Case Number: 3303575/2019 (V)

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EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Dr G Warner	and	Royal Surrey County Hospital NHS Foundation Trust

Held by CVP on 10, 11, 12, 13 November 2020.

Representation	**Claimant:**	In Person
	Respondent:	Mr T Kirk, Counsel

Employment Judge Kurrein **Members:** Ms S Elizabeth
Mr R Eyre

JUDGMENT

The Claimant's claims are not well founded and must be dismissed.

REASONS

Statement on behalf of the Senior President of Tribunals

This has been a remote hearing that has not objected to by the parties. A face to face hearing was not held because it was not practicable and all issues could be determined in a telephone hearing. The documents that were referred to are in a bundle of 2,672 pages, the contents of which have been recorded.

1 On 31 January 2019 the Claimant, having completed early conciliation, presented a claim to the tribunal alleging race discrimination, public interest disclosure detriment and unpaid wages.

2 On 22 March 2019 the Respondent presented a response in which it denied those claims.

3 On 7 May 2019 there was an order for further and better particulars, and on 16 December 2019 EJ Vowles conducted a preliminary hearing. A further preliminary hearing took place on 16 June 2020, and the Respondent presented amended grounds of resistance on 10 August 2020.

4 The issues were defined at the latter preliminary hearing as follows:-

Time limits I limitation issues

8.1. Were all of the Claimant's complaints presented within the time limits set out in sections 123(1)(a) & (b) of the Equality Act 2010 ("EQA"); and sections 23(2) to (4) and 48(3(a) & (b) of the Employment Rights Act 1996 ("ERA")? Dealing with this issue may involve consideration of subsidiary issues including: whether there was an act and/or conduct extending over a period, and/or a series of similar acts or failures; whether it was not reasonably practicable for a complaint to be presented within the primary time limit; whether time should be extended on a "just and equitable" basis; and when the treatment complained about occurred.

8.2. Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 28 August 2018 is potentially out of time, so that the tribunal may not have jurisdiction to deal with it, subject to questions of whether there was conduct extending over a period, a series of similar acts or failures and whether time should be extended for presentation of the claim. The Claimant's case is that it was not until the publication of the Roddis report on 5 September 2018 that he had knowledge that his race/religion may have had an influence on his alleged mistreatment.

EQA, section 13: direct discrimination because of race/religion

8.3. Has the Respondent subjected the Claimant to the following treatment:

8.3.1. The failure in most years from 2004 to 2018/19 to carry out job planning - the ultimate responsibility for this lay with Dr Christopher Tibbs;

8.3.2. The email dated 8 September 2016 by which Dr Tibbs stated that the Claimant "should be aware that further allegations about a colleague may be considered vexatious if they are found to be unfounded and the Trust reserves the right to consider appropriate action in such circumstances". The Claimant argues that the natural interpretation of that extract is that it was an implied threat that the Respondent would not forget that he had made a report under the whistleblowing policy and a statement to the effect that his card was marked because of the protected disclosure he had made;

8.3.3. The failure of Dr Tibbs and his Deputy Medical Director, Dr Marion Illsley, who was acting under Dr Tibbs' direction, to investigate the creation of a fake email account to try to entrap the Claimant to do non-NHS work in NHS time within a reasonable period of the Claimant reporting this in February 2017;

8.3.4. Dr Tibbs by email sent an 2 April 2017 to the Claimant threatening to withhold his revalidation and license to practice.

8.4. Was that treatment "less favourable treatment', i.e. did the Respondent treat the Claimant as alleged less favourably than it treated or would have treated others ("comparators") in not materially different circumstances? The Claimant relies on hypothetical comparators.

8.5 If so, was this because the Claimant is Jewish and/or because of the protected characteristic of race or religion more generally? The Claimant made clear that his allegation against Dr Illsley is not that his race/religion had a material influence upon her actions but that she was acting under the direction of Dr Tibbs. He alleges that race/religion had a material influence upon the actions of Dr Tibbs.

Public interest disclosure (PID)

8.6. Did the Claimant make one or more protected disclosures (ERA sections 43B & 43C) as set out below? When the Claimant provides answers to questions 11.1 to 11.4 of the order of EJ Vowles sent to the parties on 29 December 2019 that will explain why he claims to have protected whistleblower status.

Did the Respondent subject the Claimant to any detriments, as set out below? Included within this issue are the questions of what happened as a matter of fact and whether what happened was a detriment to the Claimant as a matter of law.

8.8. If so was this done on the ground that he made one or more protected disclosures?

8.9. The alleged disclosures the Claimant relies on are as follows:

8.9.1. A formal whistleblower complaint raised against Dr Patrick Trend in about 2013 to 2014.

8.10. The alleged detriments the Claimant relies on are as follows:

8.10.1.The failure in most years to 2018/19 to carry out job planning - the ultimate responsibility for this lay with Dr Christopher Tibbs;

8.10.2.The email dated 8 September 2016 by which Dr Tibbs stated that the Claimant "should be aware that further a/legations about a colleague may be considered vexatious if they are found to be unfounded and the Trust reserves the right to consider appropriate action in such circumstances". The Claimant argues that the natural interpretation of that extract is that it was an implied threat that the Respondent would not forget that he had made a report under the whistleblowing policy and a statement to the effect that his card was marked because of the protected disclosure he had made;

8.10.3.The failure of Dr Tibbs and his Deputy Medical Director, Dr Marion Illsley, who was acting under Dr Tibbs' direction, to investigate the creation of a fake email account to try to entrap the Claimant to do non-NHS work in NHS time within a reasonable period of the Claimant reporting this in February 2017;

8.10.4. Dr Tibbs by email sent on 2 April 2017 to the Claimant threatening to withhold his revalidation and license to practice.

Unauthorised deductions

8.11. Was the Claimant paid less in wages than he was contractually entitled to be paid and if so, how much less? The period for which the Claimant claims to be entitled to be reimbursed is for 2 years prior to 3 April 2018, when he submitted a grievance about lack of yearly job planning. The Claimant is reminded that s.23(4A) of the ERA limits the Employment Tribunal's jurisdiction in relation to complaints presented on or after 1 July 2015 to a period of two years ending with the presentation of the complaint.

Remedy

8.12. If the Claimant succeeds, in whole or part, the Tribunal will be concerned with issues of remedy and in particular, if the Claimant is awarded compensation and/or damages, will decide how much should be awarded?

Procedural Matters

5 A number of such matters arose in the course of the hearing. Many of these came from the technical issues following the introduction of CVP hearings.

6 At the start of the hearing we expressed our concern about what appeared to us to be the inadequate nature of the Claimant's statement and the voluminous documentation that had been presented to us.

7 We spent a considerable time explaining to the Claimant what was required of a witness statement and were surprised that a man of his undoubted intelligence had not taken the time to carry out any research at all on what was required of him. It appeared that when statements were first exchanged the Claimant's statement was a single page. The Respondent's representatives agreed to allow him to try again, but in our view that further attempt remained wholly inadequate.

8 We concluded that it was in the interests of justice for the Claimant to be given a last opportunity to prepare a statement that might do justice to his case and, in light of the time we would require to read-in to the case, that it should be produced by the following morning.

9 At this time we had yet to receive the bundles in a format that was reasonably legible, something we hope will not happen in the future now that the document upload centre is in place.

10 On the morning of 11 November we had not completed reading the documentation we had received. We received a new, and much improved, statement from the Claimant. However, that statement appeared to include a new issues of alleged less favourable treatment. The Respondent, we thought very reasonably, took no objection to the admissibility of that statement provided the new issues were not included as claims in the case. We explained that situation to the Claimant, who expressed his appreciation of the stance being taken. We then adjourned until 13:00 to continue our reading.

The Evidence

11 We heard the evidence of the Claimant on his own behalf and took account of an exchange of emails between the Claimant and a former colleague.

12 We heard the evidence of Dr Christopher Tibbs, Consultant Gastroenterologist and former Medical Director, Joint Medical Director and Deputy Chief Executive; Dr Michelle Gallagher, Consultant Gastroenterologist and former Clinical Director; Dr Marianne Illsley, Consultant Clinical Oncologist and Medical Director since 2018, prior to this Joint Medical Director from June 2017; Dr Niall Quinn, Consultant Anaesthetist, and Deputy Medical Director from 2018; and Mrs C Harwood, an independent HR Consultant; on behalf of the Respondent.

13 We considered the documents to which we were referred in the electronic bundle.

14 We considered the closing submissions made on behalf of the parties and looked briefly at certain documentation forwarded to us by the Claimant (after

submissions had closed) and the responses of the Respondent to that correspondence. We took the view that correspondence was either irrelevant or inadmissible.

15 We make the following findings of fact

Findings of Fact

16 The Claimant was born on 3 March 1964 and was appointed to a position as a Consultant Neurologist with the Respondent on 1 November 2002.

17 The Respondent is an NHS Foundation Trust with over 3,000 members of staff which provides a wide range of general and specialist healthcare services from its site in Guildford.

Contractual Pay

18 The Claimant signed a contract on 18 December 2002. That contract was set out on the basis of the Terms and Conditions of Service of Hospital Medical and Dental Staff (England and Wales) and general Whitley Council conditions of service as amended from time to time.

19 That contract provided for the Claimant to work a 40 hour week, which was the equivalent of 10 programme activities ("PA"). Shortly after he started the Claimant agreed to undertake an additional 3 PA per week, therefore working 52 hours per week. However it is clear from the correspondence that that was a fixed term addition that was intended to end no later than 31 March 2005. It was subject to review in September 2004.

20 On 27 October 2005 the Respondent wrote to the Claimant following a further review meeting to inform him that his contract for three additional PAs per week would cease with effect from 1 February 2006.

21 On 19 January 2006 the Claimant signed a formal agreement to reflect his ongoing contract for a 40 hour, 10 PA, working week. This was, we understand, entirely voluntary on the part of the Claimant: some of his colleagues, in particular another Consultant Neurologist, Dr Trend, declined to do so and remained on "old" terms and conditions working 9 PA per week.

22 The Respondent's evidence that the Claimant had always been paid in accordance with a 40 hour, 10 PA, week since that date was not challenged.

The Claimant's relationship with Dr Trend

23 On 22 February 2012 the Claimant wrote to Dr Tibbs to outline his concerns at Dr Trend's working practises. It appears to us that the Claimant's relationship with and view of Dr Trend lies at the root of many of the issues of dissatisfaction he has raised in the course of his employment, and has been ongoing for many years. It is for that reason that we set out that letter in full because, in our view, it provides an accurate summary of what underlies much of the correspondence that follows,

> **"Neurology SBU "Governance" - Consultant Working Practices (Referrals & General Process)**

> I have attempted to outline a notable number of unfair issues and concerns. These include reasonable distribution and case mix (in-patient & out-patient), appropriate recognition of my commitment and energies applied to the Trust over the last 10 years and better job planning to address some of the acute service needs (shift of ward round from Thursday morning to Friday morning) whilst maintaining balance broad needs of senior staff including CME, access to regional expertise & roles within education & training. I need an explanation as to how 0.8WHE equates to only 5 “sessions” on site regardless of Contract & how in contemporaneous NHS employ an individual’s core focus is ever acceptably primarily outside the Public Sector. I need a record of what volume of NHS “new” cases in fact just reflect transfer from outside the Public Sector & what should be seen as reasonable & acceptable in relation to how it might divert away from true waiting NHS cases.
>
> These matters are pervasive and chronic and well overdue for fair and proper intersession.”

24 The Claimant wrote to Dr Tibbs, at considerable length and on the same themes, on 28 March, 16 April, 8 May and 12 June 2012.

<u>Grievance</u>

25 This correspondence culminated, at this time, in the Claimant raising a grievance concerning Dr Trend on 16 June 2012. This was addressed to Mrs Harwood, who was then the Respondent’s Deputy Director of HR.

26 Mr J Coleman, the Operations Director, interviewed Dr Trend on 13 August 2012 and found no evidence of their being inequity in the assignment of work within the Neurology Department. He recommended the Claimant and Dr Trend take part in mediation.

27 On 13 August 2015 Mr Coleman, having looked at a portfolio of information including speciality team records, activity records, complaints recorded, job plans and contracts, concluded that there was no evidence to support the concerns raised by the Claimant. While we thought this report to be extraordinarily delayed, without any explanation, the Claimant has not raised any issue concerning that outcome in this claim.

<u>Continuing</u>

28 On 25 September 2012 Dr Tibbs emailed the Claimant and Dr Trend to draw to their attention his concerns about the issues the difficulties in their relationship were giving rise to, and asked to meet them to discuss the issue.

29 On 22 October 2012 Professor Graham Layer, who was then Director of Professional Standards, wrote to the Claimant following a meeting with him on 17 October 2012 concerning his grievance. Professor Layer confirmed that it was the Claimant’s view that there were no patient safety issues in Neurology and his remaining grievance was about the allocation of workload and case mix in the Department being unfair.

30 On 17 December 2012 the Claimant again wrote to Dr Tibbs to raise “serious concerns” about Dr Trend’s practise. We do not appear to have a copy of that letter. Dr Tibbs reply of 3 January 2013 indicated his view that a formal review would have to be undertaken.

31 On 23 January 2013 the Claimant wrote to Mrs Harwood to appeal against his failure to gain a Clinical Excellence Award ("CEA"). On 1 February 2013 the Chair of the CEA appeal panel wrote to the Claimant to inform him that his appeal had not been accepted. The Claimant has raised no issue concerning that decision in this claim.

32 On 30 May 2013 the Claimant was asked to confirm that he was willing to take on the role of "clinical lead" in Neurology. We do not appear to have seen the Claimant's response.

<u>Job Plans</u>

33 All Consultants are required to have Job Plans ("JP"), which set out the duties that they will perform and the time that each is allocated, that have been agreed with their employer

34 The Claimant had an agreed job plan dated 26 October 2005 which allowed for 10 PA per week, but which was temporarily increased to 13 PA per week as set out above.

35 We accepted the evidence given on behalf of the Respondent that the Claimant was far from alone in not having an agreed JP for periods of time. Indeed, the Claimant relied on the absence of such plans for some of his colleagues as part of his claim in respect of the validation issue (see below).

36 The difficulty in agreeing a JP for the Claimant arose from his insistence that any JP must reflect a 52 hour, 13 PA, working week, which the Respondent was not willing to accept.

37 A JP mediation meeting took place on 15 July 2016 with Dr Tibbs, Jordan Coleman and Adrian Blight. The Claimant clearly understood from that meeting that it was the Respondent's policy that Consultants should only be contracted for 10 PA per week. The Claimant therefore took the view that any further meeting that might take place regarding job planning should be by way of an appeal.

38 On 29 January 2017 the Claimant wrote to Dr Davies, who was to conduct the Claimants job planning appeal. We understood this to be the first ever appeal of that nature within the Respondent. The Claimant attached documentation that he wished to refer to, including his job plan from October 2005 and his up to date work schedule.

39 On 1 February 2017 the Claimant attended his job planning appeal meeting with Dr Davies, which did not resolve their differences.

40 There were further discussions concerning the Claimant's JP involving him, Dr Illsley, Ms Stead, Dr Tibbs and others throughout 2017.

41 These difficulties were the subject of the Claimant's grievance and the report into it (see below).

42 A JP meeting took place on 18 January 2019 and, following a JP appeal meeting on 5 March 2019 his JP was approved on 1 April 2019 for 11.75 PAs a week.

Mediation

43 Mr Coleman’s letter of outcome to the Claimant’s grievance had suggested mediation as an appropriate way forward, and he contacted Mr Harris, Director of HR, to take that forward. It appears that Mr Harris contacted the Claimant with a view to starting mediation on two occasions without receiving a response. On 1 August 2016 Mr Coleman wrote to the Claimant to ask him to confirm that he did not wish to take that suggestion further. The Claimant replied to indicate that it was his view that mediation was not part of the “whistleblower“ process.

Public Interest Disclosure

44 This was the first occasion on which the Claimant suggested that he was acting in such a capacity.

45 In the course of the hearing we repeatedly asked the Claimant to identify the documents or conversations he relied on as being his disclosures. He was unable to assist us in any meaningful way. We also asked him what actual or potential wrong he relied on, for the purposes of Section 43B, but his answers were wholly unsatisfactory (see below).

Vexatious accusation

46 On 2 August 2016 Dr Trend’s BMA representative wrote to Mr Harris, with a copy to Dr Tibbs, asking them what steps they intended to take to protect her Member from further inappropriate allegations by the Claimant.

47 On 8 September 2016 Dr Tibbs wrote to the Claimant regarding an issue of waiting times in neurology and to thank the Claimant for his information, whilst regretting his failure to attend a meeting. The email also expressed concern at the Claimants apparent intention to alter a standard clinic template letter without discussion with management. That email concluded,

> “I was also disappointed to hear that you have declined to enter into mediation with Dr Trend as recommended as an outcome of your grievance against him. I can only assume that you no longer wish to pursue any issues that you may have about your colleague and consider the matter closed. You should be aware that further allegations about a colleague may be considered vexatious if they are found to be unfounded and the trust reserves the right to consider appropriate action in such circumstances.”

Fake emails

48 On 22 January 2017 the Claimant received an email from the apparently concerned daughter of a prospective private patient seeking a consultation. The Claimant’s responses were not answered and his investigations found the email account to have been temporary and the patient not to exist.

49 On 1 February 2017 Dr A Davies, a Consultant in Palliative Medicine and Chief of Service Medicine wrote to colleagues accusing the Claimant of having made admissions of impropriety in respect of his NHS working hours.

50 On the same day the Claimant wrote to Dr Davies to explain his circumstances and his position. The Claimant set out his position more fully by email of 6 February 2017.

51 On 2 February 2017 the Claimant, Dr P Trend and another Consultant Neurologist wrote to Dr Davies to express their collective concern at the delays in referrals to Neurology for treatment.

52 On 17 February 2017 the Claimant wrote to Ms Head, Head of HR, and Dr Illsley, under the subject "conspiracy". He was concerned at recent events, including the fake emails and Dr Davies conduct at their recent meeting.

53 There was no evidence that any one thought the fake emails to be of sufficient importance to justify them being investigated at that time.

54 Later that day Dr Illsley emailed the Claimant, having spoken to Ms Head, to say that she wished to assist him and thought they should meet up. They did so later that day.

55 On 17 February 2017 the Claimant was also involved in a discussion with one of the administrative staff, in which a manager intervened. That manager informed Dr Davies of the situation that had arisen and there was correspondence concerning it.

56 Dr Illsley was copied-in to those emails, and met Ms Head to discuss the issues in Neurology. She emailed the Claimant to suggest that all three of them should meet, and the Claimant agreed. They met, together with Dr Davies, on 24 February 2017. It appears to have been agreed that all Consultants should have an agreed JP, but the Claimant still considered his should reflect 13 PA per week. The fake email issue was not raised or discussed. Ms Head emailed a summary of what had been discussed and agreed to all those present on 27 February.

57 Following the Roddis report (see below) an investigation of those emails was carried out but was inconclusive due to the passage of time.

<u>Revalidation</u>

58 Consultants such as the Claimant have to be revalidated with the GMC every five years in order to continue practicing. In this context we also bore in mind the clear evidence that there was at this time considerable pressure being exerted by the administration and HR for all Consultants to have agreed JPs.

59 The Claimant raised this issue with Dr Davies in his email of 6 February 2017. He asserted that having consulted the BMA they and he took the view that an agreed JP was not a prerequisite to revalidation. He challenged Dr Davies view to the contrary.

60 There was then a chain of emails between the Claimant and Dr Tibbs, from 20 February 2017 onwards, in which the Claimant raised the issue of his revalidation, due in Summer 2018, and his JP and the effect of failing to agree his JP on his revalidation. This was important, because Dr Tibbs was the Responsible Officer for the purpose of revalidation.

61 Dr Tibbs made it clear he thought it important that the Claimant's JP be agreed. The Claimant was insistent that he be informed if his revalidation might be compromised if the JP had not been agreed.

62 He emailed Dr Tibbs on that issue on 24 February, 1 March and 24 March 2017. Dr Tibbs emailed on 26 March to point out that the Claimants revalidation was not due until 27 June 2018, so there was more than a year to sort out a JP. The Claimant responded to say that he still did not have an answer to his question concerning the link between an agreed JP and revalidation. Dr Tibbs responded on 2 April 2017,

> "It is expected that all Drs will submit a copy of their current job plan with their appraisal documentation. This is the case of Equinity and on the GMC MAGMF form. Your appraiser can hardly be expected to do his or her job properly in assessment of your practise if he is unaware of the job you're supposed to be doing. I would argue therefore that a job plan is a prerequisite for a thorough appraisal and that appraisal is a prerequisite for revalidation. A decision to recommend deferral of revalidation to the GMC is in my gift as an RO. I have yet to tell the GMC that any of our colleagues are not engaging in the appraisal process.
>
> Irrespective of the revalidation issue it is a reasonable management request that all employees should have an agreed job plan and that this should be signed off on an annual basis and I know that the BMA agrees with this.
>
> I hope this clarifies."

63 The Roddis report was highly critical of this email,

> To attempt to close down an unresolved dispute by threatening adverse consequences if it continues is not an appropriate way to manage the problem.

64 In the course of his evidence Dr Tibbs accepted that there was no actual requirement for a JP to have been agreed in order for revalidation to be granted, and that the Claimant had been revalidated in 2013 when he did not have a currently agreed JP.

65 He also evidenced an analysis that showed the Claimant was far from alone among Consultants working for the Respondent in having a discrepancy between the hours worked and the contractual PAs.

66 In mid-March 2017 the Claimant met Dr Illsley to discuss his JP, but no agreement was achieved, and on 24 March the Claimant raised concerns with Dr Illsley regarding Dr Davies "style & unilateral approach".

<u>Grievance</u>

67 By a letter dated 2 April 2018, over 14 pages and with dozens of attachments of almost 100 pages, the Claimant raised a formal grievance. The issues he raised were under headings

- Workload and my attempts to resolve inequities
- The flawed job planning process
- Failure to respect clinical priority and expertise

- Misrepresentation and further personal ill-treatment
- Representation to external/other agencies
- Departmental representation and strategy
- Outcomes required of grievance

68 The Respondent appointed Dr M Roddis, an independent spcialist, to investigate the Claimant's grievance. He completed his investigation and provided a report on 28 August 2018. That report was detailed. Dr Roddis had interviewed

- Ms C Barkley
- Mr J Coleman
- Dr Davies
- Mr J Harris
- Mr T Powell
- Dr N Sands
- Dr C Tibbs
- The Claimant

69 Dr Roddis made a number of recommendation:-

> 4.1 This report should be shared with Dr Warner and form the basis of discussions with Dr Wilson to resolve his grievance.
>
> 4.2 Dr Warner should be offered the opportunity to present his case about his job plan to a properly constituted appeal panel in line with national job planning guidance. The Trust should accept the conclusions of the panel.
>
> 4.3 The attempted entrapment by fake emails should be subject to a thorough external independent investigation, and appropriate action taken if the allegation is proved and the perpetrator discovered.
>
> 4.4 The results of this investigation should be shared with Dr Warner.
>
> 4.5 The Neurology department should be asked to produce a strategy including a five-year plan for service development. This should be facilitated by general management and should involve a minimum of two facilitated strategy days attended by the whole of neurology and supported by the Chief of Service and the CCG.
>
> 4.6 The Trust should put in place as a matter of urgency a policy and process for the conduct of job plan negotiations, in line with national guidance and including provision for dispute resolution and appeal.
>
> 4.7 The Trust should commission a review of job planning practice across the board to ensure that there is a consistent approach to negotiation in line with national guidance.
>
> 4.7 The Trust should review its guidance on the link between appraisal, revalidation and job planning to ensure practice is within national guidance.

> 4.8 The Trust should produce comprehensive guidance to its medical leaders on Consultant performance management.
>
> 4. 9 The Trust should commission a review of private practice arrangements across the whole organisation to ensure adherence to the Code of Conduct and provide equity of approach to the management of practice in all clinical areas.

Submissions

70 We heard and read the submission of the parties. It is neither necessary nor proportionate to set them out here .

Law

71 We are primarily concerned with Sections 13, 43B and 43C Employment Rights Act 1996 and Sections 13, 123 and 136 Equality Act 2010.

72 We have also had regard to the following authorities:-

- Igen Ltd v. Wong [2005] IRLR 258 re burden of proof
- Madarassy v Nomura International Plc. [2007] IRLR 246
- Hendricks v. Commissioner of Police for the Metropolis [2003] IRLR 96
- HSBC v. Gillespie [2011] IRLR 209
- Aziz v FDA [2010] EWCA Civ 304
- Anya v. University of Oxford [2001] IRLR 377

Further Findings and Conclusions

73 In making the following further findings and drawing our conclusion we refer to and adopt all our above findings

<u>Unauthorised Deductions</u>

74 This requires us to consider,

Was the Claimant paid less in wages than he was contractually entitled to be paid and if so, how much less?

75 We are unanimous in finding that the Claimant was not paid any less than he was contractually entitled to. He signed a contract on 26 October 2005 to work and be paid for a 40 hour, 10 PA, week and has been paid on that basis throughout the relevant period.

76 The Claimant has failed to establish on the balance of probabilities that he has been subjected to any unauthorised deduction and this claim must be dismissed.

<u>Public Interest Disclosure</u>

The alleged Disclosure

77 This claim was based on a supposed disclosure identified as,

> “A formal whistleblower complaint raised against Dr Patrick Trend in about 2013 to 2014.”

78 We strove, in vain, to discern from the vast volume of documentation any communication by the Claimant that might amount to the identified, or any, protected disclosure that might fall within S.43B Employment Rights Act 1996.

> **43B Disclosures qualifying for protection**
>
> (1) In this Part a 'qualifying disclosure' means any disclosure of information which, in the reasonable belief of the worker making the disclosure, [is made in the public interest and] tends to show one or more of the following—
>
> (a) that a criminal offence has been committed, is being committed or is likely to be committed,
>
> (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,
>
> (c) that a miscarriage of justice has occurred, is occurring or is likely to occur,
>
> (d) that the health or safety of any individual has been, is being or is likely to be endangered,
>
> (e) that the environment has been, is being or is likely to be damaged, or
>
> (f) that information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed.

79 We accepted that he raised numerous matters that were of concern to him regarding Dr Trend's practice in 2012 and 2013. These related to, as the Claimant said in his letter of grievance dated 12 June 2012,

> " .. my original concerns of Influence, Representation, Consultation, Recognition/Remuneration and Governance."

We thought all those concerns were individual in nature, were held only by the Claimant, and had no public interest element at all.

80 Despite our repeated requests, the Claimant was quite unable to identify the document/s he relied on, although he was given every opportunity, over 3 days, to do so. At one point the Claimant sought to suggest that patients were put at risk, but that was contradicted by what he said to Dr Davies on 22 October 2012 and, more importantly, what he said to Dr Roddis concerning Dr Trend, "I think he's clinically fine." Yet more importantly, there was no record of his every having said that patients had been put at risk.

81 The Claimant also sought to suggest that the very fact of the difficult relationship he had with Dr Trend inevitably had an adverse effect on the performance of his Department and should thus be viewed as potentially putting patients at risk. We thought that to be unrealistic. Not only was it contrary to what he had expressly said, but the chain of causation necessary to imply from his non-clinical criticisms of Dr Trend that he was making a disclosure concerning patient safety was far too complex and extended to be fall within the statute.

82 On the basis of the above findings the Claimant's claim alleging public interest disclosure detriment must be dismissed. There was no evidence at all of any relevant disclosure, let alone a protected one.

The alleged Detriments

83 We are unanimous in our conclusion in respect of the alleged detriments to the following effect.

> 8.10.1.The failure in most years to 2018/19 to carry out job planning - the ultimate responsibility for this lay with Dr Christopher Tibbs;

84 The Respondent did not fail to carry out job planning. The Claimant had a job plan in 2005 which was agreed. Thereafter, until 2019, he and the Respondent were unable to agree a job plan. We have set out above the more recent history of the efforts taken by the Respondent to agree a job plan with the Claimant.

85 In our view this alleged detriment is misconceived: the Claimant cannot complain that the Respondent failed to accede to his demansds.

> 8.10.2.The email dated 8 September 2016 by which Dr Tibbs stated that the Claimant "should be aware that further a/legations about a colleague may be considered vexatious if they are found to be unfounded and the Trust reserves the right to consider appropriate action in such circumstances". The Claimant argues that the natural interpretation of that extract is that it was an implied threat that the Respondent would not forget that he had made a report under the whistleblowing policy and a statement to the effect that his card was marked because of the protected disclosure he had made;

86 We accepted Dr Tibbs evidence that following the receipt of Dr Trend's BMA representative's email he sought HR advice on what he should do. He was referred to the relevant policy, which contained the following paragraphs,

> "5.7 Within the Trust retaliation and victimisation against anyone raising a concern or giving evidence as part of an investigation relating to raising a concern will constitute a serious disciplinary offence and may be dealt with as gross misconduct under the Trust's Disciplinary Policy & Procedure.
>
> 7.6 False Allegations
>
> 7.6.1 False allegations can be damaging and disruptive and will be taken seriously. Disciplinary action may be taken if allegations have not been made in good faith with a genuine belief that there is a risk of malpractice.
>
> 7.6.2 If an allegation cannot be substantiated following a formal investigation and there is reasonable cause to believe that the person raising the concern acted maliciously, the matter will be investigated under the Trust's Disciplinary Policy & Procedure."

87 In the circumstances of this case we thought it unsurprising that Dr Tibbs was concerned at the Claimants repeated attempts to criticise Dr Trend and his practise. However, we thought the criticism made of that email and Dr Tibbs' management style by the Roddis report to be entirely appropriate. There was no suggestion that the Claimant had acted vexatiously or maliciously in making the criticism he did.

88 If the Claimant had made a protected disclosure by his criticisms of Dr Trend we might well have drawn adverse inferences from Dr Tibbs' conduct in this regard.

> 8.10.3.The failure of Dr Tibbs and his Deputy Medical Director, Dr Marion Illsley, who was acting under Dr Tibbs' direction, to investigate the creation of a fake email account to try to entrap the Claimant to do non-NHS work in NHS time within a reasonable period of the Claimant reporting this in February 2017;

89 This alleged detriment is based on a fundamental misunderstanding. Drs Tibbs and Illsley were the Joint Medical Directors, neither of them directed the other. We also accepted that any such investigation was the responsibility of the Claimant's line manager, not Dr Illsley.

90 It is also clear that the Claimant was grateful to Dr Illsley for the time she took to support him at this time.

91 At the time of the events the Claimant did not request that this be investigated, and did not raise it as an issue again until his grievance dated 2 April 2018.

92 In light of all our findings the Claimant has failed to establish a factual basis for this alleged detriment, far less the necessary causation.

> 8.10.4. Dr Tibbs by email sent on 2 April 2017 to the Claimant threatening to withhold his revalidation and license to practice.

93 It is, to say the least, unfortunate that the Respondent's guidance on this issue was inaccurate and did not reflect GMC policy on the subject.

94 Dr Tibbs accepted in cross examination that he became irritated by the Claimant's insistence

95 We can well understand the Claimant's disquiet on reading this email. It was not only inaccurate, because it relied on the Respondent's policy, but poorly worded. In all the circumstances we thought his interpretation of the email to be entirely reasonable.

96 This is, unfortunately, another instance of Dr Tibbs going too far in seeking to achieve his ends. Had there been a protected disclosure this conduct might well have resulted in an adverse inference,

Direct Discrimination

97 We repeat our above findings in respect of the alleged detriments in respect of the factual allegations of less favourable treatment on the issue of whether or not they took place.

98 The onus lies with the Claimant to establish, on the balance of probabilities, that he was treated less favourably than an appropriate comparator. He relies on a hypothetical comparator. We have defined that comparator as being a person with all the same attributes as the Claimant, but not of the Jewish faith or ethnic origin.

99 We are unanimous in finding that the Claimant has failed to discharge the burden of establishing on the balance of probabilities that was the case. There

was, simply, no evidence from which such a conclusion might be drawn, whether directly or impliedly.

100 The only evidence that the Claimant led on this was a short passage in Dr Roddis' record of his interview with Dr Tibbs in which recorded Dr Tibbs as saying,

> 'When Dr Warner joined the department the environment was very hostile and he was not made to feel welcome. It was not conducive to a good working environment. CT said that there might be some anti-Semitic issues as Dr Warner was Jewish."

101 Dr Tibbs gave detailed evidence both disputing the accuracy of that record and explaining the context in which he made the comments he did. In particular he stated that the reference to 'anti-Semitic' was not making such an allegation against Dr Trend, or anyone else involved since his, Dr Tibbs, appointment, but referred to the attitude of a Doctor who had been previously employed. That evidence was not challenged.

102 We considered this passage, and the evidence relating to it, at some length. We did not hear from Dr Roddis or Dr Trend. We did hear from Dr Tibbs, at length: his statement contained over 200 paragraphs and he was cross-examined for 2 hours. It was never put to Dr Tibbs that the Claimant's race or religion had been a factor in any of the actions or omissions he was alleged to be involved in. No allegation of that nature was made in the Claimant's statement.

103 We have also given careful consideration to our findings concerning Dr Tibbs' conduct, and whether it was such that an adverse inference might be drawn in respect of this aspect of the claim. We accepted that Dr Tibbs treated the Claimant unfavourably. However, that, of itself, is not enough to draw the necessary inference: Anya v. University of Oxford [2001] IRLR 377. Having regard to all the evidence in the case we are unable to draw the sought-for inference in the circumstances of this case.

104 We accepted Dr Illsley's evidence that she was unaware that the Claimant was Jewish.

105 The onus also lay on the Claimant to establish, on the balance of probabilities, evidence from which we might infer, absent an explanation from the Respondent, that the conduct of which he complained could have been because he was Jewish.

106 We are unanimous in finding that, taking all the evidence we heard into account, the Claimant had failed to surmount that hurdle.

107 We are therefore unanimous in finding that this aspect of the Claimant's claim is not well founded and must be dismissed.

Out of time issues

108 The Claimant started early conciliation on 27 November 2018. On that basis, applying the usual three month time limit, the last date on which any matter of which he could make complaint would have been 28 August 2018.

109 As indicated in the list of issues, matters arising from a continuing act might be relevant in this context. However, in light of all our above findings, there was no continuing act such as, for instance, the failure to carry out job planning or the making of unauthorised deductions.

110 The other acts relied on by the Claimant as detriments are alleged to have taken place in 2016 or early 2017. Those events are clearly very substantially out of time.

111 In those circumstances the burden lies on the Claimant to establish, on the balance of probabilities, that it would, in all the circumstances, be just and equitable to extend time in his favour.

112 Unfortunately the Claimant gave no evidence at all on this issue. He gave no explanation as to why he took no action in respect of these events at the relevant time.

113 In all the circumstances of the case we are unanimous in concluding that the Claimant has failed to discharge the burden on him of establishing that it would be just an equitable to extend time in his favour. Had his claims relating to events in 2016 and 2017 been valid we would have declined jurisdiction to hear them.

Employment Judge Kurrein

4 February 2021

Sent to the parties and

entered in the Register on 04 : 02 : 2021

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For the Tribunal

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