Neutral Citation Number: [2017] EWCA Civ 401

Case No: A2/2016/0534

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE EMPLOYMENT APPEAL TRIBUNAL
HHJ PETER CLARK

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/05/2017

Before:

SIR TERENCE ETHERTON, MR
LORD JUSTICE UNDERHILL
and
LADY JUSTICE KING

- -

Between:

DR KEVIN BEATT	**Appellant**
- and -	
CROYDON HEALTH SERVICES NHS TRUST	**Respondent**

- -
- -

Mr Daniel Stilitz QC and **Ms Harini Iyengar** (instructed by **Linklaters LLP**) for the **Appellant**
Ms Jane McNeill QC and **Mr Ian Scott** (instructed by **Capsticks Solicitors LLP**) for the **Respondent**

Hearing dates: 4 and 5 April 2017

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Approved Judgment

Lord Justice Underhill:

INTRODUCTION

1. The Appellant is a consultant cardiologist. From September 2005 until his dismissal with effect from 14 September 2012 he was employed by the Respondent Trust at Croydon University Hospital. By a judgment sent to the parties on 24 October 2014 an employment tribunal chaired by EJ Sage held that he had been unfairly dismissed, and subjected to various detriments following his dismissal, contrary to the "whistleblower" provisions of the Employment Rights Act 1996. By a judgment promulgated on 19 January 2016 the Employment Appeal Tribunal (Judge Peter Clark sitting alone) allowed the Trust's appeal. This is an appeal against that decision.

2. The Appellant has been represented before us by Mr Daniel Stilitz QC, leading Ms Harini Iyengar, and the Trust by Ms Jane McNeill QC, leading Mr Ian Scott. The two juniors appeared in both tribunals below; and Ms McNeill also appeared in the EAT. Mr Stilitz and Ms Iyengar have been acting throughout on a *pro bono* basis, as have their instructing solicitors, Linklaters LLP.

THE FACTS

3. The ET made findings about the events leading up to the Appellant's dismissal, and its aftermath, in great detail. For the purposes of the appeal I can confine myself to a very summary outline.

4. The Appellant's speciality is interventional cardiology – that is, the treatment of heart conditions by angioplasty and similar interventions by catheterisation as opposed to open-heart surgery. The unit at the hospital where these procedures were carried out was known as "the Cath Lab".

5. The interventional cardiology service at Croydon was established in 2005 by the Appellant and another consultant. For a short time after October 2007 he was the only consultant in the unit, but two others – Dr Asif Qasim and Dr Lin Soo – were appointed at or around the beginning of 2008. The new team did not work well together. A review by the Royal College of Physicians in 2009 described the cardiology department as "dysfunctional". The Appellant had a period of sickness absence due to stress in October 2009. Although the Trust took steps to try to deal with the situation, including a formal mediation process in 2010, these did not improve personal relationships between the consultants. In particular, the Appellant and Dr Qasim did not get on at all. Each made allegations about the conduct of the other. These included complaints about the treatment of the nursing staff, and it appears that the staff were to some extent drawn into the conflict between the consultants. This situation persisted throughout 2010 and early 2011.

6. Some time in (I think) 2010 Dr Qasim took over from the Appellant as Director of Interventional Cardiology. In May 2011 a "Service Manager for

Cardiology", Ms Wendy Riddle, was appointed on a one-year contract to assist him. She and the Appellant did not get on from the start.

7. The work in the Cath Lab was very specialised, and there were a small number of nurses who worked there regularly. The head nurse was Sister Lucy Jones, who had been recruited by the Appellant in the early days of the unit and was very highly esteemed by him. The Matron in charge of nursing in the Cardiology Department overall was Ms Sinead Lynch.

8. The sequence of events which led to the Appellant's dismissal began on 9 June 2011. Sister Jones was called to a meeting that morning concerning allegations by Ms Riddle and Matron Lynch that she had been rude and abusive towards them. The Appellant attended the meeting with her and took her part. During a break in the meeting he was called to the Cath Lab to take over a procedure. When the meeting resumed, in his absence, Sister Jones was suspended. In the meantime complications had developed in the procedure being conducted by the Appellant, and the patient, referred to by the ET as "GS", tragically died.

9. It was, and remains, the Appellant's strongly-held view that it was irresponsible of the Trust to suspend Sister Jones in the middle of a working day when she might be expected to have clinical responsibilities. He believed, though this is not accepted by the Trust, that her absence contributed to GS's death: as I understand it, this is on the basis that there had been a delay in obtaining a particular piece of equipment (a "snare") which if Sister Jones had been contactable she would have been able to find more readily. Also, and more generally, he believed that following her suspension it was questionable whether there were sufficient nursing staff with sufficient experience to ensure the safe performance of procedures in the Cath Lab; and that her suspension had had a deleterious effect on morale.

10. The Appellant expressed those views on a number of occasions during the following days and weeks. Several of those expressions of view constitute the "protected disclosures" which were the basis of the ET's findings. I can itemise them as follows, giving them their labels from the Tribunal proceedings:

    (1) *Disclosure 8*[1]. At a meeting on 10 June, i.e. the day after GS's death, the Appellant told senior Trust managers that the suspension of Sister Jones had directly contributed to that outcome; that it had been reckless; that it called into question whether the Cath Lab was a safe working environment; and that there should be no further procedures performed until there had been a de-briefing involving the nursing staff.

    (2) *Disclosure 9*. In an email to Gavin Marsh, the Medical Director, dated 13 June 2011, the Appellant said that he had grave doubts about the morale of the nursing staff following the events of 9 June.

[1] The numbers start at 8 and are discontinuous because the Appellant relied in the ET on certain other disclosures which were held not to be protected.

(3) *Disclosure 10*. On 2 July 2011 the Appellant wrote a report for the Coroner about GS's death. In the course of his account he referred to the delay in obtaining a snare.

(4) *Disclosure 14*. On 8 July 2011 the Appellant was contacted by a GP from a local commissioning group, Dr Fernandes, asking why procedures booked for the Cath Lab had been cancelled. He told him in outline what had happened on and after 9 June.

(5) *Disclosure 11*. On 14 July 2011 the Appellant wrote to Nick Hulme, the CEO of the Trust, complaining about Dr Qasim and escalating his previously expressed concerns about patient safety.

(6) *Disclosure 13*. On 28 July 2011 the Appellant met Mr Hulme and Mr Marsh, and raised concerns about patient safety as a result of the unavailability of sufficient specialist staff.

(7) *Disclosure 15*. On 3 August 2011 the Appellant met Ms Riddle, Matron Lynch and Mark Kemp, the Trust's Associate Director of Operations, and explained his views about the absence of sufficient specialist nursing staff.

11. In the meantime a Serious Untoward Incident ("SUI") investigation was conducted by Juliet Kenney, the Trust's Clinical Director for Cancer and Core Functions. Her report was completed in early July. As regards the impact of the suspension of Sister Jones, Ms Kenney concluded that the decision had been taken only after management had ascertained that staffing levels would be satisfactory and that her absence had not contributed to what went wrong on 9 June. It is right to say that the ET had some criticisms of the way Ms Kenney approached her task, but it is unnecessary for me to set them out here.

12. At the meeting on 3 August 2011 the Appellant declined to undertake his list of procedures for the following day because he believed that there would be inadequate nursing cover. He also said that he did not want Ms Riddle and Matron Lynch to be in the Cath Lab when he was working. He did not attend for work on 4 August.

13. The Trust operates a "Speak Up Policy" providing for the investigation of concerns raised by staff. In late July/early August 2011 an investigation was conducted into the Appellant's concerns, including his complaints about Ms Riddle, by the Trust's Director of Operations (Community Services), Sharon Jones. In her report, which was completed in mid-August, she concluded that his allegations were "entirely without merit and … gratuitous in nature"; that the Appellant had a strong personal antagonism to Ms Riddle which manifested itself in rude and bullying behaviour; and that he was trying to use the process to get Sister Jones reinstated. Again, the Tribunal was critical of aspects of Ms Jones's investigation but I need not give the details.

14. On 8 August 2011 the Appellant was suspended on the ground that he had made false accusations of poor patient safety and had made unfounded accusations against Ms Riddle. A disciplinary investigation was conducted by

a senior Trust manager, Michael Hayward, who finally produced a report in May 2012. The fact that this process took no less than nine months is extremely regrettable (though alas such delays are far from uncommon in NHS disciplinary cases). However, Mr Hayward explained to the ET the problems which he faced, and it expressed no criticism of him in this regard; and since nothing turns on this point for our purposes I need say nothing further.

15. On the basis of Mr Hayward's report nine disciplinary allegations were formulated against the Appellant. To avoid confusion with other kinds of "allegation" which I shall have to mention, I will refer to them as "the charges". To anticipate, six of the charges were eventually found proved and were the basis on which the Appellant was dismissed. In the form in which they appear in the dismissal letter those charges were:

> "1. …
>
> 2. That on Thursday 4th August 2011, when paid and scheduled to be within the Trust, you failed to attend your scheduled place of work without management authorisation.
>
> 3. …
>
> 4. That following a Speak Up Policy Investigation conducted by Ms Sharon Jones, Executive Director of Operations (Community), it is alleged that you made various unsubstantiated and unproven allegations of an unsafe service within the interventional cardiology service at Croydon Health Services NHS Trust. This gives rise to three main concerns:
>
> i. This appears to have been part of a campaign to have Sister Lucy Jones reinstated after her suspension, rather than out of a genuine concern around patient safety. The Trust therefore asserts that this constitutes an abuse of position.
>
> ii. By raising these concerns under the Trust's Speak Up Policy, the Trust believes that you were hampering the ability of the unit to run safely and effectively, and this appears to be vexatious and calculated.
>
> iii. That despite various attempts by members of the senior management team, including Ms Wendy Riddle, Mr Mark Kemp, Mr Gavin Marsh and Mr Nick Hulme, to elicit any satisfactory evidence to substantiate claims of poor patient safety, you failed to provide any. At times, you either ignored requests for such detail or did not respond in a timely manner. On the occasions that you did respond, it is alleged that you then failed to give prima facie examples to substantiate your repeated claims.

5. …

6. That on 10th June 2011 whilst reporting the death of GS to HM Coroner's Office you made unsubstantiated and unproven allegations of an unsafe service and unsafe staffing levels within the interventional cardiology service at Croydon Health Services NHS Trust, implying that they may have contributed to GS's death.

7. That at some time between the 9th June 2011 and the 8th July 2011 you made unsubstantiated and unproven allegations of an unsafe service and unsafe staffing levels within the interventional cardiology service at Croydon Health Services NHS Trust to a local GP Commissioner(s). This inaccurate and unproven disclosure resulted in the commissioners formally writing to the Chief Executive seeking assurance of safety within the CHS cardiology service, which the Chief Executive has been able to provide. It is alleged that the manner of the disclosure, to an outside body responsible for commissioning services from the Trust, demonstrates a complete breakdown in trust between you and the Trust.

8. That you failed to establish and maintain effective working relationships with various members of staff and/or demonstrated inappropriate behaviour towards members of staff with the following consequences:

- Demonstrated behaviour towards Ms Wendy Riddle, Interim Service Manager for Cardiology, and Ms Sinead Lynch, Cardiology Matron, which is in breach of Trust standards, Dignity at Work Policy and Attitudes, Behaviour & Communication Policy

- That at various times, your attitude, communication and behaviours towards Ms Wendy Riddle has amounted to bullying, harassment and intimidation which is clearly in breach of Trust standards, Dignity at Work Policy and Attitudes, Behaviour and Communication Policy

- That your behaviour communication and attitudes towards various members of the Croydon Health Services NHS Trust staff, namely Ms Wendy Riddle, Ms Sinead Lynch, Dr Asif Qasim, Mr Mark Kemp, falls well below the standard that the Trust would expect from a senior member of staff. [Reference is then made to a GMC guidance document.]

9. You have made further serious, unsupported accusations against Wendy Riddle, Service Manager for Cardiology, in order to discredit her. Specifically, you have made persistent claims that the Cath Lab is unsafe due to her

> presence/management without providing robust evidence to substantiate this claim which could be considered a deliberate attempt to destabilise the department which she is seeking to manage."

16. A disciplinary hearing was held over six days in July and August 2012 by Richard Parker, the Trust's Director of Operations. An external panel-member, Professor Trevor Beedham, was appointed, but on the basis that the ultimate decision remained that of Mr Parker. Twelve witnesses were called and there was a mass of documentation. The Appellant was represented by counsel. There was a professional transcript made of the evidence.

17. The panel's decision was notified to the Appellant by Mr Parker in a letter dated 14 September 2012. As I have said, charges 2, 4 and 6-9 were upheld. (On two of the other charges the panel were critical of the Appellant's conduct while not finding the actual charge proved.) In connection with each of the charges (which are set out in full) there is a summary of the panel's reasoning. The letter, which runs to some nine pages, is full and clearly expressed. The conclusion, as I have said, is that the conduct in respect of which the charges had been upheld constituted gross misconduct, and the Appellant was dismissed with immediate effect. The ET was critical of Mr Parker's approach to the evidence in a number of respects: very broadly, it believed that he accepted uncritically evidence which was adverse to the Appellant and gave no proper weight to the genuineness of his concerns. However, as will appear, that is not the main focus of the appeal.

18. The dismissal letter said that because the Trust had a duty of care to patients it would "be referring this matter to the General Medical Council". A letter from the Medical Director, Dr Newman-Sanders, notifying the GMC that the Appellant had been dismissed and enclosing a copy of the dismissal letter, was before the ET. It bore the date 14 April 2014, which was evidently the date of the print-out rather than the original date of the letter. A subsequent letter to the GMC (see para. 22 below) referred back to the earlier letter as having been dated 16 October 2012, but, as will appear, there is a question as to whether it was in fact sent then.

19. An appeal against the panel's decision, by way of review rather than re-hearing, was heard in May 2013 by John Goulston, the Trust's Chief Executive. By a letter dated 4 June the appeal was dismissed.

20. An inquest into the death of GS took place on 2 and 3 July 2013 before a medically-qualified Coroner, Dr Roy Palmer. The Appellant gave evidence in which he repeated his views about the suspension of Sister Jones: that evidence constitutes the last of the protected disclosures found by the ET. We have not seen the Coroner's verdict in full, but it appears from the ET's findings that his formal conclusion was that GS "died as a result of complications arising from a necessary medical procedure". However, he did also address the question of the suspension of Sister Jones. He said:

> "What does trouble me was how it (the suspension) was carried into effect, and whether any adequate thought was given to the

> consequences of a decision immediately to suspend. There I do have a concern that not enough was done; indeed it has been conceded as much by Mr Burden [the Trust's HR Director] and by Dr Kumar [who had since become lead cardiologist at the Trust] that the lead clinician ought really to have been told what was happening, and the lead clinician didn't get to know until part way through the procedure."

He also said:

> "I think in the end this is an impossible question to answer, but I think on the totality of the evidence I have heard the absence of Sister Jones did contribute in some way to the sequence of events that ended up in the death, in the sense that more things might have been done more quickly had she been present."

He made a "rule 43 recommendation" to the Trust to the effect that there should be a clearer process for considering the implications of the suspension of an employee with clinical duties.

21. Immediately following the announcement of the Coroner's decision, on 5 July 2013, the Trust issued a press release in the following terms:

> "*Inquest into [GS]*
>
> Michael Burden, Director of Human Resources & OD at Croydon Health Services NHS Trust said: "We would like to offer our deepest sympathies to [GS's] family. The Coroner found that [GS] died as a result of complications arising from a necessary medical procedure. Dr Beatt is no longer working for the hospital and following a disciplinary procedure on unrelated matters he has left the Trust. We do not accept Dr Beatt's claims surrounding the actions of the Trust. We have already referred him to the General Medical Council for further investigation."

22. On the same day as the press release the Trust also wrote to the GMC to notify it of the outcome of the appeal. We were told that the GMC in due course concluded that there was no need to take any action against the Appellant.

23. A meeting of the Trust board took place on 30 July 2013. Mr Goulston as Chief Executive submitted a report. It included an item headed "Inquests". One of the two inquests referred to was that into the death of GS. The relevant part of the report reads:

> "Two inquests into patients have been covered by the media. One was [GS], who died during an angioplasty operation in June 2011. The inquest heard from Trust staff and former cardiology consultant Dr Kevin Beatt. The coroner ruled that [GS] died as a result of complications from a necessary medical procedure. During the inquest he heard claims that [GS's] death

> was exacerbated by the suspension of Sister Lucy Jones, who was scheduled to assist in the procedure. The Coroner has exercised his discretion under Rule 43 to write to the Trust inviting us to consider amendments or additions to aspects of our policies concerning the suspension of staff.
>
> The Trust's response to this inquest when approached by the media, highlighted that Dr Beatt is no longer working for the hospital and following a disciplinary procedure on unrelated matters he has left the Trust. We refuted Dr Beatt's claims surrounding the actions of the Trust and have already referred him to the General Medical Council for further investigation."

THE BACKGROUND LAW

PROTECTED DISCLOSURE

24. The statutory scheme for the protection of whistleblowers was introduced by the Public Interest Disclosure Act 1998, which inserted a number of provisions into the 1996 Act. The scheme is based on the concept of a "protected disclosure". That term is elaborately defined in Part IVA of the Act, but for present purposes the following summary is sufficient:

    (1) The disclosure must be a "qualifying disclosure", as defined in section 43B. A disclosure qualifies if it discloses information which, in the reasonable belief of the worker making it, tends to show one or more of six specified matters. In the present case we are concerned with (d) – "that the health or safety of an individual has been, is being or is likely to be endangered".

    (2) A qualifying disclosure will be a protected disclosure if it falls within the terms of any of sections 43C to 43H. These set out various conditions for protection, depending on the identity of the person to whom the disclosure is made. In this case we are concerned with disclosure to the employer (section 43C) and – as regards the Appellant's disclosures to Dr Fernandes and the Coroner – disclosure to a third party other than those identified in sections 43D-43F (section 43G).

    (3) For most of the period with which we are concerned it was a requirement of both section 43C and 43G that the disclosure should have been made "in good faith": see sub-sections (1) and (1) (a) respectively.

    (4) I need not set out in full the conditions required for a disclosure under sections 43C or 43G to be protected. But I should note, because it is relevant to one of the submissions made, that the conditions in section 43G are elaborate and prescriptive. Among other things, the employee must believe that the information disclosed is substantially true, he must not make the disclosure for the purpose of personal gain, it must be reasonable for him to make it, and he must show one of three specified

reasons why it was not appropriate to make the disclosure to the employer rather than the third party.

25. By section 17 of the Enterprise and Regulatory Reform Act 2013 the requirement in sections 43C and 43G that the disclosure be made in good faith was removed with effect from 25 June 2013, but the definition of "qualifying disclosure" in section 43B was amended to include that the disclosure should be made "in the public interest". That change is relevant only to the last of the disclosures made by the Appellant, namely what he said at the inquest in July 2013.

26. There has been a certain amount of case-law about the requirement of "good faith". An observation frequently cited is that of Judge McMullen QC in *Street v Derbyshire Unemployed Workers Centre* [2003] UKEAT/0508/02 to the effect that disclosures made for an ulterior purpose or in order to advance personal antagonisms or grudges should not be treated as made in good faith: see paras. 29-30.

PROTECTION OF WHISTLEBLOWERS AGAINST DISMISSAL

27. The protection of whistleblowers against dismissal is afforded under Part X of the 1996 Act, i.e. the part concerned with unfair dismissal. I need to say something first about the protection against unfair dismissal in "ordinary" cases.

28. Section 94 creates the basic right not to be unfairly dismissed. Section 98 provides the general definition of the content of that right. By sub-section (1), the employer must show "the reason (or, if more than one, the principal reason) for the dismissal" and that that reason falls into an admissible category. Although sub-section (1) (b) contains a sweep-up ("some other substantial reason"), the principal categories of admissible reason are those falling within sub-section (2), which reads as follows:

> "A reason falls within this subsection if it—
>
> (a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
>
> (b) relates to the conduct of the employee
>
> (c) is that the employee was redundant, or
>
> (d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment."

Secondly, the tribunal must then decide (without either party being subject to any burden of proof) whether in all the circumstances "the employer acted reasonably or unreasonably in treating [that reason] as a sufficient reason for

dismissing the employee", determining that question "in accordance with equity and the substantial merits of the case" (sub-section (4)).

29. The case of whistleblowers is covered by section 103A, which reads:

> "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."

The effect of section 103A is that where the reason (or principal reason) for a dismissal is the making of a protected disclosure the dismissal is automatically unfair and there is no need to conduct the "second stage" exercise of assessing the reasonableness of the dismissal, as would be required under section 98.

30. What tends to be treated as the classic expression of the approach to identifying the "reason" for the dismissal of an employee for the purpose of section 98 and its various predecessors is the statement by Cairns LJ in *Abernethy v Mott Hay & Anderson* [1974] ICR 323, at p. 330 B-C, that:

> "A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee."

As I observed in *Hazel v Manchester College* [2014] EWCA Civ 72, [2014] ICR 989, (see para. 23, at p. 1000 F-H), Cairns LJ's precise wording was directed to the particular issue before the Court, and it may not be perfectly apt in every case; but the essential point is that the "reason" for a dismissal connotes the factor or factors operating on the mind of the decision-maker which cause them to take the decision – or, as it is sometimes put, what "motivates" them to do so (see also *The Co-Operative Group Ltd v Baddeley* [2014] EWCA Civ 658, at para. 41).

31. In *Kuzel v Roche Products Ltd* [2008] EWCA Civ 380, [2008] ICR 799, this Court considered the operation of the burden of proof as regards the reason for the dismissal in an unfair dismissal case brought by reference to both section 98 and section 103A. No point on the details of the decision arises here. However, I should note, since the ET in the present case sought to follow its guidance, that Mummery LJ in his judgment envisages that the tribunal will decide first whether it accepts the reason for the dismissal advanced by the employer before turning, if it does not find that reason to be proved, to consider whether the reason was the making of the protected disclosure (see in particular paras. 58-59, at p. 810 G-H).

32. I need not deal generally with the provisions relating to remedy for unfair dismissal, in whistleblower cases or otherwise. But it is necessary, because of one of the issues before us, to note that, by section 123 (6), where a tribunal finds that the dismissal was to any extent caused or contributed to by any action of the claimant it must reduce the amount of the compensatory award by such proportion as it considers just and equitable. Such a reduction for contributory fault is distinct from the principle – generally identified by

reference to the decision of the House of Lords in *Polkey v A E Dayton Services Ltd* [1988] AC 344 – that in assessing compensation for unfair dismissal a tribunal must take into account the chance that if the employee had not been unfairly dismissed when they were they might have been fairly dismissed in any event at or around the same time.

33. In whistleblower cases the cap on compensation imposed by section 124 of the 1996 Act does not apply (see sub-section (1A)), so that an unfair dismissal claim based on section 103A is potentially far more valuable than a claim based on the same facts advanced under section 98.

PROTECTION OF WHISTLEBLOWER AGAINST "DETRIMENTS"

34. The protection of workers against detriments other than dismissal is afforded by section 47B of the Act. Sub-section (1) reads:

> "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."

The definition of "worker" in section 43K includes former employees.

35. In *Panayiotou v Chief Constable of Hampshire Police* [2014] UKEAT/0436/13, [2014] IRLR 500, the EAT (Lewis J sitting alone) held that it was in principle possible to distinguish, for the purpose of section 47B, between the fact that a worker had made a protected disclosure and the manner in which they did so: if the detriment complained of occurred on the ground of the latter and not the former the employer will not be liable.

THE PROCEEDINGS IN THE EMPLOYMENT TRIBUNAL

THE CLAIM

36. The Appellant brought proceedings for unfair dismissal. He relied both on "ordinary" unfair dismissal, alleging various unfairnesses in the process leading to his dismissal, and "automatic" unfair dismissal as a whistleblower under section 103A of the 1996 Act. He also alleged "whistleblower detriment" short of dismissal contrary to section 47B and made a claim for unlawful deduction of wages in respect of unpaid holiday money.

37. The details of exactly how the Appellant put his case in law do not appear to have crystallised until the hearing. At that point, however, he itemised with precision the protected disclosures on which he relied, which included those identified at paras. 10 and 20 above. He also listed the five detriments which were the subject of his claim under section 47B. The first two are aspects of the disciplinary process and we are not now concerned with them. The remaining three post-date the dismissal and are:

(3) the Trust's press release of 5 July 2013 following the inquest – see para. 21 above;

(4) the letter to the GMC of the same date – see para. 22;

(5) Mr Goulston's report to the Board – see para. 23.

38. So far as the Trust's defence is concerned, its case was that the charges against the Appellant which were found proved constituted misconduct; that that was the reason for the dismissal and fell under section 98 (2) (b); and that it had been reasonable to dismiss him for that reason. As regards the disclosures, it took some particular points, but its broad case as regards all save the last was that even if they were qualifying disclosures they were not protected because they were not made in good faith but in pursuit of personal antagonisms against, in particular, Ms Riddle; as regards the last, to which the new statutory regime applied, it contended that the disclosure was not made in the public interest.

THE HEARING

39. The hearing took place over two weeks at the end of May and beginning of June 2014, with a further day for closing submissions in July. The Tribunal heard evidence from a number, but not all, of the witnesses who had given evidence to the disciplinary hearing and it had in any event the full transcript of the evidence given at that hearing. In principle the hearing was concerned only with liability, but as will appear the Tribunal did decide two points of principle relevant to compensation.

40. It seems that the Appellant's case was advanced in strong terms. Ms Iyengar in her written closing submissions described him as a man of integrity who had acted throughout reasonably and in good faith and who had been "hounded out of work in an insulting and humiliating manner". Hard things were said about several of the witnesses, including that the evidence of some was "disingenuous". Mr Parker and Ms Goulston were cross-examined on the basis that the disciplinary proceedings were a sham whose outcome was predetermined.

THE ET's DECISION AND REASONS

41. The ET's decision was, as I have said, promulgated on 24 October 2014. It can be summarised as follows:

(1) The claim of unfair dismissal was upheld. The Tribunal's primary finding was that the Appellant had been dismissed for making protected disclosures; but it made it clear that it considered his dismissal also to be "ordinarily" unfair.

(2) It held that there should be no reduction to the Appellant's compensatory award on the basis either of *Polkey* or of any contributory fault on his part.[2]

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[2] It appears from the parties' closing submissions that it had been agreed that the Tribunal should decide these two issues at this stage rather than at the subsequent remedy hearing. This is usually the sensible course. But I have seen several cases

(3) The claims under section 47B in respect of the pre-dismissal detriments were dismissed but the claim in relation to three post-termination detriments was upheld.

(4) The claim for unlawful deduction of wages was dismissed on the basis that it was out of time.

Directions were given for a remedy hearing. None has yet occurred.

42. The Tribunal's Reasons are extraordinarily long, running to some 201 pages. They contain extremely detailed findings of fact, based on very full reference to the oral and documentary evidence. The labour involved in producing findings on this scale must have been immense. I am bound to say that I doubt if it was necessary to grind quite so small, but I would never wish to criticise a tribunal for conscientiousness.

43. The Reasons are also rather unusually arranged. The structure is as follows:

(a) an introductory section with paragraphs numbered 1-28, which largely reproduces/summarises the contents of the ET1 and ET3;

(b) a number of pages without numbered paragraphs which list the issues, the evidence heard and other such matters;

(c) a section headed "The Findings of Fact" with paragraphs numbered 1-418;

(d) two pages headed "The Law", which set out the relevant statutory provisions and a list of authorities, followed by a reference to the fact that the parties had filed written closing submissions;

(e) a final section headed "Decision", which sets out the Tribunal's reasoning in paragraphs numbered 1-59.

The lack of sequential paragraphing is not a model which I would encourage others to follow because it makes navigation and cross-referencing rather difficult. I will preface paragraph numbers from the "Findings" section with a 2/ and from the "Decision" section with a 3/.

44. I need not attempt any summary of the "Findings" section. But I should make it clear that at each of the various points in its narrative where the Tribunal had to make findings about a question on which the Appellant on the one hand and Trust managers and Dr Qasim on the other took different views it found in favour of the Appellant, whom it regarded as having acted throughout not only in good faith but reasonably. Those findings were in practice dispositive of some the issues considered in the "Decision" section. But, more generally,

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where it has resulted in the tribunal not giving the reasoning as regards the remedy issues the same degree of attention as that going to liability: there is a tendency to treat those issues as add-ons of secondary importance. The Tribunal in this case may have erred in this way: see para. 100 below.

and putting aside the particular legal issues, they mean that the overall effect of the judgment is to vindicate the Appellant's conduct throughout.

45. The "Decision" section is under six headings, which I will take in turn.

"Credibility Issues" (paras. 3/1-11)

46. Under this heading the Tribunal gives its reasons for preferring the testimony of the Appellant, whose evidence is described as "throughout … consistent" to that of certain of the Trust witnesses, including in particular Dr Qasim, whose testimony is characterised as inconsistent and unreliable. It should be noted, however, since Ms McNeill attaches importance to this, that no findings are made about the credibility of Mr Parker and Mr Goulston.

"The Protected Disclosures" (paras. 3/12-30)

47. Under this heading the Tribunal goes with great thoroughness over the protected disclosures on which the Appellant relied. As I have said, it found that the first seven, and also the twelfth, were not protected within the meaning of the Act but that the remaining eight were. In the case of all save the last (which post-dated the change in the statute referred to at para. 25 above) that involved a finding, which is made explicitly in each case, that they were made in good faith. It also necessarily involved a finding, again made in each case, that the Appellant had a reasonable belief that his disclosures tended to show a risk to health and safety. In the case of some of them the Tribunal expressly rejects the Trust's case that the Appellant was motivated by personal antagonism towards Ms Riddle: such findings had in any event been made on a more particularised basis in the "Findings" section. As regards the Appellant's evidence to the inquest, being the final protected disclosure, it found that the disclosures involved were made in the public interest.

48. At para. 3/30 the Tribunal declines to make any distinction of the kind discussed in *Panayiotou* between the fact of the disclosures and the manner in which they were made.

49. It is essential to appreciate that there is before us no challenge to the Tribunal's conclusions under this heading – that is, that the disclosures on which the Appellant relied were qualifying disclosures; that they were made in good faith and (as regards the last) in the public interest; that they were accordingly protected disclosures; and that they were not made in a manner which might be regarded as constituting distinct misconduct.

"Detriments prior to Dismissal" (paras. 3/31-34)

50. I need say nothing about this part of the reasoning.

"The Dismissal" (paras. 3/35-54)

51. This section is the heart of the decision. The reasoning is lengthy and it is clear that the Tribunal tried to proceed systematically. I have to say, however, that the precise course being followed is not always very clear, and at first sight there seems to be a degree of repetition. There was sometimes

disagreement before us about what question was being addressed at any particular stage. I accordingly need to set the reasoning out quite fully, and at some points on a paragraph-by-paragraph basis.

52. The Tribunal starts at para. 3/35 by directing itself that it has to decide "whether the dismissal was for an inadmissible reason, namely making a series of protected disclosures, or whether the dismissal was not for an inadmissible reason and was for the reason shown by the Respondent (conduct) and was fair." It reminds itself of the effect of *Kuzel*.

53. At para. 3/36 the Tribunal identifies the admissible reason asserted by the Trust for dismissing the Appellant, namely "conduct"[3]. It refers briefly to Mr Hayward's investigation and to the disciplinary hearing. At para. 3/37 it refers to findings made in the earlier section of the Reasons about deficiencies in Mr Parker's approach.

54. The Tribunal then proceeds, at paras. 3/38-48, to go in detail through how in his dismissal decision Mr Parker dealt with the nine charges against the Appellant, picking up various adverse findings about his approach which it had previously made. I will not set those out here, though I shall have to come back later to what it said about charge 8. Its conclusion, at para. 3/49, is as follows:

> "The Tribunal therefore conclude on all the evidence before us that the Respondent has not shown that the reason for dismissal was misconduct. We refer to the vague wording of the allegations against the Claimant and Mr Parker's vague and unconvincing evidence as to why he found the allegations well founded and on what evidence. Mr Parker preferred the evidence against the Claimant, even where there was little consistent evidence to support this decision and could not show to the Tribunal the basis on which he rejected the evidence in the Claimant's favour, especially where that evidence was consistent and credible and supported by other doctors who worked in the lab. The Tribunal also noted that allegation 1, 2, 3, 8 and 9 all involved or arose around the Claimant's relationship with Ms Riddle, who was on an interim contract of short term duration and was to leave the Respondent after about 1 year. There was no evidence that any other member of staff had raised a grievance against the Claimant or had complained about his conduct (apart from Dr Qasim but his complaints against the Claimant had never been formally escalated) and there had been no concern about the Claimant's clinical competency apart from the unconvincing evidence produced by Ms Riddle to the Speak Up policy. All

[3] The Tribunal's language is not quite right because it says that the Trust "has shown a potentially fair reason to dismiss". It is pleaded in the Trust's Respondent's Notice that that statement was inconsistent with its subsequent findings. But it is clear that the Tribunal meant "shown" only to mean "identified". Ms McNeill did not press the point.

> other allegations (4, 5, 6 and 7) were directly related to the Claimant's concerns about the events of the 9 June and the state of affairs that prevailed after that date for the Claimant to conclude that there was an unsafe service."

55. The reasoning in that paragraph needs some teasing out. The essential point is that made in the opening sentence, namely that the Trust had not proved that the initial dismissal decision was for the reason alleged: I think it is clear that the Tribunal was attempting to follow the approach advocated in *Kuzel* (see para. 31 above) by addressing that question as a first step. The remainder of the paragraph appears to be intended to support that conclusion. The point to which the criticisms of Mr Parker are directed is that his inability properly to explain his findings of misconduct shows that misconduct was not the true reason for the dismissal; although the criticisms might also go to substantive fairness, that is not the Tribunal's point at this stage. The second half of the paragraph is clearly also addressed to the question whether misconduct was the true reason for the dismissal. It is true that it does so by suggesting that the true reason was the fact that the Appellant had raised concerns about patient safety, which is of course the basis of his section 103A claim; but the Tribunal is not explicitly considering that at this stage.

56. The Tribunal then goes on, at para. 3/50, to consider the appeal decision. The paragraph reads:

> "Turning to the fairness of the appeal. The tribunal have made detailed findings of fact about the conduct of the appeal hearing and especially that of Mr Goulston. The tribunal was struck as to how little understanding he had of the facts and of the issues before him and of the evidence that had been present by the Claimant or of his role as appeals manager. Although the Respondent referred to the quasi judicial nature of the appeal hearing, this appeared to be true of the presentation of evidence but not of the approach of Mr Goulston to the evidence before him. It was noted that Professor Beedham had conceded that the Claimant had raised genuine concerns about patient safety however this view appeared to carry very little weight at the appeal. Mr Goulston again appeared to focus exclusively on the evidence against the Claimant and was not seen to be even handed in his consideration of the considerable weight of facts and evidence before him. The Tribunal have concluded that the appeals process was incapable of addressing the obvious shortfalls in the disciplinary process and the appeals process in itself was unfair and showed very little understanding or analysis of any of the evidence. Mr Goulston also confirmed in answers to cross-examination and to questions posed by the tribunal that the Claimant was dismissed for reasons relating to the incident on the 9 June and the death of the patient. This in itself confirmed that the Claimant had been dismissed for raising concerns about patient safety and reporting those matters to the coroner as he was

> obliged to do and to the GP Commissioner, which the Trust was obliged to do. The Tribunal therefore conclude that on all the evidence before us Mr Parker and Mr Goulston failed to carry out a fair process. The Tribunal conclude that there was no consistent evidence before the Tribunal that the Claimant had committed an act of misconduct entitling the Respondent to dismiss the Claimant and dismissal was not within the band of reasonable responses."

57. Contrary to the impression given by the opening words, this paragraph is not concerned only with the appeal. Although most of it is indeed directed to criticisms of Mr Goulston, there are references also to the original hearing conducted by Mr Parker and Professor Beedham. The conclusion in the final sentence is that the process as a whole was unfair, both because the evidence was insufficient to justify the findings of misconduct made and (it seems – though I am not quite sure that this is what the Tribunal meant) because those findings did not justify dismissal in any event. That is a perfectly conventional finding, but its appearance at this stage of the argument seems out of place because, as will appear, the Tribunal reverts in the following paragraphs to the prior question of what was the reason for the dismissal.

58. Para. 3/51 reads as follows:

> "The Tribunal therefore conclude that on all the evidence before us that the Respondent has failed to show that they dismissed for misconduct. There was insufficient evidence to show that the Claimant had committed an act of misconduct or that the charges upheld had, on the facts before the Respondent, been proven. Allegation 4 related directly to the Claimant's concerns of an unsafe service and Mr Parker reached conclusions that were not supported on the evidence before him. Allegation 6 was in relation to the telephone conversation with the coroner but Mr Parker relied on the written protected disclosure to the Coroner to find the allegation well founded, even though it was not part of the charge. Allegation 7 relied on a protected disclosure and allegations 8 and 9 have been found to have been unsupported by the evidence before the Respondent. The Tribunal therefore conclude that the dismissal was unfair and not for misconduct. Even though allegation 2 was upheld, which was said to be a failure by the Claimant to seek management authorisation to be absent on the 4 August, there was no credible and consistent evidence before the Tribunal that this was a requirement of all consultants or that it was an offence of gross misconduct had the allegations been well founded on the facts."

59. The "therefore" in the first sentence of that paragraph is a little confusing, because it refers to the finding not in the immediately previous paragraph but in para. 3/49, namely that the Trust had not shown an admissible reason for the dismissal. The rest of the paragraph likewise seems to repeat the points made in para. 3/49, namely that the charges on the basis of which the Appellant was

dismissed related in substance not to any misconduct on his part but to his having made protected disclosures. It ought, as I have already noted, to follow from that that the dismissal was automatically unfair by reference to section 103A, and that may be what the Tribunal meant by its conclusion in the penultimate sentence that "the dismissal was unfair and not for misconduct". But it is not necessary to pin this down because the Tribunal makes more explicit findings in the following paragraphs.

60. Paragraph 3/52 begins as follows:

> "The Tribunal have considered the guidance in the case of *Kuzel v Roche* above where it stated that it will be for the tribunal to make 'primary findings of fact on the basis of direct evidence or by reasonable inferences from primary facts established by the evidence' and 'if the employer does not show to the satisfaction of the employment tribunal that the reason was what he asserted it was, it is open to the employment tribunal to find that the reason was what the employee asserted it was'. Having considered that case and the guidance stated above, we have concluded that the Respondent's evidence of conduct be rejected. The Tribunal also conclude that the reason put forward by the Claimant, that he was dismissed for making protected disclosures, was the principal factor operating on the decision maker's mind. The Tribunal reach this conclusion on the basis of the consistency of the Claimant's evidence in respect of the events of the 9 June and his concerns expressed about patient safety after that date. We conclude that the Claimant was dismissed for escalating his concerns about health and safety concerns ..."

The ET continues by detailing with some particularity the "escalation" of the Appellant's expression of his concerns from their first ventilation internally to their communication to the Coroner and Dr Fernandes; but I need not set out the detail. The point being made is that the principal factor operating on Mr Parker's mind was that the Appellant had not merely raised his concerns initially but continued to do so in an escalating manner.

61. The first half of the passage quoted – down to the rejection of "the Respondent's evidence of conduct"[4] – appears essentially to re-state the point already reached. But the Tribunal then proceeds to draw explicitly the conclusion already implicit in its previous reasoning, namely that "the principal factor operating on the decision maker's mind" was the making by the Appellant of the protected disclosures, which is then amplified by the reference to escalation. There is thus at that point, even if not before, a clear finding of unfair dismissal by reference to section 103A.

62. At para. 3/53 the Tribunal refers to guidance given by the EAT in *Blackbay Ventures Ltd v Gahir* [2014] UKEAT 0449/12, [2014] ICR 747, to the effect

[4] This must, I think, mean "the Respondent's evidence that conduct was the reason for the dismissal".

that it is desirable for tribunals to identify which protected disclosures were causally connected to which act complained of. It seeks to perform that exercise as follows:

> "We conclude on the evidence before us that the Claimant's disclosure 14 (to the GP Commissioner) and disclosure 10 (written report to the Coroner) were directly related to allegation 6 and 7. We conclude that disclosures 8, 9, 11, 13 and 15 in respect of the Claimant's concerns about an unsafe service were relied upon to find allegations 4, 8 and 9 well founded. These disclosures were therefore the reason the Respondent dismissed the Claimant. The Tribunal saw a direct causal and evidential connection between the disclosures and the dismissal and it was those reasons that operated on the mind of Mr Parker and Mr Goulston. The Tribunal conclude that Claimant was dismissed for escalating his concerns of an unsafe service to the Respondent and to the GP Commissioner and to the Coroner. It was conceded by Mr Goulston that the Claimant was dismissed for reasons relating to the death on the 9 June and he accepted that the incident on that day was evidence that supported the Claimant's view of an unsafe service. We therefore conclude that the Claimant was dismissed for making the protected disclosure and not for misconduct. The dismissal is therefore automatically unfair."

That is accordingly a re-statement, on a more particularised basis, of the conclusion already reached in the previous paragraph.

63. Ms McNeill submitted that although para. 3/52 does indeed contain a clear conclusion on the section 103A issue that conclusion is wholly unexplained. I do not accept that. This paragraph must be read in the context of the earlier paragraphs which anticipate its conclusion – that is, paras. 3/49 and 3/51 – and with para. 3/53. When they are read as a whole it is clear that the Tribunal reached the conclusion that it did because the making of the disclosures featured so prominently in the charges which were found proved and which were the basis of the decision letter. I refer in particular to the final sentences of para. 3/49 and the first sentences of para. 3/53. It is clear that the Tribunal believed that Mr Parker was influenced not just by the making of the original, internal, disclosures, but by the "escalation" represented by their being repeated externally, to Dr Fernandes and the Coroner.

64. More generally, Ms McNeill complained that the reasoning in the whole of this section does not satisfy the so-called *Meek* standard (see *Meek v City of Birmingham District Council* [1987] EWCA Civ 9, [2007] IRLR 250). It was simply too confused and lacked what she described as "integrity", by which I think she meant intellectual coherence. I do not agree. I have already acknowledged that there are points where the course of the argument seems to wander, and there are also particular sentences or passages where the train of thought is not always easy to follow. I think the main problem is that the ET took an unnecessarily elaborate route to its conclusion. In particular, in the circumstances of this case it was not very useful to deal sequentially with the

issues of whether the Trust had shown that it had dismissed the Appellant for misconduct and whether it had shown that he was dismissed for making protected disclosures: those issues overlap to too great an extent. I understand the Tribunal's wish to follow what it understood to be the course mapped by *Kuzel*, but sometimes a straightforward application of the words of the statute is all that is needed. However, the important point is that it got to the right question in the end and answered it explicitly.

65. At para. 3/54 the Tribunal addressed the question of "ordinary" unfairness, though in truth it had already done so in para. 3/50 It said (omitting some unnecessary detail):

> "Although the Tribunal do not need to consider the issue of ordinary unfair dismissal, for completeness we confirm that on the facts before us we also find the dismissal to be ordinarily unfair on the ground that the allegations were not supported by the evidence before the Respondent and Mr Parker failed to consider the facts before him and reach a conclusion on all the facts. … The Tribunal have concluded that dismissal was not within the band of reasonable responses as we have concluded that there was insufficient evidence for the Respondent to conclude that the Claimant had committed an act of misconduct, he was dismissed for raising his concerns about the events of the 9 June and of an unsafe service."

66. Finally, as regards this section, at the end of para. 3/54 the Tribunal dealt very briefly with the two issues that bore on remedy. It will, however, be more convenient if I set out the passage in question when I come to consider the Trust's criticisms of it – see para. 95 below.

"Post-Termination Detriments"

67. These are addressed at paras. 3/55-57. The parts of those paragraphs relevant to the issues before us read as follows:

> "55. Having found that the Claimant's oral evidence to the Coroner was a protected disclosure, the tribunal have concluded that the press release issued by Mr Burden on 4 July 2013 was a detriment because the decision to refer to the Claimant in the press release was materially influenced by the Claimant's protected disclosure in his written and oral communications to the coroner. The Claimant raised these concerns in the public interest and we have found as a fact that what he was said in both the written report and in the hearing was substantially true. The Press release contained an untrue statement of fact as we have found as a fact above … and therefore it was incorrect to state in the press release that the dismissal was for matters that were unrelated to the death. The tribunal heard no evidence from the Respondent as to why Mr Burden chose to issue a press release straight after the coroner's inquest. The tribunal have concluded that the

> Respondent did so in order to subject the Claimant to a detriment and was materially influenced by the evidence he gave to the coroner's hearing which was consistent with the concerns that he had raised with the Respondent and which had been categorised by the Respondent as being "unproven" "misleading" and "inaccurate" ….
>
> 56. The tribunal have also made extensive findings of fact about the Respondent's referral of the Claimant to the GMC on 5 July. The tribunal conclude that the timing of that referral was no coincidence and was reported in the press release. The tribunal were not wholly convinced that the Claimant had been reported to the GMC in October 2012 as the GMC appeared to have no record of the letter and the Respondent did not chase the matter up until the day after the coroner's hearing. Mr Goulston similarly, when he heard the appeal, felt no compulsion or obligation to report the outcome of the appeal to the GMC even though this is what the October letter was purported to have said. The tribunal were not wholly convinced by the Respondent's evidence that, even if there were a letter of October 2012, the tribunal did not find the evidence of the Respondent as to the reason why the press release should refer to the GMC referral or as to why the GMC were informed on 5 July.[5] The tribunal concluded therefore that the referral to the GMC itself was a detriment because it resulted in the Claimant facing a further investigation into his professional conduct, we conclude that Mr Burden's decision to make the referral that day was materially influenced by the Claimant's evidence of an unsafe service and his version of the events of the 9 June to the coroner's inquest which was a protected disclosure. We also concluded that reference to the GMC referral in the press release resulted in a detriment.
>
> 57. The tribunal similarly concluded that the report produced to the Board Meeting containing a full reference to the wording of the press release also amounted to a detriment as it represented a further publication of the misleading press release to a wider medical audience. This would again subject the Claimant to a detriment and would be a further personal and professional embarrassment to the Claimant and this would impact the claimant detrimentally in the eyes of his professional colleagues."

68. The reference in para. 3/55 to an earlier finding that the press release was untrue is to a finding at para. 2/409 in the following terms:

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5 Something seems to have gone wrong with the language here, but the overall sense is clear enough.

> "… the press release was an inaccurate statement of fact as it was conceded by [Mr Goulston in cross-examination] that the Claimant was dismissed for reasons that related to the death of the patient in that he was dismissed for the contents of the written report to the coroner and for discussion he had with the GP Commissioner (allegation 6 and 7) and for matters in relation to allegation 4 and 8. It cannot be said that these matter were 'unrelated to the death', they were inextricably linked to the death."

THE APPEAL TO THE EAT

69. The Trust challenged the decision of the ET as regards liability on a number of grounds which I need not itemise here. It also challenged the two decisions – on *Polkey* and contributory fault – going to the remedy for the unfair dismissal claim.

70. The judgment of Judge Clark is as short as that of the ET was long. His dispositive reasoning appears in only three paragraphs, as follows:

> "19. The flaw in the Employment Tribunal's reasoning, in my judgment, is that instead of determining 'the set of facts known to the employer, or it may be beliefs held by him, which cause him to dismiss the employee', to adopt the timeless definition of the reason for dismissal formulated by Cairns LJ in *Abernethy v Mott, Hay and Anderson* [1974] ICR 323, the Employment Tribunal has embarked on its own assessment of the conduct charges upheld, first by the Parker panel and then by the appeal panel chaired by Mr Goulston; found them less than compelling and then moved to the conclusion that conduct was not the reason for dismissal but the protected disclosures. What is signally missing from these extensive Reasons is an analysis leading to the conclusion that the evidence of both Mr Parker and Mr Goulston, representing their respective panels, was false and a deliberate attempt to mislead the Employment Tribunal as to the true reason for dismissal.
>
> 20. This error in approach was further compounded by the Employment Tribunal linking, factually, disclosures 8, 9, 11, 13 and 15 to allegations 4, 8 and 9 in the dismissal letter. I accept the submission of Ms McNeill … that at paragraph 53 … the Employment Tribunal wrongly thought that the fact that these disciplinary charges were 'related to' the substance of the disclosures referred to was sufficient to decide the reason question. That is not the correct causation test.
>
> 21. Separately, I can discern no clear reasoning leading to the expressed conclusion that Mr Goulston and his panel members determined the appeal on the basis of the protected disclosures found by the Employment Tribunal, as opposed to the conduct grounds put forward."

71. That conclusion meant that the issues of liability both for unfair dismissal and in respect of the post-termination detriments had to be remitted for re-hearing in their entirety (save that a single finding as to whether disclosure 14 was protected was allowed to stand): Judge Clark directed that they be heard before a differently-constituted tribunal. It also followed that it was unnecessary for any decision to be made on the two remedy issues.

THE ISSUES

72. The Appellant contends that the EAT's reasoning in the three paragraphs quoted above is plainly bad and that the decision of the ET should be restored. The Trust seeks to defend Judge Clark's reasoning but in its Respondent's Notice it repeats other challenges to the ET's reasoning which had been advanced in its original Notice of Appeal to the EAT but on which Judge Clark had expressed no view. It also, if the finding of unfair dismissal is restored, repeats its challenge to the Tribunal's conclusions on *Polkey* and contributory fault. I will deal in turn with the unfair dismissal claim, taking separately the issues of liability and the two points going to compensation, and the detriment claim.

UNFAIR DISMISSAL: LIABILITY

73. I will deal in turn with the issues raised by the appeal itself and the further points on which the Trust relied under its Respondent's Notice.

THE APPEAL

74. Since there is now no dispute that the Appellant made protected disclosures, the only question is whether the ET was right, or in any event entitled, to find that that was the principal reason why he was dismissed.

75. The essential submission advanced by Mr Stilitz was that that question is answered unequivocally by the terms of the dismissal letter itself. Of the six charges which were found proved, four consisted explicitly of the making of the disclosures which the Tribunal had held to be protected. To spell it out:

- Charge 4 was that the Appellant made "various unsubstantiated and unproven allegations of an unsafe service within the interventional cardiology service at Croydon Health Services NHS Trust".

- Charge 6 is that he "made unsubstantiated and unproven allegations of an unsafe service and unsafe staffing levels within the interventional cardiology service" in his initial report to the Coroner.

- Charge 7 is that he made the same "unsubstantiated and unproven allegations" to Dr Fernandes.

- Charge 9 is that he made "persistent claims that the Cath Lab is unsafe due to [Ms Riddle's] presence/management".

There are of course the other two charges, to which I will return presently; but if they are put to one side for the moment the Trust is, Mr Stilitz submitted,

straightforwardly saying "we are dismissing you because you made these disclosures". That submission is entirely consonant with the reasoning of the ET: see para. 63 above.

76. Mr Stilitz acknowledged that by saying explicitly that the Appellant was being dismissed for making the disclosures the Trust was not automatically rendering itself liable for unfair dismissal. What it was in substance saying in the letter (albeit not using the statutory language) was that the disclosures were not protected (principally, though not only, because they were made in pursuit of personal antagonism against Ms Riddle and others and so not in good faith). But that meant that if it lost on that issue, as it did, it was condemned out of its own mouth on the "reason" issue. It was adopting, as he put it, a high-risk strategy.

77. Mr Stilitz pointed out that the fact that in this case the disclosures were (subject to the question of the other two charges) the express reason for the Appellant's dismissal meant that the present case was different from the kind of whistleblowing case which is more commonly encountered in practice, where a dismissal is ostensibly for a legitimate reason but it is said that that is not the true reason. The kinds of problem about the burden of proof considered in *Kuzel* and other such cases simply do not arise here. He accepted that the ET appears not fully to have appreciated this point and had taken a long way round to reach its conclusion; but he submitted that that had not prevented it from eventually asking and answering the right question.

78. Ms McNeill's principal answer to those submissions was that they departed from the "*Abernethy* approach" which is fundamental in all unfair dismissal cases. The decisive issue was not whether *the Tribunal* found the disclosures to be protected but whether *Mr Parker* believed that they were – or, to put the same thing another way, whether they would have been protected if the facts were as he believed them to be. Take the paradigm case of a dismissal for misconduct falling for consideration under section 98. If an employer believes that an employee has stolen from the till, the "reason" for the consequent dismissal is misconduct even if it is subsequently proved that the theft was carried out by someone else. The only issue at the "reasons" stage of the enquiry is whether the employer's belief is genuine – though of course if the belief is unreasonable he will fail at the second stage under section 98. It made no difference that the particular reason in play in the present case was the making of a protected disclosure: the same approach is required. Section 103A had been incorporated into Part X of the 1996 Act and must be interpreted in conformity with the general principles of unfair dismissal law.

79. Applying that approach to the present case, Ms McNeill submitted that it was the Trust's case throughout, and his own evidence, that Mr Parker genuinely believed that the Appellant made the disclosures in question in pursuit of his personal antagonism against (primarily) Ms Riddle and with a view to securing the reinstatement of Sister Jones; in which case the disclosures would plainly have been made in bad faith and would not be protected. The question was (at the first stage) whether that was indeed his belief. The Tribunal had made no finding about that, or in any event none that was sustainable. Mr Stilitz's submissions side-stepped that question altogether.

80. In my view Mr Stilitz's approach to this issue is plainly right and Ms McNeill's plainly wrong. It is necessary in the context of section 103A to distinguish between the questions (a) whether the making of the disclosure was the reason (or principal reason) for the dismissal; and (b) whether the disclosure in question was a protected disclosure within the meaning of the Act. I accept that the first question requires an enquiry of the conventional kind into what facts or beliefs caused the decision-maker to decide to dismiss. But the second question is of a different character and the beliefs of the decision-taker are irrelevant to it. Parliament has enacted a careful and elaborate set of conditions governing whether a disclosure is to be treated as a protected disclosure. It seems to me inescapable that the intention was that the question whether those conditions were satisfied in a given case should be a matter for objective determination by a tribunal; yet if Ms McNeill were correct the only question that could ever arise (at least in a dismissal case) would be whether the employer *believed* that they were satisfied. Such a state of affairs would not only be very odd in itself but would be unacceptable in policy terms. It would enormously reduce the scope of the protection afforded by these provisions if liability under section 103A could only arise where the employer itself believed that the disclosures for which the claimant was being dismissed were protected. In many or most cases the employer will not turn his mind to the question whether the disclosure is protected at all. Even where he does, most often he will be convinced, human nature being what it is, that one or more circumstances are present that mean that the disclosure is unprotected – for example, that it was unreasonable for the employee to believe that the relevant "section 43B matter" was engaged; or that the disclosure was made in bad faith or was not in the public interest; or, in the case of disclosure under 43G, that one or more of the additional requirements for protection was not satisfied. I do not believe that Parliament can have intended employees to be unprotected in such cases. In my view it is clear that, where it is found that the reason (or principal reason) for a dismissal is that the employee has made a disclosure, the question whether that disclosure was protected falls to be determined objectively by the tribunal.

81. I do not believe that that approach involves any inconsistency with the general approach to establishing the reason for a dismissal adopted in cases under section 98. The fact that a "subjective" approach is necessary to deciding whether the reason for dismissal relates to capability or conduct under heads (a) and (b) of sub-section (2) does not mean that the same approach is required to any questions of legal classification that might arise in the context of other potential reasons for dismissal. In fact, that can be seen in the context of section 98 itself. Sub-section (2) (d) covers the case where the employee's continued employment would be in breach of a statutory requirement. It is well established that in such a case the question is not whether the employer believed that that would be the case but whether it was in fact so: see *Bouchaala v Trust House Forte Hotels Ltd* [1980] ICR 721, per Waterhouse J at p. 725 B-H.[6]

[6] The reasoning of the industrial tribunal which was disapproved in that case in fact bears a striking similarity to Ms McNeill's submissions before us. (I should say that

82. It is true that Ms McNeill's submission would have no application in the case of "whistleblower detriment" other than dismissal, i.e. under section 47B: that is because her case depends specifically on the fact that Parliament has chosen to provide for protection against dismissal within the general framework of unfair dismissal law, whereas section 47B falls another part of the Act. In this connection she referred us to the decision of this Court in *NHS Manchester v Fecitt* [2011] EWCA Civ 1190, [2012] ICR 372. That was a case under section 47B. One of the issues was whether, in order to decide whether a detriment should be treated as having occurred "on the ground that" the claimant had made a protected disclosure, it was sufficient that the making of the disclosure was a significant part of the employer's motivation or whether it was necessary that it be the only or principal reason. Counsel for the employer argued for the latter approach, in order to avoid the anomaly of different approaches applying to detriment claims under section 47B and dismissal claims under section 103A. The Court rejected that submission. As to the anomaly, Elias LJ said, at para. 44 (p. 384 C-D):

> "… it seems to me that that is simply the result of placing dismissal for this particular reason into the general run of unfair dismissal law."

I do not believe that that observation advances the argument in our case. In the first place, the Court in *Fecitt* was concerned with a different and lesser anomaly than that which would arise if "protected disclosure" were interpreted objectively for the purpose of section 47B but subjectively for the purpose of section 103A. But, more fundamentally, the anomaly recognised in *Fecitt* followed inevitably from the language and structure of the statutory provisions. That is not the case here. For the reasons already given, there is no reason to construe section 103A in the way contended for by Ms McNeill.

83. I return to the fact that the reasons for the Appellant's dismissal included the other two charges, which are not directly related to the making of protected disclosures. As to that, Mr Stilitz submitted that the "behaviour communication and attitudes" towards (in particular) Dr Qasim and Ms Riddle which were the subject of charge 8 consisted to a very large extent of the various complaints which he had made about them and was accordingly inextricably intertwined with the protected disclosures. He noted that that was the ET's conclusion too: see the reference in para. 3/53 to the disclosures being relied on for the purpose of "allegations 4, 8 and 9". He acknowledged that charge 2 – that the Appellant had refused to work on 4 August – did not have anything to do with a protected disclosure; but he submitted that on any sensible view this was not the core of the case against him. He submitted that, taking the decision letter as a whole, it was plainly the making of the protected disclosures which constituted the "principal reason" for his dismissal; and in any event that was a conclusion which the ET was entitled to reach.

84. Ms McNeill did not, I think, dispute that the question which of the reasons given in the dismissal letter constituted the principal reason was a matter for

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Bouchaala was not cited to us, but since it is not central to my reasoning I have not thought it necessary to seek the parties' submissions on it.)

the assessment of the ET, or that a decision that the charges based on the protected disclosures were more important than the other two charges was one which was open to it. But she submitted that the making of that assessment by the Tribunal was vitiated by errors in its consideration of Mr Parker's reasoning about charge 8 in the earlier part of the "Decision" section. The relevant paragraphs are 3/43-48. In those paragraphs the Tribunal essentially found that Mr Parker's approach to the evidence was one-sided and that he had uncritically accepted the evidence about the Appellant's conduct given by Dr Qasim, Ms Riddle and Mr Kemp without considering compelling contrary evidence from the Appellant himself and other sources. Ms McNeill submitted that those criticisms of Mr Parker were unfounded and that he could be shown to have reached a balanced conclusion. She referred in particular to an observation by the Tribunal at the beginning of para. 3/46 to the effect that "no evidence was provided to show the basis on which" the Appellant was found to have bullied, harassed and intimidated Ms Riddle. She took us to passages in the transcript of Ms Riddle's evidence at the disciplinary hearing in which she explicitly complained of such treatment and submitted that this demonstrated that the Tribunal's statement was unsustainable. She submitted that if the Tribunal had not made those errors it would, or in any event might, have found that Mr Parker was entitled to find charge 8 proved; and that that conclusion should, or in any event might, have affected its assessment of what was the principal reason for the Appellant's dismissal.

85. I do not accept that submission. I do not in fact believe that in the sentence which Ms McNeill particularly criticised the Tribunal meant to say that there was no evidence before Mr Parker that the Appellant had bullied Ms Riddle. That would be inconsistent with the broader criticism made in these paragraphs, which was, as I have said, that he uncritically accepted the evidence from her and the other Trust witnesses. I think that it meant that Mr Parker gave no evidence to the Tribunal about how he approached the conflict in the evidence before him. But in any event the findings about the fairness of Mr Parker's approach were not central to the decision about which of the reasons given by the Trust for dismissing the Appellant was the principal reason. That depended on looking into his mind and assessing which of the charges were likely to have carried the most weight: for that purpose it was immaterial whether his prior finding that the charges were proved was fair.

86. Against that background I can deal fairly briefly with the bases on which the EAT allowed the appeal. Para. 19 of the judgment of the EAT appears to make two criticisms of the ET's reasoning, though they are possibly related. I take them in turn.

87. The more fundamental criticism in para. 19 appears to be that the ET's finding of liability under section 103A necessarily involved a conclusion that Mr Parker and Mr Goulston had deliberately given false evidence as to their reasons for making the decisions that they did, but that the ET does not give any basis for such a conclusion. That is a rather dramatic way of putting it, which may tend to distract from the real point. Although, as we have seen, the Appellant did in the ET accuse Mr Parker and Mr Goulston of consciously participating in a sham – apparently in the EAT also Ms Iyengar referred to "a

conspiracy" – which would indeed necessarily mean that their evidence had been dishonest, liability did not depend on that being established. On the contrary, for the reasons that I have given above, both of them (though I am not sure how relevant Mr Goulston really is in this context) may perfectly honestly (or indeed reasonably) have believed that the Appellant's disclosures had been made in bad faith; and, for what it is worth, I do not read the Tribunal as having found that either Mr Parker or Mr Goulston were lying or consciously participating in a conspiracy – its criticisms go to the reasonableness of that belief rather than its honesty. But none of that matters if the Tribunal, as it did, disagreed with the assessment of the Trust's decision-makers and found that the disclosures were in fact made in good faith and were protected. So the whole of this criticism falls away.

88. Judge Clark's other criticism in para. 19 seems, though the reasoning is very compressed, to be that the ET reached its conclusion as to the reason for the dismissal simply by deciding that the case of misconduct against the Appellant was weak and jumping from that to the conclusion that the reason for the dismissal was the making of the protected disclosures. It will have been noted from paras. 3/49 and 3/51 that the ET was indeed unimpressed by the Trust's case of misconduct and that that featured in the first stage of its elaborate reasoning. But it is a travesty to say that that was the whole basis of its conclusion. On the contrary, as I have shown, it repeatedly returned to the fact that the Trust itself relied on the making of the disclosures in the dismissal letter; and that is what matters.

89. In para. 20 of his judgment Judge Clark focuses on the statements in the first two sentences of para. 3/53 (see para. 62 above) that particular disclosures were "related to" particular charges and accepts Ms McNeill's submission that that showed that it had adopted the wrong approach to causation. That is not remotely a fair criticism. The Tribunal had already found in its previous paragraphs that the making of the disclosures was the principal reason for the dismissal of the Appellant, a finding based squarely on the explicit reliance on them in the decision letter. All that it was doing in para. 3/53 was, as it believed was good practice in the light of *Blackbay*, marrying up the particular disclosures to the particular charges. Although the use of the phrase "related to" can in some cases be a sign of error – we were referred to *London Borough of Harrow v Knight* [2002] UKEAT 0790/01, [2003] IRLR 140 – in this context it was quite unexceptionable.

90. As for para. 21 of the judgment, I have not in fact been able to identify a passage in the ET's Reasons which is in the terms criticised. But in any event I do not understand the criticism. The whole point of the Appellant's case is that "the conduct grounds put forward" were, principally, the making of the protected disclosures. The basic reason why the ET accepted that case was, as I have said, the terms of the decision letter itself; but, since this criticism focuses on the appeal, it is worth noting that the ET makes the point at para. 3/50 (see para. 56 above) that Mr Goulston's own evidence in cross-examination reinforced its conclusion.

THE RESPONDENT'S NOTICE

91. In its appeal to the EAT the Trust had contended that a large number of the ET's findings of fact were perverse. The EAT did not find it necessary to address that issue. In its Respondent's Notice the Trust raises the same contentions again by way of fallback (though the case is rather differently pleaded and it may be that not all the original criticisms are pursued).

92. The Respondent's Notice pleads twenty "key findings" by the ET which are said to have been perverse. Ms McNeill did not address most of these in her oral submissions. However, even to the extent that she did so I do not find it necessary to consider them. That is because none of them impinges on the issues which are dispositive of liability. The great majority of the alleged errors (specifically, nos. (ii)-(xii) and (xv)-(xviii)) concern findings by the Tribunal about – broadly speaking – Mr Parker's approach to the disciplinary hearing and the conclusions which he reached about the Appellant. Two (nos. (xix) and (xx)) relate to the appeal. Those might indeed be material if we were concerned with liability under section 98, because the reasonableness of the conclusions reached by Mr Parker would be of central importance at the second stage of the enquiry. But the Appellant succeeded under section 103A; the finding under section 98 in para. 3/54 was made only "for completeness" and has no content if the finding under section 103A stands. None of the allegedly erroneous factual findings about Mr Parker's approach (or that of Mr Goulston) is material to liability under section 103A. The issues which are dispositive of liability on that issue are (a) whether the making of the disclosures in question was the principal reason for the Appellant's dismissal and (b) whether those disclosures were protected, which in practice means whether they were made in good faith. As regards (a), despite the rather convoluted reasoning process which it followed, the conclusion reached by the Tribunal depended primarily on what the Trust itself said in the dismissal letter, which speaks for itself. As for its conclusion on the only other issue, namely the relevance of charges 2 and 8, that depends on an overall assessment of the relative importance of the various charges which could not be affected by errors of the kind alleged. As to (b), the focus here must be on the Tribunal's assessment of the Appellant, but, as I have said, almost none of the factual errors related to the Tribunal's assessment of the Appellant's good faith.

CONCLUSION ON LIABILITY FOR UNFAIR DISMISSAL

93. For those reasons I do not believe that there was any error of law in the Tribunal's conclusion that the Appellant was unfairly dismissed under section 103A of the 1996 Act, and I would allow the appeal in this regard.

94. I wish to add this. It comes through very clearly from the papers that the Trust regarded the Appellant as a trouble-maker, who had unfairly and unreasonably taken against colleagues and managers who were doing their best to do their own jobs properly. I do not read the Tribunal as having found that that belief was anything other than sincere, even though it found that it was unreasonable. But it is all too easy for an employer to allow its view of a whistleblower as a difficult colleague or an awkward personality (as whistleblowers sometimes

are) to cloud its judgement about whether the disclosures in question do in fact have a reasonable basis or are made (under the old law) in good faith or (under the new law) in the public interest. Those questions will ultimately be judged by a tribunal, and if the employer proceeds to dismiss it takes the risk that the tribunal will take a different view about them. I appreciate that this state of affairs might be thought to place a heavy burden on employers; but Parliament has quite deliberately, and for understandable policy reasons, conferred a high level of protection on whistleblowers. If there is a moral from this very sad story, which has turned out so badly for the Trust as well as for the Appellant, it is that employers should proceed to the dismissal of a whistleblower only where they are as confident as they reasonably can be that the disclosures in question are not protected (or, in a case where *Panayiotou* is in play, that a distinction can clearly be made between the fact of the disclosures and the manner in which they are made).

UNFAIR DISMISSAL: COMPENSATION

95. As already noted, at the end of para. 3/54 the Tribunal touched briefly on the question of remedy. The passage reads:

> "The Tribunal also make no deduction for *Polkey* or for contribution as on the facts before us we have seen no consistent evidence that, had a fair procedure been followed, dismissal would have been a likely outcome. As we have found the Claimant's evidence consistent, we do not conclude that he has contributed to the dismissal so no deduction will be made for contribution."

96. Unsurprisingly, Ms McNeill submitted that that is a very summary way of dealing with two issues of great importance. But she developed that submission in more specific terms, and I should take the *Polkey* and contributory fault issues separately.

POLKEY

97. I start by identifying the nature of the Trust's *Polkey* case. Mr Scott's written closing submissions in the ET contended that, if the Tribunal found that the Appellant's dismissal for the reason, or in the manner, that he was was unfair, he would nevertheless have inevitably been (fairly) dismissed for one or both of two reasons:

    (1) He was refusing to return to work unless and until Ms Riddle and Matron Lynch were "removed". That was a wholly unreasonable stance and one which put the Trust in an impossible position.

    (2) On 16 June 2011, when e-mailing to Dr Asif about a forthcoming meeting, he referred to the agreement between them which had been reached as a result of the mediation the previous year. That was confidential, but he copied the e-mail to a number of people who were unaware of it. He was informed on 19 August that he would face

> disciplinary action in that regard; but as I understand it no further action was taken pending the outcome of Mr Hayward's investigation.

98. As can be seen, neither of those points is referred to by the Tribunal in its single sentence rejecting the Trust's *Polkey* case. Ms McNeill submitted that that was a manifest failure on the part of the Tribunal to comply with its obligation to give a properly reasoned decision on an important issue. She also submitted that its use of the phrase "had a fair procedure been followed" suggested that it believed that the *Polkey* issue arose only if the dismissal were unfair for procedural reasons, which would be wrong in law.

99. Mr Stilitz submitted that the Tribunal's conclusion must be read in the light of its findings elsewhere in the Reasons. As regards Mr Scott's point (a), he took us to a number of passages in the "Findings" section, at paras. 2/174, 194, 196, 198 and 243. I need not set them out. In them the Tribunal finds that the Appellant never asked that either Ms Riddle or Matron Lynch be removed from their posts, only that he should not have to work with them in the Cath Lab. There are no clear findings about the extent to which that would impinge on what would otherwise have been their duties. In the case of Matron Lynch the Tribunal notes that she was not herself trained in Cath Lab work. In the case of Ms Riddle, the way that the Tribunal puts it at para. 2/243 is that the Appellant had only required that she be "removed … from the office next to the Cath Lab" (apparently Ms Riddle's office was not in the Lab itself but directly adjacent). The Tribunal also finds that he took the position that he did out of a genuine concern for patient safety. because he believed that their presence in (or, I suppose, immediate proximity to) the unit would have an unsettling effect on the nursing staff in "the clinical area". As regards point (b), Mr Stilitz referred us to para. 2/115, where the Tribunal records and accepts his evidence that he had "hit the wrong button" (i.e., presumably, clicked on "Reply All"); it also records that in his oral evidence he acknowledged that the tone of the e-mail had been inappropriate and apologised. Mr Stilitz submitted that it was plainly those findings that underlaid the Tribunal's conclusion that (fair) dismissal would not have been a likely outcome; and that on the basis of that evidence that was a conclusion that was open to it.

100. I have not found this aspect of the case easy. It is unfortunate that the Tribunal did not directly address Mr Scott's submissions in terms and explain why it rejected them: these were important issues, capable of making a fundamental difference to the quantum of any award. I accept that it is nevertheless legitimate to look at other parts of the Reasons in order to try to find out what its reasons in fact were. But even if one refers to the passages relied on by Mr Stilitz they do not constitute a fully explicit answer to the Trust's particular case. I have no problem about the sending of the e-mail of 16 June 2011: on the Tribunal's findings this was clearly not something that could have led to the Appellant's dismissal. But I am more troubled about his insistence on the "removal" of Ms Riddle and Matron Lynch. Although the Tribunal clearly found that he was not seeking their dismissal, there is no finding as to how problematic their removal from the Cath Lab would have

been; if it was indeed a wholly unreasonable demand, it seems to me that it might indeed have justified his eventual dismissal.

101. However it is necessary to view this point in the wider context of the Tribunal's findings. As I have observed at para. 44 above, in the course of the exhaustive narrative contained in the Findings section the Tribunal consistently found that where the Appellant and the various Trust managers came into conflict it was the Appellant's stance which was the more reasonable. In that context, it seems to me clear that the Tribunal took the view, albeit without condescending to particulars, that the Appellant's stance about Ms Riddle and Matron Lynch also was not one which – however precisely it might have played out – could have led to his dismissal. Although it would have been better if it had said so in terms, I do not believe that the Tribunal was under an obligation to make a specific finding about how exactly the problem might have been resolved. That is not the nature of the *Polkey* exercise, which is simply to make an assessment, of what will often have to be a fairly broad-brush nature, about what might have happened in a hypothetical situation which never in fact transpired.

CONTRIBUTORY FAULT

102. The passage in Mr Scott's closing submissions in the Tribunal raising the issue of contributory fault under section 123 (6) reads simply:

> "The Respondents also respectfully submit that if, contrary to the Respondent's submissions, the claimant is found to have been unfairly dismissed his conduct was such that he contributed substantially to and brought about his own dismissal and any losses should thus be reduced by a very high percentage."

103. In so far as that was intended to invoke compendiously the Trust's allegations that the Appellant had acted unreasonably throughout, the Tribunal was entitled to answer it in equally compendious terms: its statement that "we do not conclude that he has contributed to the dismissal" is amply supported by its previous detailed findings. I suspect that in fact it was intended to pick up on the specific matters relied on in support of the *Polkey* submission, which immediately preceded it; and that is supported by the fact that the Trust's Notice of Appeal to the EAT on the contributory fault issue (reproduced in the Respondent's Notice) complains specifically only of "the Claimant's approach to lawful management instructions and his insistence that he would not work in the Catheter lab if Ms Riddle or Matron Lynch were present". If so, it is clear from the findings referred to by Mr Stilitz (see para. 99 above) that the Trust did not regard the Appellant as having acted culpably.

104. Ms McNeill in her oral submissions relied in particular on the allegations of bullying that Ms Riddle had made against the Appellant: although Ms Riddle did not give evidence in the ET the transcript of her evidence was, as already noted, before it. That does not appear to be how the case was put below, so the Tribunal cannot be criticised for not dealing specifically with it. But Mr Stilitz in any event referred us to a number of passages in the Findings section

in which the Tribunal appears not to accept those allegations. For example, at para. 2/92 it rejected the allegation that at the meeting of 10 June 2011 the Appellant was motivated by any personal antagonism towards Ms Riddle and recorded that, on the contrary, it was she who appeared to have "an unexplained antagonism" towards him.

105. Mr Stilitz submitted that the Tribunal would not in any event have been entitled as a matter of law to make a finding of contributory fault in a case under section 103A. He referred to section 123 (6A), which was inserted into the 1996 Act with effect from 25 June 2013 and permits a tribunal, where an employee has been dismissed for making a protected disclosure but the disclosure was made in bad faith[7], to reduce the award by no more than 25%. He submitted that the existence of a right to reduce compensation under section 123 (6) in a whistleblower case would be inconsistent with that provision. As at present advised I can see no such inconsistency. But I need not express a final view since section 123 (6A) was not in force at the material time. Under the Act as it stood at the time of dismissal there seems to me no basis for holding that section 123 (6) is inapplicable in whistleblower cases; and I note that the EAT so held in *Audere Medical Services Ltd v Sanderson* [2013] UKEAT/0409/12: see *per* HHJ Serota QC at para. 49.

LIABILITY: DETRIMENT

106. Judge Clark allowed the Trust's appeal on the section 47B claim on the basis that his criticisms of the ET's reasoning on the section 103A claim applied to both equally. If the appeal is allowed as to the latter it must apply also to the former, subject only to the points advanced in the Respondent's Notice. Three grounds are advanced there (see para. 7 (i) (a)-(c)).

(1) THE REFERRAL TO THE GMC

107. The detriment with which we are here concerned is the sending of the Trust's second letter to the GMC, notifying it of the outcome of the appeal, which the Tribunal found was sent as a result (at least in part) of the Appellant's evidence at the inquest: see para. 3/56, set out at para. 67 above. This ground is based on the Tribunal's observation that it was "not wholly convinced" that the Trust had ever sent the first letter to the GMC, for the reasons which it summarises (and which reflect a fuller discussion in the "Findings" section – see paras. 2/410-412). It is said that it was necessary for the Tribunal to make a firm finding on this one way or the other.

108. If the detriment found by the Tribunal consisted in the sending of the first letter the Trust's point would be obviously correct. But it does not. It consists in the sending of the second letter, as to which there is no dispute. I appreciate that the Tribunal refers to that letter in para. 3/56 as "the Respondent's referral of the Claimant to the GMC", which is inaccurate if there was an earlier referral letter to which this was only a follow-up; and it may be that the Trust's real point is that the Tribunal would not have regarded the letter of 5

[7] From 25 June 2013 the absence of good faith is of course no longer a defence: see para. 25 above.

July 2013 as a detriment if it was in truth only an update. But I do not read it that way. I think that the Tribunal regarded the sending of the "second" letter as a detriment whether or not there had been an earlier letter, which is why it did not find it necessary to decide the point. I agree that the seriousness of that detriment may well depend on whether the first letter was ever sent: if it was, then it could be argued that the second letter did not add much to the damage already done. That question may have to be resolved at the remedy hearing.

(2) THE PRESS RELEASE

109. Two distinct points are taken about the press release, which I consider in turn.

110. First, it is said that the press release contained nothing "untrue". I have set out at para. 68 above the Tribunal's reason for finding that it was misleading to describe the Appellant's dismissal as "unrelated" to GS's death. I think I can see what the Trust probably meant by that language, namely that the Appellant was not dismissed for any mistake or incompetence in the carrying out of the procedure. But if so it expressed itself badly. For the reasons given by the Tribunal I agree that in the context of the press release the statement gave a misleading impression. Having said that, I am bound to say that I am not sure how important this issue really is. What is likely to have been damaging to the Appellant is not so much the Trust's use of this particular phrase as the public statement that "following a disciplinary procedure" he had "left the Trust" – a rather mealy-mouthed formulation which would however clearly be understood (correctly) to mean that he had been dismissed – and also that he had been "referred to the General Medical Council for further investigation". Even if those statements were literally true, it is not clear why they needed to be made in a press release about the outcome of the inquest (still less if the Trust believed that the Appellant's departure was indeed for unrelated reasons).

111. The second point pleaded under this ground is that the ET should not have made a finding of an unlawful detriment under section 47B without a finding, which it did not make, that the Trust had knowingly issued an untrue press statement with the aim of damaging the Appellant. It is not of course necessary as a matter of law that any detriment should be maliciously motivated; but, as I understand it from the skeleton argument, the Trust's point is that the Appellant had expressly alleged a malicious motive and the ET should have made a finding on that allegation. Ms McNeill did not develop this point in her oral submissions, and I can see nothing in it. As I have already said, the Appellant appears at several points to have put his case unnecessarily high, and a tribunal is not obliged to address every allegation made in a case irrespective of whether it is relevant to legal liability.

(3) THE REPORT TO THE BOARD

112. The Trust treated the report to the Board as a further detriment in as much as it repeated, to a different audience, the points made in the press release. This ground simply repeats in that context the points considered under (2) above; and I dismiss it for the same reasons.

CONCLUSION ON LIABILITY FOR DETRIMENT

113. For those reasons I do not believe that there was any error of law in the Tribunal's conclusion that the Appellant was subjected to the unlawful detriments which it found, contrary to section 47B of the 1996 Act, and I would allow the appeal in this regard also.

DISPOSAL

114. I would allow the appeal and restore the findings of the Employment Tribunal on all points. The case will now have to proceed to a remedy hearing unless the parties are able to reach agreement.

Lady Justice King:

115. I agree.

Sir Terence Etherton, MR:

116. I agree that this appeal should be allowed for the reasons given by Underhill LJ.