Case Number: 3328187/2017

EMPLOYMENT TRIBUNALS

Claimant		Respondent
Mr N Finn	v	St Andrew's Healthcare

Heard at: Bury St Edmunds On: 10, 11, 12, 13 & 14 June 2019

Before: Employment Judge M Warren

Members: Mr Bone and Mr Schooler

Appearances:

For the Claimant: Mr B Cooper, QC.

For the Respondent: Mr Ho, Solicitor.

JUDGMENT having been sent to the parties on 2 July 2019 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

Background

1. Mr Finn brings complaints of automatic unfair dismissal and detriment for making protected disclosures arising out of his employment for a short period of time with the respondent.

The Issues

2. At the outset of the case I regrettably, did not have an agreed list of issues. During our reading break, the representatives put their heads together and produced for me an excellent list of issues, which I have cut and pasted below:

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Protected disclosures

1. In respect of each of the disclosures set out in the table below:

1.1. Did the Claimant disclose the information in column 3 on the dates and to the organisations/people identified in columns 1 and 2?

1.2. Did the Claimant reasonably believe that the information tended to show the matters set out in column 4? [NB The requirement for a reasonable belief that the disclosure is in the public interest under ERA, s43B(1) applies only in respect of disclosures made on or after 25 June 2013 and therefore is only identified as an issue in respect of the disclosures after that date]

1.3. Did the Claimant make the disclosure in circumstances which satisfied the further statutory requirements identified in column 5? [NB The requirement for 'good faith' was removed with effect from 25 June 2013 and so is included in Column 5 only in respect of disclosures before that date]

1.4. In respect of those disclosures which were made after 25 June 2013, were they made in good faith for the purposes of ERA, ss49(6A) & 123(6A)?

	Column 1	Column 2	Column 3	Column 4	Column 5
	Date(s)	To whom?	Summary of information disclosed	Tending to show	Other requirements
1.	Various dates between Nov 2006 & Dec 2009 (including in particular 7.11.06, 9.2.07, 6.10.09, 26.11.09)	Northamptonshire Healthcare NHS Trust (C's employer at the time)	• Millhouse Building Towcester was not fit for purpose • Staffing levels were inadequate • There were problems with team working at Towcester • Management failed to address the above	• that a person has failed, is failing or is likely to fail to comply with any legal obligation, namely obligations to provide safe and adequate care for patients, and to redress the grievances of and not bully employees and/or victimise whistleblowers (ERA, s43B(1)(b); and/or • that the health and safety of any individual has been, is being or is likely to be endangered (ERA, s43B(1)(d)	Disclosure in good faith to employer (ERA, s43C(1)(a))

2.	15.12.10	CQC	□ Same as 1. above	□ Same as 1. above	• Disclosure in good faith to prescribed person (ERA, s43F(1)(a); Public Interest Disclosure (Prescribed Persons) Order 2014, art. 3 & schedule) • C reasonably believed that

					these matters fell within the matters for which the CQC is prescribed and that they were substantially true (ERA, s43F(b))

3.	Various dates between Oct 2012 and Apr 2013 (including in particular 3.10.12, 23.10.12, 26.10.12, 8.4.13)	Serco (C's employer at the time)	☐ There were gaps in the mental health pathway and resources at Yarl's Wood Detention Centre that led to deficiencies in the assessment and care of ☐ detainees Management failed to address these and instead victimised C	☐ that a criminal offence has been committed, is being committed or is likely to be committed (ERA, s43B(1)(a)) ☐ that a person has failed, is failing or is likely to fail to comply with any legal obligation, namely obligations to provide safe and adequate care for detainees, and to redress the grievances of and not bully employees and/or victimise whistleblowers (ERA, s43B(1)(b); ☐ and/or that the health and safety of any individual has been, is being or is likely to be endangered (ERA, s43B(1)(d)	☐ Disclosure in good faith to employer (ERA, s43C(1)(a))

4.	15.5.13	Bedford Clinical Commissioning Group	Same as 3. above	Same as 3. above	C reasonably believed that these were matters for which Bedford CCG had legal responsibility (ERA, s43C(1)(b)(ii)) Disclosure in good faith (ERA, s43C(1))
5.	12.11.13	CQC	Same as 3. above	Same as 3. Above; and that the disclosure of this information was in the public interest (ERA, s43B(1))	Disclosure to prescribed person (ERA, s43F(1)(a); Public Interest Disclosure (Prescribed Persons) Order 2014, art. 3 & schedule) C reasonably believed that these matters fell within the matters for which the CQC is prescribed and that they were substantially true (ERA, s43F(b))

6.	Apr 2016	Hardcash Productions / Channel 4	In respect of the conduct of assessments for Personal Independency Payments, Capita were employing qualified nurses to undertake assessments outside their area of competence which were not clinical assessments; as a consequence	that a person has failed, is failing or is likely to fail to comply with any legal obligation, namely obligations on nurses only to act within their competence; obligations to conduct clinical assessments transparently and with	C reasonably believed that the information disclosed and any allegations contained in it were substantially true (ERA, s43H(1)(b)) C did not make the disclosure for the purposes of personal gain (ERA, s43H(1)(c))
			service users were being mislead; a bonus structure was incentivising high numbers of assessments and resulting in inadequate / poor quality assessments	integrity; obligations to conduct adequate and fair assessments (ERA, s43B(1)(b); and/or that the health and safety of any individual has been, is being or is likely to be endangered (ERA, s43B(1)(d); and that the disclosure of this information was in the public interest (ERA, s43B(1))	The relevant failure is of an exceptionally serious nature (ERA, s43H(1)(d)) In all the circumstances, it was reasonable for C to make the disclosure (ERA, s43H(a)(e))

7.	14.3.17	Nurse in Charge of shift	☐ C was not fully competent to administer medication and/or supervise preceptees, which he was being instructed to do as a result of inadequate staffing and inadequate experienced staff	☐ that the health and safety of any individual has been, is being or is likely to be endangered (ERA, s43B(1)(d); and ☐ that the disclosure of this information was in the public interest (ERA, s43B(1))	☐ Disclosure to employer (ERA, s43C(1)(a))
8.	16.3.17	Pharmacist; Janet Oppong; and to R (via datix report)	☐ Low staffing levels, lack of information and support, inadequate medication management induction, inadequate support for preceptees, and insufficient experienced staff on shift where C made medication error may have influenced that error	☐ that the health and safety of any individual has been, is being or is likely to be endangered (ERA, s43B(1)(d); and ☐ that the disclosure of this information was in the public interest (ERA, s43B(1))	☐ Disclosure to employer (ERA, s43C(1)(a))

9.	22.3.17	Lara Conway (HR Business Partner); Helen Atwell (Flexible Work Force Manager)	☐ Suspension was detriment because of whistleblowing	☐ that a person has failed, is failing or is likely to fail to comply with any legal obligation, namely not to victimise whistleblowers and/or to provide safe and appropriate care to patients (which is impeded if staff cannot raise concerns safely) (ERA, s43B(1)(b); ☐ and/or that the health and safety of any individual has been, is being or is likely to be endangered (ERA, s43B(1)(d); ☐ and that the disclosure of this information was in the public interest (ERA, s43B(1))	☐ Disclosure to employer (ERA, s43C(1)(a))

10.	23.3.17	Gil Baldwin (CEO)	☐ Suspension was detriment because of whistleblowing	☐ that a person has failed, is failing or is likely to fail to comply with any legal obligation, namely not to victimise whistleblowers and/or to provide safe and appropriate care to patients (which is impeded if staff cannot raise concerns safely) (ERA, s43B(1)(b); ☐ and/or that the health and safety of any individual has been, is being or is likely to be endangered (ERA, s43B(1)(d); ☐ and that the disclosure of this information was in the public interest (ERA, s43B(1))	☐ Disclosure to employer (ERA, s43C(1)(a))

11.	28.3.17	Gil Baldwin (CEO)	☐ Suspension was detriment because of whistleblowing	☐ that a person has failed, is failing or is likely to fail to comply with any legal obligation, namely not to victimise whistleblowers and/or to provide safe and appropriate care to patients	☐ Disclosure to employer (ERA, s43C(1)(a))
				(which is impeded if staff cannot raise concerns safely) (ERA, s43B(1)(b); and/or ☐ that the health and safety of any individual has been, is being or is likely to be endangered (ERA, s43B(1)(d); and ☐ that the disclosure of this information was in the public interest (ERA, s43B(1))	

12.	29.3.17	Dean Howells (Director of Nursing)	☐ Suspension was detriment because of whistleblowing	☐ that a person has failed, is failing or is likely to fail to comply with any legal obligation, namely not to victimise whistleblowers and/or to provide safe and appropriate care to patients (which is impeded if staff cannot raise concerns safely) (ERA, s43B(1)(b); ☐ and/or that the health and safety of any individual has been, is being or is likely to be endangered	☐ Disclosure to employer (ERA, s43C(1)(a))

				(ERA, s43B(1)(d); and ☐ that the disclosure of this information was in the public interest (ERA, s43B(1))	

13.	14.4.17	Lara Conway (HR Advisor)	☐ Suspension was detriment because of whistleblowing	☐ that a person has failed, is failing or is likely to fail to comply with any legal obligation, namely not to victimise whistleblowers and/or to provide safe and appropriate care to patients (which is impeded if staff cannot raise concerns safely) (ERA, s43B(1)(b); ☐ and/or that the health and safety of any individual has been, is being or is likely to be endangered (ERA, s43B(1)(d); ☐ and that the disclosure of this information was in the public interest (ERA, s43B(1))	☐ Disclosure to employer (ERA, s43C(1)(a))

14.	18.4.17	Paul Bentham (Services Director for CAMHS); Duncan Long (Head of Internal Audit)	☐ Suspension and disciplinary action were detriment because of whistleblowing	☐ that a person has failed, is failing or is likely to fail to comply with any legal obligation, namely not to victimise whistleblowers and/or to provide safe and appropriate care to patients (which is impeded if staff cannot raise concerns safely) (ERA, s43B(1)(b); ☐ and/or that the health and safety of any individual has been, is being or is likely to be endangered (ERA, s43B(1)(d); ☐ and that the disclosure of this information was in the public interest (ERA, s43B(1))	☐ Disclosure to employer (ERA, s43C(1)(a))

15.	15.5.17	Duncan Long (Head of Internal Audit)	☐ Suspension and disciplinary action were detriment because of ☐ whistleblowing Insufficient staffing; inaccurate methadone calculation; excessive expectations of new/ inexperienced staff	☐ that a person has failed, is failing or is likely to fail to comply with any legal obligation, namely not to victimise whistleblowers and/or to provide safe and appropriate care to patients (which is impeded if staff cannot raise concerns safely) (ERA, s43B(1)(b); and/or ☐ that the health and safety of any individual has been, is being or is likely to be endangered (ERA, s43B(1)(d); and ☐ that the disclosure of this information was in the public interest (ERA, s43B(1))	☐ Disclosure to employer (ERA, s43C(1)(a))

16.	1.6.17	Dean Howell (Direcgtor of Nursing)	☐ Suspension and disciplinary action were detriment because of whistleblowing ☐ Damaged and broken keys; insufficient staff; insufficient support and supervision of newly qualified and junior staff; incident of staff member threatening a patient; concerns about MAPA training; insufficient time for elearning; inability to access patient records; risks re manual handling and environment; controlled drugs record; factors relating to drug error.	☐ that a person has failed, is failing or is likely to fail to comply with any legal obligation, namely not to victimise whistleblowers and/or to provide safe and appropriate care to patients (which is impeded if staff cannot raise concerns safely) (ERA, s43B(1)(b); and/or ☐ that the health and safety of any individual has been, is being or is likely to be endangered (ERA, s43B(1)(d); and that the disclosure of this information was in the public interest (ERA, s43B(1))	☐ Disclosure to employer (ERA, s43C(1)(a))

17.	9.6.17	Paul Bentham (Services Director for CAMHS)	☐ Suspension and disciplinary action were detriment because of whistleblowing	☐ that a person has failed, is failing or is likely to fail to comply with any legal obligation, namely not to victimise whistleblowers and/or to provide safe and appropriate care to patients (which is impeded if staff cannot raise concerns safely) (ERA, s43B(1)(b); ☐ and/or that the health and safety of any individual has been, is being or is likely to be endangered (ERA, s43B(1)(d); ☐ and that the disclosure of this information was in the public interest (ERA, s43B(1))	☐ Disclosure to employer (ERA, s43C(1)(a))

Detriment on grounds of protected disclosures

2. In respect of those alleged detriments set out in paragraph 3 below which occurred before 18 May 2017[1], do they constitute a series of similar acts/failures and/or an act extending over a period which ended on or after that date for the purposes of ERA, s48(3)(a) and/or (4)(a)?

[1] This is the cut-off date for limitation purposes having regard to the findings and conclusions of the Tribunal in the PH Judgment (see in particular paras 9 & 13 [145-6])

3. Did the Respondent subject the Claimant to a detriment on the ground that he had made one or more protected disclosure(s) contrary to ERA, s47B, by:

3.1. investigating his past employment and associated activities in response to an email dated 20 March 2017;

3.2. suspending him on 22 March 2017;

3.3. failing to lift his suspension and/or failing to address, or adequately to address, the Claimant's concerns about his suspension and the disciplinary process raised in letters/meetings on 23 March 2017, 28 March 2017, 29 March 2017, 6 April 2017, 11 April 2017, 18 April 2017, and 15 May 2017;

3.4. recommending the dismissal of the Claimant's grievance in the investigation report dated May 2017;

3.5. not upholding the Claimant's grievance by letter dated 20 June 2017;

3.6. if the Claimant was a worker and not an employee (see paragraph 4 below), summarily dismissing him on 20 June 2017?

Automatic unfair dismissal on grounds of protected disclosures

4. Was the Claimant an employee as defined by ERA, s230(1) or a worker as defined by s230(2)-(3)?

5. If the Claimant was an employee, was the reason or principal reason for the Claimant's dismissal that he had made one or more protected disclosures for the purposes of ERA, s103A?

Evidence

3. We had before us witness statements from Mr Finn, and from the respondent: Ms Conway, (who suspended Mr Finn) Mr Long, (who conducted an investigation) Mr Bentham, (who dismissed Mr Finn) and from Miss Parker, HR business partner.

4. We had two bundles, properly paginated and indexed, running in total to page number 916.

5. At the start of day 3 we were provided with a further bundle, paginated D1-D54, which contained emails that were in the original bundle. Those

in the original bundle were redacted, so the authors and recipients could not be identified. Those in the bundle D1-D54 were unredacted. At lunch on day 3, we further added to the bundle a document 282A-B.

The Law

6. Mr Finn says that he was subjected to detriment for having made protected disclosures, (whistle-blowing) and that he was dismissed because of that disclosure. The relevant law is derived from the Employment Rights Act 1996, (the "ERA").

Protected Disclosure

7. What amounts to a protected disclosure is defined in the ERA at Section 43A as a qualifying disclosure. That in turn is defined at Section 43B as:

> "… Any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following – …
>
> a) that a criminal offence has been committed, is being committed or is likely to be committed,
>
> (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,
>
> (c) that a miscarriage of justice has occurred, is occurring or is likely to occur,
>
> (d) that the health or safety of any individual has been, is being or is likely to be endangered,
>
> (e) that the environment has been, is being or is likely to be damaged, or

8. The disclosures need not be factually correct, nor amount to a breach of the law, provided that the claimant reasonably believed them to be so, see Babula v Waltham Forrest College [2007 IRLR 346.

9. The expression, "reasonable belief" must be considered having regard to the personal circumstances of the discloser, in particular their "inside knowledge", what they know about the field in which they work, about their employer, about the subject matter to which the disclosure relates. In other words, the test is subjective, see Korashi v Abertawe Bro Morgannwg University Local Health Board [2012] IRLR 4.

10. The requirement is for the disclosure of information; i.e. conveying facts. It is not enough to make an allegation, see Cavendish Munro v Geduld UKEAT/0195/09. The mere expression of an opinion does not tend to show that the Respondent is likely to be in breach of any legal obligation, see Goode v Marks & Spencer Plc UKEAT/0442/09. However, there is a need for care; information can be disclosed within an allegation. The concept of "information" is capable of covering statements which might

also be characterised as allegations. The correct question is to ask whether the disclosure contained information of sufficient factual content and specificity that it is capable of showing one of the matters listed in section 43B(1). This is a matter of evaluative judgment in light of the facts and the context in which it was made. See Kilraine v London Borough of Wandsworth [2018] ICR 1850 CA.

11. This case is unusual, in that some of the disclosures relied on pre date 25 June 2013, before which date section 43C(1) had required that disclosures be in good faith: the claimant ought not to have any predominant ulterior motive, (Street v Derbyshire Unemployed Workers' Centre [2004] EWCA Civ 964).

12. For the disclosures after 25 June 2013, Mr Finn must also reasonably believe that the disclosure is in the public interest. In Chesterton Global Ltd (T/A Chestertons) v Nurmohamed & Others [2017] EWCA Civ 979, the Court of Appeal held that there were not absolute rules in deciding whether a disclosure was in the public interest; the essential point was that the disclosure has to serve a wider interest than the personal or private interest of the discloser. Relevant factors are would include the numbers in the affected group, the nature of the interest affected, the extent to which they were affected, the nature of the wrongdoing and identity of the alleged wrongdoer. That said, the number affected is not determinative; it is not a case of merely one other person being required to make it in the public interest. However, the larger the number affected, the more likely it is that it will engage public interest.

13. Disclosure in previous employment remains protected in subsequent employment, see BP Plc v Elstone UKEAT/141/09.

14. If the question arises as to whether one of the situations listed in section 43B(1) is, "likely" to arise, the test is whether it is, "more likely than not" to arise, see Kraus v Penna Plc [2004] IRLR 260.

15. A protected disclosure must, (per section 43A) be made to one of a number of specified persons set out at sections 43C to 43H.

16. Section 43C provides for disclosure to the claimant's employer.

17. Section 43F provides for disclosure to a person who has been prescribed by Order of the Secretary of State. For such a disclosure to be protected, the claimant must believe that the relevant failure falls within the scope of that prescribed person and must reasonably believe that what is disclosed is substantially true. Prescribed person under such Order include the CQC and Members of Parliament, (not the police).

18. Disclosures can be made to external bodies that are not prescribed, but only if stringent conditions apply, as provided for by Section 43G:

    18.1 The claimant must reasonably believe the information and any

allegation within it, to be true;

18.2 The disclosure must not be for personal gain;

18.3 One of the 3 conditions at Section 43G(2) must be met, namely:

18.3.1 The claimant at the time, believes that he will be subject to detriment for raising the concerns under the preceding provisions;

18.3.2 Where there is no prescribed person, the claimant reasonably believes that it is likely that evidence will be concealed or destroyed, or

18.3.3 The claimant has previously made the disclosure either to the employer or to a prescribed person.

18.4 In all the circumstances, it must have been reasonable to make the disclosure.

19. In circumstances where the disclosure has already been made to the employer, the subsequent response of the employer is relevant to the test of whether it is reasonable in the circumstances to subsequently make the disclosure to an external body, (see below).

20. In deciding whether it is reasonable in all the circumstances to make the external disclosure, the tribunal using its objective judgement, must take into account, (s43G(3)):

20.1 The identity of the person to whom the disclosure is made;

20.2 The seriousness of the relevant failure;

20.3 Whether it is likely to continue or recur;

20.4 Whether the disclosure is made in breach of a duty of confidentiality;

20.5 The response of the employer or prescribed person, if a previous disclosure were made, and

20.6 Whether the claimant followed the employer's whistleblowing policy in any previous disclosure to the employer.

21. External disclosures of an exceptionally serious failure may be made, pursuant to section 43H, if:

21.1 The discloser reasonably believed that the information disclosed and any allegations contained in it, are substantially true;

21.2 It is not made for personal gain;

21.3 The failure is of an exceptionally serious nature, and

21.4 In all the circumstances, it is reasonable to make the disclosure, having regard to the identity of the discloser.

Detriment

22. Section 47B of the ERA provides that a worker has the right not to be subjected to any detriment because he has made a protected disclosure. That does not apply where the detriment in question is dismissal of an employee, (because dismissal is covered by Section 103A see Melia v Magna Kansei Ltd [2006] IRLR 117).

23. A detriment may be inflicted by any act, or failure to act, (Section 47B(1)).

24. The term, "detriment" is not defined in the ERA. We look to the meaning attributed to that phrase in the discrimination case law, in particular as defined in the seminal case of Shamoon v the Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285: a detriment is where by reason of the act or acts complained of, a reasonable worker would or might take the view that he has been disadvantaged in the circumstances in which he had thereafter to work. Detriment is not limited to some physical or economic consequence.

Burden of Proof

25. Section 48(2) of the ERA provides that it is for the employer to show the ground on which any act, or deliberate failure to act, was done. The claimant must still first prove on the balance of probabilities, that there has been a protected disclosure and that there was a detriment to which the claimant was subjected by the respondent. Then the burden shifts to the respondent to prove that the detriment was not because of the disclosure.

26. Thus, where it is established that there has been a protected disclosure, in considering whether a worker has been subject to a detriment as a result, an Employment Tribunal must ask itself:

26.1 Whether the worker has been subject to detriment; if so,

26.2 Whether that detriment has arisen from an act or deliberate failure to act by the employer, and if so

26.3 Whether that act or omission was done on the ground that the worker has made a protected disclosure.

See Harrow London Borough v Knight [2003] IRLR 140).

27. The burden of proof on the question of whether there was a legal obligation and that information provided tends to show that there may be a breach, lies with the claimant, see Boulding v Land Securities Trillium (Media Services) Ltd UEKAT/0023/06, (paragraph 24).

28. As to the link between the disclosure and the detriment, ("on the ground that") one has to analyse the mental process, (conscious or unconscious) which caused the employer to act. We should not adopt the, "but for" test sometimes utilised in discrimination cases. The Court of Appeal considered this in Fecitt, (supra) where it was held that there is a causal link if the protected disclosure materially influences, (in the sense of being more than a trivial influence) the employer's treatment of the whistleblower. It is not the same test as that for a causal link in respect of dismissal; in considering whether there has been an unfair dismissal by reason of a protected disclosure, the disclosure must be the sole or principal reason before it is deemed to be automatically unfair.

29. It is the mental processes of the decision maker that are relevant, (CLFIS (UK) Limited v Reynolds [2015] IRLR 562, an age discrimination case).

30. The respondent then, must prove on the balance of probabilities that the act, or deliberate failure, was not on the grounds that the claimant had done the protected act i.e. that the protected act did not materially influence, (was not more than a trivial influence on) the respondent's treatment of the claimant, see Fecitt, in particular at paragraph 41. [this is difficult but see Harvey DII Detriment 3. Whistleblowing/D (4) [58]

31. It is of course right, (indeed trite) to say that the alleged victimiser must know of the protected disclosure, (Scott v London Borough of Hilingdon [2001] EWCA Civ 2005).

Unfair Dismissal

32. Mr Finn says that he was dismissed for making a protected interest disclosure. Section 103A of the ERA provides that

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

33. In an ordinary case of unfair dismissal, the burden of proof as to showing a potentially fair reason for dismissal lies with the employer. If the employer is able to show that potentially fair reason, then the burden of proof as to the test of fairness is neutral. The situation is slightly different where the reason for dismissal asserted by the employee is one which is automatically unfair. The authority on this is Kuzel v Roche Products Limited [2008] IRLR 530, Mummery LJ put it thus:

> "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 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."

34. So, we would look to the Claimant for some evidence that the real reason for dismissal is not that asserted by the Respondent. If he does that, we would look to the Respondent to discharge the burden of proof as to what it says was the reason for dismissal.

35. However, in Kuzel the Tribunal had jurisdiction to hear the Claimant's claim of ordinary unfair dismissal. It has been held that if the Tribunal does not have jurisdiction to hear a claim of ordinary unfair dismissal and the Claimant is therefore relying on one of the grounds of automatic unfair dismissal, then the Claimant bears the burden of proving on the balance of probabilities that the reason for dismissal was the automatically unfair reason, (see Smith v Hayle Town Council 1978 ICR 996 CA and Ross v Eddie Stobalt Ltd EAT 0068/13).

36. It will be rare for there to be direct evidence of an employer dismissing an employee because of a disclosure. A tribunal may therefore draw inferences from findings of primary fact as to the real reason for the dismissal, (see Kuzel above).

Findings of fact

37. The respondent is a charity and provides specialist mental healthcare to 900 patients at four locations, which includes the St Andrew's hospital. It employs more than 3,500 people and retains a further 1,000 people on a zero hours contract by an arrangement which it calls Work Choice.

38. Mr Finn had worked at St Andrew's hospital in the past, initially as a nursing assistant whilst he was training as a nurse and latterly, as a nurse between 1994 and 2004. Between 2006 and 2009, he worked for Northamptonshire Healthcare Foundation NHS Trust as a community services manager in mental health. During his time there, he raised four issues with his then employers which he relies upon as protected disclosures:

38.1 That something called the Millhouse Building in Towcester was not fit for purpose;

38.2 That staffing levels were inadequate;

38.3 That there were problems with the team working in Towcester, and

38.4 That management had failed to address those issues.

39. These matters were investigated, the problems acknowledged and an action plan devised but not adhered to. Mr Finn resigned. He subsequently obtained a letter of apology from his former employer. Mr Finn subsequently disclosed those matters to the CQC (Care Quality Commission) on 15 December 2010.

40. Between 2010 and 2011, Mr Finn made five unsuccessful job applications for vacancies with the respondent. In three of those five applications, he disclosed his earlier period of work.

41. In January 2012, Mr Finn started working for Serco at Yarls Wood detention centre in the medical department as a staff nurse and mental healthcare lead. During his time there, he identified that victims of torture and others with mental health issues, were not receiving the care they needed. He raised those concerns, initially with the management team. When his concerns were not dealt with, he raised them with the Chief Executive Officer. When they were still not dealt with, he resigned and raised his concerns with his MP, the Home Secretary and the CQC. He brought a complaint of constructive unfair dismissal. We are not told the outcome, but are referred to a letter of apology from his employer (page 568) acknowledging that he had raised matters of concern and had been treated unfairly as a result. These matters began to impact on Mr Finn's mental health.

42. In 2016, Mr Finn agreed to work with the Channel 4 Dispatches programme, who were investigating assessments for the state benefit known as Personal Independence Payment (PIP). There was a high rate of such assessments being overturned on appeal. Capita provided the assessment service. Working undercover, he was selected for and attended an assessors 12-week training programme. He identified breaches of the Nursing and Midwifery Council's Professional Code, which he raised with the trainers, the medical director and which were subsequently identified on the aired programme. He was not paid by Capita, his wages being withheld following broadcast of the programme. All he received from Channel 4 was his expenses. The production company with Channel 4 for whom he worked was called Hard Cash Promotions.

43. On 15 December 2016, Mr Finn made an application for a senior staff nurse position on the respondent's Work Choice panel, what some might refer to as the bank. He had telephone and face to face interviews. He was successful and on 12 January 2017, a job offer was made which he accepted on 19 January 2017. His terms and conditions of engagement are set out at a document at page 114, which we will come to in due course.

44. Mr Finn's first day of work was 20 February 2017, when he attended a week-long induction. During that induction, Mr Finn made no secret of the fact that he had previously worked for the respondent. During a Managing of Actual and Potential Aggression training course referred to as MAPA, Mr Finn raised concerns with the trainer that a fellow inductee was being inappropriately aggressive during role play. During e-learning sessions, Mr Finn noticed that fellow inductees were taking screen shots of the training slides, moving swiftly to the questions at the end of the exercise and using the screen shots to answer the questions – cheating in other words. He reported this to the trainers.

45. During a conversation, a doctor told Mr Finn that a common problem on the ward he was working on was broken keys. On arriving for duty on 2 March 2017, Mr Finn noticed some broken keys and reported that to a permanent member of staff, who said he would report it to security, commenting that this was a common problem.

46. By co-incidence, on 1 March 2017 a Channel 4 Dispatches programme featuring the respondent was broadcast. This was nothing to do with Mr Finn, who had not been approached by the Dispatches team to help.

47. On 16 March 2017, Mr Finn emailed a pharmacist (page 208). In this, he disclosed that he had made a medication error. It is a fairly lengthy email, in which he also makes references to other matters:

47.1 Not being able to access patient records on what is known as Rio;

47.2 Low staffing levels;

47.3 The nurse in charge still being under preceptorship;

47.4 To more information support being needed for new staff on the unit who are unfamiliar with medication management practices, particularly in situations where the nurse in question is not confident in dispensing medication – a reference to himself;

47.5 He suggests an induction to medication management would be helpful and that staff nurses still on preceptorship should have more support, and

47.6 He refers to the need for more support and building up professional confidence in dispensing medication.

48. He also reported the mistake he made with medication on a Datix report, (page 210); a common reporting system in hospitals.

49. I now come to a sequence of emails which we will refer to as the circa 20 March emails by reference to the bundle D1-D54. The first and important email which I will need to quote extensively from is from a Mr Harding,

whose title is Senior Clinical Night Site Co-ordinator. The relevant passage reads:

> "Several years ago myself and Glenda worked with a deputy ward manager named Noel Finn on Herewood Wake Ward. If my memory serves me right he left under a bit of a cloud after a series of challenges to the then senior nurse manager Lesley Collins. Through my professional connections I know that following this he went to work for Northamptonshire NHS Trust Community Mental Health Team South and after a short period of time he sued the trust at the professional expense of some of his colleagues and for a considerable amount of money. Sometime after this he acquired work at the Yarls Wood Immigration Detention Centre and as some of you may remember there was a documentary which was led by him, I believe he was involved in the secret filming that took place. If you Google his name you can see how he has done this on several occasions but more alarmingly if you type in Noel Finn Dispatches you can read how he is employed by the TV company responsible for the charity's recent attention."

50. Somebody called Tessa Yates, Work Choice Manager, Human Resources, replied to say that they will need to take some HR advice. That in response to a suggestion that Mr Finn's ID card should be blocked.

51. Somebody else writes to say that they were independently verifying whether he is the same person as appeared in the Yarls Wood programme.

52. Tessa Yates wrote again to say that she looked on the internet and thought that it was the same Mr Finn.

53. Ms Conway wrote 20 March at 09:16 indicating that she was with someone called Lisa and was flagging up to Ms Rosemary Hathaway that this has come up, that there is a view that he may be working for Dispatches and that it has being flagged to somebody called Dean, (that is Dean Howells, Executive Director of Nursing and Operations).

54. The next email chain begins at D9. It includes some pictures of Mr Finn to show that it is the same person. Lisa Powell, Service Director Learning Disability and ASD Pathways, writes to a considerable number of people including Mr Howells and Mr Tom Bingham, Senior Director of Communications, (not, we are told, a member of the Executive Board) to say that they are being copied in on the correspondence as guidance may be needed.

55. Above that email we see that somebody called Pheon Silaule wrote:

> "Have you had any update with this? Has he is booked to work on SEACOL early shit tomorrow."

56. We quote that email because the response from Lisa Cairns is:

"I think you might be right early shit!"

57. Perhaps telling as to people's attitude towards Mr Finn at this early stage.

58. We also note that the same Lisa Cairns says already that she is tempted to say that there is no need for him to work the next day or that day.

59. Pheon Silaule replies including the comment:

"People will be concerned."

60. The next email chain starts at D17, here we see Mr Harding reporting that he has checked the staff booking system and sees that Mr Finn has already worked a number of shifts. Lisa Cairns writes to Mr Harding, copying in a couple of other people, to say to them:

"Thank you very much for raising this issue."

Commenting that there had been some issues on the wards Mr Finn has worked on already, such as refusing to do medications and turning up to one of the wards in a suit and asking staff lots of questions. She states there will be a plan to meet him the next day and to ask him some questions about his CV because it only goes to 2004, after he had previously left St Andrew's hospital.

61. The next email chain starts at D23. It includes an email from the Executive Director of Nursing and Operations Mr Howells, to a number of people, thanking them for the information and stating that he hoped to pick it up with somebody called Martin Kaye that day. Mr Kaye was the Executive Director of Human Resources.

62. The next email chain starts at D33, somebody called Neil Shanks wrote that if Mr Finn was a whistle-blower:

"We cannot discriminate against him apparently."

Correct. Mr Lee wrote:

"I think he was a whistle-blower but on some of his other bits online it clearly states that Channel 4 have sent him in to find out what is going on."

Mr Lee sends the link to Mr Shanks and then sends a further link showing Mr Finn using hidden cameras during the programme.

63. The next email chain starts at D40. Mr Shanks writes to Mr Howells, referring to Mr Finn's Twitter and blog accounts and confirms that he had been working under cover for Channel 4, working for the Dispatches

programme. Further links are sent by Mr Lee to Mr Howells about an hour later at 11:57, Mr Lee refers to Mr Finn as being:

> "Quite activist"

64. Next is an email standing on its own at D41, Mr Shanks to somebody called Michael Speakman, in which he refers to Mr Finn infiltrating an assessment centre, to his Twitter and his blog accounts and the links to the Yarls Wood Immigration Detention Centre. He also refers to details regarding mis-treatment at Serco and the NHS after being blacklisted, although he also observes there is nothing about his time working for St Andrew's.

65. The next email, a highly significant email, is at D43 from Lisa Cairns on 20 March timed at 15:49. This email is to Dean Howells, (who we know is the Executive Director of Nursing and Operations) Mr Bingham, (Senior Director of Communications) Claire Carless, (General Counsel and Company Secretary on the Executive Board) Martin Kersey, (HR Director and on the Executive Board) and Rosemary Hathaway, (Head of HR, not on the Executive Board). This email reads as follows:

> "Prior to our meeting this evening I realised that I only forwarded the initial email, this is a further email from Stuart who has tracked the shifts he has done so far."

The significance being that clearly these people are going to have meeting that evening.

66. During the course of the day, Ms Conway and a Ms Atwell, Flexible Workforce Manager, conducted an investigation, drawing on the information being provided. They put together a report for the meeting that was to take place that evening on 20 March (page 226).

67. This single page report refers to Mr Finn's employment with the Northamptonshire NHS Foundation Trust and to his having made whistleblowing claims in respect thereof. It refers to his work as a mental health lead at Yarls Wood for Serco and to his involvement in whistle-blowing there and it refers to his working undercover for Dispatches whilst at Capita. It also notes at the foot of that page that he had already raised issues about administering medication and that he had been asking lots of questions. That report was sent to people attending the meeting, as we have seen (D43).

68. That meeting resolved that Ms Conway and Ms Atwell should meet with the Mr Finn. They prepared a script which is at pages 479-480. The script seems to us to suggest it had already been decided that Mr Finn should be suspended and they anticipated further disclosures from him.

69. On arriving at work on 22 March 2017, Mr Finn was called into a meeting with Ms Conway and Ms Atwell. He thought that he was in trouble for his medication error, which by the way, involved vitamins not any other form

of drug. The notes of this meeting are at page 481. The meeting followed the script and resulted in Mr Finn being suspended. He left in tears.

70. An action plan was then drawn up by the respondent (page 484-486). It begins setting out the work history and includes the incidents of whistleblowing we have already mentioned. It goes on to set out a series of steps to be taken, for example with regard to his security pass, his access to emails and so on. It includes that somebody, whose name has been redacted, is to be briefed and someone is to check whether they have ever before terminated somebody's employment for failing to disclose their work history.

71. On 23 March, Mr Finn wrote to the respondent's Chief Executive Officer, Mr Baldwin. The letter is at page 248. He refers to his having been suspended. He explains his history of having been involved in whistleblowing matters during the course of his career and that he hopes that he would be able to get back to his clinical practice working at the respondent, but he says, "I have been suspended because of fear and suspicion that I will do exactly this". In other words, that he would raise concerns with the respondent.

72. There is an email chain between Ms Conway and Miss Hathaway on 23 and 24 March at pages 250-251. They discuss how to phrase the letter of suspension. Who sends and who receives these emails is bizarrely, redacted. However, one suggests to the other, "How about appears that he didn't fully disclose history during the recruitment process which could constitute a breach of trust and confidence". We can see in the email chain, they are looking for justification to treat that as some kind of serious misconduct. One gains the impression that they are searching for justification to suspend Mr Finn.

73. The letter of suspension sent to Mr Finn is at page 259. It states that he has been suspended pending an investigation into an allegation that he deliberately failed to disclose his full employment history during the recruitment process. That is a reference to the fact that he had not disclosed on his CV, his earlier period of employment with the respondent and the "work" he had done for Hard Cash Promotions/Channel 4 in respect of Capita.

74. Mr Howells wrote to Mr Finn on 27 March, enclosing what the respondent's call their speaking up policy, what some of us might call the whistle-blowing policy. In this he writes:

> "You have not made clear in your letter whether you are raising concerns which may amount to a public interest disclosure which would be covered by the charities speaking up policy."

(He then refers to enclosing a copy of it.)

> "If you are raising a complaint under that policy then please confirm that this is the case."

75. So then, we can see Mr Howells focusing on any disclosures that Mr Finn may have made with regard to the respondent already, rather than the essence of Mr Finn's complaint, which is "you are picking on me because I was a whistle-blower elsewhere in the past and you think I might be a whistle-blower again". Mr Finn wrote back to Mr Howells on 28 March (page 265) seeking to make that point. He also made a subject access request under the Data Protection Act. Mr Finn did not ever receive a response from Mr Howells to either of those letters. This was deliberate, in the respondent's words they were, "keeping Mr Baldwin clean" (see page 282A).

76. On 29 March, Mr Finn responded to Mr Howells' letter of 27 March, (page 283). In summary, in this letter he makes the point that his complaint is that he had been suspended because of his reputation as a whistle-blower and that the respondent is getting the wrong end of the stick by focusing on, "disclosures" that he might have made in the first few weeks of his employment.

77. On 5 April 2017, Mr Howells wrote to Mr Finn to say that he would treat Mr Finn's concerns as a grievance, (page 329). He writes:

> "Your grievances that you have been suspended not due to the stated reason that this arose due to the fact that you deliberately failed to disclose your full employment history during your recruitment process but because you have a reputation as a whistle-blower and there is fear and suspicion that you will do likewise at St Andrew's."

That is correct.

78. Mr Finn replied on 6 April, (page 333) suggesting that things are getting out of hand and all that is needed is simply for the respondent to determine whether the action taken against him was appropriate and proportionate, and whether he is responsible for gross misconduct. He suggests that things are becoming protracted and messy.

79. On 7 April Mr Bentham, (Service Director) wrote to Mr Finn to propose that he, as appointed chair, would deal with both the grievance and the disciplinary matter together. He invited Mr Finn to attend a meeting which would be attended by a Mr Long, who was to be appointed the investigatory officer. Mr Long as the investigator, was at some point briefed by Ms Conway and provided with the document which is at page 487. It largely replicates that we have already referred to at paragraph 70 above, page 484 - 486.

80. On 11 April Mr Finn wrote to Mr Bentham, (page 338) complaining about the tone of Mr Bentham's letter and asking him to focus on the appropriateness of his suspension, i.e. that the was being targeted for being a whistle-blower. He expressed concern that he had not yet been

provided with the information that he had requested pursuant to the subject access request.

81. A grievance investigation meeting took place on 18 April, chaired by Mr Bentham, attended by Mr Long who was the Head of Internal Audit. The notes of this are at page 349A. During the course of this meeting, (page 349F) Mr Finn emphasised that his concern was that he was being picked on, that he had been suspended and was now being disciplined, because of his history as a whistle-blower.

82. On 29 April, the documents in response to Mr Finn's subject access request were provided to him. Amongst those documents, he found the emails we quoted earlier in these reasons dated 20 March, although those provided to him at that time were redacted so he could not see who they were from and to. He could however, see that the source of concern which gave rise, in his mind, to the steps being taken against him, which was his history as a whistleblower and his work for Hard Cash Productions.

83. Ms Conway was interviewed by Mr Long on 5 May, (page 357). Here we note that Ms Atwell, Ms Hathaway and Ms Conway made the decision regarding suspension, due to a lack of trust, because Mr Finn had not declared that he had worked for St Andrew's before. It is interesting to note that she confirms that the recruitment team were now putting on their recruitment documentation an explicit question about previous work at the respondent. She said there had been a joint discussion with the manager, head of department and HR, as to where this case sits and whether suspension was necessary. A leading question was put to her: Mr Long is recorded as having stated that from the meeting notes (this is for the suspension) the focus was on Mr Finn's failure to disclose his prior St Andrew's employment and not the employment or connection with Capita and he then asked if there was more focus on Capita or St Andrew's. The reply from Ms Conway was the main reason for suspension was his not being honest.

84. Another leading question is noted at page 360, where Mr Long is recorded as having said that there were huge amounts of relevance to Capita and it was misleading of Mr Finn not to include this on his application. Ms Conway agreed.

85. Ms Atwell was interviewed by Mr Long. Her interview notes are particularly interesting, as is the fact that she was not here to give evidence. The notes are at page 362. She acknowledged that emails had been sent round to everybody recognising Mr Finn as a whistle-blower and she goes on to say:

> "LC [we are told is a refer to Lisa Conway] was advised that they needed to suspend Mr Finn and for WorkChoice to do this rather than Lisa Cairns who had been an option to suspend".

The implication of the word, "was" is that an instruction was given to Ms Conway to suspend Mr Finn. In cross examination, she suggested that was a typographical error. We suspect that it was not and that there was in fact an instruction.

86. We notice Mr Long putting a leading question to Ms Atwell, trying to get her back on track, asking if it was her understanding that suspension was due to whistle-blowing, to which she replied "No".

87. Interestingly, Ms Atwell was asked about practice with regards to employment histories on CVs. She said that practice varied in different organisations. She noted that the respondent does not ask for a reason for leaving, whereas she had worked for other organisations which did. She went on to say that she would go back 10 years for relevant information on any application form. She also said that Mr Finn had not made it a secret that he had previously worked for St Andrew's once he had started. She confirmed that she had seen the information and read through the blogs regarding his whistle-blowing.

88. Mr Long put it to Ms Atwell that from the meeting notes, (that is the meeting between Ms Atwell, Ms Conway and Mr Finn on 22 March 2017) that he had read, it appeared that Mr Finn had been very vague about working for Capita and asked Ms Atwell to go into more detail about that.
We contrast that comment by Mr Long, with the minutes of the meeting on 22 March, (page 234) which read as follows:-

> "HA added that it was also mentioned that NF had worked at Capita previously.
>
> NF responded he did not work at Capita.
>
> HA said we were aware he had attended a 12-week training course at Capita.
>
> NF said it isn't a secret he is hiding, he said he did not work for Capita, he was undercover for a public interest disclosure. NF said he could assure St Andrew's that he was not working under cover and felt this was the real reason for the meeting."

Therefore, it seems to us to criticise Mr Finn for being vague about working for Capita is unfair. It is tolerably clear from the quoted excerpt what his position was with regard to Capita.

89. Mr Long produced a report, dated, "May", (page 406). We note at page 409 the following passage:

> "It is evident that the original disclosure email by an employee who I shall call A and those that subsequently followed on 12 March 2017 contained personal views and assumptions relating to NFs prior work history at St Andrew's and NFs undercover activities … it is apparent that some of the

> comments within A's emails are based on rumours or opinion, some are not relevant as they relate to NFs employment with other employers."

He writes at page 411:

> "In addition NF has alleged in his letter to Dean Howells on 29 March that his suspension was based on discrimination due to a fear that he would become a whistle-blower. Again, there is no evidence of this having spoken to both Helen Atwell and Laura Conway. Their actions were motivated by the failure to fully disclose his work history with the Charity and his work as an undercover reporter."

That is a surprising conclusion, given the emails of 20 March and the lack of detailed investigation with Ms Atwell and Ms Conway.

90. On 1 June 2017, Mr Finn wrote to Mr Howells, Executive Director of Nursing and Operations. He set out in writing the disclosures which he says he made, as requested by Mr Long during the meeting that they had had on 15 May. This document is at page 414. In short, the disclosures related to damaged or broken keys, insufficient staff, a member of staff provoking a patient into conflict, reference to the MAPA training, the online induction training, not being able to access clinical records, lack of a specific care plan for a particular patient, a problem with too much methadone being available and his own drug error.

91. Mr Long was asked to investigate and produce an addendum report. This begins at page 421 and it is dated June 2017. What we see here at pages 422 and 423, are notes of two very brief meetings with Ms Conway and Ms Atwell. Ms Conway was asked whether at the time of suspending on 22 March, she was aware of any public interest disclosure issues, to which she answered "No", the first time she was aware was the 20 March. That is clearly an error, the answer should be, "Yes" because she knew on 20 March and the suspension was on 22 March.

92. The third of three short questions in the interview of Ms Conway asked whether the decision to suspend Mr Finn was based on the likelihood now or in the future of his raising public interest disclosures? She replied, "Definitely not". It is noteworthy that the notes of this meeting are extremely brief and there is no exploration with Ms Conway of the emails of 20 March and what influence they may have had; what influence the senior managers involved in that email exchange may have had in what happened. There is no interrogation as to the potential influence of others in a more senior position.

93. Ms Atwell's interview, similarly brief, is at page 423. Again, there is the short question of whether suspension was based on the likelihood now or in the future of Mr Finn raising public interest disclosure? To which she replied "No". There was no further investigation or interrogation, as with Ms Conway.

94. In the meantime, on 2 June Mr Finn was sent a letter inviting him to attend a disciplinary and grievance hearing on 9 June, providing him with a copy of Mr Long's original report. The addendum report was sent to him on 7 June.

95. Mr Finn attended the disciplinary hearing with Mr Bentham on 9 June. Notes of that hearing are at page 424. He read out a statement, which is at page 433. He makes a number of points here, for example that the respondent had failed to recognise that his earlier applications for employment were more than 6 years ago and not more recent. He explained why his CV took the form that it did, pointing out that there was no specified time frame for an applicant's work history. He stated that his previous work history was not in his view relevant and that his work for Dispatches was not relevant because it was of an entirely different nature. He said that he had been advised in the past that his CV was too long and that it would be helpful if he reduced it from four pages to two pages.

96. Mr Bentham was working to a set script and having heard Mr Finn read out his statement, he proceeded to try and ask a series of questions, to which Mr Finn's response each time was that he had already read out his statement and provided the information required. The key and important question that Mr Bentham had to ask was, "Why his CV had not included his previous work history at St Andrew's?". Mr Finn responded that he had explained the point in his written statement and had done so in the meeting on 22 March. He was asked why his reason for not setting out his five previous applications and he explained that it had been a long time ago. Some of the other questions asked by Mr Bentham were not answered in the statement but do not strike one as being germane to the issue at hand.

97. On 12 June, the respondent's Service Director Mr King wrote a letter to Mr Finn to say that he had been appointed to investigate the latest allegations that he had made in his letter to Mr Howells of 1 June, inviting him to attend a meeting on 16 June. Mr Finn did not attend that meeting.

98. On 20 June Mr Bentham wrote to give an outcome to the grievance and disciplinary process, which was that the grievance was not upheld and that Mr Finn would be summarily dismissed for gross misconduct. The letter is at page 452. It refers to two issues; the first being the grievance, which is that his suspension had been motivated by his reputation as a whistleblower and that it was disproportionate. The second issue was that he had failed to disclose his full employment history. Mr Bentham states that he could find no evidence to support the suggestion that Mr Finn had been suspended because of his reputation as a whistle-blower. A surprising conclusion, in light of the emails of 20 March. With regard to the disciplinary matters, he found that there had been omissions of key information that would have been important in the recruitment process, namely his undercover work for Hard Cash Productions and that there were gaps in his employment history. He referred to it being particularly

important for Mr Finn to have shared the information about his work for Hard Cash Productions, given the recent documentary about the respondent. The difficulty with that is that the application for employment was made in January and the programme in question was in March.

99. Mr King in due course provided an outcome with regard to Mr Finn's allegations set out in his letter of 1 June, not upholding them. Mr Finn did not appeal his dismissal or the grievance outcome.

Conclusions

Disclosures

100. We find as a fact that Mr Finn did make the disclosures set out in column 3 of the table in the list of issues. In respect of each disclosure in turn:

100.1 Disclosure 1 – to Northamptonshire Healthcare NHS Trust, his employer at the time. This was with regard to the Millhouse Building in Towcester not being fit for purpose, staffing levels not being adequate, problems with the team working at Towcester and management failing to deal with those matters. Mr Finn reasonably believed that these tended to show a breach of a legal obligation, that is the obligation to provide safe and adequate care for patients, to redress grievances and not bully employees or victimise whistleblowers. Further, that the health and safety of individuals had been in endangered. Mr Finn made these disclosures in good faith.

100.2 The same applies to the second disclosure which is in the same terms as disclosure 1, but made to the CQC. The CQC is a prescribed person for the purposes of s.43F which further requires:

(1) That Mr Finn reasonably believed that the disclosure fell within its scope, which he did.

(2) That he reasonably believed the disclosures be true, which we find that he did.

(3) That this further disclosure to the CQC was made in good faith, which it was.

100.3 Disclosure 3 was made to his employer at the time, Serco. It was that there were gaps in the mental health pathway and resources at Yarls Wood Detention Centre, leading to deficiencies in the assessments and the care of detainees which management had failed to address and instead, had victimised Mr Finn. We are not sure what the criminal offences might be as suggested in the list of issues; we heard no evidence about that. But certainly, Mr Finn reasonably believed that such matters would be likely to be a breach of the legal obligation to provide safe and adequate care to

detainees and for the same reason, a threat to health and safety and a breach of the legal obligations to redress the grievances of employees and not to victimise whistle-blowers. These disclosures were made in good faith.

100.4 Disclosure 4 is the same as Disclosure 3, but was made to the Bedford Clinical Commissioning Group. This is not a prescribed body. Mr Finn relies upon s.43G. He reasonably believed that the information disclosed was true, he did not make the disclosure for personal gain, he had previously made the disclosure to his employer and it was reasonable for him to make the disclosure, which he did in good faith.

100.5 Disclosure 5 is also the same as Disclosure 3, but was made to the CQC, a prescribed organisation for the purposes of s.43F. We find that Mr Finn reasonably believed the disclosures to be within the ambit of the CQC, that they were true and that this further disclosure to the CQC was made in good faith. As the disclosure is after 23 June 2013, as are all of the remaining disclosures, there is a further requirement that Mr Finn reasonably believed that the disclosure was in the public interest. Mr Finn did reasonably believe that the failings at Yarls Wood as disclosed were in the public interest, as they plainly were.

100.6 Disclosure 6 relates to Mr Finn's work as an undercover reporter for Hard Cash Productions. Mr Finn was employed by Capita whilst he attended a 12-week training course. The disclosure was in respect of the conduct of Personal Independence Payments (PIPs); Capita were employing qualified nurses to undertake assessments outside their area of competence, which were not clinical assessments. As a consequence, service users were being misled. A bonus structure was incentivising high numbers of assessments and resulting in inadequate or poor quality assessments. Mr Finn reasonably believed that the disclosures revealed by his work were of failures to comply with legal obligations. That is an obligation on nurses to act within their competence, obligations to conduct clinical assessments transparently and with integrity, obligations to conduct adequate and fair assessments, the health and safety of individuals were endangered. Mr Finn reasonably believed that the failings disclosed were in the public interest and they plainly were. This was a disclosure to an external non-prescribed body i.e. to the television company. Mr Finn therefore relies upon the provisions of s.43H in this regard, the disclosure of an exceptionally serious failure. Mr Finn reasonably believed that what he disclosed was true, he did not make the disclosure for personal gain, he was merely paid his expenses by Hard Cash Promotions, his motives were entirely altruistic to expose wrong doing. The failings were exceptionally serious; potentially resulting in deserving disabled

people not receiving benefits to which they were entitled. It was reasonable in all the circumstances for Mr Finn to have made the disclosures; he performed in fact, a valuable public service.

100.7 Disclosure 7 – this was made to the respondent while Mr Finn was in their employment. It was made to the nurse in charge of the shift on which Mr Finn was working on 14 March 2017. It was that he did not feel competent to administer medication or supervise preceptees, as he was being instructed to do, that there was inadequate staffing and inadequate experienced staff. That someone who may not be competent was administering drugs or supervising junior staff has the potential to endanger the health and safety of patients. Mr Finn reasonably believed that to be so and that this was in the public interest.

100.8 Disclosure 8 was made to the pharmacists and on the Datix report. It was a disclosure to the employer. The nature of the disclosure was that there were low staff levels, a lack of information and support, inadequate medication management induction, inadequate support for preceptees, insufficient experienced staff on shift and that Mr Finn had made an error, which may have been influenced by those factors. These again are matters which Mr Finn reasonably believed would potentially place the health and safety of patients at risk and Mr Finn reasonably believed them to be in the public interest.

100.9 Disclosure 9, 10, 11, 12, 13, 14, 15 (in part), 16 (in part) and 17 – are all to the effect that Mr Finn's suspension and the disciplinary action against him were detriments because of his protected disclosures. Such disclosures are of a breach of a legal obligation, namely not to victimise whistle-blowers and endanger the health and safety of patients. If the respondent created a culture of whistle-blowers fearing that they would be victimised for raising health and safety concerns or because they might do so, that creates a climate which endangers health and safety. It is something that is in the public interest. Mr Finn reasonably believed the foregoing. The disclosures were made to more senior individuals and therefore to the employer.

100.10 Disclosure 15 (2nd part) is with regards to insufficient staffing, inaccurate methadone calculations and excessive expectations of new and inexperienced staff. Mr Finn agreed in cross examination that these matters were not raised in the meeting with Mr Long on 15 May, as the list of issues suggests. They were part and parcel of what he later set out in his letter to Mr Howells of 1 June, which is the 2nd part to disclosure 16.

100.11 Disclosure 16 (2nd part) – that there were damaged and broken keys, insufficient staff, insufficient support and supervision of

newly qualified and junior staff, there had been an incident of a staff member threatening a patient, concerns about MAPA training, insufficient time for e-learning, the inability to access patient records, risks regarding manual handling and environment, controlled drug records and factors relating to the drug error. These are all matters which Mr Finn reasonably believed tended to show that there was danger to the health and safety of patients and place the respondent in breach of its legal obligation to provide safe and adequate care to its patients. These are matters which are and were in the reasonable belief of Mr Finn in the public interest.

101. In respect to some of these disclosures, the respondent has sought to assert that they are mere allegations, not containing sufficient detail to amount to the provision of information. We disagree. Mr Finn is giving information about a state of affairs as he reasonably perceived it to be, that he had made an error, that he needs more time in dispensing, that staffing is low and not sufficiently experienced, that more support is needed etc. The matters raised in the letter to Mr Howells of 1 June do amount to the provision of information.

102. Mr Finn repeatedly asserts to various senior individuals that he is being victimised because of his whistle-blowing history. He was providing information which he reasonably believed to be true: (1) that he has a history of whistle-blowing; (2) that people in the respondent's management know that; (3) that he has been suspended and is being disciplined, and (4) that the reason for such is his reputation as a whistle-blower. Those first three points are the provision of information. Point four only, may be an allegation only.

103. In summary, we find that all of the alleged disclosures, with the exception of the second part of disclosure 15, were made and were protected disclosures.

Detriment

104. Was Mr Finn subjected to the detriments alleged, and if so, was that because of one or more of the disclosures?

105. Detriment 1 – that the respondent had investigated his past employment and associated activities in response to an email of 20 March. Analysis of the email at page 213 shows that the investigation was prompted by:

105.1 His appearance on TV in respect of Yarls Wood which itself, (that is, the TV programme) is not relied on as a protected disclosure; and

105.2 The, "discovery" that he is, "employed by" Hard Cash Productions about whom the respondent is particularly alert, because of the programme on 1 March.

106. So, the initial investigation actually, is not prompted by any of the protected disclosures as such. However, those investigations quickly revealed links to the Dispatches programme and therefore disclosure 6 and via his blog, his whistle-blowing in the form of protected disclosures 1-5, see the emails at D41-D42.

107. The exclusion of the unredacted circa 20 March emails from the trial bundle is remarkable. The identity of the recipients of those emails is highly significant, highly relevant. By the time of D43, a meeting of a number of senior people in the respondent's organisation was to take place. The discussion document at page 226 contained clear references to protected disclosures 1-6 and to his saying that he did not want to administer medication, part of disclosure 7 and that he was asking questions. We have been provided with no information or evidence about that meeting. Ms Conway suggested the meeting was just between her and Miss Hathaway, but it clearly was not.

108. The meeting was quickly followed by Mr Finn's suspension, detriment 2. We were unconvinced by the respondent's treatment of Mr Finn's failure to identify on his CV his earlier employment with them and his time with Capita as gross misconduct:

108.1 Dealing with Capita first, it is entirely understandable that a prospective employee might want to exclude something like that from his CV and it is not really, "employment" in the ordinary sense. It is clearly not something of bearing on his employment as a nurse.

108.2 As for the earlier employment with the respondent, the respondent's witnesses accepted that there was no industry standard practice for how far back one went in ones CV. No period was prescribed in the respondent's own processes. There was no practice of asking candidates why they had left previous employment. Ms Atwell told Mr Long that she would go back just 10 years, which is what Mr Finn had done, something Mr Long pointedly ignored. We thought at the outset that there must have been something about Mr Finn's earlier employment with the respondent that they had found out he wanted to conceal, but there was not. Mr Finn's own explanation of the irrelevance of his earlier employment, his dealings with Capita and the need to keep his CV short, seemed to us convincing and make complete sense.

109. The test as to whether the detriment was on the ground that Mr Finn had made a protected disclosure, is whether it materially influenced the decision. The burden of proof is on the respondent to show the ground on which any act was done. It has apparently not disclosed, we put it no higher than that, evidence of who met and who discussed Mr Finn on 20 March, nor has it provided evidence of what was discussed. It has failed to discharge the burden of proof.

110. In any event, having heard evidence from Ms Conway, in light of the circa 20 March emails and the seniority of the participants, we did not accept her evidence that Mr Finn's history as a whistle-blower and in particular disclosures 1-6, played no part in the decision to suspend. They were in our view far more than the required mere, "more than trivial influence" on the decision to suspend. The CV was in our view, a pretext to set about achieving the dismissal of Mr Finn, which the respondent thought it would be able to justify. Mr Finn was suspended because of disclosures 1-6.

111. The detriment 3 is failing to lift his suspension and failing to address, or address adequately, in a series of letters and meetings, his concerns about his suspension in the disciplinary process. The respondent did fail to lift the suspension and in our view, did fail to adequately address his concerns, by failing to recognise or acknowledge that his primary point was that because he had made protected disclosures in previous employment, he was seen as a whistle-blower and because of that, the respondent feared that he would be a whistle-blower whilst in its employment, which led to his suspension and the disciplinary action against him.

112. Mr Finn's point is well made, even before it is picked up by Mr Cooper, that Mr Long and Mr Bentham wrongly focused on extracting from him current disclosures, pressing him for more information on the same rather than tackling the fundamental issue. A fear that Mr Finn might be working for Hard Cash Productions or Channel 4 will no doubt have been a factor, but the respondent's focus was on removing Mr Finn from the business and the respondent could not be distracted from that purpose by any suggestion that the course it had set was for an impermissible reason. Having heard evidence from Ms Conway and Mr Long, and considering the correspondence and meeting notes, the respondent has not satisfied us that Mr Finn's pre-employment disclosures and his complaint that his suspension itself was an act of victimisation, was no more than a trivial consideration. It was far more than that.

113. Detriment 4 - recommending the dismissal of Mr Finn's grievance in the investigation report. For reasons which we have explained, the respondent was set upon a course to dismiss Mr Finn from its service. Mr Long was instrumental in that, in the inadequacy of his investigation, his ignoring the essence of Mr Finn's complaint. He made no attempt to explore the potential influence of Mr Finn's whistle-blowing in the past, or the involvement of senior management, probably because he knew very well that Mr Finn's past history was highly influential as was the influence of senior management. Mr Long and the respondent have failed to satisfy us that Mr Finn's pre-employment disclosures were not the reason why he recommended dismissal. Further, by now he and the respondent had become all the more determined in its planned course of action, because in their eyes, Mr Finn had affirmed their fears, having made disclosures 7 and 8.

114. We deal with detriments 5 and 6 together, that is in the letter of 20 June not upholding Mr Finn's grievance and dismissing him summarily. We heard evidence from the decision maker Mr Bentham, who no longer works for the respondent. His evidence was poor. He had very little recollection of the events, or at least that is what he said. He gave up resisting Mr Cooper's cross examination, which although persistent, was perfectly polite and reasonable. Although no longer working for the respondent, it was clear to us that he did want to stick to what Mr Cooper called, "the party line" and to justify his decision to dismiss. He failed to satisfy us that the protected disclosures, which now included the second part of disclosure 16, was merely or less than a trivial influence on his decision to suspend or dismiss, (dismissal being a detriment, if Mr Finn were a worker and not an employee).

115. The detriments are a series of similar acts extending over the period 20 March 2017 and 20 June 2017, linked by the fact that they are because of the disclosures.

116. The claim to have been subjected to detriment for having made protected disclosures, succeeds.

Unfair Dismissal: Status – worker or employee?

117. The question then arises, was Mr Finn's dismissal a detriment because he was a worker or automatic unfair dismissal because he was an employee? The respondent submits that Mr Finn was a worker. Mr Cooper submits that Mr Finn was an employee, even though such a finding means that Mr Finn will not be entitled to compensation for injury to feelings for his dismissal. The test is a higher test as to whether the protected disclosure was the reason or principal reason for dismissal, rather than more than a trivial reason for a detriment.

118. The terms and conditions are at page 114. The terminology is surprisingly contradictory, particularly given as we understand it, something like a thousand people are engaged under its terms. So for example, they begin by referring to the contract governing the individual's employment, but refers to them as a member. It says that the individuals have no entitlement to the benefit of the terms and conditions of other employees of the charity. It says that for the purposes of continuity of service, the individual's employment shall be deemed to have commenced on a particular date. It says that the individual may be offered work in a casual capacity to fill a temporary vacancy. It says that the individual has no entitlement to guaranteed continuous work or a minimum number of hours. It states that the respondents are under no obligation to offer work and the individuals are under no obligation to accept work, save that when the individuals make themselves available, they shall be obliged to take assignments offered to them. It is said then that it is entirely in the charity's discretion whether or not to offer work and it is under no obligation to give any reasons. A paragraph in clause 1 reads:

> "However, in order to maintain your competence and personal safety as well as the safety of our patients it is expected that you will be available to accept a minimum of four assignments during each calendar month."

And further the paragraph below that:-

> "The fact the charity may have offered you work or offers you work more than once shall not confer any legal rights on you and in particular, should not be regarded as establishing an entitlement to regular work. You will however be an employee of the charity and shall accrue continuity of employment."

119. There are provisions for statutory sick pay and for reporting in sick. There are provisions for making oneself available for work, although repeating that the charity is under no obligation to offer work. There is a reference to disciplinary process: the possibility of being investigated and the possibility of being suspended. Under the heading of termination, there is a reiteration that there is "no obligation on either party to provide or accept work" and the individual, (clause 25) will be afforded the opportunity to join the respondent's pension scheme.

The Law on status

120. Section 203 (1) and (2) of the Employment Rights Act 1996, (ERA) defines an "employee" as follows:

> (1) In this Act "employee" means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.
>
> (2) In this Act "contract of employment" means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.

121. In Readymix Concrete South East Ltd v The Ministry of Pensions and National Insurance 1968 2 QB 497 (approved by the Supreme Court in Autoclenz Ltd v Belcher and Others [2011]UKSC 41), McKenna J identified 3 questions to help determine whether a contract of employment exists:

121.1 Did the worker agree to provide his own work or skill (i.e. personally although limited or occasional delegation may not be inconsistent) in return for remuneration? There must be remuneration, in other words, consideration, for there to be a contract.

121.2 Did the worker agree expressly or impliedly to be subject to a sufficient degree of control for the relationship to be one of master and servant?

121.3 Were the other provisions of the contract consistent with its being a contract of service?

122. In Carmichael v National Power Plc 2000 IRLR 43 Lord Irvine of Lairg spoke of an irreducible minimum of control, mutual obligation and obligation of personal service, necessary to create a contract of service.

123. Sir Patrick Elias explained in James v Greenwich Council UKEAT/0006/06/ZT that this means that for there to be any contract at all, there must be mutuality of obligation. To place the contract in the employment field, those obligations must relate in some way to the provision of or payment for employment which must be done personally by the individual. One must then look to the nature and extent of control, if it is sufficient, that contract will be a contract of employment. The control test is what has also been referred to as the organisational test, the economic reality test or the business integration test.

124. The presence of the irreducible minima do not make the relationship one of employer and employee, but without all 3 such a relationship will not exist. A Tribunal then has to look at all the other aspects of the relationship, for example:-

124.1 Can the Claimant send a replacement and if so who does the employer pay the claimant or the replacement? (MacFarlane v Glasgow City Counsel [2001] IRLR 7)

124.2 The length of time the relationship has subsisted; a long time can infer an intention on the parties part that the relationship be permanent and that a contract of service is implied. (See e.g. Franks v Reuters Ltd [2003]IRLR 423).

124.3 Is the Claimant integrated into the employers business?

124.4 Is the Claimant in business on his own account, running his own business, taking a financial risk, providing his own capital?

124.5 Does the Claimant provide his own tools and equipment?

124.6 The regularity of payment.

124.7 How tax and national insurance is paid.

124.8 Was the Claimant free to work elsewhere?

124.9 What labels do the parties put on their relationship? (Note that the fact that the parties choose to use a particular label is not determinative, (Young & Woods Ltd v West [1980] IRLR 201).

124.10 How is the relationship terminable? (A power to dismiss, in the words of Harvey at A [82] "smacks of service").

124.11 What, if any, are the arrangements for sick pay and holiday pay?

124.12 Are there any provisions for pensions?

124.13 Is there any flexibility in the hours worked?

125. There will be other factors in an individual case that will be relevant to take into account in painting the overall picture. As Mummery J said with the subsequent approval of the Court of Appeal in Hall (Inspector of Taxes) v Lorimer [1994] IRLR 71:

> "The object of the exercise is to paint a picture from the accumulation of detail…It is a matter of evaluation of the overall effect of the detail which is not necessarily the same as the sum of the individual situation".

The exercise is not one of simply preparing and ticking off a checklist.

126. It is common ground that if Mr Finn was not an employee, he was a worker, as defined in Section 230 (3) of the ERA.

Conclusions on status

127. The key points in reaching our conclusions are this:

127.1 In practice and in accordance with Mr Finn's oral evidence, he was asked to work a lot of shifts, he agreed to work three shifts a week and he expected that would be a regular pattern.

127.2 There are frequent references in the terms and conditions to, "employment" and to, "employee".

127.3 It is fair to say that there are also contradictory references.

127.4 There is the quoted reference to there being a requirement to work at least four assignments a month, that is an obligation on the part of the individual to accept work, to do at least four days and it must be implicit that there is a corollary to that, the respondent must be obliged to provide such work for the same reasons as envisaged in the clause, that is to maintain competence and personal safety. Therein lies it seems to us, mutually of obligation.

127.5 We were also taken by the reference in the clause below, to the individual being an employee and accruing continuity of employment.

127.6 In all other respects, the relationship had the appearance of an employment relationship, including the degrees of control whilst at work.

128. We therefore conclude, although it is not straight forward, that Mr Finn was an employee.

129. As Mr Finn does not have two years' service and could not therefore otherwise claim ordinary unfair dismissal, the burden of proof is on him to prove on the balance of probabilities that the reason for his dismissal was the protected disclosures. Having heard evidence from Mr Bentham, considered the paucity of the investigation, the inadequacy of the reasons for dismissal offered by the respondent, the inadequacy of Mr Bentham's evidence, the apparent involvement of senior members of the respondent's management, we conclude the protected disclosures collectively are indeed the principal reason for dismissal and that Mr Finn was therefore unfairly dismissed.

130. Mr Finn's claim of automatic unfair dismissal for having made protected disclosures therefore succeeds.

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Employment Judge M Warren

Date: 19 August 2019

Judgment sent to the parties on

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For the Tribunal office