THE EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		*Respondent*
Ramon Etienne Niekrash	**and**	**South London Healthcare NHS Trust**

Dates of hearing: 9-11, 14-18, 21 & 22 September, 4 & (in chambers) 25-27 November & 14 December 2009

JUDGMENT

It is the unanimous judgment of the Tribunal that the Claimant was subject to detriments by the Respondent on the ground of having made protected disclosures to the extent set out in the reasons below, but not further or otherwise.

The matter will be listed for consideration of a remedy for the Claimant.

REASONS

Introduction

1 The Claimant was employed by the Respondent as a Consultant Urologist from January 2000 and remains so employed. The Claimant presented a claim to the Tribunal on 8 October 2008 alleging, in summary, that he had 'suffered ongoing detriment by the Respondent on the grounds that the Claimant [had] made protected disclosures.' The Respondent presented a response on 5 November 2008. The claim was made against Queen Elizabeth Hospital NHS Trust and the response was presented by that body. There has subsequently been a merger with another NHS Trust and the Respondent is now as above. Nothing turns on the point.

2 There was a case management discussion on 13 March 2009 at which the issues, the alleged disclosures and the alleged detriments were discussed. Those matters were refined during the course of this hearing.

3 The Claimant was represented at this hearing by Jennifer Eady QC, and the Respondent by Sally Cowen of Counsel.

4 We were provided with bundles of documents consisting of more than 1500 pages. Further documents were introduced by agreement during the hearing. As agreed with Counsel we have only taken into account those documents, or parts of documents, to which we were referred during the hearing. The bundles were not organised in chronological order but rather by topic. No doubt whoever made that decision thought

that that was a more useful method. We have found that it has delayed us in our deliberations because it has been necessary to find the facts in a generally chronological order so as to put events into context.

5 The individuals mentioned in these reasons or from whom we heard evidence are as listed below. The names of those who gave evidence are underlined. Those whose names are in italics gave evidence for the Claimant. The remainder gave evidence for the Respondent. The posts stated are those held by the relevant individual at the material time.

Mrs Maryse Barwood - British Medical Association (BMA) Industrial Relations Officer
Mr Robert Baxter – Consultant Anaesthetist
Dr Phyllis Campbell - Occupational Health Medical Adviser
Mr Nick Cetti - Lead Consultant Urologist until October 2007
Mr John Edwards - British Medical Association (BMA) representative / Senior Employment Adviser / BMA
Ms Louisa Fleure – Clinical Nurse Specialist
Mr H Hammadeh - Consultant Urologist from April 2007
Dr David Heath - NCAS
Polly Hird – General Manager Surgery from October 2006
Mrs Lynda Holt - Managing Director, Dolan & Holt Consultancy Limited / Case Investigator
Ms Sarah-Jane Holt - Radiographer, Churchill Hospital, Oxford
Dr Robin Ireland - Lead Cancer Clinician
Dr Dapo Ilo – Specialist Registrar
Mr Roy Isworth - Consultant Urological Surgeon and Lead Consultant for Urological Cancer from November 2007
Lady Ann Jenkins - Trust Vice Chairman
Mrs Valerie Kelly - General Manager - Specialist Medicine / Grievance Investigator
Ms Sarah Lacey - Operational Manager
Ms Caroline Linden - HR Manager
Ms Sandra Martin - Operational Manager, Surgery
Mr Andrew Montgomery - Lead Clinician Surgical Directorate and former Clinical Director, Surgery
Mr Ramon Niekrash - Claimant - Consultant Urological Surgeon and Lead Consultant for Urological Cancer until November 2007
Mr John Pelly –Chief Executive until March 2008
Dr Sharon Power – Former Clinical Director – Surgery
Dr David Robson – Medical Director and subsequently Interim Chief Executive from April 2008
Mrs Anne Rossi – IT Coordinator
Ms Ruth Russell – General Manager Surgery to October 2006 and then Director of Clinical Services
Mr Nik Sarangi – Consultant and Lead Clinician for Urology after Mr Cetti
Mr G Sekar – Associate Specialist Urology until mid 2007
Mrs Sally Storey – Director of Human Resources
Dr David Sulch – Clinical Director to April 2008 and thereafter Medical Director

Ms Anneliese Weichart – General Manager Surgery from May 2007
Ms Jemma Wells – Head of Nursing – Surgery
Dr Wozniak – Specialist Registrar

6 This claim is brought under section 48(1) of the Employment Rights Act 1996 alleging a breach of section 47B(1), which is as follows:

> **47B Protected disclosures**
> (1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.

7 Section 48(2) provides as follows:

> (2) On such a complaint [u
> which any act, or deliberate failure to act was done.

8 The issues to be determined by the Tribunal as agreed during the case management discussion held on 13 March 2009 included questions as to whether the matters alleged by the Claimant to be protected disclosures were in fact protected disclosures. Miss Cowen accepted at the commencement of this hearing that each of those matters was a protected disclosure as defined in 43A of the Employment Rights Act 1996. She thereby accepted that the qualifying disclosures became protected disclosures as they complied with section 43C. The Respondent therefore acknowledges that each disclosure was made in good faith, and not for an ulterior motive. Because of the concession the Tribunal was not addressed on the issue of what information each disclosure was said to have disclosed.

9 The relevant statutory provisions defining protected disclosures are as follows:

> **43A Meaning of 'protected disclosure'**
> In
> which is made by a worker in accordance with any sections 43C to 43H.
>
> **43B Disclosures qualifying for protection**
> (1) In
> reasonable belief of the worker making the disclosure, tends to show one or more of the following—
>
> (a
> committed,
> (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,
> (c
> (d) that the health or safety of any individual has been, is being or is likely to be endangered,
> (e) that the environment has been, is being or is likely to be damaged, or
> (f) that information tending to show any matter falling within anyone of the preceding paragraphs has been, or is likely to be deliberately concealed.
>
> (2) For the purposes of subsection (1), it is immaterial whether the relevant failure occurred, occurs or would occur in the United Kingdom or elsewhere, and whether the law applying to it is that of the United Kingdom or of any other country or territory.
> (3)
> disclosure commits an offence by making it.

(4) A disclosure of information in respect of which a claim to legal professional privilege (or, in Scotland, to confidentiality as between client and professional legal adviser) could be maintained in legal proceedings is not a qualifying disclosure if it is made by a person to whom the information had been disclosed in the course of obtaining legal advice.
(5) In
falling within paragraphs (a) to (f) of subsection (1).

43C Disclosure to employer or other responsible person
(1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure in good faith—

(a) to his employer, or

(b) where the worker reasonably believes that the relevant failure relates solely or mainly to—

(i) the conduct of a person other than his employer, or

(ii) any other matter for which a person other than his employer has legal responsibility,

to that other person.

(2) A worker who, in accordance with a procedure whose use by him is authorised by his employer, makes a qualifying disclosure to a person other than his employer, is to be treated for the purposes of this Part as making the qualifying disclosure to his employer.

10 The list of disclosures as identified at the case management discussion is set out below with some minor modifications made during this hearing.

List of protected disclosures:

1 13,15 and 21 July 2005: Memoranda to Dr Robson re the impact of the closure of Urology Ward 20.[1]

2 18 August 2005: Memorandum to Dr Ireland re the impact of the closure of Urology Ward 20 and Registrar training.[2]

3 19 September 2005: Memorandum to Dr Robson re the impact of the closure of Urology Ward 20.[3]

4 12 May 2006: Memorandum to Ruth Russell re the impact of the closure of the Erectile Dysfunction Clinic.[4]

5 1 January 2007: Memorandum to John Pelly re the impact of the closure of Ward 20.[5]

6 20 June 2007: Memorandum to Ruth Russell re chronic problems with the Outpatient Clinic.[6]

7 12 July, 16, 17 August 2007: Letters to Ms Weichart regarding Job Plan.[7]

8 30 August 2007: Meeting between the Claimant and Dr Power re Job Plan.[8]

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[1] 173, 174 & 175

[2] 188

[3] 206

[4] 223

[5] 208

[6] 239

[7] We have not been able to find the letter of 12.07.07. The others are at 411 & 413 respectively.

[8] See letter at 420.

9 18 October 2007: Meeting between the Claimant, Ms Weichart re Job Plan.[9]
10 19 October 2007: Letter to Ms Weichart re Job Plan, harassment.[10]
11 30 October 2007: Letter to Ms Weichart re Job Plan, harassment.
12 2 November 2007: Letter to Dr Robson summarising key problems and concerns with the Urology Service.[12]
13 12 November 2007: Letter to Dr Robson re Job Plan and Outpatient Clinic.
14 3 December 2007: Letter to Dr Robson claiming bullying and harassment.
15 4 December 2007 Letter to Ms Linden re Job Plan and review.[1]
16 7 December 2007: Letter to Dr Robson highlighting problem areas in respect of Hospital Acquired Infection.[16]
17 24 December 2007: Letter to Ms Weichart re Prospective Cover payment by 7 January 2008 and claim through the Small Claims Tribunal.[17]
18 27 December 2007: Memo to Ms Weichart regarding problems with the Urology Clinic Service and potential negligence.[1]
19 28 December 2007: Letter to Sally Storey regarding claim of bullying and harassment.[19]
20 10 January 2008: Letter to Ms Weichart regarding chronic problems with the Outpatient Clinic.[20]
21 15 January 2008: Letter to Ms Weichart re: crisis,
22 4 March 2008: Memorandum to Dr Robson about the impact of

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[9] See letters at 425 & 426.

[10] 426

[11] 434

[12] 260

[13] 444

[14] 582

[15] 449

[16] 212

[17] 459

[18] 273

[19] 586

[20] 276

[21] 277

[22] 493

[23] 286

[24] 292

[25] 291

the failure of urology surgeons to participate in major cancer surgery at Guys & St Thomas Hospital.

23 14 March 2008: Memorandum to Dr Sarangi waming of risks arising from the continuation of unsupervised 'middle grade activity'.

24 18 March 2008: Memorandum to Dr Robson about unsafe medical practices of 'unsupervised middle grade activity'.

25 18 March 2008: Letter to Dr Robson, Jemma Wells, & Ms Weichart on the delayed review of cancer patients and stating that the 'patient would have a very good case of negligence against the Trust'.

11 The alleged detriments alleged to have been suffered as a consequence of the making of the protected disclosures were identified at the case management discussion.
submissions as follows:

1 From October 2007 to October 2008, the Respondent prevented the Claimant from participating in cancer surgery at Guy's and St Thomas'

2 The Respondent failed to make retrospective payments to the Claimant for prospective cover provided by the Claimant in October to November 2007.

3 From October 2007 onwards,
remunerate the Claimant for prospective cover.

4 From July to December 2007, the Respondent put pressure on the Claimant to incorporate an additional clinic into his work duties in excess of his contractual obligations.

5 From October 2007, the Respondent used a 'time card'
analyse the Claimant's work activities.

6 From October 2007, the Respondent required the Claimant to run a 'parallel activity' which
Surgeons'

7 The Respondent unduly pressurised the Claimant to swap one activity for another.

8 The Respondent unreasonably delayed agreeing a job plan with the Claimant for 16 months.

9 Dr Power and Ms Weichart raised unsubstantiated and potentially defamatory allegations against the Claimant in their letters dated 22 March 2008 to Mr John Pelly and others.

10 The Respondent disseminated the letters from Dr Power and Ms Weichart to John Pelly dated 22 March 2008.

11 From 9 April to 5 June 2008, the Respondent excluded (i.e. suspended) the Claimant and placed restrictions on him inappropriately.

11.1 The Claimant not being allowed to contact colleagues and colleagues not being allowed to contact the Claimant;
11.2 The Claimant not being able to attend academic lectures and meetings;
11.3 The Claimant being restricted from coming onto the hospital site without permission.

12 The alleged consequences of the Claimant being excluded are:

12.1 The Claimant suffered a loss of private practice income;
12.2 The Claimant suffered a loss of his reputation;
12.3 The Claimant suffered injury to his feelings;
12.4 The Claimant suffered injury to his health (i.e. stress-related depression);

These consequences are also themselves alleged to be detriments.

The facts

12 The structure of this section of our reasons would benefit from a brief explanation.
specific.
background facts to be found.
findings of fact in chronological order as far as possible because what we must do is not only ascertain what occurred,
occurred was on the ground of the Claimant having made one or more of the protected disclosures.
necessary when a new issue or topic arises we have gone back to explain the background.
directly relevant to the specific issues which we have to determine,
so as to put the other facts into context.

13 As already mentioned the bundles were not prepared in chronological order,
either party.
proceeded and we have used that as the basis for the telling of the story. We have found it convenient for our own purposes in preparing to relate the relevant events to include references to the pages in the bundle where appropriate,
not made reference to pages in connection with the fortnightly meetings of the Consultants with management because some were included in the bundle and some were not.

14 Because the Respondent has conceded that each of the alleged protected disclosures was such a disclosure,
analyse each of them in great detail by reference to the statutory provisions.

15 The Claimant has been employed by the predecessor NHS Trust as a Consultant Urologist from January 2000 in the Urology Department at the Queen Elizabeth Hospital.
Mr Sarangi and Mr Ashworth.
Consultant in April 2007. The Consultants were supported by more junior doctors,

and we will continue to use that terminology.
Specialist.
Consultant,
middle of 2007 after a substantial period of illness.
has some Clinical Nurse Specialists on its staff,
nursing staff.

16 The Urology Department deals with benign and malignant conditions of the bladder and prostate,
surgical departments which together made up the Surgical Directorate. That Directorate is managed by a General Manager (Ms Weichart from May 2007) in association with a Clinical Director (Dr Power).

17 The Medical Director at all material times was Dr Sulch.
involves having primary management responsibility for safe and effective medical care.
March 2008 and then Dr Robson.

18 The former Greenwich Hospital moved to a new site in Woolwich in 2000 and became the Queen Elizabeth Hospital.
created at the time with the assistance of Mr Cetti and Mr Sarangi.
offices for the Clinical Nurse Specialists,
and also facilities to house specialist urological equipment.
closed in 2005, and we mention further details below.

19 We now turn to contractual matters,
straightforward.[26] Until 2003 Consultants in the NHS were employed on what has been described before us as the 'old'
the terminology 'old'
was therefore employed under the old contract initially.
Consultants had the option to transfer to the new contract.
has elected to remain on the old contract because he considers that it provides more flexibility.

20 An extract from the relevant Department of Health Circular relating to the old contract was in the bundle.
integral part of all Consultants'
the Consultant and management and include the main duties and responsibilities,
of out-of-hours responsibilities and rota commitments,
responsibilities.
fixed commitments and also a summary of hours spent on non-fixed commitments is in Appendix B to the Circular.
the job plan is to be reviewed each year.
then the local relevant grievance procedure should be used,
subsequent right of appeal to a panel.

21 The old contract works on the basis of Notional Half Days ('NHDs'
are 3.5 hours each.

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[26] There is a useful document 'Job planning with consultants on different terms and conditions; at 1495/6.

[27] DoH Circular HC(90)16 at page 1497

time or maximum part-time contract between 5 and 7 NHDs (depending on specialty) should be allocated to fixed commitments.
operating theatre and clinics are the equivalent of one NHD each, and are fixed in the weekly timetable.
administration and continuing professional development ('CPD') are not fixed commitments and consequently are not specifically included in the weekly timetable,
contract works on the basis of Programmed Activities ('PAs') which are each of four hours' duration.
difference in this case.
activities (whether clinical or otherwise) are included in the weekly programme.
for additional duties up to a maximum of 12 PAs is possible, payment to the Consultant being adjusted accordingly.

22 The Claimant's fixed duties consisted of three sessions in the operating theatre, three
to 6.3 NHDs.
changed from when he started,
monthly meetings were specified but they were not referred to before us in any detail.

23 In addition to the fixed sessions,
been running an extra Specialist Cancer Prostate Clinic ('SPC') on Thursday afternoons for which he had been paid £500 per session. Those clinics were not included in the 6.3 NHDs set out in the Claimant's contract.
Initiative and were additional to his contractual obligations.
also started to attend weekly meetings of the Specialist Multidisciplinary Team ('MDT') from May 2007 involving an additional commitment of some two hours each.
house agreement in 2006 that the rate for additional clinics was generally to be £300.

24 There are issues in this case concerning 'on-call' arrangements.
necessary for there to be at least one Consultant available at all times to advise or attend at the hospital if required.
There is the regular cover required on a weekly basis, and also the extra cover ('prospective cover') required during the absence of a Consultant for annual or study leave.

25 The British Association of Urological Surgeons ('BAUS') issued guidelines in October 2000 concerning the provision of urological services and the role of Consultants,
document in February 2002.[30] The guidelines recommend that a

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[28] There is an unresolved dispute as to whether the Claimant is employed on a whole-time or maximum part-time contract. That issue is not before us, and is only marginally relevant to the issues which we have to determine.

[29] The original job description starts at page 571

[30] 1450.2 & 1450.19 respectively

Consultant Urologist ought to have a specified number of fixed sessions and other flexible sessions.
time which should be spent being available on call.
include recommendations concerning the number of new patients and follow up patients which should be seen at each clinic.
supplementary guidelines refer more generally to the size of the unit and the number of Consultants appropriate to a specified number of population.
dedicated ward with a minimum of 12 beds.

26 We have mentioned above that the specialist urological ward closed in 2005. That closure was against the wishes and representations of the three Consultants,
would have an adverse impact upon the quality of patient care.
attention was drawn to a memorandum from the Consultants dated 20 January 2005 which in its conclusion said that the closure would be 'a risky,
Claimant wrote three further memoranda himself dated 13, 15 and 21 July 2005 each of which was addressed to Dr Robson.
were copied to the Claimant's Consultant colleagues,
then Chief Executive,
Montgomery,
what was said to be 'consultation'
with information that the ward was to be closed.
about the care of the patients and the administration of their treatment. He also sought clarification about the long-term vision of the Respondent for the provision of urological services.
some of the protected disclosures. The
memorandum of 13 July that he expected the closure of the urological ward to be ineffective,
decision should be encouraged to resign.

27 The memorandum of 21 July also mentioned that one or two more Urologists were required based upon the then current population figures and the possibility of there being an adverse impact on the running of outpatient clinics.
concerns'

28 The ward closed in the early part of August 2005.

29 The Claimant sent a further memorandum to Dr Ireland on 18 August 2005.[33] This is another of the Claimant'
memorandum referred to the ward having closed,
had been a significant deterioration in patient care as urological patients had been distributed among general wards.
wished to raise those issues during a subsequent review process.
memorandum also referred to a deterioration in the training of Specialist

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[31] 168 – That is not a protected disclosure

[32] 173, 174 & 175

[33] 188

Registrars. That memorandum was copied to nine others, being the Claimant's Consultant colleagues, and also Lead Clinicians and other Consultants in a wide variety of other departments in the hospital.

30 The three Consultants sent a further memorandum to Dr Robson on 19 September 2005 referring to a rift as having developed between management and the urological unit.[34] It was a short memorandum still protesting about the closure of the specialist ward. Again, this memorandum was signed by all three Consultants but was in fact prepared by the Claimant. It was laid out in the Claimant's own style. It is one of the Claimant's protected disclosures.

31 We were referred to various other documents relating to the closure of the ward, and we are aware from looking at the bundle that there are even more documents to which we were not referred. As the matter occurred as long ago as 2005 and because these other documents do not form protected disclosures we do not consider it necessary to refer to them in any detail.

32 At the same time as there were discussions about the closure of the ward the Claimant and his colleagues were raising concerns about what were referred to before us as 'clinic profiles'. A 'profile' for these purposes refers to the number of new patients, review patients, and urgent cases respectively to be seen at each clinic. A memorandum was sent by the three Consultants to Mrs Rossi, with copies to others, on 17 May 2005.[35] The memorandum stated that in the preceding 12 months there had been an increase in the number of patients, and the Consultants said that in future each clinic would be restricted to 25 patients in total, and there was specific reference to the mix of patients. Reference was also made to the BAUS guidelines. Although signed by each of the three Consultants that memorandum was prepared by the Claimant.

33 The Consultants sent a further memorandum to the same effect on 1 July 2005, this time to Miss Lacey.[36] Again this memorandum stated that there would be a specified number of new, urgent and review patients in each clinic with a maximum of 25 patients. This issue of the profile of clinics continued to be a source of problems between the Consultants on the one hand and the hospital management on the other and further reference will be made below.

34 The next protected disclosure is contained in a memorandum from the three Consultants to Mrs Russell of 12 May 2006 with copies being sent to Mr Pelly, Dr Power and another doctor.[37] We did not hear a great deal of evidence concerning this matter. It appears that there was a proposal from management to close an Erectile Dysfunction Clinic, which proposal was later not pursued. The memorandum states that it came from the

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[34] 206

[35] 219

[36] 221

[37] 223

Claimant, but it is quite clear that it was from him and his Consultant colleagues, along with three other doctors in different departments in the hospital. The memorandum said that the signatories were disappointed and angered about the unilateral management decision in contemplating the closure of the clinic. They said that the closure would be a retrograde and detrimental step. The fact that the clinic was to be retained was announced to the Consultants by Mrs Russell on the same day, 12 May 2006.[38] We have to assume that that was after she had received the memo referred to at the beginning of this paragraph.

35 There was a meeting of the Consultants with management on 24 November 2006. At that meeting the then General Manager - Surgery, Polly Hird, referred to proposed arrangements for operations to be undertaken at different centres depending upon specialty. The Claimant suggested that each surgeon should operate at the relevant centre once per month. This is the issue relating to the Claimant operating at Guy's.

36 The Claimant returned to the issue of the closure of the urological ward in a memorandum dated 1 January 2007 sent to Mr Pelly.[39] This is another of the protected disclosures. He said that the closure of the ward had had a detrimental effect on the morale of those involved in the care of the patients, and had not improved the quality of patient care. He referred to various detailed matters which is not necessary to record. The Claimant again mentioned that changes introduced by management were unilateral ones without a consensus from the Consultants who would be most affected. Again copies were supplied to various other individuals in the hospital, as well as the Claimant's two colleagues.

37 On 1 April 2007 Mr Hammadeh joined the Respondent as the fourth Urological Consultant.

38 Ms Weichart became the General Manager of the Surgical Directorate in May 2007. She was tasked with reducing a substantial overspend approaching £2 million, including achieving efficiency savings. She was also tasked with addressing breaches of the govemment's targets as to the period within which a cancer patient had to be seen. Ms Weichart considered in detail the expenditure being incurred by the Urology Department. She, along with the Finance Manager, concluded that there were two significant matters which contributed to the overspend in the department. The first was the payment made to the Claimant of £500 per week for running the Specialist Prostate Clinic ('SPC') on a Thursday, and the other was in respect of what were referred to before us as 'prospective on-call payments'.

39 An issue arose concerning the clinic profile in June 2007. Mrs Russell wrote to the Claimant on 18 June 2007, but it appears that we do not have a copy of that letter in the bundle. The Claimant replied on 20 June 2007.[40] He referred to what was said to be the profile which had been

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[38] 351

[39] 208

[40] 239

agreed in 2005 which had never been implemented. He complained that normally 30 patients were included in the list as against the agreed number of 25, and recently he had found there were 42 patients in the list for the morning clinic and 30 in the afternoon, which number was unacceptable. He referred to the outpatient problem as being 'chronic', and not being assisted by the fact that Mr Sekar was not to be replaced. He said that a unilateral management decision to pile patients onto clinics was not acceptable, and that he was happy do discuss ways to resolve the problem.[41] That memorandum is a further protected disclosure.

40 By the time that that memorandum was sent, Mr Sekar, the Associate Specialist who had been capable of running clinics on his own, had left the Respondent and had not been replaced, which had exacerbated the pressure on the clinics.

41 Ms Weichart and Ms Martin carried out what was referred to as a 'demand and capacity' analysis in June 2007. They concluded that it would be possible to reduce the number of clinics held each week by one, and also not to hold the Claimant's SPC clinic. All clinics would be two-man clinics. That was on the basis that patients who were not being seen for the first time, but were review patients, could be seen by a middle grade doctor without the direct supervision of a Consultant, rather than by a Consultant or by a middle-grade doctor under supervision.

42 The issue of supervision of clinics by Consultants was discussed with them at a meeting on 22 June 2007 in relation to a demand and capacity analysis exercise undertaken by Sandra Martin. That was the first occasion when the analysis was mentioned to the Consultants. The minutes of the meeting record that Mr Isworth raised the issue regarding Consultant supervision of clinics, and he said that the Claimant had contacted the Deanery and had been advised that patients should not be seen by junior doctors unless a Consultant was present in the clinic at the time. That was not the then current practice on all occasions, and if it were to be the practice then waiting lists would increase. There was no mention of the possibility of the SPC being removed, and indeed there was a suggestion of the employment of an additional middle grade doctor to enable more patients to be seen in clinics. The Consultants were saying that five more clinics were needed each week. At that time appointments for patients to be seen in clinics were having to be cancelled and there was the suggestion of the cancellation of theatre lists in the short term to enable Consultants to run extra clinics.

43 In a memorandum to Dr Power of 22 June 2007 the Claimant raised an issue concerning the level of work expected from him.[42] This memo does not form a protected disclosure but the issue raised is referred to later. He said that for the preceding three or four weeks he had been involved in a Specialist Multidisciplinary Team meeting on a Tuesday resulting in

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[41] The memo is from the Claimant alone, but he uses the word 'we' when making reference to future discussions.

[42] 397

at least two extra hours of work each week. He said that as he was on the old form of contract he had had an increased workload without any compensation. He therefore proposed that he should have one day off per month.

44 Dr Power responded on 26 June saying that every Consultant should undertake a yearly job plan review, and that then was an appropriate time to arrange it.[43] She sent a job plan review form and asked to meet with the Claimant and Ms Weichart to discuss the Claimant's suggestion. There was a meeting of Dr Power, Ms Weichart and the Claimant on 12 July 2007. No notes of that meeting were taken. The attitude taken by Ms Weichart and Dr Power was that the SPC could be stopped, or that if it were to continue then it should be incorporated into the Claimant's job plan. Ms Weichart had attempted to analyse the Claimant's activities on a day-by-day and hour-by-hour basis. She had concluded from that analysis that the SPC could be incorporated into the Claimant's job plan. In giving evidence on this point she referred to considering the start and finishing times of Consultants' 'programmed activities'. That phrase is only relevant to the new form of contract. In his witness statement, Dr Sulch said that he thought that Ms Weichart and Dr Power did not understand the old contract well enough, and that is our view also. A further meeting was to be arranged.

45 The Claimant says that a letter to Ms Weichart of 12 July 2007 relating to his job plan was a protected disclosure, but as already mentioned we have not been able to find any such letter in the bundle when meeting in chambers, nor was it mentioned by Miss Eady in her closing submissions.

46 A document was sent following the meeting of 12 July 2007 with a letter from Ms Weichart dated 30 July 2007 setting out management's understanding of what the Claimant was doing.[44] That document was on the incorrect form because it referred again to 'PAs'. The letter made reference to a further meeting with the Claimant being arranged.

47 The next Consultants' meeting to which we were referred was on 20 July 2007. There was a further discussion concerning the demand and capacity analysis. Ms Martin proposed that ideally there should be two-man clinics, and she produced draft schedules on that basis. Such clinics were supervised by a Consultant, who was assisted by a middle grade doctor. This needs some explanation. We do not know the exact details, but for some time there had been a practice of some clinics in the Respondent being run by Registrars or other middle grade doctors on their own without any direct supervision by a Consultant. Mr Sekar, Associate Specialist, had the status, although not the position, of a Consultant and there had not been an issue concerning him running clinics on his own without supervision, and also with his supervising more junior doctors. However, by the middle of 2007 he had been absent from

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[43] 398

[44] 401 & 402

the Respondent for over a year and he left the Respondent at about that time. It was agreed at the meeting that the Claimant would look at the schedules for the Registrars with a view to reverting to two-man clinics. It was stated that it was not possible to replace Mr Sekar for financial reasons. There was no specific mention of the SPC clinic.

48 The issue was discussed again at the meeting on 17 August. The Claimant produced amended copies of the Registrars' timetable. The result was that all Consultants would have two-man clinics, at all times working each with one middle grade doctor. Each middle grade doctor (apart from one) was to attend three clinics a week. The minutes record that it was agreed that there would be 27 patients in each clinic list.

49 Instead of a further meeting being arranged between the Claimant and Ms Weichart in relation to his job plan as proposed in the letter of 30 July 2007, Ms Weichart wrote to the Claimant again on 14 August 2007.[45] With that letter she provided a second draft of the Claimant's timetable.[46] That timetable showed that on Thursday afternoons the Claimant would be running the SPC as part of his job plan. It also set out what the Claimant was to be doing during the whole of Mondays to Thursdays inclusive, with five hours prescribed on Friday for administration.

50 The covering letter said that the Claimant was being given formal notice of changes to his timetable which would be discussed at the next meeting on 31 August.[47] Ms Weichart said that there was sufficient capacity within the Claimant's job plan for the weekly SPC to be included, and she was therefore giving him three months' notice that the additional payment for that clinic would cease from 14 November 2007. That issue had not been raised previously by Ms Weichart with the Claimant. Dr Power agreed in cross-examination that the giving of that notice was inappropriate and that it was a purported unilateral change in the Claimant's job plan. Ms Weichart accepted in cross-examination that the Claimant had reason to be annoyed by her letter.

51 The Claimant replied to Ms Weichart in letters dated 16 and 17 August 2007.[48] Each of these letters is a protected disclosure. In those letters the Claimant set out his original contractual obligations, and the fact that he had been voluntarily undertaking some further sessions as a matter of goodwill without extra payment. He added that he had been paid for the extra SPC on a clinic-by-clinic basis. He protested that it was offensive to be told that the running of the extra SPC could also be included within his current job plan, and he said that unless those clinics were recognized as an additional commitment and separately remunerated then he would cease performing them.

52 The issue of clinic profiles was raised again by the Claimant in two letters

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[45] 408

[46] 409

[47] It appears that the meeting was actually on 30 August 2007.

[48] 411 & 413

of 22 and 28 August 2007 addressed to Ms Lacey and Ms Weichart respectively.[49] The status of the doctors involved in the clinics was also raised in this correspondence. In the letter of 22 August the Claimant said that following discussions with his Consultant colleagues, the number of patients to be booked into the list for certain flexible cystoscopy clinics was to be as set out in that letter. He said that he and his colleagues believed that the new arrangements should commence from the start of October 2007. He suggested that a demand and capacity audit should be undertaken, and that if demand were to outweigh capacity then there could be further discussions.

53 In the letter of 28 August the Claimant said that within the department there were discussions concerning working towards holding of two-man clinics following the meeting on 17 August. He proposed various changes. He said that his Monday clinic would include only one middle grade doctor and not two such doctors as previously. In other words, it had been a three man clinic. The Claimant further said that Mr Wozniak would cease to run his Oncology Clinic on his own following the implementation of the practice of having two-man clinics. Mr Wozniak was an experienced Specialist Registrar, but not a Consultant. He had been running his clinics without supervision. The Claimant also made other proposals.

54 Ms Weichart referred to the effect of the Claimant's proposals in her witness statement as 'significantly reducing Urology's capacity'. However she was unable to support that statement in cross-examination and agreed that the outcome would probably have been neutral. Dr Power said in her witness statement that there would be a 'potentially drastic effect on the capacity of the department' but conceded in cross-examination that that statement was misleading, and that the Claimant was making constructive suggestions towards the holding of two-man clinics.

55 We now turn to the issue of 'on-call cover', and again some background information needs to be set out. The position is not straightforward, and is different between the old and new forms of contract. There is also a difference between what might be described as 'ordinary' on-call cover and 'prospective' on-call cover. Ordinary on-call cover refers to cover during evenings and weekends which was dealt with on a rota basis. Under the old form of contract the Claimant received an additional payment, referred to as an 'intensity payment' to reflect the extent of the obligation. The Claimant was actually paid the highest rate of the intensity payment principally because there were only three Consultants, and the proportion of time spent on call was therefore higher than if there had been a larger number of Consultants. Under the new form of contract the obligation was compensated for by an allocation of PAs.

56 'Prospective' on call on the other hand refers to cover provided for annual leave and sickness of Consultants. When there were only three Consultants they were paid on a time basis at a locum rate for the

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[49] 245 & 246

provision of this cover when necessary. Part of the business case for the appointment of a fourth Consultant was that it would no longer be necessary to make such payments because the cover could be provided within the ordinary on-call arrangements. However following the appointment of Mr Hammadeh payments on a time basis continued to be made to the Consultants.

57 A meeting was held on 29 August of all the Consultants with Mrs Russell and Dr Robson. There are no notes of that meeting, but the outcome of that meeting is set out in a letter from Mrs Russell to the Consultants dated 3 September 2007.[50] The letter made various points. It acknowledged that there had been a misunderstanding concerning payments for prospective on-call cover following the appointment of Mr Hammadeh, and it was confirmed that all claims for payment which had by then been made would be honoured.

58 Mrs Russell said in the letter that job planning sessions would be conducted with all the Consultants to ensure 'that prospective cover of the on-call rota is appropriately acknowledged and remunerated, in a standardised way (*our emphasis*) across all four job plans.' Mrs Russell continued by stating that separate payments for this cover would cease from 1 October 2007. Any agreed changes to the job plan and associated pay would be backdated to that date.

59 It was not in fact possible for all four Consultants to be treated exactly equally because of the difference in contracts. The other three Consultants could be remunerated by the allocation of PAs to the obligation, whereas that was not possible for the Claimant. Dr Robson in his evidence stated that the way the Consultants were paid in respect of on-call cover differed 'radically' between the old and new forms of contract. The Consultants on the new contract have been allocated 1 PA each for time spent on call. Dr Sulch eventually agreed in a letter of 21 November 2008 to the Claimant being paid the equivalent of an additional NHD in respect of on-call duties.[51] That agreement was part of continuing negotiations between Dr Sulch and Ms Barwood of the BMA over the Claimant's job plan. The letter also makes reference to the number of NHDs being worked by the Claimant and an issue over private practice. It is not a simple acknowledgment that the Claimant should receive a sum of money for the prospective on-call cover. Ms Weichart also agreed in cross-examination that such compensation was possible under the Claimant's 'old' form of contract.

60 Dr Power, Ms Linden, and Ms Weichart met the Claimant on 30 August 2007 to discuss his job plan. The position taken by Dr Power and Ms Weichart was that they accepted that the SPC should continue, but they expected it to be incorporated into the Claimant's job plan. The Claimant disagreed. No agreement was reached on the point at that meeting. Dr Power agreed in cross-examination that the cessation of the SPC would

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[50] 418

[51] 523

have an impact on other clinics, and that the issue related to the whole of the department, and not just the Claimant alone. When questioned specifically on the point she acknowledged that it was wrong to look solely at the position of the Claimant, although she added that the Claimant felt he had ownership of the particular clinic. It was indeed his clinic, although its scope had widened somewhat from its original purpose of dealing only with cancer cases.

61 Ms Weichart wrote to the Claimant after that meeting. In her letter of 3 September 2007 she included a table showing that the Claimant worked fixed sessions totalling 7 NHDs, excluding the SPC and any additional meetings.[52] She confirmed that while discussions continued then the pre-existing arrangements would remain in place.

62 There was a meeting of the Consultants with Dr Power, Ms Weichart and others on 31 August, at which various matters were discussed. The Claimant made the point that Registrars and other middle grade doctors were not comfortable carrying out operating lists and clinics when a Consultant was on annual leave. No conclusion was reached on the point at the time.[53]

63 Following that meeting the Consultants wrote to Ms Weichart on 31 August stating that clinic numbers were to be fixed, with a set profile, that no operating lists or outpatient clinics were to be run in the absence of a Consultant, other than flexible cystoscopy clinics.[54] It was further stated that the provision of such cover would continue during September as agreed, but that no agreement had been reached concerning prospective on-call cover from the beginning of October. The Consultants said that they may consider continuing to offer such cover with payment based on time sheets, or only provide ordinary on-call cover without any prospective cover. The Claimant accepted in cross-examination that the effect of that letter was to impose the matters set out in it on the Respondent.

64 The Claimant himself wrote to Ms Weichart on 1 September 2007 regarding the clinic profiles making various points and suggestions.[55] The Claimant wrote again to Ms Weichart on the following day, 2 September, making further detailed points about clinic profiles.[56] In particular he made reference to the number of patients being limited to 25 in accordance with the BAUS guidelines rather than the 27 patients which had been discussed, which he described as being ambitious.

65 The Claimant wrote to Ms Weichart again on 4 September 2007.[57] This letter is three pages in length. At the commencement of that letter he

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[52] 420

[53] The minutes of that meeting were provided to us

[54] 417

[55] 248

[56] 249

[57] 250

said that he had been 'angered' by the suggestion that he had agreed to 27 patients per clinic. At the end of the letter he said that he had been 'offended' by the matter. He referred to management's assumption that figure of 27 would be agreed as representing 'a combination of distorted facts, selective managerial amnesia, and indeed wishful thinking.' He also protested about changes being imposed by management without delay, whereas any proposals by Consultants were subject to consideration.

66 Ms Weichart responded to the various letters from the Claimant on 10 September 2007.[58] Copies were sent to the Claimant's colleagues, as well as Dr Power, Dr Robson and others. In summary what Ms Weichart was saying in a relatively short letter is that the subjects raised by the Claimant were to be discussed.

67 A further meeting to discuss the Claimant's job plan took place on 18 October 2007.[59] What occurred at that meeting is said to be a protected disclosure. We do not know what aspect of that meeting was said to be a disclosure. The matter was not dealt with specifically by the Claimant in his evidence nor by Miss Eady in her submissions. What was raised at that meeting was the issue of the Claimant undertaking surgery at Guy's and St Thomas' Hospital. The issue of carrying out such work forms one of the alleged detriments.

68 We do know that at that meeting the Claimant was presented with an analysis which had been carried out by Dr Power and Ms Weichart of the amount of time the Claimant spent at a flexible cystoscopy session on Wednesdays. They used data readily available to them, although the process was referred to before us as 'time carding'. No similar exercise was carried out for any of the Claimant's colleagues. The outcome was that it was concluded that the Claimant was only present for 26% of the time, or perhaps for that percentage of patients. The balance was covered by a middle grade doctor.

69 It was agreed at this hearing that the extent of supervision of a middle grade doctor by a Consultant depended upon the nature of the activity, the skill and experience of the middle grade doctor, and how far that Consultant felt able to allow the middle grade doctor to work on the Consultant's list without the Consultant directly supervising.

70 Ms Weichart and Dr Power suggested to the Claimant that the Claimant should also run a clinic while at the same time being responsible for the flexible cystoscopy list. This was referred to as being a 'parallel activity'. The Claimant would not agree. The Claimant was told that management could unilaterally alter the job plan, even if he did not agree. Ms Weichart agreed in cross-examination that the way that those issues were expressed and dealt with could be seen as being insulting.

71 There was a discussion concerning the Claimant operating at Guy's. Again a little background information is required. Since 2004 discussions

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[59] 425

had been taking place in the London area concerning the concentration of major surgery of various types taking place at specified centres. The centre for Urological Cancer was to be Guy's Hospital. The intention was that those involved in such surgery would operate at Guy's Hospital rather than at their local hospitals. Similar discussions were taking place relating to other surgery. The Claimant wished to operate twice a month because he had an interest in both bladder and prostate cancer surgery. Both the Claimant and Dr Power understood that the scheme had been agreed, subject only to Guy's receiving the appropriate references for him, and issuing an Honorary Contract. Then there would have to be a gap of six weeks or so because that was the lead time for booking clinics at Queen Elizabeth Hospital.

72 Following the meeting of 18 October 2007 the Claimant wrote two letters to Ms Weichart on 19 October.[60] One letter is headed 'Stepping down as Lead Clinician for Urological Cancer', and the other is headed 'Job Plan Meeting – 18.10.07'. In the first letter the Claimant returned to the issue of the extra meeting which he attended for which he had not sought additional remuneration. He said that with effect from the date of that letter he would commence his Monday morning clinic one hour later at 10 a.m. as compensation for the extra meeting, and consequently the clinic profile should be adjusted. He also stated that when he had fulfilled the required number of NHDs and when he had no formal commitment to the Trust he would not be present in the hospital but would be available in the normal way for the on-call rota. The Claimant resigned from his post as Lead Clinician for Urological Cancer with effect from 19 November 2007, having stated he would do so in the letter of 19 October 2007.

73 In the second letter the Claimant said that he was surprised and disappointed that the approach taken by the Respondent was that the Trust was empowered to make changes to his job plan even if he disagreed. He made various references to specific proposals which had been made. He said he had spoken to the BMA and he said that any changes could only be made with his consent. In the final paragraph of the letter he said that he would not be 'forced pressured or bullied . . . on this matter, and [would] take any further harassment on this matter seriously.' Copies of the letter was sent to his Consultant colleagues, Mrs Russell, Dr Power, Dr Robson, and various other Lead Consultants. This letter is a protected disclosure.

74 Dr Power wrote to the Claimant on 24 October 2007.[61] She apologised that he felt that her attitude had been heavy-handed and that she had been pressurising and harassing him. She pointed out that if he wished to pursue the matter formally then he should write to Dr Robson in accordance with the Respondent's grievance procedure. In cross-examination Dr Power accepted that she could understand why the Claimant could have felt under pressure and not having been fully consulted.

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[60] 425 & 426

[61] 430

75 The Consultants wrote to Ms Weichart again on 26 October 2007.[62] This letter was produced by the Claimant and is clearly in the layout which he normally adopts. The letter set out four conclusions reached by the Consultants following the discussions which had taken place. The first was that certain specified clinics which had been run by an independent middle grade doctor could no longer take place without a named Consultant having responsibility for them. The second was that if any Consultant were required to attend a hospital or answer telephone calls after midnight then they would 'exercise [their] need for compensatory rest the following day.' Thirdly, the extent of the activity on the Unit during the periods of annual leave would be reduced or cancelled according to the wishes of each individual Consultant. The final point was that prospective cover was considered to be the equivalent of 1.5 PAs, but alternatively the Consultants may be prepared to continue with the arrangements for payment based upon time sheets. The Claimant had by then been advised by the BMA that he should receive the equivalent of payment for 1.5 PAs but calculated on the basis of NHDs.

76 Ms Weichart also wrote to the Claimant in response to his letters on 26 October.[63] She said that she was sorry to learn that the Claimant had felt that the approach had been heavy-handed and regretted that he had felt pressurised and bullied. She said she was seeking advice on aspects of the letters.

77 The Claimant replied to that letter on 30 October 2007.[64] He referred to the history of the discussions concerning the SPC and the payment for it, and the analysis that had taken place of his activity. He again referred to it as a form of harassment. He specifically stated that none of his Consultant colleagues had been approached concerning forming an additional clinic or whether they wished to exchange one commitment for another. The appointment of the fourth Consultant had provided an appropriate opportunity. In the final paragraph he said that raising a grievance to the Medical Director would come to nothing but he would welcome an independent review by an individual who had no pecuniary interest in the Trust management. That letter is one of the Claimant's protected disclosures. It was copied to his Consultant colleagues and seven others in the Respondent.

78 The Claimant wrote to Dr Robson on 2 November 2007, and this is also one of his protected disclosures.[65] It is a lengthy and detailed letter raising matters to which we have previously referred, and also other issues relating to patient care. The final paragraph of the letter reads as follows:

> In
> force in decision-making has been based on cost-cutting, and doing as much as possible for as

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[62] 431

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[64] 434

[65] 260

> little outlay as possible. Developing a service of the highest quality has not specifically been the driving force. However, I can give you our assurance that with all the restrictions as outlined above, we are doing the best we can under the circumstances.

79 A copy of that letter was sent to the Claimant's colleagues and also to Dr Power, Mrs Russell, Ms Weichart and Mr Pelly, and also other Lead Consultants. Dr Robson replied to that letter on 21 November 2007 dealing with the points raised by the Claimant.[66] He pointed out that by then administrators were spending a disproportionate amount of time rearranging appointments for patients.

80 Dr Robson wrote to the Claimant on 8 November 2007, but not in reply to the letter to which we have just referred.[67] The Claimant was told that because the SPC could not be incorporated in the job plan it would cease with effect from 14 November 2007. The Claimant was told that it was expected that he would be present at the hospital on Thursday afternoons and Fridays, and he was invited to let Dr Robson know if there were particular requirements for flexible working. The Claimant was told that he would not be allowed to start his Monday clinic later at 10 a.m. as he had previously stated. Finally, he told the Claimant that as a full-time Consultant on the old contract he was required to provide a certificate that any private practice earnings had not exceeded 10% of the full-time salary, and that such certificates had not been supplied from February 2002 onwards. The Claimant had not previously been asked for the provision of the remaining certificates.

81 We did hear some evidence as to whether the Claimant was working on a maximum part-time basis or on a full-time basis. It does not appear to us that the difference is of relevance to the issues which we have to decide and we are not therefore pursuing the matter further.

82 The Claimant replied to Dr Robson on 12 November 2007, and this is another protected disclosure.[68] He referred to Dr Robson as being the fourth person attempting to interpret his job plan. He went into detail as to his obligations under his contract saying that they were six clinical sessions and one weekly meeting. Over the preceding six years two additional meetings had evolved. He said that the Respondent was expecting him to perform nine clinical sessions, which excluded the SPC. He sought an independent review of his job plan. He said that the proposal to staff the clinic later on Mondays was to compensate for the additional time commitment for the extra meeting as payment for it had not been made by the Trust.

83 The Claimant wrote to Ms Weichart on the 21 November 2007 concerning operating at Guy's and St Thomas' Hospital.[69] In the letter he gave notice to Ms Weichart that he would commence his participation in surgery at Guy's from late December 2007. He would be operating there,

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[66] 265

[67] 442

[68] 444

[69] 448

he said, on Tuesdays and Fridays once a month each. He said that therefore some of his Tuesday theatre lists would have to be cancelled, but as he did not have any fixed sessions on Fridays there would not be any impact on either his theatre or clinic services. In the letter he set out the dates when his operating list should be cancelled.

84 The Claimant wrote to Dr Robson on 3 December 2007 concerning the letters which he had written on 30 October about the alleged harassment in connection with his job plan.[70] He said that he had expected a response from Dr Robson and asked that the matter be addressed. That is another protected disclosure.

85 On 4 December 2007 the Claimant wrote to Ms Linden, the HR Manager. He referred to there having been various meetings concerning his job plan, and he set out a summary of the disagreement.[71] In the penultimate paragraph he said that as there had been a failure to agree upon his job plan he sought a formal review of his contract. That is another protected disclosure.

86 We need to record a further letter of 7 December 2007 from the Claimant to Dr Robson.[72] It did not form any major part of this hearing. It is one of the Claimant's protected disclosures, which is why we must mention it. In substance what the Claimant was saying is that the closure of the specialist ward had increased the risk of infections being acquired by patients while in hospital. The reasons are set out in the letter and it is not necessary to go into them. Dr Robson considered that the issue was being dealt with by a relevant Committee and did not reply to the Claimant.

87 Following receipt of the letter from the Claimant of 4 December 2007 Dr Robson wrote to Mrs Kelly on 17 December requesting that she undertake an investigation into the Claimant's allegations of bullying and harassment against Ms Weichart and Dr Power, and report the findings to Mrs Storey and him.[73] With that letter Dr Robson enclosed all the correspondence which was available to him and/or Ms Storey relating to the Claimant, rather than just the letters relating to the allegations of bullying and harassment. The letters which Mrs Kelly had are set out in her report. In all she was provided with 42 letters, some of which have been referred to above.

88 The Claimant returned to the subject of payment for prospective on-call cover in a letter to Ms Weichart of 18 December 2007.[74] By then it had been agreed that the Consultants working under the new contractual terms would be entitled to 1 PA in respect of prospective on-call cover. No similar arrangement or financial provision had been made in respect

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[70] 582

[71] 449

[72] 212

[73] 584

[74] 455

of the Claimant. In the letter the Claimant complained of that and requested written confirmation that an equivalent payment would be added to his December salary. In the alternative he said he would continue with the arrangement for payment based on time sheets. Ms Weichart replied on 20 December 2007.[75] She stated that his obligation to provide such cover was covered by the intensity payment and he was not entitled to any further payment.

89 Ms Weichart wrote a second letter on the same day, this time concerning the cancellation of the Claimant's operating list by reason of his operating at Guy's.[76] She said that arrangements had not been put in place to enable the Claimant to carry out operations at Guy's and that it would not be possible to start the arrangement as of 31 December 2007 as the Claimant had stated he would. She said that the administration had been told to book patients onto his Tuesday operating lists and for his clinic on 31 December to be reinstated.[77]

90 The Claimant replied to that letter also on 20 December.[78] Before a surgeon operates out of his normal hospital at a different Trust it is necessary for there to be an honorary contract so as to put the relevant professional obligations in place. The Claimant said that the arrangements had been in preparation for some time and that the day for him operating at Guy's had been discussed with her predecessors. He said that all surgeons had delayed commencing operating at Guy's until the honorary contract wording had been agreed, and that he had signed his honorary contract during the preceding week. At the end of the letter the Claimant said the following: 'What further clarification do you actually require?'

91 On 24 December 2007 the Claimant wrote to Ms Weichart again, this time concerning the issue of payment for prospective on-call cover.[79] This is a further protected disclosure. The Claimant said that his contractual obligations did not include an obligation to participate in the prospective on-call arrangements and he said that he hoped that agreement could be reached for payments during the next job plan meeting in January 2008. He continued by saying that he gave the Trust 14 days within which to pay for the cover provided during October and November 2007, and that if he were not paid he would issue proceedings in the small claims court.

92 The Claimant made another protected disclosure on 27 December 2007 in a memo to Ms Weichart, copies of which was sent to Doctors Power, Robson and Mr Kelly.[80] It raises the issue about one particular patient

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[75] 456

[76] 457

[77] That reference is somewhat confusing because 31 December 2007 was a Tuesday. The discrepancy was not explored before us.

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[79] 459

[80] 273

who had said that his appointment had been cancelled four times, and said that an appropriate service was not been provided.

93 By 28 December 2007 the Claimant had been told that Mrs Kelly would investigate his claims of harassment. On that date he wrote to Ms Storey.[81] He wanted the investigation to include opinions from his Consultant colleagues so that it could be seen that his was 'not an isolated incident'. He said that there appeared 'to be a widespread usage of "bullying" in the Surgical Directorate, in an attempt to achieve cost cuts, under the disguise of "attempting to achieve targets under difficult financial conditions"'.

94 On 7 January 2008 Ms Weichart wrote to the Claimant concerning payments for prospective cover.[82] She said that there was no obligation on the Respondent to make any additional payments in respect of cover other than the intensity payments. She further pointed out that it had been made clear to the Claimant and his colleagues that the payments which had previously been made would cease from the end of September 2007.

95 Ms Weichart wrote to the Claimant also on 7 January concerning delays in the clinics, and it is not necessary to go into that letter in any detail.[83] The Claimant replied on the 10 January, and this letter is another of the protected disclosures.[84] He referred to the closure of unsupervised middle grade clinics and other matters. The final two paragraphs read as follows:

> The major problem is that there is a chronic demand - capacity mismatch which has existed since my appointment, and you fail to recognize this being lulled into believing that after several demand - capacity exercises that this is not the case. In essence the current problem falls squarely on your and Dr Power's shoulders.

96 The Claimant wrote to Ms Weichart again on 14 January 2008.[85] The letter was headed 'Common decency'. This is clearly in reply to the letter from Ms Weichart of 20 December concerning the cancellation of the Claimant's operating list.[86] This is not one of the documents which the Claimant relies upon as a protected disclosure. The bulk of the letter set out the Claimant's position that discussions had been taking place concerning him operating at Guy's. However, it is necessary to quote the first and last paragraphs of the letter as follows:

> I am
> in unilaterally instructing the Waiting List to 'reopen' and fill my closed Tuesday operating list on January 29, 2008.
>
> This simply reflects the endemic attitude, which has permeated in the Surgical Directorate who

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[81] 586

[82] 463

[83] 274

[84] 276

[85] 471

[86] 457

seem see themselves (*sic)* as the controlling authority in managing the Consultant human resource without due consideration, politeness and dialogue.

97 Ms Weichart replied on the same day.[87] She said that she was sorry to hear about the Claimant's perception of how he had been treated. She said it would be appreciated if he would continue with his lists as planned. The Claimant replied to that letter on 15 January.[88] He said that the letter fell short of a simple courteous conversation and discussion, and he objected to the list being filled, and asked why he was unable to commence participation at Guy's and when it was anticipated that he could do so. He also pointed out that one of his colleagues had by then commenced operating outside of the Trust's hospitals.

98 The Claimant wrote a second letter to Ms Weichart on 15 January.[89] This letter was headed 'Outpatient clinic crisis, flawed assumptions and a lesson in history'. This is a protected disclosure. The thesis of the letter was that there was a demand/capacity mismatch, and that the responsibility was that of Ms Weichart and Dr Power. Various details were set out which are really repetitions of matters already raised.

99 The Claimant wrote again to Ms Weichart on 17 January, this time relating to operating at Guy's.[90] He said that he had spoken to professional colleagues at Guy's and there was nothing as far as they were concemed to prevent him from operating there immediately. He could not see any impediments to his commencing operating there and he asked why the matter had been so difficult.

100 Mrs Kelly met the Claimant on 18 January 2008 as part of her investigation into his complaints.[91] He complained about the various matters which we have already recorded. In particular he said that other Consultants had not been treated in the same way as he had in not being asked to undertake an extra clinic, or to exchange clinics, or run one in parallel. He said that his complaint was specifically about the behaviour of Ms Weichart and her style of management. He referred to her as being 'a woman on a mission.' Goodwill had dissipated.

101 Mrs Kelly met Ms Weichart on 21 January.[92] Ms Weichart set out her position concerning the SPC and incorporation of it into the Claimant's job plan. There was also discussion about the covering of clinics by middle grade doctors and the Claimant operating at Guy's. It is clear from what Ms Weichart told Mrs Kelly that her perception was that the Claimant was single-minded about matters. She made reference on two occasions to receiving letters from him, sometimes more than one a day and sometimes with emotive language in them, and she found that

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[87] 472

[88] 473

[89] 277

[90] 475

[91] The notes of the meeting commence at 590

[92] The notes of the meeting commence at 593

difficult. She further commented on the fact that many letters were inappropriately copied to others in the Trust.

102 On 29 January 2008 a meeting was held concerning the Claimant. The Claimant was not present. At the meeting were Mr Pelly, Dr Robson, Mrs Russell and Ms Storey.[93] The notes of the meeting commence as follows:

> A series of confrontational issues – we can deal with them individually but they are part of a systematic approach on his part, designed to allow the Trust to 'crash and burn'. JP's view – possibly a vexatious allegation of harassment and bullying, though must be investigated properly.

103 It was agreed that negotiations about working at Guy's should continue pending completion of the job planning review and the appeal process. In the notes of that meeting there was the following question:

> Should we allow [the Claimant] to do this while he is being as awkward as he is being locally over his job plan?

104 The 'this' referred to is operating at Guy's. It was concluded that the position would be reconsidered after the receipt of the report from Mrs Kelly. Following that meeting Mrs Russell wrote to the Claimant on 31 January 2008.[94] She said that any agreement relating to the Claimant operating at Guy's 'must be part of a wider job planning review process'.

105 The Claimant wrote to Mrs Kelly on 21 February 2008 asking her to obtain a comprehensive picture of the situation within the surgical directorate and asked that she discussed the matter with four named individuals not involved in the Urology department.[95]

106 The four Consultant urologists now raised an issue which had not achieved a major profile previously. This was done in a letter 28 February 2008.[96] They said that if they had to answer telephone calls or return to the hospital after midnight when they were on call then they would take compensatory rest on the following day or on a day of their choosing during the following week. An incident occurred relating to compensatory rest and Mr Hammadeh's clinic on 3 March 2008 but we do not need to record the details nor subsequent correspondence.

107 The Claimant returned to the subject of operating at Guy's in a letter dated 4 March 2008 addressed to Dr Robson.[97] He complained that the delays were having a significant impact on the personal development, employability, loss of private work and deskilling as an urologist. He wanted to know what was happening.

108 On or about 13 March 2008 Mrs Kelly produced her report.[98] In cross-

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[93] Notes of the meeting are at 497

[94] 477

[95] 419

[96] 281

[97] 493

[98] 621

examination Mrs Kelly acknowledged that the matters raised by the Claimant in his complaint stated 30 October 2007[99] were that there had been a heavy-handed treatment of him before and at the job plan meeting of 18 October 2007, that data had been obtained as to the extent to which he attended a clinic himself, that he had not been paid at the agreed rate for clinics already undertaken, and finally that there had been a difference in treatment between him and his Consultant colleagues in respect of the arrangements for holding clinics.

109 The report by Mrs Kelly concluded that she could not find any evidence of bullying or harassment by either Ms Weichart or Dr Power. She accepted in cross-examination that her report included reference to the issue of payment for prospective on-call cover which had not been raised by the Claimant in his letter of complaint to the 30 October 2007. That issue had, however, been raised by the Claimant in his meeting with Mrs Kelly. Mrs Kelly also accepted that the issue which he had raised of being treated differently from his Consultant colleagues in respect of the allocation of responsibilities for the clinics had not been addressed by her, but she had referred to a difference in treatment in relation to on-call payments.

110 In addition to her report Mrs Kelly produced a further document headed 'Issues of concern relating to the behaviour of' the Claimant'.[100] She said that other issues had come to light during her investigation which were outside her remit. She listed nine bullet points. Some of those relate to the letters which the Claimant had been sending. She referred to the volume of letters and that some of them could be construed as bullying / harassment. She also mentioned that irrelevant people received copies of the correspondence.

111 The Claimant wrote a letter on 14 March 2008 to Mr Sarangi who had by then taken over from the Claimant as the Lead Consultant for urological surgery.[101] The Claimant was expressing concern that Mr Wozniak was continuing to perform an unsupervised clinic and that unless the Surgical Directorate stopped the practice then the matter would have to be pursued with the Department of Health. This was said to be a serious matter of clinical governance and good medical practice which needed to be addressed. This is another of the Claimant's protected disclosures.

112 Mr Hammadeh wrote a letter to Dr Robson on 17 March 2008 concerning a similar issue relating to an operating list on 13 March 2008.[102] All the Consultants wrote to Dr Robson on the 18 March 2008 saying that if a clinical list was undertaken by a middle grade doctor who was unsupervised then the name of Dr Robson would appear as the Consultant responsible for that list from 25 March.[103] That letter is

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[99] 580

[100] 628

[101] 286

[102] 288

[103] 292

another of the protected disclosures.

113 On 22 March 2008 each of Dr Power and Ms Weichart wrote to Mr Pelly.[104] These are most important letters in relation to this claim. The letter from Dr Power was sent by e-mail at 12:49 hours, and that from Ms Weichart at 11:51 hours. Ms Weichart had spoken to Dr Power on the previous day and said that she was proposing to write to Dr Robson, and Dr Power said that she would write also in order to support Ms Weichart.

114 Although the letters are very similar in content, we will deal with each of them in turn. The letters need reading in full, and we can only summarise them here. Dr Power referred to there being serious issues within the urology service which were made worse by the attitude and behaviour of the Claimant. She said that during the past month the behaviour of the Consultants had become increasingly uncooperative and that the viability of the service was at risk. She referred to discussions concerning prospective on-call cover, payments to the Claimant for the SPC, and the Consultants then refusing to allow middle grade doctors to see patients when the Consultants were away. Dr Power referred to new profiles and work patterns under the name of clinical governance requiring the cancellation of more and more activity. She said that the Claimant went out of his way to cause serious disruption by cancelling lists of patients at short notice. We pause to comment that the only proposal to cancel a list of which we are aware was in connection with the Claimant operating at Guy's.

115 The sixth, eighth and eleventh paragraphs are as follows:

> I
> largely from the behaviour and attitude of [the Claimant]. Many of the changes explained above were initiated by him and subsequently taken up by his colleagues in turn, although to be fair it must be said that Mr Sarangi is struggling, being pulled two ways. [The Claimant] appears to go out of his way to cause serious disruption of the service in every way possible, e.g. cancelling lists of patients at short notice.
>
> I am seriously disturbed that [the Claimant] is not only destroying the urology service at QEH by ensuring complete destruction of the working relationships of the urologists with the whole surgical management team, but particularly [Ms Weichart] and to a lesser extent myself, but is also successfully beginning to erode our relationships with the other specialist teams within the directorate.
>
> I
> [the Claimant]. He has destroyed our working relationships with the rest of the urology team and is utilising much energy on trying to do the same for the orthopaedic and general surgeons and anaesthetists.

116 Dr Power said in the letter that the Claimant copied and personally delivered his letters widely within the Trust, talked in the corridor or became huddled in offices for long meetings which caused unrest and ill feeling. She said that the Claimant's letters were relentless, sometimes more than one per day and they had become increasingly menacing and contained unfounded claims and allegations. She concluded that urgent

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[104] 732 & 737 respectively

help was needed to resolve the issues and to rebuild the urology service.

117 Ms Weichart said she was writing with great sadness and expressed concerns concerning the Claimant's general conduct and behaviour towards management. She said the reputation of the urology service was being eroded and the working relationships with the urologists had become almost untenable. She said that the Claimant had defamed particularly Dr Power and her and had created ill feeling. She then referred to the steps which had been taken by her to attempt to reduce the overspending in relation to prospective on-call payments, and the SPC payment of £500 as opposed to £300. Ms Weichart also referred to the difficulties said to have been caused by the insistence of the Consultants in having two man clinics. She said that the Claimant and then his colleagues had introduced new arrangements for the clinics which had reduced capacity and the service was at breaking point. Specific reference was made to the letter from the Claimant of 14 March 2008 concerning the running of a clinic by Mr Wozniak unsupervised by a Consultant. Ms Weichart acknowledged that it was possible that the urology service need additional investment, but said that it was impossible to quantify because the Consultants had introduced rules which reduced capacity.

118 The pre-penultimate and penultimate paragraphs of the letter from Ms Weichart are as follows:

> The effect that [the Claimant's] behaviour has on his colleagues, on the service and ultimately on [Dr Power] and I is unsustainable. It causes disruption and destruction to the service provision and it has an increasingly negative impact on other services in the Directorate.
>
> It has also started to affect my private life to an extend (*sic*) that I cannot allow to continue for much longer. [The Claimant's] letters are relentless, his language at times is offensive, his comments about the Trust, the service and about my colleagues and me are hurtful and damaging.

119 Neither Dr Power nor Ms Weichart had previously articulated to the Claimant that either the number of letters which he wrote or the tone and content of them was causing them any distress. Dr Power acknowledged in cross-examination that following the Claimant having accused her of bullying and harassment she was feeling insecure, and that on reflection perhaps she had been over-sensitive.

120 Dr Robson replied on 25 March to the Consultants' letter of 18 March concerning his name being shown as the Consultant responsible when middle grade doctors were running clinics without the consultants supervising them.[105] He said that in fact there was no difficulty because a Consultant was carrying out an operating list in an adjacent operating Theatre. He said that the proposal that his name be shown was 'clearly absurd and is no credit whatsoever to your collective professional judgement.'

121 The Claimant was 'excluded' by the Respondent on 9 April 2008. The more normal word used in other areas of employment is 'suspended'. We

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[105] 295

now set out to the background to that occurring. The Department of Health issued a procedure in 2005 entitled 'Maintaining High Professional Standards in the Modern NHS.'.[106] This was referred to throughout as 'MHPS'. The procedure for excluding a doctor is detailed and we summarise it as follows. Exclusion was to be used as an interim measure and must be for the minimum necessary period of time, up to a maximum of four weeks. All extensions of exclusion must be reviewed and a brief report provided to the Chief Executive and the Board. Under the heading of 'Managing the risk to patients' it is stated that where serious concerns are raised then the employer must consider whether it is necessary to place temporary restrictions which might relate to clinical duties or provide for the exclusion of the practitioner from the workplace. Exclusion must be reserved for the most exceptional circumstances. The purpose of exclusion was to be protect the interests of patients or staff and/or to assist the investigation process where there is a clear risk that the practitioner's presence would impede the gathering of evidence. It is stated specifically that it is imperative that exclusion from work is not misused or seen as the only course of action that could be taken. Alternatives to exclusion were set out.

122 The procedure draws a distinction between an 'immediate exclusion' and then 'formal exclusion'. An immediate exclusion may be necessary where there is a critical incident, or a breakdown in relationships within a team, or the presence of the practitioner is likely to hinder the investigation. The procedure requires that the manager making the exclusion must explain in broad terms to the practitioner why it is being made and it must be for a maximum of two weeks. The manager must advise the practitioner of his rights, including the right of representation. A formal exclusion on the other hand only takes place when a case to answer has been prepared and considered at a case conference. A preliminary report must be prepared for that conference. Consideration must be given at such conference as to whether a return to work in a limited capacity was appropriate. Formal exclusion must be confirmed in writing, and the practitioner must be told that representations may be made to a designated board member. Before formal exclusion is considered then there must be consultation with the National Clinical Assessment Service ('NCAS').

123 The procedure also states that practitioners should not automatically be barred from the premises and such bar should only occur where it is absolutely necessary such as where there is a danger of tampering with evidence or there may be a serious potential danger to patients or other staff. Arrangements should be made to ensure that the practitioner keeps in contact with colleagues and in is enabled to continue to take part in continuing professional development and clinical audit activities.

124 Dr Robson telephoned Dr David Heath of NCAS on 26 March 2008.[107] Dr Robson told Dr Heath that the Claimant had made a complaint of bullying

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[106] 108 et seq

[107] 743

and harassment which had been dismissed,
raised concerns about the Claimant's behaviour.
had been received from Dr Power and Ms Weichart about the effect of the Claimant's behaviour and that a formal investigation was to be undertaken into that complaint.
about the Claimant's clinical care.
considering excluding the Claimant.
option to consider although there were other options such as cautioning the Claimant not to interfere with the investigation which was to take place.

125 A case conference was held on 26 March after Dr Robson had spoken to Dr Heath.
purpose of the meeting was expressed to be to consider action following the concerns that had been raised about the Claimant.
reached was that the Claimant should be excluded and three reasons were given.
relationships between the Claimant on the one hand and Dr Power and Ms Weichart on the other.
assist the investigation process as the Claimant's presence would impede the gathering of evidence, and the third was to protect the interests of patient and other staff.
the Claimant as soon as he returned from his then current leave.
agreed that the exclusion would be for two weeks in the first instance and that formal exclusion would be considered if necessary.
which was agreed upon was immediate exclusion.
maker was Dr Robson,
with Dr Sulch and Ms Storey.

126 In reaching this conclusion the meeting,
a process using an 'Incident Decision Tree'.
National Patient Safety Agency.
is a form of flow chart with different outcomes specified depending upon the answers to a succession of questions.
actions as intended?'
answered in the affirmative or negative then different further questions had to be asked.
was given the conclusion reached by Ms Storey when making notes using the tree was that the Claimant was to be excluded.
difficulty in seeing how the questions set out in the flow chart were relevant to this particular situation.

127 The notes of the meeting refer to having received the comments of Mrs Kelly about 'unsolicited instances of difficult,
behaviour on [the Claimant's part]',
Weichart and Dr Power.

128 None of the witnesses who appeared before us was able to give any

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[108] 744

[109] 745

evidence of any Consultant having been excluded in circumstances similar to these, as opposed to cases of possible clinical errors.

129 Dr Heath wrote to Dr Robson on 2 April 2008 following the telephone conversation with him.[110] There is one clear error in that letter in that Dr Heath refers to the Claimant at times providing poor clinical care. There was never any suggestion of that. As much was acknowledged in an email from Dr Robson of 21 April.[111] Dr Heath again recorded that one reason for excluding a practitioner was where his presence would impede the gathering of evidence, and he added that there should be good evidence to support that view.

130 On a date which we do not know exactly, but towards the end of March, Mrs Russell contacted Mrs Holt and asked if she would be prepared to undertake an investigation for the Respondent. Mrs Holt had been employed in the NHS was some years but had left and set up an external consultancy. She had previously carried out an investigation for the Respondent relating to another department. She was aware of the MHPS procedure. Terms of reference were prepared dated 3 April 2008.[112] Mrs Holt was required to prepare a report into the conduct of the Claimant towards Dr Power and Ms Weichart, to consider the impact of his conduct on the planning and delivery of Urological services, and the impact of the Claimant's conduct on the wider Surgical Directorate. It appears that Mrs Holt also received a copy of the supplemental report prepared by Mrs Kelly listing the issues of concern about the Claimant's conduct to which we have referred above.

131 Following various telephone conversations about making appropriate arrangements for representation the Claimant met Dr Robson and Mrs Storey on 9 April 2008.[113] He was not represented. He was told by Dr Robson that he was to be excluded for an immediate period of two weeks and he was not to come onto the Trust premises except by explicit written permission from Dr Robson or another Director. The exclusion was on full pay and the Claimant was to remain available for work and any relevant meetings. He was advised that Lady Anne Jenkins, a member of the Trust Board, had been designated to oversee the case and that he may make representations to her. The Claimant was advised that Mrs Holt would be undertaking an investigation. The Claimant was told he was not to discuss the matter with anyone other than Dr Sulch, who was the case manager, Mrs Holt, the Claimant's representative, or his family. A copy of the Respondent's whistleblowing procedure was supplied. The fact of the exclusion was set out in a letter of 9 April 2008.[114] The letter records what was said at the meeting. It refers to the Claimant having been supplied wit a copy of the list of concerns prepared

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[110] 747

[111] 807

[112] 750

[113] 764

[114] 766

by Mrs Kelly, and also the two letters from Dr Power and Ms Weichart.

132 The Claimant wrote to Dr Robson of 14 April 2008 concerning practical matters.[115] He asked for copies of various policies. He asked whether issues had been raised with NCAS conceming his clinical competence. He complained that although he had been allowed to visit the hospital to have access to his computer in order to prepare for his job plan appeal he found he had been locked out of the IT system and asked when it was decided that he was to be denied access, and who had instigated the action. We record that he had been in fact locked out.

133 Mrs Storey replied to the Claimant on the same day, 14 April, saying that she could not find any evidence of him having been barred from the IT system.[116] In fact, Ms Weichart had sent an e-mail asking that the Claimant's account be blocked and when that was discovered by Mrs Storey arrangements were made for access to be reinstated. This occurred on 15 April. Dr Robson had authorised the initial blocking.

134 Dr Sulch wrote to the Claimant on 17 April at the request of Dr Robson in reply to the Claimant's letter of 14 April.[117] He assured the Claimant that no concerns had been raised about his fitness to practice or clinical competence. He said that Dr Robson had authorised the removal of the Claimant's access to the IT system as being standard practice when staff were excluded. On behalf of Dr Robson an apology was given for the major inconvenience that was caused to the Claimant for that action.

135 The Claimant wrote a letter of just over seven pages to Mrs Storey on 19 April 2008.[118] It is principally a complaint about various aspects of the investigation carried out by Mrs Kelly. In it he listed eight matters in respect of which he said he had been treated differently from his colleagues. In his summary he said that he believed that the way in which the investigation had been carried out and the conclusions drawn from it were flawed and breached the Respondent's own guidelines. He said that Mrs Kelly had failed to recognize the widespread experiences among Consultants of harassment and bullying. He also enquired why the issues of concern identified by Mrs Kelly outside her remit had not been discussed with the Claimant before the investigation was concluded. The Claimant wrote a further letter by way of a supplement on 26 April 2008.[119]

136 Dr Robson decided that the exclusion of the Claimant should be extended and he wrote to the Claimant to that effect on 22 April 2008.[120] That letter said that 'a decision has been reached to exclude you formally for a further period'. The exclusion was extended for a period to 20 May

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[115] 779

[116] 776

[117] 791

[118] 643

[119] 689

[120] 810

2008. The letter stated that the reason for the extension was that the investigation was still being carried out by Mrs Holt. Mrs Holt had that day provided what was described as an interim report, but in reality it was merely a statement that the investigation was continuing and that in her opinion the Claimant's presence at the hospital may hinder that investigation.[121]

137 Mr Edwards of the BMA, representing the Claimant, wrote to Mrs Storey on 25 April.[122] The majority of that letter refers to the report of Mrs Kelly and contains criticism of the procedure adopted. Towards the end Mr Edwards said that there was no evidence that any alternatives to exclusion had been explored nor how the Claimant met the criteria for exclusion set out in the MHPS procedure.

138 Mr Edwards wrote to Mrs Storey and Dr Robson on 14 May expressing concern that he had not had any response to earlier communications he had sent.[123] He said that there appeared to be no good and justifiable reason for the exclusion of the Claimant and there was no reason to suggest that the Claimant would interfere in the investigation being carried out by Mrs Holt.

139 Mrs Storey wrote two letters to the Claimant on 15 May 2008 in response to five letters from the Claimant and Mr Edwards as set out in that letter.[124] One letter relates to the Claimant's criticisms of Mrs Kelly's report, and the other to the exclusion process. In respect of the latter matter it was simply stated that the decision to exclude the Claimant had been taken in accordance with the MHPS process and alternatives had been considered.

140 Mrs Holt issued a further 'interim report' on 16 May stating that at that time there was no evidence to suggest that the Claimant possessed any risk to patients, but there had been a breakdown in the relationship between him and management.[125] She recommended that if the Claimant were to return to work then interim management arrangements be made relating to his relationship with the existing management team.

141 Dr Robson and Mrs Storey met on 16 May 2008 to discuss the exclusion of the Claimant. They decided to extend it for a further period of four weeks, but to attempt to make arrangements for the Claimant's return to work within that period.[126] A letter to that effect was written to the Claimant by Mrs Storey on 19 May.[127]

142 A meeting was arranged of Dr Robson, Mrs Storey, Dr Sulch, the

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[121] 812

[122] 683

[123] 882

[124] 887

[125] 901

[126] 897

[127] 902

Claimant and Mr Edwards on 5 June 2008.[128] The outcome of that meeting was that the Claimant was told that his exclusion was lifted with immediate effect. However, there were to be restrictions on his day-to-day activities. He was to be managed by Dr Sulch and Mrs Russell. He was not to attend management meetings, as opposed to clinical meetings. He was not to write on contentious issues to management nor spend time discussing with others any dissatisfaction which he had. Those restrictions were said to be interim measures and to be reviewed every four weeks.

143 A further meeting took place of Dr Robson, Mrs Storey, the Claimant and Mr Edwards also on 5 June 2008.[129] As a result Dr Robson wrote to the Claimant on 26 June.[130] In the letter Dr Robson acknowledged that with hindsight there were some aspects of the investigation by Mrs Kelly which were less than ideal. He said that there were lessons to be learned all round. He said that he would delay a decision as to whether to accept the report until he received the report of Mrs Holt which was covering much the same ground.

144 The Claimant raised a formal grievance concerning the exclusion from the Trust in a letter to Mrs Storey of 8 July 2008.[131] He added further details in letters of 23 July and 3 August.[132] He said that his exclusion was manifestly disproportionate, and that the concerns he had raised should have been treated as protected disclosures. He said he had also raised contractual issues concerning his job plan and prospective on-call cover arrangements. He referred to the whistleblowing policy as encouraging a climate of openness. He said that the effect of the exclusion on him had been profound, and that his health had suffered. When asked about it he set out details of the disclosures which he said he had made and the detriments he said he had suffered. He said that the disclosures he had made were with the best interests of patient care and service improvement in mind.

145 We have been unable to trace the exact date upon which the report prepared by Mrs Holt was provided to the Respondent. The report is dated July 2008, but the first documentary reference we can find to it is in an e-mail from Mrs Storey to Mrs Holt dated 16 August 2008.[133]

146 Mrs Storey had asked Mrs Holt to provide two reports. One was to report solely on matters relating to the Claimant, and the other on wider issues concerning the work environment within the Surgical Directorate.[134] The

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[128] Notes of the meeting commence at 955

[129] 707

[130] 711

[131] 1311

[132] 1318.1 & 1319 respectively

[133] 1030 – We were not referred to this document at the hearing, but its contents are not contentious.

[134] 1032 and 1001 respectively

reason for this was that Mrs Storey thought she may wish to limit the distribution of the conclusions in respect of the allegations made against the Claimant, but disseminate the conclusions relating to the Directorate as a whole to a wider audience.

147 Mrs Holt helpfully provided an executive summary at the commencement of the report relating to the behaviour of the Claimant. She recorded that all witnesses described him as being an excellent clinician. However, there were significant difficulties in the working relationship. Mrs Holt concluded that the volume of letters written by [the Claimant] had been excessive. This, compounded by the tone of some letters, was unacceptable and had caused distress to both Dr Power and Ms Weichart. Mrs Holt recorded that that behaviour had not been formally challenged by management before her investigation was undertaken. She stated that if there had been such intervention then the situation might not have reached the position which had been attained. In this context she specifically referred (as we understand it) to Mr Pelly, Dr Robson and Mrs Russell, although by position and not by name. She said that the Claimant needed to be made aware that that excessive letter writing, and the patronising and potentially undermining tone and the circulating of the letters beyond the immediate addressee was not acceptable. Mrs Holt also refers to the impact of conversations which the Claimant was having and said that they must be conducted at a mutually agreeable time. Those issues should be discussed informally between the Claimant and Dr Sulch.

148 Mrs Holt said that it was likely that there were genuine capacity issues in the Unit needing further consideration and that all four Consultants had been engaged in service changes including changes to middle grade activity and the cancellation of clinics and theatre lists. Mrs Holt noted that the Claimant was a senior and influential figure although his colleagues had been involved also. The Claimant had not incited his Consultant colleagues to make service changes, but he was passionate about the service which was to be delivered. She believed that the Claimant had the opportunity to influence others and have an impact on the morale. She also concluded that the Claimant's behaviour had impacted on the well-being of Dr Power and Ms Weichart but as this had never been identified as a problem previously he could have been unaware of that impact. The Claimant should be warned that a breach of behavioural expectations could result in disciplinary action.

149 In the report relating to the wider department Mrs Holt concluded that all the Consultants were clear that they agreed over the service changes and actions regarding clinical provision and middle grade activity which had taken place. Mrs Holt said that many of the concerns appeared to be genuine and needed to be addressed by management, including the issue of middle grade activity. Ms Weichart needed to be given appropriate support by other members of management in so doing. Mrs Holt found that a significant proportion of the Consultants found Ms Weichart 'to have a personal style which they found unhelpful.' Mrs Holt commented that disagreements had escalated and positions had become entrenched, and that management was in part culpable for that.

Efforts were needed to be made to improve working relationships and resolve disagreements.

150 A copy of the report (or reports) was sent to Ms Barwood of the BMA, by now the representative for the Claimant, on 19 August 2008. The Claimant wrote to Dr Sulch on 5 September 2008.[135] The Claimant's letter is four pages and detailed. He said that the report lacked impartiality and that Mrs Holt had oversimplified the issues. He said that although he had been fundamentally vindicated by the report it had failed to address the wider issues of concern which had been raised. He repeated that his exclusion was, in his view, entirely unjustified and wholly inappropriate.

151 A meeting was held of Dr Sulch, Mrs Storey, the Claimant and Ms Barwood on 1 October 2008.[136] Dr Sulch wrote a long letter to the Claimant on 16 October as a result of that meeting.[137] He said that he was satisfied that the investigation had been carried out properly by Mrs Holt, and he accepted that no disciplinary action should be taken against the Claimant. However, he said that he agreed with Mrs Holt's findings that the Claimant had acted inappropriately. Dr Sulch referred to matters under the headings of letter writing, tone of language, circulation of complaints, corridor conversations, and the effect of the Claimant's behaviour on Dr Power and Ms Weichart. He said that he agreed that disciplinary action was not appropriate but that any repetition of the previous conduct would not be tolerated and if there were such a repetition then the Claimant would be disciplined. Specific points were set out. At the end of the letter he said that his priority was to ensure that productive and courteous working relationships were restored and he expected the Claimant to engage in the appropriate steps.

152 On 13 October 2008 Dr Sulch held a meeting with the Claimant and Ms Barwood to discuss the Claimant's job plan. This was not part of the formal appeal process. As a result of that meeting Dr Sulch wrote to Ms Barwood on 21 November 2008.[138] He acknowledged that the Claimant's then current job plan meant that he was working in excess of the agreement reached when he commenced working with the Trust in 2001. He acknowledged that there was a more than usually onerous on-call rota and that the Claimant should receive payment for a temporary additional NHD on top of the intensity payment already received. He proposed that the un-remunerated prospective cover provided since Mr Hammadeh had been appointed in 2007 should be balanced out against any reduction in income which the Claimant would have suffered under the 10% rule relating to private practice. The issue of the number of NHDs to be worked going forward was raised. Dr Sulch said that the old contractual obligation allowed the employer to require a Consultant to

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[135] 1055

[136] Manuscript notes of the meeting are at 1060.9

[137] 1066

[138] 523

work between 5 and 7 NHDs and that the Claimant should agree officially to increase his number from 6.3 to 7. If that were not acceptable then the matter would have to be dealt with by mediation or a formal job plan appeal.

153 The Claimant had by then presented his claim form ET1 on 8 October 2008. We are aware that the discussions concerning the Claimant's job plan and the grievance he had raised continued after the date of the presentation of the claim form.

154 One element of this case is the impact on the Claimant's health. There was limited evidence before us. A letter dated 24 April 2008 from Dr Campbell, the Respondent's Occupational Health Medical Adviser, to Ms Weichart states that the Claimant was experiencing major problem with his emotional health, and also physical problems caused by the stress from which he was suffering.[139] A further letter of 29 May says that he was more stressed, and a rapid resolution of the problems was urged.[140] At the meeting on 9 June 2008 it was agreed that the Claimant's absence would be treated as sick leave.[141] Then on 26 June 2008 Dr Campbell wrote to Dr Sulch saying that the Claimant was fit to return to work.[142] The letter also states that the absence was to be treated as suspension rather than sickness. That discrepancy was not pursued before us.

155 We find that the suspension of the Claimant did have an adverse effect on his wellbeing. In the absence of any more detailed medical evidence we are unable to make any further findings.

Submissions

156 Miss Cowen made submissions on behalf of the Respondent having had the benefit of reading the written submissions of Miss Eady in advance. She agreed with the legal analysis set out by Miss Eady (as to which, see below) but made one further specific point relating to causation. Miss Cowen referred the Tribunal to *London Borough of Harrow v. Knight*[143], and submitted that the burden of proof only passes to the Respondent where the Tribunal finds that there is a *prima facie* case. In this case, she said, there was no link between what occurred to the Claimant and the protected disclosures.

157 Miss Cowen also provided written submissions to which she spoke. She said that the case was factually heavy (a submission which we have no difficulty in accepting without question) and emphasised that the Tribunal must consider first of all whether the Claimant has suffered the alleged detriments. She submitted that he had not done so in respect of some of them.

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[139] 848

[140] 935

[141] 968

[142] 994

[143] [2003] IRLR 140 EAT

158 Miss Cowen's submissions focused on the facts, and we have taken them into account when making our findings of fact and during our deliberations as to the conclusions to be reached.

159 Miss Eady QC made submissions on behalf of the Claimant. She dealt first of all with the law and summarised the outstanding questions for the Tribunal to determine as follows:

> Was the Claimant subjected to a detriment?
> If so, did that detriment arise from an act or deliberate failure to act by the Respondent?
> If so, was that act or omission done on the ground that the Claimant had made a protected disclosure?

160 Miss Eady referred the Tribunal to the following passage from Harvey:[144]

> The term detriment is not defined in the Act but it is a concept that is familiar throughout discrimination law and it is submitted that the term should be construed in a consistent fashion. If this is the case then a detriment will be established if a reasonable worker would or might take the view that the treatment accorded to them had in all the circumstances been to their detriment. In order to establish a detriment it is not necessary for the worker to show that there was some physical or economic consequence flowing from the matters complained of (see *Shamoon v Chief Constable of the Royal Ulster Constabulary (Northern Ireland)* [2003] ICR 337; as per Lord Hope at [2003] ICR 349 at paras [34] and 35)

161 Miss Eady relied on *Tapere v. South London Maudsley NHS Trust*[145] for the proposition that the Tribunal must consider the matter from the employee's point of view, and that a detriment would be material if it were more than trivial or fanciful. She further submitted that suspension of a qualified professional is not a neutral act.[146]

162 Miss Eady reminded the Tribunal that if the first two questions above were to be answered in the affirmative, then it is up to the Respondent to show the ground upon which the act, or failure to act, occurred.[147]

163 Miss Eady's written submissions on the evidence were lengthy, and we have taken them into account both when making our findings of fact and considering our conclusions. They did not analyse in any detail the relationship of the facts to the legal issues which we must determine.

164 Miss Eady and Miss Cowen had helpfully prepared a form of Scott Schedule based upon the various alleged detriments. In her submissions, Miss Eady suggested that they could be divided up into five categories as follows:

164.1 Those relating to the Claimant's Job Plan;
164.2 The delay in allowing the Claimant to operate at Guy's;
164.3 The Claimant's exclusion;

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[144] DII [90]

[145] EAT/0410/08

[146] *Mezey v. South West London & St George's Mental Health NHS Trust* [2007] IRLR 244 CA and *Watson v. Durham University* [2008] EWCA Civ 1266

[147] Section 48(2)

164.4 The making of defamatory allegations by Ms Weichart and Dr Power in their letters of 22 March 2008, and the subsequent dissemination of the letters;

164.5 The treatment of the Claimant in relation to prospective on-call payments.

We find that to be a useful categorisation.

Discussion and conclusion

165 It is a great pity that this matter has had to be considered by an Employment Tribunal. Considerable expense will have been incurred by both parties, and valuable time has been spent by the Claimant and other medical practitioners in attending at the Tribunal. However, it has not been possible for the parties to resolve the issues between themselves, and we are required to adjudicate upon them. We have reminded ourselves that our function is limited and it is to determine the legal issues before us. It is not our function to determine whether at any particular time one or other individual was 'right' or 'wrong' save insofar as relevant to the legal issues.

166 What is immediately apparent is that there has been a tension between the professional desire of the Claimant and his Consultant colleagues to provide a good quality urology service for the patients, and the requirements of management to reduce or limit costs and also comply with varying targets laid down by the Department of Health from time to time. The differences between the parties will have to be resolved by the restoration of a proper working relationship which will require goodwill on both sides. There is nothing which the Tribunal can do in this respect. That is up to the Claimant and current management.

167 As mentioned above Miss Cowen did not disagree materially with the submissions of Miss Eady as to the issues to be determined. We need to clarify one matter, and that relates to the burden of proof in accordance with section 48(2). It is not in dispute that what we must do is find whether or not any detriment was motivated (whether conscious or unconscious) by a protected disclosure, or to use the statutory language, weather the detriment in question was an act or omission of the Respondent 'done on the ground that' the Claimant had made a protected disclosure - see *Knight* at paragraph 16.

168 What was not authoritatively decide in *Knight* was the effect of section 48(2). Having referred to other statutory provisions, Mr Recorder Underhill (as he then was) said this at paragraphs 20 and 21:

> 20 Against that background, Mr Patten [Counsel for the employer] submits that all that s.48(2) does is to make it clear to employers that they have to be prepared in the tribunal to say why they acted in the respect complained of, with the result that if they fail to do so they may find inferences drawn against them (though only if such inferences are justified by the facts as a whole).
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> 21 We find Mr Patten's submission persuasive, but we do not believe that on this appeal we are obliged to resolve the question of the effect of s.48(2). After being briefly referred to in paragraph 1 of the reasons, it played no part in the tribunal's expressed reasoning. Any use to which it might legitimately have been put in support of Mr Knight's case was superseded

> by the misdirection which we have identified above. Prudent tribunals in dealing with victimisation claims will no doubt prefer, wherever possible, to make positive findings as to the grounds on which the employer acted rather than to rely on s.48(2) until its effect has been authoritatively established.

169 We too find the formulation by Mr Patten attractive. We have, however, as a primary task sought to make findings of fact as to the motivation of the Respondent's employees, where it is necessary so to do as a consequence of having answered the first two questions articulated by Miss Eady in the affirmative. It is not necessary for the questions set out above to be considered in the order set out. All three questions must be answered in the affirmative for the Claimant to succeed.

170 We accept the submissions by Miss Eady as to the meaning of the word 'detriment' in these circumstances as et out above.

171 As mentioned in the introduction to these reasons, the Respondent through Miss Cowen conceded that all the matters alleged by the Claimant to have been protected disclosures were such. As a consequence there was little concentration upon them during this hearing, whether in evidence or in closing submissions. Our task is to determine whether any detriments suffered by the Claimant arose from an act or omission of the Respondent which was on the ground of having made a protected disclosure.

172 We now turn to the question of the individual detriments alleged by the Claimant. As mentioned, these were categorised by Miss Eady and Miss Cowen. The first relates to various aspects of the job plan. Miss Cowen's submission was, in essence, that the fact that agreement had not been reached was not a detriment. The Claimant had failed to agree to any of the proposed changes, and that there was nothing wrong in asking a Consultant to agree to variations.

173 The alleged detriments in question are the alleged delay in agreeing the job plan, pressure to incorporate the SPC clinic into the job plan in late 2007 and the removal of the additional pay for running the clinic, the proposal to exchange activities, the analysis of the Claimant's time spent at the flexible cystoscopy clinic, and the consequent suggestion that he should undertake another activity at the same time. These are numbered 4-8 inclusive in the list set out at the beginning of these reasons.

174 We can deal with these together. We accept that at least the letter of 14 August 2007[148] constituted a detriment. However, we do not consider it necessary to go into the question of detriment in further detail. We are entirely satisfied that what occurred in these respects was not on the grounds of the protected disclosures made by the Claimant at the relevant time. Ms Weichart was presented with a requirement to reduce expenditure significantly. It was therefore natural for her to note the SPC clinic as a possible target for making savings because it was a regular clinic but paid for in addition to the normal salary. There is the additional subsidiary point noted by Ms Weichart that the Claimant was being paid

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the agreed sum of £500 as opposed to what was later generally agreed between management and clinicians as the normal fee for extra clinics of £300.

175 Ms Weichart carried out various analyses, some of which were discussed with the Consultant body as a whole. The Claimant had requested payment for extra meetings on 22 June 2007[149] and as a consequence of that request a job plan review was commenced. We have found that Ms Weichart did not understand the relative flexibility which the Claimant under the old contract as opposed to the prescriptive nature of the new contract. The review was accordingly not handled well by Ms Weichart, but we cannot find that what occurred was on the grounds of the various disclosures which had been made by the Claimant at the time. The Claimant was the only Consultant on the old contract and therefore his job plan was rather different from that of his colleagues. He was also the only Consultant carrying out an additional clinic on a regular basis for which a separate payment was made. We find that those were the reasons for the proposals put to the Claimant about changing his job plan. The analysis of time spent at the cystoscopy clinic was part of that process.

176 As far as the alleged delay in agreeing the job plan is concerned, we consider that the matter is straightforward. There has simply not been an agreement between the Claimant and management upon a revised job plan. We were told that the matter had been put on hold pending the conclusion of these proceedings. We do not consider it our role in these circumstances to make any comment about the respective positions adopted by the parties, not least because we are not satisfied that we know the up-to-date position. We are unable to say that the failure of the Respondent so far to agree to whatever the Claimant's proposals about the job plan are is a detriment. Further, even if the Claimant has suffered a detriment, we are unable to say that that was on the grounds of any protected disclosure(s) having been made. The review of job plans should be an annual process, although in fact that had not occurred. It takes two parties to agree to a new job plan, or indeed to retain the pre-existing plan. The Respondent is fully entitled to propose variations to the job plan. There is a mechanism for resolving disputes. That is all perfectly proper.

177 The next mater with which we deal relates to the prospective on-call payments. Those are items 2 and 3 in the above list. The first element is that the Claimant says he was not paid for October and November 2007, and the second element is that the Claimant was not thereafter remunerated in the same manner as his colleagues.

178 The Respondent's case is that the Claimant knew from 31 August 2007 that no agreement had been reached at the time about arrangements after September.[150] Therefore the claim for October and November was

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[150] See the Claimant's letter at 417

disingenuous. We cannot trace that this precise point was addressed by Miss Eady in her submissions.

179 The letter of 3 September 2007[151] from Mrs Russell said that payments would cease from 1 October, and then there would be standardised remuneration backdated to that date. The letter states that any agreed changes to the job plan and associated pay would be backdated to that date. Miss Eady drew our attention to the fact that this issue remains outstanding. She also drew our attention in her written submissions to the acknowledgment by Dr Power that the Claimant could be remunerated in a manner equivalent to that of his colleagues who were on the new contract. That was also acknowledged by Dr Sulch who gave evidence after Miss Eady had prepared her submissions.

180 Miss Cowen submitted that the reason that the Claimant was treated differently from his colleagues in relation to the period from 1 October 2007 onwards was because he was on the old contract, and that the offer of an additional NHD by Dr Sulch was made as negotiations continued.

181 Working on the assumption that the Claimant and his colleagues each undertook approximately the same amount of prospective on-call duties from October 2007 onwards and that his colleagues have been awarded one extra PA in that respect, there is a clear detriment to the Claimant. We must determine whether that was on the ground of one or more protected disclosures. In our judgment this forms part and parcel of the discussions over the Claimant's job plan. The letter of 3 September 2007 made specific reference to the remuneration being in a standardised way across all job plans, and that any relevant agreed changes to the job plan and pay would be backdated to that date. We accept Miss Cowen's submission that the fact that the acknowledgment by Dr Sulch that the Claimant should receive credit for the cover was in the context of continuing negotiations over the job plan.

182 We therefore conclude that the failure of the Respondent to make any payment to the Claimant (or credit him with an NHD) from October 2007 for prospective on-call cover was not on the ground of having made any protected disclosure. The negotiations over the job plan had (and have) not been concluded because the parties were not in agreement.

183 The first alleged detriment in the list relates to the Claimant being prevented from operating at Guy's for one year from October 2007. We accept that an unjustified delay in the Claimant carrying out major surgery at Guy's forms a detriment because he would thereby become deskilled in the particular procedures, with a potential adverse impact upon him being allowed to carry out such procedures in the future.

184 Miss Eady submitted that the attitude of Ms Weichart to the Claimant in relation to this matter was a result of a wider sense of frustration. She also referred to the meeting on 29 January 2008. She reminded us of the evidence of Dr Sulch in cross-examination that the proposal only affected

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one day per month when the Claimant would otherwise be undertaking an operating list on either a Tuesday or a Thursday. The second day would be on a Friday when the Claimant did not have any fixed commitment and his attendance at Guy's could properly be described as CPD.

185 Miss Cowen submitted that the earliest date at which the Claimant could have started operating at Guy's was early 2008, and that the reason for the further delay was that the potential impact on the Queen Elizabeth Hospital needed to be resolved through the job plan process. It was reasonable, she said, for the Respondent to allow the Claimant to commence operating at Guy's when it did.

186 We have found some of the fact-finding on this point particularly difficult. When it was put to the Claimant that he needed an Honorary Contract before he could operate at Guy's he said he could have attended there. It is from October 2007 that the Claimant alleges that there was a delay, although that does not appear to us to be the correct time frame. We will consider the matter from mid-December 2007, because in his letter of 20 December 2007[152] the Claimant said that he and other surgeons had been waiting for the signature of the Honorary Contracts, and he had signed his a week earlier.

187 Both Ms Weichart and Mrs Storey said in cross-examination that there was no difficulty in principle with the Claimant and some of his colleagues working at Guy's but the arrangements needed to be worked through. Further, it was necessary to liaise with Mr Hague at Guy's. There was a flurry of correspondence on 14 and 15 January 2008.[153] Then Mrs Russell wrote to the Claimant on 31 January 2008.[154] In that letter she referred to the wider job planning review process. There had by then been the meeting of 29 January 2008 which referred to the Claimant being difficult over his job plan and questioning whether he should be allowed to work at Guy's in those circumstances.

188 In our view the evidence is somewhat thin as to what occurred thereafter. We have noted that in an email of 9 February 2009 from Ms Barwood to Dr Sulch[155] she refers to his letter of 21 November 2008[156] but also states that he had agreed to the Claimant commencing operating at Guy's and that work would replace a clinical activity at the Respondent's hospital.

189 We conclude that the reason that there was a delay beyond the end of 2007 was not on the ground of the protected disclosures by then made, but the fact that there were discussions continuing about the Claimant's job plan. We have referred to that matter above.

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[152] 458

[153] 471, 472 & 473

[154] 477

[155] 525

[156] 523

190 We now turn to the major question of exclusion. In her submissions Miss Cowen identified the alleged reasons for the exclusion of the Claimant in nine different subparagraphs. We will endeavour to summarise the points made. She submitted that there had been a breakdown in the working relationship between the Claimant on the one hand and Ms Weichart and Dr Power on the other, and that their ability to address serious issues was hampered by the presence of the Claimant. The tone of the letters to them was demeaning, undermining, offensive and confrontational. He had sent 34 letter himself between August 2005 and March 2008, and 12 on behalf of colleagues, sometimes more than one per day. There was the perception that he was seeking to undermine managers and did not want to be managed. There was an intolerable working environment which had adversely affected their health. The Claimant could have influenced more junior staff during the investigation by Mrs Holt. There was a concern about the safety of patients as a result of potential failings to administer the cancer pathway programme. This final point is not one which was investigated to any extent during the hearing, and is not material.

191 There is a pleading point concerning whether the exclusion was itself a detriment. Miss Cowen said that in the submissions by Miss Eady she sought to add the fact of exclusion as a detriment, whereas previously it was the consequences which had been said to be detriments. We do not consider that the Tribunal ought to become too bogged down in the niceties of pleading. It is true that no specific detriments were pleaded in the claim form ET1. The notes of the issues made at the case management discussion on 13 March 2009 state that the trial Tribunal would have to consider whether the Respondent excluded the Claimant inappropriately. In our judgment the issue is clearly before the Tribunal. In the Scott schedule Miss Cowen herself appeared to acknowledge that the exclusion was a detriment.

192 Miss Cowen submitted that the Claimant had not suffered any detriment because he had continued to work at the same hospital. The Claimant does indeed continue so to work, but that ignores the fact that he was excluded for a time. We accept the submissions of Miss Eady on the point as set out above and find that the exclusion was itself a detriment.[157]

193 The Tribunal must therefore consider the reason(s) for the exclusion. That is a question of fact, based of course on the evidence before us. We must decide whether the exclusion was on the ground of the Claimant having made the protected disclosure(s). Borrowing the language of *Knight*[158] we must determine whether the making of the protected disclosure(s) caused or influenced the Respondent to exclude the Claimant. It is not sufficient to show that 'but for' the disclosure(s) the exclusion would not have occurred.

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[157] We have noted the authorities of *Mezey* and *Watson* mentioned by Miss Eady on the point to which reference is made in a footnote above.

[158] Paragraph 16 of the judgment of Mr Recorder Underhill

194 We have already mentioned that exclusion is a highly unusual step, and no witness had any experience of an exclusion in any circumstances which could be considered similar. There was some evidence before us as to whether what occurred strictly complied with the MHPS procedure. We do not consider it to be necessary to investigate that matter in detail. The fact is that the Claimant was excluded, and we accept that the Respondent attempted to follow the prescribed procedure, even if it did not entirely succeed.

195 Miss Eady submitted that the reasons given by the Respondent at the time do not stand scrutiny. She said that any breakdown in relationships was not new, and they were as they had been for the previous six to nine months. Nothing required the sudden exclusion of the Claimant. There was nothing to suggest that the Claimant would hinder the investigation to be carried out by Mrs Holt. He had not interfered with the Kelly investigation. There was no evidence of which staff (or patients) needed to be protected.

196 The reason(s) for the exclusion had not been specifically identified by the Respondent in the particulars of the response to the claim. In the Scott schedule in relation to not being allowed to contact colleagues reference was made to the Claimant's behaviour and attitude as shown in letters having led to a breakdown in relationships. In her oral submissions Miss Cowen submitted that the reason for the exclusion was the breakdown in the relationship between the Respondent's management and the Urology Consultants and the Claimant in particular. A further linked reason was the tone and contents of the letters.

197 We have to go back to the contemporaneous evidence and chronology in an attempt to ascertain the mental processes resulting in the exclusion decision. Details of the history of the raising of various issues by the Claimant, some along with his colleagues, has been set out above. Various issues had been raised by the Claimant and his colleagues from 2005. Matters clearly came to a head in late 2007. Mrs Kelly was appointed to investigate the Claimant's complaints. Then there was the meeting about the Claimant on 29 January 2008, followed by the Kelly report in March and the two letters from Dr Power and Ms Weichart of 22 March 2008. The Claimant was excluded on 9 April 2008 following a meeting to make that decision on 26 March 2008.

198 We have noted the text from the MHPS document as to the purpose of exclusion and when immediate exclusion may be appropriate and we have referred to that above. The reasons given by the Respondent when notifying the Claimant of the exclusion clearly adopt some of the reasons in the document. We have no doubt that of the three reasons for the exclusion as articulated by the Respondent at the time it is the first which is the principal one, that is the breakdown in relationships. The investigation process was secondary to that. There was nothing of substance mentioned to us about the safety of patients or staff. We therefore concentrate on the relationships with Dr Power and Ms Weichart. It is the supplementary report of Mrs Kelly relating to relationships with Dr Power and Ms Weichart and their letters of 22

March which sparked off the process. We have summarised those letters above.

199 The two letters recite the differences between the Claimant (and also his colleagues) and the Trust management in respect of the various matters raised by the Claimant in the correspondence referred to above. In our judgment it was the letters from Dr Power and Ms Weichart which were the proximate cause of the exclusion, along with the reference by Mrs Kelly to earlier letters from the Claimant. The letters of 22 March 2008 were in turn written as a consequence of the Claimant adopting the stance he had taken in earlier correspondence and meetings about the issues raised in the two letters. The Respondent has conceded that each of the letters and other matters alleged by the Claimant to have been protected disclosures were in fact protected disclosures. In those documents the Claimant is setting out his position (and sometimes that of his colleagues) over the relevant issue(s). The differences between the Claimant and management over various issues resulted in the letters of 22 March. We are therefore inexorably drawn to the conclusion that the exclusion of the Claimant was on the ground of the Claimant having made the protected disclosures in question. Clearly but for the Claimant having adopted the stance which he did on the various matters the exclusion would not have taken place, but that is not the test. The Claimant made various allegations and adopted positions on various matters as set out in the letters forming the disclosures. That was what was making life difficult for Ms Weichart and Dr Power. It was those matters which caused the exclusion. The exclusion was therefore on the ground of the protected disclosures. When deciding upon the categorisation of the reason for exclusion, the Respondent lifted the phrase 'breakdown in relationships' from the MHPS procedure. If the disclosures in turn caused a breakdown in the working relationship with management then it is not in our judgment possible to say that the exclusion was on the ground of the breakdown, rather than the protected disclosures behind that breakdown.

200 We do not accept the submission of Miss Cowen that it was the tone and volume of the letters which was the cause of the exclusion. It is true that the Claimant had used some forceful language in some correspondence. But we return to the basic fact that the letters written by the Claimant were conceded to be protected disclosures. Some of those letters set out disagreement with management. Further the two letters from Dr Power and Ms Weichart of 22 March 2008 concentrate upon the management issues and the attitude of the Claimant to them, rather than upon the tone and content of the letters.

201 The eleventh category of detriments includes not only the exclusion but also having restrictions placed upon the Claimant during his exclusion. The alleged restrictions were not being allowed to contact colleagues, not being able to attend lectures and meetings, and being barred from the hospital site without permission. It is true that he was told not to discuss the issues with anyone during the investigation. He was not prevented from contacting colleagues. He did not therefore suffer the detriment alleged. In any event, as Miss Cowen pointed out that was a perfectly

normal step in such circumstances. The reason was not the making of protected disclosures, but the fact that there was an investigation under way. Exactly the same rule would no doubt have been applied if another Consultant had been excluded for some reason other than the making of protected disclosures.

202 There was no evidence of the Claimant being banned from attending lectures or meetings. The Claimant was excluded from the Respondent's premises without prior permission, but that is the whole purpose of exclusion. That is not a detriment separate from the exclusion itself. He did not request being allowed to attend any lectures or meetings.

203 Linked to the claim relating to exclusion are the supplementary claims that the allegations by Dr Power and Ms Weichart in their letters of 22 March 2008 were potentially defamatory, and that the letters were disseminated to Dr Pelly. These are numbered 9 and 10 in the list of alleged detriments. We have some difficulty with the first matter. The submission by Miss Eady was any complaint against an individual which could result in an investigation constituted a detriment, and that the real reason for the writing of the letters was that they were written in response to the protected disclosures. Miss Cowen contended that the allegation was effectively one of malice on the part of Ms Weichart and Dr Power. She also pointed out that Mrs Holt had found the allegations to be factually valid, and that he should (in effect) be given a verbal warning.

204 We have difficulty with the phrase 'potentially defamatory'. They either were defamatory or they were not. It appears to us that the letters were clearly defamatory in the sense that they made derogatory comments about the Claimant. Whether the defence of justification would succeed in any action for defamation is an entirely different matter. Taking into account the broad meaning given to 'detriment', we accept the submission of Miss Eady and conclude that the making of the complaints in question did constitute a detriment to the Claimant. We note the submissions of Miss Cowen, but do not consider them to be relevant to the issue which we have to determine.

205 Although with considerable unease, we conclude that the making of the complaints was on the ground of the Claimant having made the protected disclosures and that constituted a detriment, given the wide meaning of that word. It is the contents of the various letters and the stance taken by the Claimant about which complaint was being made in the letters of 22 March 2008. Whether in the end our conclusion on this point adds anything to our finding relating to the exclusion is another matter.

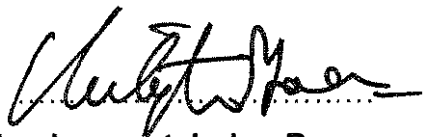
206 We can deal with the claim in respect of the copying of the two letters of 22 March 2008 to Mr Pelly can be dealt with easily. This is alleged detriment number 10. In the notes of the case management discussion of 13 March 2009 the alleged detriment was the dissemination of the letters to Mr Pelly and others. Miss Eady did not mention this point separately in her submissions. We find that there was no additional detriment caused to the Claimant by the pre-existing letters of complaint being copied to the then Chief Executive. Mr Pelly was the senior member of management, and we fail to see how additional discomfort was caused to

the Claimant by him having a copy. Further, there was no evidence on the specific point.

207 We now turn to the alleged detriments arising as a consequence of the exclusion which are also said to be detriments in their own right. For them to be detriments in their own right then they must satisfy the proper test. The alleged detriments are a loss of private practice income, loss of reputation, injury to feelings and to health. We accept on a balance of probabilities that the Claimant has suffered each of those detriments. The loss of reputation and private practice income can be dealt with together. We have no doubt that the exclusion of a Consultant, being a rare occurrence, must have an adverse impact upon his reputation. We accept that we did not hear any evidence from others as to how the Claimant's reputation had been reduced. We must adjourn any decision as to whether there has been an adverse impact on the Claimant's private practice income until a more detailed schedule is prepared. That is a matter which can conveniently be dealt with at a hearing as to remedies for the Claimant. There was some evidence before us on the point but the Tribunal needs further information before being able to come to a properly informed decision. The Respondent needs such information also.

208 The injury to feelings and health issues can also be taken together. Again we accept that the Claimant has been hurt by the exclusion and that his health has suffered, but we are not prepared to make any further precise findings at present based upon the limited evidence presented to us.

209 The next issue is whether they arose from an act of the Respondent. The answer to that question is in the affirmative. They result from the exclusion. The third question is whether that act was on the ground of the Claimant having made a protected disclosure. We have already answered that question in the affirmative.



Employment Judge Baron

29 January 2010

Reasons sent to the parties on

29th January 2010

and entered in the Register

for Secretary of the Tribunals