Case No: 2301566/2023

EMPLOYMENT TRIBUNALS

Claimant: Mr. K Bruecker

Respondents: Smart Medical Clinics Ltd (Respondent 1/R1)
Mr. Martin Dace (Respondent 2/R2)
Ms. Monika Mordel (Respondent 3/R3)
Ms. Sylvia Nieciecka (Respondent 4/R4)
Mr. Michael Spira (Respondent 5/R5)
Mr. Mike Parker (Respondent 6/R6)

Heard at: London South (by video)

On: 17 June 2024
18 June 2024
19 June 2024
20 June 2024
21 June 2024
24 June 2024

12 and 13 September 2024 and 27 and 28 November 2024 – panel only

Before: Employment Judge Cawthray
Ms. C Beckett
Mr. K Lannaman

Representation
Claimant: In person, not legally qualified
Respondent: Ms. Joanna Veimou, Litigation Consultant with Peninsula – non practising barrister

RESERVED JUDGMENT

1. The complaint of direct sex discrimination it not well-founded and is dismissed.

2. The complaint of victimisation is not well-founded and is dismissed.

3. The complaint of being subjected to detriment for making a protected disclosure is not well-founded and is dismissed.

4. The complaint of automatically unfair dismissal is not well-founded and is dismissed.

5. The complaint of breach of contract in relation to notice pay is not well-founded and is dismissed.

6. The complaint in respect of holiday pay is well-founded. The First Respondent failed to pay the Claimant in accordance with regulation 14(2) and/or 16(1) of the Working Time Regulations 1998. The First respondent shall pay the Claimant £2,633.75. The Claimant is responsible for paying any tax or National Insurance.

7. The complaint of unauthorised deductions from wages is well-founded. The First Respondent has made an unauthorised deduction from the Claimant's wages by failing to pay the Claimant the full amount of wages due between 15 and 21 March 2023. The First Respondent shall pay the Claimant the gross sum of £2,107.00 in respect of the amount unlawfully deducted. The Claimant is responsible for the payment of any tax or National Insurance.

REASONS

Introduction - evidence and procedure

8. ACAS Early Conciliation took place between 15 March and 6 April 2023.

9. The Claimant submitted his claim form on 7 April 2023.

10. The Claim is brought against six respondents, the Claimant's former employer, Smart Medical Clinics Ltd is the First Respondent/R1, and the other five named respondents were employees /officers of the First Respondent.

11. A case management preliminary hearing was conducted by Regional Employment Judge Khalil on 23 October 2023. However, the parties had not attended the hearing ready to discuss the issues, and therefore little progress was made. A number of case management directions were ordered and the case was listed for a six day final hearing taking place between 17 to 24 June 2024.

12. On 5 December 2023 the Respondents' representative raised that one of the respondent witnesses was due to be on leave between 10 and 20 June 2024 and requested if they could be cross examined later in the hearing. The email did not identify which respondent this related to.

13. On 8 February 2024 Employment Judge Martin wrote to the parties and informed them that: "*The Tribunal does what it can to accommodate witnesses provided that the hearing is not delayed or compromised in any way. The hearing has been listed for six days. Therefore, provided the witness can give evidence in the first four days, this should not be a problem.*"

14. On 9 February 2024 the Respondents' representative asked for their email of 5 December 2023 to be reviewed.

15. A further case management preliminary hearing took place on 23 April 2024 before Employment Judge Hart. It was specifically explained to the parties that the purpose of the hearing was to clarify the issues and determine if the claim was ready for a final hearing. A discussion regarding the issues took place and a List of Issues was appended to the Case Management Order.

16. At the hearing, the Respondents' representative Ms. Mayhew-Hills confirmed that an application for postponement of the final hearing was **not** being pursued.

17. A provisional timetable for the final hearing was set out in the Case Management Order.

18. The Respondents' representative wrote to the Tribunal on 7 May 2024, 3 June 2024 and 11 June 2024 making applications for postponement of the final hearing, on the basis that Ms. Nieciecka R4, and Dr. Spira R5, were not available.

19. Acting Regional Employment Judge Andrews considered the application and wrote to the parties informing them that the application for postponement was refused, noting that Dr. Spira had booked flights after the final hearing had been listed, that there had already been a significant passage of time since the events the claim is about and that it may be possible to adjust the final hearing timetable.

20. In relation to the issues to be determined, Employment Judge Hart's Orders, as made at the Case Management Preliminary Hearing on 23 April 2024, state:

    *7. By **8 May 2024** the **claimant** and the **respondent** must both write to the Tribunal, **marked for the attention of EJ Hart**, providing a final list of issues incorporating any agreed corrections or further detail as identified below. The parties to confirm that this will be the final list of issues for the hearing or, if not, to explain why. Once agreed, the list will be treated as final unless the Tribunal decides otherwise.*

    *8. By **8 May 2024** the claimant to confirm in writing that any claim or issue not*
    included in the list of issues is to be dismissed upon withdrawal, or if not to
    explain why.

21. We had been provided with an amended List of Issues shortly before the start of the final hearing. This had not been referred to Employment Judge Hart. A significant number of allegations of victimisation and whistleblowing detriment had been added. The additions were in red text and therefore were easily identifiable. The parties said the List of Issues was agreed.

22. The List of Issues was discussed with the parties, and it was explained by the Employment Judge that on a quick review there were some allegations which were not entirely clear to the Tribunal. In relation to some of the new allegations, after discussion with the parties, they were amended slightly and were set out in a more understandable manner. The list of issues below reflects the changes made to the List of Issues at the start of the hearing. The Claimant also sought to confirm the basis of his notice pay, holiday pay, unauthorised deduction from wages and breach of contract complaints.

23. Ms. Veimou, on behalf of the Respondents, stated that all three alleged protected acts under the victimisation complaint were accepted as amounting to protected acts. In relation to the alleged protected disclosures, Ms. Veimou confirmed that the second alleged protected disclosure was accepted as amounting to a protected disclosure but the first was not, as she submitted it did not meet the public interest test.

24. There was some delay in the Tribunal receiving the electronic documents, but that was because the final hearing had been converted from an in person hearing to a video hearing, at short notice, on 14 June 2024.

25. We were provided with a witness statement from the Claimant, a bundle of witness statements for the Respondents and a bundle of 670 pages. The bundle contained pages at the end which the parties referred to as the supplementary bundle, but this section had no index. The bundle was not well organised, it was not in chronological order and index did not always clearly identify the document.

26. The Claimant's witness statement was 40 pages long, and had no paragraph or page numbers. The Employment Judge asked the Claimant to add paragraph and page numbers whilst the Tribunal were reading, on the morning of day 1, which he did. The Claimant also added an additional paragraph, numbered 61. Within this paragraph he set out what he said at the start of the hearing when clarification was sought about the amount of holiday pay and wages that he says was owed to him. The Claimant submitted his amended statement to the Tribunal, copied to the Respondents representative at 13:04 on the first day of the final hearing.

27. At the start of the final hearing it was ascertained that there was some difficulties with attendance relating to Ms. Nieciecka and Dr. Spira. Ms. Nieciecka had booked her flights abroad on the 30 Augst 2023 at 10:22 before the final hearing was listed. However, Dr. Spira had booked his flights on the 14 November 2023, after the final hearing was listed. It was agreed that as Ms. Nieciecka was due to land on day 4 of the final hearing that she would need to give

evidence on day 5. This meant that it would not be possible to hear submissions until later in day 5 and that only day 6 would be available for deliberation.

28. Unfortunately, Ms. Nieciecka's flight was delayed, and this meant she was not able to give evidence until day 6. Dr. Spira was also restricted in availability, and he gave his evidence on day 4. Oral submissions were made in the afternoon of day 6. This allowed no time for panel deliberations. The panel reconvened on 12 and 13 September 2024, but due to the very large number of allegations and the volume of information it was not possible to complete deliberations on those dates and the panel met again on 28 and 29 November 2024. This judgment and reasons were completed as soon as possible thereafter.

29. At the start of the final hearing the Employment Judge explained the Tribunal process to the parties, specifically, the process of giving and challenging evidence and putting forward a case and the difference between the evidence stage and making submissions. It was explained that the parties needed to direct the panel to relevant documents.

30. The Claimant affirmed his witness statement at 14.40 on day 1. During the hearing the Claimant emailed the Tribunal on 20 June (day 4) at 09:20 stating that he wished to amend his witness statement in relation to sick leave. The Claimant was recalled and reaffirmed on day 4 of the hearing and read out his email as the evidence he wished to amend. Ms. Veimou did not ask any questions at this stage.

31. The Claimant had prepared a list of questions for each respondent witness. The Respondents all either affirmed or swore on a holy book.

32. It was necessary for the Employment Judge to carefully manage the timetabling of the final hearing. The Employment Judge warned the parties when the time for cross-examination was near to ending and gave the Claimant time to check the questions he wished to ask the Respondents.

33. During the final hearing there were a significant interruptions, the parties spoke too fast and overtalked each other on many occasions. The Employment Judge reminded the parties on numerous occasions of the need for a clear question and answer at a slow pace to enable notes to be made. The Employment Judge also reminded the parties many times during the hearing that the Tribunal would only be determining the issues as set out in the List of Issues and directed them to the issues regularly.

34. There were no adjustments needed for any attendee.

The Issues

35. As noted above, the issues were discussed at the start of the hearing, and some small changes were made.

36. At the start of the final hearing, the Employment Judge asked the Claimant to clarify the sums he was seeking and confirm whether the holiday pay,

unlawful deduction from wages and breach of contract complaint were being pleaded in the alternative. The Claimant explained the amounts he says he was owed, and although he initially said all the claims were different he then accepted they were in the alternative.

37. The text in red font indicates the allegations that the Claimant added after the Case Management Preliminary Hearing with Employment Judge Hart on 23 April 2024. We have kept the numbering as set out in the List of Issues for consistency as the List of Issues has been copied from the document provided by the parties.

38. The Claimant is making the following complaints:

    a. Direct sex discrimination

    b. Victimisation

    c. Public interest disclosure detriment

    d. Automatic unfair dismissal

    e. Wrongful dismissal

    f. Non-payment of holiday pay

    g. Unlawful deduction from wages

    h. Breach of contract

39. The claim includes 5 allegations of direct sex discrimination, 24 allegations of victimisation and 18 allegations of whistleblowing detriment.

1. Time limits

    a. Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 16 December 2022 may not have been brought in time.

    b. Were the discrimination and victimisation complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:
        i. Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?
        ii. If not, was there conduct extending over a period?
        iii. If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?
        iv. If not, were the claims made within a further period that the Tribunal thinks is just and equitable?

    c. The Tribunal will decide:
        i. Why were the complaints not made to the Tribunal in time?

ii. In any event, is it just and equitable in all the circumstances to extend time?

2. Direct sex discrimination (Equality Act 2010 section 13)

a. Did the respondent do the following things

i. From around November 2022, did Ms Mordel book female patients away from the claimant; allowing them to be seen by female doctors only?
ii. On 25 November 2022 did Ms Mordel state "oh no Dr Klaus, why are you doing this to me, why do you want to work extra days? I was hoping we get a female doctor; this will mean a lot of extra work for me, I am disgusted by chaperoning for you, we used to have this date free to do our admin. Now because of you, we will be very busy."
iii. On 19 January 2023 did Ms Mordel say "men are pigs" and / or "women are far cleaner"?
iv. On 17 February 2023 did Ms Mordel make comments that a smear test being done by the claimant was "the most disgusting experience"?
v. Did Dr Dace fail to act when the claimant relayed this information to him on the 10 December and 21 February 2023.

b. Was that less favourable treatment?
c. The Tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimant's.
d. The claimant says they were treated worse than Dr Olivia Abrahim.
e. Alternatively, if there was nobody in the same circumstances as the claimant, the Tribunal will decide whether they were treated worse than someone else would have been treated.
f. If so, was it because of sex?
g. Did the respondent's treatment amount to a detriment?

3. Victimisation (Equality Act 2010 section 27)

a. Did the claimant do a protected act as follows:
i. On 10 December 2022, during a meeting complain about Ms Mordel's sexist behaviour to Dr Dace?
ii. On 21 February 2023 make an allegation of sex discrimination in a formal grievance to Dr Dace?
iii. On 22 February 2023 make the same allegation of sex discrimination in a formal grievance to Ms Nieciecka?

b. Did the respondent do the following things:
i. From 21 February 2023 did Dr Dace and / or from 22 February 2023 did Ms Nieciecka fail to investigate the grievances and conduct a fair process?
ii. On 24 February 2023 did Mr Parker imply to an outside source that the claimant has a mental health issue thereby breaching confidential information?

iii. On 27 February 2023 did Dr Dace and Dr Spiro sign a letter requesting that the claimant be dismissed without investigation?
iv. On 1 March 2023 did Mr Parker suspend the claimant due to the concerns raised?
v. On 1 March 2023 did Mr Parker withhold pay from the claimant?
vi. From 15 March did Mr Parker behave unreasonably in setting up the investigation meeting?
vii. On 17 March 2023 did Mr Parker subject the claimant to a video recording without his consent?
viii. On 17 March did Mr Parker conduct the meeting with his PA present and failed to introduce the claimant to the PA by name or on the video recording?
ix. On or after 17 March 2023 did Mr Parker post the video on a public platform?
x. On 21 March 2023 did Mr Parker dismiss the claimant?
xi. From 21 March 2023 did Mr Parker not pay the contractual notice period?
xii. On 21 March did Mr Parker backdate the claimants last day of employment to 28 February 2003
xiii. On 21 March 2023 did Mr Parker inform the claimant by email that he would not provide him with a reference if he progressed matters to the Employment Tribunal?
xiv. From 21 February 2023 did Ms Nieciecka not comply with the Subject Access Request and withhold evidence?
xv. On 23 February did Ms Nieciecka fail to investigate the claimant's grievance that the information about a complaint was withheld from him?
xvi. On 23 February did Ms Nieciecka fail to investigate the claimant's grievance about Health & Safety issues?
xvii. On 23 February did Mr Parker dismiss the claimant's concerns that he was victimised under the Equality Act 2010 raised to him in an e-mail
xviii. On 24 February did Mr Parker, Dr Spira and Dr Dace ignore the fact that the claimant made it clear he felt victimised in an e-mail to them?
xix. On 27 February did Mr Parker fail to respond to the claimant's concern that he experienced bullying?
xx. On 28 February did Ms Neiciecka fail to act on a grievance made by the claimant about professional misconduct By Dr Dace?
xxi. On 1 March did Mr Parker fail to address a grievance made by the claimant about victimisation and professional misconduct of Dr Spira?
xxii. On 21 March did Mr Parker not comply with a reminder to act on the claimant's Subject to access request
xxiii. Did Smart Medical Clinics fail to comply with internal policies?
xxiv. The policies in question are
    1. Disciplinary procedure
    2. Procedure for Dealing with Alleged Harassment or Bullying
    3. Grievance Procedure

4. Public Interest Disclosure
5. Complaints policy
6. Health, Safety and Hygiene
7. Did Smart Medical clinics fail to adhered to the ACAS code of conduct?

c. By doing so, did it subject the claimant to detriment?
d. If so, was it because the claimant did a protected act?
e. Was it because the respondent believed the claimant had done, or might do, a protected act?

4. Protected disclosure

a. Did the claimant make one or more qualifying disclosures as defined in section 43B of the Employment Rights Act 1996? The claimant says he made disclosures on these occasions:

    i. On the 10 December 2022, did the claimant make a disclosure verbally to Dr Dace regarding the potentially sexist commentary made by Ms Mordel. [Protected Disclosure 1]
    ii. On the 23rd February 2023, did the claimant make a protected disclosure by emailing Ms Nieciecka regarding potential recording of CCTV footage in the examination room? [Protected Disclosure 2].

b. Did he disclose information?
c. Did he believe the disclosure of information was made in the public interest?
d. Was that belief reasonable?
e. Did he believe it tended to show that: Protected Disclosure 1 showed a breach of a legal obligation (breach of sex discrimination laws) and Protected Disclosure 2 showed a breach of legal obligation and that a criminal offence had been, was being or was likely to be committed.
f. Was that belief reasonable?
g. The respondent accepts that if the claimant made a qualifying disclosure, it was a protected disclosure because it was made to the claimant's employer.

5. Detriment (Employment Rights Act 1996 section 48)

a. Did the respondent do the following things:

    i. From 21 February 2023 did Dr Dace and / or from 23 February 2023 did Ms Nieciecka fail to investigate the grievances and conduct a fair process?
    ii. On 21 February did Ms Nieciecka encourage only female receptionists who are managed by Monika Mordle to provide written evidence against the claimant which has not been investigated before.
    iii. On 24 February 2023 did Mr Parker imply to an outside source that the claimant has a mental health issue thereby breaching confidential information?

iv. On 27 February 2023 did Dr Dace and Dr Spiro sign a letter requesting that the claimant be dismissed without investigation?

v. Is the fact that the protected disclosure was mentioned in this letter a breach of confidentiality and of internal policies? [At the start of the hearing the Claimant clarified this allegation as being: The Claimant says a protected disclosure should be dealt with confidentially but it was leaked before it was addressed. It was leaked by Sylvia to R2 and R5.]

vi. Did Dr Dace deliberately made the incident regarding the haematoma sound worse in the email from Dr Dace and Mr Spira asking for the Claimant to be dismissed. [This allegation was clarified and amended at the start of the hearing as recorded here.]

vii. Were additional allegations made which were not part of the initial investigation meeting? [The Employment Judge asked the Claimant to clarify which additional allegation he was referring to. He said that there were at least 20 more allegations that there added after the initial investigation meeting after all the female receptionists were invited to bring issues.]

viii. On 1 March 2023 did Mr Parker suspend the claimant due to the concerns raised?

ix. On 1 March 2023 did Mr Parker withhold pay from the claimant?

x. On 1 March 2023 did Mr Parker suspend the claimant due to the concerns raised?

xi. On 17 March did Mr Parker send new evidence to be discussed at the meeting and therefore not providing sufficient notice to the claimant

xii. On 17 March 2023 did Mr Parker subject the claimant to a video recording without his consent?

xiii. On or after 17 March 2023 did Mr Parker post the video on a public platform?

xiv. On or after 17 March who did Mr parker sent the link to to watch the video to? [At the start of the hearing the Claimant amended this allegation to be: On 17 March or thereafter did Mr Parker send the video link to others and it be watched by 14 people.]

xv. From 21 March 2023 did Mr Parker not pay the contractual notice period?

xvi. On 21 March 2023 did Mr Parker inform the claimant by email that he would not provide him with a reference if he progressed matters to the Employment Tribunal?

xvii. From 21 February 2023 did Ms Nieciecka not comply with the Subject Access Request and withhold evidence?

xviii. From 21 March did Mr Parker not send the claimant a written verbatim of the video recording

b. By doing so, did it subject the claimant to detriment?

c. If so, was it done on the ground that he made a protected disclosure?

6. Automatically Unfair Dismissal

a. Was the reason or principal reason for dismissal that the claimant made a protected disclosure?

b. If so, the claimant will be regarded as unfairly dismissed.

7. Wrongful dismissal / Notice pay

a. What was the claimant's notice period?
b. Was the claimant paid for that notice period?
c. If not, was the claimant guilty of gross misconduct / did the claimant do something so serious that the respondent was entitled to dismiss without notice?

8. Holiday Pay (Working Time Regulations 1998)

a. Did the respondent fail to pay the claimant for annual leave the claimant had accrued but not taken when their employment ended? [At the start of the hearing the Claimant said he was owed for five days holiday pay -
7 hours at £75.22 x 5 days - £2,633.75]

9. Unauthorised deductions

a. Did the respondent make unauthorised deductions from the claimant's wages and if so how much was deducted in relation to:
b. Any holiday pay owed? [At the start of the hearing the Claimant said he was owed for five days holiday pay - 7 hours at £75.22 x 5 days - £2,633.75]
c. Did the Claimant have wages withheld during the periods of 21 February 2023 and 21 March 2023? [At the start of the hearing the Claimant said he was owed full pay between 1 and 21 March 2023. He said this amounted to 9 working days and one Saturday – 9 days x 7 hours plus 4 hours = 67 times hourly rate 75.25 = £5041.75. As set out above, and below, the Claimant amended this complaint part way through the hearing.]
d. If so, how much?

10. Breach of Contract

a. Did this claim arise or was it outstanding when the claimant's employment ended?
b. Did the respondent do the following:
c. Fail to pay any contractual holiday pay owed? [7 hours at £75.22 x 5 days - £2,633.75]
d. Fail to pay wages between 21 February and 21 March 2023? 9 days x 7 hours plus 4 hours = 67 times hourly rate 75.25 = £5041.75. As set out above, and below, the Claimant amended this complaint part way through the hearing.]
e. Was that a breach of contract?

11. Remedy

a. How much should the claimant be awarded as damages

Findings of Facts

40. We have attempted to set out our findings of fact in chronological order as far as practicable. The findings have been made based on the evidence presented, and as far as necessary to determine the issues being considered in this claim.

    General Background

41. The First Respondent/R1, Smart Medical Clinics Limited, provides private GP medical services and health check medical services for BUPA.

42. R2, Dr. Martin Dace is an employee of R1 and his position at the time of the allegations was Clinical Director.

43. R3, Ms. Monika Mordel is a Senior Receptionist and Administrator at the First Respondent/R1. She was responsible for reception and administration tasks and was a trained chaperone. Ms. Mordel is the first point of contact for reception/administration matters, and if a complaint comes to her from the team, she reviews and forwards to management as necessary. Ms. Mordel is not responsible for assessing all complaints from patients.
44. R4, Ms. Sylwia Nieciecka is the Compliance Director at the First Respondent/R1.

45. R5, Dr. Michael Spira is an employee of the First Respondent/R1 and holds the position of Medical Director.

46. R6, Mr. Mike Parker is CEO and Chairman of the First Respondent/R1.

47. Policies and Procedures

48. The First Respondent has an Employee Handbook that contains a number of policies and procedures. The policies referenced in this claim are: Disciplinary Procedure, Procedure for Dealing with Alleged Harassment or Bullying, Grievance Procedure, Public Interest Disclosure, Complaints Policy and Health, Safety and Hygiene.

49. For completeness, there is no procedure labelled as “Procedure for Dealing with Alleged Harassment or Bullying” in the Employee Handbook, but there is a chapter headed Positive Work Environment which contains a section called “Procedure for Dealing with Alleged Harassment or Bullying”. Within it, it sets out that concerns can be raised both informally and formally, and in relation to formal complaints, it states:

    “If you decide to make a formal complaint you should do so through the grievance procedure as soon as possible after the incident has occurred. All complaints will be handled in a timely and confidential manner. You will be guaranteed a fair and impartial hearing and the matter will be investigated thoroughly. If the investigation reveals that your complaint is valid, prompt attention and action will be taken, designed to stop the behaviour immediately and prevent its recurrence. In such

circumstances, if relocation proves necessary, every effort will be made to relocate the harasser or bully rather than you as the victim, however, the Company will endeavour to relocate you if this is your preference.

You will be protected from intimidation, victimisation or discrimination for filing a complaint or assisting in an investigation. Retaliating against an employee for complaining about harassment or bullying is a disciplinary offence.

Whilst this procedure is designed to assist genuine victims of harassment or bullying, you should be aware that if you raise complaints which are proven to be deliberately vexatious, you may become subject to proceedings under the disciplinary procedure."

50. The Respondent's Public Interest Disclosure (Whistleblowing) Policy sets out information about whistleblowing and says concerns should be raised initially with a line manager, who will treat the matter in confidence. It says the matter will be investigated.

51. The Respondent's Disciplinary Procedure states that it does not form part of an employee's contract of employment. It also states:

"We retain discretion in respect of the Disciplinary Procedure to take account of your length of service and to vary the procedures accordingly. If you have a short amount of service, you may not be in receipt of any warnings before dismissal."

52. The Handbook also contains a section on Disciplinary Rules, within it, it says: "*It is not practicable to specify all disciplinary rules or offences that may result in disciplinary action, as they may vary depending on the nature of the work."*

53. The Disciplinary Rules has a section called "General Rules", some of the rules are copied below:

"You must conduct yourself and perform your work at all times in a manner that is in the interests of the Company. Any conduct detrimental to its interests or its relations with any third party, or damaging to its public image, shall be considered to be a breach of the Company's rules.

You are expected to achieve and maintain a good standard of work and to show a conscientious approach to the job or to the detail of that job to a standard that may reasonably be expected."

54. There is also a section on Gross Misconduct, which states:

"The following acts are examples of gross misconduct offences and as such may render you liable to summary dismissal without notice and without previous warnings. It is not possible to provide an exhaustive list of examples of gross misconduct. However, any behaviour or negligence resulting in a fundamental breach of contractual terms that irrevocably destroys the trust and confidence necessary to continue the employment relationship will constitute gross misconduct. Illustrative examples of offences that will normally be deemed as gross misconduct include serious instances of: …"

55. The Grievance Procedure sets out information in relation to grievances. It is a short document, only half a page, but it does set out:

"It is the Company's intention to consider all grievances as soon as possible, and a meeting will be held usually within 5 days of you raising a grievance. The meeting will enable you to give full details of your grievance."

56. The Health, Safety and Hygiene Policy is just over one page long and sets out information about health and safety at work, and makes reference to raising concerns.

57. The Complaints Policy and Guide is not contained within the Employee Handbook, and is a separate document.

58. Under Stage 2 – Investigations, Statements and Grading, it states:

"Copies of the complaint will also be forwarded to any staff/ doctors with practicing privileges involved in the care to provide a factual written statement to the Complaints Handler within 5 working days.

59. However, under stage 3 of the procedure section it states:

"In the majority of cases, the Registered Manager will issue a copy of the complaint to the staff involved or to other senior members of staff of the relevant department to resolve the problem as soon as possible…"

60. The policy states that straightforward complaints will usually be involved within 20 days.

<u>The Claimant's employment</u>

61. The Claimant had an initial discussion regarding the vacancy for General Practitioner (GP) at the First Respondent/R1 with Ms. Nieciecka. In this discussion the Claimant explained that he had limited experience with women's and children's health matters. The Claimant attended a telephone interview with Dr. Dace on 10 May 2022. The Claimant repeated what he told Ms. Nieciecka regarding his experience in women's health matters.

62. The Claimant started his employment as a GP at the First Respondent/R1 on 10 August 2022.

63. In an employment contract dated 5 August 2022 it states that after one months' service the Claimant is entitled to three months' notice. It also states that: *"The Practice has the right to terminate your employment without notice or payment in lieu of notice in the case of gross misconduct."*

64. With reference to disciplinary matters, the contract states:

65. "At any stage of the Disciplinary Procedure you may be suspended, on full pay, whilst investigations are carried out. Suspension is a holding measure and is not to be taken as an indication that any allegations against you will be substantiated. In the event that you become unfit for work or unable to

attend any necessary meetings due to sickness during the period of suspension, the Company will review the decision to keep you on suspension and, following this review, your suspension may be lifted. If your suspension is lifted, you may no longer be entitled to full pay but will be entitled to Statutory Sick Pay in accordance with the Company's rules and procedures."

66. Ms. Mordel's evidence, which we accept, is that when the Claimant first joined the First Respondent/R1 she tried to help him in his role.

67. During the Claimant's employment, the First Respondent/R1 had a demand for a female doctor based on requests from patients.

68. In his witness statement the Claimant states:

"I overheard several times that MM was always booking Dr Olivia first. She usually said: "The only other available appointment is with our new doctor" She often said: "We have an appointment available with Dr. Olivia. She is wonderful and will look after you".
She never mentioned my name when making these bookings initially or portrayed me in a positive light".

69. In response to cross examination the Claimant acknowledged that some patients may express a preference for a female doctor. However, the Claimant replied that he did not think that would account for all the occasions on which Ms. Mordel is alleged to have booked female patients away from the Claimant.

70. There was no evidence provided about the dates and/or of frequency of the occasions on which Ms. Mordel was alleged to have booked female patients away from the Claimant.

71. In her witness statement, Ms. Mordel denied having a preference for female doctors. The Claimant did not question Ms. Mordel on this allegation.

72. Based on the above, also noting the Claimant could not hear the full conversations taking place, and the lack of any specificity and corroboratory evidence we do not find that Ms. Mordel booked female patients away from the Claimant.

73. Early in November 2022 the Claimant increased his working hours, from two to three days.

74. The Claimant, in his witness statement says that on 25 November 2022 Ms. Mordel said to him *"oh no Dr Klaus, why are you doing this to me, why do you want to work extra days? I was hoping we get a female doctor; this will mean a lot of extra work for me, I am disgusted by chaperoning for you, we used to have this date free to do our admin."*

75. Within Ms. Mordel's witness statement, at paragraph 31, she says: *"I categorically deny that I have ever made a comment about being "disgusted" chaperoning the Claimant . This is not the language I use*

when communicating with anyone, and I take my duties as a chaperone seriously."

76. It is noted, as set out below, that Ms. Mordel used the word disgusting to describe her view on some of the Claimant's behaviours, in a complaint email dated 21 February 2023 but at that time, as set out below, the relationship between them had become strained.

77. The alleged 25 November 2022 comments do not appear to have been specifically addressed in Ms. Mordel's witness statement but there is a general denial regarding chaperoning and the word disgusting as set out above, however, at paragraph 29 of her witness statement she states:

"I deny that I have ever made a comment about smear tests being a disgusting experience. I value my job working alongside medical professionals, and I would not make comments abut the routines they carry out. Furthermore, we had no women booked into the clinic that day as alleged by the Claimant. We had four male patients".

78. It is not entirely clear if paragraph 29 is said to relate to 25 November 2022.
79. We note that it is a very specific comment that the Claimant alleges Ms. Mordel to have said. We were not directed to any corroboration or documentary evidence to support this statement being said, or the Claimant reporting this specific statement to anyone at the time.

80. The Claimant did not question Ms. Mordel on the comments allegedly made on 25 November 2022.

81. In response to a question put in cross examination, when asked about the context of the conversation, the Claimant said it was said to belittle him and make him feel incompetent. His answer made no reference to his sex.

82. As set out further below the Claimant lodged a grievance on 20 February 2023 and sent it to Dr Dace. In the second paragraph of this grievance he states, with reference to Ms. Mordel: *"She stated several times that she finds chaperoning absolutely disgusting and tries to avoid it wherever possible".* This does not appear to relate to any specific conversation with the Claimant or in relation to Claimant only, but appears to be an assertion about general comments allegedly made. In this document, in relation to increasing his working hours the Claimant says Ms. Mordel said to him: *"oh no now I cannot do my admin time, please do not do this to me, why do you want to work here three days."* There is no reference at this point to Ms. Mordel saying she was disgusted chaperoning for the Claimant. The Claimant goes on to reference Ms. Mordel pulling faces when asked to chaperone.

83. On balance, taking all into account, we find that Ms. Mordel did not say the specific words as alleged on 25 November 2022. We do not think that later using the word disgusting in a complaint email is evidence to suggest she made such a comment in the context of chaperoning on the 25 November 2022.

84. The Claimant spoke with Dr. Dace on 10 December 2022 and raised his concerns about Ms. Mordel's behaviour towards him.

85. The Claimant, in his witness statement says, he informed Dr. Dace about *"potential sex discrimination by MM".* He says he that he told Dr. Dace that Ms. Mordel would prefer a female doctor, finds him doing a smear test the most disgusting thing, and showed preference for Dr. Abrahim when booking patients.

86. The Claimant says Dr. Dace was dismissive and made comments about Ms. Mordel preferring to work with a woman as it was more comfortable for her, and that he does not think Dr. Dace would have dismissed concerns raised by a female.

87. Dr. Dace says he directed the Claimant to speak with Ms. Nieciecka, and explained that he did not deal with grievances, as they did not fall within his responsibilities. The Claimant, in response to cross examination, did not agree that Dr. Dace told him he was not the appropriate person to deal with it.

88. Dr. Dace did not take any further action in relation to the matters raised by the Claimant. The Claimant did not pursue his concerns with Ms. Nieciecka.

89. On the balance of probabilities we find that, noting the consistency of the Claimant's evidence on this particular point, that Dr. Dace did not, in any clear manner, direct the Claimant to Ms. Nieciecka.

90. The Respondents accept that what the Claimant said to Mr. Dace on 10 December 2022 was a protected act. The Respondents do not accept it was a protected disclosure.

91. The Claimant alleges, in the list of issues, that on 19 January 2023 Ms. Mordel made the following comments: *"men are pigs" and / or "women are far cleaner"?* In his witness statement the Claimant does not provide any details about the date of alleged comments or where they took place.

92. The Claimant alleges that Ms. Mordel said this to him in the corridor of the Wandsworth clinic. Ms. Mordel's evidence is that she did not work at Wandsworth clinic on 19 January 2023, and that she worked at the Clapham Junction clinic on that date. There was no evidence in the Bundle to confirm where Ms. Mordel worked on 19 January 2023. We are not able to reach a definitive finding on where Ms. Mordel worked on 19 January 2023, but we do not consider it necessary to do so. Ms. Mordel denies making such a comment, and says that she was not aware of the English phrase referring to pigs until the Claimant complained. English is not Ms. Mordel's first language. During cross examination the Claimant asked Ms. Mordel about the translation for men are pigs, and she explained that she understood the literal translation but that this was not a phrase she was aware of.

93. On balance, taking all the evidence presented to us, we find that Ms. Mordel did not make a comment that *"men are pigs".*

94. There were no questions put on the comment *"women are far cleaner"* to Ms. Mordel, and this does not appear to be addressed in her witness statement.

95. However, Ms. Mordel, in oral evidence, with reference to a question about taking bloods, described the Claimant as leaving blood on the floor, on the sink and paper towels covered in blood in the room. In her witness statement she set out that her role included keeping the clinic clean and tidy, and that needles were not disposed of correctly. The Bundle contains images of sharps bins.

96. Ms. Nieciecka, in her witness statement, also set out that Ms. Mordel had raised concerns about the state of the Claimant's room with her, on 19 December 2022 , following a concern raised by the Claimant that his room had not been cleaned. Ms. Mordel told Ms. Nieciecka that she had forgotten the clinic was in use that day but that the Claimant had left sharps outside bins and blood left uncleaned. Ms. Nieciecka's evidence was that there had previously been concerns with the Claimant leaving used smear tests outside of the appropriate bin.
97. We have not made any findings of fact on whether or not the Claimant disposed of sharps or other medial items correctly, but we do find that Ms. Mordel had concerns about how clean he kept his room.

98. There were no questions put to the Claimant on "women are far cleaner", which is set out in paragraph 9 in his witness statement, with no reference to a date. Therefore, as the Claimant's evidence is unchallenged in this respect, we accept the Claimant's evidence that Ms. Mordel said women are a lot cleaner, but do not make a finding on what date this was said.

99. On 25 January 2023 the Claimant took blood from a patient. Approximately one week later, on 31 January 2023, the patient contacted the First Respondent/R1 and spoke with Ms. Mordel as he had a very large and significant bruise on the arm that he had blood taken from. He emailed a photograph and the email stated:

"Following my last experience I am questioning my membership and considering leaving the Smart Clinics

I assume I can just confirm in writing to you and cancel the Standing Order?"

Can you please advise then what happens to my medical records??"

100. Ms. Mordel forwarded the matter to Dr. Dace and booked time for Dr. Dace to call the patient that day. Dr. Dace spoke with the patient and also spoke with the Claimant. Dr. Dace emailed Ms. Mordel, copying in Ms. Nieciecka and the Claimant on 1 February 2023 and said:

"Klaus and I had a good discussion about this and I do not believe that he acted incorrectly.
In future I think it would be best if any complaints were passed to the doctor concerned for resolution in the first instance, even if you feel it would also be useful for me to be informed.

In this case, no further action is required."

101. The Claimant considered this matter to have been addressed.

102. In supplemental oral evidence, Dr. Dace stated that he had reviewed the photograph again and was shocked on review when looking at the bruise and considered he had been too generous to the Claimant and that he should have dealt with it differently at the time and that on reflection he considered the patient did leave because of the bruise.

103. In January 2023, Ms. Mordel had found her working relationship with the Claimant to be challenging, and although she still assisted the Claimant with tasks, she distanced herself from him.

104. On 8 February 2023 Mr. Pinder, Practice Manager, spoke with the patient with bruising regarding his membership and sent an internal email following the discussion. Within the email he reported:

"In summary, he would like to terminate his Smart Clinics membership. He feels like there is no value in continuing it, as he doesn't use our services enough times throughout the years and he feel like over the years the quality of GP care and interest has decreased. The incident below wasn't related to his decision to leave".

105. Around 9 February 2023, during an audit, management noted that the Claimant had inputted incorrect details into patient notes. This was flagged with the Claimant by Ms. Nieciecka as it had to be treated as a GDPR matter. The Claimant and Ms. Nieciecka exchanged several emails regarding the matter.

106. On 10 February 2023, a female patient attended an appointment with the Claimant to request a referral letter. Following the appointment, she telephoned the First Respondent/R1 and spoke with Ms. Leila Arafa, Medical Receptionist, and complained about the Claimant, saying he made her feel stupid and the letter he wrote upset her. Ms. Arafa made a note of the discussion and emailed it to Ms. Nieciecka and Mr. Pinder. Mr. Pinder forwarded the complaint to Dr. Spira, as Dr. Dace was on leave at the time, on 13 February 2023. Dr. Spira attempted to call the patient, with no success, and on 15 February 2023, he emailed Mr. Pinder and asked him to email the patient asking her to call back.

107. On 17 February 2023 the Claimant was sent an invitation to an investigation meeting by email at 13:31. The meeting was scheduled for 22 February 2023. The Claimant was asked to provide comments by 20 February 2023. The letter was sent by Ms. Nieciecka and said she would be accompanied at the meeting by Dr. Spira, Dr. Dace and Mr. Pinder. It explains it was not a disciplinary meeting and no decision had been made on whether the matter would continue to a disciplinary hearing. The letter states:

"The purpose of this meeting is to give you the opportunity to provide an explanation for the following matters of concern:

- *The complaints raised from patients REDACTED TEXT and GDPR mistake for patient REDACTED TEXT from January 2023 and February 2023.*
- *Feedback from The Smart Clinics employees regarding; attitude to receptionists, your cleanliness of the clinical room and staff area.*
- *Reports of lack of knowledge of Smart and Bupa services/products.*
- *Continuous mistakes when ordering Bupa Pathology/Smear tests on EMR2 and late completion and/or lack of awareness of outstanding patient blood results.*
- *Reports of you leaving early from work.*
- *Reports of you leaving confidential information lying face up around the reception desk.*
- *Your ability to perform ECG's and other clinical tests."*

108. The letter mentioned the patient that complained on 10 February 2023. The Claimant had not been aware of this complaint before receipt of the invitation letter. The Claimant did not ask any colleague about the content of the complaint, but instead accessed the patient records to obtain information. The Claimant was upset and stressed by the lack of information provided to him about the complaint.

109. The Claimant alleges that on 17 February 2023 Ms. Mordel made comments that a smear test being done by him was *"the most disgusting experience".* Ms. Mordel denies making such a comment, and says that no female patients were booked in to the clinic on the day. However, we do find that a conversation took place between the Claimant and Ms. Mordel, at a clinic – we cannot determine which, and that during the conversation Ms. Mordel fedback to the Claimant some concerns, in particular regarding in an incorrect throat swab sample and locating patient vaccine records. There is no reference to smear tests at all in the email.

110. It is noted, as set out above and below, that Ms. Mordel used the word disgusting to describe her view on some of the Claimant's behaviours, and at the time of this email the relationship between them had become strained.

111. Taking the above into account, on balance we find that Ms. Mordel did not make such a comment on 17 February 2022.

112. This finding takes account on the content of the email Ms. Mordel sent on 21 February 2023, which is a contemporaneous account of the discussion.

113. The Claimant did not attend work on 18 February 2023 and called in sick.

114. On 20 February 2023 Ms. Nieciecka reported to Dr. Spira and Dr. Dace that she had been informed that the receptionist was upset following a discussion with the Claimant. In an email she stated:

"It has also been reported to me on Friday, that following the invitation to the meeting email, Dr Bruecker 'jumped' verbally on the receptionist, with the patient in the clinic accusing her she is at fault and the cause of the meeting. The receptionist informed Dr Bruecker she does not wish to be spoken to that way. She said she felt she is being attacked."

115. Dr. Spira asked that a written account be provided by the receptionist.

116. On 20 February 2023, at 17:42, the Claimant provided a written response to the invitation letter.

117. On 20 February 2023 the Claimant emailed Ms. Nieciecka regarding his concerns about Dr. Dace's and his training needs and support.

118. On 20 February 2023 the Claimant emailed Dr. Spira setting out his concerns about the CCTV in a clinic and an incident allegedly on 12 November 2022. Within it he said he had reported the matter to the police and quoted a crime reference.

119. On 20 February 2023, in the evening around 19:00, the Claimant contacted Ms. Nieciecka via WhatsApp asking her direct questions about her relationship with Ms. Mordel and within one of his messages he referenced that if has been alleged by Francesca that Ms. Nieciecka had bullied her and had a sexual relationship with the owner of the clinic.

120. At 20:15 on 20 February 2023 the Claimant emailed Ms. Mordel, Mr. Pinder, Dr. Dace and Dr. Spira attaching the WhatsApp messages and stated:

"I think it is important to have some clarification about the relationship between Monika and Sylwia as she neither confirms or denies it . It further confirms bias on behalf of Sylwia to support Monika's agenda for reputational damage against me."

121. On 21 February 2023 the Claimant emailed Ms. Nieciecka. Within it he alleged that due to her friendship with Ms. Mordel she may be bias and should not lead the investigation meeting and made a Subject Access Request.

122. At 11:04 on 21 February 2023, Ms. Mordel sent an email to Dr. Dace and Dr. Spira, copied to Ms. Nieciecka, setting out her concerns regarding the Claimant. The email opens with: *"I have been asked to write down the statement regarding my interaction with Dr Bruecker on Friday."* The email largely focuses on the discussion between them on 17 February 2023 and reports that in the conversation she gave the Claimant examples about concerns relating to patient care, namely throat swab samples and locating patient vaccine records.

123. At 11.12 on 21 February 2023 Leila Arafa, Medical Receptionist, emailed Ms. Nieciecka and set out some concerns regarding the Claimant. In summary, she referenced an incorrect sample, that she *"get a lot of people requesting not to see him when I book them in usually because the patient dislikes his bedside manner or because previous appointments*

with him lasted only 5-10 minutes when they should be taking closer to 30" and that she was hesitant to book patients in with him if the needed something urgent.

124. At 11:40 on 21 February 2023, Maria Freire, Medical Receptionist and Administrator, emailed Ms. Nieciecka and set out some concerns regarding the Claimant. In short, she made comments about blood paperwork, frequently asking questions about prices, him arriving late, a patient charging matter, leaving door open during consultation and leaving room untidy.

125. On 21 February 2023 at 14:04, Ms. Mordel sent an email, which was two pages long, and set out her various concerns regarding the Claimant's work and how upset she had been by the Claimant's action in this respect. It is not proportionate to copy the entire email here, but we have copied what we consider to be pertinent parts.

"I would like to point out that this way of communication is disgusting, unprofessional, lack of morals and respect for other people."
"Last 5 months I supported Dr Bruecker, I fixed his issues, I apologized to patients for every mistake he made. I was fixing the system, trying to find a solution to every problem. I did all this because I always support the team I am working with. I didn't get a raise or a promotion for it. From my position of senior reception, I was much more than that. I supported from a medical, IT, ethical and problemsolving position and it was not my duty to do it. At the end of 2022, I was tired of it and, speaking colloquially, I had enough of it. Further emerging problems and complaints from the rest of the team members, I decided from January to cut the cord from Dr Brucker and kindly ask doctor to self discipline and try to solve his medical issue with medical directors and management. Unfortunate Dr Bruecker even though said he understood it he did not acknowledge it."

"Closing this email, I would like to say that my time with Smart Clinics is slowly coming to an end. What is most important to me is to keep calm my spirit that has been irreversibly shaken here. Until then I am requesting to move me away from work with Dr Klaus Bruecker. I do not agree to further cooperation in the same location as Klaus Bruecker. I refuse further teamwork with the above mentioned person."

126. On 21 February 2023, at 16.02, the Claimant submitted a formal grievance to Dr. Dace. The grievance was about an allegation of sex discrimination and focused on his view of Ms. Mordel's behaviour. The Respondent accepts this amounts to a protected act. Dr. Dace requested the Claimant forward the grievance to Ms. Nieciecka. The Claimant replied that he did not wish for Ms. Nieciecka to investigate his grievance. Dr. Dace's evidence, which we accept, is that this meant Mr. Parker would consider.

127. At 17:06 on 21 February 2023 Ms. Nieciecka emailed Mr. Parker, Dr. Dace and Dr. Spira and set out that she wished to make an informal complaint regarding the Claimant's actions on 20 February 2023. Within the email Ms. Nieciecka references the Claimant having made a Subject Access Request, that she had took advice and that work related data must be disclosed.

128. The Claimant alleges that on 21 February 2023 Ms. Nieciecka encouraged female reception staff managed by Ms. Mordel to submit written evidence against the Claimant on matters that had not been investigated previously.

129. This allegation is not addressed in Ms. Nieciecka's witness statement, but this was one of the late and additional allegations added to the Claimant in the List of Issues. The Claimant did not ask any questions about whether she encouraged female staff to submit evidence against him.

130. There is no definitive evidence of Ms. Nieciecka encouraging female reception staff to submit written statements. However, it is noted that Ms. Freire and Ms. Arafa both sent their concerns directly to Ms. Nieciecka via email. In Leila's statement it opens by stating *"Hi Sylivia, I hope you are well. Please find my statement below".* Ms. Mordel, on 21 February 2023 at 11:04, addressed her email to Dr Dace and Dr Spira but copied in SN. Her email opens with *"I have been asked to write down the statement regarding my interaction with Dr. Bruecker on Friday".* Ms. Mordel's email of 14:04 is sent to Mr. Pinder, Dr Dace, Dr Spira and Ms. Nieciecka. In that email Ms. Mordel lists a number of people, including men, that she says can support her assertions regarding the Claimant's behaviour.

131. On the balance of probabilities we find that Ms. Freire, Ms. Arafa and Ms. Mordel, all who work in reception, were asked to set down their concerns regarding the Claimant. However, we are unable to conclude who made such a request but we consider it is likely to have been Ms. Nieciecka and/or Dr Dace and/or Dr Spira as we note at that time, by 21 February, those persons were considering issues with Claimant, and note this took place in the morning of 21 February 2023, after the Claimant contacted Ms. Nieciecka in the evening on 20 February 2023 and the day before the scheduled meeting with the Claimant.

132. The investigation meeting scheduled for 22 February 2023 was postponed. The management team considered that given the various concerns and complaints that had been received since the invitation dated 17 February 2023 it was necessary to review the situation further.

133. Ms. Nieciecka informed the Claimant by email at 09:50 on 22 February 2023 that the meeting with Dr. Dace and Dr. Spira was being postponed to be provide more time to consider the matter. The Claimant replied that he was unhappy about the postponement and noted the stress that it was causing him. Ms. Nieciecka replied stating that the Claimant would still have a meeting with Mr. Parker following the Claimant's earlier request to speak to someone more senior.

134. On 22 February 2023 the Claimant emailed Ms. Freire asking her for details of her complaint against him.

135. On 22 February 2023 the Claimant forwarded the grievance he sent to Dr. Dace the previous day to Ms. Nieciecka. The Respondent accepts this was a protected act. We were not directed to this document in the

Bundle and on review have not been able to identify which document this is purported to be.

136. At 08:44 on 23 February 2023 Dr. Spira emailed Dr. Dace (who had been on leave) which opened with the following paragraphs and set out a draft letter to the Claimant detailing a range of concerns:

"Mike, Sylwia and I had a discussion yesterday afternoon about Klaus. Mike is of the opinion that we must offer Klaus an opportunity to mend his ways with further training as appropriate before resorting to dismissal. To that end, he asked that you and I write to him regarding his medical competence and professionalism and that Sylwia will write to him regarding other matters (for example, regarding his allegations about her and Monika and his apparent need to see their personal emails).

To that end, I have drafted a provisional email below. At the end of it I have appended for your convenience the rather lengthy responses of Klaus to the various concerns. I have diarised 11am today for you and me to discuss."

137. On 23 February 2023 at 09:25am, the Claimant emailed the patient that had complained on 10 February 2023. In the email the Claimant apologises for any upset he may have caused and asked for details of the complaint, inferring that he had not been given any by the First Respondent/R1. Within the letter he states: *"I do apologise for approaching you directly and obviously you do not have to comment at all but it would hugely help me to understand what is happening and also learn from this."*

138. The patient did not reply to the Claimant, but following receipt she sent an email to the First Respondent/R1 at 09:37am which stated:

"Hi, I complained about one of your doctors and he has since called me and emailed me to discuss it directly. I find it incredibly intimidating to have to discuss a complaint with the person I complained about. I will withdraw my complaint to stop this. Please also delete my emails from your database, I won't be using your services again."

139. Dr. Spira forwarded this email to his colleagues at 10:46 and expressed his view to Mr. Parker that:

"This has raised the whole matter to a new level. It is unacceptable for a doctor to call a patient, who has made a complaint against him, out of the blue. And it is unacceptable for a doctor to cast serious aspersions to a patient on his employing company. To date, we have lost two members who have had contact with a particular doctor. Please may we discuss asap."

140. Following this email, Dr. Dace asked Mr. Pinder to apologise and tell the patient they would be in contact further by email, which he did. The patient replied at 13.03am on 23 February 2023 and stated:

"Thank you for your email, I appreciate you taking it seriously, however I don't want to take the complaint further. I disagreed with factual inaccuracies in his letter (eg saying I refused to be examined) and how this would impact my ability to get further investigations done via my insurance company. I was uncomfortable with being contacted directly to discuss my complaint, but I don't need this to be escalated. I explained in my last email I would just like to withdraw the complaint now. It's causing undue stress, I didn't want to get anyone in trouble, I wanted to highlight a fault in the service, and also point out that your complaints procedures are inappropriate. Please consider my complaint withdrawn."

141. The Claimant contacting the patient changed the view of Dr. Dace and Dr. Spira on how matters should move forward.

142. At 12:28 on 23 February 2023 Mr. Parker emailed the Claimant and said:

143.

"I have received a very disturbing email which you have sent to a patient whom has made a complaint about you. You contacting the patient direct is completely inappropriate. The patient has raised further complaints and cancelled her membership as a result of your email. For the avoidance of doubt under no circumstances whatsoever are you to have any further communications either directly or indirectly with this client.

I am coming to the clinics shorty and I will be speaking to the complainant directly.

As a result, I may then suspend your employment with immediate effect.

Any and all issues resulting to this matter will be handled by me personally."

144. The Claimant emailed Mr. Parker at 13:44 and said:

"I feel treated badly because I complained about discrimination and the issues in my response letter as part of the investigation meeting.

You cannot ask me to respond to a complaint I know nothing about , this is setting me up to fail.

This is called victimisation. ***Victimisation is unlawful under the Equality Act 2010****."*

145. Following this email, at 14:13 on 23 February 2023 , the Claimant emailed Ms. Nieciecka and informed her he would be leaving work as he

was sick. Mr. Parker arrived at the clinic soon after the Claimant had left, as he had travelled to the clinic the Claimant was working at from a different location to speak to the Claimant.

146. We were not directed to any other email from Mr. Parker to the Claimant on 23 February 2023.

147. On 23 February 2023, at 16:41, the Claimant emailed Ms. Nieciecka with the grievance that he had sent to Dr. Spira regarding CCTV on 20 February 2023. The email was headed Protected Public Disclosure.

148. On 23 February 2023 the Claimant emailed Ms. Nieciecka at 17:10 with a grievance regarding health and safety matters and a DSE assessment. Ms. Nieciecka forwarded this to Mr. Parker the following morning at 10:16, 24 February 2023, copied to Dr Spira and Dr Dace.

149. On 23 February 2023 the Claimant emailed Ms. Nieciecka at 17:27 with a grievance regarding not being given details of the complaint made by the patient who was seen on 10 February 2023. Ms. Nieciecka forwarded this to Mr. Parker the following morning at 10:21, on 24 February 2023, copied to Dr Spira and Dr Dace.

150. On 24 February 2023 at 10:56 Mr. Parker emailed the Claimant, copied to Dr. Spira, Dr. Dace and Alan Cole at Bupa. Alan Cole is an employee of BUPA, who the First Respondent/R1 hold a contract with. In response to cross examination Mr. Parker said that under contract terms with the BUPA the First Respondent/R1 was required to report any patient complaints. This was explained to the Claimant in an email on 27 February 2023 also.

151. The email is headed “Your unprofessional behaviour” and is approximately one A4 page.

152. The email references a conversation between Mr. Parker and the Claimant regarding the patient complaint on 10 February 2023. In this respect, it states:

“You are well aware that I personally spoke to you two days ago. I told you very clearly that a complaint had been received which I would deal with; the complaint was only received the day I called you. You have completely and totally over-reacted. I gave you confirmation that Dr Spira and Dr Dace were going to investigate the matter and discuss it with you, you were also going to attend a meeting the same day with the two doctors (it is my understanding that this was pre-arranged some days earlier). You chose not to attend that meeting.”

153. The letter goes on to reference the Claimant contacting the patient directly and that Mr. Parker does not believe the Claimant should have contacted the patient. It sets out that he proposed to suspend the Claimant, but that he had already reported sick. The email also states:

“I as a result wrote to you and told you that I would come and see you that day, ie yesterday. I drove from Head Office immediately to the clinic to be informed that you had decided that due to stress you were unable to

continue with your patients, one of whom was actually sat in the waiting room waiting to see you and instead went off sick due to stress. You have also informed us that you will not be in today, so whilst it was my intention to immediately suspend you subject to investigation, you did not take the opportunity to discuss matters or wait to see me. You simply chose instead to disrespect the patients that were booked in to see you in what you describe as ill health due to stress."

154. The email goes on to state:

"I am extremely disappointed, concerned and surprised that a GP who on his engagement made no reference to ever suffering from stress or mental health issues. You when we spoke made no reference to mental health issues and I assured you that you would be given the support and proper chance to make your comments and defence."

155. The email closed by Mr. Parker informing the Claimant that the complaints will be investigated and he will be given an opportunity to put forward his position and depending on the outcome would be reinstated or dismissed.

156. We find that there was discussion between Mr. Parker and the Claimant on either 22 or February 2023 in which the patient complaint was discussed. The initial complaint was received on 10 February 2023. It is not clear when it was sent to Mr. Parker as initially other persons were involved.

157. The Claimant replied to this email, but the time shows as 06:08. However, the email refers the words used in Mr. Parker's email of 10:56, and therefore it had to be sent in reply to Mr. Parker's email. The Claimant said: *"Your statement ' my intention to immediately suspend you subject to investigation, to me can be interpreted as bias and victimisation as I raised a gross misconduct grievance."* He also asked for clarification on who Alan Cole was.

158. On 26 February 2023, at 13:04, Dr Dace and Dr Spiro emailed Mr. Parker setting out their opinion that the Claimant should be dismissed. The email was then appended to an email that Mr. Parker sent to the Claimant the following day, 27 February 2023. The email states there have been a number of complaints raised about the Claimant by patients and reception staff and sets out 14 points, by way of example. Some of the points relate to time management, data entry, equipment use errors, lack of understanding, approach to patients and reception staff. Key points are copied below:

"6. A patient complained that Dr Bruecker had made her feel her request for a gynaecology referral was inappropriate and unnecessary. Inspection of the notes suggests that the patient was quite justified in her request. Dr Bruecker subsequently contacted the patient directly without first clearing this with the clinic. The patient was distressed by the contact and made a further complaint about this and as a result of Dr Bruecker's actions has withdrawn her membership of the clinic."

"7. Another patient complained of a large bruise after a venesection performed by Dr Bruecker. Whilst a small amount of bruising following the taking of blood from a vein is not uncommon, this patient's bruise was a huge haematoma, which suggests poor technique or a rushed procedure on the part of the doctor. As a consequence, the patient has withdrawn his membership of the club."

"11. He has accused the clinic of constantly using a live CCTV feed in an examination room. In fact, the camera is actually covered and therefore has no picture recording. This camera is used only during the infusions, which can last up to 3 hours, to monitor patients, with their consent, as part of health and safety in case patients become unwell during treatments. Dr Bruecker should have been able to see on the day of his clinic that the camera was actually covered and was therefore unable to transmit a picture."

"It is not possible to ignore the unprecedented volume of complaints and concerns from both patients and receptionists regarding both his clinical competence and general manner. We, the medical director and clinical director, are concerned about the damage this is doing to the reputation and business of the clinic and to the morale of the staff. But, most important of all, we are concerned for the safety of our patients. It is our firm opinion that Dr Bruecker should no longer be employed in The Smart Clinics."

159. At 11:31 on 27 February 2023 Mr. Parker emailed the Claimant. In short, it states that in relation to the concerns regarding him, he *"will be given the opportunity to reply to the findings direct to me before any decision is taken."* It contains a copy of the email sent by Dr. Spira and Dr. Dace to Mr. Parker on 26 February 2023. It also explains the Operations Director is considering a number of allegations and that Mr. Parker will send information to the Claimant. It is not clear who Mr. Parker is referring to as Operations Director, but we consider this to refer to either Mr. Pinder or Ms. Nieciecka. Mr. Parker explained in the email that under the terms of its contract with Bupa it needed to notify them of any patient complaints. The letter does not reference any allegations of bullying made by the Claimant.

160. The Claimant replied to Mr. Parker at 10:08 on 28 February 2023 stating that he believed the matter he raised as a protected disclosure had been leaked to Dr. Spira and Dr. Dace and alleged they were not showing due care for his well-being and were perpetuating bullying. He also states that only on that day, 17 days later, was he made aware of the details of the complaint. The Claimant provided comments on the points raised in Mr. Parker's email of 27 February 2023 and Dr. Spira and Dr. Dace's email of 26 February 2023.

161. As noted above, the Claimant had raised his concerns about the CCTV matter with Dr. Spira before he raised with Nieciecka.

162. On 28 February 2023, at 15:26, Mr. Parker emailed the Claimant asking when he may feel well enough to meet and provided a copy of an investigation document produced by Ms. Nieciecka. This was in the form of an email running to just over two pages. The concerns listed cite the

following topics: patient complaints about attitude and appointment length, staff complaints, concerns around ECG training, comments on DSE assessments, concerns raised by Bupa, behaviour towards a senior receptionist following the invitation letter, the Claimant's WhatsApp messages on 20 February 2023 and the Claimant's timekeeping.

163. At the close of the document, Ms. Nieciecka stated:

"Considering the amount of complaints received from the patients, and reported concerning behaviour from various departments of The Smart Clinics, I do not believe Dr Bruecker is a right fit for the Company and that his engagement with the company is putting The Smart Clinics at risk of a further financial loss, due to lack of care towards the patients, losing more members and affecting staff members mentally."

164. On 28 February 2023, 16:42, Ms. Mordel submitted a formal complaint against the Claimant. Within the complaint, which runs to 5 pages she raised matters additional to the concerns in her email dated 21 February 2023 – which related to the 17 February 2023 conversation.

165. The Claimant submitted a grievance about Dr. Dace to Ms. Nieciecka on 28 February 2023. Dr. Dace prepared a written response, which he finalized on 10 March 2023. Within Dr. Dace's response, he states:

"31 January 2023 I consulted with patient XXX regarding a large haematoma (bruise arising from a bleed under the skin) following phlebotomy by Dr Bruecker on 25 January 2023. I subsequently spoke face-to-face with Dr Bruecker regarding his technique. Dr Bruecker admitted he had not applied pressure to the venepuncture area at all, and not for the minimum two minutes that is normally necessary to prevent bleeding. I discussed the technique with him and satisfied myself that he now understood how to minimise the risk of bleeding following venepuncture. This patient subsequently ceased his membership of Smart Clinics as a result of this incident."

166. Mr. Parker, in an email dated 28 February 2023 asked the Claimant to update him on when he would be well enough to return. There is no evidence of the Claimant providing any details about his return.

167. On 1 March 2023 the Claimant emailed Mr. Parker at 11:40 and stated: "*I wanted to resume work today, but I saw that all sessions were cancelled already . I do not think that is reasonable to return to such a hostile environment where you have provided strong statements from your clinical leadership team and Sylwia."*

168. Mr. Parker replied at 12:07 and said*: "Whilst this enquiry is ongoing, now you have confirmed you're well enough to return to work, you are immediately suspended whilst I consider all matters and carefully investigate."*

169. On 1 March 2023, at 1:13 the Claimant emailed Mr. Parker with

a grievance relating to Dr. Spira. In short, the email raised questions about Dr. Spira's involvement in the letter of concern dated 26 February 2023, which the Claimant said followed him making a protected disclosure.

170. In oral evidence Dr. Spira initially said he had not seen the email before, and then said he was not saying he hadn't but couldn't recall.

171. The Claimant was assessed and certified as being unfit from work on 6 March 2023, until 5 April 2023.

172. During the hearing, the Claimant said he wanted to amend his witness statement and he stated that he did not actually return to work on 1 March and he remained sick until 15 March 2023.

173. Within the email on 1 March 2023, at 11:40, the Claimant emailed Mr. Parker and set out his view that the investigation by Ms. Nieciecka was not adequate. He provided comments within Ms. Nieciecka's document.

174. On 3 March 2023 at 11:56 Mr. Parker emailed the Claimant asking him to meet with him at a time to suit him *"so that we can go through the individual points face to face."* He goes on to say:

"A lot of the complaints are in so far as I'm concerned, could be very simple to deal with if the parties concerned are willing to take a sensible approach. There are however some more serious points which I'd like to discuss with you and give you the opportunity to consider how we could possibly resolve them to everybody's mutual satisfaction. I am trying very hard not to overreact or come to any conclusion before everybody concerned has had the opportunity to a fair hearing."

175. On 6 March and 10 March 2023, Dr. Dace set out written comments on the grievance made against him by the Claimant.

176. On 14 March 2023 Ms. Nieciecka emailed Kelly Maher, Medical Receptionist and Administrator, asking for her account of 12 November 2022, the date which the Claimant alleges he was told he was being watched on CCTV. Ms. Maher replied the same day, and denied the account put forward by the Claimant. She commented she was the only one at reception that day and the Claimant had worked in a downstairs room.

177. On 14 March 2023 Ms. Nieciecka submitted a formal grievance against the Claimant. Within it she said she did not see the future working alongside the Claimant as she considered he did not see any wrongdoing on his part.

178. On 15 March 2023 the Claimant emailed Mr. Parker and informed him he was no longer off work with stress and was able to meet him. He also asked for all the evidence so that he could prepare. They exchanged

several emails regarding meeting arrangements that day. Initially, Mr. Parker suggested meeting the following day, confirmed no further evidence was to be provided and offered the Claimant the opportunity to bring a colleague. The Claimant replied that was too short notice, and suggested the following week. Mr. Parker replied:

"You are really being obstructive. You will not be returning to work until this matter has been concluded. If you're well enough to attend work, you're well enough to attend a meeting. Next week I have commitments already booked so please prioritise your position. Either you want to come back to work or you don't and in order to do that we need to resolve the issues. I am available tomorrow and/or Friday morning. You don't have to have a witness, I'm happy for you to record the meeting if you would prefer. I intend to anyway."

179. Further short and polite emails regarding potential times and dates were exchanged and it was agreed that the meeting would take place on 17 March 2023 at 3.00pm.

180. At 12:56 on 17 March 2023 Mr. Parker emailed the Claimant a spreadsheet with all the concerns and issues that had been raised. Within the email he said:

"As previously stated whilst the majority of them I don't believe we need to spend a lot of time on, as they by agreement can probably be sorted and allow everyone to move on, the ones I intend to concentrate on relate to clinical issues and again I am happy to talk through each of those individually and allow you additional time after our meeting if you wish to make further representation once we've discussed them individually."

181. The spreadsheet contains 3 sections: complaints, incidents, staff member concerns. Within each section the issues are summarised in date order (save for the last entry) setting out a summary of the complaint, persons involved, action and outcome. The staff concerns listed in the spreadsheet start from 14 February 2023, but the content relates to prior matters. The spreadsheet was produced by Mr. Parker followed him speaking to staff and reviewing documents.

182. The Claimant attended a meeting with Mr. Parker at 3.00pm on 17 March 2023. Mr. Parker's PA also attended the meeting. The interview took place by TEAMs and was recorded. The parties had their cameras on.

183. The Bundle contains a record of the meeting, a note produced by Mr. Parker's PA. There is also a one page extract of the recorded transcript. The Claimant did not challenge the recording, or raise any concern, at the time. At the outset of the meeting Mr. Parker said:

"I am recording this meeting and my PA is taking notes. If you need the notes/recording afterwards, I can let you have a copy of the recording and the minutes, at any time with my consent."

184. Neither record identifies the PA's name, but both confirm the Claimant was told the meeting was being recorded. The Claimant did not ask the identity of the PA at the time.

185. Mr. Parker and the Claimant discussed a range of issues at the meeting. During the meeting Mr. Parker expressed a view that some issues could be resolved with training and better communication internally, but his main concerns related to patients and his relationship with Dr. Spira and Dr. Dace. Mr. Parker explained his concerns about the Claimant contacting the patient who had complained. When discussing communications with administration staff Mr. Parker clearly indicated he thought these matters could be resolved by more respectful communication and referenced playground attitudes, bickering and nipping things in the bud.

186. Mr. Parker asked the Claimant what his concerns were, at least two points. In response to the first time he was asked he said that he had not been given complaint and in response to the second time he said "it is your investigation meeting".

187. Within the meeting Mr. Parker asked the Claimant if he had seen the 10 February 2023 patient complaint, and the Claimant said no.

188. During the meeting the Claimant expressed concern regarding references and his career. Mr. Parker stated:

"Second point I want to raise is that if your employment isn't to continue, I would give you a fair and honest reference. It would never be a bad one. If you do something wrong, I'd decline to give a reference. But we're not at that point."

189. Towards the end of the meeting Mr. Parker stated:

"I'm not making a decision tonight, I'll write to you early next week and tell you what my findings are. If positive and you're coming back to work I'd want you back as soon as possible after training and your health is good. And if negative we'll cross that bridge if/when we get to it. I want to reflect on what you've had to say, removing any emotional bits and I want to consider patients, staff etc. Most points on the spreadsheet can be dealt with. I want you to have a good weekend and don't draw any conclusions. As far as I'm concerned there's no decision made yet. Anything you want to add?"

190. In oral evidence, the Claimant said that Mr. Parker sent a link for people to access and that this gave access to a recording that was held on a public website called Vmaker. He says 14 people have accessed it.

191. In oral evidence, Mr. Parker said he sent the link to Dr. Spira, Dr. Dace, Ms. Nieciecka and Croners Peninsula (the First Respondent's advisors) and that he does not know how many people at the R1 HR provider, Croners Peninsula have viewed it.

192. Neither Mr. Parker or the Claimant addressed this allegation in their witness statements.

193. A screen shot within the Bundle shows that there had been 14 views as at 20 March 2023.

194. At 10:15 on 21 March 2023 the Claimant emailed Mr. Parker and said that he had not received a response to his Subject Access Request. We were not directed to any response in the Bundle. On our own review, as set out below, we note Mr. Parker commented on the SAR in the dismissal email.

195. On 21 March 2023 Mr. Parker informed the Claimant, in an email at 11:44, that he had made the decision to dismiss the Claimant. Mr. Parker told the Claimant that his last day of employment was 28 February 2023.

196. The email is almost a page and half long. The email opened by setting out his view that a lot of the issues could have been addressed and he has discussed approach with the clerical team. However, he then went on to say that:

"The colleagues who have raised concerns have informed me that they do not wish to work with you further. They are disappointed in the way that you have behaved with them previously and the general consensus of opinion is that matters have gone too far in so far as they are concerned. Two of them have stated that if your employment is to continue with the company, they will resign immediately."

197. The email goes on to explain that Mr. Parker's main areas of concern were:

198.

- the Claimant contacting the female patient that complained about him on 10 February 2023 and that the Claimant did not stay at work to discuss the situation with Mr. Parker;
- there was a breakdown in the relationship between the Claimant and the clinical directors, being Dr. Dace and Dr. Spira, following the Claimant's allegations and complaints;
- the number of patients that have commented to staff after consultation that they considered the Claimant to be rude, aggressive and generally lacking respect for their dignity and concerns.

199. The email also set out comments on the Claimant's approach:

"You have today further challenged the company in requesting and chasing up the data which is held on you. You have previously been informed that the company does not hold any video, Whatsapp messages or other information on you other than your DBS check which you provided and has later been confirmed as being valid by the agency we use to provide DBS checks. You then go on to inform me that our professional medical indemnity insurance is insufficient. You are wrong. Our insurance as you've been previously informed, clearly covers you for treatments and advice given to Smart Medical patients whilst you work for the company. It does not and is not meant to provide you cover working anywhere else."

200. The email concluded:

"In conclusion, I have decided that your employment with Smart Medical Clinics is ended as of the end of February 2023 (28th). As you went off on sick leave, I intend to honour your sick period up until the 15th March 2023 and I will be requesting your P45 and statutory sick pay at the month's end

payroll. I'm disappointed that you place more effort and energy into dictating to the company and it's directors, rather than showing a genuine compassion to work within the Smart Medical Clinics team. This is sad and ultimately is your downfall. I understand you will be disappointed and unhappy with your employment being terminated and no doubt will insist upon processing the Tribunal you have so heavily threatened. That is of course your prerogative. If you decide to go down that road I will not be issuing a reference to any future potential employer until the Tribunal matter has been resolved."

201. In oral evidence Mr. Parker explained, that we accept, that if any reference was requested he would give a truthful one.

202. Mr. Parker's witness statement did not deal with backdating the Claimant's last day of employment, but it was addressed in cross examination and Mr. Parker's evidence was that the backdating was because the Claimant was on sick leave. We accept this.

203. The Claimant requested a copy of the recording of the meeting with Mr. Parker in a letter to Mr. Parker dated 21 March 2023.

204. Neither the Claimant or Mr. Parker deal with this in their witness statements.

205. In oral evidence, Mr. Parker said he posted a copy himself, and that he regularly uses post. The Claimant's evidence is that no such copy was received.

206. There was no email sent by Mr. Parker with the transcript of the recording.

207. On balance, we do not find that Mr. Parker sent the transcript. We note that Mr. Parker corresponded via email and sent documents by email. There was no clear explanation of why the transcript wasn't sent in this form, or any clear detail regarding a postal copy.

<u>The Claimant's Subject Access Request (SAR)</u>

208. In addition to any findings set out above in chronological order, we considered it helpful to set out findings regarding this matter here.

209. The management of the SAR is not addressed in Ms. Nieciecka's witness statement.

210. In cross examination, Ms. Nieciecka said that Mr. Pinder dealt with the Claimant's SAR.

211. On 21 March 2023 the Claimant emailed Mr. Parker and said his subject access request had not been complied with. Mr. Parker, within the dismissal email references the Claimant chasing up data.

212. An e-file was sent to the Claimant on 11 August 2023 headed SAR Request– Documents Part 1, but we are unable to make any finding on what was provided at this stage and whether any other documents were provided earlier. There is email correspondence in the Bundle between Mr. Pinder and the Claimant regarding his subject access request from 16 August 2023 to 19 October 2023 . The Claimant sets out his view that the information provided was not complete and the deadline was missed.

213. During the hearing, when questioning the respondent witnesses, the Claimant made reference to the SAR not being completed until ICO intervention and to an ICO order.

214. The ICO wrote to emailed Ms. Neicecka on 18 October 2024 and within it, it says:

"We are writing to you now as Dr Bruecker has advised that his SAR concerns remain outstanding following his email of 21 September, so we would ask that a response is provided to those. Further clarity is also needed in relation to the CCTV recording concern that he raised. We would like you to provide the following information:
• where is footage being captured in your clinics
• what are you doing with the footage
• you have stated that it is on a loop previously, please can you explain this (e.g. is it not stored at all, therefore no retention policy necessary. If it is stored, explain how and for how long)
• what is its purpose and what is the lawful basis that you are using
• who has access to the footage
• have you got a CCTV policy, is there a particular policy shared with employees and signage up for patients visiting the premises
• did you carry out a DPIA You must provide this response as soon as possible and in any event within 14 days."

215. On 20 November 2023 the ICO wrote to the Claimant. Within the letter, it states:

"Whilst I appreciate your concerns about the organisation's response to your subject access request, this is not a matter which the ICO would be able to dispute and take further because there is no evidence to indicate that data has been unreasonably withheld from their disclosure to you.

If you remain concerned about information having not been provided, you have the right to take the matter to court. The court has the power to make an order requiring the data controller to provide information if it is found to have been unreasonably withheld."

216. There is no evidence that Ms. Nieciecka was involved in the management of the Claimant's SAR at the time of his employment, other than it is known the ICO sent an email to her email address and a reply from her in November 2023. The Respondent's Data Protection Policy does not specify who at the Respondent is responsible for dealing with SARs.

Management of the Claimant's grievances

217. In addition to any findings set out above in chronological order, we considered it helpful to set out further findings regarding this matter here.

218. The Claimant raised multiple grievances on various matters within a short time frame starting on 20 February 2023. Some of the grievances were similar and some were sent to several people. Some related to matters that had taken place sometime previously, for example the CCTV grievance related to a date in November 2022. The Claimant raised grievances/complaints about Dr. Dace, Dr. Spira, Ms. Nieciecka and Ms. Mordel. He had queried Ms. Nieciecka's independence and professionalism.

219. We consider the number and scope of the concerns/grievances would have been difficult to manage.

220. The Respondent has a Grievance Policy.

221. Dr. Dace says management of grievances was not within his remit.

222. Within his witness statement, Mr. Parker's stated*: "All of the grievances raised by the Claimant were investigated, but none were found to have any merit to them".* However, he also made reference to Ms. Nieciecka investigating some matters, and as set out above, it is clear Ms. Nieciecka was involved in collating information about the CCTV grievance. At times, due to the way in which questions were asked and the way in which answers given, it was not always clear which grievance/s Mr. Parker was answering in respect of, despite attempts to obtain clarity.

223. Mr. Parker stated he could not remember how many grievances were brought by the Claimant and by others but stated that he investigated every one of them that were brought to his attention. Mr. Parker said that he followed guidance, including from including Bright HR. He said he spoke with people, considered their comments and destroyed notes he made at the time.

224. In regard to the grievance raised to Dr. Spira on 20 February 2023, the CCTV matter, Mr. Parker's oral evidence was that he examined and treated every allegation and comment and he actively supports whistleblowing. It is not clear when Mr. Parker became aware of this grievance.

225. In regard to the grievance raised to Dr. Dace and then sent to Ms. Nieciecka regarding sex discrimination allegations in relation to Ms. Mordel, Mr. Parker's oral evidence was that he investigated the grievance. We have not been able to make a clear finding of fact about when Mr. Parker became aware of the sex discrimination grievance. He stated he had a conversation with Ms. Mordel and with the Claimant. He could not remember whether it was face to face or over the phone. He says he asked Ms. Mordel and the Claimant for their comments. He said he concluded there was no merit to the grievance and that he considered the

relationship could have been resolved with some training or counselling between Ms. Mordel and the Claimant.

226. Regarding the grievance sent to Ms. Nieciecka about not relaying any details of a patient complaint against him. Mr. Parker stated he had invited comments from all of the parties concerned, including the Claimant, and asked for input from the medical directors. Mr. Parker stated he had contacted the GMC and asked if it appropriate for a doctor to contact a patient who has made a formal complaint, and the answer was most definitely not.

227. Mr. Parker said he tried to adopt commonsense approach in managing the complaints, and he produced a spreadsheet of concerns raised about the Claimant.

228. With reference to the GMG, the Claimant's witness statement makes no reference to him contacting the GMC for advice in relation to the patient complaint. In oral evidence the Claimant said he contacted he contacted the GMC and they told him that in some circumstance it is ok to contact a patient.

229. Mr. Parker makes reference to contacting the GMC and sets out in the dismissal email that he undertook investigations and *"conclude that the GMC would have been very unlikely to have advised you to call a patient who has personally complained and made allegations".*

230. On the balance of probabilities, on the evidence available, we prefer Mr. Parker's view and consider it unlikely that that GMC advised the Claimant to contact the patient.

231. At some point after the Claimant's dismissal he made a complaint to the GMC about Dr. Dace and Dr. Spira.

Payments

232. The Claimants last pay slip, that dated 31 March 2023, shows a payment of £218.57 for SSP. No other payments were recorded in that pay slip.

233. During the hearing the Claimant amended his witness statement by emailing the Tribunal, his amended evidence was:

"Following the discussion about my fit note I have looked further into this and would like to amend my witness statement as although the e-mail of Mr Parker states I returned to work on 1 March and I was suspended with immediate effect the actual date I returned to work was the 15 March (Bundle 469) and I was given 2 days notice to attend the hearing on 17 March. This will also affect the schedule of loss to 4 working days at £ 75.25 per day which amounts to £ 2,107 unfairly deducted from my salary."

234. None of the Claimants pay slips show any payments in relation to holiday pay at all. We heard no evidence about what, if any, holiday was taken.

235. In oral evidence Mr Parker said the Claimant was paid everything owed and referenced the Claimant being off sick and on SSP. He referenced a payroll service being employed.

The Law

Direct sex discrimination

Section 13 Equality Act 2010 states:

13 Direct discrimination

(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

(2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.

(3) If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B.

(4) If the protected characteristic is marriage and civil partnership, this section applies to a contravention of Part 5 (work) only if the treatment is because it is B who is married or a civil partner.

(5) If the protected characteristic is race, less favourable treatment includes segregating B from others.

(6) If the protected characteristic is sex—

(a) less favourable treatment of a woman includes less favourable treatment of her because she is breast-feeding;

(b) in a case where B is a man, no account is to be taken of special treatment afforded to a woman in connection with pregnancy or childbirth.

(7) Subsection (6)(a) does not apply for the purposes of Part 5 (work).

(8) This section is subject to sections 17(6) and 18(7).

Section 136 of the Equality Act 2010 states:

136 Burden of proof

(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

(4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.

(5) This section does not apply to proceedings for an offence under this Act.

(6) A reference to the court includes a reference to—

(a) an employment tribunal;

(b) the Asylum and Immigration Tribunal;

(c) the Special Immigration Appeals Commission;

(d) the First-tier Tribunal;

(e) the Education Tribunal for Wales;

(f) the First-tier Tribunal for Scotland Health and Education Chamber.

236. Under section 13(1) of the Equality Act 2010 read with section 11, direct discrimination takes place where a person treats the claimant less favourably because of sex than that person treats or would treat others.

237. Under section 23(1), when a comparison is made, there must be no material difference between the circumstances relating to each case.

238. In many direct discrimination cases, it is appropriate for a tribunal to consider, first, whether the claimant received less favourable treatment than the appropriate comparator and then, secondly, whether the less favourable treatment was because of sex. However, in some cases, for example where there is only a hypothetical comparator, these questions cannot be answered without first considering the 'reason why' the claimant was treated as they were. (*Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11; [2003] IRLR 285).*

239. Decisions are frequently reached for more than one reason. Provided the protected characteristic had a significant influence on the outcome, discrimination is made out. (*Nagarajan v London Regional Transport [1999] IRLR 572, HL*).

240. The case law recognises that very little discrimination today is overt or even deliberate. Witnesses can even be unconsciously prejudiced.

241. There are two stages to the burden of proof test as set out in section 136 of the Equality Act 2010.

Stage 1: There must be primary facts from which the tribunal could decide – in the absence of any other explanation, that discrimination took place. The burden of proof is on the claimant (*Ayodele v (1) Citylink Ltd (2) Napier [2018] IRLR 114, CA; Royal Mail Group Ltd v Efobi [2021] UKSC 22*). This is sometimes referred to as proving a prima facie case. If this happens, the burden of proof shifts to the respondent.

Stage 2: The respondent must then prove that it did not discriminate against the claimant.

242. In other words, where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the respondent. It is then for the respondent to prove that it did not commit, or as the case may be, is not to be treated as having committed, that act.

243. The burden of proof provisions requires careful attention where there is room for doubt as to the facts necessary to establish discrimination, but have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or another. (*Hewage v Grampian Health Board [2012] IRLR 870, SC.)*

244. Guidelines on the burden of proof were set out by the Court of Appeal in *Igen Ltd v Wong [2005] EWCA Civ 142; [2005] IRLR 258.* Once the burden of proof has shifted, it is then for the respondents to prove that they did not commit the act of discrimination. To discharge that burden it is necessary for the respondents to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of the protected characteristic, since 'no discrimination whatsoever' is compatible with the Burden of Proof Directive. Since the facts necessary to prove an explanation would normally be in the possession of the respondents, a tribunal would normally expect cogent evidence to discharge that burden of proof.

245. The Court of Appeal in *Madarassy*, a case brought under the then Sex Discrimination Act 1975, states: *'The burden of proof does not shift to the employer simply on the claimant establishing a difference in status (e.g. sex) and a difference in treatment. Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal 'could conclude' that on the balance of probabilities, the respondent had committed an unlawful act of discrimination.*

246. A false explanation for the less favourable treatment added to a difference in treatment and a difference in sex can constitute the 'something more' required to shift the burden of proof*. (The Solicitors Regulation Authority v Mitchell UKEAT/0497/12.)*

247. In *Glasgow City Council v Zafar 1998 ICR 120, HL*, Lord Browne-Wilkinson said that in the context of a discrimination claim *'the conduct of a hypothetical reasonable employer is irrelevant. The alleged discriminator may or may not be a reasonable employer. If he is not a reasonable employer he might well have treated another employee in just the same unsatisfactory way as he treated the complainant, in which case he would not have treated the complainant "less favourably".*' He approved the words of Lord Morison, who delivered the judgment of the Court of Session, that *'it cannot be inferred, let alone presumed, only from the fact that an employer has acted unreasonably towards one employee, that he would have acted reasonably if he had been dealing with another in the same circumstances'.* It follows that mere unreasonableness may not be enough to found an inference of discrimination. Unfair treatment itself is not discriminatory.

248. In *Amnesty International v Ahmed UKEAT/0447/08/ZT* the EAT stated, paragraph 36, *"…the ultimate question – is – necessarily – what was the ground of the treatment complained of (or – if you prefer – the reason why it occurred)…".*

249. Evidence of discriminatory conduct and attitudes in an organization may be probative in deciding whether alleged discrimination occurred: *Chief Constable of Greater Manchester Police v Bailey [2017] EWCA Civ 425.*

Victimisation

250. Section 27 Equality Act 2010 states:

Victimisation

(1) A person (A) victimises another person (B) if A subjects B to a detriment because—

(a) B does a protected act, or

(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act—

(a) bringing proceedings under this Act;

(b) giving evidence or information in connection with proceedings under this Act;

(c) doing any other thing for the purposes of or in connection with this Act;

(d) making an allegation (whether or not express) that A or another person has contravened this Act.

(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

(4) This section applies only where the person subjected to a detriment is an individual.

(5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule.

251. The law on victimisation is designed to ensure that employees can raise concerns about discrimination without fear of repercussions. Victimisation has a specific legal meaning.

252. A claimant is protected when he or she complains about discrimination even if they are wrong and there has been no discrimination. However, a claimant is not protected if they made an allegation in bad faith, namely they did not really believe it was discrimination.

253. In considering the link between the protected act and the detriment a Tribunal needs to consider how to interpret the word 'because' in section 27. The law requires more than a 'but for' link: it is not enough to say that, if the claimant had not made the complaints, then the bad treatment would not have happened.

254. The Tribunal must consider what was in the mind of the decision maker, consciously or subconsciously. *Chief Constable of West Yorkshire v Khan [2001] ICR 1065 HL* suggests must find the 'core reason' or the 'real reason' for the act or omission. The Equality and Human Rights Commission Code at paragraph 9.10 also makes it clear that the protected act need not be the only reason for the decision.

255. The person who subjects a claimant to a detriment needs to have known that the claimant did the protected act.

256. The EHRC Employment Code, contains a useful summary of treatment that may amount to a 'detriment', which explains that detriment can be a range of treatment.

257. "Generally, a detriment is anything which the individual concerned might reasonably consider changed their position for the worse or put them at a disadvantage. This could include being rejected for promotion, denied an opportunity to represent the organisation at external events, excluded from opportunities to train, or overlooked in the allocation of discretionary bonuses or performance-related awards… A detriment might also include a threat made to the complainant which they take seriously and it is reasonable for them to take it seriously. There is no need to demonstrate physical or economic consequences. However, an unjustified sense of grievance alone would not be enough to establish detriment".

<u>Protected Disclosures</u>

258. The relevant sections of the Employment Rights Act 1996 are set out below:

43A Meaning of "protected disclosure"

43A Meaning of "protected disclosure" In this Act a "protected disclosure" means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H.

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, is being 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) A disclosure of information is not a qualifying disclosure if the person making the 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 this Part " the relevant failure ", in relation to a qualifying disclosure, means the matter 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 ...—

(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.

259. The Claimant must prove that they have made a protected disclosure.

260. The necessary components of a qualifying disclosure to an employer were summarised helpfully by HHJ Auerbach in *Williams v Michelle Brown AM (UKEAT/0044/19/00):*

> *"9. It is worth restating, as the authorities have done many times, that this definition breaks down into a number of elements. First, there must be a disclosure of information. Secondly, the worker must believe that the disclosure is made in the public interest. Thirdly, if the worker does hold such a belief, it must be reasonably held. Fourthly, the worker must believe that the disclosure tends to show one or more of the matters listed in subparagraphs (a) to (f). Fifthly, if the worker does hold such a belief, it must be reasonably held."*

261. There must be a disclosure of information. The disclosure must contain facts, not simply make an allegation. A disclosure can be made orally and in writing. It makes no difference if the recipient is already aware of the information provided.

262. The case of *Cavendish Munro Professional Risks Management Limited - v- Geduld [2010] ICR 325* makes clear, there is a need to convey facts, and not just make an allegation. An opinion does not equate to information *(Goode -v- Marks and Spencers PLC EAT 0442/09).*

263. The Employment Appeal Tribunal in the case of *Kilraine -v London Borough of Wandsworth UK EAT/0260/15* warned that tribunals should take care when deciding if the alleged disclosure was providing information as in practice information and allegations are often intertwined and the fact that information is also an allegation is not relevant.

264. The information disclosed must tend to show the alleged wrongdoing in section 43B, and therefore requires sufficient factual content.

265. A communication asking for information or making inquiry is unlikely to be conveying information.

266. The Claimant must have a reasonable belief that the disclosure is made in the public interest.

267. There is no definition of public interest in the legislation. A matter that is of "public interest" is not necessarily the same as one that interests the public.

268. The focus is on whether the worker/employee reasonably believed that the disclosure was in the public interest.

269. In *Chesterton Global Limited and others -v- Nurmohamed [2017] EWCA 979* the Court of Appeal made a number of useful observations when dealing with the issue of public interest. It made the point that simply considering whether more than one person's interest was served by a public disclosure was a mechanistic view and required the making of artificial distinctions. The Court of Appeal said that instead a Tribunal should consider four relevant factors. It reiterated that Employment Tribunals should be cautious when making a decision about what "is in the public interest" when dealing with a personal interest issue because "*the broad intent behind the amendment of section 43B(1) is that workers making disclosures in the context of private workplace disputes should not attract the enhanced statutory protection accorded to whistle blowers – even, where more than one worker is involved. But I am not prepared to say never."*

270. The four factors that the Tribunal should consider when looking at public interest are:

The numbers in the group whose interests are affected;

The nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed – a disclosure of wrongdoing directly affecting a very important interest is more likely to be in the public interest than a disclosure of trivial wrongdoing affecting the same number of people, and all the more so if the effect is marginal or indirect;

The nature of the wrongdoing disclosed – disclosure of deliberate wrongdoing is more likely to be in the public interest than the disclosure of inadvertent wrongdoing affecting the same number of people;

The identity of the alleged wrongdoer – the larger or more prominent the wrongdoer, in terms of the size of its relevant community i.e. staff, suppliers and clients, the more obviously should a disclosure about its activities engage the public interest, though this point should not be taken too far.

271. There can be more than one reasonable view as to whether a disclosure has been made in the public interest, and the Tribunal should not

substitute its view for that of the Claimant; it must consider whether the Claimant subjectively believed the disclosure was in the public interest, and whether that belief was reasonable. *Chesterton* established that the necessary belief is that the disclosure is made in the public interest; the particular reasons why the worker believes that to so be is not of the essence. Also, while the worker must have a reasonable belief that the disclosure is in the public interest, that does not have to be his or her predominant motive in making it – the Court of Appeal doubted whether it need be any part of the worker's motivation.

272. The Employment Appeal Tribunal in *Dobbie v. Felton (t/a Feltons Solicitors) [2021] IRLR 679* provided further guidance on the meaning of "in the public interest", particularly at paragraphs 27-30. Disclosures about certain subjects are, by their nature, likely to be "made in the public interest" (see paragraphs 30-31). 30. The question of the reasonable beliefs of the Claimant needs to be determined.

273. The Claimant must show that they have a reasonable belief that the "information disclosed tends to show". The case of *Soh v Imperial College of Science Technology and Medicine EAT 0350/14* it was confirmed that there is a distinction between a worker saying "I believe X is true" and "I believe that this information tends to show that X is true".

274. The test of reasonable belief is objective and subjective. The case of *Phoenix House Ltd v Stockman [2017] ICR 84* explains that a judgment must firstly be made as to whether the Claimant's belief was reasonable and secondly whether objectively, on the perceived facts, there was a reasonable belief in the truth of the complaints.

275. The test for assessing whether the worked has a reasonable belief is a low threshold, but the Claimant's belief must be based on some evidence – rumours and unfounded suspicions are not enough to establish reasonable belief.

276. There can be a qualifying disclosure even if the facts relied upon turn out to be wrong.

277. In cases dealing with a number of alleged disclosures it is necessary to look at them individually.

<u>Automatic unfair dismissal</u>

278. Section 103A of the Employment Rights Act 1996 states:

103A Protected disclosure.

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

279. The burden is on the claimant to show that the principal reason for dismissal was the protected disclosure.

280. Section 103A indicates that there may be more than one reason for a dismissal. An employee will only succeed in a claim of unfair dismissal if the Tribunal is satisfied, on the evidence, that the 'principal' reason is that the employee made a protected disclosure.

281. The principal reason is the reason that operated on the employer's mind at the time of the dismissal. Lord Justice Elias confirmed in *Feccitt and ors v NHS Manchester (Public Concerns at Work intervening) 2021 ICR 372 CA* that the causation test for unfair dismissal is stricter than that for unlawful detriment under section 47B of the Employment Rights Act 1996. The latter claim may be established where the protected disclosure is one of many reasons for the detriment, so long as the disclosure materially influences the decision-maker, whereas section 103A requires the disclosure to be the primary motivation for a dismissal.

282. If the protected disclosure was merely a subsidiary reason, the claim will fail.

283. A Tribunal needs to consider two questions: firstly, what is the reason for dismissal, and secondly whether a disclosure was protected. The question of whether the principal reason for dismissal was a protected disclosure is a question of fact for the Tribunal to make. In cases of multiple disclosures, the approach is to ask whether the disclosures, taken as a whole, were the principal reason for dismissal.

284. Where an employee has less than two years' service the employee has the burden of showing, on the balance of probabilities, that the reason for dismissal was for an automatically unfair reason.

285. A tribunal may draw inferences from facts established by evidence, but is not obliged to do so.

Protected disclosure detriment

286. The relevant sections relating to protected disclosure detriment of the Employment Rights Act 1996 are set out below:

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.

(1A)A worker ("W") has the right not to be subjected to any detriment by any act, or any deliberate failure to act, done—

(a) by another worker of W's employer in the course of that other worker's employment, or

(b) by an agent of W's employer with the employer's authority, on the ground that W has made a protected disclosure.

(1B) Where a worker is subjected to detriment by anything done as mentioned in subsection (1A), that thing is treated as also done by the worker's employer.

(1C) For the purposes of subsection (1B), it is immaterial whether the thing is done with the knowledge or approval of the worker's employer.

(1D) In proceedings against W's employer in respect of anything alleged to have been done as mentioned in subsection (1A)(a), it is a defence for the employer to show that the employer took all reasonable steps to prevent the other worker—

(a) from doing that thing, or

(b) from doing anything of that description.

(1E) A worker or agent of W's employer is not liable by reason of subsection (1A) for doing something that subjects W to detriment if—

(a) the worker or agent does that thing in reliance on a statement by the employer that doing it does not contravene this Act, and

(b) it is reasonable for the worker or agent to rely on the statement.

But this does not prevent the employer from being liable by reason of subsection (1B).

(2) This section does not apply where—

(a) the worker is an employee, and

(b) the detriment in question amounts to dismissal (within the meaning of Part X).

(3) For the purposes of this section, and of sections 48 and 49 so far as relating to this section, " worker ", " worker's contract ", " employment " and " employer " have the extended meaning given by section 43K.

48 Complaints to employment tribunals

(1)An employee may present a complaint to an employment tribunal that he has been subjected to a detriment in contravention of section 43M, 44(1), 45, 46, 47, 47A, 47C(1), 47E, 47F or 47G.

(1XA)A worker may present a complaint to an employment tribunal that the worker has been subjected to a detriment in contravention of section 44(1A).

(1YA)A shop worker may present a complaint to an employment tribunal that he or she has been subjected to a detriment in contravention of section 45ZA.

(1ZA)A worker may present a complaint to an employment tribunal that he has been subjected to a detriment in contravention of section 45A.

(1A)A worker may present a complaint to an employment tribunal that he has been subjected to a detriment in contravention of section 47B.

(1AA)An agency worker may present a complaint to an employment tribunal that the agency worker has been subjected to a detriment in contravention of section 47C(5) by the temporary work agency or the hirer.

(1B)A person may present a complaint to an employment tribunal that he has been subjected to a detriment in contravention of section 47D.

(2)On a complaint under subsection (1), (1XA), (1ZA), (1A) or (1B) it is for the employer to show the ground on which any act, or deliberate failure to act, was done.

(2A) On a complaint under subsection (1AA) it is for the temporary work agency or (as the case may be) the hirer to show the ground on which any act, or deliberate failure to act, was done.

(3) An employment tribunal shall not consider a complaint under this section unless it is presented—

(a) before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them, or

(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

(4) For the purposes of subsection (3)—

(a) where an act extends over a period, the "date of the act" means the last day of that period, and

(b) a deliberate failure to act shall be treated as done when it was decided on;

*and, in the absence of evidence establishing the contrary, an employer, a temporary work agency or a hirer**]** shall be taken to decide on a failure to act when he does an act inconsistent with doing the failed act or, if he has done no such inconsistent act, when the period expires within which he might reasonably have been expected to do the failed act if it was to be done.*

(4A)Section 207B (extension of time limits to facilitate conciliation before institution of proceedings) applies for the purposes of subsection (3)(a).

(5)In this section and section 49 any reference to the employer includes—

(a)where a person complains that he has been subjected to a detriment in contravention of section 47A, the principal (within the meaning of section 63A(3)).

(b)in the case of proceedings against a worker or agent under section 47B(1A), the worker or agent.

(6)In this section and section 49 the following have the same meaning as in the Agency Workers Regulations 2010 (S.I. 2010/93)—

- *"agency worker";*
- *"hirer";*
- *"temporary work agency".*

287. Workers who have been found to have made a qualifying disclosure are protected from detriment on the ground that the worker made a protected disclosure.

288. The burden of proof for the protected disclosure detriment claim is that the claimant must prove that they have made a protected disclosure and that there has been detrimental treatment on the balance of probabilities.

289. The case of *London Borough of Harrow v Knight 2003 IRLR 140 EAT* set out the correct approach to apply under section 47B(1) and section 47B(1A) which is:

-the claimant must have made a protected disclosure and they must have suffered a detriment
-the employer/worker/agent must have subjected the claimant to that detriment by some act/deliberate failure to act and
-the act or deliberate failure to act must be done on the ground that the claimant made a protected disclosure.

290. Detriment has the same meaning as in discrimination law – being put to a disadvantage.

291. In the case of *Blackbay Ventures Ltd v Gahir [2014] ICR 747* the Employment Appeal Tribunal gave guidance about the definition of the word "detriment". In paragraph 84 of the judgment, reference was made to the speech of Lord Hoffmann in Chief Constable of the *West Yorkshire Police v Khan [2001] ICR* **1065** quoting in turn Brightman LJ in *Ministry of Defence v Jeremiah [1980] ICR 13*, 31 *"a detriment exists if a reasonable worker would or might take the view that the [treatment] is was in all the circumstances to his detriment."*

292. In paragraph 85 of *Blackbay,* the opinion of Lord Hope in *Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337* was quoted which also referred to Brightman LJ's formulation, Lord Hope adding, *"An unjustified sense of grievance cannot amount to 'detriment'".* Mr Kemp relied upon the case of *Jesudason v Alder Hey Children's NHS Foundation Trust [2020] ICR 1226,* but it makes the same point as the cases cited above that the threshold for a detriment is not high, adding in paragraph 28:

"28 Some workers may not consider that particular treatment amounts to a detriment; they may be unconcerned about it and not consider themselves to be prejudiced or disadvantaged in any way. But if a reasonable worker might do so, and the claimant genuinely does so, that is enough to amount to a detriment. The test is not, therefore, wholly subjective."

293. In paragraph 98 of *Blackbay*, tribunals were reminded that: *"Where it is alleged that the claimant has suffered a detriment, short of dismissal it is necessary to identify the detriment in question and where relevant to the date of the act or deliberate failure to act relied on by the claimant. This is particularly important in the case of deliberate failures to act because unless the date of a deliberate failure to act can be ascertained by direct evidence the failure of the respondent to act is deemed to take place when the period expired within which he might reasonably have been expected to do the failed act."*

294. There must be a causal link between the fact of making the disclosure and the decision of the employer to subject the worker to detriment. In the case of *Aspinall v MSI Mech Forge Ltd EAT 891/01* it used the wording adopted in the discrimination case of *Chief Constable of West Yorkshire Police v Khan 2001 ICR 1065 HL* where it stated that it had to be causative in the sense of being *'the real reason, the core reason….the motive for the treatment complained of'.*

295. It must be proved that the wrongdoer knew about the disclosure, and the mental process of the decision maker must be considered.

296. If a Claimant proves they have made a protected disclosure and that there has been detrimental treatment on the balance of probabilities. The Respondent then has the burden of proving the reason for the detrimental treatment if the Claimant meets the threshold. The Tribunal does not have to find in favour of the Claimant by default.

297. A Tribunal may, where there is an absence of direct evidence, need to draw inferences as to the real reason the employer acted as they did. Inferences drawn must be justified by the facts found.

Notice pay/wrongful dismissal

298. An employer is entitled to terminate an employee's employment without notice if the employee is in fundamental breach of contract. This will be the case if the employee commits an act of gross misconduct. If the employee was not in fundamental breach of contract, the contract can only lawfully be terminated by the giving of notice in accordance with the contract or, if the contract so provided, by a payment in lieu of notice.

299. A claim of breach of contract must be presented within 3 months beginning with the effective date of termination (subject to any extension because of the effect of early conciliation) unless it was not reasonably practicable to do so, in which case it must be submitted within what the Tribunal considers to be a reasonable period thereafter.

Holiday Pay

300. The Working Time Regulations 1998 provide for minimum periods of annual leave and for payment to be made in lieu of any leave accrued but not taken in the leave year in which the employment ends. The Regulations provide for 5.6 weeks leave per annum, although a contract of employment can provide more. The leave year begins on the start date of the Claimant's employment in the first year and, in subsequent years, on the anniversary of the start of the Claimant's employment, unless a written relevant agreement between the employee and the employer provides for a different leave year. There will be an unauthorised deduction from wages if the employer fails to pay the Claimant on termination of employment in lieu of any accrued but untaken leave.

Unlawful deduction of wages

301. Section 13(1) of the Employment Rights Act 1996 (ERA) provides an employer shall not make a deduction from wages of a worker employed by him unless the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract or the worker has previously signified in writing his agreement or consent to the making of the deduction.

302. An employee has the right to complain to an Employment Tribunal of an unauthorised deduction from wages pursuant to section 23 ERA. The definition of "wages" in section 27 ERA includes holiday pay.

303. A claim about an unauthorised deduction from wages must be presented to an Employment Tribunal within three months beginning with the date of payment of the wages from which the deduction was made, with an extension for early conciliation if notification was made to ACAS within the primary time limit, unless it was not reasonably practicable to present it within that period and the Tribunal considers it was presented within a reasonable period after that.

Breach of contract

304. Under the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 the Employment Tribunal was given power to deal with breach of contract claims brought by employees in relation to breaches of contract outstanding on the termination of employment.

Conclusions

305. Both parties gave oral submissions after all the evidence was heard. Neither party directed us to any law. The submissions were considered in full, but have not been repeated here.

306. We have set out our conclusions in the order of the List of Issues, save for any consideration on time limits. The conclusions we reached were made on the basis of the specific allegation as framed, and agreed by the parties, the evidence we heard and the relevant law. Our conclusions were unanimous.

Direct sex discrimination (Equality Act 2010 section 13)

307. We considered each allegation separately. We considered whether there were any overarching inferences that could be drawn from the evidence in relation to all the allegations of sex discrimination, and did not consider there was any.

308. It is important to note that Ms. Veimou did not make any submissions regarding the named comparator, Dr. Olivia Abrahim. The Claimant, in submissions, said he was treated less favourably than a person of the same sex in similar position. We understood he meant to say of a different sex, and was making reference to Dr. Abrahim. It is understood that Dr. Abrahim is a GP. We have heard no evidence on whether or not Dr. Abrahim's circumstances are the same or nearly the same. Further, the Claimant has not clearly specified if he seeks to rely on Dr. Abrahim as a named comparator for each of the five allegations of direct sex discrimination or not. In fairness to the Claimant, we have therefore considered the named and a hypothetical comparator for each allegation. We heard very little evidence regarding the treatment of Dr. Abrahim.

309. For ease of reference we have used the numbering of the allegation in the List of Issues and underlined the precise allegation and set out our conclusions under each.

4.a.i - From around November 2022, did Ms. Mordel book female patients away from the Claimant; allowing them to be seen by female doctors only?

310. As set out in the findings of fact above, on the evidence we heard we did not find that Ms. Mordel booked female patients away from the Claimant from November 2022. Accordingly, as this was not found to have happened as a matter of fact, the allegation fails.

4.a.ii - On 25 November 2022 did Ms. Mordel state "oh no Dr Klaus, why are you doing this to me, why do you want to work extra days? I was hoping we get a female doctor; this will mean a lot of extra work for me, I am disgusted by chaperoning for you, we used to have this date free to do our admin. Now because of you, we will be very busy."

311. We have considered this allegation as specifically put by the Claimant. Our findings of fact were that, the comments as in quotation marks were not made by Ms. Mordel on 25 November 2022. Accordingly, as this was not found to have happened as a matter of fact, the allegation fails.

4.a.iii - On 19 January 2023 did Ms. Mordel say "men are pigs" and / or "women are far cleaner"?

312. As set out above, we found that Ms. Mordel did not say "men are pigs" therefore this part of the allegation fails as we found it did not happen as a matter of fact.

313. However, we did find that Ms. Mordel said "women are a lot cleaner".

314. We found as a matter of fact the comment was said, based largely on it not being addressed by Ms. Mordel or the Respondent's representative in cross examination and therefore accepted the Claimant's unchallenged evidence.

315. We considered whether the Claimant had discharged the burden on him to show evidence from which the Tribunal could reasonably conclude that the comment made was 'because of" sex. We have kept in mind this is an allegation of direct discrimination, it is not an allegation of harassment.

316. We concluded that there was no evidence sufficient to discharge the burden on the Claimant. There was no evidence from which we could reasonably conclude that the Claimant's sex was the reason why Ms. Mordel made the comment. There is no prima facie case of sex discrimination.

317. We considered the reason why the comment was said, and we have kept in mind the context of the relationship between Ms. Mordel and the Claimant, which had become strained by January 2023. We concluded that the reason why Ms. Mordel said "women are far cleaner" was because she considered the Claimant to keep his room in an unclean state and pose a risk to the First Respondent, and not because the Claimant was a man, or related to men generally.

318. There is no evidence, direct or which could be inferred, to infer that Ms. Mordel had a discriminatory attitude towards men, and indeed when the Claimant initially joined the Respondent Ms. Mordel attempted to help him in his role and she appeared to have good working relationships with other male colleagues.

319. The Claimant has failed to show that any of the Respondents treated him less favourably than Dr. Abrahim or a hypothetical comparator.

320. We did not consider there to be something more in this case that shifted the burden of proof to the Respondent.

321. If we are wrong on this, and the burden of proof shifted to the Respondent, we consider there was a non-discriminatory explanation, namely that set out above, that Ms. Mordel considered the Claimant to keep his room in an unclean state and this posed a risk.

322. The allegation fails.

<u>4.a.iv - On 17 February 2023 did Ms. Mordel make comments that a smear test being done by the claimant was "the most disgusting experience"?</u>

323. As set out in the findings of fact above, on the evidence we heard we did not find that Ms. Mordell said that a smear test done by the Claimant was "the most disgusting experience" on 17 February 2023.

Accordingly, as this was not found to have happened as a matter of fact, the allegation fails.

4.a.v - Did Dr Dace fail to act when the claimant relayed this information to him on the 10 December and 21 February 2023.

324. We have considered this allegation as specifically framed. We remain unclear on what specifically "this information" is said to have been relayed, but in general terms understand it to mean the Claimant's concerns about Ms. Mordel's behaviour towards him.

325. The Claimant relies on complaining to Dr. Dace on 10 December 2022 "during a meeting complain about Ms. Mordel's sexist behaviour" as a Protected Act and at the start of the hearing the Respondent accepted this was a Protected Act.

326. We heard little evidence on what was actually said on 10 December 2022, but as set out in the findings of fact, we found Dr. Dace did not clearly direct the Claimant to Ms. Nieciecka to deal with his concerns, but the Claimant did not pursue this matter.

327. The Claimant also relied on making an allegation of sex discrimination in a formal grievance to Dr. Dace on 21 February 2023 as a Protected Act. The Respondent accepted this was a Protected Act.

328. As set out in the finding of facts, Dr. Dace told the Claimant it should be dealt with by Ms. Nieciecka, the person responsible for dealing with grievances. Subsequently, Mr. Parker also considered it. Therefore, in conclusion we do not consider Dr. Dace failed to act when the Claimant raised a grievance on 21 February 2023. Accordingly, this part of the allegation was not found to have happened as a matter of fact, and therefore this part of the allegation fails.

329. In relation to the part of the allegation relating to 10 December 2022, we considered whether the Claimant had discharged the burden on him to show evidence from which the Tribunal could reasonably conclude that the failure to act was 'because of" sex.

330. We concluded that there was no evidence sufficient to discharge the burden on the Claimant. There was no evidence from which we could reasonably conclude that the Claimant's sex was the reason why Dr. Dace failed to act when the Claimant relayed his concerns. There is no prima facie case of sex discrimination.

331. We considered the reason why Dr. Dace failed to act on 10 December 2022, and concluded that Dr. Dace did not do anything at that stage because he did not consider management of internal staff concerns or grievances to be part of his role. Dr. Dace could have given clearer information or directed the Claimant to Ms. Nieciecka, but there is no evidence to support a conclusion that his failure to do so was because the Claimant was a man, or is in anyway related to sex.

332. There is no evidence to infer that Dr. Dace had a discriminatory attitude towards men, indeed Dr. Dace had been the key person involved in the recruitment of the Claimant.

333. The Claimant has failed to show that any of the Respondents treated him less favourably than Dr. Abrahim or a hypothetical comparator.

334. We did not consider there to be something more in this case that shifted the burden of proof to the Respondent.

335. If we are wrong on this, and the burden of proof shifted to the Respondent, we consider there was a non-discriminatory explanation, namely that set out above, that Dr. Dace did not consider management of internal staff concerns or grievances to be part of his role.

336. The allegation fails.

337. All of the Claimant's direct sex discrimination complaints fail. His complaint of direct sex discrimination is dismissed entirely.

338. As none of the allegations were considered to acts of discrimination we did not go onto consider time limits in relation to the direct sex discrimination complaints.

Victimisation (Equality Act 2010 section 27)

339. The Respondent accepted that all three of the alleged protected acts relied upon constituted protected acts. For ease of reference, they are set out below, and we have labelled them.

Protected Act 1 - "On 10 December 2022, during a meeting complain about Ms Mordel's sexist behaviour to Dr Dace."

Protected Act 2 – "On 21 February 2023 make an allegation of sex discrimination in a formal grievance to Dr Dace."

Protected Act 3 - "On 22 February 2023 make the same allegation of sex discrimination in a formal grievance to Ms Nieciecka?"

340. In the list of issues, paragraph 5.b states "Did the respondent do the following things", but each allegation of detriment references the persons allegedly involved, either one or more of the named individual respondents or the First Respondent. It is therefore understood that the alleged victimiser is the person/persons/or First Respondent as referenced in each allegation.

341. For ease of reference we have used the numbering of the allegation in the List of Issues and underlined the precise allegation and set out our conclusions under each allegation.

<u>5.b.i - From 21 February 2023 did Dr Dace and / or from 22 February 2023 did Ms. Nieciecka fail to investigate the grievances and conduct a fair process?</u>

342. The allegation is somewhat difficult to understand as the Claimant has not identified what grievances he alleges Dr. Dace and Ms. Nieciecka failed to investigate or conduct a fair process in.

343. Our findings of fact sets out what happened in relation to the various grievances as best as possible on the evidence we heard and the documentation that we were directed to or reviewed.

344. It is clear that Dr. Dace did not consider grievances to be part of his remit, and responsibility rested with Ms. Nieciecka. We accept this. He directed the Claimant to Ms. Nieciecka and grievance management was ultimately passed to Mr. Parker. In relation to the grievance that the Claimant lodged about Dr. Dace, Dr. Dace set out his written comments. We do not consider there to be any failure by Dr. Dace relating to the any of the Claimant's grievances in these circumstances. We do not consider Dr. Dace subjected the Claimant to detriment.

345. Further, even if he did fail to investigate or conduct a fair process, we do not consider the reason for this was in anyway related to the fact the Claimant had done any or all of the protected acts, but was because he didn't consider it to be a matter for him.

346. In reaching our conclusions about Ms. Nieciecka we have kept in mind that around mid-February 2023 there were a significant number of concerns being raised by the Claimant but also by the staff at the First Respondent about the Claimant. We consider that in a situation where there are multiple allegations regarding a number of staff, that it became difficult to manage.

347. Further, on 21 February 2023 the Claimant raised concerns about Ms. Nieciecka being bias and that she should not lead an investigation.

348. As set out in the findings of fact above, Ms. Nieciecka forwarded grievances to Mr. Parker promptly on receipt, and Mr. Parker took over management of the grievances, and all concerns raised about the Claimant.

349. In relation to the grievance regarding CCTV usage, also later referred to as a whistleblowing complaint, it is evident from the findings of fact that she took steps to ascertain factual matters.

350. In all of these circumstances we do not consider there was a failure by Ms. Nieciecka to investigate the Claimants grievances, or conduct a fair process. We do not consider Ms. Nieciecka subjected the Claimant to detriment.

351. Further, even if she did fail to investigate or conduct a fair process, we do not consider the reason, or one of the reasons for this, was the fact the Claimant had done any or all of the protected acts, but was because she considered it was not appropriate for her to investigate all of the grievances, in a situation where the Claimant raised concerns about her lack of impartiality and Mr. Parker took responsibility for grievance management.

352. The allegation fails.

5.b.ii - On 24 February 2023 did Mr Parker imply to an outside source that the claimant has a mental health issue thereby breaching confidential information?

353. The findings of fact set out above explain that Mr. Parker did copy Mr. Cole of Bupa into an email that he sent to the Claimant.

354. The email makes reference to the patient complaint, in particular the Claimant contacting the patient the day before, but also the mental health of the Claimant. Whilst we appreciate that the First Respondent may be required, or may wish to inform Bupa of any patient complaints, it was not appropriate for Mr. Parker to make comments on the Claimants mental health or sickness absence.

355. We consider Mr. Parker's comments did amount to a detriment.

356. As set out in the findings of fact, we were unable to make a finding of fact on when Mr. Parker was specifically informed about any of the protected acts. It is accepted he was aware, and other grievances (that are not relied on as protected acts) were forwarded to Mr. Parker on 23 February 2023. The Respondents did not make any argument that Mr. Parker did not have knowledge on 24 February 2023. In conclusion, on balance, it is reasonable to conclude Mr. Parker was aware of the Protected Acts by 10:56 on 24 February 2023.

357. Accordingly, we went on to consider if the detriment was because of any or all of the Protected Acts.

358. Although we consider Mr. Parker did subject the Claimant to detriment by implying he had a mental health issue, we do not consider he made the comments in the email to Mr. Cole to be because of the fact that the Claimant had done any of the Protected Acts. On the evidence, we consider that Mr. Parker made the comments because he was extremely frustrated with the Claimant contacting the patient and leaving work sick after Mr. Parker told him he was travelling to speak to the Claimant about the matter. Mr. Parker.

359. The allegation fails.

5.b.iii - On 27 February 2023 did Dr Dace and Dr Spiro sign a letter requesting that the claimant be dismissed without investigation?

360. As set out in the findings of fact above, Dr. Dace and Dr. Spiro sent a document to Mr. Parker on 26 February 2023, and within it they set out a number of concerns, 14 specifically. There is no reference at all the Protected Acts.

361. The document ends by saying that: "*It is our firm opinion that Dr Bruecker should no longer be employed in The Smart Clinics."* The document does not say that the Claimant should be dismissed without

investigation, indeed arrangements had previously been made for an investigation meeting and Mr. Parker investigated a range of matter subsequent to this letter. It sets out their view on the Claimant's employment to Mr. Parker, who was responsible for considering all issues.

362. Accordingly, as this was not found to have happened as a matter of fact, the alleged detriment in this allegation is not made out.

363. The allegation fails.

5.b.iv - On 1 March 2023 did Mr. Parker suspend the claimant due to the concerns raised?

364. Mr. Parker did suspend the Claimant on 1 March 2023, as set out above, he specifically said: *"Whilst this enquiry is ongoing, now you have confirmed you're well enough to return to work, you are immediately suspended whilst I consider all matters and carefully investigate."*

365. We consider that Mr. Parker suspended the Claimant because of the need to investigate and consider the concerns raised by Dr. Dace and Dr. Spira on 26 February 2023. We note that the Claimant did remain sick at the same time.

366. We consider that a reasonable view of suspension is that it amounts to detriment.

367. However, we have considered whether the suspension was because the Claimant did any or all of the Protected Acts.

368. We do not consider the suspension was because of, in any way, the Protected Acts. We conclude that Mr. Parker suspended the Claimant, when he understood the Claimant would be returning to work, to enable him to investigate the various concerns raised about him, which included contacting the patient directly.

369. We also considered it relevant to note that on 24 February 2023, the day after Mr. Parker found out the Claimant had contacted the patient directly and gone home sick, that Mr. Parker had informed the Claimant that he had intended to suspend him the previous day, in response to discovering the Claimant had contacted the patient directly. We consider the reason for suspension was the Claimant contacting the patient, and the need to investigate matters.

370. We note that Mr. Parker was also responsible for considering the multiple concerns and grievances raised by the Claimant, which included the Protected Acts, however, there is no evidence to suggest that any of the Claimant's grievances formed a significant reason in Mr. Parker suspending the Claimant.

371. The allegation fails.

5.b.v - On 1 March 2023 did Mr. Parker withhold pay from the claimant?

372. We must consider the allegation as specifically framed.

373. Based on the evidence set out in the findings of fact, Mr. Parker did not withhold pay from the Claimant specifically on 1 March 2023. It is important to note that during the hearing the Claimant changed his evidence and confirmed that he remained on sick leave until 15 March 2023.

374. As set out above, the Claimant's last pay slip dated 31 March 2023 shows only a payment of £218.57 SSP. The weekly rate at the time is understood by the Tribunal to be £99.35.

375. We were not directed to any evidence that any thought had been given to the appropriate level of pay that the Claimant should get during a period of simultaneous suspension and sick leave.

376. There is not enough evidence to conclude that Mr. Parker withheld pay on 1 March 2023 and therefore conclude there was no detriment.

377. Accordingly, as this was not found to have happened as a matter of fact, the allegation fails.

378. However, even if we are wrong, we do not consider the level of any pay for 1 March 2023 was because of, in full or part, the Protected Acts but was as result of the First Respondent processing the Claimant as being on sick leave.

379. The allegation fails.

<u>5.b.vi - From 15 March did Mr Parker behave unreasonably in setting up the investigation meeting?</u>

380. The Claimant has not set out how specifically he considers Mr. Parker to have behaved unreasonably in setting up the investigation meeting. We consider the reference to setting up to be sensibly interpreted as the practical arrangements such as the date, notice and format of the meeting.

381. The findings of fact set out the communications regarding the arrangements for the meeting. We consider that some of the earlier emails demonstrate frustration on the part of Mr. Parker and demonstrate that he was seeking to arrange for the meeting to take place as soon as possible, around his pre-existing commitments. We do not consider this to be unreasonable, and in this respect, do not consider there to be any detriment.

382. The Claimant was on notice of the concerns raised. He had been sent a letter on 17 February 2023, he had been sent the document prepared by Dr. Dace and Dr. Spira on 26 February 2023 and had been sent Ms. Nieciecka's investigation document. We note that the Mr. Parker only sent the spreadsheet of concerns shortly before the meeting on 17 March 2023. We understand that that Mr. Parker was undertaking discussions and pull together a large amount of information. We do

consider that it would have been better for the Claimant to have had the spreadsheet earlier, to enable time to consider, and although he was aware of most, if not all of the matters, and the intention was to discuss the matters, we do consider the late provision of the spreadsheet to be detrimental.

383. However, we do not consider Mr. Parker's conduct in relation to providing the spreadsheet shortly before the investigation meeting to be because of, or in any way related to, any of the Protected Acts. We note that Mr. Parker was dealing with a lot of information and it was explained that he wanted to discuss the concerns and would give the Claimant further time to comment after the meeting if he wished. We consider the late provision of the spreadsheet was because he was seeking to meet with the Claimant as soon as possible after the Claimant being well enough to return to work and he had a significant number of concerns to map out.

384. Allegation fails.

5.b.vii - On 17 March 2023 did Mr Parker subject the claimant to a video recording without his consent?

385. As set out in the findings of fact above, Mr. Parker clearly informed the Claimant at the outset of the meeting on 17 March 2023 that he was recording the meeting, and his PA would be present.

386. The Claimant did not object to the meeting being recorded and continued with the meeting. Further, in email correspondence on 15 March 2023 Mr. Parker and the Claimant discussed the arrangements for recording the meeting.

387. We do not consider being recorded, when told and no objection is made, to amount to mean that the Claimant was recorded without his consent.

388. Accordingly, as this was not found to have happened as a matter of fact, the allegation fails.

389. However, for completeness, we do not consider recording of a meeting to be detriment, as it will provide an accurate note of the discuss and there was no evidence that Mr. Parker recording the meeting was in any way because of or related to any of the Protected Acts but was because he wished to record the meeting, which was discussing serious matters.

5.b.viii - On 17 March did Mr Parker conduct the meeting with his PA present and failed to introduce the claimant to the PA by name or on the video recording?

390. As set out in the findings of fact above, Mr. Parker clearly informed the Claimant at the outset of the meeting that his PA would be present. The PA's name was not given to the Claimant by Mr. Parker, and the Claimant did not ask the Claimant's name.

391. We do not consider the fact the Claimant was only told the PA was present and not given their name to amount to any detriment. The Claimant was aware that the PA was present, and could have asked their name if they wished.

392. Further, if we are wrong, and Mr. Parker not giving the Claimant the PA's name, either at the start of the meeting or on the recording, does amount to a detriment, there is no evidence that support a conclusions that Mr. Parker did not give the name of the PA because of, or was in anyway related to, any of the Protected Acts.

393. Allegation fails.

5.b.ix - On or after 17 March 2023 did Mr Parker post the video on a public platform?

394. Again, we reminded ourselves that we must consider the allegation as presented.

395. As set out in the findings of fact, Mr. Parker sent a link of the recording. The recording was accessible to people who had the link. We do not consider this to amount to Mr. Parker positing the video on a public platform, which as framed, implies anybody can access and view.

396. The allegation as framed, is not established on the facts, and therefore fails.

397. For completeness, we do not consider sending the link to colleagues and advisors to be detriment.

398. However, if we are wrong and there was detriment, there is no evidence to support a conclusion that we Mr. Parker sending the link was because of or in any way related to any of the Protected Acts.

399. Allegation fails.

5.b.x - On 21 March 2023 did Mr Parker dismiss the claimant?

400. As set out above, in an email of 11:44, Mr. Parker informed the Claimant that he had been dismissed.

401. It is clear that dismissal can amount to a detriment.

402. However, we do not consider the dismissal was because of any of the Protected Acts. As set out above, the reasons for Mr. Parker dismissing the Claimant were set out in the email notifying the Claimant od his dismissal.

403. The letter does reference the fact the Claimant has made allegations and complaints about the Respondent's clinical and medical directors, and that there had been a serious breakdown of the relationship with superiors.

404. We have kept in mind that the three PAs related to Ms. Mordel only. As evidenced in the notes of the meeting dated 17 March 2023, Mr. Parker was of the view that communication and issues with administrative was a minimal concern, that he considered could be sorted.

405. We conclude that the reasons for dismissal were primarily the Claimant's conduct in contacting the patient, patient concerns and the breakdown in his working relationships with colleagues and that staff no longer wished to work with the Claimant.

406. Allegation fails.

5.b.xi - From 21 March 2023 did Mr Parker not pay the contractual notice period?

407. The Claimant was not paid his contractual notice period. This was not addressed in Mr. Parker's witness statement. We have considered that although the dismissal letter does not specifically use the phrase gross misconduct, it is reasonable for us to infer from the content of the dismissal letter and Mr. Parker's witness evidence that he considered the Claimant had committed gross misconduct.

408. We understand that not being paid for a contractual notice period can amount to a detriment. However, we consider that whether or not non-payment is detriment or not turns on whether the Respondent was entitled to withhold notice pay.

409. Our conclusions in relation to the wrongful dismissal complaint are set out below, but are relevant here, and in short we conclude that the First Respondent, as the employer, was entitled to not pay notice pay.

410. In any event, we do not consider the reason the Claimant was not paid for his notice period was related to any of the Protected Acts, but rather was because Mr. Parker considered the Claimant had committed gross misconduct, despite the phrase not being used, the matters referenced in the dismissal email are serious.

411. Allegation fails.

5.b.xii - On 21 March did Mr Parker backdate the claimants last day of employment to 28 February 2003

412. We found, as per the findings of fact, that Mr. Parker did tell the Claimant his employment ended on 28 February 2023. This was inappropriate, and it is not permissible to simply backdate termination of employment. For completeness, we find that the effective date of termination was 21 March 2023, the date the Claimant was notified of his dismissal. The dismissal letter goes on to reference honouring the Claimant's sick period until 15 March 2023.

413. We consider that attempting to back date a dismissal does amount to a detriment.

414. We do not consider the reason the dismissal was backdated was related to any of the Protected Acts, but rather was because Mr. Parker incorrectly considered that was what should happen when an employee is absent on sick leave and dismissed.

415. Allegation fails.

5.b.xiii - On 21 March 2023 did Mr Parker inform the claimant by email that he would not provide him with a reference if he progressed matters to the Employment Tribunal?

416. We understand the allegation of detriment to be the act of Mr. Parker informing the Claimant he would not provide a reference if he went to Employment Tribunal, rather than the allegation being about the non-provision of a reference.

417. Within the dismissal email sent by Mr. Parker it says:

"I understand you will be disappointed and unhappy with your employment being terminated and no doubt will insist upon processing the Tribunal you have so heavily threatened. That is of course your prerogative. If you decide to go down that road I will not be issuing a reference to any future potential employer until the Tribunal matter has been resolved."

418. This is not the same as put in the allegation. Mr. Parker says that he would not give a reference until any Employment Tribunal proceedings were resolved.

419. There is no legal obligation on an employer to provide a reference. However, in many situations, it is common practice for references to be provided. We consider that withholding a reference, either temporarily or permanently, could potentially amount to a detriment. However, in this case we were not referenced to any actual reference request and as we note above, the allegation appears to be the fact he was told this, in essence, we consider this could be interpreted as a threat, and we consider such a comment does amount to a detriment.

420. However, we do not consider this was because of or in any way related to the Claimant's Protected Acts as pleaded in this case. We consider it was said as a result of the Claimant indicating he would take matters to an Employment Tribunal and Mr. Parker made the comment about not giving a reference because of this potential route pursued by the Claimant to set out that he would give an honest reference.

421. Allegation fails.

5.b.xiv - From 21 February 2023 did Ms Nieciecka not comply with the Subject Access Request and withhold evidence?

422. This allegation does not specify how Ms. Nieciecka is alleged to have not complied with the Subject Access Request.

423. The findings of fact are that Ms. Nieciecka was not involved in the management of the Claimant Subject Access Request whilst the Claimant was employed, this was dealt with by Mr. Pinder.

424. In circumstances where Ms. Nieciecka was not primarily involved, we not consider there to be any detriment by Ms. Nieciecka.

425. Accordingly, the allegation as framed against Ms. Nieciecka fails as it is not established on the facts.

5.b.xv - On 23 February did Ms Nieciecka fail to investigate the claimant's grievance that the information about a complaint was withheld from him?

426. Our conclusions in relation to allegation 5.b.i are applicable here also.

427. Our findings of fact set out what happened in relation to the various grievances as best as possible on the evidence we heard and the documentation that we were directed to or reviewed. This grievance was passed to Mr. Parker, by Ms. Nieciecka. Mr. Parker took over management of the grievances, and all concerns raised about the Claimant.

428. Again, in reaching our conclusions about Ms. Nieciecka we have kept in mind that around mid-February 2023 there were a significant number of concerns being raised and the situation was becoming challenging to manage.

429. Further, as noted above, on 21 February 2023 the Claimant raised concerns about Ms. Nieciecka being bias and that she should not lead an investigation.

430. In all of these circumstances we do not consider there was a failure by Ms. Nieciecka to investigate this particular grievance. We do not consider Ms. Nieciecka subjected the Claimant to detriment.

431. Further, even if she did fail to investigate or conduct a fair process, we do not consider the reason for this was because of, or in anyway related to, the fact the Claimant had done any or all of the protected acts, but was because she considered it was not appropriate for her to investigate all of the grievances, in a situation where the Claimant raised concerns about her lack of impartiality and Mr. Parker took responsibility for grievance management.

432. The allegation fails.

5.b.xvi - On 23 February did Ms Nieciecka fail to investigate the claimant's grievance about Health & Safety issues?

433. Our conclusions as set out in relation to allegation 5.b.xv apply here, and for brevity we have not repeated them. The only difference to note, factually, is that Ms. Nieciecka forwarded this grievance to Mr. Parker at 10:16 on 24 February 2023.

434. The allegation fails.

5.b.xvii - On 23 February did Mr Parker dismiss the claimant's concerns that he was victimised under the Equality Act 2010 raised to him in an e-mail

435. As set out in the findings of fact, in an email exchange on 23 February 2023 the Claimant in response to an earlier email from Mr. Parker said he felt he was being victimised.

436. It does not appear that Mr. Parker replied to this email, we were not directed to a response. However, we considered the context and timing of this chain is important. Mr. Parker was, around the time that the Claimant sent his email at 13:44, travelling to speak with the Claimant about him contacting the patient. When he arrived, the Claimant had already left and gone home sick.

437. There is no email on 23 February 2023 in which Mr. Parker dismissed the Claimant's concerns. We think, in the circumstances as set out above, that not replying when an employee has gone home sick, is different to dismissing concerns. We also considered it relevant that Mr. Parker went on to consider the situation with the Claimant globally and, in his own way, considered the Claimant's grievances.

438. Accordingly, in these circumstances, we do not consider that as fact on 23 February 2023 Mr. Parker dismissed the Claimant's concerns that he was victimised.

439. The allegation as framed, is not established on the facts.

440. However, for completeness, although we do not consider there to be any detriment on the facts, if we are wrong, we do not consider that Mr. Parker did not reply to the email because of, or principally because of, the Protected Acts but because of the situation at the time, namely the Claimant had reported sick and Mr. Parker was starting to consider a range of concerns raised about the Claimant, and by him.

441. Allegation fails.

5.b.xvii - On 24 February did Mr Parker, Dr Spira and Dr Dace ignore the fact that the claimant made it clear he felt victimised in an e-mail to them?

442. As set out in the findings of fact, on 24 February 2023 Mr. Parker emailed the Claimant and the Claimant replied, within it he said: "*Your statement ' my intention to immediately suspend you subject to investigation, to me can be interpreted as bias and victimisation as I raised a gross misconduct grievance."*

443. We were not directed to any reply from Mr. Parker, Dr. Spira and Dr. Dace. The next email to the Claimant was on 27 February 2023, this does not specifically address the Claimant's comments.

444. On balance, we consider that the fact there was no response to this issue raised could and did amount to a detriment. Mr. Parker could have referred to the concern in his later email.

445. However, again, we consider the context at this stage is that the situation has become challenging and complicated. In view of the chronological account set out in the findings of fact we do not consider that Mr. Parker, Dr. Spira or Dr. Dace not replying, or in essence ignoring, the comments was because of, or related to the Protected Acts, but was because at that time Dr. Spira and Dr. Dace were setting out the details of their concerns about the Claimant's behaviour and Mr. Parker was focusing on attempting to manage the situation and how to address the various concerns.

446. Allegation fails.

5.b.xix - On 27 February did Mr Parker fail to respond to the claimant's concern that he experienced bullying?

447. As with other allegations, we have reminded ourselves that we must consider the allegation as framed.

448. On 27 February 2023 Mr. Parker emailed the Claimant in relation to the concerns raised against him. The Claimant replied on 28 February 2023 and within that email, with reference to Dr. Dace and Dr. Spira, he said that they were indirectly perpetuating bullying at work.

449. On 28 February 2023 Mr. Parker emailed the Claimant asking when he may feel well enough to meet and provided a copy of an investigation document produced by Ms. Nieciecka. The Claimant was off sick at this time.

450. We were not directed to any email on 27 February 2023 on which the Claimant said he was experiencing bullying, it is also noted that in oral evidence the Claimant also referenced 27 February.

451. Therefore, as framed the allegation fails factually, as we were not directed to any evidence that on 27 February Mr. Parker failed to respond to the Claimant's concerns that he was experiencing bullying, noting the references was made by the Claimant on 28 February.

452. However, for completeness, although we do not consider there to be any detriment on the facts, if we are wrong, we do not consider that Mr. Parker did not reply to the comments regarding bullying on 28 February 2023 because of, or principally because of, the Protected Acts but because of the situation at the time, namely the Claimant was off work sick and Mr. Parker was seeking to arrange a time to discuss matters with him.

453. Allegation fails.

5.b.xx - On 28 February did Ms Neiciecka fail to act on a grievance made by the claimant about professional misconduct By Dr Dace?

454. As set out above, the Claimant submitted a grievance about Dr. Dace to Ms. Nieciecka on 28 February 2023. Dr. Dace prepared a written response, which he finalized on 10 March 2023.

455. In general, all grievances were passed to Mr. Parker, noting the Claimant had raised concerns and grievances about a number of matters and people.

456. It is not clear when this grievance was passed to Mr. Parker but the very fact that Dr. Dace prepared a response indicates that there was not a failure to act by Ms. Nieciecka, in the very least she must have forwarded it to Mr. Parker or asked for Dr. Dace to prepare a response.

457. Accordingly, on the facts, we do not consider there to be any detriment as Ms. Nieciecka did not fail to act on a grievance made by the claimant about professional misconduct By Dr Dace.

458. If we are wrong, and there was any detriment, we do not consider any failure to act by Ms. Nieciecka was because of the Protected Acts but her not acting or dealing directly was due to Mr. Parker considering the grievances raised by the Claimant.

459. Allegation fails.

5.b.xxi - On 1 March did Mr Parker fail to address a grievance made by the claimant about victimisation and professional misconduct of Dr Spira?

460. As set out in the findings of fact above, the Claimant did send Mr. Parker a grievance regarding Dr. Spira on 1 March 2023.

461. On 3 March 2023 Mr. Parker emailed the Claimant asking to meet with him. In our view, the email indicates that Mr. Parker was considering a range of issues.

462. The Claimant specifically asked Mr. Parker if he investigated the grievance against Dr. Spira, and he said, as set out in findings above, that he examined every allegation, had discussion and reviewed documents. Mr. Parker did not undertake a methodical approach, and we are unable to make specific findings of fact on what was done in relation to this grievance.

463. We have kept in mind the context of this grievance is Dr. Spira's involvement in the letter of concern dated 26 February 2023. The contents of 26 February 2023 are incorporated into Mr. Parkers concerns and at the meeting on 17 March 2023 Mr. Parker gave the Claimant the opportunity to state what his concerns were.

464. On balance, taking all into account, and the limited evidence available, we conclude that the relationship between the Claimant and Dr. Spira was considered by Mr. Parker, and at the meeting on 17 March 2023 the Claimant could have raised this matter.

465. We do not consider there was a failure that amounted detriment.

466. However, if we are wrong, and there was any detriment, we do not consider any failure to address the grievance was because of the

Protected Acts but was because Mr. Parker was seeking to look at a multitude of concerns on both sides, globally.

467. Allegation fails.

5.b.xxii - On 21 March did Mr Parker not comply with a reminder to act on the claimant's Subject to access request

468. On 21 March 2023 Mr. Parker informed the Claimant that he had been dismissed, but within the email he also referred to the Claimant's data and said:

"You have today further challenged the company in requesting and chasing up the data which is held on you. You have previously been informed that the company does not hold any video, Whatsapp messages or other information on you other than your DBS check which you provided and has later been confirmed as being valid by the agency we use to provide DBS checks."

469. Again, the allegation is not entirely clear on what is meant by "not comply with a reminder to act". Mr. Parker, on the facts, did comment on the data that was held but it is understood that Mr. Pinder dealt with the SAR.

470. In circumstances where Mr. Parker was not responsible for dealing with the SAR, we not consider there to be any detriment by him by responding as he did.

471. If we are wrong, and there was detriment, we do not consider any failure to comply with the reminder by Mr. Parker was related to the Protected Acts but was because, as indicated in his email, that he considered the Claimant had been told what data was held.

472. Allegation fails.

5.b.xxiv Did Smart Medical Clinics fail to comply with internal policies? The policies in question are

1. Disciplinary procedure
2. Procedure for Dealing with Alleged Harassment or Bullying
3. Grievance Procedure
4. Public Interest Disclosure
5. Complaints policy
6. Health, Safety and Hygiene
7. Did Smart Medical clinics fail to adhered to the ACAS code of conduct?

473. This allegation is wide and vague. The Claimant did not specify which parts of all the various policies he says the Respondent failed to comply with.

474. In his witness statement, at page 36 under the heading "Breach of Contract" the Claimant comments that a proper disciplinary and grievance process were not followed. In this section he does not provide any evidence in relation to the other policies of the First Respondent cited in the allegation above. In submissions the Claimant said, in generic terms for each policy, that there had not been compliance.

475. We have reminded ourselves that this allegation is one of victimisation.

476. Dealing firstly with the Disciplinary Procedure. As set out above, the First Respondent does have a procedure. The Claimant has not specified which parts of this procedure, which is non-contractual, he considers the First Respondent failed to comply with because of the Protected Acts.

477. In summary, the Claimant was told about concerns, firstly on 17 February 2023. Mr. Parker later set out additional concerns in a letter dated 15 March 2023 and then met with the Claimant, after considering information provided by others on 17 March 2023. The Claimant was not offered any right of appeal. Further detail about the events is set out in the findings of fact above.

478. Further, as set out above, the Disciplinary Procedure specifically states:

"We retain discretion in respect of the Disciplinary Procedure to take account of your length of service and to vary the procedures accordingly. If you have a short amount of service, you may not be in receipt of any warnings before dismissal."

479. In February 2023 the Claimant had approximately six months continuous employment.

480. Taking all of the above into account, we do not consider the First Respondent failed to comply with the Disciplinary Procedure in view of the specific ability to vary the process contained within it.

481. Further, we see no link to Mr. Parker's management of the disciplinary concerns and the Claimant making the Protected Acts.

482. In relation to the Procedure for Dealing with Alleged Harassment or Bullying, the Claimant has not specified which parts of this procedure, which is non-contractual, he considers the First Respondent failed to comply with because of the Protected Acts.

483. The Claimant did lodge a number of grievances, as set out in the findings of fact above and we have set out our conclusions in this respect below.

484. As a matter of fact we found that Mr. Parker considered both the concerns raised by the Claimant and concerns raised by others, in his own way, prior to meeting with the Claimant.

485. As the Claimant has not specified the way he considers the First Respondent has failed to comply with the Procedure for Dealing with

Alleged Harassment or Bullying, we are unable to make a specific conclusion in this respect. However, we do not consider that the way the First Respondent, namely by sending concerns to Mr. Parker for consideration – which he did globally and by way of discussions and being sent written concerns and without formally documenting his approach – to be because of or related to the Protected Acts. Mr. Parker was dealing with a significant number of concerns raised both by the Claimant and about him, and although we consider that Mr. Parker could have taken better steps to set out what he did and when, we do not consider his more approach to be because of or related to the Protected Acts, but was because of his style of working.

486. Again, the Grievance Procedure is non-contractual. The Claimant does comment on this in his witness statement. Again, he has not specified any particular part of the Grievance Procedure that he says the First Respondent failed to comply with, but he says his grievances were ignored. As set out in the findings of fact and the above conclusions, we do consider the First Respondent, mostly via Mr. Parker, considered the Claimant's grievances, although there was not a formal and documented process, and the Claimant was given an opportunity to set out any concerns at the meeting on 17 March 2023. However, we do not consider the First Respondent's approach to managing the Claimant's grievances to be because of or related to the Protected Acts for the reasons set out in relation to the Procedure for Dealing with Alleged Harassment or Bullying above.

487. Again, it is not entirely clear how the Claimant is arguing that the First Respondent has failed to comply with its Public Interest Disclosure (Whistleblowing) Policy, but from the Claimant's submissions his position appears to be that the matter was not kept confidential. As noted above, the policy states that concerns should be raised initially with a line manager, who will treat the matter in confidence, and that the matter will be investigated. The findings of fact demonstrate that the Claimant sent his whistleblowing complaint to Dr. Spira and Ms. Nieciecka, and informed the police. In notifying the police he would have been aware this may have led to public consideration. It is evident that steps were taken to consider the concerns, as comments were provided on the contents. We consider that the concerns were considered, and the procedure does not set out a prescriptive process. I conclusion, we do not consider the First Respondent failed to comply with the policy and do not consider any of the actions it took in relation to the policy were because of or related to the Protected Acts. There were steps taken to look into the issues raised and again, the context of a large number of concerns in a short period of time is relevant and we consider informed how matters were approached.

488. Similarly, within the allegation the Claimant has not specified the particular failure in relation to the Complaints Policy but we understand that the Claimant's position is that he was not informed about the compliant made by the female patient within 5 days, and was not given details about the complaint.

489. Our findings of fact are that the policy states:

"Copies of the complaint will also be forwarded to any staff/ doctors with practicing privileges involved in the care to provide a factual written statement to the Complaints Handler within 5 working days."

490. However, under stage 3 of the procedure section it states:

"In the majority of cases, the Registered Manager will issue a copy of the complaint to the staff involved or to other senior members of staff of the relevant department to resolve the problem as soon as possible…"

491. The policy states that straightforward complaints will usually be involved within 20 days.

492. We do not consider the policy to be clear. When reading the sections above together, it is not clear whether it intends that the complaint should be sent to the staff/doctor involved within 5 days of receiving the complaint or whether the reference to 5 days is the period or whether the five days refers to the timeframe for the staff/doctor to provide a written complaint.

493. It is clear the staff of the First Respondent were taking steps to contact the patient and understand the concerns.

494. On balance, noting the comments on stage 3 procedure, we do not consider the policy includes a timeframe of 5 days to tell the Claimant, and the 5 day reference relates to the staff/doctor providing their comments within 5 days.

495. The first time the Claimant was made aware of the complaint was on 17 February 2023, in the letter of concerns. We do consider, as a matter of commonsense and courtesy, that it would have been better for the Claimant to have been told about the complaint in a different way, before it was included in the letter of concerns. We did find, as a matter of fact that, after 17 February, Mr. Parker did discuss the complaint with the Claimant.

496. On balance, we do not find there was a failure to comply with the Complaint Policy.

497. Further, it is important to note that only the Protected Act 1 had taken place before 17 February 2023, the first time the Claimant was made aware of the complaint. We do not consider the First Respondent failed to comply with the Complaints Policy and do not consider any of the actions it took in relation to the patient complaint policy were because of or related to the Protected Acts. There were steps being taken to liaise with the patient by several staff, before Protected Acts 2 and 3 and the Claimant was later spoken to by Mr. Parker. There is no evidence that Protected Act 1, 10 December 2023, was an influencing feature of the management of the complaint, and the process for dealing with the complaint was already underway by Protected Acts 2 and 3.

498. The Claimant has not specified the way he considers the First Respondent has failed to comply with the Health, Safety and Hygiene as an act of victimisation. The Claimant's position on this allegation is not

clear, there was a very brief reference to a DSE assessment not being undertaken.

499. The Health, Safety and Hygiene Policy is just over one page long and sets out information about health and safety at work, and makes reference to raising concerns.

500. We are on, the evidence and arguments presented, not able to make any conclusion that the there had been a failure in relation to this policy as the allegation remains unclear.

501. The Claimant also alleges that the First Respondent failed to comply with the ACAS Code of Practice.

502. Our first observation is that the ACAS Code of Practice is not an internal policy. In submissions the Claimant referenced not being invited to a meeting, no evidence that he was accused of gross misconduct and said the Code was not applied.

503. We have assumed the Code that he references is the ACAS Code of Practice on disciplinary and grievance procedures.

504. The Code itself explains that it*: "provides basic practical guidance to employers, employees and their representatives and sets out principles for handling disciplinary and grievance situations in the workplace."*

505. The Code also states:

"A failure to follow the Code does not, in itself, make a person or organisation liable to proceedings. However, employment tribunals will take the Code into account when considering relevant cases. Tribunals will also be able to adjust any awards made in relevant cases by up to 25 per cent for unreasonable failure to comply with any provision of the Code. This means that if the tribunal feels that an employer has unreasonably failed to follow the guidance set out in the Code they can increase any award they have made by up to 25 per cent. Conversely, if they feel an employee has unreasonably failed to follow the guidance set out in the Code they can reduce any award they have made by up to 25 per cent."

506. The findings of fact set out how the First Respondent approached and managed the conduct concerns raised about the Claimant and the Claimant's grievances, and we have not repeated these here save to say there was consideration of the range of concerns on both sides and Mr. Parker met with the Claimant to discuss the situation.

507. On balance, in view of the fact the ACAS Code of Practice is not an internal policy that must be complied with as a contractual term and the lack of clarity, we are unable to conclude there has been a breach.

508. Further, even if the First Respondent did not take into account the guidance in the Code, we do not consider that the Protected Acts formed any part of any potential non-compliance with the Code. Mr. Parker, primarily dealt with range of concerns after 22 February 2023, and for the reasons set out above, we do not consider the Protected Acts had any

bearing on the approach taken and he was seeking to be pragmatic and deal with a wide range of matters.

509. We have kept in mind throughout that this allegation is about the First Respondent, the Claimant has not addressed what was in the mind the First Respondent, which is a company.

510. This allegation fails.

511. We have concluded that there was no victimisation of the Claimant, and therefore we have not gone on to consider time limits.

512. As none of the allegations were considered to acts of discrimination we did not go onto consider time limits in relation to the direct sex discrimination complaints.

Protected disclosures

513. The Respondent's position in relation to the alleged protected disclosures is set out below.

514. We deal first with alleged protected disclosure 1, PD1.

PD1 - On the 10 December 2022, did the claimant make a disclosure verbally to Dr Dace regarding the potentially sexist commentary made by Ms Mordel. The Claimant says this tended to show a breach of a legal obligation.

515. The Respondent accepts that the comments were made to Dr. Dace but does not accept that this amounts to a protected disclosure.

516. We have gone on to consider the matter as set out below.

517. We conclude that the Claimant did disclose information about comments made to him by Ms. Mordel as set out in the findings of fact above.

518. We then considered if the Claimant reasonably believed that the disclosure of information was made in the public interest.

519. We have kept in mind that the focus is on whether the Claimant reasonably believed that the disclosure was in the public interest, which is both subjective and objective, and we must not substitute our view.

520. We have considered the *Chesterton* factors.

521. In relation to the numbers in group affected, on the evidence presented, it appears that the other male doctors working at the First Respondent at the time were Dr. Spira and Dr. Dace. There were no difficulties in the working relationship between Ms. Mordel and Dr. Spira and Dr. Dace and when the Claimant was asked if Ms. Mordel would treat them the same way if they made same the same mistake he said he was not sure. There is no evidence at all of any discriminatory attitudes in the

workplace, by Ms. Mordel or others, and Ms. Mordel had a good working relationship with other male doctors.

522. In relation to the nature of interests affected and extent affected by the wrongdoing we note that although the Claimant appears to have been sufficiently upset to raise the matter with Dr. Dace he does not take any further action and does set out any concerns in writing and continues working. There does not seem to be any significant issues until after 17 February 2023, when the Claimant is invited to a meeting.

523. When considering the nature of wrongdoing, we note that the Claimant now says the comments made by Ms. Mordel were discriminatory. It is not entirely clear what the Claimant said to Dr. Dace but on a factual basis it appears that the only comments we are aware are those alleged to have been said on 25 November 2022.

524. We considered the nature of the alleged wrongdoer – Ms. Mordel. Ms. Mordel was an employee of the First Respondent/R1, she was a senior receptionist and administrator and therefore her role was to assist doctors and the running of the First Respondent. We did not understand there have been any concerns raised by other staff about Ms. Mordel. The Claimant is senior to Ms. Mordel, and at the start of his employment Ms. Mordel was helpful and supported the Claimant.

525. The issues appear to relate solely to him, and as a matter of fact we found that Ms. Mordel did not say the specific words alleged on 25 November 2022.

526. Further, in the Claimant's own witness statement he says he reported "potential sex discrimination" to Dr. Dace. Use of the word potential indicates that the Claimant himself, at the time, cannot have been convinced there was wrongdoing and further as noted above, when asked about the context of the conversation, the Claimant said it was said to belittle him and make him feel incompetent. His answer made no reference to his sex.

527. Taking all the above into account, we do not consider the Claimant had a reasonable belief that the disclosure was in the public interest and that it tended to show a legal obligation was being breached.

528. Accordingly, we do not consider PD1 qualifies as a protected disclosure.

529. In relation to the second protected disclosure, as set out below, the Respondent accepts that this constitutes a protected disclosure.

PD2 - On the 23rd February 2023, did the claimant make a protected disclosure by emailing Ms. Nieciecka regarding potential recording of CCTV footage in the examination room?

530. The Claimant says this tended to show a breach of a legal obligation and criminal offence.

Whistleblowing Detriment

531. We have considered each allegation of whistleblowing detriment as pleaded by the Claimant. It is important to note that a large number of the allegations are the same as the section 27 victimisation complaint, and therefore many of our conclusions overlap with what has been set out above, but we have reminded ourselves of the law on whistleblowing detriment as summarised in the law section above, which is of course different to section 27 of the Equality Act 2010.

532. We have also kept in mind that alleged PD1 has not been found to be a protected disclosure, and the date of the only protected disclosure, PD2 is, 23 February 2023. Therefore, any allegations of whistleblowing detriment that pre-date the time of PD2 (16:41) on 23 February 2023, fail.

7.a.i - From 21 February 2023 did Dr Dace and / or from 23 February 2023 did Ms Nieciecka fail to investigate the grievances and conduct a fair process?

533. As set out in our conclusion in relation to allegation 5.b.i this allegation is somewhat difficult to understand as the Claimant has not identified what grievances he alleges Dr. Dace and Ms. Nieciecka failed to investigate or conduct a fair process in.

534. Our findings of fact sets out what happened in relation to the various grievances as best as possible on the evidence we heard and the documentation that we were directed to or reviewed.

535. It is clear that Dr. Dace did not consider grievances to be part of his remit, and responsibility rested with Ms. Nieciecka. We accept this. He directed the Claimant to Ms. Nieciecka and grievance management was ultimately passed to Mr. Parker. In relation to the grievance that the Claimant lodged about Dr. Dace, Dr. Dace set out his written comments. We do not consider there to be any failure by Dr. Dace relating to the any of the Claimant's grievances in these circumstances. We do not consider Dr. Dace subjected the Claimant to detriment.

536. Further, even if are wrong and he did fail to investigate or conduct a fair process, we do not consider the reason for any failure was on the ground of the Claimant having done PD2. We do not consider PD2 had any material influence and any failure was because Dr. Dace didn't consider it to be a matter for him.

537. In reaching our conclusions about Ms. Nieciecka we have kept in mind that around mid-February 2023 there were a significant number of concerns being raised by the Claimant but also by the staff at the First Respondent about the Claimant. We consider that in a situation where there are multiple allegations regarding a number of staff, that it became difficult to manage.

538. Further, on 21 February 2023 the Claimant raised concerns about Ms. Nieciecka being bias and that she should not lead an investigation.

539. As set out in the findings of fact above, Ms. Nieciecka forwarded grievances to Mr. Parker promptly on receipt, and Mr. Parker took over

management of the grievances, and all concerns raised about the Claimant.

540. In relation to the grievance regarding CCTV usage, also later referred to as a whistleblowing complaint, it is evident from the findings of fact that she took steps to ascertain factual matters.

541. In all of these circumstances we do not consider there was a failure by Ms. Nieciecka to investigate the Claimants grievances, or conduct a fair process. We do not consider Ms. Nieciecka subjected the Claimant to detriment.

542. Further, even if she did fail to investigate or conduct a fair process, we do not consider the reason for any failure to be on the ground of the Claimant having done PD2. We do not consider PD2 had any material influence and any failure was because she considered it was not appropriate for her to investigate all of the grievances, in a situation where the Claimant raised concerns about her lack of impartiality and Mr. Parker took responsibility for grievance management.

543. The allegation fails.

7.a.ii - On 21 February did Ms Nieciecka encourage only female receptionists who are managed by Monika Mordle to provide written evidence against the claimant which has not been investigated before

544. As set out above, alleged PD1 has not been found to be a protected disclosure. This allegation is about alleged conduct on 21 February 2023 and therefore it pre-dates PD2 which was done at 16:41 on 23 February 2023.

545. The allegation fails

7.a.iii - On 24 February 2023 did Mr Parker imply to an outside source that the claimant has a mental health issue thereby breaching confidential information?

546. Our conclusions in relation to allegation 5.b.ii are relevant here.

547. The findings of fact set out above explain that Mr. Parker did copy Mr. Cole of Bupa into an email that he sent to the Claimant.

548. The email makes reference to the patient complaint, in particular the Claimant contacting the patient the day before, but also the mental health of the Claimant. Whilst we appreciate that the First Respondent may be required, or may wish to inform Bupa of any patient complaints, it was not appropriate for Mr. Parker to make comments on the Claimants mental health or sickness absence.

549. We consider Mr. Parker's comments did amount to a detriment.

550. Accordingly, we went on to consider if the detriment was on the ground of PD2.

551. Although we consider Mr. Parker did subject the Claimant to detriment by implying he had a mental health issue, we do not consider he made the comments in the email to Mr. Cole to have any causal connection with PD2.

552. We were not able to make a finding of fact on when Mr. Parker became aware of PD2, the first document in which it is clear he has been informed that the Claimant raised concerns about CCTV is 26 February 2023, which is after this allegation.

553. However, even if Mr. Parker had knowledge of PD2 in the morning of 24 February 2023, we do not consider this detriment was done on the grounds of the Claimant having done PD2.

554. We consider that Mr. Parker made the comments because he was extremely frustrated with the Claimant contacting the patient and leaving work sick after Mr. Parker told him he was travelling to speak to the Claimant about the matter. Mr. Parker.

555. The allegation fails.

7.a.iv - On 27 February 2023 did Dr Dace and Dr Spiro sign a letter requesting that the claimant be dismissed without investigation?

556. Our conclusions in relation to allegation 5.b.iii are relevant here.

557. As set out in the findings of fact above, Dr. Dace and Dr. Spiro sent a document to Mr. Parker on 26 February 2023, and within it they set out a number of concerns, 14 specifically. There is no reference at all the Protected Acts.

558. The document ends by saying that: "*It is our firm opinion that Dr Bruecker should no longer be employed in The Smart Clinics."* The document does not say that the Claimant should be dismissed without investigation, indeed arrangements had previously been made for an investigation meeting and Mr. Parker investigated a range of matter subsequent to this letter. It sets out their view on the Claimant's employment to Mr. Parker, who was responsible for considering all issues.

559. Accordingly, as this was not found to have happened as a matter of fact. The Claimant has not met the burden of proving that he has been subjected to any detriment.

560. The allegation fails.

7.a.v - Is the fact that the protected disclosure was mentioned in this letter a breach of confidentiality and of internal policies? At the start of the hearing the Claimant clarified this allegation as being: The Claimant says a protected disclosure should be dealt with confidentially but it was leaked before it was addressed. It was leaked by Sylvia to R2 and R5.

561. We again remind ourselves that we must consider the allegation as framed.

562. As set out in the findings of fact above, concerns about the use of CCTV, the content of PD2, was first raised to Dr. Spira on 20 February 2023. In it he says he has contacted the police and provides a crime reference number. The Claimant must have been aware that a possible consequence of reporting to the police would be that there would be a public investigation.

563. The Claimant then sent PD2 to Ms. Nieciecka on 23 February 2023.

564. We were not directed to any document that evidences Ms. Nieciecka forwarding PD2 to Dr. Dace and/or Dr. Spira.

565.

566. The letter dated 26 February does refer to concerns about use of CCTV, but the Claimant had already raised this with Dr. Spira.

567. Based on the fact that the Claimant had already set out the substance of his concerns to Dr. Spira on 20 February 2023, we do no find as a matter of fact that Ms. Nieciecka leaked information that was confidential before it was addressed.

568. Accordingly, as this was not found to have happened as a matter of fact. The Claimant has not met the burden of proving that he has been subjected to any detriment.

569. The allegation fails.

7.a.vi - <u>Did Dr Dace deliberately made the incident regarding the haematoma sound worse in the email from Dr Dace and Mr Spira asking for the Claimant to be dismissed</u>

570. As set out in the findings of fact above, Dr. Dace does change his view in relation to his thoughts on the haematoma.

571. We have reminded ourselves that detriment means, in simple terms, put to a disadvantage.

572. We do not consider that Dr. Dace deliberately made the incident worse, and accepted his evidence that he had been too generous when first dealing with the matter.

573. We do not find there to be the detriment as specifically worded by the Claimant, with reference to deliberate.

574. However, we can understand that the change in Dr. Dace's position could reasonably have been considered disadvantageous to the Claimant.

575. However, for completeness, if we are wrong and there was detriment, we do not considered there was any causal link between the reference to the haematoma in the document dated 26 February 2023 and PD2.

576. In reaching this conclusion we have considered it relevant that in the letter dated 17 February 2023 there was reference to "*Your ability to*

perform ECG's and other clinical tests." Although it is not clear what is referenced by this.

577. By 26 February 2023 the relationship between the directors and the Claimant had changed, in particular following the Claimant contacting the patient directly, and Dr. Dace and Dr. Spira were setting out all their concerns to Mr. Parker.

578. Further, we considered it important to note that on the morning of 23 February 2023, before PD2 but after Dr. Spira was already aware of the CCTV concerns as he the Claimant had raised it directly with him, Dr. Spira updated Dr. Dace and explained that Mr. Parker had asked them to write to him regarding the Claimant' medical competence and professionalism.

579. Dr. Dace set out his views, which included reference to the haematoma incident in that document, following request by Mr. Parker.

580. There is no evidence to support a conclusion that there was any causal connection between PD2 and the changed view of Dr. Dace.

581. The allegation fails.

7.v.ii - Were additional allegations made which were not part of the initial investigation meeting?

582. At the start of the hearing the Employment Judge asked for succinct list of the additional allegations that the Claimant was referencing in this allegation to be provided. The Claimant said that this would be difficult. He said that there was at least 20 more allegations after all the female reception staff were invited to raise concerns.

583. As set out in the findings of fact above, initially Dr. Dace and Dr. Spira set out a number of concerns in an email dated 17 February 2023 which invited the Claimant to a meeting.

584. Following this, on 20 February 2023 the Claimant contacted Ms. Nieciecka in the evening querying her relationships with work colleagues and on 21 February 2023 the female reception staff set out in writing a number of concerns. Further, on 23 February 2023 the Claimant contacted the patient that complained against him. Mr. Parker took over considering concerns raised by staff, and those raised by the Claimant. Further, as set out above, Ms. Mordel and Ms. Nieciecka both submitted formal grievances after the initial document of concern, and Dr. Dace and Dr. Spira set out their view that the Claimant should not continue in employment and noted 14 areas of concern on 26 February 2023.

585. Mr. Parker spoke to staff and produced a spreadsheet that includes a list of allegations that was sent to the Claimant on 15 March 2023. The spreadsheet contains a list of matters of concern that go beyond that set out in the document produced on 16 February 2021.

586. We concluded that, on review of the spreadsheet produced by Mr. Parker that there were matters included within it which were additional to those in the invitation email sent on 17 February 2023.

587. The Claimant has not identified the individual that he says subjected them to this alleged detriment.

588. We do consider further allegations to be a detriment.

589. Although we have concluded that there were additional allegations made, and added to the spreadsheet on 15 March 2023, we do not consider that Mr. Parker added these additional allegations on the grounds that the Claimant had done PD2. We do not consider there to be any causal link between the inclusion of the additional allegations and PD2.

590. We consider that the additional allegations were matters of concern that had been brought to Mr. Parker's attention whilst he was investigating concerns regarding the Claimant, and that they were included in the spreadsheet as Mr. Parker wanted to discuss all matters. Further, it is important to note that some of the additional allegations derive from concerns from the reception staff on 21 February, which was before PD2.

591. The allegation fails.

7.a.vii - On 1 March 2023 did Mr. Parker suspend the claimant due to the concerns raised?

592. Our conclusions in relation to allegation 5.b.iv are relevant here.

593. Mr. Parker did suspend the Claimant on 1 March 2023, as set out above, he specifically said: *"Whilst this enquiry is ongoing, now you have confirmed you're well enough to return to work, you are immediately suspended whilst I consider all matters and carefully investigate."*

594. We consider that Mr. Parker suspended the Claimant because of the need to investigate and consider the concerns raised by Dr. Dace and Dr. Spira on 26 February 2023. We note that the Claimant did remain sick at the same time.

595. We consider that a reasonable view of suspension is that it amounts to detriment.

596. However, we have considered whether the suspension was on the ground that the Claimant did PD2.

597. We do not consider the suspension was in any way related to PD2. We conclude that Mr. Parker suspended the Claimant, when he understood the Claimant would be returning to work, to enable him to investigate the various concerns raised about him, which included contacting the patient directly.

598. We also considered it relevant to note that on 24 February 2023, the day after Mr. Parker found out the Claimant had contacted the patient directly and gone home sick, that Mr. Parker had informed the Claimant that he had intended to suspend him the previous day, in response to

discovering the Claimant had contacted the patient directly. We consider the reason for suspension was the Claimant contacting the patient, and the need to investigate matters.

599. The allegation fails.

7.a.ix - On 1 March 2023 did Mr. Parker withhold pay from the claimant?

600. Our conclusions in relation to allegation 5.b.v are relevant here.

601. As set out above, based on the evidence set out in the findings of fact, Mr. Parker did not withhold pay from the Claimant specifically on 1 March 2023. It is important to note that during the hearing the Claimant changed his evidence and confirmed that he remained on sick leave until 15 March 2023.

602. As set out above, the Claimant's last pay slip dated 31 March 2023 shows only a payment of £218.57 SSP. The weekly rate at the time is understood by the Tribunal to be £99.35.

603. We were not directed to any evidence that any thought had been given to the appropriate level of pay that the Claimant should get during a period of simultaneous suspension and sick leave.

604. There is not enough evidence to conclude that Mr. Parker withheld pay on 1 March 2023 and therefore conclude there was no detriment.

605. Accordingly, as this was not found to have happened as a matter of fact, the allegation fails.

606. However, even if we are wrong, we do not consider the level of any pay for 1 March 2023 was on the ground of, or materially influenced by PD2. because of, but was as result of the First Respondent processing the Claimant as being on sick leave.

607. The allegation fails.

7.a.xi - On 17 March did Mr Parker send new evidence to be discussed at the meeting and therefore not providing sufficient notice to the claimant

608. Our conclusions in relation to allegation 5.b.vi are partly relevant here.

609. As set out above, at 12:16 on 17 March 2023 Mr. Parker emailed the Claimant attaching a spreadsheet and explaining that it summarised all the complaints and issues that had been raised, that Mr. Parker intended to focus on clinic matters but that he was happy to talk through them all individually and give the Claimant further time after the meeting to make representation if he wished.

610. The Claimant was on notice of the general concerns raised. He had been sent a letter on 17 February 2023, he had been sent the document prepared by Dr. Dace and Dr. Spira on 26 February 2023 and had been

sent Ms. Nieciecka's investigation document. We note that the Mr. Parker only sent the spreadsheet of concerns shortly before the meeting on 17 March 2023. We understand that that Mr. Parker was undertaking discussions and pull together a large amount of information. We do consider that it would have been better for the Claimant to have had the spreadsheet earlier, to enable time to consider, and although he was aware of most, if not all of the matters, and the intention was to discuss the matters, we do consider the late provision of the spreadsheet to be a detriment.

611. However, we do not consider Mr. Parker's sending the spreadsheet, which contained new matters, shortly before the investigation meeting to be in any way related to PD2. We do not consider there to be any causal link.

612. We note that Mr. Parker was dealing with a lot of information and it was explained that he wanted to discuss the concerns and would give the Claimant further time to comment after the meeting if he wished. We consider the late provision of the spreadsheet was because he was seeking to meet with the Claimant as soon as possible after the Claimant being well enough to return to work on 15 March 2023 and he had a significant number of concerns to map out based on information he had collated.

613. The allegation fails.

7.a.xii - On 17 March 2023 did Mr Parker subject the claimant to a video recording without his consent?

614. Our conclusions in relation to allegation 5.b.vii are relevant and repeated here.

615. As set out in the findings of fact above, Mr. Parker clearly informed the Claimant at the outset of the meeting on 17 March 2023 that he was recording the meeting, and his PA would be present.

616. The Claimant did not object to the meeting being recorded and continued with the meeting. Further, in email correspondence on 15 March 2023 Mr. Parker and the Claimant discussed the arrangements for recording the meeting.

617. We do not consider being recorded, when told and no objection is made, to amount to mean that the Claimant was recorded without his consent.

618. Accordingly, as this was not found to have happened as a matter of fact, the allegation fails.

619. However, for completeness, we do not consider recording of a meeting to be detriment, as it will provide an accurate note of the discuss and there was no evidence that Mr. Parker recording the meeting was in any on the grounds of the Claimant having done PD2, but was because he wished to record the meeting, which was discussing serious matters.

620. The allegation fails.

7.a.xiii - On or after 17 March 2023 did Mr Parker post the video on a public platform?

621. Our conclusions in relation to allegation 5.b.ix are relevant and repeated here.

622. Again, we reminded ourselves that we must consider the allegation as presented.

623. As set out in the findings of fact, Mr. Parker sent a link of the recording. The recording was accessible to people who had the link. We do not consider this to amount to Mr. Parker positing the video on a public platform, which as put, implies anybody can access and view.

624. The allegation as framed, is not established on the facts, and therefore fails.

625. For completeness, we do not consider sending the link to colleagues and advisors to be detriment.

626. However, if we are wrong and there was detriment, there is no evidence that there is any causal link between PD2 and to Mr. Parker sending the link.

627. The allegation fails.

7.a.xiv - On 17 March or thereafter did Mr Parker send the video link to others and it be watched by 14 people.

628. Our conclusion in relation to allegation 7.a.xiii above is relevant here.

629. Mr. Parker sent the link to the meeting recording to Dr. Spira, Dr. Dace, Ms. Nieciecka and Croners Peninsula (the First Respondent's advisors). The recording was viewed 14 times. We are unable to conclude how many people watched the recording, but found that by 20 March 2023 it had been viewed 14 times.

630. We do not consider sending the link to colleagues and advisors to amount to detriment. We do not consider the meeting recording being shared with and viewed 14 times with the First Respondent's management team and legal advisors to put him at a disadvantage.

631. However, if we are wrong and there was detriment, there is no evidence that there is any causal link between PD2 and to Mr. Parker sending the link.

632. The allegation fails.

7.a.xv - From 21 March 2023 did Mr Parker not pay the contractual notice period?

633. Our conclusions in relation to allegation 5.b.xi are relevant and repeated here.

634. The Claimant was not paid his contractual notice period. This was not addressed in Mr. Parker's witness statement. We have considered that although the dismissal letter does not specifically use the phrase gross misconduct, it is reasonable for us to infer from the content of the dismissal letter and Mr. Parker's witness evidence that he considered the Claimant had committed gross misconduct.

635. We understand that not being paid for a contractual notice period can amount to a detriment. However, we consider that whether or not non-payment is detriment or not turns on whether the Respondent was entitled to withhold notice pay.

636. Our conclusions in relation to the wrongful dismissal complaint are set out below, but are relevant here, and in short we conclude that the First Respondent, as the employer, was entitled to not pay notice pay.

637. In any event, we do not consider the reason the Claimant was not paid for his notice period was connected to PD2, but rather was because Mr. Parker considered the Claimant had committed gross misconduct, despite the phrase not being used, the matters referenced in the dismissal email are serious.

638. The allegation fails.

7.a.xvi - On 21 March 2023 did Mr Parker inform the claimant by email that he would not provide him with a reference if he progressed matters to the Employment Tribunal?

639. Our conclusions in relation to allegation 5.b.xiii are relevant and repeated here.

640. We understand the allegation of detriment to be the act of Mr. Parker informing the Claimant he would not provide a reference if he went to Employment Tribunal, rather than the allegation being about the non-provision of a reference.

641. Within the dismissal email sent by Mr. Parker it says:

"I understand you will be disappointed and unhappy with your employment being terminated and no doubt will insist upon processing the Tribunal you have so heavily threatened. That is of course your prerogative. If you decide to go down that road I will not be issuing a reference to any future potential employer until the Tribunal matter has been resolved."

642. This is not the same as put in the allegation. Mr. Parker says that he would not give a reference until any Employment Tribunal proceedings were resolved.

643. There is no legal obligation on an employer to provide a reference. However, in many situations, it is common practice for references to be

provided. We consider that withholding a reference, either temporarily or permanently, could potentially amount to a detriment. However, in this case we were not referenced to any actual reference request and as we note above, the allegation appears to be the fact he was told this, in essence, we consider this could be interpreted as a threat, and we consider such a comment does amount to a detriment.

644. However, we do not consider this has any causal connection with PD2. We consider it was said as a result of the Claimant indicating he would take matters to an Employment Tribunal and Mr. Parker made the comment about not giving a reference because of this potential route pursued by the Claimant to set out that he would give an honest reference.

645. Allegation fails.

7.a.xvii - From 21 February 2023 did Ms Nieciecka not comply with the Subject Access Request and withhold evidence?

646. Our conclusions in relation to allegation 5.b.xiv are relevant and repeated here.

647. This allegation does not specify how Ms. Nieciecka is alleged to have not complied with the Subject Access Request.

648. The findings of fact are that Ms. Nieciecka was not involved in the management of the Claimant Subject Access Request whilst the Claimant was employed, this was dealt with by Mr. Pinder.

649. In circumstances where Ms. Nieciecka was not primarily involved, we not consider there to be any detriment by Ms. Nieciecka.

650. Accordingly, the allegation as framed against Ms. Nieciecka fails as it is not established on the facts.

7.a.xviiiFrom 21 March did Mr Parker not send the claimant a written verbatim of the video recording

651. As set out above, we found that Mr. Parker did not send the Claimant a copy of the recording transcript. We consider that the Claimant may have felt at a disadvantage without having a copy, and consider not sending to be a detriment.

652. However, we do not consider Mr. Parker did not send the recording to be in any way related to PD2. As set out above, we do not consider Mr. Parker's approach to be methodical, and although we considered from his evidence that he did send it, as a matter of fact we found he did not. We consider not sending was in any way related to PD2, but was due to his unorganised approach.

653. Allegation fails.

Automatically Unfair Dismissal

654. As set out above, only one protected disclosure, PD2 continues. For ease of reference, PD2, as set out in the List of Issues, is that *"On the 23rd February 2023, did the claimant make a protected act by emailing Ms Neiciecka regarding potential recording of CCTV footage in the examination room".*

655. We considered whether the reason, or principal reason for dismissal, was that the Claimant made PD2.

656. We have concluded that on the balance of probabilities that the Claimant has not demonstrated that the reason, or principal reason for the dismissal, was the fact he did PD2. He believes this to be the reason for his dismissal, but based on the evidence, both oral and documentary, we cannot conclude that he has discharged the burden of proving prima facie, i.e. on the face of it, that the principal reason was that he made a protected disclosure.

657. We have considered the facts carefully and conclude that there were a number of reasons for dismissal, as set out in Mr. Parker's email dated 21 March 2023 at 11:44, and summarised below.

658. A significant part of the reason for dismissal was the Claimant contacting a patient that had complained about him. In our view, this is a significant factor, and Mr. Parker considered this to be *"totally unprofessional and unacceptable".* Indeed this appears to have been a key trigger in the breakdown of trust that Dr. Dace and Dr. Spira had in the Claimant.

659. One of the reasons was that there had been a breakdown in the working relationships between the Claimant and other employees of the First Respondent, namely Ms. Mordel and Ms. Nieciecka – who had both indicated that they would resign and would not work with the Claimant, but also Dr. Dace and Dr. Spira who had clearly indicated they did not consider he should remain employed at the First Respondent and had set out a number of concerns.

660. M. Parker does reference that the Claimant had made a number of complaints and allegations about the First Respondent's staff, and says that this has led to a serious breakdown between his immediate supervisors, which we understand to mean Dr. Dace and Dr. Spira. PD2 is just one of many allegations the Claimant raised, mostly from February 2023 onwards. Although PD2 forms part of these many allegations, we do not consider it to be a reason for dismissal, but rather the overall picture of dispute led to the breakdown, which formed one of the reasons for dismissal.

661. A further reason for dismissal was that Mr. Parker considered there to have been a high number of complaints from patients that that the Claimant was considered to be *"rude, aggressive and generally lacked respect for their dignity and concerns"* and that Mr. Parker considered the Claimant's general approach was *"aggressive, dictatorial and not conducive"* to the Respondent's business.

662. Although dismissing an employee with less than 2 years' service without following a full and proper procedure may feel harsh, or unfair, it is not relevant to consideration of the reason for dismissal.

663. This is not a case where the real reason for dismissal is hidden from decision maker. Mr. Parker made the decision to dismiss the Claimant.

664. Accordingly, the claim fails, the Claimant was not unfairly dismissed, and the complaint is dismissed.

Wrongful dismissal / Notice pay

665. The Claimant was dismissed without notice. His contract of employment sets out that he is entitled to three months' notice.

666. When dealing with a wrongful dismissal claim, we must consider whether the Claimant fundamentally breached the contract of employment by an act of gross misconduct, or whether he did something so serious that entitled the Respondent to dismiss without notice.

667. In distinction to a claim of ordinary unfair dismissal (which was not brought as the Claimant has less than 2 years' service), where the focus is on the reasonableness of managements decisions, and immaterial to what decision we would have reached, we must decide whether the Claimant was guilty of conduct serious enough to entitle the Respondent to terminate the employment without notice.

668. We note that phrase gross misconduct was not used in the dismissal letter, or elsewhere in the documentation from Mr. Parker to the Claimant. However, we do not consider this is requisite for us to determine the Claimant had committed an act of gross misconduct or whether whether he did something so serious that entitled the Respondent to dismiss without notice.

669. The Respondent does have a Disciplinary Policy, and it does set out examples of gross misconduct, but they are examples and it is not an exhaustive list.

670. We conclude that, on an objective assessment, on the balance of probabilities, the Claimant's actions, in accessing the records of the patient that complained and contacted the Claimant directly were sufficiently serious to amount to a fundamental breach entitling the Respondent to dismiss the Claimant without notice.

671. Although we are sympathetic to the fact that the Claimant felt very strongly that he had not been given any adequate information about the patient complaint, the Claimant could have, on receipt of the email dated 17 February 2023 asked one of his colleagues for information, we were not directed to any evidence of this happening. Further, as set out in the findings of fact above, Mr. Parker had spoken to the Claimant about the situation prior to the Claimant contacting the patient.

672. We conclude that he consciously chose to act in this way, and we do not consider that objectively a person in the Claimant's position would consider it reasonable to access patient records for this reason, email the patient and make comments about their employers actions and ask for information about the complaint directly.

673. The complaint fails.

Holiday Pay (Working Time Regulations 1998)

674. As set out in the Introduction section, the Employment Judge sought to clarify if the Claimant was pursing complaints regarding unpaid wages and holiday pay in the alternative, noting the overlap in the substance of the claims – namely that he says he was not paid for five days accrued but unused holiday and was underpaid for March 2023. Accordingly, we dealt with the issues regarding pay in the order they are set out in the list of issues, but note here that the Claimant is not entitled to "double recovery", for example, if he is successful in a complaint under the Working Time Regulations he cannot also be compensated for the same sums under the unlawful deduction from wages provisions.

675. In considering this complaint we had to determine whether or not First Respondent failed to pay the Claimant for annual leave the Claimant had accrued but not taken when their employment ended. An employee is entitled to be paid in lieu of accrued but untaken holiday on termination of employment under regulation 14 of Working Time Regulations 1998.

676. As set out in introduction section above, within the witness statement that the Claimant submitted to the Claimant at 13:04 on the first day of the hearing there was an additional paragraph, numbered 61. Within this paragraph he sets out what he said at the start of the hearing when clarification was sought about the amount of holiday, and holiday pay, he says he is owed.

677. The Claimant's witness statement sets out that he is owed for five days holiday, at 7 hours at a rate of £75.22 and that he is owed £2,633.75.

678. The Respondent's representative did not ask the Claimant any questions at all about holiday, or holiday pay. As such the Claimant's evidence was unchallenged. The Claimants pay slips are in the Bundle, and none of them include any reference to holiday pay. In oral evidence Mr. Parker said he told payroll to round up holiday pay, there is no evidence in the Bundle that the Claimant was paid for any accrued but unused holiday pay within his last pay slip of 31 March 2023.

679. Accordingly, we conclude that the Claimant is owed £2,633.75.

680. The First Respondent is ordered to pay the Claimant the gross sum of £2,633.75 for holiday that was accrued but not taken.

Unauthorised deductions

681. As set out in the list of issues above, the Claimant alleges that the Respondent made an unlawful deduction of wages in relation to holiday pay and pay withheld between 21 February 2023.

682. In relation to holiday pay, we have considered this under the Working Time Regulations above, and determined that holiday pay is owed and ordered payment. We have not considered this under the unlawful deduction from wages provisions also as the Claimant cannot be compensated for the same losses twice.

683. Again, as summarised above, the Claimant changed his case and his evidence regarding wages that he says he is owed. For ease of reference, we have summarised the position hear.

684. At the start of the hearing, when discussing the list of issues, the Claimant said that he was off sick between 23 and 28 February 2023 but was later paid statutory sick pay in relation to this period. He initially said that he returned to work on 1 March and should have been paid full pay until his dismissal on 21 March 2023.

685. During the course of the hearing the Claimant emailed the Tribunal and said:

"Following the discussion about my fit note I have looked further into this and would like to amend my witness statement as although the e-mail of Mr Parker states I returned to work on 1 March and I was suspended with immediate effect the actual date I returned to work was the 15 March (Bundle 469) and I was given 2 days notice to attend the hearing on 17 March. This will also affect the schedule of loss to 4 working days at £ 75.25 per day which amounts to £ 2,107 unfairly deducted from my salary."

686. The Claimant was recalled and affirmed the above evidence.

687. The Respondent did not challenge this evidence.

688. The Claimant's pay slip dated 31 March 2023, his last pay slip, shows only a payment of £218.57 SSP.

689. On the evidence available we conclude that the Claimant was not paid his basic pay for four working days between 15 and 21 March 2023.

690. The Respondent has made an unauthorised deduction from the Claimant's wages by failing to pay the Claimant the full amount of wages due between 15 and 21 March 2023 and is ordered to pay to the Claimant the gross sum of £2,107.00 in respect of the amount unlawfully deducted.

Breach of Contract

691. As set out in the list of issues above, the Claimant alleges that the Respondent breached his contract by failing to pay holiday pay and pay withheld between 21 February 2023.

692. In relation to holiday pay, we have considered this under the Working Time Regulations above, and determined that holiday pay is owed and ordered payment.

693. We have not considered this under either the unlawful deduction from wages provisions or as a breach of contract claim also as the Claimant cannot be compensated for the same losses twice.

694. The same principle applies in relation to wages. We have found that there was an unlawful deduction from wages and ordered payment and therefore we have not considered as a breach of contract claim also as the Claimant cannot be compensated for the same losses twice.

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Employment Judge Cawthray
12 December 2024

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