group "I would only say as Semsettin has written on the medal, you are the 'Hero of MSW', meaning that he should be dismissed'.

129. One of the Claimant's fellow MSWs (first name, Semsettin) had been on holiday and bought a gift for Dr Metcalfe: a medal, on one side of which she had had Dr Metcalfe's name engraved, and on the other side 'Hero of the MSWs'.

130. In a WhatsApp message on 13 November 2021, another MSW, Mr Ahlam Muthanna wrote:

> 'I would only say as Semsettin has written on the medal, you are the "Hero of MSW".'

131. The Claimant alleged in his witness statement that this message was sarcastic, 'meaning that I should be dismissed' and was connected with his protected disclosures.

132. The medal was produced at the hearing for the Tribunal to see, at which point the Claimant suggested that it had been fabricated for the purposes of these proceedings. That was an allegation made on no evidence whatsoever, and we reject it.

D20: 'On 19 November 2021 at around 9:00, Mr Cassim Schott, Physician Associate, said to the Claimant on the Renal Ward (9F) "You look like the boss in the Renal Ward"'.

133. The Claimant alleges that, on 19 November 2021, Mr Cassim Schott said to him: 'you look like the boss in the renal ward'. The Claimant explains in his witness statement (paragraph 64) that he believed that Mr Schott said this because he had made the first and third protected disclosures which related to mistakes made by registrars; Mr Schott was suggesting that by going over their heads, he was acting as the boss; moreover, the Claimant alleges, he did so on the instruction of Dr Forbes.

134. Mr Schott, in his statement, says that he is 'absolutely certain that I did not say this' to the Claimant and that, even if he had said something similar, it would have been a positive thing to say.

135. Mr Schott was unable to attend the hearing. We have recorded his reason for not doing so, which we regard as credible, and we are prepared to give weight to his statement. We think it inherently implausible that any member of the team would have described the Claimant as looking like 'the boss' on the ward. We find the Claimant's explanation as to why it might have been made utterly implausible; the allegation against Dr Forbes is baseless.

136. We find, on balance, that the remark was not made.

D21: '19 November 2021, Renal Professor Magdi Yaqoob pointed at the Claimant and said "he is useless, he only got the job because of the pandemic"'.

137. The Claimant alleges that, on 19 November 2021 Professor Yaqoob pointed at him and said: 'he is useless, he only got the job because of the pandemic'. The Claimant referred to this incident in an email of 26 November 2021, and later referred to it in his complaint, without naming the person who made the remark. At the interview with Mr Khurram, who investigated his bullying complaint, the Claimant said he was reluctant to give person's name, as he feared it might damage his career, but eventually he named Professor Yaqoob. He repeated the allegation in the email he sent after the meeting with Mr Khurram.

138. Mr Khurram investigated and Professor Yaqoob denied saying it; all the other staff on the ward agreed that they did not hear any such remark. Professor Yaqoob did not attend to give any evidence to the Tribunal. There was no explanation for his absence.

139. We think the allegation has the ring of truth. It is factually correct that the MSW role was created because of the pandemic. We think it plausible that Professor Yaqoob did not have a high estimation of the Claimant's abilities and made a remark to that effect. It was an unprofessional and hurtful thing to say.

140. The Claimant infers (paragraph 65 in his statement) that Professor Yaqoob must have known about his protected disclosures because he had made a complimentary remark to the Claimant ('good thought') on a single occasion before the Claimant made the disclosures; after he made the protected disclosures Professor Yaqoob made this derogatory remark.

D22: '19 November 2021, Dr Sajeda Youssouf (Renal Consultant) said to Cassim Schott "do you need extra cash" referring to the Claimant's financial position'.

141. Dr Sajeda Youssouf (registrar) began working on the ward in November 2021. She was aware of performance concerns about the Claimant. She encouraged him to see patients so that he could then present them to her, but he focused all his time on one case, when there were twenty-five other patients on the ward for which the team was responsible. Dr Youssouf was concerned that only being able to manage the care of one patient at a time would not help the Claimant develop the necessary skills and experience to work as an independent practitioner.

142. On 19 November 2021, Dr Youssouf said to Mr Schott, in the Claimant's presence: 'do you need extra cash?' She was referring to the possibility of additional shifts. The Claimant alleges that she said this 'to insult me intentionally about my poor financial position'. He also asserts that she must have known about PD1. We find that she did not; we have already found that Dr Forbes did not mention that message to anyone (para 50).

143. We find as a fact that, although the Claimant was present, the remark had nothing to do with him or his financial position.

D23: '19 November 2021, Dr Sajeda Yousouf (Renal Consultant) said to the Claimant "whistleblowing is not going to harm your professional career" thereby teasing the Claimant'.

144. The Claimant quotes the comment slightly differently in his witness statement: '*is* whistleblowing not going to harm your professional career?' We accept that the thrust of his allegation is that Dr Youssouf was warning him about the consequences for his career of whistleblowing.

145. Dr Youssouf's evidence was that she did not have the kind of relationship with the Claimant in which she might make a personal comment of this sort: she spent little time with him and the relationship was entirely formal. We accept her evidence: we think it improbable that she said it.

146. We also accept her evidence that she knew nothing about PD1 and PD2: both the incidents they relate to, and the Claimant's disclosures about them, predate her time on the ward. She eventually knew about PD3, but not until December 2021.

The email exchange on 20 November 2021

147. On 20 November 2021, Dr Youssouff sent an email to Dr Metcalfe and Dr Forbes concerning the Claimant's conduct in relation to a cardiology referral.

> 'I am raising a concern about Dewan who has been on the MSW programme with us for a few months

> I have tried to get him to review and present patients, and he is clearly keen to take on some responsibility, which we have attempted to let him do with supervision. However, he is unreliable and consequently a potential risk.
>
> A patient with cardiac sounding chest pain was admitted on 17/11/21 from dialysis. I saw him on the ward round on 18/11/21. Dewan was keen to take the lead on reviewing and presenting the patient, and translated for and presented on the ward round. The patient's troponin was elevated and he required cardiology referral, and Dewan told me more than once he had spoken to the cardiologists. The patient was not reviewed on 18/11/21 so our IMT2 re-referred the following day on 19/11/21. I called the cardiology IMT3 myself around lunchtime that day to discuss another patient, and to check if they were coming to see the patient with chest pain. The IMT3 told me the patient had only been referred that morning, and they weren't aware of him prior to that. His colleague had been on call the day before and I spoke to him directly. He advised me someone had called from 9F to refer a patient. He (the cardiology IMT3) said he was on renal HDU and told the person to go over in person to speak to him directly, but the person didn't go over, never called back, and didn't give any patient details. I also asked Dewan what happened. He told me the cardiology doctor advised him that he would come to 9F, so he gave the patient's ECG to the 9F registrar and went for lunch. When I spoke to the registrar, he told me Dewan had given him the ECG, but did not tell him the cardiologist would be coming over to take the referral - he assumed Dewan was asking him to review the ECG.
>
> There may have been a misunderstanding in who would go where to ensure the patient was referred, and that is understandable. However, I checked with Dewan more than once during the day whether the patient had been referred to cardiology, and he categorically stated that he had spoken to the cardiologist. He simply did not understand that he had not completed the task, or that the level of communication to the cardiology or with me/the team was inadequate. He thought his actions were complete and satisfactory.
>
> In addition, previously he would not see patients, but would read notes on CRS. He has started to talk to patients, but he chooses to go to see them himself, and doesn't always let me know. Clearly he is with us under supervision, but even with this level of supervision, and only one patient allocated to him that day, he has failed to achieve a basic standard. I have slightly lost faith unfortunately, and from next week ensure we directly supervise his interactions with patients. However, to make this a meaningful and valuable experience in order to get his registration this will represent a significant increase in workload for myself and the ward team, with someone who was supposed to ease rather than increase the burden.'

148. The Claimant gave a number of accounts of what happened on that day, which vary quite significantly.

149. At the meeting with Mr Khurram in December 2021 (para 182 onwards), Mr Khurram asked the Claimant if he had given the the cardiology registrar the patient's details. The Claimant replied: 'patient's details. I can't remember right now.' He then appeared to change his answer and said: 'But I gave the details of the patient's history that I took and what we have done for the patient. That's it.' Asked again by Mr Khurram if he remembered giving the registrar the patient's history and whether he discussed the case with him over the phone, the Claimant replied 'No. The line was not good. He was not listening as well but he said he would come to the doctor's room. I was waiting for that.'

150. The Claimant gave a further account of his actions in the email to Mr Khurram on 7 January 2022. He said that Dr Youssouf decided to refer the patient to cardiology. The Claimant called cardiology but the telephone line was not good enough to understand everything that the cardiologist said but '*so far as I can remember*' [emphasis added] the cardiologist said he would come to the doctor's room on the renal ward to take the patient's details. He then got on with

other work and, around 4 p.m. handed the patient over to Dr Kamal, telling him that they were waiting for the cardiologist to arrive. As to whether he had given the patient's details to the cardiologist, he wrote: 'I can't remember exactly'. He could not remember the name of the cardiologist, or whether he put their name on CRS.

151. In his witness statement (paragraph 76) the Claimant said that he had done the referral in the correct way; the idea that he might be expected to leave the ward to find the cardiologist was 'impractical' (para 76.2.3); he blamed Dr Kamal, to whom he asserts that he 'delegated' responsibility for the patient, even asserting that Dr Kamal 'did not listen to me when I made the handover of the patient to him.'

152. At the meeting with Mr Khurram, the Claimant said: 'because I have given my work to my senior and now it is not my headache because I am working at the root level, I have different type of works, cannot concentrate on one patient.'

153. In oral evidence at the hearing, the Claimant asserted that the decision to refer the patient was his; it was he who had taken the initiative. That was not true. It is inconsistent with his own account at the time; Dr Youssouf rejected the suggestion and observed that she would be very concerned if a junior member of staff made a decision like that without consulting with a senior.

154. Dr Youssouf, in her oral evidence, said that the concern that she raised – and which she continued to have – was that the Claimant never accepted at any stage that he was at fault in any way. She observed that everyone makes mistakes but, to learn from a mistake, they have to realise they have made one. The Claimant's inability to accept that his actions on this occasion were incorrect showed, in her view, a worrying lack of insight, which itself presented a risk to patients.

<u>Management's response to Dr Youssouf's complaint</u>

155. Dr Metcalfe replied to Dr Youssouf on 20 November 2021, saying:

> 'Thank you Saj. I know. Heike [Bojahr] and I are building up to tell him together that he has no future as a doctor which will be difficult obviously but it clearly has to be done. We are hoping that he will take up offer of psychology support but insight into that need is part of the problem of course. Regardless of all he is clearly now more than just a nuisance to renal and we will remove him next week. I will speak to Heike and Janet [Bradford] soon as I can and talk Monday. And obviously thank you to you, Suzanne, and all in renal doing so much to help Dewan but also to clearly define what is best for him going forward with his life.'

156. Ms Bradford (Revalidation/Business Manager) intervened, proposing a staged approach to managing the Claimant, involving setting objectives and, if necessary, going through a formal performance management process.

157. Dr Bojahr replied, saying that the situation was now urgent and that the Claimant must be removed:

> 'not even sure if there is room for setting objectives as this is a clear probity issue where a patient has potentially been harmed.

158. Ms Bradford replied: 'I am inclined to agree.'

159. Dr Bojahr wrote in her statement that this complaint 'expedited any plan to look more slowly into his performance and we discussed ending his contract straightaway'. We reject that suggestion. Apart from the email which she sent to Ms Croft on 29 October 2021, which we have already quoted above (para 111), Dr Bojahr ended her own email of 20 November 2021:

> 'Looking at the bright side, this episode will make our job easier I suppose…'

We find that she meant that this was a clear-cut incident which would make it easier to justify terminating the Claimant's contract.

160. Dr Metcalfe sent an email early on 21 November 2021, saying:

> 'Lack of insight is now combining with a degree of arrogance and an unreliable relationship with fact and the truth which is a pretty dangerous combination to say the least.'

He also referred to the Claimant's prospects of achieving registration with the GMC, and the fact that it would require confirmation of satisfactory progress by a clinical supervisor before it could be considered:

> 'The judgement of his supervisors is that after 5 months he has made no progress at all and indeed is now seen as a risk in the clinical environment.'

161. Dr Bojahr sent a further email later on 21 November 2021, copying in Mrs Coman of HR, stating that the Claimant was 'beyond remedial action now'. Because of the the incident with the cardiology referral, they felt they needed to take him out of the clinical context and terminate his employment. She also raised the following:

> 'Misuse of patient data – it appears he is spending considerable time going through his colleagues' documentation online in order to find fault with it. He has a long history of openly criticising consultants and junior doctors.'

162. Mrs Coman replied, saying that they should be following the Maintaining High Professional Standards ('MHPS') policy, and that suspension should be a last resort. Mr Metcalfe intervened to say that, in his opinion and that of Drs Forbes and Bojahr, the Claimant was 'a significant risk in the clinical environment and needs to be removed from it with immediate effect'; Dr Forbes replied, endorsing this and offering to provide more information.

<u>D24: '22 November 2021, at about 8:45 am, Dr Mark Blunden (Renal Consultant) made bad facial expressions suggesting that he and senior doctors had managed to "get" the Claimant with regard to a mistake'.</u>

163. The Claimant alleges that, on 22 November 2021, Dr Blunden 'made bad facial expressions suggesting that he and senior doctors had managed to "get" the Claimant with regard to a mistake'. In his statement (paragraph 75), he alleged that Dr Blunden made a (single) facial expression. The Claimant made no contemporaneous complaint about this.

164. There is insufficient evidence for the Tribunal to make a finding that Dr Blunden made a face at the Claimant, let alone to be in a position to interpret it in the manner contended for by the Claimant. We have already found (para 102) that there is no evidence that Dr Blunden knew about the Claimant's disclosures.

D25: '22 November 2021, the Claimant was required to attend a meeting to discuss a problem with a cardiology referral which was not his fault. During the meeting Dr Karl Metcalfe, (one of the Medical Support Worker project leads) intentionally created conflict with the Claimant'.

165. Dr Bojahr and Dr Metcalfe arranged to meet the Claimant on 22 November 2021 to discuss the incident Dr Youssouf had complained about. The Claimant said:

> 'I was expecting the cardiology registrar to come over to our room on the ward and by 16:00 nobody turned up and I did not have any lunch. On that day it was so busy.'

166. At the meeting on 22 November 2021, Dr Metcalfe also raised other concerns, including that the Claimant continued not to attend handover, as he had been asked to do.

167. The Claimant also alleges that, at the meeting on 22 November 2021, Dr Mertcalfe 'intentionally created conflict' with him. The Claimant confirmed that this relates to an exchange, when the Claimant said that he wanted to 'feel like I am in a "family" and helping each other'. Dr Metcalfe replied that:

> 'We like to think that we treat each other with the same respect as you would someone in your family but it is work. The most important thing in our work is tha patient and everything has to fit in with that and yes we have to treat each other well respectfully but it is work and serious work.'

D26: 'In the meeting held on 22 November 2021, Consultant Anaesthetist Heike Bojahr (one of the Medical Support Worker Project leads) restricted the Claimant's opinion about a professional diagnosis by stating, "you can give your opinion."'

168. The Claimant says that, at the same meeting, Dr Bojahr 'restricted the Claimant's opinion about a professional diagnosis by stating: 'you can give your opinion'. Dr Bojahr agreed that she may well have said this, but could not remember doing so.

169. In his witness statement (paragraph 76.4), the Claimant describes the exchange:

> 'In the meeting […] consultant Heike Bojahr restricted my opinion saying: "you can give your opinion". This statement was given by her as I had made a statement: "I can give my opinion, but decision taker is my consultant" to Dr PETER JOHNSTONE (Senior House Officer) at renal ward on 12/11/2021 […] Therefore I wrote a statement to Heike Bojahr in the email dated on 17/11/2021. The statement in the email is: "I believe as a medical support worker, I have the right to make my own opinion about any patients and discuss further with consultants. Who is a decision maker, with evidence, if the disagnosis and management plan by any registered doctors, including FY1, FY2, SHO, SpR, consultants are not satisfied by me for the sake of our patients."'

D27: 'The Claimant was referred to Occupational Health as a pretext to find a reason for dismissal'.

170. At the meeting on 22 November 2021, the Claimant said he was finding it very difficult to work on the ward and was feeling very stressed. It was agreed that he would take the rest of the week off and be referred to OH. He remained on full pay. Dr Bojahr also wrote to him to say that she would ask one of the Respondent's clinical psychologists to see him:

> 'to help you with dealing with uncertainty and work pressures. To emphasises this again, a lot of us are feeling under intense pressure after the pandemic, and we have been given access to a team of psychologists who are looking after staff welfare.'

171. An appointment with OH was arranged for 25 November 2021, but the Claimant did not attend. The Claimant explained in his witness statement (paragraph 79) that he deliberately avoided taking the call from OH because he considered that it was part of a conspiracy by senior management to dismiss him. It was rearranged to 16 December 2021.

172. The OH report records that the Claimant said he was experiencing stress and depression. OH recommended that he would benefit from psychological support and counselling.

173. The substance of the report is consistent with the fact that management was seeking support to mitigate the impact on the Claimant if they moved to dismissal (para 111 onwards). They also asked if there was any underlying medical reason which might explain what they regarded as his inappropriate behaviour. In our judgment, both questions were appropriate in the circumstances.

<u>The Claimant's bullying complaint of 26 November 2021</u>

174. On 26 November 2021, the Claimant emailed Dr Bojahr, copying in Dr Forbes and Dr Metcalfe, setting out his account of the cardiology referral and making allegations of bullying on the ward. The complaint was dealt with under the Respondent's dignity at work policy.

175. Dr Metcalfe took the view that the investigation into the Claimant's concerns should be carried out by someone not directly involved and asked Mr Khurram to investigate. At paragraph 81 of his statement, the Claimant alleges that, by doing this, Dr Metcalfe was drawing Mr Khurram into the conspiracy.

176. Mr Khurram was the surgical lead for the MSW program and helped place MSWs in surgical roles. Because the Claimant was not one of the surgical MSWs, Mr Khurram did not know him; he had seen him once or twice on the renal wards, but did not remember ever interacting with him. We think it was logical and reasonable to appoint Mr Khurram to deal with the matter, as he had not been involved in the any of the events which were its subject. We reject the Claimant's allegation of a conspiracy between Dr Metcalfe and Mr Khurram.

<u>D28: On 1 and 24 December 2021, Dr Heike Bojahr refused the Claimant's request to return to work from sickness absence.</u>

177. On 1 December 2021, Dr Bojahr wrote to the Claimant that she thought it better that they wait until he had had the OH appointment before planning the Claimant's return to work.

178. On 9 December 2021, Dr Bojahr emailed the Claimant referring him to Ms Croft (consultant psychologist). He did not attend the appointment because he considered that it was part of the conspiracy against him (paragraph 85 of his statement).

179. As we have recorded above, the OH appointment took place on 16 December 2021. OH advised that he was fit to work with adjustments.

180. On 18 December 2021, the Claimant asked to return to work. Dr Bojahr replied on 24 December 2021, saying that she thought it:

> 'better to wait for an update from Mr Khurram's investigation before you come to work […]. We don't want you exposed to any situations that might impact on your mental health, and as you are very stressed by the way you feel treated by your colleagues, we need to make sure the area is safe for you.'

181. Dr Bojahr gave a different explanation in her oral evidence: renal refused to have the Claimant back on the ward, and no other department wanted him. Dr Bojahr said: 'given his labile state we thought it was better to let the contract run out without having the stain of dismissal'. In the event, that was exactly what they did: they kept him off work until close to the point at which his contract expired at the end of March, and then told him that it would not be renewed.

D29: '23 December 2021, in an investigation meeting with Dr Muhammed Khurram (Consultant Renal transplant surgeon and Medical Support Worker project Co-ordinator), the Claimant was not allowed to put his points. Instead of investigating, Dr Muhammad Khurram made allegations against the Claimant of probity, not sitting with colleagues inside the doctor's room or non-engagement with colleagues, causing problems with colleagues and the unfounded allegation about the cardiology referral. Janet Bradford requested third party authority to contact the GMC by emails dated 20 December 2021 and 24 December 2021, in the meeting held on 20 January 2022 and by email dated 20 January 2022.'

182. On 23 December 2021, the Claimant attended a meeting about his bullying complaint with Mr Khurram.

183. The meeting lasted an hour and twenty minutes. We find that the Claimant was allowed to put his points, indeed it is clear from the transcript Mr Khurram went to considerable lengths to clarify the points he was seeking to make. It was difficult to explore the issues, because the Claimant tended not to listen and not to focus on a single issue (a tendency which he also displayed at the hearing before us). Mr Khurram's interventions were, in our view, designed to understand the Claimant's complaints.

184. Both the calcium and albumin incidents were discussed at the meeting; the Claimant referred to them essentially as examples of 'how efficient I am' and of occasions when his opinion had not been given sufficient respect. In relation to the calcium incident, Mr Khurram suggested to him that perhaps the lead consultant would know the patient well and would know what to prescribe. The Claimant replied: 'Yes I can give my opinion but decision-taker is my consultant. Decision-taker is my resgistrar.' As for the albumin incident, the Claimant again said that the registrar had 'made a mistake, patient was dying. I saved the patient'.

185. Mr Khurram acknowledges that he must have seen the documents containing the protected disclosures relating to those incidents among other documents which were sent to him.

186. It is correct that Mr Khurram asked some questions about the Claimant's own behaviour, including in relation to the cardiology incident and, more generally, whether he might be isolating himself by not sitting with colleagues, instead taking his work elsewere.

187. As for the suggestion that Mr Khurram '[made] an allegation' against the the Claimant of lack of probity, that is a mischaracterisation. He asked the Claimant when he had discovered he had failed his fourth PLAB2 attempt. The Claimant asked why he was asking; Mr Khurram explained that, if the Claimant had withheld information about his progress with PLAB, that may be an issue of probity. The Claimant agreed to re-send the email he had received from the GMC. He explained that, in his most recent PLAB2 attempt, he had scored zero seven times in relation to his interpersonal skills.

188. Mr Khurram suggested that the Claimant agree to a 360 degree feedback exercise. The Claimant was not keen to do this, but eventually agreed, albeit with the observation:

> 'Doctor Khurram, if you give any feedback that seems to me a rubbish one I will not agree it, I ignore it and I will feel that you are also a rubbish colleague to me. Am I clear? Feedback has to be a good one.'

189. The Claimant later changed his mind about the exercise. Instead, on 1 January 2022, he sent Mr Khurram copy of his son's school record:

> 'I am writing to let you know that my two children are studying in the UK. My son's school progress report (ie reflecting my background) is attached herewith as requested. If you ask any of my colleagues, the adjectives that have been given by my son's teacher to him, you would come to know that all are present in me. Please read it thoroughly. My son is, probably, also coming to work in the NHS as a doctor in the future. Please keep him in your prayer. I have been praised throughout my life in the same way as my son is now.'

190. Mr Khurram was concerned by the fact that the Claimant appeared to believe that his son's school report reflected his own abilities in this context; he considered that showed a further lack of insight.

191. The next day, on 2 January 2022, the Claimant sent a long follow-up email about his allegations; Mr Khurram found this easier to follow than the Claimant's oral account. In his email he came back to the calcium incident and wrote:

> 'This incident also proves my greater basic medical knowledge, experience, my talent, efficiency, ability to understand and interpret any cases and work very minutely. Likewise, there were many other incidents where I was the only person who discussed and argued (discussed with reasoning) about different cases in a relevant manner with the consultants during the ward round. That's why, probaby, I am the victim of their (ie. registered doctors of the UK) jealousy.'

192. We note that the Claimant was not alleging at this point that the bullying was because he had blown the whistle; he was advancing a different explanation for his colleagues' alleged treatment of him: professional jealousy.

193. The Claimant also alleges under this heading, that Ms Bradford asked him, on several occasions, for third-party authority to contact the GMC. Ms Bradford was responsible for liaising with the GMC about issues including registration. The Claimant had asked her if there was another way, other than through the PLAB process, of achieving registration. She offered to contact the GMC on his behalf; in order to do so, he would need to give her third-party authority to contact them. This was part of her job; she had done the same for others. She made the offer several times, by way of emails dated 20 December 2021 and 24 December 2021, in the meeting held on 20 January 2022 and by email dated 20 January

2022. She made it clear that it was up to him whether he wished her to do so; the Claimant did not take up her offer.

The Claimant's email of 17 January 2022

194. On 17 January 2022, the Claimant wrote to Dr Bojahr, saying that he was confused by the suggestion of concerns about his performance and attitude. He believed these concerns were a retaliation against him because he had made complaints of bullying.

195. He then raised described further clinical incidents, when he said that 'very senior colleagues' had made mistakes: he described the mistakes, but did not identify the colleagues or the patients. He then wrote:

> 'If anyone investigate all those, they would support my excellent performance, medical knowledge, talent, my honesty.'

196. These matters are not relied on by the Claimant as public interest disclosures.

197. Dr Bojahr met with the Claimant on 20 January 2022 to update him about the progress of the bullying investigation. She again suggested he might wish to engage with the available psychological support, but he declined.

D30: 'On 1 February 2022, Georgina Triantafilledes, the MSW WhatsApp Administrator, became angry with the Claimant because of material he was putting on the WhatsApp group where he was expressing bullying, harassment and victimisation due to the protected disclosures'.

198. On 1 February 2022, the Claimant posted the following message in the MSW WhatsApp group:

> 'Yes obviously MSW is a very good program to familiarise with NHS Hospital System, no doubt, if you are allowed to work in this post with respect. If you try to help and support your colleagues by using your knowledge in a very safe way where they are doing mistakes and you become victimised then MSW programme is useless. That means a tiger have to behave like a Cat just to satisfy your colleagues ignoring patient safety and care.'

199. Ms Georgina Triantafilledes, the WhatsApp group administrator replied:

> 'Thank you for your response, after reading your comment I don't believe this is the appropriate forum to discuss such matters. I value your contribution to the discussioin, however where your personal views, judgement, and comments can have an effect on another individual/team that cannot speak for themselves then it isn't appropriate. There are policies within the Trust that you can engage in with said allegations.'

D31: 'In January 2022 and February 2022, Dr Muhammad Khurram (investigator), Consultant Renal transplant surgeon and Medical Support Worker project co-ordinator) delayed and/or failed to give the Claimant a decision on the bullying investigation'.

200. The Claimant alleged that Mr Khurram delayed and/or failed to give a decision in realtion to his bullying complaint in January/February 2022.

201. Mr Khurram met with the Claimant on 23 December 2021. He interviewed doctors who were central to the Claimant's concerns; they had a heavy workload which Mr Khurram had to work around; some were away on leave. That process was completed by 27 January 2022, on which date he sent them a summary of

their interviews to be checked for accuracy. He wrote his report on 8 February 2022.

The February 2022 grievance

202. On 15 February 2022, the Claimant submitted a further grievance to Dr Bojahr; it covered much of the same ground as his previous bullying complaint. He also raised new matters, some of which he has raised in the course of these proceedings. In relation to many incidents he said that he 'would like to have a written apology letter' from the individual in question.

203. He also expressly said that he considered he had been 'bullied, harassed and victimised as I have been a whistleblower time to time at the renal ward of Royal London Hospital'. At a number of points in the grievance, having described an incident, he went on to say 'I would like this incident to be investigated by an independent professional medical investigator (not currently working with Barts health and there is no conflict-of-interest) […] This is completely for the sake of patients.' This was the first time the Claimant described himself as a whistleblower and alleged that some his treatment by colleagues was retaliation for whistleblowing.

204. Towards the end of the document the Claimant wrote this:

> 'My contract with Barts health is going to end on 31/03/2022. My contract must be extended as long as the contract of a single MSW has been extended. I should not be laid off being I was whistleblower time to time unless I want to leave the MSW job.'

205. This document was not relied on by the Claimant as a protected disclosure in these proceedings.

206. On 22 February 2022, Dr Bojahr wrote to the Claimant to invite him to a meeting to discuss his original complaint, the new grievance and his contract of employment.

D35: 'Failure to extend the Claimant's placement beyond 31 March 2022'

207. That meeting took place on 2 March 2022, and was conducted by Dr Metcalfe; Mrs Coman was present; the Claimant was accompanied by his Unison representative, Ms Mary Hanson.

208. Dr Metcalfe told the Claimant that his allegations of bullying had not been upheld; a separate letter would be sent to him providing a summary of the findings.

209. Dr Metcalfe reminded the Claimant that his contract would expire on 31 March 2022 and told him that it would not be renewed. He explained that the decision was based on the view of those supervising him as to his lack of progress in the role. Dr Metcalfe referred - in general terms only - to the Claimant's competence, his failure to listen (in particular to advice given by those supervising him) his timekeeping and his poor communication skills.

210. The Claimant responded by continuing to blame any failings on his part on the bullying he felt he had experienced from others. Dr Metcalfe observed that the Claimant had a tendency to interpret innocent actions as bullying; he gave the example of his own WhatsApp messages, which the Claimant had raised in his

February grievance and which are raised in these proceedings as D15 (para 102). Dr Metcalfe said that the his message was not about the Claimant; the Claimant did not accept that.

211. Mrs Coman referred to the fact that the Claimant had repeatedly failed to pass his PLAB2; she referred to the fact that the Respondent had only discovered this after his employment had begun; she used the term 'probity'. It is clear that there was still a suspicion that the Claimant had misled the Respondent by withholding information, even though that does not appear to have been the case.

212. In any event, Mrs Coman explained that they did not consider they could help the Claimant get to the point where he would be able to pass PLAB2. In response to a question from the Claimant's trade union representative as to how the Claimant might move foreward in his career, Dr Metcalfe frankly told the Claimant that he should consider a career other than medicine. Asked by the Claimant what he meant, he spelt it out: 'not working as a doctor in the UK'. Dr Metcalfe and Mrs Coman offered the Claimant access to psychological support. The Claimant replied that the only support they could give him was allowing him to continue in the job.

213. Dr Metcalfe also acknowledged receipt of the Claimant's new grievance. He observed that it contained 66 allegations against 23 different colleagues, many of which were similar to the allegations made in the bullying complaint. Dr Metcalfe and Mrs Coman indicated that it was not their intention that the new grievance should be investigated; it would be referred to an investigation triage panel, but they anticipated that the panel was likely to agree with them.

D32: '23 March 2022, Dr Karl Metcalfe (Consultant Endocrinologist and one of the Medical Support Worker project leads) provided an overview of a report finding no bullying and problems with the Claimant's communication'.

214. On 23 March 2022, Dr Metcalfe sent the Claimant a three-page summary of Mr Khurram's report, confirming that the report concluded that there had been no bullying; on the other hand there was a common concern about the Claimant's communication skills and his interpretation of discussions/exchanges.

D33: 'On 25 March 2022, an email from Leslie Coman (Human Resource manager and lead) convening a panel meeting without first providing an outcome to the Claimant's formal grievance'.

215. On 25 March 2022, Mrs Coman wrote to the Claimant to tell him that a triage panel would be meeting on 29 March 2022 to consider his outstanding grievance.

216. On 29 March 2022, the panel informed Mrs Coman that they did not support commissioning a further investigation for a number of reasons, including 'lack of supporting evidence, contradictory allegations, invalid/inappropriate allegations, replication of earlier themes'. Mrs Coman informed the Claimant of this.

217. We were taken to the dignity at work policy, which was the policy under which this decision was said to have been taken. The policy sets out various options for resolving such complaints, including mediation or a facilitated conversation.

At para 6.3, it explains that, if the individual did not wish to go down those routes, they may request an investigation, outlining the situation. That request would then be considered by a triage panel. Para 6.4 then describes the triage process: the triage panel 'may make a recommendation that a mechanism such as a facilitated conversation or mediation seems a more appropriate process for resolving the situation rather than an investigation […] If either party does not voluntarily enter into the recommended alternative dispute resolution then an investigation will be commissioned'. On our reading of the policy, the triage panel does not have the power simply to reject the grievance without further action of any sort.

D34: 'Postponing the panel meeting arranged for 14 April 2022.

218. On 5 April 2022, the Claimant emailed Dr Thuraisingham to appeal Mr Khurram's decision not to uphold his bullying complaint. He also asked for the outcome of his formal grievance of 15 February 2022.

219. On 6 April 2022, Ms Lesley Woodman of HR emailed the Claimant to make arrangements for an appeal hearing; she offered him a hearing on 14 April 2022. She emailed again the next day to say that, because the Claimant had not confirmed his availability, it was now too late to organise paperwork to get to him in time; the next available date would be 26 April 2022. Later the same day, the Claimant replied to say that he was not available on that date; he was free on 3,4 and 5 May 2022. Ms Woodman replied that she would check those dates. On 10 April 2022, the Claimant informed Ms Woodman that, because his contract had not been extended, it would be a waste of his time and that of the panel to arrange a hearing. No further steps were taken to do so.

Holiday pay

220. The Claimant conceded in oral evidence that he had received all the holiday pay to which he was entitled.

Pension pay

221. The Claimant agreed in oral evidence that he has been paid the 14.3% pension contribution which he was entitled to receive from the Respondent for the period of his employment and that any top-up was to be allocated by NHS England, not by the Respondent.

Time limits

222. Detriments 1 to 19 are *prima facie* out of time. Because the Claimant had not led any evidence in his statement about time limits, without objection from the Respondent, I asked him some questions on the subject.

223. The Claimant told the Tribunal that he joined a trade union in November 2021. From then on he had access to advice from them. He did not seek advice from anyone before then. His evidence was that he did not know about time limits in the Employment Tribunal.

224. The Claimant said that, before 13 January 2022, he did not think that the adverse treatment he was concerned about was because he had made protected disclsoures. He told the Tribunal that he received an email from Dr Bojahr on that date which mentioned performance concerns. He then did some

research on the internet and 'on 20 January 2022 I told straight away to Dr Bojahr that I was bullied because of the protected disclosures, but she avoided that'.

The law to be applied: public interest disclosure claims

Time limits in PIDA detriment claims

225. With regard to time limits, s.48(3) and (4) ERA 1996 provide (as relevant):

> **(3) An employment Tribunal shall not consider a complaint under this section unless it is presented–**
>
> **(a) before the end of the period of three months, beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them, or**
>
> **(b) within such further period as the Tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.**
>
> **(4) For the purposes of subsection (3)**
>
> **(a) where an act extends over a period, the "date of the act" means the last day of that period**

226. The Court of Appeal in *Palmer v Southend-on-Sea Borough Council* [1984] ICR 372 at [34] held that to construe the words 'reasonably practicable' as the equivalent of 'reasonable' would be to take a view too favourable to the employee; but to limit their construction to that which is reasonably capable, physically, of being done would be too restrictive. The best approach is to read 'practicable' as the equivalent of 'feasible' and to ask: 'was it reasonably feasible to present the complaint to the Industrial Tribunal within the relevant three months?'

227. In *Walls Meat Co Ltd v Khan* [1979] ICR 52 at p.56, Denning LJ held that the following general test should be applied in determining the question of reasonable practicability.

> **'Had the man just cause or excuse for not presenting his complaint within the prescribed time limit? Ignorance of his rights – or ignorance of the time limit – is not just cause or excuse, unless it appears that he or his advisers could not reasonably have been expected to have been aware of them. If he or his advisers could reasonably have been so expected, it was his or their fault, and he must take the consequences.'**

Protected disclosures

228. A qualifying disclosure is defined by section 43B, as follows:

> **(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—**
>
> **[…]**
>
> **(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,**
>
> **[…]**

> **(d) that the health or safety of any individual has been, is being or is likely to be endangered**
>
> **[…]**
>
> **(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.**

229. A qualifying disclosure is protected if it is made by a worker in accordance with any of sections 43C to 43H, which identify the persons to whom a disclosure may be made. In this case, it is not in dispute that the disclosures were made to the employer in accordance with s.43C.

230. In *Williams v Michelle Brown AM*, UKEAT/0044/19/OO at [9], HHJ Auerbach identified five issues, which a Tribunal is required to decide in relation to whether something amounts to a qualifying disclosure:

> **'It is worth restating, as the authorities have done many times, that this definition breaks down into a number of elements. First, there must be a disclosure of information. Secondly, the worker must believe that the disclosure is made in the public interest. Thirdly, if the worker does hold such a belief, it must be reasonably held. Fourthly, the worker must believe that the disclosure tends to show one or more of the matters listed in sub-paragraphs (a) to (f). Fifthly, if the worker does hold such a belief, it must be reasonably held.'**

What was the disclosure of information?

231. As for what might constitute a disclosure of information for the purposes of s.43B ERA, in *Kilraine v London Borough of Wandsworth* [2018] ICR 1850 CA, Sales LJ provided the following guidance:

> **'30. the concept of "information" as used in section 43B(1) is capable of covering statements which might also be characterised as allegations […] Section 43B(1) should not be glossed to introduce into it a rigid dichotomy between "information" on the one hand and "allegations" on the other […]**
>
> **31. On the other hand, although sometimes a statement which can be characterised as an allegation will also constitute "information" and amount to a qualifying disclosure within section 43B(1), not every statement involving an allegation will do so. Whether a particular allegation amounts to a qualifying disclosure under section 43B(1) will depend on whether it falls within the language used in that provision.**
>
> **[…]**
>
> **35. In order for a statement or disclosure to be a qualifying disclosure according to this language, it has to have a sufficient factual content and specificity such as is capable of tending to show one of the matters listed in subsection (1).**
>
> **[…]**
>
> **36. Whether an identified statement or disclosure in any particular case does meet that standard will be a matter for evaluative judgment by a Tribunal in the light of all the facts of the case.**
>
> **[…]**
>
> **41. It is true that whether a particular disclosure satisfies the test in section 43B(1) should be assessed in the light of the particular context in which it is made. If, to adapt the example given in in the *Cavendish Munro* case [at paragraph 24], the worker brings his manager down to a particular ward in a hospital, gestures to sharps left lying around and says "You are not complying with health and safety requirements", the statement would derive force from the context in which it was made and taken in**

> **combination with that context would constitute a qualifying disclosure. The oral statement then would plainly be made with reference to the factual matters being indicated by the worker at the time that it was made. If such a disclosure was to be relied upon for the purposes of a whistleblowing claim under the protected disclosures regime in Part IVA of the ERA, the meaning of the statement to be derived from its context should be explained in the claim form and in the evidence of the Claimant so that it is clear on what basis the worker alleges that he has a claim under that regime. The employer would then have a fair opportunity to dispute the context relied upon, or whether the oral statement could really be said to incorporate by reference any part of the factual background in this manner.'**

232. Where a disclosure is vague and lacks specificity, it will not provide sufficient information: *Leclerc v Amtac Certification Ltd* UKEAT/0244/19 at [26-31]. Where the link to the subject matter of any of ERA s.43B(1) is not stated or referred to, or is not obvious, a Tribunal may regard this as evidence pointing to the conclusion that the information is not specific enough to be capable of qualifying as a protected disclosure (*Twist DX Ltd v Armes* UKEAT/0030/20 at [86] and [87]).

233. The burden is on the Claimant to prove each of the elements necessary for a qualifying disclosure under s.43B ERA. In s.43B(1)(b) ERA, 'likely' requires more than a possibility or risk that the employer (or other person) might fail to comply with a relevant obligation. The information disclosed should, in the reasonable belief of the worker at the time it is disclosed, tend to show that it is probable, or more probable than not that the employer (or other person) will fail to comply with the relevant legal obligation. If the claimant's belief is limited to the possibility or risk of a breach of relevant legislation, this would not meet the statutory test of likely to fail to comply (*Kraus v Penna plc* [2004] IRLR 260 at [24]).

Did the worker believe that the disclosure tended to show one or more of the matters listed in sub-paragraphs (a) to (f)? If he did hold that belief, it must be reasonably held.

234. The issues arising in relation to the Claimant's beliefs about the information disclosed were comprehensively reviewed by Linden J. in *Armes*, from which the following principles emerge.

234.1. Whether the Claimant held the belief that the disclosed information tended to show one or more of the matters specified in s.43B(1)(a)-(f) ('the specified matters') and, if so, which of those matters, is a subjective question to be decided on the evidence as to the Claimant's beliefs (at [64]).

234.2. It is important for the ET to identify which of the specified matters are relevant, as this will affect the reasonableness question (at [65]).

234.3. The belief must be as to what the information 'tends to show', which is a lower hurdle than having to believe that it 'does show' one of more of the specified matters. The fact that the whistleblower may be wrong is not relevant, provided his belief is reasonable (at [66]).

234.4. There is no rule that there must be a reference to a specific legal obligation and/or a statement of the relevant obligations or, alternatively, that the implied reference to legal obligations must be obvious, if the disclosure is to be capable of falling within section

43B(1)(b). Indeed, the cases establish that such a belief may be reasonable despite the fact that it falls so far short of being obvious as to be wrong (at [95]).

235. As with the other categories of relevant failure, a worker will be expected to have provided sufficient details in the disclosure of the nature of the perceived threat to health and safety. However, this duty does not appear to be too onerous (*Fincham v HM Prison Service*, unreported EAT 0925/01).

Disclosure in the public interest

236. The Court of Appeal considered the 'public interest' test in *Chesterton Global Ltd v Nurmohamed* [2018] ICR 731. The following principles emerge.

236.1. The Tribunal must ask: did the worker believe, at the time he was making it, that the making of the disclosure was in the public interest (at [27])? That is the subjective element.

236.2. There is then an objective element: was that belief reasonable? That exercise requires that the Tribunal recognise that there may be more than one reasonable view as to whether a particular disclosure was in the public interest (at [28]).

236.3. While the worker must have a genuine (and reasonable) belief that the disclosure is in the public interest, that does not have to be his or her predominant motive in making it (at [30]).

236.4. 'Public interest' involves a distinction between disclosures which serve the private or personal interest of the worker making the disclosure and those that serve a wider interest (at [31]).

236.5. It is still possible that the disclosure of a breach of the Claimant's own contract may satisfy the public interest test, if a sufficiently large number of other employees share the same interest (at [36]).

<u>PIDA detriment claims</u>

237. S.47B ERA provides:

> **(1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.**
>
> **(1A) A worker ("W") has the right not to be subjected to any detriment by any act, or any deliberate failure to act, done—**
>
> **(a) by another worker of W's employer in the course of that other worker's employment, or**
>
> **(b) by an agent of W's employer with the employer's authority, on the ground that W has made a protected disclosure.**
>
> **(1B) Where a worker is subjected to detriment by anything done as mentioned in subsection (1A), that thing is treated as also done by the worker's employer. (1C) For the purposes of subsection (1B), it is immaterial whether the thing is done with the knowledge or approval of the worker's employer.**
>
> **[…]**

> **(1D) In proceedings against W's employer in respect of anything alleged to have been done as mentioned in subsection (1A)(a), it is a defence for the employer to show that the employer took all reasonable steps to prevent the other worker—**
>
> **(a) from doing that thing, or**
>
> **(b) from doing anything of that description.**
>
> **(1E) A worker or agent of W's employer is not liable by reason of subsection (1A) for doing something that subjects W to detriment if—**
>
> **(a) the worker or agent does that thing in reliance on a statement by the employer that doing it does not contravene this Act, and**
>
> **(b) it is reasonable for the worker or agent to rely on the statement.**
>
> **But this does not prevent the employer from being liable by reason of subsection (1B).**
>
> **(2) This section does not apply where—**
>
> **(a) the worker is an employee, and**
>
> **(b) the detriment in question amounts to dismissal (within the meaning of Part X).**

238. S.48 ERA provides:

> **(1A) A worker may present a complaint to an employment Tribunal that he has been subjected to a detriment in contravention of section 47B.**
>
> **[…]**
>
> **(2) On a complaint under subsection […](1A)[…] it is for the employer to show the ground on which any act, or deliberate failure to act, was done.**

239. Care must be taken to establish the 'reason why' the employer acted as it did. The 'reason why' is the set of facts operating on the mind of the relevant decision-maker, it is not a 'but for' test. The correct test is whether 'the protected disclosure materially influences (in the sense of being more than a trivial influence on) the employer's treatment of the whistleblower' (*Fecitt v NHS Manchester* [2012] IRLR 64 at [45]).

240. If an employment tribunal can find no evidence to indicate the ground on which a Respondent subjected a Claimant to a detriment, it does not follow that the claim succeeds by default. In *Ibekwe v Sussex Partnership NHS Foundation Trust*, UKEAT/0072/14/MC the EAT concluded that there were no grounds for interfering with the tribunal's unequivocal finding that there was no evidence that an unexplained managerial failure to deal with an employee's grievance was on the ground that the grievance contained a protected disclosure.

<u>Detriment and dismissal</u>

241. Part X of the ERA deals with unfair dismissal. The relevant sections apply only to employees and not to other workers.

242. Within Part X, dismissal is defined in s.95 ERA by reference to the termination of the employee's contract of employment. S.95(1)(b) provides that the non-renewal of a fixed term contract constitutes a dismissal for these purposes.

243. S.103A ERA provides:

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

244. The Court of Appeal in *Timis v Osipov* [2019] ICR 655 held that a claim can be brought against a co-worker under section 47B(1A) even where the co-worker's act amounts to dismissal. Summarising his conclusions at [91(1)], Underhill LJ said:

> **'It is open to an employee to bring a claim under section 47B(1A) against an individual co-worker for subjecting him or her to the detriment of dismissal, i.e. for being a party to the decision to dismiss; and to bring a claim of vicarious liability for that act against the employer under section 47B(1B). All that section 47B(2) excludes is a claim against the employer in respect of its own act of dismissal.'**

245. In *Wicked Vision Ltd v Rice* [2024] EAT 29, Bourne J held that an employment tribunal erred in allowing an amendment to add a new claim that a company employer was vicariously liable under s.47B(1B) ERA for the acts of a worker - the company's owner - who was alleged to have subjected the employee to a detriment by dismissing him because he had made a protected disclosure. The EAT concluded that the vicarious liability claim was barred by S.47B(2) because the alleged detriment amounted to a dismissal within the meaning of Part X ERA. A claimant who has a claim for automatically unfair dismissal under s.103A ERA cannot repackage it as a claim under s.47B. The Judge held (at [38]) that in *Osipov* that situation did not arise, because the issue there was whether there could be a claim against the directors, not the company, and the claim against the directors obviously could not be brought under s.103A ERA.

<u>Automatically unfair dismissal</u>

246. There is an important distinction between detriment cases, where it is sufficient that the disclosure is a material factor in the treatment, and dismissal cases, where it must be the sole or principal reason.

247. The approach to the burden of proof in section 103A claims was summarised by Mummery LJ in *Kuzel v Roche Products* [2008] ICR 799 as follows:

> **'[…]**
>
> **[52] Thirdly, the unfair dismissal provisions, including the protected disclosure provisions, pre-suppose that, in order to establish unfair dismissal, it is necessary for the ET to identify only one reason or one principal reason for the dismissal.**
>
> **[53] Fourthly, the reason or principal reason for a dismissal is a question of fact for the ET. As such it is a matter of either direct evidence or of inference from primary facts established by evidence.**
>
> **[…]**
>
> **[57] I agree that when an employee positively asserts that there was a different and inadmissible reason for his dismissal, he must produce some evidence supporting the positive case, such as making protected disclosures. This does not mean, however, that in order to succeed in an unfair dismissal claim, the employee has to discharge the burden of proving that the dismissal was for that different reason. It is sufficient for the employee to challenge the evidence produced by the employer to show the reason advanced by him for the dismissal and to produce some evidence of a different reason.**

> **[58] Having heard the evidence of both sides relating to the reason for dismissal it will then be for the ET to consider the evidence as a whole and to make findings of primary fact on the basis of direct evidence or by reasonable inferences from primary facts established by the evidence or not contested in the evidence.**
>
> **[59] The ET must then decide what was the reason or principal reason for the dismissal of the Claimant on the basis that it was for the employer to show what the reason was. If the employer does not show to the satisfaction of the ET that the reason was what he asserted it was, it is open to the ET to find that the reason was what the employee asserted it was. But it is not correct to say, either as a matter of law or logic, that the ET must find that, if the reason was not that asserted by the employer, then it must have been for the reason asserted by the employee. That may often be the outcome in practice, it is not necessarily so.**
>
> **[60] As it is a matter of fact, the identification of the reason or principal reason turns on direct evidence and permissible inferences from it. It may be open to the Tribunal to find that, on a consideration of all the evidence, in the particular case, the true reason for dismissal was not that advanced by either side. In brief, an employer may fail in its case of fair dismissal for an admissible reason, but that does not mean that the employer fails in disputing the case advanced by the employee on the basis of an automatically unfair dismissal on the basis of a different reason.'**

Conclusions: the disclosures

PD1: 16 September 2021, via WhatsApp to Dr Forbes, in respect of the treatment of a patient that same day.

248. This alleged disclosure (para 48-50) falls at the first hurdle: there was a complete absence of specificity in the message: the Clamant did not identify the patient, the nature of the medical issue in question (even in general terms), the actions he took or the context in which the incident arose.

249. In our judgment the disclosure did not tend to show that the health or safety of an individual had been endangered. It is in the nature of much medical care in an acute setting that it involves 'saving patients' from the consequences of serious ill-health. Merely disclosing that you have 'saved a patient' does not equate to disclosing that the patient had been 'endangered' within the mearning of s.43B(1)(b) ERA, by reason of wrongdoing (for example, a mistake, an act of negligence or a systemic failure).

250. If we are wrong about that, we have concluded that the Claimant did not subjectively believe that the making of this disclosure was in the public interest. The very absence of specificity, which renders the disclosure of no practical use, is itself an indicator that he did not have the public interest in mind when he sent this message. In our view, he was simply expressing his feelings and trying to impress his manager, in a way which we consider somewhat inappropriate.

251. Accordingly, this was not a qualifying disclosure.

PD2: 19 September 2021, by email to Dr Forbes, in respect of the patient treatment incident above and that on 17 September 2021 wrongly-prescribed medication was provided to a patient. The Claimant said that both tended to show that the health and safety of an individual was endangered.

The medication disclosure

252. The disclosure (paras 55-56) was brief and did not name the patient or give the date. Nonetheless, the context was sufficiently specific that the incident could be understood and the patient identified.

253. We accept that the Claimant subjectively believed that the information tended to show that an individual's health had been endangered, based on the fact that a mistake had occurred. He regarded it as a near-miss.

254. However, we have concluded that that belief was not reasonable. The Claimant knew that an effective system was in place to prevent the wrong medication being given to a patient in these circumstances. He also knew that the system had worked in this instance, and the wrong medication had not been given. As a matter of fact, the patient's health had not been endangered. Nor was it likely that the patient's health would be endangered in these circumstances, given the safeguards that were in place. There was a possibility of endangerment, had the system of checks not worked, but a mere possibility is not sufficient.

255. This was not a qualifying disclosure.

The albumin disclosure

256. We are satisfied that there is sufficient factual content in the information disclosed in this passage (paras 57-60).

257. We are also satisfied that, whether or not he was right, the Claimant subjectively believed that the patient's health had been endangered because albumin had not been prescribed and administered.

258. In circumstances where the Claimant said before the procedure was carried out that he thought albumin should be administered, and when the procedure was carried out the patient had an adverse reaction, we consider that it was reasonable for him to maintain his belief that there was a connection between the decision not to administer albumin and the adverse reaction.

259. We record that it is far from clear that the Claimant was right in his belief that albumin should have been prescribed. All the practitioners who gave evidence to the Tribunal explained that albumin is rarely used these days; moreover, its use in the situation described by the Claimant might have been positively counter-productive. The Tribunal is not able to adjudicate upon the rights or wrongs of the clinicians' actions, because we did not hear expert evidence about this incident, only the various opinions of witnesses of fact, including the Claimant. Of course, the fact that the Claimant may have been wrong does not make his belief unreasonable.

260. We are also satisfied that the Claimant subjectively believed that, in disclosing this information, he was acting in the public interest. We think this is clear from the language of the email itself ('to provide high standard and safe delivery of care…as a safety for the patient…ignoring me can affect the safe delivery of care' etc.).

261. At the same time we have concluded that the Claimant's primary motive in making the disclosure was his desire to persuade his line manager as to the superiority of his knowledge over that of his colleagues. However, that ulterior

motive does not prevent there being a concurrent public interest motive in the making of the disclosure.

262. Given that we have found that the Claimant reasonably believed that an individual's health had been endangered, we consider that it follows that it was reasonable for him to believe that making the disclosure was in the public interest.

263. We have concluded that this was a protected discosure.

PD3: 3 November 2021, by email to Dr Forbes, stating that a patient had been discharged with the wrong diagnosis and their care improperly managed by Dr Osborne and Dr Mahrukh.

264. Although the Claimant does not identify the patient by name, his email gives a sufficiently detailed account of the clinical concern to enable the patient to be identified (para 116). He is also very clear about what his concern was. The email satisfies the test for specificity.

265. We have no doubt that the Claimant subjectively believed that this was a serious error, which put the patient at risk. We note that Mr Schott, in his witness statement, recalls that the Claimant persistently raised this issue with various members of the team; he was clearly preoccupied by it.

266. Whether or not he was right, there was a logic to the Claimant's explanation (at paragraph 57 of his statement) as to why he believed the treatment put the patient at risk: the patient was given a high dose of calcium, when he had been admitted with high blood calcium level which could have caused serious consequences for the patient. All the other clinicians with whom he spoke disagreed with him, including the specialist registrar. We remind ourselves of Dr Kamal's explanation as to why the treatment was correct (para 119). Notwithstanding that, we are satisfied that it was reasonable for the Claimant, as a nonspecialist in this field, to maintain his belief.

267. We are satisfied that the Claimant subjectively believed that he was disclosing the information in the public interest; we note his express wish in the email to use this as a teaching point for other practitioners 'to prevent such medical error in [the] future'.

268. We have concluded that it was reasonable for him to believe that disclosing something which he regarded as a medical error was in the public interest.

269. Accordingly, this was a protected disclosure.

Conclusions: the whistleblowing detriments

D1: 17 September 2021 insulted by Dr Kenki Matsumoto (Foundation year 2) unnecessarily saying, "you are not allowed to say doctor to others".

270. Given our finding that the Claimant had probably referred to himself as a doctor (para 52), there was no detriment to him in Dr Matsumoto's reminding him not to do so. In any event, this cannot be whistleblowing detriment because we have found (paras 248-251) that the Claimant had not made a qualifying public interest disclosure before this date.

271. For both reasons, the claim is not well-founded.

D2: 21 September 2021 Renal Specialist Registrar Gabrielle Edith Goldet improperly used the Claimant's CRS card to enter a note on a patient record.

272. The Claimant asserted that Dr Goldet acted in this way because it was she who had made the error with the albumin, about which he had made a protected disclosure (paras 57-60 and 258-261).

273. Dr Goldet did not attend to give evidence. We have rejected as implausible the Claimant's evidence that she inserted a 'Do Not Resuscitate' document into the records (paras 63-64). There was no evidence before us that the information which she entered could in any other way reflect badly on the Claimant. In the circumstances, there was no detriment to the Claimant.

274. Although we have found (para 59) that Dr Goldet knew about the Claimant's disclosure about the albumin incident, there was no cogent evidence that her actions on this day were in any way influenced by it. Even if she had wished to reataliate in some way, we think it implausible that she would have chosen to do it in this way which, as we have already found (para 64), might lead to a further complaint by the Clamant. We accept Dr Forbes' evidence that the more likely explanation was that Dr Goldet, during a busy ward round, simply forgot to log the Claimant out and herself in.

275. The claim is not well-founded.

D3: 21 September 2021 Dr Daniel Miranda (Foundation Year 1) restricted the Claimant's work on patient care by shouting "go home and take rest" in reception. Renal Specialist Registrar Dr Gabriella Goldet heard and said, "do not talk to him, the senior management will deal with it".

276. We have found (para 67) that Dr Miranda did not know about the disclosure and so cannot have been influenced by it. The allegation against him fails for this reason.

277. We have found that Dr Goldet was dismissive of the Claimant (para 69). We have concluded that Dr Goldet probably was irritated by the fact that the Claimant had complained about the albumin incident (which we have found was a protected disclosure), in which she was involved, and expressed her irritation by this remark. It follows that the claim of whistleblowing detriment is meritorious. Although it was a relatively minor incident, the Claimant was entitled to feel aggrieved.

278. However, the claim is out of time by nearly two months. The Claimant had access to union advice from November 2021 onwards. He had until late December to issue a claim (longer with an ACAS extension). There was no good reason why he did not raise this matter with his advisers; if he had done so, they would have advised him about his rights and about time limits. In our judgment, it was not reasonable for the Clamant not to seek advice, if he genuinely regarded this as a serious matter. We have concluded that it was reasonably practicable for the claim to be presented in time and we decline to extend time.

279. Consequently, the Tribunal has no jurisdiction in respect of this claim and it is dismissed.

D4: 24 September 2021, in the staff room, Andy (a female consultant believed to be Dr Andrea Cove-Smith) asked the Claimant what he was doing and, when told he was preparing to present a case, said "not to take too long".

280. In our judgment no reasonable employee would regard this anodyne remark as a detriment. In any event, Dr Cove-Smith cannot have been influenced by the Claimant's protected disclosures because she did not know about them (para 74).

281. The claim is not well-founded.

D5: On or around 28 September 2021, Dr Jian Peng Kieran Chen (FY1) shouted at the Claimant when the latter asked for a second opinion as to whether a patient required IV cannulation.

282. We have concluded (paras 252-255) that the Claimant's disclosure of Dr Chen's prescribing error was not a qualifying disclosure; even if it was, although Dr Chen knew about the incident, he did not know about the disclosure (para 77) and so cannot have been influenced by it.

283. The claim is not well-founded.

D6: On or around 30 September 2021, during a ward round, Ms Katherine Price (Physician Associate) asked how Dr Forbes could remember all the patient information in order to undermine the Claimant by inferring that he could not.

284. Ms Price was being complimentary about Dr Forbes' mastery of patient information. There was no comparison, express or implied, with the Claimant's abilities (para 78). The allegation is baseless. Moreover, the Claimant's explanation in his witness statement (paragraph 37) as to why he believes that Ms Price must have known about his protected disclosures is, in our judgment, implausible.

285. The claim is not well-founded.

D7: 3 October 2021, Dr Suzanne Forbes (Renal Consultant and Claimant's line manager) refused to permit the Claimant to view patient records to which he needed access for the performance of his duties.

286. The allegation fails on its facts: Dr Forbes did not refuse to permit the Claimant to view patient records; she merely made a suggestion (which she thought might aid his development) that he should try not to be too tied to the computer when presenting a case (para 81). The Claimant misconstrued her purpose. No reasonable employee would have considered that there was any detriment to him. There was no evidence of any connection with the Claimant's disclosure about the albumin incident.

287. The claim is not well-founded.

D8: 4 October 2021, Ms Katherine Price (Physician Associate) said to the Claimant "make sure you do not copy and paste my writing" in respect of a discharge summary.

288. Given our finding that Ms Price did not know about the albumin disclosure (para 284), it cannot have been a factor in her treatment of him, and the claim must fail. Moreover, no reasonable employee would have regarded the remark as

detrimental treatment. We think the Claimant resented being given guidance by someone he regarded as inferior; any sense of grievance was, in our view, unjustified.

289. The claim is not well-founded.

D9: 7 October 2021, Dr Seline Dilmec (Senior House Officer) prevented the Claimant from doing patient care work by asking him to do tasks which were not part of his duties, namely speak to a nurse about a skin rash.

290. The Claimant explained the purported causal connection between Dr Dilmec's request and his whistleblowing. The disclosure he relied on relates to Dr Chen's medication error, which we have found was not a qualifying disclosure (paras 252-255). There is no evidence whatsoever that Dr Dilmec knew about the disclosure relating to the albumin incident, let alone that she was influenced by it. For that reason alone the claim fails.

291. Ini any event, part of the Claimant's role as an MSW was to provide support to the registered clinicians by performing a variety of tasks, including those which he may have regarded as menial. Insofar as he had a sense of grievance about this request, we conclude that it was unjustified. Accordingly, there was no detriment.

292. The claim is not well-founded.

D10: 18 October 2021, Ms Katherine Price (Physician Associate) interrupted the Claimant's conversation with Renal Specialist Registrar Raja Muhammed Kaja Kamal, saying "registrars can break the queue", thereby undermining the Claimant by suggesting that he could not whistle blow against a Registrar.

293. Given our finding that Ms Price did not know about the albumin disclosure (para 284), it cannot have been a factor in her treatment of him, and the claim fails for that reason alone.

294. In our judgment, there is no evidence that Ms Price's remark had anything whatsoever to do with the Claimant's whistleblowing, or indeed anything to do with the Claimant at all. We think it far more likely that Ms Price simply made a light-hearted remark to excuse the fact that she was interrupting a conversation between the Claimant and the registrar. In our view, the Claimant's convoluted interpretation makes no sense.

295. The claim is not well-founded.

D11: At some point in October 2021, Ms Katherine Price (Physician Associate) said "are we all bad" indicating that they were all involved in the poor treatment of the Claimant.

296. Given our finding that Ms Price did not know about the albumin disclosure, it cannot have been a factor in her treatment of the Claimant, and the claim must fail.

297. Even if the words quoted by the Claimant were said by Ms Price, they do not support the interpretation he puts on them; they do not suggest that he, the Claimant, was bad; far from suggesting that 'they were all involved in the poor treatment to me', if anything they say the opposite.

298. The claim is not well-founded.

D12: From 16 October 2021, Dr Mark Blunden (Renal Consultant) ignored the Claimant's request to work on a project on complications of kidney biopsies.

299. We have found (para 102) that Dr Blunden knew nothing about the albumin disclosure. For that reason alone the claim fails.

300. We think it probable that Dr Blunden did not reply to the Claimant's email because he was busy.

D13: At some point in October 2021, Renal Professor Magdi Yaqoob referring to the Claimant said, "he is going to be a nurse soon".

301. We have found that the remark was not made (para 104).

D14: Dr Suzanne Forbes (Renal Consultant and the Claimant's line manager) failed to deal with the Claimant's protected disclosure complaints.

302. Insofar as Dr Forbes did not take any formal action in relation to the two matters which we have found to be protected disclosures (the albumin and calcium incidents), it is correct that she did not deal formally with them. She did speak informally to Dr Goldet about the albumin incident, and Dr Kamal about the calcium incident.

303. We asked ourselves whether Dr Forbes not taking formal action was in any sense on the ground of the fact that the Claimant had made a protected disclosure. We have concluded that the sole reason why she did not do so was because she did not regard the complaints as being disclosures requiring formal investigation: the Claimant did not ask her to investigate; he did not give details of the patients concerned; and he did not raise the matters through DATIX. She believed that the Claimant was simply trying to demonstrate to her the superiority of his clinical knowledge over that of others in the team. She did not regard his knowledge as superior to theirs; she did not take any further action because she thought they were more likely to be right than the Claimant.

304. One might be critical of that approach; nonetheless we are satisfied that that is the sole reason why she acted as she did.

305. The claim is not well-founded.

D15: 20 October 2021, Consultant Karl Metcalfe, one of the leads for the Medical Support Worker project, on WhatsApp commented about the Claimant's failure to pass the PLB2 on a couple of occasions.

306. Dr Metcalfe did not comment on the Claimant's failure to pass his PLAB2, explicitly or implicitly. His message was directed at all MSWs who had not yet passed the exam. His clear purpose was to be encouraging. The tone of his messages was supportive and self-deprecating. It is clear from the Claimant's contribution to the thread (para 108) that he understood this at the time. His allegation now that the comments were derogatory, aimed at him and influenced by the fact that he had made a protected disclosure is, in our judgment, unsustainable.

307. This claim is not well-founded.

D17: In the first week of November 2021, a SPR Doctor called Harry approached the Claimant aggressively, saying "where, where, where" in relation to a murmur on a patient which the Claimant had diagnosed.

308. In circumstances where the Claimant is unable to give the identity of the alleged perpetrator, or indeed the date on which the incident occurred (para 127), he has not proved to our satisfaction that the incident occurred. The Claimant's explanation as to why there was a causal connection with the protected disclosures (at paragraph 58 of his witness statement) is inadequate.

309. The claim is not well-founded.

D18: 12 November 2021, Dr Peter Johnston (Senior House Officer) improperly blamed the Claimant for delaying a patient discharge.

310. As a matter of fact, the Claimant had delayed the patient's discharge (para 128). There was nothing improper in Dr Johnston pointing out to the Claimant the consequences of his action. Any sense of grievance the Claimant had was, in our judgment, unjustified; there was no detriment. There is no evidence that Dr Johnston said what he did because of the Claimant's disclosures.

311. The claim is not well-founded.

D19: 13 November 2021 at 11:15, Mr Ahlam Muthanna (one of the MSWs), on WhatsApp, sarcastically wrote in the MSW WhatsApp group "I would only say as Semsettin has written on the medal, you are the 'Hero of MSW', meaning that he should be dismissed.

312. The Claimant gave a lengthy explanation in his witness statement (paragraph 61) as to how he arrived at the conclusion that this message was really about him. We regard it as utterly implausible; his explanation as to why he thought it was connected with his protected disclosures is, in our judgment, convoluted to the point of absurdity.

313. The medal was nothing more than a kind gesture of thanks for a respected colleague; the WhatsApp message (para 130 above) was equally kindly meant. It had nothing to do with the Claimant; the fact that he thought that it did reveals a worrying degree of solipsism on his part.

314. There was no detriment to the Claimant; the claim is baseless.

D20: On 19 November 2021 at around 9:00, Mr Cassim Schott, Physician Associate, said to the Claimant on the Renal Ward (9F) "You look like the boss in the Renal Ward".

315. We have found as a fact that the remark was not made (para 136).

316. The claim fails on its facts.

D21: 19 November 2021, Renal Professor Magdi Yaqoob pointed at the Claimant and said "he is useless, he only got the job because of the pandemic".

317. We have found that the remark was made (paras 137-140). However, we have concluded that there is no cogent evidence that Professor Yaqoob knew about the Claimant's disclosures about the albumin or calcium incidents, let alone that those disclosures had any influence on his making the remark. The Claimant's theory is entirely speculative. We think it probable that Professor Yaqoob made

the remark because it reflected his view of the Claimant's competence. He should not have said it, but it had nothing to do with the Claimant's protected disclosures.

318. The claim is not well-founded.

D22: 19 November 2021, Dr Sajeda Youssouf (Renal Consultant) said to Cassim Schott "do you need extra cash" referring to the Claimant's financial position.

319. We have already found that the remark had nothing to do with the Claimant (para 143). His theory (in his statement at paragraph 67) is that this was a veiled reference by Dr Youssouf to PD1 (the WhatsApp message in which the Claimant wrote: 'very poor MSW'). We regard that as a fanciful suggestion. In any event, we have already concluded that PD1 was not a qualifying disclosure (paras 248-251).

320. The claim is baseless.

D23: 19 November 2021, Dr Sajeda Yousouf (Renal Consultant) said to the Claimant "whistleblowing is not going to harm your professional career" thereby teasing the Claimant.

321. We have already found (para 145) that Dr Youssouf did not make the remark and that she did not know about PD1 or PD2 (para 146).

322. The claim is not well-founded.

D24: 22 November 2021, at about 8:45 am, Dr Mark Blunden (Renal Consultant) made bad facial expressions suggesting that he and senior doctors had managed to "get" the Claimant with regard to a mistake.

323. We have found that there is insufficient evidence that the conduct occurred as alleged (para 164). There is no evidence that Dr Blunden knew about the protected disclosures, let alone that he was motivated by them.

324. The claim is not well-founded.

D25: 22 November 2021, the Claimant was required to attend a meeting to discuss a problem with a cardiology referral which was not his fault. During the meeting Dr Karl Metcalfe, (one of the Medical Support Worker project leads) intentionally created conflict with the Claimant.

325. We are satisfied that the sole reason why the Claimant was required to attend a meeting on 22 November 2021 was because a consultant, Dr Youssouf, had raised a very serious concern about his conduct in relation to the cardiology referral (para 147). We are satisfied that Drs Metcalfe and Bojahr had good grounds for thinking that the Claimant may be at fault in light of her account.

326. In any event, we are satisfied that the requirement to attend the meeting was unconnected with the protected disclosures about the albumin and calcium incidents.

327. As for the allegation that Dr Metcalfe intentionally created conflict with the Claimant at the meeting (para 167), we consider it to be far-fetched. Dr Metcalfe was entitled to remind the Claimant that this was a work situation, not a family

situation. Any sense of grievance the Claimant may have felt was unjustified; there was no detriment to him.

328. These claims are not well-founded.

D26: In the meeting held on 22 November 2021, Consultant Anaesthetist Heike Bojahr (one of the Medical Support Worker Project leads) restricted the Claimant's opinion about a professional diagnosis by stating, "you can give your opinion."

329. If the allegation was that Dr Bojahr told the Claimant that he could *not* give his opinion, that might arguably be a detriment; but the allegation is the opposite, that Dr Bojahr said 'you can give your opinion' (para 168). The Claimant's opinion was not restricted; there was no detriment to him.

330. The claim is misconceived.

D27: The Claimant was referred to Occupational Health as a pretext to find a reason for dismissal.

331. We are satisfied that the sole reason for referring the Claimant to OH was because of concerns about his health: he had told Dr Bojahr and Dr Metcalfe at the meeting on 22 November 2021 that he was feeling very stressed (para 170). Moreover, Dr Bojahr and Dr Metcalfe had already decided that they were going to terminate his contract (paras 111 and 155 onwards); they were concerned about the impact this would have on him when he found out.

332. There is no evidence that the referral was because the Claimant had made protected disclosures. The referral was made because he had been open about his health concerns at the meeting and Drs Bojahr and Metcalfe were concerned about him.

333. The claim is not well-founded.

D28: On 1 and 24 December 2021, Dr Heike Bojahr refused the Claimant's request to return to work from sickness absence.

334. We have recorded (para 180-181) that the explanation Dr Bojahr gave the Claimant at the time for not allowing him to return to work in December 2021 was not truthful. We are satisfied that the account she gave to us in her evidence was the true explanation.

335. It is clear to us from Dr Bojahr's statement about the meeting on 19 October 2021 (para 107) amd her email of 21 November 2021 (para 161), that she was troubled by the Claimant's propensity to criticise senior clinicians. We have concluded that this was part of the reason why she did not want him to come back onto the ward, with the longer-term intention of allowing his contract to run out and not to be renewed.

336. We are satisfied that she (and Dr Metcalfe) regarded the Claimant's criticism of established clinicians on the renal ward as inappropriate, given their seniority and expertise, and the fact that the criticisms were made made by someone they regarded as lacking expertise; they believed his criticisms were wrong; we think they also regarded them as disrespectful. That does not reflect well on an organisation in which whistleblowing (even when not expressly labelled by the

complainant as such, and even if perceived to be wrong) ought to be taken seriously.

337. The criticisms which the Clamant made of colleagues included, but were by no means confined to, the two matters which we have found to be protected disclosures - the albumin and calcium incidents - and we have concluded that those disclosures materially influenced this decision. To be clear: we do not consider that they were the sole or even the main reason why this decision was taken; we have concluded that that was capability (see below at para 363 onwards).

338. Nonetheless, because the decision was materially influenced by the fact that the Claimant had made the two protected disclosures, this claim is well-founded; it is in time and it succeeds.

D29: 23 December 2021, in an investigation meeting with Dr Muhammed Khurram (Consultant Renal transplant surgeon and Medical Support Worker project Co-ordinator), the Claimant was not allowed to put his points. Instead of investigating, Dr Muhammad Khurram made allegations against the Claimant of probity, not sitting with colleagues inside the doctor's room or non-engagement with colleagues, causing problems with colleagues and the unfounded allegation about the cardiology referral. Janet Bradford requested third party authority to contact the GMC by emails dated 20 December 2021 and 24 December 2021, in the meeting held on 20 January 2022 and by email dated 20 January 2022.

339. We have already found that the Claimant was allowed to put his points at the meeting with Mr Khurram (para 183). That part of the allegation fails on its facts.

340. We have also found that Mr Khurram did raise the Claimant's own conduct in the meeting, including the cardiology referral and his way of interacting with colleagues. He did not 'make allegations' against the Claimant, he merely asked questions and explored issues, including in relation to the GMC correspondence. We have concluded that he did so solely with a view to understanding the whole picture and establishing whether the Claimant's account of events was credible.

341. As for the protected disclosures, we accept Mr Khurram's evidence that, although he probably saw the protected disclosures as part of the overall documentation, they did not register with him as public interest disclosures. We are satisfied that his conduct of the meeting was not in any way influenced by the fact that the Claimant had made the disclosures. He conducted the meeting as he did in a genuine attempt to clarify the Claimant's concerns and to understand the context in which they had been raised.

342. As for the allegation that Ms Bradford repeatedly asked the Claimant for third-party authority to contact the GMC on his behalf (para 193), we have concluded that there was no detriment to the Claimant in her making these offers; he was free to decline them, which he did. If he had a sense of greivance about this, it was unjustified.

343. Further, we are satisfied that Ms Bradford acted as she did solely in order to assist the Claimant to understand what options might be available to him, in terms of achieving GMC registration. There was no evidence that she had an ulterior motive, let alone that she was motivated to any extent by the fact that

the Claimant had made the disclosures about the albumin and calcium incidents; the Claimant's case as to this is nothing more than speculation.

344. These claims are not well-founded.

D30: On 1 February 2022, Georgina Triantafilledes, the MSW WhatsApp Administrator, became angry with the Claimant because of material he was putting on the WhatsApp group where he was expressing bullying, harassment and victimisation due to the protected disclosures.

345. We are satisfied that the sole reason why Ms Triantafillides replied as she did to the Clamant's WhatsApp message was for the reasons she gave in her response (para 199): she thought the the Claimant's post was inappropriate in this group. In our view, she was right: any reasonable employee would have appreciated that this was not the correct forum for a message of this sort and it showed poor judgement on his part. There was no detriment to the Claimant.

346. Further, there is no evidence that the Ms Triantafillides knew of, or was motivated by, the two protected disclosures. In his own message he mentioned unspecified 'mistakes'; he did not mention having made disclosures about them.

347. The claim is not well-founded.

D31: In January 2022 and February 2022, Dr Muhammad Khurram (investigator), Consultant Renal transplant surgeon and Medical Support Worker project co-ordinator) delayed and/or failed to give the Claimant a decision on the bullying investigation.

348. We have concluded that insofar as there was any delay on Mr Khurram's part in concluding his investigation, the length of that delay was not excessive, given the fact that the pandemic was ongoing, Mr Khurram was a busy transplant surgeon; he had to work around the availability of other busy clinicians (para 201).

349. Mr Khurram was not responsible for the further delay in communicating the outcome to the Claimant, which was handled by Drs Bojahr and Metcalfe; no allegation of whistleblowing detriment in relation to this is made against them.

350. There is no evidence whatsoever that the timing of Mr Khurram's conduct of the investigation was influenced in any way by the fact that the Claimant had made protected disclosures about the albumin and calcium incidents.

351. The claim is not well-founded.

D35: Failure to extend the Claimant's placement beyond 31 March 2022

352. The Claimant brings a claim of whistleblowing detriment in respect of the non-renewal of his contract. At the start of his 'statement of claim', attached to the ET1, the Claimant wrote this:

> 'The person you're making the claim against (the respondent): Barts Health NHS TRUST'

353. The claims are expressly brought against the Respondent employer. For the avoidance of doubt, there is no pleaded claim of whistleblowing detriment

brought against any individual co-worker under s.47B(1A) ERA for being party to the decision to dismiss.

354. Not extending a fixed-term contract is a dismissal under Part X of the ERA 1996 (see para 242 above). Thus this claim is, in law, a claim of detriment amounting to dismissal within the meaning of Part X, brought against the Respondent employer. The EAT in *Wicked Vision Ltd v Rice* [2024] EAT 29 has held that a detriment claim of that sort is excluded by operation of s.47B(2) ERA. That decision is binding on this Tribunal.

355. Accordingly, this claim must fail.

D32: 23 March 2022, Dr Karl Metcalfe (Consultant Endocrinologist and one of the Medical Support Worker project leads) provided an overview of a report finding no bullying and problems with the Claimant's communication.

356. This allegation is factually correct. Dr Metcalfe sent the Claimant a summary of Mr Khurram's report, rather than the full report (para 214). We accept Dr Metcalfe's explanation that this was the Trust's usual practice. Mr Khurram found that there had been no bullying, but that there was a common concern about the Claimant's communication skills and his interpretation of many exchanges.

357. Dr Metcalfe provided this summary because it accurately reflected the outcome provided to him by Mr Khurram. If the allegation is to be interpreted as a criticism of Dr Metcalfe's adopting the report, we are satisfied that he did so for the sole reason that he considered that Mr Khurram's was entitled to reach his conclusions. We are satisfied that Dr Metcalfe's conduct in this respect was in no sense influenced by the fact that the Claimant had made the two public interest disclosures. There is no evidence which would support such a conclusion.

358. The claim is not well-founded.

D33: On 25 March 2022, an email from Leslie Coman (Human Resource manager and lead) convening a panel meeting without first providing an outcome to the Claimant's formal grievance.

359. There was nothing wrong with Mrs Coman convening a triage panel meeting without first providing an outcome to the Claimant's formal grievance; it was in line with the Respondent's procedure (para 217); the purpose of the triage procedure was to decide how the grievance should be dealt with, which might include an investigation, leading to an outcome. There was no detriment to the Claimant in adopting this process.

360. For that reason alone, this claim is not well-founded.

361. If the Claimant's issue were that the panel later decided that the grievance should not be investigated (which it is not), that is factually correct. That was a decision of the triage panel, against whom no allegations of whistleblowing detriment are made.

D34: Postponing the panel meeting arranged for 14 April 2022.

362. The panel meeting on 14 April 2022 was postponed solely for logistical reasons; the Claimant was offered an alternative date, which he declined (para 219). There is no evidence that the postponement was connected in anyway with the Claimant's protected disclosures.

363. The claim is not well-founded.

Conclusions: automatically unfair dismissal

364. The Tribunal has concluded that the Claimant made two public interest disclosures, in relation to the albumin and calcium incidents, in September and November 2021 respectively.

365. The Claimant told us (para 224 above) that he did not consider that the treatment he had received was because of whistleblowing until 13 January 2022. His explanation before that date was that his colleagues were jealous of him (para 192).

366. We observe that a person's subjective belief about the cause of bullying is not something which requires research; research can reveal the availability of a particular kind of legal claim arising out of certain treatment. It appears to us that it was only after his research that he advanced that narrative, which he then pursued in these proceedings in relation to each alleged act of detriment. In our judgment, the Claimant characterised himself as a whistleblower for the first time in his February 2022 grievance because he realised that his contract was unlikely to be extended (see the quotation from his grievance at para 204).

367. Nonetheless, the fact that the Claimant's case is one which was articulated in retrospect, and the fact that he had an ulterior motive for characterising himself as a whistleblower, does not inevitably mean that the Claimant's claim of automatically unfair dismissal cannot succeed.

368. We have already concluded in relation to Detriment 28 (paras 334-338) that the two disclosures were a material factor in the decision not to allow him to return to work. We have concluded that the Claimant's propensity to criticise senior clinicians was a cause for concern for Dr Bojahr and, we think, for Drs Metcalfe and Forbes. It is plain that they regarded it as inappropriate, for the reasons we have already given.

369. For the same reasons we are satisfied that the protected disclosures were a material influence on the decision not to renew his contract (i.e. to dismiss him).

370. The question for us in dealing with the claim of automatically unfair dismissal is: was the fact that the Claimant made the disclosures the *sole or principal* reason for the dismissal?

371. We reminded ourselves that the two matters which we have found to amount to protected disclosures were only part of a larger pattern of the Claimant criticising colleagues (for example, paras 107, 195). We also reminded ourselves of the fact that the Respondent had significant concerns about the Claimant's capability even before he made the disclosures (paras 39-47). Those concerns only increased over the months to the point where Drs Bojahr, Metcalfe and Forbes had formed a settled view that the Claimant was unreliable, lacked competence, had poor judgment, had little insight into what the role MSW

required of him and his own weak points; they considered that his presence on the ward increased work for others, rather than reducing it. They concluded that he had no realistic prospect of becoming registered as a doctor in the UK; they had reached that conclusion before the cardiology incident; it was that incident which caused them to exclude him from the workplace.

372. We are satisfied that these concerns were genuine and formed independently of the fact that the Claimant had made the two protected disclosures. We have concluded that the disclosures played a small, but nonetheless material, part in the decision to dismiss. However, the principal reason for that decision was capability, that is the concerns we have summarised in the previous paragraph. In light of that conclusion the Claimant's claim of automatically unfair dismissal must fail.

373. The Claimant complains at some length in his witness statement (paragraph 119 onwards) that, insofar as the Respondent relied on concerns about his capability, these were 'not valid reasons' for not renewing his contract, because they had not been properly raised with him during his employment. He is right that the Respondent did not go through any form of performance management or capability procedure with him. If this were an ordinary unfair dismissal claim, that may have supported an argument that the dismissal was unfair. However, the Claimant lacks the qualifying period to bring a claim of ordinary unfair dismissal. In a claim of automatically unfair dismissal, the issue for the Tribunal is the reason for the dismissal; the Respondent did not act unlawfully in dismissing him without going through a formal procedure.

Final observations

374. In the course of the hearing the Tribunal observed how, in some respects, the Claimant's conduct replicated his conduct during his employment. We record our observations below.

375. We concluded that, at the time of his employment, the Claimant struggled to reconcile his relatively junior status as an MSW with the fact that he had been an independent practitioner in Bangladesh and had (he believed) superior knowledge to those he was working with in the Respondent organisation (for example, see paras 53, 70-71, 83, 90, 191, 198, 288).

376. That same struggle was apparent during his oral evidence before us. For example, he asserted that 'my MSW role is an independent role'; when that was queried, he acknowledged that it was a supervised role and said that his previous assertion was a 'slip of the tongue'. At another point he was reluctant to accept that a senior house officer or a registrar was senior to him in the hospital's hierarchy, which they plainly were. He also disagreed when it was put to him that specialist renal clinicians might know more than he about the treatment of patients in the renal ward, observing: 'maybe I am overqualified, I qualified with a full scholarship, I did an MSc in gastroenterology, which is related to the liver'. In cross-examining Dr Forbes, he put to her that he had said at interview that, in his MSW post, he wanted to work at the level of a senior house officer; Dr Forbes rejected that, observing that he was not qualified to work at that level in the UK.

377. On the last day of the hearing, in cross-examinig Mr Khurram, the Claimant said that, as an unregistered doctor, he was in 'the highest position in the hospital'. Mr Khurram disagreed. The Claimant continued to assert 'we are all doctors though unregistered, they are equivalent to the registered doctors of this country'. He also asserted that the PLAB exams were 'just a formality'. Again, Mr Khurram disagreed, observing that the PLAB process set important standards, designed to assess whether an individual had the necessary skills to practice independently in the UK. The Claimant then asserted that the PLAB exams were 'discrimination against unregistered doctors'.

378. By contrast, at other times he asserted that he could not be held responsible for any lack of knowledge or understanding on his part because he was (to use the language of para 76.2.6 of his witness statement) 'in a supervised work experience post'.

379. There is then the concern which management had at the time about the Claimant's tendency not to listen properly to others (for example, paras 183, 209), and his apparent unwillingness to acknowledge that others might legitimately take a different view from his, without their being wrong (for example, paras 79-81, 84, 188).

380. The Claimant's tendency not to listen - to questions from Counsel and to observations by the Tribunal - was apparent throughout the hearing. At several points in the hearing, he insisted on the importance of his ability to challenge other practitioners as part of his learning experience. Dr Cove-Smith, to whom he put this proposition, agreed that this was important, but emphasised that if an individual genuinely wished to learn from colleagues, it was equally important for them to be able to take the responses of those practitioners on board. She observed that it was difficult for a senior doctor to work with a junior team member, if they were not willing to listen, learn and adapt. Similarly, it was vital that, if a junior member of the team said they had done something, they could trust that they had actually done it; and if something had not been correctly done, that they were able to learn how it should be done the next time.

381. As for disagreements between colleagues, the Claimant asserted when cross-examining one of the Respondent's witnesses: 'if I was reasonable, the other person must be unreasonable'. He did not appear to acknowledge that two people might disagree without either of them being unreasonable.

382. Finally there was the Claimant's tendency to identify conspiracies in the absence of evidence (paras 97-98, 99, 108-109, 115, 131, 133, 175, 178).

383. At the hearing the Claimant alleged without evidence that meeting notes were fabricated and/or manipulated by the Respondent (for example, paras 105). He also alleged without evidence that the silver medal which had been bought by an MSW as a gift for Dr Metcalfe may have been fabricated after he brought his Tribunal claim (para 132).

384. The most striking example of this occurred on the last day of the hearing. Mrs Coman, who had attended a meeting with the Claimant in her HR role, was about to give evidence to the Tribunal, when the Claimant stated that the person at the witness table was not, in fact, Mrs Coman. He based this on the fact that she looked older than the person he remembered. He went on to explain what

he thought had happened: that the real Mrs Coman must have refused to attend the hearing to give evidence on the Respondent's behalf, and the Respondent had asked this person to come to the hearing and impersonate her. He said that, if the Tribunal were to listen to his recording of the meeting, we would realise that it was a different person. We did so; it was clear that it was the same person. The Claimant maintained his belief, even when Mrs Coman produced her work photo ID and two credit cards in her name.

385. The Tribunal understood that the Claimant may not have recognised Mrs Coman; the meeting was some time ago. What troubled us was his willingness confidently to assert a conspiracy theory on no evidence, and to maintain it in the face of positive evidence to the contrary. It was not until the end of Mrs Coman's evidence that he accepted that she was who she said she was; he apologised to her.

386. His belief in a conspiracy involving most of the people he came into contact was at the root of his overall case, which he explained to us as follows: he made public interest disclosures to Dr Forbes in relation to three separate incidents; because he had made the disclosures, Dr Forbes instructed staff to bully him, which they did; at the same time, there was a conspiracy among all the registered doctors with whom he worked to subject him to detriments because he had made public interest disclosures; as part of this conspiracy, and because he had made public interest disclosures, senior management fabricated performance and capability concerns about him, in order to dismiss him.

387. As we have already recorded (paras 364-365) this theory only came into existence in January 2022. Before then, although the Claimant believed that he was subjected to detriments in the form of bullying, he believed that the reason for this was because his colleagues were jealous of his superior skill. It will be apparent from our findings and conclusions above that we reject this theory. In particular, the allegation that Dr Forbes instructed anyone to bully the Claimant is baseless.

388. On the other hand, the Respondent must bear some responsibility for the Claimant's belief that there was a conspiracy against him. Management were not straightforward with him when they formed the view in late October 2021 that he had no future with the Respondent (para 111) and, in late November, that he should not be allowed back on the ward (paras 155-162); they positively misled him by suggesting in December 2021, perhaps out of a misplaced desire to spare his feelings, that there was a prospect of his returning to work (paras 180-181); they did not tell him until early March 2022 that his contract would not be extended at the end of that month (paras 207-213).

389. When, as a result of the disclosure exercise in these proceedings, the Claimant saw their contemporaneous emails to each other, and discovered that what they had said to him for several months was different from what they said to each other behind his back, it is to some extent unsurprising that his trust in them was further undermined; it may even go some way to explaining why, in these proceedings, he saw conspiracies at every turn.

Remedy

390. The Tribunal has upheld a single claim of whistleblowing detriment in relation to the failure to permit the Claimant to return to work in December 2021 (D28). He is entitled to an award of compensation in respect of that claim. We observe that the Claimant remained on full pay up to the termination of his employment and was then (we have concluded) fairly dismissed. Our preliminary view is that the question of compensation ought to be relatively straightforward.

391. If the parties are unable to reach agreement as to the level of compensation, they shall notify the Tribunal of their available dates for a one-day remedy hearing by no later than 28 days from the date on which this judgment is sent to them. The hearing will then be listed and orders given for preparation.

Employment Judge Massarella
4 April 2024