



# EMPLOYMENT TRIBUNALS

BETWEEN

**Claimant**

**AND**

**Respondent**

Ms A Yousefi

HCA International Limited

**Heard at:** London Central

**On:** 8, 9, 15-19 November 2021,  
22-24 November 2021 and (in  
Chambers) on 30 November and  
3 December 2021

**Before:** Employment Judge H Stout  
Tribunal Member Ms C Ihnatowicz  
Tribunal Member Mr S Hearn

## **Representations**

**For the claimant:** Aileen McColgan QC

**For the respondent:** Katharine Newton QC

# JUDGMENT

The unanimous judgment of the Tribunal is that:

- (1) The Claimant's claim for unfair dismissal under Part X of the Employment Rights Act 1996 (ERA 1996) (including automatic unfair dismissal under s 103A ERA 1996) is not well-founded and is dismissed.
- (2) The Respondent has not contravened the Equality Act 2010 (EA 2010) and the Claimant's claim for direct sex discrimination under ss 13 and 39 of the EA 2010 is dismissed.
- (3) The Claimant's claim that she was subjected to detriments for having made protected disclosures contrary to s 47B ERA 1996 is not well-founded and is dismissed.

## REASONS

1. Ms A Yousefi (the Claimant) was employed by HCA International Limited (the Respondent) from 1 November 2001 until 30 December 2019 when she was dismissed for what the Respondent says was gross misconduct. The Respondent is a private hospital group and the Claimant was latterly employed as Chief Executive Officer (CEO) of a number of them. In these proceedings she claims that her dismissal was unfair, automatically unfair because she had made protected disclosures and/or was directly discriminatory because of her sex. She also claims that certain alleged acts of the Respondent prior to dismissal constituted unlawful detriments to which she was subjected because she had made protected disclosures.

### The type of hearing

2. This has been a remote electronic hearing by video under Rule 46. The public was invited to observe via a notice on Courtserve.net. A number of members of the public joined. There were no significant connection issues apart from in relation to one witness (Mr Youngman) where there was a lot of noise interference which could not be resolved. All participants agreed to continue notwithstanding the difficulties.
3. The participants were told that it is an offence to record the proceedings. The participants who gave evidence confirmed that when giving evidence they were not assisted by another party off camera.
4. Members of the public who wished were provided with access to the bundle by the Respondent's solicitors. They were told that this was only for the purpose of viewing during the hearing. The bundle and statements must not be copied, photographed or otherwise made use of in any way or distributed further.

### The issues

5. The issues to be determined had previously been agreed between the parties and are set out in an Annex to this judgement.

### The documentary evidence

6. We explained to the parties at the outset that we would only read the pages in the bundle which were referred to in the parties' statements and skeleton arguments and to which we were referred in the course of the hearing. We did so. We also admitted into evidence certain additional documents which were added to the bundle. Some of these were additional documents were produced voluntarily by the parties, some the Respondent produced following

our making orders in response to applications by the Claimant. The Claimant also made additional disclosure applications which we refused for reasons given orally at the hearing.

7. We explained our reasons for various case management decisions carefully as we went along.

### **The witness evidence**

8. The Claimant had produced witness statements for, and we heard oral evidence from:
  - a. The Claimant;
  - b. Simon Willoughby (The Claimant's husband);
  - c. Daniel McGuigan (The Claimant's Leadership Development Coach);
  - d. Annette Anderson (Chief Governance and Risk Officer).
9. The Claimant made applications for witness orders for the following witnesses, which were granted before or at the hearing:-
  - a. Enda O'Meara (Former Vice President of Financial Operations of THSC and TPH); and,
  - b. Claire Champion (Former Chief Nursing Officer (CNO) for THSC and TPH).
10. Mr O'Meara then sent a witness statement to both parties, in respect of which he had received drafting assistance from the Respondent's solicitors, and the Claimant decided not to call him. The Respondent wanted to rely on his statement anyway but not call him as a witness. For reasons we gave at the hearing, we permitted the Respondent to rely on the statement, on condition that the Claimant have the opportunity to cross-examine. As the Respondent did not wish to call Mr O'Meara, we left the witness order in place so that the practical effect was that the Tribunal 'called' Mr O'Meara, invited him to confirm paragraphs 1-3 and 10-16 of his statement on which the Respondent sought to place reliance and the Claimant then had an opportunity to cross-examine. The Respondent was also given an opportunity to ask Mr O'Meara questions if it wished, but Ms Newton indicated that she had no questions.
11. We refused the Claimant's further application for a witness order for another potential witness, Ms Fisher, for reasons we gave orally at the hearing.
12. Ms Anderson's witness evidence was confined to that in her witness statement of 5 February 2020 relied on by the Claimant at the interim relief hearing. For reasons we gave at the hearing, we refused permission for the Claimant to rely on another statement of Ms Anderson, which was produced very late and potentially expanded significantly the scope of the evidence.
13. The Respondent had produced witness statements for, and we heard oral evidence from:
  - a. Nicola Gillis (Vice President of HR of the Respondent)

- b. Lorraine Hughes (Former Divisional Chief Nursing Executive (CNE) of the Respondent)
- c. Tony Goldstone (Chair of HCA Cancer Services)
- d. Miranda Dodd (CEO of the Princess Grace Hospital (PGH))
- e. Mike Neeb (Former President and CEO of the Respondent)
- f. Claire Smith (CEO of HCA Healthcare UK Joint Ventures and the Respondent's Cancer Department CEO Lead)
- g. Teresa Finch (Former Group Chief Financial Officer of the Respondent)
- h. John Reay (President and CEO of the Respondent)
- i. Nigel Youngman (Independent HR Consultant / Investigator in the Claimant's Disciplinary process)
- j. Dr Cliff Bucknall (Chief Medical Officer (CMO) of the Respondent / Chair of the Claimant's Disciplinary Hearing)

### **Adjustments**

- 14. The Claimant requested that she have breaks about every hour during cross-examination, which request we accommodated.

### **Rule 50**

- 15. We make a permanent anonymity order under Rule 50 in respect of one individual doctor who features in this judgment, but who has not been a witness in the case or otherwise involved in or (to our knowledge) aware of this case. We invited the parties' submissions as to whether we should make a Rule 50 Order. The parties remained neutral and were content to leave it to our judgment. We have placed due weight on the principle of open justice, but find that principle to be outweighed in this case by this doctor's rights under Article 8 of the ECHR. The matters in this judgment are, we are satisfied, capable of affecting her personal autonomy and reputation both in her work and personal life. So far as we can tell, the matters are not already in the public domain. The doctor's identity is not relevant to the issues we have to decide and publicly identifying her in this judgment will make no substantive difference to the principle of open justice. It would also, in our judgment, be unfair given that she has not been involved in the proceedings in any way. The doctor is therefore referred to throughout this judgment as Dr R.

### **The facts and our approach to the evidence**

- 16. We have considered all the oral evidence and the documentary evidence in the bundle to which we were referred. The facts that we have found to be material to our conclusions are as set out below. If we do not mention a particular fact in this judgment, it does not mean we have not taken it into account. All our findings of fact are made on the balance of probabilities.

17. In our findings of fact we do not take a wholly chronological approach to the evidence because in this case it is more convenient to deal with the evidence thematically. We have, however, had the overall chronology in mind at all times.
18. It should also be noted that the issues in this case are such that we do not always need to make factual findings about what happened, rather than what was reported to have happened. This is particularly the case in relation to the matters of misconduct for which the Claimant was ultimately dismissed. Although we have made factual findings about the underlying incidents where we can and where appropriate, what matters in some respects is what evidence was before the relevant Respondent decision-makers, and the issue for us is whether they reached reasonable conclusions based on that evidence rather than what actually happened as a matter of fact. This is especially the case for allegations made against Mr O'Meara relating to the disciplinary investigation into the Claimant's mother. What matters for the purposes of these proceedings is what allegations were made and what the Respondent did about them. It does not matter whether the allegations were true or not and, given that the Respondent did not specifically investigate them and Mr O'Meara did not deal with them in his evidence, we make no findings as to whether the allegations were true or not.
19. We further record by way of preliminary that both parties have in closing submissions sought to make something of the other parties' witness not having been cross-examined on particular points. We have taken account of whether or not a particular witness was challenged on a particular part of their evidence. However, this is not the sort of case where it would be right to take it that because a particular part of a witness statement was not the subject of cross-examination, that it is not challenged or must inevitably be accepted. Both sides were under significant time pressure in relation to cross-examination and, of necessity, in order to complete the case within the time available, advocates had to make choices about what were the most important matters to deal with in cross-examination. We take this into account. However, where fairness demands that a party should have challenged a witness on a point in cross-examination (or put a particular part of their client's or witness's evidence to another party) before they should be permitted to rely on that evidence, we have given less weight to that evidence.
20. Conversely, where the Claimant in closing submissions has sought to rely on the failure by the Respondent's counsel to challenge her evidence on a particular alleged protected disclosure, we have not placed much weight on the failure to challenge. It would not be fair to do so: the Claimant pleaded 23 protected disclosures, many of which included multiple 'sub-disclosures', and many of which were in non-specific terms. Although the Claimant's counsel identified 11 on which to focus, she did not abandon the others. As it is, we consider that the Respondent's counsel adequately challenged the Claimant's protected disclosures by putting to her in general terms that she had not raised at any point most of the matters on which she relies, even if

counsel did not always focus on each of the specific occasions on which the Claimant now focuses.

21. Finally, we record that in making our findings of fact we have at all times borne in mind the totality of the evidence when considering the evidence in relation to any particular incident. We have also cautioned ourselves against assuming that because we have found a witness to be unreliable on one matter, they are likely to be unreliable on another matter. We recognise that people may be mistaken about one thing, but right on another. Nonetheless, having carefully considered all of the evidence, we have in general terms found the Claimant to be an unreliable witness. In particular in relation to the incidents of misconduct for which she was dismissed, the Claimant's evidence (or, where she did not give evidence on a particular point, her case as it was put on her behalf by Ms McColgan) was inconsistent with both that of the Respondent's witnesses in these proceedings and that of the individuals who provided evidence to the Respondent's internal investigations, and sometimes also her own documents. She has pursued a case of conspiracy theory against Mr Reay and Ms Gillis for which there is no direct evidence at all and (we have concluded) no facts from which any inference of such could reasonably be drawn. In the circumstances, we have occasionally, where we lack documents to assist on a point, found against the Claimant on a particular factual dispute on the basis that she has proved to be generally the least reliable witness.

### Background

22. The Respondent is a subsidiary of HCA Healthcare Inc, a US company which has grown from running four small hospitals in 2000 to now being the world's largest private hospital group.
23. On 1 November 2001 the Claimant commenced employment with the Respondent as an oncology pharmacist at the Harley Street Clinic Hospital (THSC). She was promoted over the next 13 years, becoming Chief Operating Officer in 2010 and CEO in 2014/15. In January 2017 the Claimant became in addition CEO of The Portland Hospital (TPH). In May 2018 she also became CEO of Leaders in Oncology Care (LOC), a private cancer treatment centre. She continued to hold all three roles until she was dismissed on 30 December 2019 for what the Respondent contends was gross misconduct in relation to two matters: (i) her behaviour towards other employees in connection with disciplinary proceedings relating to her mother, who was employed at the Respondent's Chiswick site (one of the sites for which the Claimant was responsible); and (ii) her handling of concerns raised by the THSC Chief Nursing Officer (CNO) Mrs Champion and other staff about a particular consultant.
24. As CEO of the hospitals the Claimant was the 'registered manager' with the Care Quality Commission (CQC) with overall responsibility for patient care. In January 2017 the leadership of THSC under the Claimant was rated Outstanding by CQC. (CQC is the independent regulator of health and adult

social care in England whose purpose is to make sure health and social care services provide people with safe, effective, compassionate, high quality care.)

25. At the time of her dismissal the Claimant was paid a gross annual salary of £270,504, with additional executive benefits.

The Respondent's business and approach to patient safety generally

26. As a private hospital group, the Respondent aims to provide high standards of service and patient care so as to attract business from patients in the UK and around the world. It strives to achieve 'Outstanding' grades on CQC inspections because that is both good for patients and good for business.
27. From 2016 Teresa Finch was the Chief Finance Officer of the Respondent. Her role was to ensure that costs were managed in the hospitals to maintain profitability. Our impression, based on the evidence of other witnesses and the documents, as well as Ms Finch's oral evidence, is that she is a strong personality who takes a firm approach on costs with all the Respondent's hospitals, and challenges managers at all times to reduce costs wherever possible. However, she maintained that this was always 'subject to' patient safety, and that she would not ask anyone to compromise on patient safety. The Claimant in oral evidence accepted that discussions about finance at the Respondent always took place on the understanding that financial measures would not risk patient safety.
28. In oral evidence the Claimant further accepted that as CQC registered manager if patient safety concerns were not being dealt with she should have raised it with CQC. She did not do so at any point during her employment. The Respondent also has an internal Ethics Line, to which employees can take any concerns of a whistleblowing nature. At no point during her employment did the Claimant raise any concerns about patient safety with the Respondent's Ethics Line. Mr O'Meara also gave forthright evidence that the Claimant never raised any patient safety concerns.
29. The Claimant was required for periods from 2016 onwards to reduce staffing levels to meet cost-saving targets. Contemporaneous emails from 2016-2017 (387, 395-396) make clear that the Claimant was keen to take on board Ms Finch's advice and implement cost-saving measures. Despite this, the Claimant says that she was during this period raising concerns orally about patient safety to Teresa Finch, John Reay and others. There is no evidence to corroborate this, however, and the Claimant has not sought to rely in closing submissions on any alleged protected disclosures made in 2016. We find she did not raise any such concerns in 2016.
30. Five out of the Respondent's seven hospitals had female CEOs and approximately 50% of the Respondent's UK executive team are female. All of these report to Mr Reay. The two individuals recruited to replace the Claimant at TPH and THSC were female.

The Claimant's contract and the Respondent's policies

31. By clause 2.3 of her employment contract the Claimant agreed to comply with all the Company's rules, regulations, policies and procedures from time to time.
32. The Respondent has a Corporate Personal Relationships at Work Policy. Among other things, it provides that if an employee is related to a colleague *"they do not allow that relationship to influence their conduct at work"*.
33. The Respondent's Corporate Harassment and Bullying Policy defines bullying as *"Offensive, intimidating, malicious or insulting behaviour, an abuse or misuse of power through means that undermine, humiliate, denigrate or injure the recipient"*. It provides that all employees are responsible for ensuring their conduct is in line with the standards set out in the policy, for *"Reporting incidents of bullying and harassment to a senior manager, even if they are not the victim"* and *"Setting a positive example by treating others with respect"*.
34. The Respondent also has a Code of Conduct which provides that colleagues who experience any form of harassment should report it to their supervisor, to HR, to HCA UK's Ethics and Compliance Officer or call the Ethics Line (2801).
35. The Respondent's Grievance Policy provides that employees discuss any grievance initially with their line manager or HR and that informal resolution will be pursued in the first instance. Mediation may also be employed to prevent a grievance from becoming formal. The policy provides that *"All parties should be absolutely clear whether a meeting is being held under the informal or formal stage of the procedure"*.
36. The Respondent has a Disciplinary Policy. It provides as examples of gross misconduct *"serious breach of company policies"*, *"breach of the Code of Conduct"*, *"Causing loss, damage or injury through gross negligence, serious incompetence, or dereliction of duties"* and *"Victimisation of a whistle-blower"*.
37. The Respondent's Corporate Attendance Policy provides that sick pay above the statutory sick pay entitlement is discretionary and will not normally be paid where an employee is the subject of an investigation under the disciplinary procedures (2679). This is also referred to in the Corporate Disciplinary Policy.

John Reay's alleged historical conduct and Claimant's alleged protected disclosures about that

38. Until he retired in April 2019 Mike Neeb was President and CEO of the Respondent and when the Claimant was first appointed CEO of THSC she reported directly to him. Until 2016 the Claimant and Mr Reay were both hospital CEOs and peers, both reporting to Mr Neeb. In November 2016 Mr



Reay was appointed as President of Operations for HCA UK and from that point on the Claimant reported to Mr Reay. In January 2019 it was announced that Mr Reay was to be Mr Neeb's successor when he retired in April 2019 and Mr Reay duly took over as HCA UK CEO in April 2019. Mr Reay was supportive of the Claimant being promoted to the TPH and LOC roles in 2017 and 2018.

39. The Claimant alleges that while Mr Reay was CEO of London Bridge Hospital during 2015 and 2016 he mistreated three senior female executives, Deidre Madden (COO), Nikki Simons (CNO) and Shirley Edwards, and that likewise Sarah Fisher had told her that when she was CEO of the Wellington Hospital, John Reay *"would seek information about her behind her back, and use it to discredit her"*, and this caused them to leave. The Claimant alleges that this shows a pattern of behaviour by Mr Reay of sexist behaviour and bullying. Mr Reay denied this, and Ms Gillis denied ever receiving any complaints about Mr Reay's conduct. We accept their evidence that no one else has ever complained about Mr Reay's conduct to them because there is no evidence to contradict it.
40. As to the situations of the other individuals that the Claimant refers to, we have received very little in the way of detail. We have had evidence from Ms Gillis, Mr Reay and Ms Smith that Ms Fisher was very unwell prior to her departure from the business, and that their perspective of what happened was that there was a complete communication breakdown. Ms Smith appeared to have had the more intimate conversations with Ms Fisher about the situation and said that Ms Fisher felt 'very challenged' in the work environment but not bullied. We also have an email in the bundle from Ms Fisher herself (1403) of 18 May 2019 in which in response to the Claimant's request for help and advice, Ms Fisher replied *"I hope you are not suffering by the hands of that terrible person JR. I still have dreams of how to get retribution for his lies."* This is insufficient evidence from which to infer a pattern of unfavourable treatment by Mr Reay of female colleagues. Mr Reay told us (and there is no reason for us not to accept this) that a similar number of male colleagues had left over the period. Further, given the relatively large numbers of females in senior positions at the Respondent, even the numbers of individuals to whom the Claimant has referred do not, in our judgment, raise any 'red flags'. We also note that the Claimant in her own statement (para 55) alleges that Mr Reay also bullied Mr Topalovic, who was male.
41. The Claimant says she personally witnessed this sort of behaviour by Mr Reay on a number of occasions. Most of these were not put to Mr Reay and given their nature it would not in those circumstances be fair to make findings about those allegations, but two allegations were put to him. The Claimant alleged that at a dinner in 2018 a female colleague reached under the table for her handbag, and Mr Reay said, suggestively *"While you are down there ..."*. She alleged that this was witnessed by Claire Smith, Suzy Jones and Ms Dodd. Ms Dodd and Ms Smith have been witnesses in these proceedings. When this incident was put to them, they both said they had no recollection of it. Mr Reay denied it outright. (In this respect, we note that, as with other denials by Mr Reay that were put in the form of *"I think you would have to find*

*evidence ...*” rather than simple denials, we accept that Mr Reay was denying these allegations, and the Claimant’s submission to the contrary is a ‘lawyer’s point’ rather than one of substance.) As the Claimant has in general not proved to be a reliable witness, and three other people say it never happened, we find that the incident alleged by the Claimant did not happen.

42. The Claimant also gave an example of Mr Reay telling her in February 2019 that she had upset a colleague Nuala Close, when Ms Close told her that this was not the case. The Claimant intended this as an illustration of Mr Reay’s practice of sowing discord among colleagues. However, that is not borne out by the evidence we have received. The emails at 1018-1027 indicate that there had been a discussion about preparation for the CQC inspection at the LOC, that the Claimant was overburdened and assistance was required. Mr Reay decided that Nuala Close should take over as Registered Manager (RM) in advance of the inspection, but the Claimant disagreed and arranged to have herself registered as RM. The Claimant’s rationale was that continuity was important and she envisaged Ms Sullivan being the next RM for LOC, with Ms Close just supporting on a ‘sabbatical’. Ms Smith’s perception, which Mr Reay shared, was that the Claimant was ‘working against’ Ms Close by speaking to consultants about her who then formed the view that they did not want Ms Close to step in to assist in preparation for the CQC inspection at the LOC site. At the same time, it is clear that, when communicating directly with Ms Close (see eg the texts at 1037 and 1038) the Claimant was friendly. In that context, it is quite plausible that Ms Close would have been upset by the Claimant’s actions as the evidence we have shows that the Claimant was working against her behind her back, and it is equally plausible that if asked by the Claimant directly whether she had upset her, Ms Close would have denied it. In any event, this incident does not illustrate any sowing of discord by Mr Reay, but a disagreement between the Claimant and Mr Reay as to the way forward with LOC, and the Claimant taking steps to ensure that her view prevailed.
43. It was around this time that the Claimant says she was so upset by Mr Reay’s treatment of her that, following a meeting with Mr Reay in which she was left shaking and upset, she spoke to Mr Neeb on 26 February 2019, alleging again bullying by Mr Reay. Mr Neeb recalls that discussion about Ms Close, and that he was frustrated by the Claimant’s resistance to installing Ms Close as Registered Manager of LOC. He does not recall the Claimant raising any concerns about Mr Reay’s treatment of her or others. He did not recall her being upset. He could not explain why she wrote her email to him at 1027 afterwards or what his response was to that. We accept that the Claimant was upset on this occasion, but we do not accept that she alleged Mr Reay was bullying her. We find that her upset was about the disagreement that had arisen between them and the difficulty she had encountered in getting her own way regarding the LOC, as is reflected in the documents.
44. The Claimant further alleges that in a taxi in 2018 after Mr Reay was drunk he boasted to the Claimant that he took pride in his ability to divide teams and force colleagues to turn against one another. We also heard evidence from Dr McGuigan to the effect that this is Mr Reay’s character. Dr McGuigan

said that his evidence was based on the work he had done coaching other senior executives at the Respondent, and was an ‘amalgam’ of what he had heard. He has not coached Mr Reay or heard his side of any of the stories. In the premises, his evidence seems to us to amount to little more than gossip. On the particular allegation made against Mr Reay about what he said in a taxi in 2018, we accept Mr Reay’s evidence over that of the Claimant. We have found him in general to be the more reliable witness, and the Claimant’s allegations about his conduct generally we have found to be inconsistent with other evidence, most notably her recordings of her private conversations with him on 13 March 2019 and 16 May 2019 (to which we come below).

45. In terms of Mr Reay’s general attitude towards women, we note that the Claimant in her complaint to the (US-based) Ethics Line of 29 July 2019 (1565) (the document in which she first made the aforementioned allegation about Mr Reay saying ‘while you are down there ...’ at the dinner), makes another relevant allegation about Mr Reay. The Claimant wrote: *“In the townhall meetings following the CEO summit, JR referred to our fellow USA CEO colleagues as ‘a sea of bald headed, blue suited men’ he said there was little diversity in USA and ‘less woman CEOs than the entire UK group.’”* The Claimant advanced this as *“another example of John badmouthing people behind their backs”*, but we observe that it is not the sort of remark that one would expect to be made by someone who has a practice of discriminating against women as alleged by the Claimant. It is an anecdote that makes it sound like Mr Reay is alive to the need for equality in the workplace and not afraid to speak publicly about that.
46. Another incident relied on by the Claimant by way of background to her relationship with Mr Reay was one where the Claimant alleges Mr Reay started undermining her in front of Mr Neeb to the extent that Mr Neeb took Mr Reay out of the room apparently to tell him to stop. Mr Reay and Mr Neeb confirmed that there was a meeting where Mr Neeb took Mr Reay aside at the end. Mr Neeb explained that he did this because the two of them were ‘butting heads’ and as Mr Reay was the more senior he considered it appropriate to take him outside the room. On this incident, there is only a difference in perspective as between the witnesses. We accept that the incident occurred; given the lack of detail about the content of the argument, we find that it was bad-tempered on both sides and we accept Mr Neeb’s reasons for taking Mr Reay outside rather than the Claimant. The reasons he gave were both plausible and appropriate.
47. Regarding the foregoing evidence about the background to the Claimant’s relationship with Mr Reay, we are not satisfied that the Claimant has shown that Mr Reay did tend to treat women less favourably than men, or that he was generally a ‘scheming’ individual as the Claimant alleges. There is simply not enough evidence from which we could reach that conclusion; indeed, there is evidence that points the other way, in particular, as we detail later, Mr Reay’s conversations with the Claimant of 13 March and 16 May 2019 show the Claimant herself reaching out to Mr Reay in the face of the adversity of the grievances, and he speaks to her in a kindly and supportive manner. It

is also significant that he did not move to pursue the Claimant with disciplinary allegations even when presented with the 'ammunition' to do so by Ms Canham and Ms Dodd with their complaints in June 2018. We do accept that the relationship between the Claimant and Mr Reay was at times a difficult one, because many of the witnesses from whom we have heard (including the Claimant, Mr Reay, Mr Neeb, Mr O'Meara and Mrs Champion) appeared to recognise this, but we reject the Claimant's case that this was part of a pattern by Mr Reay of mistreating women. We find it more plausible that the difficulties stemmed from the fact that the Claimant is ambitious, but Mr Reay was promoted over her, and that Mr Reay had concerns about aspects of her performance which (as we describe below) he tried to address through a coaching process which the Claimant did not welcome. It was not, however, a poor relationship in all respects.

48. In 2016 the Claimant asked Mr Neeb not to make her report to Mr Reay when Mr Reay was promoted. She says that she told Mr Neeb that Mr Reay had a reputation for sexist behaviour and bullying of direct reports, who were often women, and them leaving because of this. She says that she raised such allegations with Mr Neeb on 13 October and 16 November 2016 and also on 26 February 2019. Mr Neeb denies that the Claimant ever raised concerns about bullying and harassment by Mr Reay. He considered that if she did have such concerns she would have raised them clearly and he would have taken action in response. His perception of the Claimant was that she was someone who in general stood up for herself and was ambitious, as was demonstrated by her not being shy of seeking to negotiate pay and benefit increases, and to propose promotions for herself (as she did with the 'market CEO' role below). He did recognise that the Claimant and Mr Reay did not have a good relationship, but he saw that as being because they were in competition with each other and both wished to run the business. He understood that it was because of this that the Claimant wished to continue reporting to him when Mr Reay was promoted. Mr Neeb refused that request urging the Claimant to accept that she reported to Mr Reay. Around the time of her first alleged conversations with Mr Neeb, on 29 November 2016 (383), the Claimant texted Ms Gillis: *"Why do our leaders not see the value of their CEOs? I'm not one to brag, but Come on! I was hoping for a 50% uplift that I could negotiate up further, not a 27% uplift to bring to my minimum mark!"*
49. The Claimant also says that she raised the same matters with Ms Gillis on 12 February 2018, 25 April 2018 and 22 May 2018. Ms Gillis denies that the Claimant ever raised with her any allegations of bullying or harassment by Mr Reay. There are text messages between Ms Gillis and the Claimant of 12 February 2018 (427-430) that indicate the Claimant had a frank discussion with Ms Gillis about this time. The Claimant maintains that during this conversation she referred to Mr Reay's treatment of her and Ms Fisher and Mr Reay's reputation for mistreating women at work. Ms Gillis' evidence is that the Claimant mentioned none of this, and that the frank conversation in February 2018 related to the Claimant's speaking to her following Ms Dodd's interview and appointment to the TPH CEO role and expressing her concerns about the decision to appoint Ms Dodd. She said that their conversation was also about the Claimant's proposal for her to become 'market CEO' (see

below), to have a salary increase, supplant Ms Dodd and to report directly to Mr Neeb. She says that the Claimant did not allege bullying or harassment by Mr Reay. The Claimant's text messages to Ms Gillis following the February 2018 meeting (427-429) include *"hope I haven't burdened you with too much honesty"* and a draft message to Mr Neeb which included the following: *"I can then make the changes I see fit to ensure I have a robust exec team to deliver our strategy"* and then *"This may be too much of an ask, but it would be hugely helpful to report directly to you and have your direct support to deliver on the central london strategy going forward. It will give our doctors, competitors and team the reassurance that we are very much still IN THE GAME."*

50. The Claimant and Ms Gillis also met again on 25 or 26 April 2018. Following this meeting, the Claimant and Ms Gillis exchanged emails about salary, bonus and share options for the Market CEO role. Ms Gillis' email contains the sentence *"All other terms and conditions will remain the same"*, which the Claimant says was a reference to her request to change reporting lines. The Respondent submits that cannot be the case as reporting lines are not 'terms and conditions'. We agree with the Respondent that this would be a strange way of referring to the Claimant's request to change reporting lines, but that is not material. The Claimant had requested to change reporting lines, and the Respondent refused that request, the question for us is what reason she gave for making the request.
51. The Claimant's email and texts following the discussion of 22 May 2018 (520 to 521) refer to the matter that Ms Gillis says they discussed in February 2018, i.e the Claimant's preference (stated in the Claimant's text message to be Ms Gillis' preference) that Ms Smith should be CEO of PGH with Ms Dodd as deputy, and also expresses various criticisms of Ms Dodd.
52. Neither the Claimant or Ms Gillis or Mr Neeb took any notes of any of these conversations. Ms Gillis was asked in cross-examination about her note-taking practices and she confirmed that it is not her practice to take notes of every conversation. She explained that although she is diligent in replying to emails, she is 'more of a talker than a writer' and considers it appropriate to listen and respond to employees when they raise concerns, rather than taking notes of everything. She considers it important to enable people to speak freely without keeping a formal record of everything. We accept Ms Gillis' evidence that this was her practice. Contrary to the Claimant's submission, we see nothing sinister in it, and there is no adverse inference to be drawn; indeed, some might consider that as a practice it has much to commend it.
53. The Claimant relies on each of the foregoing alleged complaints to Mr Neeb and Ms Gillis as protected disclosures in these proceedings. However, we accept Mr Neeb's and Ms Gillis's evidence in relation to what was said at those meetings. We find the Claimant did not make any allegation to them of sexist or bullying behaviour by Mr Reay. We so find because Mr Neeb's and Ms Gillis's evidence is consistent, and because what the Claimant says she said is not reflected anywhere in the contemporaneous documentation, whereas the Respondent's version of events does tally with the

documentation, in particular the text messages which bear out that the Claimant's focus was on herself, her own pay and prospects, and her concerns about Ms Dodd. It is particularly significant that in her draft text message to Mr Neeb in February 2018 she does not allude to any reason connected to Mr Reay for wanting to report direct to Mr Neeb, but just to the commercial/self-promotional reason of making herself appear more senior in order to impress doctors and competitors. Had she put the request on a different basis to Mr Neeb previously, we would have expected her at least to allude to it in this text message, but she does not.

54. In rejecting the Claimant's account of Mr Reay's historical conduct and her complaints about it, we have taken into account that the Claimant in her Ethics Line complaint of 12 July 2019 (1542) did state that she told Mr Neeb in 2017 when asking to change her reporting line that Mr Reay had "*a reputation for bullying and harassing direct reports and maintaining a drinking and social culture*" and also stated that she made Ms Gillis aware that she was "*being bullied*" in August 2018 (1542) and suggested that her allegations in this respect must have been passed onto Mr Reay and prompted his retaliation with the disciplinary allegations. Her follow-up Ethics Line Complaint of 29 July 2019 also sets out allegations of "*harassment towards me and other women*" by Mr Reay. It does not say that these were reported to anyone other than "*independent coaches*" at any point (1572). We recognise that what the Claimant said in her Ethics Line complaint provides some support for her case that she raised these things at the time in 2017/2018. We observe, however, that what the Claimant put in this Ethics Line Complaint was not consistent with her evidence in these proceedings. For example, she did not in the Ethics Line Complaint suggest that she had complained to Mr Neeb or Ms Gillis about Mr Reay's treatment of women, rather than about bullying/harassing behaviour more generally. We also observe that the Claimant made the Ethics Line complaint only after disciplinary proceedings had been commenced against her and with a view to bringing a halt to those proceedings by complaining to the US. A common thread in our judgment below is that we have found that the Claimant is prepared to say things she does not mean, or to exaggerate concerns, in order to achieve particular ends. For example, we find that she did this when deploying the words "*patient safety*" to complain about the absence of the Chief Nursing Officer in order to persuade the Respondent to handle Mrs Champion's grievance differently, and in emails in April 2019 when she was trying to secure the return of medical oncology services to her own hospital. We find that this was what the Claimant was doing in the Ethics Line complaint too. We see no trace in the documentation of the Claimant having raised these concerns about Mr Reay previously and we do not accept that she did.

2017/18: proposals for service reorganisation: Projects Lego, Tri-Star, and Starlight

55. In January 2017 the Claimant was promoted to CEO of The Portland Hospital (TPH) in addition to her role at THSC. Over the next two years there were

proposals made by the Claimant and others for reorganisation of the Respondent's central London hospital services. These proposals were developed under various project names, including Projects Lego, Tri-Star and Starlight. Project Tristar in general terms involved proposals to rationalise services at the three sites in W1 (THSC, TPH and PGH) so that all of one type of service was based on one site. Project Starlight related specifically to consolidation of medical oncology units at PGH. Project Lego was also a service consolidation proposal put together by the Claimant but one which required more investment. In truth, it seems to us that various configurations for the various services and hospitals were discussed over time and we are not convinced that all the witnesses were using the same names to describe the same proposals. In any event, for our purpose the project names are not material. We have used the names where we can.

56. There were also ongoing issues during this period about staffing levels and budgets. In 2017 patient numbers had dropped, especially international patients. Ms Finch's view, recorded in her email of 8 June 2017 (388) was that THSC was significantly overspending (by £2m), that it was overspending to a much greater extent than other hospitals, and this needed to be addressed.
57. THSC had better results in July 2017 and Ms Finch wrote on 18 August 2017 (397) thanking the Claimant for "*great results*" and "*leadership*".
58. In September 2017 issues arose due to low staffing levels. There were complaints from patients and consultants and an email chain at 398-400 shows responses to that. Mrs Champion accepted that the staffing levels were in principle sufficient at 1:2, but expressed the view that 1:1 nursing support could be justified given the hospital layout. The Claimant backed her up writing on 30 September 2017 (399) "*I support 1 to 1 due to our layout and will not accept anything else. If anyone tells us otherwise, I'm happy to raise further. It's quite simple. We will choose to turn away cases if we cannot have the numbers we need to manage our patients.*" Mr O'Meara pushed back saying that while appropriate level of care for patients was for clinical staff to decide, staffing levels had been 1:2 for a long time without significant incident, and those were the levels at other hospitals and approved by most insurers.
59. Discussions about staffing numbers were ongoing in October 2017 (413-415). On 2 October 2017 Mrs Champion raised that having low core staff is problematic for CQC as they want a better core to bank and agency ratio. In an email of 2 October 2017 (p 408) she wrote that core level set at the moment was 'unworkable'. She wrote that she would undertake a review and the Claimant indicated she would await the outcome of that.
60. By the end of the month Ms Finch was still of the view that THSC was overstaffed. The Claimant disagreed. By email of 30 October 2017 (412-415), the Claimant protested "*I know it's optics but I simply can't grow the business with no staff*", to which Mr Reay replied that this was not the battle to fight, what was needed was good EBITDA (i.e. earnings), though he agreed that he did not want to delay growth.

61. During 2017 the Claimant also pursued a management structure which involved having an additional layer of management at THSC than at other hospitals so that each of THSC and TPH would have a CFO, then reporting in to a Vice President for Financial Operations who in turn reported to the Claimant. Ms Finch considered that this was unnecessary and became frustrated with the Claimant as is apparent from her email of 16 June 2017 (389): *“This is all coming from Aida. She does not want just one CFO reporting into her. She wants a VP of Financial Operations and two CFOs. She is manipulative. I had all this ironed out with Kirsty and Enda last Friday.”* Despite Ms Finch’s concerns, the Claimant’s approach prevailed and Mr O’Meara was engaged as the VP of Financial Operations. Mr O’Meara was, or became, a family friend of the Claimant’s.
62. In 2017/early 2018, the Claimant was given permission to propose Project Lego to relevant US Executives as a means of consolidating specialist services to create better operational efficiencies. The Project Lego proposal presented in July 2018 to the Respondent’s US board was for THSC, TPH and PGH to consolidate under the Claimant’s management. In developing Project Lego the Claimant did not involve Ms Dodd who was then Interim CEO of PGH. Ms Finch was against the proposal in part because it would ‘mask’ what she saw as the poor financial performance of THSC and TPH with the better financial performance of PGH. The Claimant costed this project at £40 million, which was considered by the US company’s board to be uncommercial and therefore rejected. The Claimant was asked to find alternative cost-saving measures.
63. One of the Claimant’s proposals included her becoming the Central London ‘market CEO’ of the Tristar facilities, with each individual facility having a CEO who would report directly to her. On 12 February 2018 she discussed this proposal with Ms Gillis (see above). She got as far as drafting an announcement to staff in May 2018 (524). The Claimant sent her Tristar proposal to Mr Neeb on 2 May 2018 (464). She did not copy in Ms Dodd. The email proposed that she take leadership of PGH over Ms Dodd. The Claimant told Ms Dodd at a meeting around this time that Ms Dodd would be placed in a project management role as that was where her skills lay.
64. The Claimant’s proposal was not taken forward by the Respondent because of cost and because of concerns that the Claimant would be overstretched if she took on the market CEO role, but it was decided to proceed with one element of the project, the consolidation of the separate medical oncology units at PGH and THSC. Initially the Claimant’s proposal of consolidating services at THSC (of which she was already CEO) was pursued, but then the plan was revisited and it was decided by the Respondent that it would be better to consolidate at PGH (where the CEO was Ms Dodd).
65. On 18 April 2018 the Claimant emailed Mr Reay about the the move of paediatric services from THSC to TPH. She stated that this would require extra theatres and upgraded imaging services. The email she refers to in her



witness statement in this regard (448-449) includes the following under a heading of “TPH”:

- In desperate need of refurb and development of obs and OP services - should start to fit out argosy as per lego plan.
- in order to move Work over from Thsc we need extra theatre- all this HS domino knock on disruption and cost as we n Ed to move and upgrade imaging. It's still an analog X-ray service! (sic)

66. The Claimant said in oral evidence that analog X-ray services are not as good for patients as more modern digital X-rays and she would rather her children were X-rayed by a digital X-ray. Mr Reay, however, said that analog X-rays are still in general use, and the fact a new digital version might be better does not mean that the old version has become a danger to patients. We observe at this point that there is nothing in the Claimant's email to suggest that she thought that the analog X-ray service had become a danger to patients. The natural reading of the email, where the point is included in a list of bullet points about refurbishment and equipment upgrades, is merely that the technology is out-dated and out of place in a premium private hospital service such as the Respondent seeks to run.
67. The Claimant also contends that this email represents a disclosure that moving paediatric oncology services from THSC to TPH would first require obstetrics to be moved because of concerns about pregnant women sharing services with patients undergoing chemotherapy. The email does not say this, but she said in oral evidence: *“Although I don't write ‘this will therefore lead to’ it is understood that the reason you would ask for this is not because it would just be nice, but because you need them. This is why we didn't make the move in the end.”* In other words, the Claimant's point here is that because there were safety concerns about moving paediatric oncology services to TPH, the Respondent did not proceed with that. Mr Reay's evidence was broadly consistent with the Claimant's assessment of the position: *“None of us disagree that the obstetric wards need refurb as did much of the Portland”*. We find this is a ‘business as usual email’ in note form which itself contains no reference to patient safety (although that was obviously part of the wider discussion happening at the time). The email itself is forward-looking. It is part of the discussion about what would be needed if the services were consolidated. In the end, they were not.
68. It is agreed that the Claimant had a conversation with Mr Reay in the summer of 2018 (possibly early August 2018) in which she referred to patients who require out of hours MRI and radiation treatment needing to have it at THSC as it was not available at PGH. THSC is a 3 to 7 minute ambulance ride from PGH. Mr Reay said that patients could be transferred in ambulances. In oral evidence Mr Reay confirmed that this is what had happened hitherto, and that although it is not comfortable for patients and ‘not ideal’ it is a practice accepted by the CQC and is not deemed unsafe. In any event, he said, the PGH MRI service was open until 8pm and NICE guidelines are that in cases of suspected spinal cord compression an MRI should be carried out within 24 hours and so out of hours MRI is only needed in an emergency where there is a clinical need to proceed immediately to treatment. Mr Reay recalls

the Claimant agreeing with him and does not recall her raising the issue again. The Claimant, however, says she disagreed as she considered patients would be seriously ill and in a lot of pain and this would not be in the patients' interests. She says she also said that patients on active radiotherapy who were too unwell to travel needed to receive treatment as in-patients which was not possible at PGH. She says that she also told Mr Reay that moving oncology paediatric patients into an obstetric environment would be damaging to the health and safety of patients. The Claimant did not raise any of these points in writing and gives no evidence that she raised the issue orally again at any later date either. We find that if the Claimant had really thought this was a patient safety issue, she would have made that clear in writing and on more than one occasion. She did not and for this reason (coupled with the fact that we have found the Claimant to be less reliable than the Respondent's witnesses generally) we reject her evidence that she believed, or said to Mr Reay, that this was a patient safety issue.

69. The Claimant says that she also informed Michael Neeb, John Reay and Teresa Finch orally around this time that she did not support the move of oncology services to PGH because of the risk to patient safety and because it would not yield the savings suggested. This was also not a view that she recorded in writing, and neither Mr Neeb or Mr Reay recall her saying this to them (save to the extent of the conversation about out of hours MRI and radiation treatment dealt with in our previous paragraph). Indeed, in writing she was supportive of the project. Thus she proposed in her email of 2 May 2018 to Mr Neeb (466) moving forward with consolidation of the services. On 29 June 2018 while preparing a presentation on the proposals, the Claimant in an email notes that Ms Dodd has made available a 28-bed unit at PGH 'asap' so that the move could be brought forward (546). The presentation itself of July 2018, prepared by the Claimant, Ms Dodd and Mr O'Meara (548-576) states that previously identified problems with the proposed move are no longer an issue, and that consultants' concerns have been addressed. Financial results for July were poor and as the move would enable reductions in cost, Ms Finch and Mr Reay pressed for the move to proceed quickly (613-614). The view of Mr Neeb, Mr Reay and Dr Bucknall (among others) was that the move would improve patient safety as well as achieving economies of scale as services previously split between two sites would be consolidated at one site with a resultant concentration of expertise and staffing (staffing remained the same). Mr Neeb said that there were numerous discussions with consultants about the move and they had no concerns. He recalled the Claimant being eager to run Project Starlight and that she took the lead as the more experienced CEO. The Claimant's emails of 18 August 2018 (619) to Mr Reay and 9 September 2018 to Mr Neeb (copied to Mr Reay) (678) are also supportive of the project, although the Claimant was 'out of the loop' between these two emails as she was away on holiday. The Claimant was named on project documents as a co-owner of the project with Ms Dodd and the letter to staff formally announcing the move on 21 August 2018 and stating that it would mean higher standards and service improvements had the Claimant as primary signatory to the letter to staff (680). A 7 September 2018 project update (695) on which the Claimant is identified as project co-owner identifies no risks or issues with the move, and when the Claimant was

informed on 20 September 2018 by Ms Dodd that the oncology and medical ward reconfiguration at PGH was complete and they were ready to receive the THSC team the following week, she congratulated her and said this would “*give thsc team even more confidence in moving over*” (690).

70. However, despite all this, Ms Smith and Ms Finch both recall the Claimant expressing negative views of the project privately. Ms Finch considered that the Claimant’s opposition to the move was because it would have a negative impact on the THSC budget (as indeed it did as is demonstrated by Mr O’Meara’s email of 1 October 2018 (715) noting that “*at least we are seen as taking one for the team*”). Ms Smith’s recollection was that the Claimant cited consultant opposition to the move and that the move was bound to fail and services would come back, but she does not recall her citing patient safety concerns. Ms Smith did as a result of these conversations later arrange to meet with consultants (on 22 November 2018) to discuss the move: their concerns were, in Ms Smith’s view, organisational and logistical rather than patient safety issues. The Claimant alleges that she discussed the impact of the move on oncology services on or around 30 August 2018 during a meeting with Professor Goldstone, Professor Paul Ellis and Ms Smith, but it seems unlikely this date is correct as the Claimant was on holiday at that time. In any event, Professor Goldstone in his witness statement accepted that the Claimant did make “*repeated points in opposition to the move of the medical oncology unit primarily stating that she was opposed to the potential loss of core services ... it is possible that one such comment made by the Claimant was related to patient safety. However, I cannot recall specifically what was said, and if a legitimate concern about patient safety had been raised I would have dealt with it*”. There is also evidence (to which we come later) that after the move the Claimant took action suggesting she considered the services should be returned to THSC.
71. In the light of the evidence, we accept that the Claimant’s personal view was unresponsive of the project, and that she expressed this to a number of people including Ms Finch, Ms Smith and Professor Goldstone, but we do not accept that she expressed the view to Mr Reay and Mr Neeb. To Mr Reay and Mr Neeb she maintained a ‘public’ position of support for the project. Mr Neeb said that patient safety was always paramount and even where a lot of money had been spent if a project was not safe, it was discontinued, as happened with a paediatric bone marrow transplant programme on which the Respondent spend £1m in April 2018. He said (and we accept) that if similar issues were raised in relation to Project Starlight he would have dealt with them, but they were not. In the circumstances we find that the Claimant did not raise any patient safety concerns about Project Starlight. We also do not accept that Mr Reay’s email of 9 August 2018 instructing Ms Dodd and Ms O’Sullivan to take the project forward indicates that the project was ‘being taken out of her hands’ as the Claimant suggests. We infer that Mr Reay’s email merely reflected that the Claimant was going to be away over the next few weeks and that the project needed to move forward in her absence. Nor do we accept that any concerns the Claimant expressed to Ms Smith and others amounted to concerns that patients would be endangered by the move. The Claimant’s concerns were more territorial than that: we infer her

chief motivation was to retain the services and the accompanying budget at THSC under her control. It was for this reason that she did not express any concerns in writing. Had she had genuine patient safety concerns, she would, as a professional, have made those concerns clear.

June 2018: Miranda Dodd complaint

72. As already touched on above, the Claimant's proposals in 2018 had included consolidating TPH, PGH and THSC under her leadership, with Ms Dodd (who was acting CEO and then CEO of PGH) taking up a more junior role. She had been opposed to Ms Dodd's appointment in the first place and did not involve Ms Dodd in developing those proposals. In June 2018 Ms Dodd sought to get involved in advance of the presentation on Project Lego planned for July 2018, but the only response from Mr O'Meara (or the Claimant) was to ask for her picture and short biography for the slides (537). Ms Dodd was unhappy about this and forwarded it to Mr Reay.
73. There had also been other issues between Ms Dodd and the Claimant and following an away day and dinner on 13 June 2018, on 14 June 2018 Ms Dodd sent Mr Reay a relatively formal email (539) raising a number of concerns about the Claimant's conduct towards her. These included that the Claimant had told her to her face that she was 'not the person she would have appointed', that she had been reminded by the Claimant at a number of 1:1 meetings that her then interim CEO role was 'only temporary', and that she had been excluded from the preparation of Project Lego even though it involved the hospital for which she was acting CEO. Ms Dodd also complained about the Claimant's conduct at dinner the previous evening where she had said in front of all present that Ms Dodd ought to dismiss a particular person who Ms Dodd did not intend or want to dismiss. This put Ms Dodd in a very awkward position. When asked in cross-examination whether she disputed what was said in Ms Dodd's complaint, the Claimant said that she did, but did not give details; she did, though, confirm that she had told Ms Dodd, in an effort, to be transparent, that Ms Dodd had been her second choice for the CEO role and that she would rather it had gone to her Deputy, Clare Sullivan. Ms Dodd confirmed in oral evidence that the Claimant had reiterated this point on a number of occasions, to the extent that she felt uncomfortable meeting with the Claimant. We therefore find that Ms Dodd's complaint was, at least in this respect, well-founded.
74. Earlier on 14 June 2018 the CEO of the Lister Hospital, Suzy Canham, also wrote to Mr Reay complaining about the Claimant's conduct, suggesting that the Claimant was 'land grabbing' and making a specific complaint about the Claimant 'poaching' two consultant breast surgeons from The Lister and then 'lying' about it in a presentation and saying that they were new to HCA. She indicated that she was losing trust in the Claimant. Her email appears also to have been prompted by the dinner the previous day. She concluded: "*I know that is petty but that is what happens when you lose trust. I must say as a person I find her to be polite/friendly etc...*". Ms McColgan QC for the Claimant argued that this last comment was strange and suggested that Ms

Canham added it because she had been encouraged by Mr Reay to complain and it was not her genuine complaint. That is not our reading of this email. Reading the whole email, it is clear that Ms Canham adds the last remark because she has just accused the Claimant of lying and underhand dealing and she wishes to temper that.

75. There is nothing to indicate that Mr Reay prompted either Ms Canham's or Ms Dodd's complaints. Indeed, the contrary is indicated by the fact that Mr Reay did nothing with them immediately and did not even mention them to the Claimant until the following month. We observe that had Mr Reay wished to use these as 'ammunition' against the Claimant they contain allegations that are in themselves serious enough to warrant action of some sort if someone wished to take action. The fact that Mr Reay did not act on them (other than to provide support to Ms Dodd) suggests that he was not looking to take action against the Claimant.

Coaching / mediation / leadership exercises

76. In June 2018 Mr Reay organised a team day for CEOs and senior managers, including the Claimant, which was run by Keven Bright of YSC, a leadership coaching organisation. The organisation as a whole had been running a leadership coaching programme since 2016 but the Claimant had her own coach (Dr McGuigan) and did not participate in the Respondent's programme until 2018. In May 2018 YSC completed an Executive Development Profile of the Claimant which identified her strengths as a *"bold, charismatic and charming leader"* and also development themes in relation to *"managing herself through conflict"*, *"listening and tuning into others"*, *"softening her judgments"* and *"leading through others"*.
77. The Claimant had become increasingly unhappy about her relationship with Mr Reay at this time. In July 2018 there was a 1-2-1 meeting between her and Mr Reay which left her in tears. She requested a meeting with Mr Reay and Ms Gillis to discuss this. Mr Reay took this opportunity to raise with her the nature of her relationship with Ms Dodd (in light of Ms Dodd's complaint of 14 June 2018) so the Claimant perceived the meeting as Mr Reay 'turning it around' to be about the Claimant's relationship with Miranda Dodd. Mediation was suggested to which the Claimant agreed and she also asked for mediation between her and Mr Reay. The Claimant's email of the same date reflects her request in this respect (578). The Claimant on 25 September 2018 chased for mediation with Mr Reay (698). Although the Claimant referred to what she was requesting in relation to Mr Reay as a "mediation", that was not how Ms Gillis and Mr Reay were thinking of it. As the Claimant's email of 24 July 2018 also refers, what they had proposed was "coaching" with a focus on the relationship between Mr Reay and the Claimant, and that was what was arranged.
78. On 30 July 2018 the Claimant invited Mr Reay and Ms Gillis out to lunch (3179).

79. There were initial meetings between the Claimant and Kevin Bright in November 2018. Following the November 2018 meeting Mr Bright emailed Mr Reay and Ms Gillis (798) noting that the Claimant was “*open and very much wanting to move things forward, but also feeling ‘bruised’ and ‘confused’ by recent events*”. He said that she was focused on the relationship with Mr Reay (and, to a lesser extent, Ms Dodd) and was open to 360 feedback (which she mentioned ‘unprompted’, but “*didn’t talk about her competence or performance as a CEO*”. By email of 3 December 2018 (801) Mr Bright proposed a way forward to include the 360 for the Claimant and then a joint coaching session looking at her and Mr Reay’s working relationship. From this email it is apparent that Mr Reay had raised with Mr Bright concerns about the Claimant’s personal organisation and time management skills.
80. In January 2019 Mr Neeb announced his retirement from HCA. Mr Reay was appointed as his successor, taking over in May 2019.
81. On 11 January 2019 (938) Mr Reay forwarded one of the Claimant’s emails to himself with a note that her email was ‘not helpful’ and then forwarded it onto Ms Gillis observing that he is aware the Claimant is in a stressful situation but that “*some basic errors of judgment have occurred which must be picked up but carefully and with your input*”. The Claimant suggests that this is an example of Mr Reay gathering further ammunition against her, but again we do not accept that as he did not take any specific action in relation to this email. Further, reading the email chain it is apparent that there was an objective justification for Mr Reay’s concern as expressed here. The background to the email was that senior management (including the Claimant and Mr Reay and others) had decided that a new digital theatre and integrated MRI scanner (iMRI) were to be located at the Wellington Hospital. This decision had not yet been communicated to consultants. Jane Whitney-Smith, Deputy CEO of the Wellington emailed a large number of consultants, including those not working at the Wellington, to ask for their views on precisely which scanner to buy. This was thus inadvertently the first communication to consultants at THSC that the new theatre and scanner were to be located at the Wellington rather than THSC and there was an immediate round of upset emails from consultants with the London Neurosurgery Partnership (LNP) working at THSC who felt ‘unvalued’ as a result of lack of communication with them. (It is in the course of this email chain that examples are given by consultants of patient cases not being well-handled at PGH, including the example to which Ms McColgan took us a number of times about the patient who was wrongly told that he needed a complex procedure to “*remove cement from his spinal nerves*”. We observe that these cases are raised clearly in disgruntlement about not being kept ‘in the loop’ about the new iMRI scanner and the tone of the correspondence verges on sarcastic. This correspondence does not provide any proper basis for any findings about levels of clinical care at PGH.)
82. The Claimant responded to the above correspondence apologising for the way Ms Whitney-Smith’s email had reached them, and expressing herself in terms that suggested that as yet no decision had been made about location

of the new equipment, that she would be talking to Sanj Bassy (of the London Neurosurgery Partnership (LNP)), Ms Whitney-Smith and Mr Reay and would get back to them. Mr Bassy then sent a fairly sarcastic email thanking everyone for keeping LNP 'so well informed' and asking for confirmation that LNP surgeons would be permitted to use the iMRI ('admitting privileges'). Mr Reay then weighed in, emphasising commitment to LNP, apologising for the poor communication, explaining the rationale for the decision to locate the iMRI at the Wellington and confirming that he would "*sort the admitting privileges issue*" now. The Claimant was unhappy about this because it undermined her tactic which had been to try to pretend that no decision had been made so that it could be better communicated at a later date. She felt that as it was her department, Mr Reay should not have weighed in. Mr Reay, however, considered that the Claimant's handling of this had been unsatisfactory because although Ms Whitney-Smith's communication had been unfortunate, he felt that the Claimant should not have tried to make it look as if Ms Whitney-Smith had got it wrong, or tried to disown the decision that had been made in order to create a charade of consultation, but should (as he did) simply have apologised for the communications failure and explained the rationale for the decision.

83. In January 2019 Mr Reay made an entry in his personal notebook of a number of bullet points under a heading of "*Feb-Apr*" as follows: "*Timeline; Ca Team plan; CQC team; Convicting AY; Turnaround plan*". The Claimant links this with a note further down the page under an asterisk that says "*Values and behaviours*", but it does not look as if these are linked, and Mr Reay in oral evidence linked this note with the next page as setting out 'key messages' that he wished to get across to the organisation on succeeding Mr Neeb. Mr Reay says that by "*convicted*" he meant "*convinced*". He says that he uses the word in that way frequently, and the parties are agreed that he did indeed use the word apparently with this meaning again in the suspension meeting with the Claimant on 17 May 2019 which the Claimant secretly recorded. We accept that by "*convicting*" in this note Mr Reay meant "*convinced*" as that does appear to be how he uses that word. In his witness statement Mr Reay said that what he was referring to was the need to 'convince' the Claimant to take on board the 360 feedback she had received from Kevin Bright, which he considered she had shown reluctance to do. This cannot, however, be correct as in January 2019 the Claimant had not yet received the 360 feedback. In our judgment this does not indicate that Mr Reay is lying but that he has slightly misremembered. Although the 360 feedback had not yet happened, what is clear is that a coaching process with the Claimant had already started and there had been some reluctance by the Claimant both to engage with that and to reflect on her own performance. We find that this is what Mr Reay was referring to in this note. It is not sinister as the Claimant suggests.
84. On 17 January 2019 the Claimant attended a meeting with Mr Reay and others as a number of neurosurgeons were unhappy with the Respondent. At the end of the meeting Mr Reay left his diary behind. The Claimant says that she asked Dr Buckley to take the diary but he refused so the Claimant took it home and her husband, Simon Willoughby, took photos of it. He did

not share these with the Claimant at the time. Later in November 2019 he showed her the photos and she saw that Mr Reay had written what she thought was “*Convicting AY*” on the page referred to.

85. There were formal mediation sessions between the Claimant and Ms Dodd on 4 January and 28 January 2019 with a professional external mediator, about which both expressed positive views on the outcome.
86. The 360 of the Claimant was completed in February 2019. The Claimant was asked by Mr Bright to identify eight people to be spoken to for her 360, but in fact produced a much longer list from which she invited Mr Reay on 7 January 2019 to choose as he wished (930). He added Dr Bucknall to the list and highlighted people he considered would provide a balanced but informative view of the Claimant, including not only Ms Dodd (with whom he knew the Claimant had a poor relationship), but also Mrs Champion (who he would not have known at that stage had any difficulty with the Claimant), and Rob Hill (who is very supportive of the Claimant) and he did not include Ms Canham (who the Claimant had put on her list). We observe that had he wished to ‘weight the scales’ against the Claimant he could have chosen quite differently, and included Ms Canham who had previously made a complaint about the Claimant. The Claimant in her witness statement expressed unhappiness at the selection of Ms Dodd and Mrs Champion but she had included these two individuals on her own list and there is nothing to suggest that she complained at the time, even though it is apparent from the email at 930 that it had been open to her to object or propose different people if she wished to. In fact, it is clear to us that Mr Reay’s selection was fair and balanced; it is not the selection of someone who was ‘out to get’ the Claimant.
87. On 14/15 February 2019 Mr Bright shared with the Claimant the feedback themes from the 360 interviews he had carried out (981).
88. On 18 March 2019 the Claimant participated in a joint coaching session with Mr Bright and Mr Reay. This looked at what was working well and what was not working well between them. The Claimant made no reference to bullying behaviours by Mr Reay in that meeting.
89. The Claimant said in oral evidence that she asked for a “male mediator” for her and Mr Reay so that Mr Reay would take her more seriously. This had not been raised by the Claimant previously and there is no trace of this request in the documentation. We do not accept that this request was made. This suggestion appears to have been brought in to bolster the Claimant’s sex discrimination claim. Although the Claimant had requested “mediation” with Mr Reay, what she subsequently agreed to take part in were clearly coaching sessions with Kevin Bright, a professional coach not mediator, and someone who had already been working with the organisation. That must have been apparent to the Claimant and we do not accept that after the initial requests she continued to regard what was happening as ‘mediation’.



Other staffing and cost saving issues during the period August 2018 to October 2018

90. During this period, beginning on 1 August 2018 an email conversation started with a proposal from Cleave Gass and Nuala Close to make savings by making some changes to RMO roles at TPH (608). Mrs Champion querying whether the proposal is workable as *“The ICU RMO is an intensivist and I’m not sure our obstetric anaesthetist colleagues are intensive care trained?”*. Someone else costed the proposal, at which point Mr O’Meara indicated that it made a lot of sense as the potential cost saving was nearly £500k. Mrs Champion referred again to her previous email saying she needed to look at it properly because of her concerns and warning people ‘not to count their chickens’ (604-605). Mr O’Meara followed up with an email:

As someone who has observed “HCA behaviour for a long long time, we need to start to show we are “a can-do team”. Coming to MORs with cost saving ideas like this. Frankly - we are starting to piss some very senior people off in appearing that we can’t. We can’t always cite patient safety. Because the response will always be of other facilities are doing it. You may agree or disagree.

91. Mrs Champion replied *“I hope we can discuss this in a respectful manner next week”* to which Mr O’Meara responded *“I agree”*. Mrs Champion then sent a longer email on 6 August (602) asking various questions about patient safety and staffing in respect of the proposal. Mr O’Meara then replied making clear he respects Mrs Champion as a clinician, but continuing:

We are very, very much under the Corporate Microscope now. A narrative circling around 242 amongst Senior Executives, is of an HSC/PH Exec team that is often obstructive, negative and hostile to many corporate initiatives. Shy of delivering any cost saving, resentful of anyone from Corporate offering an alternative view etc.... and slow to react on Corporate lead initiatives unless harassed. That microscope, and that perception risks micromanagement, not to mention alienation. I have seen this happen so often at HCA. Case in point is Whit, who I now notice had been added to the Project Starlight team and will report back to Teresa. The fact that Teresa doesn’t seem to trust us to deliver without Whit, is I think a reflection of that narrative taking root.

Is any of this fair? No, and trust me, I am doing everything I can in meetings with Teresa and (when I get a chance) Mike, to dispel that notion and offer concrete examples as to our “can do” attitude. But we have to reverse and dispel that view with tangible, demonstrable examples of what we can do. For example, we may believe (for perfectly justifiable reasons) the consolidation of Med Onc across PGH/HSC will not deliver the level of cost saving you think for these reasons, but look – try this approach, which delivers this £ saving.

No – consolidation or employment of RMOS might not deliver that level of cost saving, but look – but try this approach which delivers this £ saving. That’s why I emphasise can do. Also, and again I say this as advice having heard this at 242, please don’t cite “patient safety” unless you truly believe it to be the case. This term is particularly sensitive and nothing winds them up more. Fact is as soon as you say that the first port of call as soon as you leave the room will be to check your reasoning with the closest clinician to hand. Unless everyone in the company agrees with your viewpoint – you may be on a hiding to nothing here and, at worst, accused of abusing the term. Absolutely we deal with some of the most vulnerable of all patients, but, with the deepest respect, let’s not overlay this.

I enjoying with all of you (*sic*), and respect your disciplines and concerns. But I too have difficult relationships to manage and Kirsty and I trying to shield many of you from that we encounter.

I will accept the group consensus on this point, and adhere to at MORs. But can I ask we debate with maturity, cognisant of our commercial pressures as well as clinical ones.

92. The Claimant was copied in on all this, but did not join in. However, Mrs Champion did forward her exchange with Mr O'Meara to the Claimant under cover of an email: *"I need to talk to you about this. I know you don't need it, but that's quite an inflammatory email."* The Claimant responded: *"Let's discuss, nothing to worry about here. We will get there, I assure you. See you tomorrow Aida."*
93. Mr O'Meara's oral evidence about the 'patient safety warning' email above is that this email was directed to Mrs Champion because he considered she did tend to overplay patient safety as a reason for not cutting staff, even when no one else agreed with her. His perspective was that the Respondent was running a *"5 star hotel for some very sick patients"* and that the main risk from cost-cutting exercises was that the patients would take their money elsewhere rather than a risk to patient safety. In his later investigation interview with Mr Young, Mr O'Meara said that relations with Mrs Champion were generally difficult as there was rigorous scrutiny of staff costs, which Mrs Champion 'was not used to' and 'tended to push back'. Mr O'Meara said (2191-2) that *"After Monthly Operating Reviews I would be told to get a grip on the CNO [i.e. Mrs Champion]. I expressed those concerns to Aida and Aida defended her. In August last year, Theresa Finch made it clear to me that if things were not changed in Harley Street that my and Aida's jobs would be under threat"*. We observe at this point that what Mr O'Meara says about the Claimant defending Mrs Champion could be said to represent the documentary high point of support for the Claimant's case that she was raising patient safety concerns during this period, and we have taken it into account although no reliance was placed on it by the Claimant during the hearing and it was not put to any of the witnesses. We further note that Mr O'Meara's latter point about Ms Finch threatening his and the Claimant's jobs is consistent with an allegation that the Claimant makes about Ms Finch making such a threat. In oral evidence, the Claimant said that Ms Finch said words to the effect that the Respondent would *"make an example of a CEO that does not meet the targets that are set for them"*. We accept the Claimant's evidence in this regard as it is corroborated in this way.
94. During August 2018 Ms Finch was challenging the Claimant to accelerate cost savings and in particular to reduce the numbers of agency staff being used (614, 616 and 621-622). Her focus was on the numbers of agency staff scheduled, as agency staff are both more expensive and also likely to be less familiar with the Respondent's systems than core staff. The Claimant accepted in oral evidence that it was Ms Finch's job to do this. Ms Finch was particularly concerned about agency staff being scheduled weeks ahead when there was not the volume of patients to justify that.

Alleged concerns following the move of oncology services to PGH

95. The consolidation of oncology units at PGH (Project Starlight) was implemented between August 2018 and October 2018 as described above. The same staff and facilities remained post consolidation, but all based at PGH rather than split between the two sites, and there were decisions to be made about staffing of shifts in the newly combined unit.
96. The Claimant alleges that patient safety issues arose following the move. She says that at a meeting of the Medical Advisory Committee (MAC) on 22 October 2018 she informed Mr Reay and Ms Hughes of four complaints she had received from consultants relating to “*serious clinical incidents*” at PGH involving oncology patients. The Minutes of the meeting record that the ‘largest perceived risk’ to the Respondent at that time was GDPR, and that there was an issue with accessibility of patient records because LOC and the Respondent were operating on different servers. This is presented in the Minutes as a general issue rather than one relating to the move of medical oncology services to PGH. Regarding that move, the Minutes note that inpatient medical oncology services have been successfully moved to PGH, but that since the move the Claimant has received four complaints from consultants relating to “*clinical oncology patients pathways for Chemo-RAD patients*”. Mr Reay was not at the meeting, but the complaints were brought to his attention and he and the Claimant met with the consultants subsequently to address their concerns which related to teething issues following the move of oncology services to PGH and his understanding is that the complaints were quickly resolved. Ms Hughes did not recall the Claimant raising any such concerns but observed that the notes of the meeting indicate that the incidents were not classified as serious incidents, since if they were they would need to have been separately investigated.
97. The Claimant says in her witness statement that in Monthly Operational Review (MOR) meetings between April 2018 and Feb/March 2019 she raised concerns about the impact of cost reductions, staff shortages and poor services on patient safety for oncology patients. She says that she also raised these concerns in her monthly meetings with John Reay and in some Senior Management Team meetings. None of these witnesses recall the Claimant raising patient safety concerns. While we accept that cost reductions, staff shortages and problems with services would have been topics of discussion at these meetings, we have seen nothing to indicate that these discussions were anything other than ‘business as usual’, and we do not accept that any issues were specifically framed by the Claimant as ‘patient safety’ issues. Her professional duties, including as RMO, meant that if she had any genuine patient safety concerns she should have raised them clearly, and taken necessary steps to address them.
98. On 8 November 2018 at a LOC Cancer Department Update Meeting, concerns were raised by Professor Paul Ellis about the management of the new medical oncology ward at PGH, and that reduced RMO and nursing provision was impacting patient care, consultant experience and staff morale. The Minutes record that Professor Goldstone and Ms Sullivan were to

discuss with Ms Dodd later that day. This they did and Ms Dodd addressed the issues, emailing all concerned the next day to inform them that an operational board had been set up to ensure operational excellence at PGH (751).

99. By email of 13 November 2018 Dr Gaya (Consultant Clinical Oncologist) set out concerns regarding the oncology unit at PGH (759). Previously there had been two RMOs at THSC and two at PGH. Immediately following transfer there had been three RMOs, but now it had been reduced to two. Dr Gaya considered the level of cover was 'dangerously sparse' with a threat to patient care. He concluded, *"I understand and appreciate that HCA UK is currently cutting costs where possible to maximise profit, however reducing RMO cover by 50% is simply not acceptable, and has a direct knock on effect on the quality of patient care"*. He copied in a number of other consultants, one of whom replied joining with Mr Gaya adding *"It was far safer when we had PGH and HSC oncology wards. The current situation is neither safe nor sustainable"*. Ms Dodd responded (763-765 and 758-9) with a reply that Dr Gaya found *"helpful and reassuring"* and she then increased the number of RMOs back to three. Professor Goldstone was angry about the *"cutting costs to maximise profit"* allegations and responded to Dr Gaya, with that comment in the subject heading, *"You need to be very very careful what you say. The credo of the HCA Cancer Dept is to optimise patient care. We are doing this. It will have hiccups along the way. We will succeed in optimising patient care."* When Dr Gaya replied saying he was not sure that reducing RMOs from four to two was optimising patient care, but otherwise accepting his point, he replied *"I'm not going to get into deep discussion with you. The adjustment of staffing to the new ward is 'work in progress'. You will NOT make remarks like that and expect them to remain unnoticed. I hope I am understood."* Professor Goldstone explained in oral evidence (and we accept as it is consistent with the documents) that what he had found inappropriate was Dr Gaya's suggestion that HCA was maximising cost-cutting and profit.
100. Ms Hughes gave unchallenged evidence, which we therefore accept, that during the period with which we were concerned there were national specialist nursing shortages. On 3 December 2018 (807) Rui dos Santos (PICU Clinical Nurse Manager, THSC/TPH) emailed noting that they have high levels (60-70% agency staff), but saying that they are starting to see 'CVs coming through' (i.e. for permanent posts) and asking for authorised positions to recruit into. Mrs Champion joined in, observing that this would be a *"high risk area"* for the next CQC inspection as CQC expects ratios of core to temporary staff to stay within reasonable bounds (there being a potential risk to patient safety if there are too many temporary or agency staff if they are not as experienced or as familiar with the Respondent's systems). At that point the system was showing Ms Hughes as having placed a restriction on recruitment. Mrs Champion then spoke with Ms Hughes and reported back that Ms Hughes would make sure that posts could be offered (811). The Claimant missed this email and that afternoon asked again the same question as Ms Hughes had already answered about PICU posts apparently being on hold (815, 806, 814). Ms Hughes then confirmed again the posts were no longer on hold. Ms Hughes confirmed in evidence that this was the

case despite Rui dos Santos raising concerns about delays. The Claimant in closing submissions pointed to a further email from Mr dos Santos of 12 December (836) when the posts seem to be on hold again, but the Claimant is not copied in on these emails and gave no evidence about them, so we cannot see the relevance of this to her case.

101. On 4 December 2018 the Claimant alleges that she informed Mr Neeb, Mr Reay and Ms Finch that she did not support the move of oncology services to PGH or the reduction in number of medical and nursing staff at the Respondent's sites. We do not accept that there was any specific disclosure on this date as there is no evidence of it other than this vague assertion by the Claimant. What email exchanges around this time between Mrs Champion, the Claimant and Mr O'Meara and others do show is that they had recognised they had too high a percentage of agency staff, beyond what CQC standards require, and had identified an urgent need to recruit more permanent staff (811-817). The Claimant's email of 4 December 2018 (815) refers to posts that are vacant at THSC and TPH. Although compliance with CQC standards relates to patient safety, there is no reference to patient safety per se in the emails. Mrs Champion refers to the upcoming CQC inspection and temporary staff ratios being a 'high risk area' for the Respondent, which we consider in context meant 'high risk' in the sense that the Respondent may not retain its Outstanding rating with the CQC, rather than 'high risk' in the sense that it was any real threat to patient safety.
102. On 5 December 2018 Prateek Saxena (Director of Operations, Urgent Care Centres) emailed flagging concerns about patients being turned away because of insufficient paediatric beds in the urgent care centre (UCC) (819) at TPH. The Claimant forwarded this onto a number of people including Mr Reay, Ms Finch and Mr Neeb (all on the CC list) informing them that they had insufficient staff to open a further unit for additional space and that she was doing everything to ensure that they were not transferring patients out unnecessarily. The Claimant in these proceedings has suggested that here she was raising a patient care concern as what is being referred to is sending patients away from an urgent care centre, but the email does not spell this out. Ms Finch regarded it as the Claimant raising a commercial concern. Mr Reay viewed it as a status update. He saw no patient safety concern as no one was asking the Claimant to admit patients that they could not treat. The Claimant sought to link this with an email of Mrs Champion's from 21 August 2018 where she wrote "*we don't say no to admissions*" in order to suggest that there was a patient safety issue because patients would not be turned away even if there was not space. When asked about that earlier email in cross-examination Ms Hughes said that Mrs Champion's email very much reflected the Claimant's line on admissions that it should 'not be no, it is how', i.e. emphasising a 'can do' attitude. We accept that evidence about the Claimant's attitude generally, and consider it explains her concern to ensure that many senior people were copied in when in December it reached a point where TPH considered that patients had to be sent away because they could not be safely cared for. However, it does not follow that the Claimant was here raising a patient safety concern because in fact the issue was that

patients were being turned away, thus avoiding the potential patient safety issue.

103. We pause to observe here that in relation to these discussions, patient safety and cost reduction are aligned because bank staff are cheaper than agency staff, so reducing agency staff also reduced cost as well as (generally) increasing patient safety. Further, sending a patient away from the Respondent is not normally a patient safety issue but a commercial issue. It means that patient's custom is lost to the NHS or a private provider. The Claimant's colleagues regarded the Claimant in this instance as raising a commercial or operational concern and we find that objectively that is what it was. All of the above emails read to us as 'business as usual' emails. They are ordinary discussions between colleagues about concerns that have arisen and how to resolve them.
104. On 6 December 2018 the Claimant received a letter of concern from a consultant Dr Harper on 6 December 2018. The letter begins with the observation that clinicians had not been informed about the move of oncology to PGH, but says that the move is not itself an issue, "*but the problem we have got is that we are not able to admit acute emergencies because the beds are full*" (824-826, 830 and 833). He says there need to be overspill arrangements. The Claimant replied stating that he should be able to overspill to THSC if need be, but Dr Harper responded "*It's not working. Please review. 7 hours today and only solved by my putting the patient under a general physician. This is not a role for a consultant and secretary*". The Claimant says she viewed this as a patient safety issue, but she had put in place overspill arrangements and in oral evidence she accepted that it was an operational issue which she had dealt with. She sought to reassure Dr Harper that his concerns would be addressed by copying in Mr Reay, Ms Dodd and Ms Hughes on her reply. Mr Reay regarded the Claimant's communication on this issue as a status update. He and Ms Hughes assumed that there was no patient safety issue because Dr Harper would have taken the necessary steps to ensure that the patient was safe. There were beds available at the Wellington Hospital as Dr Harper acknowledged so Mr Reay did not view it as a patient safety issue. We further find that the Claimant did not believe this at the time to be a patient safety issue. If she did, she would have made more of it at the time.
105. Also on 6 December 2018 the Claimant emailed Ms Hughes and Marcella O'Brien (833) stating that there is "*a list of oncologists now diverting patients away*", identifying the reason for that as being staffing levels at THSC and PGH. She concluded: "*I've purposely stayed out of this. To be honest thought we were making good progress since Miranda's and everyone's excellent efforts a couple of weeks ago. Today I was inundated with complaints again.*" Again, we observe the Claimant's primary concern in this email is loss of patients (and thus revenue) not patient safety. It is also a case here, as elsewhere, of the Claimant passing on concerns rather than raising them herself.

106. Ms Anderson gave evidence to the Tribunal that as Chief Governance and Risk Officer she would have been expected to be asked by Lorraine Hughes and Dr Bucknall to risk assess the move of oncology services to PGH, but she was not told about the move until afterwards. She gave evidence that the move did entail risks to patient safety, in particular as a result of the failure to make arrangements for staff at PGH to be able to access medical notes of patients previously at THSC, for ambulances for out of hours treatments and some other matters. She gave evidence that issues connected to the move had been a contributory factor in one patient death. However, Ms Gillis gave evidence contradicting that. We are in no position (and do not need) to decide whether we prefer Ms Anderson's or Ms Gillis's evidence in this respect. The Respondent's witnesses were also asked in oral evidence about the issue Ms Anderson had raised about medical notes and none of them were aware there had been an issue. They said there were various systems for notes: handwritten bedside notes, Meditech records (onto which paper admission forms are scanned), Mosaic (outpatient records), Aria (radiotherapy) and Eclipse (which 'sits on top' of Aria). The witnesses told us that systems were the same in all hospitals so the move did not result in a change so far as the Respondent's witnesses were aware. In the course of cross-examination of the Respondent's witnesses Ms McColgan QC took them repeatedly to Datixes of patient safety incidents that had occurred at PGH before and after the move. She suggested that after the move these showed numerous problems with staffing at PGH. In the hearing no one took us to the part of the Minutes of the Medical Advisory Committee (MAC) Meeting of 22 October 2018 which do at 726 note that LOC operates on a different system to HCA so that there is a risk arising from that in relation to timely availability of patient records. It may be that this was not referenced by the parties as it did not relate specifically to the consolidation of services as between THSC and PGH.
107. We have taken account of all the evidence that we were presented with regarding patient safety at PGH. Our understanding was that the Claimant wished to demonstrate that there was a poor safety record at PGH and that thus her concerns about the move were reasonable. However, the material we have been shown does not establish this. Although there clearly was an issue with patient notes as a result of LOC and the Respondent operating different systems, this is not a matter which the Claimant has referred to or relied on in her own evidence, so it does not appear to have informed her thinking at the time. The Datix reports do not assist: they are snapshots which are meaningless without an overview and analysis of their significance in the wider context of the hospital. In any event, again, the Claimant was ignorant of them at the time so they cannot have informed her thinking. There were evidently some issues following the move regarding staffing and procedures, but this is to be expected and the issues appear to have been swiftly resolved, with the move being regarded as successful in formal meetings.

Professional Services Agreements

108. On 26 June 2018 Ms Finch emailed all CEOs and CFOs to remind them of the need to have Professional Service Agreements (PSAs) in place before any invoice by a consultant is presented for payment (542). Ms Finch also sent a personal email to the Claimant about this (544). The purpose of these agreements was to ensure that all payments made by the Respondent to consultants were made under and in accordance with a contract. Having such agreements in place was a requirement of anti-bribery legislation in the United States and taken very seriously by the Respondent's US parent company. In September 2018 a number of out of contract invoices for THSC were put on hold, and again in October 2018. The Claimant was notified and asked by Ms Finch what controls had been put in place (682). In November 2018 the Claimant and other CEOs were required to sign a document to say that they undertook to ensure compliance with these policies. The Claimant did this (796).

Dr R

109. Since 2017 there had been complaints about, and counter-complaints by, a particular consultant, Dr R. Dr R had made allegations of racism against staff who had complained about her clinical practices and behaviours.

110. The Respondent has a policy *Corporate Responding to Concerns Regarding a Doctor's Practice Policy* which provides that decisions regarding a Consultant's Practising Privileges at a particular facility will be made by the CEO of that facility in his or her sole and absolute discretion, with advice from a Local Decision Making Group (LDMG) and Corporate Decision Making Group (CDMG). There had been an LDMG in relation to Dr R on 5 December 2017 at which Dr Wyn Davies and the Claimant were present and Dr Davies said Dr R was advised she needed to change her approach.

111. In July 2018 there was a particular incident where Mrs Champion (Chief Nursing Officer) had countermanded a clinical decision made by Dr R at the Urgent Care Centre (UCC) in respect of a patient which was subsequently investigated by Robert Hill (Medical Director at TPH). The Claimant's evidence (consistent with what she said in her meeting with Mr Reay on 11 March 2019) is that Mrs Champion called Dr R a 'liar' in relation to this incident. We have not heard any detailed evidence about this incident and make no findings about it beyond this.

112. The position had been reached where nursing staff were afraid to raise concerns about Dr R. On 24 September 2018 a meeting was held at which staff were given an opportunity by Mrs Champion and Ms Sullivan to raise concerns under "Chatham House rules" on the basis that no individual would be identified. The concerns raised at this meeting included such matters as Dr R 'ranting' and 'belittling' nurses, 'talking the service down' and criticising particular nurses in front of parents of patients. Staff expressed the view that "*if the behaviour continues the team will disintegrate because nurses won't want to keep working there*". The notes of the meeting conclude:



The nurses said they knew they could have complained in writing or through the grievance procedures but didn't want to appear petty, said it was tiring, and ultimately not conducive to a good working relationship. They also expressed a view that if it came down to a consultant or the nurses no one would put the nurses first. They were aware of numerous meetings between their managers and Dr R but that Dr R continued to make complaints rather than work with them, and they felt nothing would improve. They were hopeful that by meeting to express their views things might change. One said "we don't know what else to do".

113. Although the concerns expressed at this meeting may in our judgment properly be classed as 'behavioural' concerns (as distinct from specifically clinical ones), the Claimant in cross-examination accepted that a consultant with behavioural issues can pose a risk to patient safety and that where staff are afraid of speaking to a doctor or raising concerns that poses a clinical risk. A number of the Respondent's witnesses gave similar evidence and we therefore find as a fact that there is no clear distinction to be made between behavioural and clinical concerns so far as patient safety is concerned: behavioural concerns may also impact on patient safety if serious enough.
114. It was suggested by Ms McColgan that the reference to "*petty*" in the paragraph quoted above indicated that the staff recognised their concerns were not serious. However, none of the Respondent's witnesses agreed with her and in our judgment it is clear in context that their concerns were not "*petty*". The meeting was being held under Chatham House rules in the first place because of the seriousness of the concerns, their impact on staff and staff being afraid to raise any individual complaint because Dr R repeatedly complained about them, management appeared to be doing nothing and the nurses felt that management would side with Dr R rather than them. The word "*petty*" is used because of staff fear that they would not be taken seriously rather than because the concerns were not serious.
115. Mrs Champion and Ms Sullivan met with the Claimant shortly afterwards to discuss. Mrs Champion's evidence was that this was an uncomfortable meeting as the Claimant appeared angry that concerns were being raised and indicated that they ought to have managed the nursing staff to stop such concerns being raised. The Claimant asked them to prepare a 'she said, we did' record of events. It appeared to Mrs Champion that the Claimant was taking Dr R's side and had been talking to Dr R as she repeated Dr R's responses to Mrs Champion and Ms Sullivan. When questioned about this at this hearing, the Claimant denied she had reacted like that, saying that she was angered by staffing shortages referred to in Mrs Champion's write-up of the meeting. However, as she was not sent the write-up until 17 October 2018, that cannot be the explanation. In her statement for the disciplinary process (incorporated by reference into her witness statement for these proceedings) the Claimant said that she was aware of Dr R's complaints about staff and considered that she would "*need the clearest evidence I could get to back up anything I would say to her*". We prefer the evidence of Mrs Champion as to the Claimant's attitude at this meeting as she has throughout the internal processes at the Respondent and in this hearing told a consistent story that the Claimant was defensive of Dr R and unwilling to take staff

concerns seriously. It is also consistent with the picture that later emerges of the Claimant not doing very much at all to investigate these concerns.

116. Ms Sullivan's viewpoint, as expressed in the course of Mr Thomas' later investigation into Ms Charmpion's grievance, was that the concerns raised by Mrs Champion and staff at this point about Dr R were predominantly or completely 'behavioural'. She acknowledged that the decision to hold a Chatham House meeting was 'unusual' (1472 – 1473), but said that she did not come out of the meeting considering there were 'massive behavioural concerns'. She said that if that was the case, she would have taken it forward. She said it seemed "*very much around personalities and how things [were] run*".
117. On 11 October 2018 Dr Hill produced his report into the July 2018 incident at the UCC. Under the Respondent's procedures, this had to be sent to the doctor concerned for comment before being finalised.
118. On 17 October 2018 (1033) Claire Champion sent the notes of the Chatham House meeting to the Claimant. The Claimant acknowledged these the same day, saying she had discussed them with Dr Wyn Davies and that she would await the completion of Mr Hill's investigation into the July 2018 incident.
119. On 18 October 2018 there was a Facility Ethics and Compliance Committee Meeting (2372), the minutes of which record an action for the Claimant to meet with Dr R, although it is not clear from the minutes whether this relates to the concerns raised at the Chatham House meeting or not.
120. On 23 October 2018 Mrs Champion sent to the Claimant a table in the 'she said, we did' format the Claimant had requested (1032, 1103). This document begins with a chronological table of complaints and counter-complaints raised by or against Dr R and what had been done about them, beginning with an incident on 7 April 2017. It concludes with a separate table summarising the effect of Dr R's conduct on staff. The tables include reference to Dr R's conduct being cited in a staff resignation letter. Mrs Champion regarded the sending of this document as a formal raising of her concerns. Many of these concerns were explicitly patient safety concerns, and recognised as such when Hayley Marle drew together a formal investigation document on 14 March 2019.
121. The Claimant's position is that she discussed Dr R with Mr Hill and Dr Davies on 29 October 2018 (2511 and 1519). Mr Hill in interview with Mr Thomas as part of the subsequent grievance processes, and in his responses to Dr Bucknall as part of the subsequent disciplinary process on 16 December 2019, said that the discussion on Dr R at this meeting was between Dr Davies and the Claimant as it concerned THSC and Mr Hill had no responsibility for THSC at this point. Dr Davies, however, in his email response to Dr Bucknall of 15 December 2019 did not recall the Claimant raising any concerns about Dr R's conduct at THSC at this point. His understanding was that the concerns related to TPH and were being investigated by Mr Hill. We have cautioned ourselves that Mr Hill and Dr Davies have not given evidence or

been cross-examined, but there is nothing to suggest that either of them had any animus against the Claimant – quite the reverse in the case of Dr Davies who is very supportive in his email – and we find that the documentary evidence from them undermines the Claimant’s case as to what she was doing during this period about the concerns raised by Mrs Champion. Even if the Claimant did mention Mrs Champion’s concerns to them, it is clear that she downplayed it to such an extent that neither of them had any recollection at all of her raising it and she did not convey to them that there was anything serious that needed to be looked into or that an LDMG needed to be convened.

122. On 30 November 2018 Dr R emailed Mr Hill thanking him for his report (2548), and making some comments on it. On 5 December Mr Hill replied and confirmed he would append her comments to the final report. At this point therefore the investigation into the UCC incident was complete (2547).
123. On 7 December 2018 the Claimant met with Hayley Marle and we accept that at this meeting she did mention Mrs Champion’s document. She also agreed with Ms Marle that she would arrange a meeting with Dr R and Mr Hill as this is recorded in the meeting notes (2385). Later that day the Claimant forwarded Mrs Champion’s email of 23 October 2018 to Ms Marle and Mr Hill with a covering note: *“Dear Rob Please see concerns raised below. Please can we discuss before we meet with [Dr R] in the new year.”* The Claimant at the disciplinary hearing suggested that this was a reference to arranging an LDMG meeting under the formal procedure, but the email does not say this.
124. In her subsequent grievance, Mrs Champion says that the Claimant’s PA requested in December 2018 that her documents be re-sent (which Mrs Champion did) and in January 2019 when she spoke to the Claimant the Claimant said that she had not read the documents yet. Mrs Champion maintained this evidence under cross-examination and we accept it as there is no evidence of the Claimant having actually engaged with the detailed content of the document at all. We reach this conclusion without reliance on Ms Sullivan’s investigation interview in May 2019 where she referred to the Claimant having said to her that she felt bad because Mrs Champion had sent her an email about Dr R that she had not read (2185). While it is not unreasonable to infer that Ms Sullivan was in this interview referring to the same email that the Claimant had told Mrs Champion she had not read (as Mr Youngman later did), we accept the Claimant’s point that it is possible Ms Sullivan was referring to a later email and we have therefore not relied on Ms Sullivan’s evidence ourselves.
125. Further, although the Claimant had indicated that she would discuss the concerns with Mr Hill and Dr R in the New Year, in fact she did not attempt to do so. On 14 January 2019 Mr Hill met with the Claimant and discussed three consultants, but not Dr R (1821). On 30 January 2019 Mr Hill had a further meeting with the Claimant at which he (in his email to Dr Bucknall of 16 December 2019) again could not recall any discussion about Dr R. The Claimant has not given us any evidence to contradict this, so we take Mr Hill’s account to be accurate.

126. The Claimant's position is that she was trying to schedule a Local Decision Making Group (LDMG) at which Dr R would also be present, but that scheduling this meeting was difficult and nothing was arranged. There is no evidence before us as to the efforts that were made to arrange a meeting, and the Claimant says this should have been looked into by Mr Youngman or Dr Bucknall as part of the disciplinary process, but we note that in her disciplinary hearing (1853) the Claimant told Dr Bucknall that arranging an LDMG "*wouldn't work*" and her PA asked her (i.e. the Claimant) to contact Dr R. We do have the evidence of what the Claimant did about contacting Dr R, in the form of a text message on 12 February 2019 (2393): "*Hi [Dr R] just tried to ring you. Would you like to meet you to discuss all the issues raised in 84 over the time period of change with TPH. As part of your pp with us, we have to showcase how we have worked together to resolve pathway issues*". This text is, we find, inconsistent with the Claimant's case that she had been trying to arrange an LDMG with Dr R. It makes no reference to any formal procedure, it makes no reference to previous attempts by the PA to contact her and it does not suggest that there has been a complaint raised about her that needs investigating. In the circumstances, we find that no efforts were made by the Claimant up to this point either to arrange an LDMG or to discuss the concerns with Mr Hill or Dr Davies in anything more than the most cursory fashion.
127. The Claimant in her disciplinary hearing sought to suggest that she had around this time taken the Dr R issues to Stuart James, but it is clear from Stuart James' email to Dr Bucknall (1812) that the first he heard of the matter was on 14 March 2019, so we reject the Claimant's evidence on that point too.
128. On 18 February 2019 it was recorded in the Minutes of the Facility Ethics and Compliance Committee meeting (993) that the Claimant was to meet with Dr R, but unlike similar entries for other consultants (where there is in some cases explicit reference to meeting about 'behaviours') there is no indication in the Minutes of what the meeting was about for Dr R.

Feb 2019 onwards: further alleged protected disclosures/concerns

129. The Claimant alleges that on 12 February 2019 she spoke to Mr Reay about the budget cuts the Respondent had imposed on her hospitals and the negative impact it was having on patient safety. She refers in her witness statement to an email she sent that day to Mr Reay (961) which makes no reference to patient safety but only states that the budget was unachievable because more staff were required than budgeted for. Mr Reay does not recall speaking to the Claimant following this. While we accept there may have been a conversation around this time as the Claimant offered to discuss the position and so it is plausible there was a conversation, the fact that Mr Reay does not recall the conversation indicates it was unremarkable. We also do not accept that the Claimant would have explicitly raised patient safety in any such conversation. We accept that it would be implicit in the Claimant's

justification for going over the staffing budget that her position was that additional staff were needed in order to ensure the necessary quality of patient care but we are not persuaded that the Claimant would have suggested that budget cuts were having a negative impact on patient safety as it was her job to ensure that her hospitals were run safely and she had the necessary authority to deploy staff or turn patients away to achieve that. The Claimant's concern here was about meeting budget and the commercial performance of her hospitals.

130. The Claimant alleges that on 14 February 2019 she spoke to Mr Reay and told him that the oncology move was endangering patients. He does not accept that the Claimant raised such concerns with him at any point and we do not accept that she did on this occasion. Her email of this date to Mr Reay, copied to various people including Ms Dodd (975), refers to most of the challenges with the move having been resolved, but that one issue remains which is making it difficult to deliver "*complex RT treatments*" in the Respondent's central London hospitals. She does not state this is a patient safety issue, but that this work delivers "*excellent returns*" and is "*at potential risk of local competitors*". She writes that consultants are keen to have a central London location for this service. She makes a proposal for how this could be done by using a new property the Respondent was contemplating leasing. She concludes her email by harking back to her much earlier Project Lego proposal (where she had proposed consolidating medical oncology services at THSC) and writes: "*Alternatively and as per LEGO, we could scope surgical services into PGH and the move back of Medical to THSC to manage the immediate risk and plan next steps*". Thus does she spell out explicitly that she is angling to bring medical oncology services back to THSC. Moreover, what she alleges she said to Mr Reay on this date is plainly inconsistent with her email of the same date which notes that challenges with the oncology move have been mostly resolved and identifies only ongoing commercial concerns.
131. On 18 February 2019 at the Ethics and Compliance Committee meeting (996) it was recorded that the Respondent was adopting a new Speak Up policy to replace the current whistleblowing policy, with Mr Tim Graveney being appointed as the Freedom to Speak Up Guardian.
132. The Claimant alleged in her claim form that on 12 March 2019 she informed Mr Neeb, Mr Reay and Ms Finch that she did not support the move of oncology services to PGH or the reduction in number of medical and nursing staff at the Respondent's sites but she has not adduced any evidence that she did so.
133. In her witness statement the Claimant alleged that on 17 April 2019 she met with Mr Reay and 'raised her opposition to the Respondent's Management Team's decision to move the medical oncology service from THSC to PGH'. Given that this move happened six months' previously and the position by this point was that the Claimant was angling to get the services moved back again, we do not accept that she had any such conversation on 17 April. What was happening around this time was that it had been noted that revenue

figures for oncology at PGH were falling (1241) and Ms Dodd was looking into that to see if revenue had moved to another site or been lost altogether. Mr Reay's email of 9 April 2019 shows that he wanted the reasons for this considered. He indicates he is open to considering moving the service back to THSC, among other options. He suggested speaking to consultants at LOC (1240), which the Claimant indicated by email of 18 April she was doing.

134. On 18 April 2019 the Claimant wrote to Ms Dodd and Mr Reay (1239-1241) to inform them that one medical practitioner she had spoken to had "*patient safety issues*" within medical oncology at PGH, and another had raised concerns about nursing cover and nurse leadership. She said that she had also been told that staff were looking to leave and that patient feedback was "*very negative ... all related to lack of nursing care, RMO and nurse leadership*". The Claimant then forwarded her email to Mr Reay. Mr Reay did not deal with this email in his witness statement and was not questioned on it by Ms McColgan. In answer to a question from the Judge, he said that they were looking into the reasons for the decline in work. He viewed the Claimant's email as part of her developing her case for the return of medical oncology services to THSC. Ms Dodd considered that the issues raised by the Claimant were operational rather than patient safety issues.
135. On 24 April 2019 a Consultant Clinical Oncologist (Mary MacCormack) also reported to the Claimant her concerns about services at PGH. We infer that these concerns were reported in the context of the Claimant having made it known to the consultant team that she wanted feedback on the PGH services. The Claimant made a note of the concerns in an email to herself (1260), then forwarded them to Ms Dodd. She also emailed Ms McCormack (1269), copying in Ms Dodd and then forwarding it to Mr Reay. The Claimant then texted Mr Reay to let him know about what she described as "*the patient safety concern*" (1228-9). Ms Dodd felt that the Claimant was trying to collect ammunition for moving the oncology services back to THSC and that is the inference we draw too. Given that the email of 18 April and the text of 24 April are the only written communications in the whole case where the Claimant actually uses the words "*patient safety*" (despite alleging that she made multiple disclosures about patient safety), and both of these come within days of the first indication from Mr Reay that he is open to considering the Claimant's long-preferred option of consolidating oncology services at THSC, we find that the Claimant was trying to build a case for that. In so saying, we are not doubting the genuineness of the concerns raised by consultants, but we agree with Ms Dodd that the Claimant makes more of them than is warranted, and that she does this with a view to securing the return of what Ms Dodd described in her statement as "*a reasonably profitable unit*" to the Claimant's THSC budget.

Feb-Mar 2019: Mrs Champion's grievance

136. On 21 January 2019 Cornelia Hunter raised with Mrs Champion certain further concerns regarding Dr R. Between 24 January and 18 February 2019 Mrs Champion was on annual leave. On 26 February 2019 Mrs Champion

emailed the Claimant to find out what she had done with the concerns Mrs Champion previously raised in October 2018 following the Chatham House staff meeting and in the 'she said, we did' document sent on 23 October 2018. Mrs Champion also referred in her email to additional, explicitly clinical, concerns about Dr R which had been raised by Ms Hunter on 21 January, and also a further incident which had occurred "*yesterday*".

137. Mrs Champion met with the Claimant on 28 February 2019 for a 1-2-1. Mrs Champion's grievance of 10 March 2019 states that in this meeting the Claimant told her that she had met Dr R informally and appeared defensive of Dr R and dismissive of concerns (1055). The Claimant did not deal with this meeting in her witness statement, but referred to the statement she prepared for her disciplinary hearing in which this was dealt with (1795). There, she says that Mrs Champion spoke to her about the new clinical concerns and that she (the Claimant) expressed concern that Mrs Champion had delayed in raising those with her and asked if the concerns had been Datixed which she said they had not. Her account of the meeting given orally in the grievance investigation meeting on 28 March 2019 is quite different, focusing on what she perceived as being the unexpected extent of Mrs Champion's upset, and on the absence of Datixes for the incidents Mrs Champion was referring to. We prefer Mrs Champion's account of this meeting as it was set out relatively soon after the meeting and it has been consistent throughout. The Claimant's supposed expression of concern about Mrs Champion having delayed also rings somewhat hollow given that Mrs Champion had been on annual leave, and one of the three incidents had been raised by her within 24 hours.
138. Mrs Champion spoke to Ms Hughes after the 28 February meeting and told her that it was a difficult conversation, and that the Claimant had not been receptive to the previous concerns she raised. In oral evidence, Ms Hughes told us that she would have expected Mrs Champion to escalate to her a matter as apparently serious as the Chatham House meeting and concerns raised by 'distressed staff' much sooner than she did, but Mrs Champion told us that she was following a process and expecting the Claimant to deal with it, and it was only when she did not appear to be doing so that she raised it with Ms Hughes.
139. On 4 March 2019 Mrs Champion says that the Claimant came into Mrs Champion's office between meetings. She said that she had seen Dr R at the Family Fun Day at Chiswick at the weekend. She said that she thought people were treating Dr R badly, and that staff were colluding against her. She repeated some of Dr R's complaints about staff and then said that she considered it was a personal problem between Mrs Champion and Dr R and that they ought to 'sort it out' (1057). For Mrs Champion, what the Claimant said at this meeting 'crossed the line'. In her subsequent grievance she wrote that she was "*not only astounded but really offended about this statement and completely refuted this*". The Claimant in cross-examination denied saying much of this, but she did refer in her answer to the July 2018 incident as being, in her eyes, an incident where Mrs Champion had possibly done wrong and faced investigation, suggesting that it was her view that Mrs

Champion was at least in part raising complaints about Dr R in retaliation. Further, in her own statement for the disciplinary hearing, she explained that she warned Mrs Champion not to get “*personally involved*” and to “*rise above personal circumstances*”. In the circumstances, we again prefer Mrs Champion’s version of events. The aspect of the meeting that Mrs Champion felt ‘crossed the line’ (i.e. the Claimant saying that multiple serious concerns about Dr R – concerns that ultimately led to her practicing privileges in the Respondent’s hospitals being suspended – was a ‘personal issue’) is in any event essentially corroborated by the Claimant.

140. On Thursday 7 March 2019 Claire Champion met with Lorraine Hughes and discussed her concerns about the Claimant’s handling of the complaints about Dr R, as a result of which Ms Hughes called in Ms Gillis. Ms Hughes and Ms Gillis gave evidence that at the meeting Mrs Champion was visibly upset and Ms Gillis said that she was crying. Ms Gillis urged her to take time over the weekend to consider what to do and offered to call her a taxi. Mrs Champion did not recall crying, although she accepted she was ‘a bit emotional’. She said that she had not been feeling well with a chest infection and that might be why Ms Gillis had called a taxi. She said that she had not wanted to raise a grievance, but that Ms Gillis explained that the way the Respondent would deal with it would be to investigate Dr R, and to deal separately with Mrs Champion’s concerns over the Claimant’s handling of the allegations against Dr R. Ms Gillis explained that there were formal and informal options. Mrs Champion said that she had already raised it informally so many times that she felt she had exhausted that option. Ms Gillis suggested that she might wish to think about it over the weekend, to which Mrs Champion agreed.
141. It was submitted by the Claimant that the discrepancy between Mrs Champion’s account of her emotional state at this meeting and Ms Hughes/Ms Gillis’ account indicated that Ms Hughes/Ms Gillis’s accounts were unreliable and part of an attempt by the Respondent to ‘manufacture’ a grievance by Mrs Champion. That is not the case as we see it. There is in reality only a difference in emphasis and perspective about Mrs Champion’s state in this meeting. It is clear that Mrs Champion was in general terms upset as the terms of her subsequent written grievance make clear, and she accepts she was not well, and in combination in our judgment all three witnesses are giving honest accounts of this meeting. There is no evidence that Ms Gillis sought to persuade Mrs Champion to put in a formal grievance. None of the witnesses who were actually present and involved suggest that. Further, the fact that Mrs Champion was given the weekend to think about it and then contacted Ms Gillis, rather than the other way round, makes clear that it was Mrs Champion acting freely at this point, without pressure from Ms Gillis.
142. Following the meeting on 7 March Ms Hughes and Ms Gillis went to speak to Mr Reay about what had happened. Ms Gillis did not mention this in her statement because she had overlooked it but Mr Reay deals with it in his. This was the first he heard of the grievance.



143. Mrs Champion texted Ms Gillis on 8 March asking for a quick chat and she called her. In accordance with her customary practice where an employee is unsure how to proceed, Ms Gillis suggested that she write down her concerns to get her own thoughts in order. She reassured her that any concerns raised would be taken seriously.
144. On Sunday 10 March 2019 Mrs Champion texted Ms Gillis again and they spoke and Mrs Champion confirmed she felt she had no option but to raise a formal grievance. Mrs Champion was so emotional and concerned about raising a grievance that Ms Gillis advised her to take paid leave while the grievance was investigated. Mrs Champion's grievance concluded: *"Sadly I feel that having needed to escalate my concerns about [Dr R] and the way Aida has responded to them will seriously compromise my relationship with Aida, who of course is my direct line manager. I am very sorry to be in this position because as I began by saying, Aida leads some great work and in the main I have enjoyed working with her, but her sustained response to this issue and the undermining of my professional credibility and integrity, as well as that of a team I respect, has led to a serious breach of trust and confidence in our relationship on my side, and I find it untenable to continue working under these conditions and while this is not resolved."*
145. When submitting the grievance, Mrs Champion asked Ms Gillis for reassurances as to process and support and Ms Gillis gave that assurance in her reply email. She also confirmed the leave of absence. Mrs Champion explains that this was not sick leave and she was clear that she did not need to take sick leave but she agreed that it would be very awkward for her to be in work while the grievance was investigated and was grateful to the Respondent for arranging paid leave for her.
146. Mrs Champion in her witness statement for these proceedings suggested that she did not want to raise a grievance, and was concerned it could be used against the Claimant because of what she recognised as her bad relationship with Mr Reay. However, in oral evidence she confirmed, as she had done when interviewed by Mr Youngman, that although she did not use the label 'grievance' herself, she did choose to pursue the formal option and was 'comfortable' with the action she took. In oral evidence Mrs Champion accepted that her letter met the definition of 'grievance' in the Respondent's policies. She also accepted that although she herself did not use the word 'bullying', what she had described, in particular being 'undermined' by the Claimant fitted the definition of 'bullying' in the Respondent's policy. We accept that Mrs Champion's oral evidence represented the true position.
147. On Monday 11 March 2019 Ms Gillis and Mr Reay met with Claimant regarding Claire Champion's grievance. The Claimant secretly recorded this meeting, having been advised by a friend to do so (1060-1068). At the meeting, the Claimant expressed surprise at Mrs Champion being off and also having raised a grievance. She agreed with Mr Reay when he said that Dr R was *"not an easy lady"* and referred to her having threatened to sue the Respondent previously. The Claimant then recounted in general terms the history of allegations and counter-allegations. She indicated that her view

until her recent 1:1 with Mrs Champion had been that the issues with Dr R were behavioural concerns, not safety concerns, and that she had asked Mrs Champion 'where are the safety issues'. She referred to Mrs Champion having called Dr R a 'liar' and had suggested that Mrs Champion and Dr R meet with her and try to resolve issues as it should be 'a personal thing'. Mrs Champion's paid leave was discussed and the Claimant said that she really could not do without a CNO, and was 'really going to struggle' but she did not disagree with Ms Gillis' decision. Ms Gillis then explained Mrs Champion's grievance in outline to the Claimant and the Claimant's initial reaction was that the grievance was against Dr R not her. She said that she had been following policy on consultant concerns 'to the last letter' and that *"the issues that were raised in October of last year were all personal issues"*.

148. The Claimant emailed after the meeting on 11 March 2019 (1083-1086) expressing sadness at the position with Mrs Champion, but reiterating that this will put a lot of pressure on her team, especially in advance of the CQC inspection. She wrote: *"We are preparing for TPH CQC and the CNO role is integral to this"*. Mr Reay's understanding of the Claimant's point here was that she was saying it would add to her own workload and risk the Respondent's reputation because the Hospital might not get an 'Outstanding' with CQC rather than compromise patient safety as there was adequate clinical cover. None of the Respondent's witnesses accepted that the absence of a CNO created a patient safety issue. That included Mrs Champion herself. There was no dispute that there had been no one in the CNO role for six months before Mrs Champion joined.
149. The Claimant also asked for a copy of the grievance. Ms Gillis refused to give the Claimant a copy of Mrs Champion's grievance as she said she was 'scoping it out' and seeking someone to investigate (1086). She said that she would look at senior nursing support for the Claimant in Mrs Champion's absence.
150. On 12 March 2019 the Claimant met with Dr Davies and discussed the clinical concerns about Dr R that Mrs Champion had 'brought to her attention on 28 February' and she informed relevant persons that she was going to let Dr R know that she would begin a formal investigation into the clinical concerns raised (1098). Her email states *"We have discussed the behaviour concerns previously in 2018"*. Mrs Champion was copied in and replied to Ms Hughes and Ms Gillis alone with the observation, *"Flippin cheek saying brought to my attention on 28<sup>th</sup> Feb!"*
151. The Claimant then by further email (not copied to Ms Gillis) requested to meet with Mr Reay 1-2-1 about the grievance, writing *"Please can we meet and discuss this issue one to one. I am concerned about the way in which this issue has been handled and the risk it places [us] as an organisation"* (1085). The Claimant and Mr Reay then met on 13 March, which meeting the Claimant again secretly recorded (1069-1080).
152. At the meeting itself Mr Reay was sympathetic, expressing concern for her situation and long working hours, identifying things she had done well

(including getting on top of the finances), making suggestions for the future, saying she needs 'a stronger SMT ultimately'. He referred to the importance of working together, and said: *"Not do a Sarah Fisher and just shut down. What she effectively did was talk to no one, do no one, just try and leave the old model and that's why she had the near break down at the end. It's just a case of she wouldn't .. and she was sick, so it wasn't a good time for her anyway"*. Regarding Mrs Champion, he said at the start of the meeting 'forget Claire Champion' and later in the meeting was critical about her performance on an executive development programme. In the course of the meeting, Mr Reay does express the view that *"Branny and Ray have to go around the block several more times before they can be any more senior"*. The Claimant did not in this meeting raise any patient safety concerns about Mrs Champion's absence. She raised concerns about her own long working hours, and also about Sarah Wheatman being overstretched. The discussion is long and full, and apparently very equal, with both of them offering advice to the other. We observe that the Claimant's request to have this meeting with Mr Reay is inconsistent with her case that she believed he was trying to 'get her out' of the organisation, and the content of the meeting does not at all suggest that this what Mr Reay is trying to do. He is supportive of the Claimant, if anything in general terms 'siding' with her against Mrs Champion (albeit not specifically in relation to the grievance) and the discussion appears to be that of two colleagues working well together.

153. Ms Hughes and Ms Gillis met with a member of the recruitment department on 13 March 2019 about recruiting cover for Mrs Champion.
154. On 14 March 2019 the Claimant and Ms Sullivan met with Dr R for the first time since the allegations had been raised in September 2018. Ms Marle then produced a formal report (1120). The report states in it that she was asked by the Claimant to prepare it on 14 March 2019. It makes no reference to the Claimant having asked Ms Marle about these matters previously. The report explicitly labels many of the concerns as clinical *"patient safety"* concerns. Around this time, responsibility for investigating Dr R moved to Dr Bucknall as Chief Medical Officer and he appointed an independent investigator to deal with the matter.
155. Around this time the Claimant met with Dr Bucknall and he advised her to get 'lawyered up'. Dr Bucknall accepted that he uses this term whenever there are grievances or complaints about senior individuals. He said, and we accept, that he gives the same advice to clinicians and consultants in similar circumstances. We were satisfied from his responses in oral evidence that this is the sort of thing that Dr Bucknall usually says in such situations.
156. Andrew Coombes (Group Commercial Director) was appointed, with support from Andrew Thomas (Head of Employee Relations) to investigate Mrs Champion's grievance.
157. On 18 March 2019 Mr Hill met with Sarah Wheatland and had an extensive discussion with her about Dr R (1822).

158. On 19 March 2019 Mr Thomas and Mr Coombes contacted those they wished to interview as part of the grievance investigation. Mr Topalovic telephoned Mr Thomas to say that he did not wish to be interviewed as he had just had the appraisal meeting with the Claimant and Ms Sullivan about which he subsequently raised his own grievance (with which we deal below) and he was too 'concerned for his position' (2194).
159. On 25 March 2019 (1159) the Claimant informed staff that Mrs Champion would be absent and that her two deputies would be stepping up into Mrs Champion's role. On 29 March 2019 Ms Hughes also confirmed that Elaine Strachan Hall would also be providing support while the Claimant was due to be away. Ms Sullivan and Ms Hughes (who was previously CNO for THSC) were also available to support.
160. On 28 March 2019 Mr Thomas and Mr Coombs met with the Claimant to discuss Mrs Champion's grievance (1168). The Claimant secretly recorded this meeting. The Claimant had still not been given a copy of the grievance, but she was told more about it and answered questions at length about the actions she said she had taken subsequent to Mrs Champion raising her concerns in October 2018.
161. On 10 April 2019 (1236, 1233) Ms Hughes suggested that Morag now act up as CNO. The Claimant was slightly resistant to this because of concerns about Morag's capacity, but made suggestions as to how this could potentially be made to work (1232).
162. On 18 April 2019 (1230, 1253, 1255) the Claimant contacted Ms Gillis regarding her concern about the ongoing absence of the CNO, writing that they *"are really [battling] without a CNO and are in needs of hands on support"*. Ms Gillis provided interim CNO CVs for the Claimant to consider. The Claimant responded after the weekend indicating they seemed experienced, but flagging the cost.
163. On 23 April 2019 the Claimant emailed Mr Thomas and Mr Coombs (and forwarded to Ms Gillis) (1251) suggesting that Mr Thomas had a 'conflict of interest' because he was also investigating the concerns in relation to the Claimant's mother (as to which, see below) as well as the grievance against the Claimant and reported to her in his capacity as CHRO for LOC. She pointed out that under the grievance policy her line manager should hear the grievance (i.e. Mr Reay). She asked again for a copy of Mrs Champion's grievance. She complained that she had *"been without a CNO for 4 weeks and this continues to place unnecessary pressure on myself and my team and in my view compromises my responsibility as registered manager with CQC"*.
164. On 30 April 2019 the Claimant texted Mr Reay (1299) thanking him for *"the chat"* and saying *"I'm sure between us we can find a solution. Really need the clinical support. A"*.

165. The Claimant then wanted to speak to Mr Reay and Ms Gillis again about her concerns about Mrs Champion's grievance and continuing absence and so she requested a meeting which took place on 2 May 2019. The Claimant secretly recorded this meeting. It is apparent from the transcript that the Claimant's principal concern was about the length of time that the grievance was taking, and that she had not been provided with a copy of it. The Claimant expressed the view (1309) that the grievance was very simple and it should not be taking so long to investigate it because so far as she was concerned she had given all the information on the first day that the grievance was raised with her. Ms Gillis indicated that two more grievances had been received in relation to the Claimant, and one in relation to Mr O'Meara as well. She explained that she was unable to give details as they had only just come in. The discussion then is more focused on the Claimant's concern that someone else might 'blow the whistle' by going to CQC and the effect that would have on the Hospital's reputation (1306 and 1310), although at 1309 the Claimant does say "*There doesn't seem to have been any consideration taken to the fact we have agreed for a chief nursing officer to be off while we do a very in depth complicated investigation of something that is really quite simple. It's bizarre to me. Over such a long period of time in my opinion it compromises patient safety more having the CNO off than doing this investigation or even the behaviour about the consultant*". Later in the transcript (1325) the Claimant refers to staff (including herself) working 60 hour weeks, but this is not phrased in a way to suggest that Mrs Champion's absence is the cause of that, it is referred to as if it is the (undesired) 'norm', albeit that she indicates she used Mrs Champion's absence as a reason for refusing a time off request from Ms Sullivan.
166. Ms Gillis did not understand the Claimant at this meeting to be raising a health and safety concern about Mrs Champion's absence, and nor did Mr Reay. They understood the Claimant's concern to be about impact on workload of her and other staff and ability to prepare for CQC. They considered that Mrs Champion's absence was being appropriately covered by Deputies and arrangements being made for longer-term cover. Ms Gillis also told us, and we accept as it is common practice, that all senior staff have opted out of the working time regulations and that it is not unusual for the Respondent's staff to work 60 hour weeks. We find that that the Claimant's reference to 'patient safety' at this meeting was deployed to enhance her argument that preparation for the CQC inspection was compromised in a way that might affect the Respondent's ability to retain its Outstanding rating, rather than in a way that might be relevant to patient safety. The Claimant also deployed the words 'patient safety' in order to put pressure on Ms Gillis and Mr Reay regarding the progress and handling of the grievance. We find that the Claimant cannot really have been concerned about patient safety because of Mrs Champion's absence given that there was no one in the role for 6 months before Mrs Champion joined, nursing cover for patients was not reduced as a result of her absence and the Claimant had not 'jumped' at the suggestion of getting Morag to act up, but wished to explore other options and even cavilled somewhat at the cost of the alternative options. If it was really a patient safety issue everyone, including the Claimant, would have moved more swiftly to appoint a replacement for Mrs Champion. The Claimant's

follow-up email to this meeting (of 4 May 2019: 1343) reinforces this impression as it focuses on the failure to share the grievance documents (which the Claimant asserts is contrary to the principles of the HCA Code of Conduct in relation to transparency and fairness), but says nothing about patient safety or the absence of Mrs Champion.

167. On 2 May 2019 there was further email discussion about cover for the CNO role (1338) as there was another possible candidate. By 10 May 2019 a candidate was found (1367). The Claimant, Ms Hughes and Ms Sullivan all agreed the candidate, with the discussion being reflected in this email chain.
168. On 9 May 2019 Ms Hughes met with Sarah Findlay to discuss the Dr R allegations. At that stage, it was expected that the investigation could take three to six months *“but hopefully quicker than that”* (2060). It was suggested by Ms McColgan that this indicated that the initial delay by the Claimant in dealing with the matter was not unreasonable, but we observe that the Claimant had taken four-and-a-half months (from October 2019 to 14 March 2019) to arrange even an initial meeting with Dr R and had only done that after Mrs Champion raised a grievance about her handling of the matter. Three to six months (or hopefully quicker) to complete the whole investigation is a much shorter timeframe.
169. The Claimant alleged in her witness statement that she informed Lorraine Hughes on 13 May 2019 of her concern that the interim CNO posed a threat to staff and patient safety. However, the new CNO had not started at that point. We find that the conversation took place on 16 May as that was the day that the new interim CEO started. The Claimant recalled speaking to Ms Hughes. She said that at the end of the corporate meeting they discussed the new CNO and the Claimant expressed concerns that she did not have the knowledge and experience required. The Claimant said that Ms Hughes told her not to be so critical. Ms Hughes denies that the Claimant raised concerns about her skills or experience, she said that the Claimant complained that the new CNO had decided not to attend the TPH AGM on the evening of her first day at work and that she had been wearing trainers. The Claimant’s email of 17 May to Ms Hughes echoes this complaint stating *“We had TPH AGM last night and we were hoping [the new CNO] could join us. Clare informed me before the meeting that she declined attending and headed to the hotel. Thought to keep you informed”* (1401). In the light of the Claimant’s email, we accept Ms Hughes’ account of their conversation, which is consistent with that. It is apparent that the Claimant had taken against the new CNO, but it is not because of her skills and experience. Were that the case, the Claimant could only have been expressing views based on her CV as she had done no work as yet and if the view was based on her CV it would have been raised earlier by the Claimant and in writing in the email chain in which candidates were discussed.
170. On 29 July 2019 Mr Thomas and Mr Coombes completed their investigation into Claire Champion’s grievance. The grievance outcome letter was a long and detailed document, the relevant conclusions from which were that the Claimant had not made any reasonable effort to deal with Mrs Champion’s

concerns, no specific actions had been taken, that there was cause for concern as to why senior management appeared to be reluctant to deal with/take action on the concerns raised relating to Dr R and that the Claimant's failure to take action in relation to the concerns was cause for concern too.

171. We pause the story of Mrs Champion's grievance at this point to set out the background to the second issue for which the Respondent ultimately says it dismissed the Claimant.

Feb 2019: Disciplinary proceedings against the Claimant's mother

172. The Claimant's mother had worked for the Respondent for about 10 years, based at the Chiswick Outpatient Centre, latterly as a Lead Patient Administration Officer. Chiswick was one of the sites for which the Claimant was responsible. Her line manager was Mr O'Meara, who was (as already noted) a family friend of the Claimant and her mother.

173. The Claimant in these proceedings has relied on the notes of investigation meetings in her mother's subsequent disciplinary meetings with Lucy Barnard (HR) and Mandeep Takhar. These documents were not provided to Mr Youngman or Dr Bucknall when they were considering the Claimant's own case later. However, these show that Ms Takhar and Juchi (former Patient Admin) had in November 2018 complained about racist and homophobic comments by the Claimant's mother. These were reported to Ms Barnard, but they asked her to keep them confidential. She advised both employees to contact the Ethics Line. Ms Barnard moved roles on 19 November 2018, moving away from Chiswick. The notes of her interview indicate that she spoke with Ms Barker a couple of times in the two weeks after she left Chiswick and in one of those conversations she mentioned to her that "*some of the above comments had been made in order to try help her handle the situation during the changes*". We infer from the way the notes are phrased that as she had been asked by staff to keep the matters confidential, she did not 'name names' to Ms Barker.

174. From December 2018 Mr Topalovic was asked by the Claimant to take over as executive in charge of Chiswick as it was underperforming, and he was given a 10% salary rise for taking on these additional duties.

175. At that time the Claimant's mother was concerned about the performance of a member of staff called Juchi who was then on probation. The Claimant called Mr Topalovic and asked him to look into it. Mr Topalovic and Ms Barker met with Juchi and her line manager (Ms Barnard) and decided that there were no concerns about Juchi's performance and communicated this to the Claimant. It was suggested to Mr Youngman in cross-examination by Ms McColgan that Mr Topalovic at Chiswick was only responsible for the clinical side and had only one direct report, it being suggested that this was one reason why the Claimant was rightly suspicious of the investigation initiated at Chiswick by Mr Topalovic regarding the Claimant's mother. However, the

Claimant gave no evidence to this effect in these proceedings, and we note that this incident regarding the performance of Juchi makes clear that the Claimant herself at the time saw Mr Topalovic's role as extending to matters of employee relations and performance management (in conjunction with line managers and HR).

176. When Mr Topalovic started at Chiswick he began to hear complaints about the Claimant's mother from staff, including that she had made comments about his sexuality in front of staff. He tried to raise his concerns with the Claimant but found her defensive, and felt that she responded "*as a daughter rather than ... [a] CEO*" (2145). We find it would be reasonable to accept Mr Topalovic's account in this respect because it explains why it was that the Claimant very quickly came to suspect on 12/13 February 2019 (see below) that what HR was doing in Chiswick had something to do with her mother. Had she not previously heard anything about allegations concerning her mother, we cannot see how she would have guessed this. Mr Topalovic's account of the Claimant's reaction to his raising this with her is also consistent with the accounts of others interviewed in the course of Mr Youngman's later investigation (including Mr Topalovic, Ms Barker, Mrs Champion, Mr Thomas, Mr Graveney) that the Claimant was very defensive about her mother.
177. Around this time Simon Platt was taking over responsibility for HR at Chiswick. On 10 December 2018 he visited Chiswick to introduce himself to staff. The Claimant has been very concerned to establish that at this point Mr Platt was himself already aware of complaints about the Claimant's mother. There is a conflict of evidence on this between the account of Mr Topalovic (2144), who says that he shared these concerns with Mr Platt before his first visit to Chiswick and Mr Platt (1818) who said he was not aware of them. We have not heard oral evidence from either of them, or from Ms Barker, and we do not need to resolve this particular dispute to determine the issues in the case before us. What is clear is that, whether or not Mr Platt had been told about concerns about the Claimant's mother before attending Chiswick on 10 December 2018, staff did during that visit raise concerns directly with him about the Claimant's mother. Mr Platt in his account states that during this visit he met with the Patient Admin Officers (Mandee Takhar, Lee Elford and Samuel Orié) in order to better understand their roles and team structure. During those meetings both Mandee and Lee expressed concerns about the Claimant's mother. He discussed this with Ms Barker and she advised him to arrange further 'drop-in sessions', which he did on 6 and 11 February 2019.
178. During these drop-in sessions employees raised further concerns about the Claimant's mother, including allegations about her making racist and homophobic comments, and of the Claimant's mother inappropriately invoking the Claimant's name as 'protection' against staff complaints. Some of those complaints were the same as those which had first been mentioned back in November 2019, but some were new. Allegations were made by several different members of staff and several incidents had more than one witness. We do not need to record here precisely what the allegations were, and we do not know ultimately precisely which ones were upheld by the Respondent. It suffices to record that the allegations we have seen of



comments that were made were sufficiently serious as to require full investigation. The alleged remarks were overtly racist and homophobic and included inappropriate invoking by the Claimant's mother of the 'protection' of the Claimant. Such documentary evidence as we have from Mr Platt (including his private text messages to Ms Barker – see below) satisfies us that employees raised concerns without being prompted.

179. Late afternoon on Monday 11 February 2019 Mr O'Meara emailed Mr Topalovic (958) noting that HR had been in Chiswick at Mr Topalovic's request. Emphasising that he was the Claimant's mother's line manager, he asked what the purpose of the visit was. Mr Topalovic responded, not entirely truthfully, that a number of employees had requested a visit from Simon and that employees had contacted him directly. The Claimant then forwarded this on to Ms Barker (959) giving instructions that Mr Topalovic must discuss all matters relating to team members with their line managers and emphasising reporting lines and asking Ms Barker to discuss it with her tomorrow. At 9pm that day, the Claimant also asked for an update from Ms Barker regarding staffing at Chiswick (963). The Claimant's emails were ostensibly in the form of routine enquiries, but Mr Topalovic perceived them as being in direct response to the Claimant learning about HR's activities at Chiswick, and we find that to be a reasonable inference because on her own account the Claimant had by 12 February 2019 guessed that what was happening at Chiswick might concern her mother (1785).
180. The fact that Mr O'Meara was aware of the drop-in sessions came to Ms Barker's attention. Ms Barker texted Mr Platt on 11 February to ask for his feedback on the visits urgently by 8am the next day. He responded that he could not write up 10 interviews over night. He added "*Nahid is panicking, the feedback is actually very concerning, this was provided without prompting.*" He then provided 'highlights' of the allegations, noting "*I'm really not comfortable I've had to do this, so will cover myself with detailed notes. I trust I have your support and backing when this becomes messy?*". Ms Barker replies: "*Yes [of] course you have my backing. We will keep this p&c and anonymise names. If we ignore [situations] like this we would not be doing our job. Thanks for your help. Will catch up tomorrow.*"
181. On 12 or 13 February 2019 (there is a dispute about the date which does not matter) the Claimant met with Ms Barker and Mr Topalovic after an Executive meeting and asked them what HR was doing in Chiswick. The Claimant's position, as set out in her statement prepared for her disciplinary hearing (1785) is that at this meeting Ms Barker and Mr Topalovic did not tell her that the concerns at Chiswick related to her mother, but she did ask Ms Barker and Mr Topalovic what HR was doing at Chiswick and although Ms Barker initially denied any knowledge, she did then say that Mr Platt had texted her to say that there were confidential concerns. The Claimant thought that the concerns probably related to her mother and so she said that they should speak to Mr O'Meara about them as the Claimant's mother's line manager. Ms Barker in her documents and investigation interviews (1361) states that at this meeting, in answer to the Claimant's questions, she did say that allegations had been made against the Claimant's mother and that the

Claimant asked for copies of statements which Ms Barker refused to provide, citing the conflict of interest. Mr Topalovic's account (2146) is that the atmosphere in this meeting was immediately hostile, that the Claimant asked why Mr Platt was visiting Chiswick and that it should have been discussed with her first before any action was taken. He does not say that the Claimant was told the allegations concerned her mother at this point or that she asked for statements, but the tenor of his evidence is that he was under the impression from the Claimant's previous emails that she knew it was about her mother. Given that Mr Topalovic's account does not include the same detail as Ms Barker's about Ms Barker having told the Claimant that the allegations concerned her mother, we do not find that the Claimant was explicitly told at this meeting that allegations had been made concerning her mother, but we do find that the Claimant had deduced this was the case. The Claimant's emphasis in her own account on Ms Barker speaking to her mother's line manager, echoes her previous instructions for Mr Topalovic to communicate with line managers when she first heard about what was happening in Chiswick on 11 February. This confirms (in our view) that she had already made the connection with her mother (even if she was not certain of it).

182. On 15 February 2019 the Claimant's mother was formally told of the allegations by Mr O'Meara (1785) and she told the Claimant about them. Mr O'Meara also told the Claimant about the allegations (2189), despite having been advised by Ms Barker to keep matters confidential. (Mr Youngman considered this was a breach of confidentiality as he had been told not to do this by Ms Barker.) In the course of Mr Youngman's later investigation, Ms Barker alleged she had had (1361) a conversation with Mr O'Meara in which he made clear that he was a friend of the Claimant's family and would 'fight this until the end'. We make no finding of fact as to whether this or any other allegation of this sort against Mr O'Meara is true because they were not investigated by the Respondent, or raised with Mr O'Meara and his evidence in these proceedings did not cover them. What is relevant to the case before us is that the allegations were made. The Claimant's statement for the disciplinary hearing says that what Mr O'Meara did from this point on to help and support her mother he did on his own initiative and not under her instructions or at her request, but this was not how it was perceived by Ms Barker, Mr Topalovic, Mr Thomas, Mr Youngman, Ms Gillis and others, and we find their perception to be reasonable. They considered that Mr O'Meara tended to talk about the allegations and the investigation in similar terms to the Claimant (for example emphasising his position as the Claimant's mother's line manager, suggesting that employees had been colluding and adopting a 'fighting' attitude). Again, we do not need to resolve what the position was as a matter of fact; what matters for this case is how the position appeared to the relevant Respondent decision-makers (Mr Reay, Ms Gillis, Mr Youngman and Dr Bucknall) on the basis of the material before them, and whether that was reasonable. In this fact-finding section of our judgment, we therefore record (so far as relevant) what that material was. As will be seen, on all material points there was evidence from which they could reasonably reach the conclusions they did.

183. On 17 February 2019 the Claimant sent an email to Ms Barker and Mr O'Meara, copying in Ms Sullivan. She raised concerns about the accusations of homophobia and racism against her mother, and stated that *"correct HR processes do not seem to have been followed"*. She asked how this would impact her as CEO and registered manager. She asked to meet Michelle Barker and Enda O'Meara the next morning (1001). In oral evidence Dr Bucknall said that if the Claimant did have concerns about the process, she should have taken those concerns much higher up the chain of command and not directly challenged those involved in the process about it because of her conflict of interest. It was then put to Dr Bucknall in cross-examination that the Claimant did not at this point know that Ms Barker was involved in the HR investigation, as if to suggest that she was when she sent this email 'going above' the level of the employees directly involved as Dr Bucknall said she should have done. However, this suggestion is inconsistent with the Claimant's own statement to the disciplinary (1787) that the reason why she sent this email was her concern that *"BT and MB [i.e. Ms Barker] were not following HR procedures or complying with my instructions in this regard"*. We take this to be a reference to her instructions of 11 February 2019 to Ms Barker to ensure that Mr Topalovic is respecting line management responsibility. Further, we find that the Claimant was obviously aware that Ms Barker was 'involved' because even on the Claimant's own account Ms Barker had on 12 or 13 February 2019 told the Claimant that she had received a text from Mr Platt about confidential concerns, which the Claimant guessed were about her mother. The Claimant was not therefore going 'above' the individuals involved, but writing directly to one of the people in HR who she understood to be dealing with the matter and who she considered was not acting appropriately.
184. Early on 18 February 2019 (998) Ms Barker emailed Mr O'Meara, copying in the Claimant, with answers to questions that Mr O'Meara had asked the previous day. His first question was why as the Claimant's mother's line manager Mr Topalovic had not raised it with him first. His second question was: *"It is not a serious complaint, and consultants regularly complain about our staff. I have read the content, why was it deemed serious enough for Brani to immediately refer to HR. Frankly it was not immediately apparent to me ...."* stated that the complaints were not serious and asked for the notes of the interviews. Ms Barker referred Mr O'Meara to Mr Topalovic for the substance, but replied to the effect that the 'feedback' about the Claimant's mother had been raised for the first time in the HR drop-in sessions and that those were not investigatory meetings. This was not true or, at least, it was not the whole truth as the concerns had been raised earlier and in an informal sense HR was 'investigating' by holding informal meetings with a view to enabling employees to raise any concerns if they wished to do so.
185. From the point that she first became aware of the allegations against her mother and what HR had done about them, the Claimant has been very concerned to demonstrate that HR acted improperly in providing opportunities for staff to complain about her mother in the way that they did. There is no doubt that there was an element of subterfuge practised by HR, in particular Ms Barker, in relation to the Claimant. We infer that the sensitivity

of the situation, with serious concerns having been raised about their boss's mother, led to Ms Barker and Mr Topalovic wanting to withhold from the Claimant the role that they had played in providing an opportunity for employees to air these concerns that they had previously been unwilling to raise on an open basis. No doubt Ms Barker and Mr Topalovic hoped to avoid the very situation which did arise with the Claimant of her suspecting that they had in some way encouraged the complaints to be made. Although honesty is important in a workplace, and dishonesty is not to be condoned, we consider it understandable that a degree of subterfuge was practiced in an apparent effort to avoid confrontation with the Claimant. Unfortunately it 'backfired' as it resulted in the Claimant becoming very suspicious and focusing on the process by which the complaints had come to light, rather than the complaints themselves. There is no evidence at all to suggest that the allegations made against the Claimant's mother were anything other than genuine allegations raised by employees in good faith to HR representatives. (We note that Mr Thomas who investigated the allegations against the Claimant's mother was specifically asked by Mr Youngman whether he had found any evidence of collusion and he said "*Not at all. There was reluctance to be involved and mixed views. There was concern about speaking up and genuine fear of losing their jobs.*" We note that this conclusion is further supported by Mr Platt's private text message to Ms Barker of 12 February referred to above.) Once allegations of racist and homophobic behaviour came to HR's attention, any responsible HR department needed to take action to ensure that employee's welfare was safeguarded and any behavioural problems dealt with. We observe that that is precisely what Ms Barker says to Mr Platt in their private text message exchange of 12 February. Given the frankness of that private exchange, we are confident that what Ms Barker says there reflects the reality of the situation and her motivation for instructing Mr Platt to act as he did in relation to Chiswick.

186. As the Claimant had requested in her 17 February email, on 18 February the Claimant met with Ms Barker, Mr O'Meara, Mr Topalovic and Ms Sullivan to discuss Chiswick. Ms Barker later raised a grievance that she felt bullied at this meeting by both the Claimant and Mr O'Meara. In the course of her grievance, Ms Barker reported that the Claimant at this meeting sought to discuss the allegations against her mother, saying that she believed employees were colluding, alleging that HR had gone to Chiswick to interview staff, and did not believe Ms Barker that they were 'HR drop in sessions'. She reported that the Claimant became angry and upset, leaving the meeting at one point, and slamming the door. She reported that the Claimant agreed Mr Thomas should be appointed to investigate the allegations against her mother. The Claimant acknowledges being upset at this meeting and having to leave it in tears, and that she agreed to Mr Thomas being the investigator, but denies being angry or saying most of what Ms Barker alleges she said. However, we find that Ms Barker's account is likely to be broadly accurate because on the Claimant's own account as set out in her statement for the disciplinary hearing (1787) she quizzed Ms Barker and Mr Topalovic on what was happening at Chiswick, and was "*unconvinced that HR was following corporate policy or my instructions, or that they were telling me the whole story, or indeed the truth, about what had been going on*". It therefore seems

to us that on the balance of probabilities, as Ms Barker reported, the Claimant communicated those views at the meeting. We further find that it would be reasonable to conclude the Claimant did say something along the lines that employees were colluding against her mother, because that is also what Mr Thomas says she said to him, and Mr Graveney (the Respondent's Speak Up Guardian) later reported to Dr Bucknall that she said to him that the allegations had been made up by Mr Topalovic (1860). Mr O'Meara's account also supports that of Ms Barker because in his interview with Mr Youngman he described the Claimant as being "*upset and frustrated*", stating specifically that the Claimant was "*frustrated that she didn't have an opportunity to intercept*" the allegations against her mother. What Mr O'Meara says carries with it both the implication that the Claimant made clear that she considered HR was acting inappropriately, and that the allegations ought not to have been picked up by HR at all, but dealt with by her. In those circumstances, notwithstanding that we have not heard evidence from Ms Barker, and notwithstanding that it is apparent that she was at times not truthful about events at Chiswick, we consider that it was nonetheless reasonable for the Respondent to prefer Ms Barker's account and, indeed, we also prefer Ms Barker's account for these reasons.

187. By email of 19 February 2019 (1006), not seen by the Claimant at the time, Ms Barker emailed Mr Platt "*Out of interest, do you have an email exchange between yourself and Nahid where Nahid had requested your visit to Chiswick?*". Mr Platt replied that it was Nahid's perception that she requested an HR drop in session but in reality it was Mr Topalovic's suggestion. We infer that Ms Barker asked the question because, as we have found, the Claimant had challenged her the previous day on what HR was doing and she was hoping there might be an easy explanation to give the Claimant.
188. Ms Barker and Mr Platt then met with Mr Thomas to appoint him as investigator. Mr Thomas in his later interview with Mr Youngman described how he then had a meeting with the Claimant on 20 February at which the Claimant sought to speak to him about the allegations against her mother, saying that she could not believe the allegations that had been made and felt people were colluding. He felt there was an 'an element of venting'. He did not know whether she was expecting him to engage more, but he did not engage. She then asked him if she could arrange for Tim Graveney (the Speak Up Champion for the Respondent) to accompany her mother to the investigation meeting. Mr Thomas considered this was "*highly unusual*" but agreed to it. He did not speak to the Claimant again during the investigation process, but Mr O'Meara did speak to him and Mr Thomas said that Mr O'Meara said the same things as the Claimant had said about people colluding and false allegations. Mr O'Meara in his interview with Mr Youngman said that he asked for weekly updates on the investigation 'because the Claimant asked him to' (a point that provides further support for the Respondent's conclusion that Mr O'Meara was acting on the Claimant's behalf in relation to the investigation).
189. The Claimant then contacted Mr Graveney. She had in total two conversations with him (one on 18 February and one on 20 February) in

which she spoke about the allegations as we have noted above and asked him to accompany her mother to the investigation meeting. She said in her statement for her own disciplinary hearing that she felt that *“this was not undue interference but was justified because of what BT and MB were doing”* (1788). In his written answers to Dr Bucknall at the disciplinary hearing stage, Mr Graveney stated that his meeting with the Claimant on 20 February lasted 1-1.5 hours, that she was very upset and that she *“reported concerns that Brani was out to get her and must have been making up allegations against Nahid”*. She also spoke about having a difficult relationship with Mr Reay and Ms Gillis.

190. Mr Graveney said that Mr O’Meara also spoke to him twice about it and wanted to accompany the Claimant’s mother to her disciplinary hearing, which he was advised against. Mr Graveney acknowledged that it was unusual for him to be involved in such a matter, but his text messages and emails to the Claimant on the subject were warm and would not have suggested to her that there was anything improper in him accompanying her mother to the investigation meeting on 8 March 2019 (which he did). Mr Thomas agreed to this, although considered it was potentially a conflict of interest for Mr Graveney to attend and that although he could attend he should not contribute.
191. At an Executive Meeting around this time at which Ms Barker, Mrs Champion and the Claimant were present, Mrs Champion told Mr Youngman (and confirmed to us) that the Claimant’s mother’s case was on a spreadsheet of HR issues, and the Claimant *“flew for Michelle and said it was inappropriate, it was confidential information. She was very unpleasant. From that point she was very brittle with Michelle. From then onwards she was shirty with all of us at different points”*. We accept that evidence as Mrs Champion was in our view a reliable and straightforward witness. We also record that Mrs Champion also told Mr Youngman as part of the investigation that Mr O’Meara’s *“behaviour towards Brani is appalling and [the Claimant] does not stop him”*.
192. Mr Topalovic first spoke to Ms Gillis about concerns about the Claimant’s conduct towards him in meetings following his involvement in the Claimant’s mother’s disciplinary process in the w/c 11 March 2019.
193. On 18 March 2019 Mr Topalovic had his appraisal with with the Claimant, and Clare Sullivan was also in attendance. Prior to 12/13 February 2019 Mr Topalovic had always felt he had a good relationship with the Claimant, a view which is supported by her decision to promote him relatively quickly through the ranks, and also ask him to take on responsibility for Chiswick. However, there is evidence that a number of employees (Mr Reay, Mr O’Meara, Ms Sullivan and the Claimant) considered that Mr Topalovic had been struggling somewhat in his newly senior role, and Ms Sullivan reported to Mr Youngman that he said at the start that he had been preparing for the appraisal at 11.30pm the previous night, so we accept that there may have been justification for him receiving a less-than-glowing appraisal. However, Mr Topalovic felt that the Claimant was overly critical and unfair in this

appraisal. He said that towards the end she commented, *“This is what happens when people are promoted too early”*. The Claimant denies making the latter comment, and Ms Sullivan could not recall it being said, but Mr O’Meara in his interview with Mr Youngman said that his view was that Mr Topalovic had been promoted too early, and the Claimant in her interview (2241) said that she ‘had been criticised for having promoted him too early’, all of which suggests that it is something she may well have said. The evidence Ms Sullivan gave to Mr Youngman was to the effect that although the Claimant was fair, she *“perhaps did not show the softness and empathy she would have done in the past”*, but Ms Sullivan’s view as expressed to Mr Youngman was that the Claimant had not been herself since October 2018 and that she was in a bad mood with everyone. Ms Sullivan was a close colleague of the Claimant’s and the evidence before us was that she was generally perceived as loyal to the Claimant. Mrs Champion also gave relevant evidence on this to Mr Youngman, stating that she considered Mr Topalovic had been promoted too quickly into a bigger role by the Claimant without coaching or support and that he was now receiving *“heavy criticism”* from the Claimant which she viewed as *“extremely unfair”* in the light of the lack of support he had been given. She said that she believed that the Claimant had *“turned on him because of what has happened with her mother”* (2165).

194. Immediately after the appraisal Mr Topalovic complained to Ms Barker and Mr Platt and then wrote to Ms Sullivan saying he felt stressed and needed to reflect on the appraisal which he considered *“was unwarranted and contained a level of unfairness”*. Ms Barker texted Ms Gillis on 20 March stating that Mr Topalovic felt that his appraisal with the Claimant was *“hostile, bullish and unfair”* and that he *“feels that he is being victimised for being the one who brought the Chiswick issues to HR’s attention”* (1141).
195. On 19 March 2019, Mr Topalovic called Andrew Thomas who was still in the process of investigating the allegations against the Claimant’s mother. He told Mr Thomas that he felt undermined and victimised and did not feel able to participate in the investigation. He said he was considering resigning. Mr Topalovic asked the Claimant for a follow-up meeting, which she agreed for 26 March, but this was then cancelled.
196. The Respondent preferred the account of Mr Topalovic over that of the Claimant in relation to the appraisal, and we consider it was reasonable to do so. While his performance may not have been as good as previously, there is evidence (from Mr Graveney) that the Claimant regarded Mr Topalovic as ‘out to get her’ by making up allegations against her mother and if that is what she thought it was highly likely to have soured her attitude towards Mr Topalovic and affected the way that she appraised him. Moreover, this is part of a pattern of conduct by the Claimant towards Mr Topalovic (as he reported it), and his account has been consistent from his first complaint. We do not consider that it is weakened by the fact that he did not complain about the Claimant’s hostility towards him when it first started on 12/13 February. It is understandable, given their acute consciousness of the difficulty of dealing with allegations against the Claimant’s mother given the Claimant’s position,

and their discomfort about revealing to the Claimant how HR had handled the allegations in Chiswick, that they would not have rushed to complain about the Claimant's conduct in the early stages. Equally, it is understandable that when the Claimant was still behaving (as they saw it) inappropriately after a month or so that they would then complain.

197. In April 2019 Mr Neeb formally stepped down as President and CEO of HCA UK and John Reay took over.
198. On 2 April 2019 Andrew Thomas completed his investigation report in relation to the allegations against the Claimant's mother and recommended disciplinary proceedings in relation to the Claimant's mother.
199. On 8 April 2019 Mr Topalovic met with Ms Gillis and raised his concerns with her about the Claimant's behaviour. Ms Gillis suggest that he try to resolve it informally with the Claimant and Mr Topalovic agreed.
200. On 18 April 2019 there was a theatres meeting attended by the Claimant and Mr Topalovic where he considered the Claimant to be aggressive, critical of him and blaming him for delays. Mr Topalovic texted Ms Gillis after this meeting. He had spoken to her previously following his appraisal. He texted (1243) that he had discussed with Ms Barker and would *"like now to pick on our conversation when convenient"*. He texted *"I have met up with Aida on business matters today and I feel that the relationship is irretrievable"*. Ms Gillis and Mr Topalovic spoke on 19 April. Mr Topalovic appeared distressed at that meeting. In further texts of 19 April he stated that he felt *"severely victimised"* and thanked Ms Gillis for her support. By text of 20 April Ms Barker added her thanks, confirming that Mr Topalovic had been very upset, that she was okay herself although *"it is becoming an increasingly challenging environment to operate in"*.
201. Also on 18 April there was a regular catch-up meeting between Ms Barker and the Claimant, which Ms Barker wrote up shortly afterwards, in which Ms Barker says that the Claimant 'ranted' about HR and Chiswick, complained about the length of time the investigation into her mother's case was taking, said that all of the allegations had been instigated by one employee, that the drop in sessions were set up to work against her mother, that as a family 'they intend to fight this to the end', and that the matter should have been dealt with via Mr O'Meara and not via Mr Topalovic. Ms Barker also included in her note that the Claimant argued that her mother would never say any of the things that she was alleged to have said, and that in particular her mother was not racist and *"living in South Africa would never say that she disliked Asians as Lebanese and Asians are very similar"*. The Claimant has argued that the last alleged remark was clearly not true as the family are not Lebanese but Persian. However, while we accept that Ms Barker must have misremembered this detail, we do not consider that it follows that the rest of her account is also mistaken. Although it was not a contemporaneous note, it was written up by Ms Barker within 10 days of the meeting and sent to Ms Gillis on 29 April, and much of its contents echo the sort of things that the Claimant and/or her mother and/or Mr O'Meara are reported to have said by



other witnesses or at other times. For example, even regarding the disputed remark, Mr Graveney in his answers to Dr Bucknall's questions says that the Claimant's mother denied being a racist and "*told me about her family history – a Persian in South Africa*". It would thus be reasonable to conclude that the Claimant said something similar, which was slightly misremembered by Ms Barker. What Ms Barker says about the Claimant saying that all the allegations had been instigated by one employee, is very similar to the opinion that Mr Graveney said she advanced to him, only with Mr Graveney she named the employee she had in mind as Mr Topalovic saying she thought Mr Topalovic was 'out to get her'. The reference to 'fighting to the end' is also similar to something Mr O'Meara was alleged by Ms Barker to have said. In the circumstances, we again find that it was reasonable for the Respondent to prefer Ms Barker's account, and for the same reasons we do too.

202. Ms Barker and Mr Topalovic raised similar concerns about the Claimant's conduct at meetings on 24 and 25 April.

Mr Topalovic/Ms Barker raise formal grievances – Mrs Champion's grievance continues to be investigated

203. By email of 25 April to Ms Gillis and Ms Barker, Mr Topalovic set out his concerns about his treatment by the Claimant and Mr O'Meara since 11 February and explained that it had undermined his confidence and jeopardised his relationship with the Respondent. Ms Barker then spoke to him and emailed afterwards to confirm that he had said that he would not return to work after his upcoming annual leave unless his concerns were addressed formally. She asked him to confirm that he did want to proceed formally, which he did.
204. By email of 29 April Ms Barker raised her own formal grievance about the Claimant's behaviour. She attached her notes of the 18 April meeting.
205. On 2 May 2019 the meeting took place between Mr Reay, Ms Gillis and the Claimant at which Ms Gillis first indicated to the Claimant that two additional grievances had been received (though without naming names or giving details at this point). We have dealt with this meeting above as part of the history of Mrs Champion's grievance.
206. On 3 May 2019 the Claimant travelled to the US for a conference. She was there until 14 May, during which time she felt she was being excluded from discussions between other senior management at the conference. She felt that senior executives were reluctant to be with her and were excluding her. Dr Bucknall recalled being in meetings with her, but did not recognise her description of being excluded, and said there were no discussions about the Claimant.
207. On 4 May 2019 the Claimant emailed Ms Gillis and forwarded the email to Mr Reay (1343) complaining about the delay in dealing with Mrs Champion's

grievance, the failure to provide her with a copy of Mrs Champion's grievance, or to share details of the Topalovic/Barker grievances with her. She said that she was being forced to seek external advice and did not feel that she was being treated fairly or transparently. She expressed that the approach adopted was contrary to the principles of the HCA Code of Conduct and that she was being prevented from getting on with her job of CEO.

208. Ms Gillis replied on 7 May 2019 (1346). She explained that when they met on 2 May she was unsure whether the grievances were going to be pursued formally or not and she wanted to discuss how they wanted to progress this. The Claimant submits in her closing submissions that Ms Gillis provided a 'false' explanation for not providing the grievances to the Claimant in this email because Mr Topalovic had actually confirmed on 25 April that he did wish to pursue a formal grievance. However, when asked about this in oral evidence, Ms Gillis explained (consistent with her email, which refers not only to needing to confirm whether the grievances were formal or not, but also how they were to be taken forward) that she was in the process of arranging for Ms Barker to meet with Ms Findlay (Chief Legal Advisor) and for Mr Topalovic to speak to Ms Baron. She said that this was becoming very serious and she wanted to take a measured approach. Her evidence is consistent with what happened as those meetings took place after this email. We note that in general Ms Gillis' email to the Claimant of 7 May 2019 shows care for the Claimant and her wellbeing, she seeks to reassure the Claimant that it is not her intention to cause her distress or undermine her and expresses the hope that matters can be resolved internally without recourse to external advice.
209. On 8 May 2019 Mr Topalovic met with Rebecca Baron to discuss his concerns. He agreed with her that he would take a week off in order to calm down and reduce his stress and anxiety. Later that day, he sent a much longer email to Ms Gillis setting out his "Recollection of evidence" on which we have drawn in making our findings of fact above. Mr Topalovic subsequently went off sick from 10 May 2019, stated by his GP to be because of the Claimant's conduct, and then because of unrelated surgery. He was later made redundant.
210. Also on 8 May 2019 Ms Barker met with Sarah Findlay regarding her grievance. Ms Findlay took a file note of this conversation (1359-1365), upon which we have drawn in our findings of fact above.
211. On 9 May 2019 the disciplinary hearing for the Claimant's mother took place. Mr O'Meara accompanied her, but stayed outside the hearing room.
212. On 9 May 2019 Ms Findlay had a telephone call with Mr Graveney, of which she took a file note, asking him about what had happened between him and the Claimant. We have drawn on this file note in making our findings of fact above.
213. On 10 May 2019 the Claimant's mother was issued with an outcome letter giving her a formal warning and moving her work location. The Claimant's

mother subsequently appealed against the warning and on appeal the sanction was, unusually, increased to dismissal, notice of which she was sent on 10 September 2019. The Claimant's mother brought an unfair dismissal claim in relation to her dismissal which was settled.

214. On 11 May 2019 Ms Barker sent several additional emails to Ms Findlay about the Claimant and Mr O'Meara that were critical and not obviously relevant to the matters being investigated, including allegations that the Claimant had sought to lay 'blame' with Ms Dodd for the 'failure' of the transfer of Medical Oncology services to TPH and that the Claimant's plan was to get that transferred back under her management (2113); that the Claimant had asked for Mr Topalovic's signature sign off to be looked into (2105); and that Mr O'Meara had adopted a 'defensive and accusatory stance' from the outset (2115). Ms Gillis was asked whether this looked like dirt-dishing. She did not agree. We observe that it does not look like 'dirt-dishing' so much as like Ms Barker ensuring she has drawn all points that she considers important to Ms Findlay's attention.

May 2019: Claimant suspended, disciplinary proceedings commence

215. Ms Gillis and Mr Reay decided that it was appropriate for the allegations against the Claimant to be investigated as a potential disciplinary matter.
216. On 17 May 2019 Nigel Youngman was engaged by Respondent to investigate the allegations against the Claimant, having been approached through the Respondent's lawyers. He was an independent HR consultant with 30 years experience. He was also an Employment Tribunal lay member between 1992 and 2016. He was selected by Mr Reay, but Mr Reay did not meet or speak with him about the investigation.
217. On advice from Ms Gillis, Mr Reay decided that it was appropriate to suspend the Claimant pending investigation. We accept that their conscious reasons for doing this were because of the number of grievances, and the particular nature of them, i.e. that the Claimant had sought to interfere with HR processes in relation to her mother. We accept those were their conscious reasons because we have found them in general to be reliable witnesses and because those reasons are on their face plausible and good reasons for taking that decision. It reasonably appeared at this point that there were a number of relatively serious concerns about the Claimant's conduct being raised by independent individuals and a plausible basis for concern about the Claimant's reaction to complaints given the behaviour alleged against her in respect of the investigation into her mother's conduct. We address the question of whether the decision was nonetheless influenced either by the Claimant's sex or her alleged protected disclosures in our Conclusions section at the end.
218. On 17 May 2019 the Claimant was invited without warning to a meeting with Mr Reay, Ms Gillis and Ms Findlay where they informed her that she was

being suspended pending investigation into allegations of gross misconduct. The Claimant again covertly recorded this meeting (1383ff).

219. At the meeting Ms Gillis informed her that the allegations related to the three grievances and that there were also concerns about her behaviour arising out of a confidential discussion with Lorraine Hughes (Chief Nursing Executive). Ms Gillis set out the formal allegations as they appear in the letter that was given to the Claimant at that meeting. The letter set out the allegations as follows:-

Following our meeting of Friday 17 May 2019 I am writing to confirm that, as of the date of this letter, you have been suspended from work until further notice pending investigation into allegations of gross misconduct.

We shall provide you with full details of the allegations during the investigation but for now we summarise these as follows:

Serious breach of Company policies, in particular the Personal Relationships at Work Policy and Harassment & Bullying Policy;

Breach of the HCA UK Code of Conduct, in particular the Mission Statement and Values, Leadership Responsibilities, Patients – Quality of care and patients' safety and Patients safeguarding, Confidential Information, Conflict of Interest and Harassment;

Serious acts which break the mutual trust and confidence, or which brings or is likely to bring the Company into disrepute;

Victimisation of a whistleblower; and

Breach of Corporate Professional Services Agreements and/or Corporate Contracts Approvals Policy

We reserve the right to add to or change these allegations as appropriate in the light of our investigation.

220. At the meeting Ms Gillis gave some further background to the allegations in the meeting. She explained that the headline allegations relating to *"Failing to address concerns raised regarding the conduct and clinical practice of [Dr R]"*, *"Being dismissive and/or critical of senior members of staff who raise concerns leading to them feeling that no action would be taken to address such concerns and/or that they are unable to raise future concerns"*, *"Seeking to interfere with or influence the disciplinary process relevant to your mother, Nahid Youfesi, and criticising the process and those involved with it"*, *"Disclosing confidential information to your mother regarding proposed changes at Chiswick"*, *"Being openly critical of the performance of direct reports"*, *"Undermining direct reports in front of others in particular in meetings"*; *"Being hostile, unprofessional and/or aggressive towards direct reports"*, *"Bullying and victimising direct reports by reason of their raising concerns and/or being involved in the disciplinary process relevant to your mother"*, *"Failing to comply with the corporate contract approvals policy by submitting a significant number of breach forms since the 1<sup>st</sup> January this year, in respect of third parties in particular consultants who have been engaged to provide services to HCA UK with no written PSA"*.

221. Ms Gillis did not explain then, but does explain in her witness statement, that she had identified Mrs Champion's concerns as being clinical ones and therefore she identified her as a whistleblower and thus the allegation "*Victimisation of a whistleblower*" related to the Claimant's treatment of Mrs Champion, although this was not explained to the Claimant until much later.
222. The alleged breaches of Professional Services Agreements related to payments being made to consultants who did not have a written PSA in place. There had been 42 such payments at the Claimant's hospitals that year, including £161,875 of payments to one particular consultant. Mr Reay confirmed in oral evidence that it was his decision to add the PSA allegations to the disciplinary investigation. He said that although there were other hospitals that still had PSAs not in place, the Claimant's hospitals were the worst offenders and because all CEOs had been required to sign a document to say they would adhere to PSA requirements, he considered that this was potentially a serious matter that warranted investigation. We accept that those were his conscious reasons for acting.
223. The suspension letter reserved the Respondent's right to add to or change the allegations. The Claimant suggests this was intended to intimidate her into resigning. Ms Gillis says that this was 'boilerplate' standard wording and did not indicate any sinister intent. We accept Ms Gillis' evidence as it is common wording in our experience and appropriate because it is to be expected that investigation of complex allegations might lead to a change in the specific allegations. As it is, some allegations did fall by the wayside. What Ms Gillis had discussed with Ms Hughes in a confidential discussion was never revealed. Nothing came of the allegation that the Claimant had 'disclosed confidential information to her mother regarding proposed changes at Chiswick' and it is unclear why it was included. The PSA allegations were also ultimately dropped following Mr Youngman's investigation.
224. At the meeting there was discussion about how the suspension should be conveyed to others in the business. The Claimant wanted to tell the truth, but Mr Reay and Ms Gillis advised against that. The Claimant also thought that she should get some advice and she did instruct solicitors. By email of 19 May 2019 from the Claimant's solicitors (1422) the Claimant asked for a simple message to go out that stated she was out of the business and queries to be directed to Ms Finch. This was what Mr Reay did send out on 20 May 2019, with some minor additions (1406).
225. At the end of the suspension meeting, the Claimant asked to speak to Mr Reay alone and secretly recorded this part of the conversation too. She asked him what his 'gut feeling' was about the allegations and he said that Ms Gillis was very experienced and if she had decided to call in an external investigator then it needed to be taken seriously. He advised her to get professional advice. He said he was happy to have a "*without prejudice conversation ... but again you've got to be convicted (sic) that's the right thing to do you know*" (1393). Mr Reay was here using the word "*convicted*" in place of "*convinced*" as is his custom. The Claimant went on to try to discuss

the detail of the allegations with Mr Reay and he said that he could not do that. He advised her to get counselling and professional advice, to step back and look after herself.

226. Following the Claimant's suspension, Ms Findlay emailed Mr Youngman on 17 May 2019 informing him that he could now proceed with his investigation (2034). This letter set out the allegations in the same terms as they were set out to the Claimant in the suspension letter.
227. On 20 May 2019 Ms Findlay provided Mr Youngman with some further materials by way of 'background' (2127). These included Miranda Dodd's complaint of 14 June 2018 and Suzy Canham's complaint of the same date. In her covering email Ms Findlay explained that "*Following Miranda Dodd's email, a coach was put in place to work on Aida and Miranda's relationship*". Ms Findlay has not been a witness so we are unclear why she considered it necessary to forward these previous complaints. There is no evidence that it was anyone else's idea but her own. It is possible to see from her covering email that she considered it might be relevant that there had been previous interpersonal issues between the Claimant and others and that she had been through a coaching process as a result. This is not wholly irrelevant to the allegations of misconduct that Mr Youngman had been asked to investigate. However, Mr Youngman said that once he realised these had nothing to do with the specific allegations, he set them to one side, and we accept his evidence on this as there is nothing to contradict it. He accepted they could in principle have been prejudicial to the Claimant but he did not in fact take any account of them. His unchallenged evidence, which we accept, was that no attempts were made by any staff at the Respondent to influence the course or outcome of his investigation. His evidence that he was unaware the Claimant had made any protected disclosures, or that she contended she had been subjected to any detriment by the Respondent for having done so, was also unchallenged and we accept it.
228. The Claimant has alleged in these proceedings that Mr Reay or others told people that she had left the business. There is no evidence that this happened. Following her suspension, the Claimant received (unprompted by her) messages of support from a significant number of staff (3079-3121). This is testament to the Claimant's long service and the high esteem in which she was held by many staff. On 28 May 2019 nine Consultants wrote to the CEO of the US company expressing support for the Claimant (1424). Some of these were under the impression that the Claimant had been dismissed when she had not. We infer that this impression was gained as a result of a 'Chinese whispers' process and not because of anything the Respondent actually did.
229. Mr Youngman interviewed in total six witnesses before interviewing the Claimant. He began with Mrs Champion, Mr Topalovic and Ms Barker. It is Mr Youngman's practice in investigations to question openly and allow the witnesses to speak. Each of these witnesses had also brought prepared statements to the interview, which they read out (largely without interruption from Mr Youngman). Mr Youngman recorded the interviews and transcribed

them afterwards. The Claimant suggests that Mr Youngman did not question witnesses sufficiently, but we find that his approach was appropriate. At the time of his first interviews with them, he was just information-gathering. He did not know what the Claimant's position was at that stage and so could not reasonably be expected to challenge them unless what they were saying did not make sense.

230. In the course of those interviews Mr Topalovic and Mrs Champion had indicated to Mr Youngman that Ms Sullivan and Mr O'Meara were likely to 'close ranks' with the Claimant and Mr Youngman therefore decided to interview them so as to get a balanced view. He also interviewed Mr Thomas who had investigated Mrs Champion's grievance.
231. In interview, Ms Sullivan said that she regarded the Claimant as supportive of her, but said that the Claimant's 'whole attitude' had changed from October 2018, although she was not sure of the reasons. She had been present at Mr Topalovic's appraisal as well and said that in her view it had been fair. She said that the Claimant had not been 'overly friendly', but she felt that the Claimant was behaving like that with everyone by that stage. Mrs Champion in her interview identified the change in the Claimant's behaviour as stemming from her 'extremely bad' reaction to the 360 feedback she received (2164).
232. In her interview Ms Barker presented the HR drop-in sessions as having been arranged without prior knowledge of staff concerns about the Claimant's mother (2168), which we observe was not true in the light of what we now know, but was consistent with the position she had taken with the Claimant previously.
233. In interview with Mr Thomas, Mr Youngman asked whether he had got the sense that there was any collusion from Chiswick employees during his investigation. He answered *"Not at all. There was reluctance to be involved and mixed views. There was concern about speaking up and genuine fear of losing their jobs"*. He said that the Claimant had not spoken to him about the matter after the meeting on 20 February when she had identified him as an appropriate investigator. He said that subsequently Mr O'Meara had continued to show a lot more interest in the investigation than was normal for a line manager. He felt that Mr O'Meara was acting as the Claimant's 'voice'.
234. By emails of 29-31 May 2019 Mr Youngman and Ms Findlay liaised over email regarding what further information to give the Claimant about the allegations, and the text of an invitation to a first interview on 10 June 2019 (1504, 1429-30), which was sent to the Claimant on 31 May 2019 (1503). These emails make it clear that Mr Youngman understood that Mrs Champion had been identified as a 'whistleblower', although Mr Youngman (reasonably) points out in his private email to Ms Findlay that the positions of Mr Topalovic and Ms Barker are similar and his email to the Claimant indicates that he is regarding all of them as whistleblowers. Mr Youngman also asked Ms Findlay whether the Claimant was permitted to be accompanied to the investigation meeting (there being no specific entitlement

to accompaniment to investigation meetings under the Respondent's policy) and Ms Findlay confirmed she was.

Claimant on sick leave / further investigation

235. On 6 June 2019 the Claimant became ill and went on sick leave and was unable to attend the investigation meeting on 10 June 2019. The Claimant was paid statutory sick pay only. Ms Gillis said that this was because discretionary sick pay is not payable while disciplinary proceedings are ongoing under the HCA Corporate Attendance Policy (1508). The Claimant accepts that is what the policy states, but argues that she was treated differently to other employees in that regard. She says she cannot remember the policy being applied with any other employee. Ms Gillis, however, could think of four examples where the policy had been applied in that way (she could not remember names). We accept that the policy was ostensibly the reason for the decision to pay only statutory sick pay, but we recognise that the Respondent still had a discretion and we consider in our Conclusions whether the Claimant's sex or alleged protected disclosures influenced the decision to adhere to the policy in her case.
236. On 13 June 2019 Mr Youngman in an email to Mr Thomas (2194) asked him whether he had established from Rob Hill or Wyn Davies what discussions the Claimant had with them regarding the Dr R concerns. Mr Thomas replied by forwarding the notes of his meeting with Rob Hill and indicated that they were going to meet with Wyn Davies (2193).
237. On 17 June 2019 solicitors for the Claimant wrote to Mr Reay regarding the suspension and allegations (1524). They asserted that the Claimant had not been provided with enough detail of the allegations because (in particular) the specific elements of the policy breached had not been set out. Further correspondence ensued in which Ms Gillis answered most of the Claimant's solicitors questions about the process and allegations fully and carefully, but she did not provide any further detail of the specific allegations, saying that the allegations would be put to her at the investigation meeting in line with the Respondent's policies and the ACAS Code of Practice. Ms Gillis urged the Claimant to attend the investigation meeting, but the Claimant's solicitors informed that her GP had advised against it. The Respondent wanted to refer the Claimant to Occupational Health (OH), but the Claimant did not agree to that, arguing through her solicitors that OH was not independent of the Respondent. The Claimant subsequently agreed to attend, but her psychiatrist and psychotherapist advised her to defer. The Claimant remained on sick leave until 16 September 2019.

Jul/Aug 2019: Claimant's Ethics Line complaints and solicitor correspondence

238. On 10 July 2019, while on sick leave, the Claimant wrote direct to Sam Hazen (President of the Respondent's parent US company) complaining about her treatment and alleging that Mr Reay had bullied and harassed her. She



offered to fly to the US to discuss matters with him. However, he replied that he would not start a separate dialogue with her given the ongoing disciplinary proceedings.

239. On 12 July 2019 the Claimant's solicitors wrote to the Respondent making allegations against Mr Reay to the effect that he had acted deliberately to 'get rid' of the Claimant. The letter alleged that the course of conduct by Ms Gillis and Mr Reay amounted to criminal harassment, and threatened criminal or civil proceedings.
240. On 12 July 2019 the Claimant also filed a complaint with the Respondent's Ethics Line (1541-44, 1552-3 and 1563-1574), providing follow-up information on 28 July 2019 (1565-1573) in response to a request from Mr Aquilina (1552), the Investigator allocated to her complaint. The Claimant's complaints to the Ethics Line do not include any reference to the Claimant having raised patient safety concerns or any allegation that she had been victimised for raising patient safety concerns although, as we noted above, they do contain an allegation that she told Mr Neeb in 2017 that Mr Reay had "*a reputation for bullying and harassing direct reports and maintaining a drinking and social culture*" and that she made Ms Gillis aware that she was "*being bullied*" in August 2018 (1542). Her follow-up of 29 July 2019 also sets out allegations of "*harassment towards me and other women*" by Mr Reay. It does not say that these were reported to anyone other than "*independent coaches*" at any point (1572).
241. None of the witnesses who have appeared before us saw the Ethics Line Complaints at the time. After a preliminary review by Mr Aquilina, it was decided by the Respondent that her complaint would not be taken forward because the Claimant had threatened "*Protection from Harassment proceedings*" against the Respondent and it was felt that "*it would be prejudicial to the legal proceedings for all parties if we were to continue such review at this time*". The Claimant was informed of this decision by letter from Kathi Whelan (SVP and Chief Ethics and Compliance Officer) of 15 August 2019 (1574).

#### Outcome of Mrs Champion's grievance

242. On 29 July 2019 Mr Coombs' concluded his investigation into Mrs Champion's grievance and sent outcome letters. Mr Coombs' decision upheld the grievance on the basis that the Claimant had not made reasonable efforts to deal with the concerns about Dr R and there was cause for concern as to why senior management had appeared reluctant to deal with concerns regarding Dr R. Dr R was then suspended while concerns regarding her practice were investigated and her practising privileges were withdrawn in November 2019.

#### Claimant returns from sick leave, investigation recommences

243. On 10 September 2019 the Claimant's mother was dismissed.
244. On 13 September 2019 the Claimant confirmed (following psychiatric assessment) that she was well enough to attend an interview with Nigel Youngman.
245. On 16 September 2019 the Claimant formally returned from sick leave, at which point her suspension was re-instated and her salary re-instated in full.
246. On 26 September 2019 the Claimant attended a first investigatory interview with Mr Youngman (i.e. the interview originally scheduled for 10 June 2019 but postponed because of the Claimant's ill health). The Claimant attended the interview with her trade union representative Mark Shervington. The meeting started at 12:09 and ended at 15.43.
247. At the meeting the Claimant asked for further details about the allegations, in particular about who was alleged to be the 'whistleblower' referred to in allegation four, and precisely what policies she was alleged to have breached. Mr Youngman had, we infer, forgotten his previous exchange with Ms Findlay four months previously about the identity of the 'whistleblower' as it had not struck him as important given that the substance of the allegations by all three individuals were similar. Initially at the meeting he indicated that all three were whistleblowers, but he then checked with Ms Findlay during an adjournment and confirmed that the Respondent had only classified Mrs Champion as a whistleblower. He was then also able to confirm that the allegations against Mr Topalovic and Ms Barker were 'just' bullying and harassment. Generally, our impression of this first interview is that it consisted more of the Claimant asking questions of Mr Youngman about the particulars of the allegations rather than him asking questions of the Claimant about the substance of the matters.
248. Just after the interview started Ms Gillis emailed the Claimant's solicitor (who was not with her in the interview) at 12:16 informing of further allegations that may be considered (albeit that it was made clear that these matters would not form part of Mr Youngman's investigation) (1606). The further allegations were:
- a. It is alleged that Aida, in relation to Project Lego, did not consult with key Consultants about moving their practices and the redesign proposals from The Harley Street Clinic to The Portland Hospital despite indicating to the business that this had been done. In addition, it is alleged that the financials regarding the business case had not been properly costed to the extent that staffing costs had been underestimated by circa £3m; there was no business case for a £4m intraoperative MRI and mis-design costs of circa £150k.
  - b. The DIPG clinical trial was not fully costed, in particular as regards to proposed sponsorship of the trial by HCA/The Harley Street Clinic.
249. These allegations were raised with Ms Gillis in August by Mr Reay. He said that he raised them at this point because these were things that 'blew up' while the Claimant was absent because steps were taken to move forward with the Claimant's Project Lego proposals only to find that Consultants had not been consulted about the plans. He and Ms Gillis discussed the position

and their evidence is that they thought the right thing to do was to notify the Claimant that these were also potential disciplinary allegations. Ms Gillis' evidence was that she considered it would be unfair if such allegations were sprung on the Claimant at the end of a disciplinary process. We accept that these were their conscious reasons for acting as they did in relation to these allegations, although we also sympathise with the Claimant's argument that these allegations were made with a view to putting pressure on her. Given the Respondent's failure to take any formal action in relation to the June 2018 complaints by Ms Canham and Ms Dodd, we would not have expected these additional allegations to be raised as disciplinary matters at all if disciplinary proceedings were not already 'on foot', but given that disciplinary proceedings were 'on foot' we find it understandable why these allegations were added. There is an element here of 'kicking someone when they are down', but we nonetheless find it plausible, given that disciplinary proceedings had been commenced, that when another significant issue arose, Ms Gillis and Mr Reay felt it appropriate to raise it rather than 'sit on' it and potentially have it 'hanging over' at the end of the disciplinary process. Despite accepting their evidence as to their conscious reasons, we consider below whether their actions in this regard were nonetheless influenced by the Claimant's sex or her protected disclosures.

250. By email of 2 October 2019 Mr Youngman provided the Claimant and her representative with more information about the allegations in answer to her questions (2250).
251. On 4 October 2019, at Mr Youngman's request, the Claimant was provided with a table of the alleged PSA breaches (1608-1612 and 1634-1635).
252. Mr Youngman also interviewed Ms Sullivan and Ms Barker for a second time on 4 October 2019 in order to clarify some points.
253. On 24 October 2019 Mr Youngman convened a second investigatory interview with the Claimant.
254. The day before the Claimant emailed raising additional queries and asking about the date on which Mrs Champion was classified as a whistleblower and precisely which clauses of the policies had been breached (1634-1635).
255. The Claimant brought some hard copy documents to the meeting for Mr Youngman to consider (2283-2286). The Claimant was generally more willing to answer questions at this meeting. At no point in this interview (or the first one) did she raise any patient safety concerns, or allude to having done so previously, or suggest that the allegations raised against her were raised in retaliation for any disclosure that she had made. Mr Youngman was thus unaware of this aspect of the case that the Claimant has now brought.
256. On 7 November 2019 the Claimant provided a further 200 pages of documents to Mr Youngman.

Outcome of Mr Youngman's investigation

257. Mr Youngman completed his investigation report in three parts: Part 1 concerned the allegations relating to the Claimant's mother's investigation. Part 3 concerned the PSA breaches. These were completed on 31 October. Part 2 concerned Dr R. This was completed on 14 November 2019, along with an Executive Summary. Mr Youngman concluded that Mr O'Meara and the Claimant had unduly interfered with the investigation process into her mother from 13 February 2019 onwards. He also found that her actions led to a breakdown of trust and confidence between her and Ms Barker and Mr Topalovic. He concluded that the Claimant had failed to take appropriate action regarding the complaints about Dr R, and that her actions were bullying and undermining to Mrs Champion (albeit not victimisation of a whistleblower). Her failure to take the concerns seriously led to a breakdown of trust and confidence with Mrs Champion. He concluded there were no grounds of disciplinary action in relation to the alleged PSA breaches.
258. Although Mr Youngman identified misconduct by Mr O'Meara, he did not frame this as being a case to answer or recommend disciplinary proceedings. He explained in oral evidence, and we accept, that this was because he considered that to do so would have been beyond his terms of reference.
259. Mr Reay considered the investigation report and decided that a disciplinary hearing should be convened. Dr Bucknall (HCA's Chief Medical Officer) was appointed by Mr Reay as the disciplinary officer. It was Ms Gillis who approached Dr Bucknall. Mr Reay did not speak to Dr Bucknall at all on the matter until he was informed by Ms Gillis later that Dr Bucknall had decided to dismiss the Claimant. Although Dr Bucknall reports to Mr Reay in the Respondent's hierarchy, it is essential to his role as Chief Medical Officer that he exercises independent judgment on matters of patient care and safety and he accordingly also has a direct report line to Dr Prana Mehta, the Respondent's American Group Chief Medical Officer and also Dr Jonathan Perlin the Respondent's group's global Chief Medical Officer.
260. Dr Bucknall was uncertain whether to accept the role of disciplinary officer as he felt he had enjoyed such a good working relationship with the Claimant that he might be swayed in her favour. However, despite his initial concerns, Dr Bucknall satisfied himself that he would be able fairly to deal with the matter and agreed to take on the role. This was notwithstanding his responsibility for the Dr R investigation. He felt they were different issues and also that an independent doctor was in fact carrying out the investigation into Dr R. He did not consider there was a conflict. He was then sent and reviewed all the material from the investigation process and met a number of times with Paul Leach (Chief HR Officer at PGH who had been appointed to support him).

Disciplinary hearing

261. By letter of 22 November 2019 the Claimant was invited to a disciplinary hearing on 29 November 2019. This letter set out the allegations against the Claimant as revised in the light of Mr Youngman's report. The allegations in this letter are much more detailed than the allegations that were originally set out in the suspension letter. The allegation about PSA breaches was dropped as Mr Youngman had recommended, but the allegations about Project Lego were included at Mr Reay's request to go straight to a disciplinary hearing. A full set of documents were to be enclosed with that letter including Mr Youngman's reports, meeting notes, emails and documents the Claimant submitted to Mr Youngman, management case and Powerpoint in relation to Project Legal and the grievance/complaint documents from Mrs Champion, Ms Barker and Mr Topalovic. These were omitted from the original letter, but were supplied on 25 November 2019.
262. The Claimant requested more time and so Mr Leach informed her by email of 26 November 2019 (1670) that the hearing would be rescheduled to 9 December 2019. He explained why he considered that was a reasonable time to review the evidence.
263. On 29 November 2019 the Claimant's solicitors replied (1669) complaining that there was still insufficient time to prepare for the disciplinary hearing. They seem to have been under the impression that the hearing would take the form of a tribunal hearing with 'live' witness evidence and questioning, although that is not normal, and was not the Respondent's policy. The email also sets out a detailed objection to Dr Bucknall acting as the disciplinary manager on the basis that he is not as senior as John Reay who had made the allegations in relation to Project Lego that had been added in. In the final paragraph the email suggested that in any event Dr Bucknall was conflicted because *"He was himself involved in decisions which were made during the Lego project and was also ultimately responsible for actions which [were] taken in relation to Dr [BAR]"*.
264. Mr Leach replied on 2 December 2019 (1667) informing the Claimant that the Project Lego issues would be separated out and subject to a separate investigatory process, explaining that it would not be normal for there to be 'live' witnesses at a disciplinary hearing, and confirming that the Respondent did not see there was any conflict in relation to the Dr R matter because the allegations in relation to that concerned the Claimant's treatment of Mrs Champion rather than Dr R. The Respondent refused further to postpone the disciplinary hearing, stressing the delay that there had already been in reaching that stage.
265. The Claimant prepared a written statement for the disciplinary hearing (1782-1797).
266. The disciplinary hearing duly took place on 9 December 2019. The Claimant challenged Dr Bucknall's impartiality again at the start on the ground that he reports to Mr Reay who had 'made the allegations'. Dr Bucknall explained that he did not consider the allegations involved Mr Reay and that he did not feel there was any conflict. He confirmed he would be making the decision.

Dr Bucknall further gave oral evidence to us, which we accept, that he had not spoken to Mr Reay about the matter and was not aware that Mr Reay had any particular desired outcome.

267. In advance of the disciplinary hearing the Claimant had indicated that there were further witnesses who she wished to question or call to the meeting. Dr Bucknall informed her at the meeting that he would put relevant questions to further witnesses after the meeting. During the course of the hearing, the Claimant read from her prepared statement and Dr Bucknall put to the Claimant the key elements of Mr Youngman's findings and gave her a chance to respond. He also sought to probe her as to whether she had learned any lessons from what happened in relation to her mother's disciplinary investigation, but the Claimant did not answer. He further noted that the Claimant was very pre-occupied with the genesis of the allegations against her mother and the actions of Ms Barker and Mr Topalovic. Dr Bucknall considered that this was not relevant to the disciplinary issues and was concerned that she was dwelling on this rather than focusing on the allegations against her. The Claimant's position at the hearing regarding this allegation was that she acknowledged that there was a conflict of interest and maintained that she had accordingly 'stepped away'.
268. Dr Bucknall asked additional questions of various individuals, both those who had been interviewed previously by Mr Youngman, and those who had not. These included Dr Wyn Davies, Rob Hill, Ms Barker, Mrs Champion, Stuart James, Ms Sullivan, Mr Topalovic, Mr Platt, Mr Graveney, and Ms Wheatland. He also put questions to Hayley Marle but did not wait for an answer as she was on leave (1800). He did not attempt to speak to the Claimant's personal assistants. When asked about this in cross-examination, Dr Bucknall said that he did not consider that these avenues of enquiry would have made any difference because it would have remained the case that there had not been sufficient progress, and if (as the Claimant said) there were difficulties arranging a LDMG, his view was that the Claimant should have escalated it to a Corporate DMG. We find it was reasonable for him to conclude on the basis of the material before him that it was unlikely that those further enquiries would make any material difference to the position (and indeed, it is even clearer now that it would not have done because we have been able to make findings of fact about the Claimant's actions regarding Mrs Champion's concerns about Dr R which essentially confirm the picture as it appeared to Mr Youngman and Dr Bucknall and which leave no room for any significant involvement by Hayley Marle or the Claimant's personal assistants).
269. By email of 13 December 2019 Dr Bucknall also asked Mr Youngman two questions about the process he followed, to which Mr Youngman responded.
270. By email of 15 December 2019 to Dr Bucknall (1810), Dr Wyn Davies informed Dr Bucknall that he recalled that during the period that Rob Hill was investigating the allegations against Dr R raised at The Portland Hospital the Claimant mentioned Dr R at their fortnightly meetings, but he did not recall her raising issues about Dr R's conduct at THSC. His understanding was that at the time of his meetings with the Claimant they were waiting for Rob Hill to

complete his investigation at TPH. Wyn Davies' account is thus inconsistent with the Claimant's as his position is that the Claimant at no point raised with him concerns about Dr R's conduct at THSC. He expressed the view that he could not imagine the Claimant being anything other than very supportive of her staff.

271. By email of 17 December 2019 (1874) Dr Bucknall sent the Claimant the notes of the further witness responses and she was given until the close of business on 18 December 2019 to respond. The Claimant did provide comments by that date (1872). Her comments focus on pointing out alleged 'inconsistencies' between Ms Barker, Mr Platt and Mr Topalovic regarding the genesis of the HR investigation in Chiswick. She suggested that Ms Barker ought to have been disciplined for giving 'so many different answers to questions in this investigation'.

### Dismissal

272. By letter of 30 December 2019, Dr Bucknall informed the Claimant in a detailed letter of his findings and that he had decided to dismiss her. In his letter he noted the *"clear dichotomy between [the Claimant's] concern for proper HR process [in relation to her mother's investigation] as compared with how [she] dealt with the situation relating to Dr R"*. He informed her that he had decided to dismiss her by reason of gross misconduct. His reasons were set out in detail in the letter. In summary, he found:
- a. That the Claimant's actions in relation to her mother's investigation had been inappropriate given her conflict of interest and in breach of the Respondent's Code of Conduct, which sets a higher standard for the leadership team who must *"lead by example"*. The actions that he found to be inappropriate, and to amount to victimisation and bullying were not, as the Claimant submits, limited to the sending of the email on 17 February 2019, but encompassed the whole of the Claimant's conduct towards Ms Barker and Mr Topalovic from 15 February onwards.
  - b. That similar allegations were levelled against Mr O'Meara and that if he had still been an employee he would have recommended an investigation to look into those allegations. (We note here that Mr O'Meara was in fact still an employee at this point but under notice of dismissal, terminating on 31 December 2019.)
  - c. That the Claimant had harassed, undermined and bullied Mr Topalovic and Ms Barker, in particular that the Claimant had been 'overbearing' with Ms Barker and Mr Topalovic in the meeting on 18 April 2019 and with Mr Topalovic in his appraisal on 18 March. He did not confine his findings to these meetings however but found there had been a pattern of behaviour from 15 February onwards in relation to all three grievances.
  - d. That she had acted towards Mrs Champion in a way that could reasonably be construed as bullying and that was not acceptable conduct for a CEO.

- e. That she had begun to investigate the allegations against Dr R (so she had not 'failed' to do this as alleged), but that she had moved too slowly given the seriousness of the concerns, and that she had not convened a Local Decision Making Group (LDMG) at all before Mrs Champion raised further concerns. He (wrongly) concluded that Mr Hill's investigation report into the Urgent Care Centre (UCC) incident had been completed on 11 October 2018, but he also considered that the Claimant had not acted swiftly enough following concerns being raised, especially given the impact the situation was having on staff, that Dr R's presence was not required to hold an LDMG such that any difficulties contacting her did not excuse failure to convene, and that Dr R could have been suspended while any necessary investigations were ongoing. He found her actions amounted to serious incompetence or gross negligence, which are listed as examples of gross misconduct under the Respondent's Corporate Disciplinary Policy.
- f. He took into account as mitigating factors the Claimant's 17 years of service, her promotions, clean disciplinary record and good performance, and the fact that it would be the natural desire of anyone to help their mother. However, against that he held her senior role and lack of insight into her actions and lack of contrition (including failure to apologise to those most affected, i.e. Mrs Champion and Mr Topalovic) which indicated clouded judgment.
- g. In the light of her misconduct, and inability to be reflective, Dr Bucknall decided to dismiss her for gross misconduct.

273. Dr Bucknall's evidence, which was not shaken by cross-examination, was that he was unaware of any instance of the Claimant raising patient safety concerns during her employment, save potentially in relation to the absence of Mrs Champion. He accepted that in principle staffing issues could raise patient safety issues, but he had not understood the Claimant to be raising her concern about Mrs Champion on that basis, rather than on basis of difficulties presented from a governance and nurse leadership perspective. He also understood that arrangements had been made to provide cover. He confirmed that even if the Claimant had been raising patient safety concerns that would not have influenced his decision to dismiss. He emphasised that the Respondent strives to attain 'Outstanding' in all its CQC inspections, and it could not achieve this (as it frequently does) unless patient safety was top priority. We accept Dr Bucknall's evidence as honest in terms of what he knew and did not know about the alleged protected disclosures. We also accept his evidence as to his conscious reasons for deciding to dismiss, reflecting as it does the careful reasoning in his dismissal letter.

274. The Claimant was offered the right of appeal but did not appeal the decision because she had lost faith in the Respondent as an organisation.

275. Subsequently, Mrs Champion, Mr O'Meara and Ms Sullivan were all made redundant and Mr Topalovic left, as did Ms Marle.



276. The Claimant obtained new employment on 25 February 2020 and moved to her current company on 16 March 2021. The stress-related anxiety and depression she developed following her dismissal by the Respondent has continued to affect her.

Allegations against Mr O'Meara

277. Similar allegations of misconduct as were made against the Claimant were made against Mr O'Meara in relation to his conduct in connection with the Claimant's mother's disciplinary process. As a friend of the family he is also alleged to have got too involved, threatened to 'fight it all the way' etc. We have heard evidence about why no action was taken against Mr O'Meara.

278. In her witness statement, Ms Gillis said that allegations against Mr O'Meara were not pursued because in the summer of 2019 when the Claimant was suspended she already expected him to be made redundant because he was a stand-alone, expensive CFO who was an extra layer of management in the business. We accept that she had this in mind, even though the conversation with Mr O'Meara about redundancy did not happen until later. This is because we have found her to be a reliable witness who gave frank, direct evidence and because Mr O'Meara's position was one that had been considered unnecessary from the outset by Ms Finch and so was no doubt an obvious role for redundancy. She considered it appropriate to let him leave 'career unblemished'. Again, we accept that this featured in her thinking because she was sensitive to Mr O'Meara's feelings about such matters as is evident from her suggestion to him that as a 'face-saving' device he might want to tell people that he had resigned on six months' notice in July 2019 rather than say he had been made redundant.

279. Further, although he was criticised by Mr Youngman, Mr Youngman did not make findings that Mr O'Meara's actions were potential misconduct so Ms Gillis felt there was no reason for her to change her initial view about how to handle allegations against Mr O'Meara in the light of Mr Youngman's report.

280. In oral evidence, Ms Gillis provided further insight into her thinking, to the effect that she understood that the Claimant was Mr O'Meara's line manager and he was acting partly at her instigation. He was also named in one grievance (Mr Topalovic) rather than all three. Although this was not in her witness statement, we accept that these factors did feature in her reasons at the time because they are obvious points of distinction between the Claimant's case and Mr O'Meara's. We accept therefore that these factors constituted Ms Gillis' conscious reasons for acting. We consider in our conclusions whether she was nonetheless influenced by the Claimant's sex or her alleged protected disclosures.

281. Mr Reay met Mr O'Meara for lunch for his exit interview on 21 November 2019. He had read Mr Youngman's criticism of Mr O'Meara in his report, but he understood that it had already been decided not to pursue this as a disciplinary matter. Mr Reay had no involvement in that decision.

282. Dr Bucknall would have taken a different approach: in his letter dismissing the Claimant he states that if Mr O’Meara had remained an employee he would have recommended investigation under HCA’s disciplinary process, but in fact by that time he had resigned.

283. As a result, Mr O’Meara was unaware that there were any allegations against him when his employment terminated (on notice) by reason of redundancy on 31 December 2019.

#### These proceedings

284. On 6 January 2020 the Claimant issued proceedings under claim number 2200056/2020 claiming interim relief. This was the first time the Claimant alleged that she had been dismissed for making protected disclosures.

285. The Claimant’s application for interim relief was dismissed at a hearing on 12 February 2020.

286. On 27 March 2020 the Claimant issued these proceedings.

### **Conclusions**

#### Alleged protected disclosures

##### *The law*

287. Section 43A ERA 1996 defines a protected disclosure as a qualifying disclosure, which is in turn defined in s 43B(1) as “*any disclosure of information which, in the reasonable belief of the worker making the disclosure, is in the public interest and tends to show one or more*” of a number of types of wrongdoing. These include, (b), “*that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject*” and (d) “*that the health and safety of any individual has been, is being or is likely to be endangered*”.

288. A qualifying disclosure must be made in circumstances prescribed by other sections of the ERA, including, under section 43C, to the worker’s employer.

289. In the light of *Cavendish Munro Professional Risks Management Ltd v Geduld* [2010] ICR 325, [24]-[26], it was for a time suggested that a mere allegation could not constitute a disclosure of information. However, in *Kilraine v Wandsworth LBC* [2018] ICR 1850 the Court of Appeal clarified (at [30]-[36]) that “*allegation*” and “*disclosure of information*” are not mutually exclusive categories. What matters is the wording of the statute; some ‘information’ must be ‘disclosed’ and that requires that the communication have “*sufficient factual content and specificity such as is capable of tending to show one of the matters listed in subsection (1)*” (ibid at [35]). In *Kilraine*

generalised allegations of bullying, harassment and ‘inappropriate’ conduct as set out in the ‘third disclosure’ at issue in that case quoted at [15] of the Court of Appeal judgment were held by the EAT (see [21]; upheld by the Court of Appeal and [38]-[42]) to be too vague to amount to a protected disclosure.

290. In *Simpson v Cantor Fitzgerald Europe* [2020] EWCA Civ 1601, [2021] ICR 695 the CA at [53] approved the approach of the EAT (UKEAT/0016/18/DA) at [42] in relation to the use of questions in an alleged protected disclosure, holding that the fact that a statement is in the form of a question does not prevent it being a disclosure of information if it “sets out sufficiently detailed information that, in the employee’s reasonable belief, tends to show that there has been a breach of a legal obligation”.
291. In this case, so far as s 43B(1)(d) is concerned, we further accept the Respondent’s submission that ‘endangered’ is a strong word that means someone is actually ‘in danger’, i.e. that there is a significant (more than minor or trivial) threat to their mental or physical health, not that they may simply be less comfortable or at risk of some minor effect on their health. We add in this regard that we are conscious that, like the parties, we have in this judgment frequently used the words ‘patient safety issue’. We emphasise, however, that we have not regarded the use of the term ‘patient safety issue’ as either synonymous with, or necessarily determinative, of the question of whether a disclosure has been made within s 43B(1)(d). We have treated the question of whether or not the witnesses used the term ‘patient safety issue’ or understood a ‘patient safety issue’ to have been raised as merely being part of the factual matrix against which we have assessed whether the statutory test for a protected disclosure has been met.
292. Information disclosed in cumulative communications can constitute a single protected disclosure; whether it does is a question of fact: *Norbrook Laboratories (GB) Ltd v Shaw* [2014] ICR 540, approved in *Simpson v Cantor Fitzgerald Europe* *ibid* at [41].
293. A ‘disclosure of information’ can take place when the information being communicated is already known to the recipient. This is clear from section 43L(3) ERA 1996, and was confirmed by the Employment Appeal Tribunal in *Parsons v Airplus International Ltd* (UKEAT/0111/17/JOJ).
294. What must be established in each case is that the Claimant has a reasonable belief that the information disclosed tends to show one of the matters in s 43B(1), i.e. that the information disclosed ‘tended to show’ that someone had failed, was failing or was likely to fail to comply with one of the legal obligations set out there. ‘Tends to show’ is a lower hurdle than having to believe the information ‘does’ show the relevant breach or likely breach: see *Twist DX Limited v Armes* (UKEAT/0030/20/JOJ) [66]. The word “likely” appears in the section in connection with future failures only, not past or current failings where what is required is that the Claimant reasonably believe that the information disclosed ‘tends to show’ actual failures. Where what is in issue is a likely future failure, the EAT in *Kraus v Penna Plc* [2004] IRLR

260 at [24] held that “likely” in this context means “more probable than not”. On this particular point, *Kraus v Penna* was not over-ruled by *Babula v Waltham Forest College* [2007] EWCA Civ 174, [2007] ICR 1026, but in *Babula* the Court of Appeal did over-rule *Kraus* in relation to the approach to be taken to assessing the reasonableness of the Claimant’s belief.

295. In the light of *Babula* (ibid, [74]-[81]), what is necessary is that the Tribunal first ascertain what the claimant subjectively believed. The Court of Appeal in *Ibrahim v HCA International Ltd* [2019] EWCA Civ 2007, [2020] IRLR 224 (see especially [14]-[17] and [25]) has confirmed that it is the claimant’s subjective belief that must be assessed when considering the public interest element as well. The Tribunal must then consider whether the claimant’s belief in both respects was objectively reasonable, i.e. whether a reasonable person in the claimant’s position would have believed that all the elements of s 43B(1) were satisfied, specifically that the disclosure was in the public interest, and that the information disclosed tended to show that someone had failed, was failing or was likely to fail to comply with a relevant legal obligation. The Court of Appeal in *Babula* emphasised that it does not matter whether the claimant is right or not, or even whether the legal obligation exists or not. As such, it is not necessary that the disclosure identify or otherwise refer to the legal obligation (or any of the matters in s 43B(1)), although whether it does or not may be relevant to the reasonableness of the claimant’s belief that the information disclosed tends to show a relevant breach: see *Twist DX Limited v Armes* (UKEAT/0030/20/JOJ) at [87] and [103]-[104] *per* Linden J.
296. The reasonableness of the worker’s belief is determined on the basis of information known to the worker at the time the decision to disclose is made: *Darnton v University of Surrey* [2003] ICR 615. It is to be assessed in the light of all the surrounding circumstances and as such witness evidence will be relevant to determining whether or not a written disclosure satisfies the statutory requirements or not. What was or was not known to the claimant and relevant witnesses at the time will be relevant to whether or not the claimant could reasonably believe that the disclosure met the statutory requirements: see *Twist* ibid at [57]-[59].
297. The burden of proof is on the Claimant to establish a protected disclosure was made.

### Conclusions

298. In relation to each of the alleged protected disclosures relied on by the Claimant in these proceedings, as identified in the List of Issues, we find as set out below.
299. We observe by way of preliminary, that there was in our judgment a lack of care taken by the Claimant (or those acting on her behalf) in drawing up the list of alleged protected disclosures. A “scattergun” approach was taken, frequently without regard to how what was being alleged matched up with the documents or the Claimant’s own evidence. It also unnecessarily expanded

the issues we have had to deal with. As Ms McColgan accepted in her closing submissions, *“It is ... not necessary for the Claimant to establish that all or most of these disclosure meet the statutory tests for protected disclosures”*. That is plainly correct and, as such, we would have expected the Claimant, in accordance with the over-riding objective, to have withdrawn those she considered unnecessary at the start of the hearing. However, she did not do so, Ms McColgan indicating instead that although she would ‘focus’ on particular disclosures, all of those listed in the claim form were relied on. Such an approach to litigation is not in accordance with the over-riding objective and is to be deprecated.

300. We have for the most part not specifically addressed in our reasons below whether the public interest test in relation to each disclosure is met. In general terms, we accept that a disclosure about risk to health and safety of patients will generally be in the public interest (unless the issue is very specific to one particular patient), but as will be apparent for the most part we have found the Claimant has not proved either that she made disclosures of information at all or, if she did, that she subjectively believed they met the statutory test, or that objectively they did not meet the statutory test. It is only where the statutory test in those respects has been met, or come close to being met, that we have gone on to give any consideration to the public interest.
301. We have also not sought to distinguish between disclosures alleged to fall within s 43B(1)(b) and disclosures alleged to fall within s 43B(1)(d). This is because the Claimant’s case has generally not focused on the precise words she alleges she used on any particular occasion, because the Claimant has not in her case sought to distinguish the two types of disclosure and because in our judgment there will generally be an overlap between the two as something that endangers health and safety is also likely to be a breach of the Respondent’s duty of care in tort.

*The alleged disclosures*

- a. *Informing the Respondent on 5 December 2018 of her concerns relating to the proposed reduction in staff levels at The Harley Street Clinic and The Portland Hospital, as per paragraph 5 of the Grounds of Claim;*
302. Our findings of fact regarding this allegation are at paragraphs 102103 above. We find that this was not a protected disclosure. In this email, the Claimant discloses information, but it is not, objectively, information that tends to show a failure to comply with a legal obligation or that the health or safety of any individual is likely to be endangered. The issue here was that there were not sufficient staff to open a further unit for additional patients. However, the Respondent does not have a legal obligation to admit patients. It is a private hospital, not the National Health Service. We accept it does have a legal obligation to ensure it has sufficient staff to fulfil its legal duty of care to patients it has admitted (which is not necessarily the same as the levels of staffing it actually maintains, which may be above that minimum legal

threshold) and that failure to maintain staffing at appropriate levels may endanger patient safety. However, the situation on 5 December 2018, as reported by the Claimant, was that there were not sufficient staff to take on more patients and, indeed, that they may have to transfer patients out. In other words, the email is concerned with the steps that the Claimant is taking to ensure that there is no risk to patients. The information she discloses thus did not tend to show that there had been or was likely to be a breach of a legal obligation or any danger to patients (applying the proper threshold for the meaning of 'endangered'). We found as a fact that it did not convey any such meaning to its recipients, who saw the Claimant as alerting them to operational issues and commercial risks, rather than breaches of legal obligations or health and safety. Further, considering all of the evidence, we find that the Claimant did not have any subjective belief at the time that she was disclosing information that tended to show a breach of a legal obligation or a risk to patient safety. If there had been a risk to patient safety, then as CQC registered manager the Claimant ought to have made that clear. The Claimant has argued, based on Mr O'Meara's email exchanges with Ms Champion, that the Respondent sought to deter people from using 'patient safety' as an argument, but the point he was making there was that 'patient safety' should not be used as an argument when there is no real risk to patients and what is really at issue is maintaining a level of comfort that is not really necessary. We observe in any event that the Claimant was *not* deterred from referring to 'patient safety' when she wanted to, as her emails of 18 April 2019 and 24 April 2019 make clear (above paragraphs 134 and 135). If she had really thought there was a patient safety issue in December 2018, she would have said that. This is not therefore a protected disclosure.

*b. opposing John Reay and the Respondent's Management Team's decision to move the medical oncology service from The Harley Street Clinic to The Princess Grace Hospital on 22 October 2018, 6 December 2018, 17 April 2019, 18 April 2019 and 24 April 2019, as per paragraph 6 of the Grounds of Claim;*

303. These alleged protected disclosures span the period *after* the move of the medical oncology service had already taken place. The Claimant alleged in these proceedings that she expressed patient safety concerns prior to the move. We found as a fact at paragraphs 54-70 that she did not.

304. The alleged disclosure on 22 October 2018 we have dealt with at paragraph 96. It relates to the Claimant mentioning at the MAC meeting four complaints she had received from consultants. We have not been provided with the four complaints in question. The Claimant did not present them to the meeting as patient safety concerns or breaches of legal obligations. In the circumstances, we find that the Claimant has not discharged the burden on her of proving that she disclosed information that tended to show the requisite matters. Even if she did, we observe that this appears to have been an entirely routine raising in a meeting of complaints made by others that even if it did constitute a protected disclosure by the Claimant, we would not have found that this influenced anyone else in their treatment of the Claimant thereafter.

305. The alleged disclosure(s) on 6 December 2018 are dealt with at paragraphs 104-105. They consist of the Claimant passing on concerns raised by others. We found that that these were not regarded by the Claimant or the Respondent's witnesses at the time as 'patient safety issues'. However, as noted in the Law section above, we have not assumed that what the Claimant and Respondent regarded as 'patient safety issue' necessarily equates to the statutory threshold for a protected disclosure. We recognise that a patient who is kept waiting for seven hours for a transfer may have suffered a measure of discomfort, but based on the evidence before us we find it does not cross the threshold. Had there been anything more than a minor or trivial effect on the patient, we would expect this to have featured clearly in Dr Harper's letter or the Claimant's subsequent emails. It does not. The Claimant submits there is no need to spell this sort of thing out because it is obvious, but it was not obvious to the Respondent's witnesses, and it is not obvious to us. Applying the objective test we find that the Claimant in passing on and discussing Dr Harper's concerns did not disclose information that tended to show any endangerment of a patient. Nor do we accept that the Claimant subjectively believed that at the time: her concerns were operational, organisational and commercial.
306. The alleged disclosures of 17, 18 and 24 April 2019 are dealt with at paragraphs 133-135. If we had come to these alleged protected disclosures in isolation from the rest of this case, we would have found that they met the statutory test. The information disclosed by the Claimant does in our view cross the threshold of 'tending to show' that the health and safety of patients has been or is likely to be endangered because the words 'patient safety' are used and some of the matters described (eg consultant having to suction own patient who had not been given morphine) cross the line from patient discomfort to patient safety (not for that particular patient necessarily, but for others who might be in the same position but without the consultant available to step in to perform the nursing duty). However, these are the only occasions in the evidence before us when the Claimant actually uses the words 'patient safety concern' in writing despite having claimed to have raised patient safety concerns on multiple previous occasions. We found as a fact that the Claimant was at this point building a case for persuading Mr Reay to adopt her long-preferred option of consolidating the relatively profitable medical oncology services at THSC rather than at PGH, and that she was not genuinely concerned about patient safety. Further, Ms Dodd perceived that this was what the Claimant was trying to do. Ms Dodd did not regard the issues being raised by the Claimant as patient safety issues, they appeared to her to be operational issues, and we infer from his evidence on other incidents that this was also Mr Reay's view. As such, despite the appearance of these emails when viewed in isolation, in context we find that they do not meet the statutory definition: the Claimant did not subjectively believe that she was disclosing information that tended to show endangerment of health and safety or breach of a legal obligation and/or she did not subjectively believe that she was making the disclosure in the public interest as distinct from the interests of THSC as a business (and her interests as CEO in charge of that business). Further, objectively, those to whom she made these

disclosures did not, in context, view them as such, and we find (again in context) that it was reasonable of them to take this view so that objectively these were not disclosures that tended to show the relevant matters or were in the public interest.

307. These are not therefore protected disclosures.

*c. informing Michael Neeb, John Reay and Teresa Finch on 4 December 2018, 5 December 2018, 6 December 2018, 12 February 2019, 12 March 2019, 18 April 2018, 24 April 2019 and 2 May 2019 that she did not support the move of oncology services to The Princess Grace Hospital or the reduction in number of medical and nursing staff at the Respondent's sites for which she had managerial responsibility as she considered these changes would damage the health and safety of the Respondent's patients, as per paragraph 7 of the Grounds of Claim;*

308. The alleged disclosures of 5 December 2018, 6 December 2018, 18 and 24 April 2019 we have already dealt with above. There was no disclosure on 4 December 2018 as such (see 101). Our findings of fact regarding the conversation between the Claimant and Mr Reay on 12 February 2019 are set out at paragraph 129. We were unable to make findings as to any specific words used. We find that the Claimant did not subjectively believe that she was disclosing information that tended to show that the health and safety of any person was endangered. (See also in this respect paragraph 71 where we concluded that the Claimant did not raise patient safety concerns about the medical oncology move.) We further find that objectively such information as was disclosed by her did not meet this threshold. The Claimant's concerns related to budget and commercial performance, and were understood as such by Mr Reay. Our findings about what happened on 2 May 2019 are at paragraphs 165-167. There was no disclosure about the medical oncology move on that date.

309. These are not therefore protected disclosures.

*d. informing John Reay on a date between 9 August to 16 August 2018 of her concerns relating to patients at The Princess Grace Hospital who may require out of hours MRI and radiation treatment for which they would be required to be transferred by ambulance to The Harley Street Clinic, as she considered that this was in breach of the Respondent's legal obligations to care for its patients, as per paragraph 8 of the Grounds of Claim;*

310. Our findings of fact in relation to this conversation are at paragraph 68. We found that the Claimant did not subjectively believe in this conversation that she was raising a patient safety issue, and in this instance we find that that also means that the subjective test for the making of a protected disclosure within s 47B(1)(d) is not met. In any event, we consider that, objectively, the Claimant was not here making a disclosure that tended to show that the health and safety of anyone was endangered. Moving the patients between hospitals might be uncomfortable for the patient, but the evidence before us



is that it was accepted practice and the distance between hospitals was so short that we cannot reasonably see that any patient safety issue arose, and Mr Reay did not think so. This was not therefore a protected disclosure.

- e. *informing John Reay on 18 April 2018 that the move of paediatric services would require extra theatres and upgraded imaging services, as she considered not having these would put patient safety at risk, and that the disruption of the move itself would be damaging to the health and safety of the patients, as per paragraph 9 of the Grounds of Claim;*

311. Our findings of fact relating to this alleged disclosure are at paragraphs 65-67 above. Although the move of paediatric services from THSC to TPH in the end did not proceed because there were safety concerns about that (which the Claimant shared), the Claimant's email of this date does not, in our judgment, contain a disclosure of information that tends to show that the health and safety of patients is endangered. Her email refers to the need for refurbishment and the fact that an analog X-ray service is still being used. While that may be less than ideal, given that it is technology that has been used for years and is still widely used, it cannot sensibly be understood as being a danger to patients, and Mr Reay did not understand it as such. This is not therefore a protected disclosure.

- f. *informing Michael Neeb in July and August 2018 that she did not support the move of oncology services, as she considered it posed a risk to patient safety, as per paragraph 9 of the Grounds of Claim;*

312. Our findings of fact in relation to these alleged disclosures are at paragraphs 69-71. For the reasons we set out there, we find that the Claimant did not express to Mr Neeb her view that she was unsupportive of this project. This was not therefore a protected disclosure.

- g. *the discussing on around and from 30 August 2018 of the impact of the move of oncology services by the Claimant at the weekly meeting with Professor Tony Goldstone, Professor Paul Ellis, and Claire Smith, with the Claimant explaining as part of this the risk the move would have to patients and the risks to their health, as per paragraph 10 of the Grounds of Claim;*

313. Our findings of fact in relation to these alleged disclosures are set out at paragraphs 70-71. There was no evidence before us of any particular words having been used by the Claimant to Professor Goldstone, Professor Paul Ellis or Ms Smith and we found as a fact that the Claimant had not raised any patient safety concerns in relation to the proposed move of medical oncology services. In the circumstances, these were not protected disclosures.

- h. *informing John Reay and Lorraine Hughes on or around 22 October 2018 of four complaints she had received from consultants relating to incidents at The Princess Grace Hospital involving oncology patients, as per paragraph 11.1 of the Grounds of Claim;*

314. Our findings of fact in relation to this alleged disclosure are at paragraph 96. We have not been provided with copies of the complaints from consultants, we only have the evidence of the MAC meeting minutes and the witnesses. The Claimant says they were “*serious clinical incidents*” but she does not say that she introduced them as such to the meeting, the minutes do not indicate they were and the Respondent’s witnesses did not recognise or remember them as being serious. As such, we do not accept that the Claimant made any disclosure of information that tended to show an endangerment to health and safety. Even if she believed she had, she has not provided the evidence to us of any disclosure of information, and objectively we find that such information as she did disclose did not meet the statutory test. This was not therefore a protected disclosure.

*i. informing John Reay, Michael Neeb, Teresa Finch, Nicola Gillis and Lorraine Hughes at a MOR meeting in October, November or December 2018 of her concern that staff shortages and poor services were endangering the safety of oncology patients, as per paragraph 11.2 of the Grounds of Claim;*

315. Our findings of fact on this are at paragraph 97. The Claimant has not shown that she made any disclosures of information at these meetings that objectively met the statutory test. These were not protected disclosures.

*j. informing Lorraine Hughes, Ms Champion and Nicola Gillis in writing on 4 December 2018 of her concern that the Respondent was overly reliant on temporary nursing staff, as per paragraph 11.4 of the Grounds of Claim;*

316. Our findings of fact in relation to this alleged disclosure are at paragraph 101 above. The email of 4 December 2018 itself contains no disclosure of information that objectively tends to show endangerment of patients and we do not accept that the Claimant subjectively believed it did either. It is an email about vacant posts and recruitment requirements, but there is nothing to suggest that patient safety is at risk as a result. The Claimant says now that it was implicit, but we do not accept it was. Had she really thought that, then as the registered manager with CQC she should have made that clear. As such, the particular communication relied on by the Claimant is not a protected disclosure. We add that, in context, this email is part of a discussion about the need to reduce reliance on agency staff, and to meet CQC requirements in that regard. In our findings of fact we accepted that compliance with CQC standards relates to patient safety, but we found that the nature of the discussion here was about what was required to obtain an Outstanding rating with CQC. While obtaining such a rating indicates high standards of patient care, objectively what was ‘at risk’ in our judgment was the Respondent’s commercial reputation, rather than the patients. As such, even viewed in context, this was not a protected disclosure.

*k. informing Sarah Wheatland, Lorraine Hughes, Neil Buckley, Teresa Finch and John Reay on 5 December 2018 that Prateek Saxena had raised concerns relating to bed numbers at the Portland Hospital and The Harley*

*Street Clinic, as the Claimant was concerned that services were insufficient for patients, as per paragraph 11.5 of the Grounds of Claim;*

317. Our findings of fact in relation to this alleged disclosure are at paragraph 102 and we have dealt with it above as part of considering protected disclosure a. above. It was not a protected disclosure.

*l. informing Miranda Dodd, Lorraine Hughes and John Reay on 6 December 2018 of her concerns relating to the lack of beds for oncology patients at The Princess Grace Hospital and that this risked patient safety, as per paragraph 11.6 of the Grounds of Claim;*

318. Our findings of fact in relation to this alleged disclosure are at paragraphs 104-107 and we have dealt with them as part of considering protected disclosure b. above. This was not a protected disclosure.

*m. speaking with John Reay on 12 February 2019 regarding budget cuts and the impact of targets imposed on staffing in the hospitals she managed, as per paragraph 11.7 of the Grounds of Claim;*

319. We have dealt with this as part of protected disclosure c. above. It is not a protected disclosure.

*n. informing John Reay on 12 March 2019 of her concern that staff shortages and the absence of a Chief Nursing Officer endangered patient safety, as per paragraph 11.8 of the Grounds of Claim;*

320. This alleged disclosure was actually made in the Claimant's email of 11 March 2019 to Ms Gillis and Mr Reay, about which we have made findings of fact at paragraph 148. The Claimant in this email disclosed information that the absence of a CNO would compromise her ability to prepare for the upcoming CQC inspection and put pressure on her team and the arrangements needed to be made for covering Mrs Champion's duties in her absence. We find that the Claimant did not subjectively believe that this information tended to show a breach of legal obligation by the Respondent, or an endangerment to health safety, and it does not objectively meet that test either. The Claimant's concerns here, and Mr Reay's understanding of what she was communicating, was that Mrs Champion's absence would mean more work for the rest of the team which might make it more difficult for them to achieve an Outstanding at the upcoming CQC inspection. There was no risk to patients as there was adequate clinical cover and the hospital had functioned safely for six months before Mrs Champion joined without a CNO at all. This was not a protected disclosure.

*o. informing Nicola Gillis and John Reay on 2 May 2019 of her concern that the absence of a Chief Nursing Officer endangered the health and safety of patients and could lead to a breach of CQC regulatory requirements, as per paragraph 11.9 of the Grounds of Claim;*

321. Our findings of fact in relation to this alleged disclosure are at paragraph 165. This is the only occasion, in a case that was supposedly all about disclosures the Claimant made concerning patient safety, that she actually uses the words “*patient safety*” orally and, as with the only occasions she uses that term in writing in April 2019 (see above), it is apparent that she deploys the words because she is seeking to achieve something else rather than because she is concerned about patient safety. In this meeting on 2 May 2019 the Claimant’s primary concern was about the grievance that had been brought against her by Mrs Champion and the length of time it was taking to investigate that. What she says about the supposed compromise to patient safety of having Mrs Champion absent is in our judgment intended to persuade Mr Reay and Ms Gillis either to drop or speed up dealing with Mrs Champion’s grievance. Given that, for the reasons we have already set out, no one could reasonably have believed that Mrs Champion’s absence posed a health and safety risk, the Claimant’s remark in this meeting about Mrs Champion’s absence posing a greater risk to patient safety than the behaviour of Dr R (behaviour which included a long list of clinical as well as behavioural concerns for which Dr R’s practising privileges were ultimately removed) demonstrates either very poor judgment or disingenuousness on the Claimant’s part. In this case, it was disingenuousness as the Claimant had an ulterior motive and so it follows that the Claimant did not subjectively believe that she was disclosing information that tended to show a breach of a legal obligation / endangerment to health and safety. In any event, even it was poor judgment and the Claimant did have the subjective belief she claims, it was such poor judgment that it was not objectively reasonable in the circumstances. This was not a protected disclosure.

*p. informing John Reay and Nicola Gillis on 4 May 2019 of her concern that the absence of a Chief Nursing Officer was a risk to patient safety, as per paragraph 11.10 of the Grounds of Claim;*

322. We deal with this email at the end of paragraph 165. It does not contain the disclosure alleged.

*q. informing Lorraine Hughes on 13 May 2019 of her concern that the interim Chief Nursing Officer posed a threat to staff and patient safety, as per paragraph 11.11 of the Grounds of Claim;*

323. This conversation in fact happened on 16 May 2019 and our findings of fact in relation to it are at paragraph 169. We did not accept that the Claimant disclosed any information that the interim CNO posed a threat to staff and patient safety. The Claimant had participated in selection of the interim CNO on the basis of her CV in the preceding weeks and all she had done at this point was to turn up wearing trainers and not attend the TPH AGM as the Claimant had hoped she would. In those circumstances, it is impossible for the Claimant to have expressed the view to Ms Hughes that she considered the interim CNO posed a threat to staff and patient safety. This was not a protected disclosure.

r. *making the complaint to Nicola Gillis on 12 February 2018 that John Reay bullied and harassed her and other female employees, as per paragraph 12.1 of the Grounds of Claim;*

324. Our findings of fact regarding this conversation are at paragraphs 4954. For the reasons set out there, we find that the Claimant did not make these alleged disclosures about Mr Reay.

s. *making complaints to Michael Neeb on 13 October 2016, 16 November 2016 and 26 February 2019 that John Reay had bullied and harassed female members of staff, as per paragraph 12.2 of the Grounds of Claim;*

325. Our findings of fact regarding this conversation are at paragraphs 4954. For the reasons set out there, we find that the Claimant did not make these alleged disclosures about Mr Reay.

t. *making the complaint to Nicola Gillis on 25 April 2018 that John Reay harassed her and other women, as per paragraph 12.3 of the Grounds of Claim;*

326. Our findings of fact regarding this conversation are at paragraphs 4954. For the reasons set out there, we find that the Claimant did not make these alleged disclosures about Mr Reay.

u. *making the complaint to Nicola Gillis on 22 May 2018 that John Reay bullied her and other women, as per paragraph 12.4 of the Grounds of Claim; and*

327. Our findings of fact regarding this conversation are at paragraphs 4954. For the reasons set out there, we find that the Claimant did not make these alleged disclosures about Mr Reay.

v. *informing Michael Neeb on 26 February 2019 of her concern that John Reay's behaviour had not improved and that he continued to bully and harass female members of staff, as per paragraph 12.5 of the Grounds of Claim.*

328. Our findings of fact in relation to this alleged disclosure are at paragraph 43. We do not accept any such disclosure was made.

#### *Conclusion on the alleged protected disclosures*

329. It follows from the above that we do not find that the Claimant made any protected disclosures within the meaning of s 43B of the ERA 1996. That disposes of her claims based on those protected disclosures, but as we have heard all the evidence, we have nonetheless gone on to consider whether, if we are wrong in our conclusions in relation to the alleged protected disclosures, those communications by the Claimant played any material part in the detriments about which she complains, or were the sole or principal reason for her dismissal.

Alleged whistle-blowing detriments

*The law*

330. Under s 47B(1) ERA 1996, a worker has a right not to be subjected to a detriment by any act or deliberate failure to act on the part of her employer done on the ground that the worker has made a protected disclosure. Under s 47B(1A)(a) ERA 1006 a worker has the same right not to be subjected to a detriment by another worker of the employer done in the course of that other worker's employment.
331. A detriment is something that a reasonable worker in the Claimant's position would or might consider to be to their disadvantage in the circumstances in which they thereafter have to work. Something may be a detriment even if there are no physical or economic consequences for the Claimant, but an unjustified sense of grievance is not a detriment: see *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11, [2003] ICR 337 at [34]-[35] *per* Lord Hope and at [104]-[105] *per* Lord Scott. (Lord Nicholls ([15]), Lord Hutton ([91]) and Lord Rodger ([123]) agreed with Lord Hope.) The Court of Appeal has confirmed that the same approach to 'detriment' is to be applied in whistle-blowing cases as in discrimination cases: *Tiplady v City of Bradford MDC* [2019] EWCA Civ 2180, [2020] ICR 965 at [42].
332. If a protected disclosure has been made, the Tribunal must consider whether the Claimant has been subjected to a detriment "*on the ground that*" she made a protected disclosure (s 47B(1)). This means that the protected disclosure must be a material factor in the treatment: *Fecitt v NHS Manchester* [2011] EWCA Civ 1190, [2012] ICR 372 at [43] and [45]. This requires an analysis of the mental processes of the worker who is alleged to have subjected the claimant to a detriment. In order for a decision-maker to be materially influenced by a protected disclosure, they must have personal knowledge of it: see *Malik v Cenkos Securities Plc* (UKEAT/0100/17/RN) at [85]-[87]. As Choudhury J explains there, that is because in whistle-blowing cases, as in discrimination, the focus is on what is in the mind of the individual alleged to have subjected the claimant to a detriment. As was held in the discrimination case of *CLFIS (UK) Limited v Reynolds* [2015] IRLR 562, it is not permissible to add together the mental processes of two different individuals.
333. The Claimant in this case seeks to rely on *Royal Mail Ltd v Jhuti* [2019] UKSC 55, [2020] ICR 731. That case concerned a claim of automatic unfair dismissal for having made a protected disclosure contrary to s 103A ERA 1996. The situation was one which the Supreme Court described at [41] as "*extreme*" and "*not ... common*". The dismissal decision had been taken in good faith by a manager on the basis of evidence of poor performance presented by the claimant's line manager. However, the Tribunal found that the line manager had dishonestly constructed the evidence of poor

performance in response to a protected disclosure made by the employee. At [60] the Supreme Court concluded as follows:

60. In searching for the reason for a dismissal for the purposes of section 103A of the Act, and indeed of other sections in Part X, courts need generally look no further than at the reasons given by the appointed decision-maker. Unlike Ms Jhuti, most employees will contribute to the decision-maker's inquiry. The employer will advance a reason for the potential dismissal. The employee may well dispute it and may also suggest another reason for the employer's stance. The decision-maker will generally address all rival versions of what has prompted the employer to seek to dismiss the employee and, if reaching a decision to do so, will identify the reason for it. In the present case, however, the reason for the dismissal given in good faith by Ms Vickers turns out to have been bogus. **If a person in the hierarchy of responsibility above the employee** (here Mr Widmer as Ms Jhuti's line manager) **determines that, for reason A** (here the making of protected disclosures), **the employee should be dismissed but that reason A should be hidden behind an invented reason B which the decision-maker adopts** (here inadequate performance), **it is the court's duty to penetrate through the invention rather than to allow it also to infect its own determination. If limited to a person placed by the employer in the hierarchy of responsibility above the employee, there is no conceptual difficulty about attributing to the employer that person's state of mind rather than that of the deceived decision-maker.** (Emphasis added)

334. We also accept that the principle in *Jhuti* applies to situations in which the manipulating manager (i.e the manager who is acting because of the employee's protected disclosures) has played a part in the decision-making process, such as by carrying out the investigation stage of that process. This is because the Supreme Court in *Jhuti* at [51]-[53] approved (*obiter*) the (also *obiter*) view expressed by Underhill LJ in *Orr v Milton Keynes Council* [2011] EWCA Civ 62, [2011] ICR 704 that "*the motivation of [a] manipulator could in principle be attributed to the employer, at least where he was a manager with some responsibility for the investigation*". Although *obiter*, we accept that these conclusions represent the law. Subsequent decisions of the EAT have emphasised the very limited situations in which the *Jhuti* principle will apply (see eg *University Hospital North Tees & Hartlepool NHS Foundation Trust v Fairhall*, UKEAT/0150/20, per HHJ James Tayler at [36] – [37]) and *Kong v Gulf International Bank (UK) Ltd* EA-2020-000357-JOJ and EA-2020-000438-JOJ per HHJ Auerbach at [72].

335. The Claimant in this case seeks to apply the principle in *Jhuti* about the circumstances in which the state of mind of one employee can be attributed to the employer to the alleged whistle-blowing detriments under s 47B(1A) as well. We note that Choudhury P in *Malik v Cenkos Securities Plc* (UKEAT/0100/17/RN) at [93] considered that *Jhuti* does not apply to detriments cases: "*The case of Royal Mail Group v Jhuti does not assist the Claimant for the simple reason that that was a dismissal case and not one relying upon detriment. One can attribute the motivation of someone other than the dismissing officer to the employer in a dismissal case in some circumstances. That is because the liability for the dismissal lies only with the employer, and the injustice which concerned the Court of Appeal in CLFIS does not arise.*" That observation is probably part of the *ratio* of that case, but it is not a very developed part of the judgment. We have taken ourselves to

be bound by it, but also record that had it been open to us to decide this point we would have decided that the principle in *Jhuti* can apply to detriments cases against the employer under s 47B(1). This is because the injustice which concerned the Court of Appeal in the discrimination case of *CLFIS* does not arise in a whistle-blowing detriments case. In discrimination cases the individual is always liable with the employer by dint of being deemed by ss 109 and 110 to have aided and abetted the employer; accordingly in *CLFIS* it was held that the focus must always be on the mind of an individual alleged discriminator and that the corporate employer can only be liable if an individual alleged discriminator has discriminated as otherwise there is an 'injustice' to the employee as they are liable with the employer even if they have not themselves discriminated. That is not the case for whistleblowing where there are separate provisions for the liability of the employer (s 47B(1)) and the worker (s 47B(1A)) and while the employer is deemed liable for the worker subject to the reasonable steps defence, the worker is not deemed liable with the employer as there is no equivalent to ss 109 and 110 EA 2010 in the ERA 1996: see *Fecitt v Manchester* [2012] ICR 372 where the Court of Appeal held that the Act did not create any liability at all for individual workers, following which s 47B(1A) was inserted to create that liability, but without also adding the equivalent of ss 109 and 110 of the EA 2010. We can therefore see no reason why the principles in *Jhuti* should not apply to detriments claims brought against the employer under s 47B(1) where the task of the Tribunal is to identify the state of mind of the corporate employer.

336. The burden of proof is on the Claimant to establish a protected disclosure was made, and that he or she was subject to detrimental treatment. However, s 48(2) provides that it is then "*for the employer to show the ground on which any act, or deliberate failure to act, was done*". It has been held that, although the burden is on the employer, the Claimant must raise a *prima facie* case as to causation before the employer will be called upon to prove that the protected disclosure was not the reason for the treatment: see *Dahou v Serco Ltd* [2016] EWCA Civ 832, [2017] IRLR 81 at [40] (deciding this point so far as dismissal cases are concerned, persuasive *obiter* on the same point for detriment cases). As such, the section creates a shifting burden of proof that is similar to that which applies in discrimination claims under s 136 of the Equality Act 2010 (EA 2010). Unlike in discrimination claims, though, if the employer fails to show a satisfactory reason for the treatment, the Tribunal is not bound to uphold the claim. If the employer fails to establish a satisfactory reason for the treatment then the Tribunal may, but is not required to, draw an adverse inference that the protected disclosure was the reason for the treatment: see *International Petroleum Ltd v Osipov and ors* UKEAT/0058/17/DA and UKEAT/0229/16/DA at [115]-[116] and *Dahou* *ibid* at [40].

### Conclusions

337. We have found that the Claimant did not make any protected disclosures within the meaning of s 43B of the ERA 1996. We do not therefore need to go on to make findings in relation to her detriments claims, but (as already



noted above) we have heard all the evidence, we have nonetheless gone on to consider whether, if we are wrong in our conclusions in relation to the alleged protected disclosures, those communications by the Claimant played any material part in the detriments about which she complains. In doing so, we have also (for completeness) addressed the Claimant's case on *Jhuti* on the assumption that Choudhury P in *Malik v Cenkos Securities Plc* (UKEAT/0100/17/RN) was wrong and *Jhuti* does apply to detriments cases.

*a. wrongful suspension of the Claimant on 17 May 2019, as per paragraph 13.1 of the Grounds of Claim;*

338. Our findings of fact regarding the decision to suspend the Claimant are set out at paragraph 217. We found that the conscious reasons that Mr Reay had for deciding to suspend the Claimant, and Ms Gillis' conscious reasons for advising him to do so, were because of the number of grievances, and the particular nature of them, i.e. that the Claimant had sought to interfere with HR processes in relation to her mother. We accepted those were their conscious reasons because we found them in general to be reliable witnesses and because those reasons were on their face plausible and good reasons for taking that decision as it reasonably appeared at this point that there were a number of relatively serious concerns about the Claimant's conduct being raised by independent individuals and a plausible basis for concern about the Claimant's reaction to complaints given the behaviour alleged against her in respect of the investigation into her mother's conduct.
339. We have, however, gone onto consider whether, despite the ostensibly good reasons for suspending the Claimant at this point, the decision to do so was influenced by the communications that the Claimant relied on as protected disclosures. We find that those communications had absolutely nothing to do with it.
340. On the Claimant's case, she had been making protected disclosures about various matters throughout 2018 and the first half of 2019. There is no evidence to suggest that at any point anyone 'turned against' her because of those alleged protected disclosures or sought to victimise her in any way. On the contrary, opportunities that could have been used by Mr Reay vindictively to victimise the Claimant were passed over: Ms Canham and Ms Dodd's complaints about her in June 2018 were not used as an opportunity to proceed to a disciplinary (despite Ms Canham making the relatively serious allegation that the Claimant had lied about 'poaching' consultants), but were picked up in a measured fashion as part of an ongoing coaching programme; when selecting individuals to provide 360 feedback to the Claimant as part of that coaching exercise, Mr Reay chose fairly and did not include Ms Canham although he could have done if he had wanted to weight the exercise against the Claimant (see our paragraph 86); when Mrs Champion raised her grievance against the Claimant, the investigation into this proceeded with the Claimant in the office, there was no rush to suspend her. It was only when the allegations were made by Mr Topalovic and Ms Barker, allegations which were on their face allegations of serious bullying of junior staff and interference with due process in relation to internal investigations, that Mr

Reay moved (entirely appropriately in our judgment) to suspend the Claimant. Mr Reay's private conversations with the Claimant in March and May 2019 (which she recorded) also provide strong support for the conclusion that he had no animus against the Claimant.

341. We have found no evidence to support the Claimant's case that Human Resources, Ms Gillis or Mr Reay encouraged Mrs Champion, Mr Topalovic or Ms Barker to raise grievances against the Claimant. It is clear that each of these individuals had genuine and heartfelt individual grievances against the Claimant which they each set out in writing at great length in their own words and style. Each of them came forward with their grievances and although Ms Gillis in each case went through her standard process of asking them whether they wished to raise a formal grievance and to set out the grievances in writing, we have found no evidence of undue pressure or encouragement to do so.
342. Contrary to Ms McColgan's submission in closing, we do not find it odd that Mr Topalovic's and Ms Barker's grievances were subsumed into the disciplinary process against the Claimant rather than being dealt with separately as happened with Mrs Champion. This is in our judgment wholly (and reasonably) explained by the fact that those grievances followed on from Mrs Champion's and were on their face more serious so that when they were received it was apparent that a disciplinary investigation was appropriate (whereas that was not so apparent from the outset in relation to Mrs Champion's grievance). Having devoted so much time and resources to the disciplinary investigation, it is unsurprising that the grievances were not picked up again in December 2019 when that process concluded, especially as Mr Topalovic had left and Ms Barker (still in employment) could plainly see that the outcome in her case was that the Claimant was dismissed.
343. We also find that no adverse inference is to be drawn from the Respondent's failure to pursue disciplinary proceedings against Mr O'Meara. We accept that the reasons that disciplinary proceedings against him were not pursued were those we have set out at paragraphs 277-283. Those reasons wholly explain the difference in treatment between him and the Claimant.
344. Finally, we have considered whether Mr Reay's addition to the disciplinary allegations against the Claimant of, first, the breaches of PSA procedures and, second, failure to consult (etc) in relation to Project Lego indicate some malice or ulterior motive on his part. As to the PSA breaches, our findings of fact are at paragraphs 108 and 221. The failure by the Claimant to ensure that PSAs were in place in relation to 42 contracts representing substantial sums of money, even after having signed a document indicating that she understood the importance of this was in our view a serious matter that it was appropriate, once disciplinary proceedings were on foot, to include within those proceedings. We accepted that this was Mr Reay's conscious reason for acting and in our judgment it wholly explains why he did so.
345. As to the Project Lego allegations, our findings of fact in relation to that are at paragraph 249 above. We there explained why we were satisfied that Ms

Gillis' and Mr Reay's conscious reasons for adding in those allegations were that they appeared to them to be significant matters and that as disciplinary proceedings were already 'on foot' it was appropriate for them to be raised then so that they would not be 'hanging over' at the end of the process. Standing back and considering all the evidence, we accept that these were genuinely their only reasons for including these allegations and that they were not influenced by the communications that the Claimant alleges to be protected disclosures.

346. Even if the communications the Claimant relies on did constitute protected disclosures, therefore, we would have concluded that she was not when she was suspended subjected to any detriment by the Respondent for having done so. This claim therefore fails.

*b. suspension of payment of full salary to the Claimant during her period of illness whilst suspended, as per paragraph 13.2 of the Grounds of Claim;*

347. Our findings of fact regarding this are at paragraph 235. The Respondent's ostensible reason for paying only statutory sick pay when the Claimant went on sick leave was because that is its policy. However, there is no doubt that the Respondent had a discretion to do something different if it wished. The Claimant asserts that the Respondent has not followed its policy in this respect in other cases, but she provided no evidence of any specific case, and we find it unlikely that in her position as CEO she would be aware of what happened with individual employee pay in other cases. Ms Gillis, on the other hand, was able to think of four examples where the policy had been applied as it was with the Claimant, and we accept her evidence in that regard as she was a generally reliable witness and there is no reason not to. We further observe that, although the policy may appear harsh, the reason for having such a policy is clear and would be thought by many employers to have much to commend it as it discourages employees from extending or avoiding disciplinary processes by taking sick leave. Of course, it may have harsh effects where the need for sick leave is genuine (and we do not suggest that the Claimant's need was not genuine), but the policy makes sense and, given that it was applied in other cases, there is no basis or reason for us to infer that it was applied in the Claimant's case because of the communications that she alleged to be protected disclosures. This claim therefore fails.

*c. Wrongly informing colleagues of the Claimant that the Claimant had been dismissed, before the Claimant had been dismissed, as per paragraph 13.3 of the Grounds of Claim;*

348. There is no evidence that this happened so this claim fails: see paragraph 228 of our findings of fact.

*d. the continuation of the disciplinary procedure, as per paragraph 13.5 of the Grounds of Claim (i.e. 'despite the fact that it was evident from the minutes of the*

*disciplinary investigation meetings that the allegations against the Claimant do not justify disciplinary action’).*

349. This allegation turns on the Claimant’s contention that there was no disciplinary case for her to answer at the end of Mr Youngman’s investigation. However, Mr Youngman concluded that the Claimant had unduly interfered with the investigation process into her mother from 13 February 2019 onwards and that her actions led to a breakdown of trust and confidence between her and Ms Barker and Mr Topalovic. He also concluded that the Claimant had failed to take appropriate action regarding the complaints about Dr R, that her actions were bullying and undermining to Mrs Champion and that her failure to take the concerns seriously led to a breakdown of trust and confidence with Mrs Champion. Mr Youngman was unaware of any of the Claimant’s alleged protected disclosures so his conclusions in this regard cannot have been influenced by any of those. Further, for the reasons set out further below in relation to the Claimant’s unfair dismissal claim, we find that there was ample material in the witness interviews to justify his conclusions. As he found there was a disciplinary case for the Claimant to answer, it naturally followed that the disciplinary procedure should continue and there is no scope to infer that the Respondent’s decision to continue with the disciplinary process in those circumstances was influenced by any of the communications that the Claimant alleged constituted protected disclosures. This claim therefore fails.

### Sex discrimination

#### *The law*

350. Under ss 13(1) and 39(2)(c)/(d) of the Equality Act 2010 (EA 2010), we must determine whether the Respondent, by subjecting her to any detriment, discriminated against the Claimant by treating her less favourably than it treats or would treat others because of protected characteristic, in this case her sex.

351. The test of detriment is the same as for the claim under s 47B ERA 1996 (see above).

352. ‘Less favourable treatment’ requires that the complainant be treated less favourably than a comparator is or would be. A person is a valid comparator if they would have been treated more favourably in materially the same circumstances (s 23(1) EA 2010). However, we may also consider how a hypothetical comparator would have been treated.

353. The Tribunal must determine “*what, consciously or unconsciously, was the reason*” for the treatment (*Chief Constable of West Yorkshire Police v Khan* [2001] UKHL 48, [2001] ICR 1065 at [29] *per* Lord Nicholls). The protected characteristic must be a material (i.e non-trivial) influence or factor in the reason for the treatment (*Nagarajan v London Regional Transport* [1999] ICR 877, as explained in *Villalba v Merrill Lynch & Co Inc* [2007] ICR 469 at [78]-

[82]). It must be remembered that discrimination is often unconscious. The individual may not be aware of their prejudices (*cf Glasgow City Council v Zafar* [1997] 1 WLR 1695, HL at 1664) and the discrimination may not be ill-intentioned but based on an assumption (*cf King v Great Britain-China Centre* [1992] ICR 516, CA at 528).

354. If a decision-maker's reason for treatment of an employee is not influenced by a protected characteristic, but the decision-maker relies on the views or actions of another employee which are tainted by discrimination, it does not follow (without more) that the decision-maker discriminated against the individual: *CLFIS (UK) Ltd v Reynolds* [2015] EWCA Civ 439, [2015] ICR 1010 especially at [33] *per* Underhill LJ. What matters is what was in the mind of the individual taking the decision. It is also important to remember that only an individual natural person can discriminate under the EA 2010; the employer will be liable for that individual's actions, but the legislation does not create liability for the employer organisation unless there is an individual who has discriminated. As Underhill LJ explained in that case at [36]:

36. ... I believe that it is fundamental to the scheme of the legislation that liability can only attach to an employer where an individual employee or agent for whose act he is responsible has done an act which satisfies the definition of discrimination. That means that the individual employee who did the act complained of must himself have been motivated by the protected characteristic. I see no basis on which his act can be said to be discriminatory on the basis of someone else's motivation. If it were otherwise very unfair consequences would follow. I can see the attraction, even if it is rather rough-and-ready, of putting X's act and Y's motivation together for the purpose of rendering E liable: after all, he is the employer of both. But the trouble is that, because of the way [what is now the EA 2010 works], rendering E liable would make X liable too .... To spell it out: (a) E would be liable for X's act of dismissing C because X did the act in the course of his employment and—assuming we are applying the composite approach—that act was influenced by Y's discriminatorily-motivated report. (b) X would be an employee for whose discriminatory act E was liable under [EA 2010, s 109] and would accordingly be deemed by [EA 2010, s 110] to have aided the doing of that act and would be personally liable. It would be quite unjust for X to be liable to C where he personally was innocent of any discriminatory motivation.

355. However, in that case the Court of Appeal also observed, that where a decision is taken jointly by more than one decision-maker, a discriminatory motivation on the part of one decision-maker will taint the whole decision: *ibid* at [32].
356. In relation to all these matters, the burden of proof is on the Claimant initially under s 136(1) EA 2010 to establish facts from which the Tribunal could decide, in the absence of any other explanation, that the Respondent has acted unlawfully. This requires more than that there is a difference in treatment and a difference in protected characteristic (*Madarassy v Nomura International plc* [2007] EWCA Civ 33, [2007] ICR 867 at [56]). There must be evidence from which it could be concluded that the protected characteristic was part of the reason for the treatment. The burden then passes to the Respondent under s 136(3) to show that the treatment was not discriminatory: *Wong v Igen Ltd* [2005] EWCA Civ 142, [2005] ICR 931. The

Supreme Court has recently confirmed that this remains the correct approach: *Efobi v Royal Mail Group Ltd* [2021] UKSC 33, [2021] 1 WLR 3863.

357. This does not mean that there is any need for a Tribunal to apply the burden of proof provisions formulaically. In appropriate cases, where the Tribunal is in a position to make positive findings on the evidence one way or another, the Tribunal may move straight to the question of the reason for the treatment: *Hewage v Grampian Health Board* [2012] UKSC 37, [2012] ICR 1054 at [32] *per* Lord Hope. In all cases, it is important to consider each individual allegation of discrimination separately and not take a blanket approach (*Essex County Council v Jarrett* UKEAT/0045/15/MC at paragraph 32), but equally the Tribunal must also stand back and consider whether any inference of discrimination should be drawn taking all the evidence in the round: *Qureshi v Victoria University of Manchester* [2001] ICR 863 *per* Mummery J at 874C-H and 875C-H.

### Conclusions

358. The Claimant complains that she was in respect of the following detriments less favourably treated because of her sex: a) suspension, (b) disciplinary investigation, and (c) dismissed. The Claimant relies on Mr O'Meara as a comparator, or alternatively a hypothetical comparator.
359. As evidence from which discrimination may be inferred, the Claimant relies on what she alleged to be Mr Reay's sexist behaviour in relation to her and other women. However, we rejected the Claimant's case in that regard for the reasons set out at paragraphs 3854, so that provides no basis for any inference of sex discrimination.
360. So far as Mr O'Meara is concerned, the reasons that disciplinary proceedings against him were not pursued are set out at paragraphs 277283. In short, they were that:- the allegations against him were not as numerous, he was named in only one grievance rather than all three; the Claimant was his line manager and the allegations concerned her mother so it was clear he was acting partly at the Claimant's instigation and that she as the more senior should bear greater responsibility; Mr Youngman did not recommend disciplinary action against Mr O'Meara; and it was known from around the time that the allegations were made that he would be leaving the Respondent in any event. These reasons cumulatively mean that Mr O'Meara's circumstances were not materially similar to those of the Claimant so that he is not a comparator within the meaning of s 23 EA 2010. They are, moreover, significant enough differences in our judgment that they wholly explain the difference in treatment and provide no basis for any inference that the Claimant's sex played any part in the treatment of her.
361. The Claimant has not identified any other reason why we should infer that the decisions to suspend her, subject her to disciplinary investigation and ultimately dismiss her were tainted by sex discrimination. We have nonetheless asked ourselves whether a hypothetical man would have been treated the same in materially the same circumstances and we are satisfied that he would have been. So far as the decisions to suspend and commence

disciplinary investigation are concerned, we have had regard to all the considerations that we have already set out above in relation to the alleged detriments for having made protected disclosures (the reasons for commencing disciplinary investigation in our judgment being the same in this case as the reasons for suspending). For the reasons that we did not find there was room for an inference that the alleged protected disclosures had influenced those decisions, we find there is no room for an inference that a man would have been treated differently in materially similar circumstances.

362. So far as the decision to dismiss is concerned, there is also no basis on which it could be inferred that the Claimant's sex had anything to do with the decision. The decision to dismiss was Dr Bucknall's alone. The Claimant has not identified any reason at all why Dr Bucknall might have been discriminating against her because of her sex. For the reasons set out below in relation to the unfair dismissal claim, we consider that the decision he reached was a thorough, fair and reasonable one. We are wholly satisfied that he would have reached the same decision in respect of a man in similar circumstances.

363. The sex discrimination claims therefore fail.

#### Unfair dismissal

##### *The law*

364. The test for unfair dismissal is set out in section 98 of the Employment Rights Act 1996. Under section 98(1), it is for the employer to show the reason (or, if more than one, the principal reason) for the dismissal, and that it is a potentially fair reason falling within subsection (2), i.e. in this case conduct. A reason for dismissal is the factor or factors operating on the mind of the decision-maker which cause them to make the decision to dismiss (cf *Abernethy v Mott, Hay and Anderson* [1974] ICR 323, 330, cited with approval by the Supreme Court in *Jhuti v Royal Mail Ltd* [2019] UKSC 55, [2020] ICR 731 at [44]). There are exceptions to that approach, as identified in *Jhuti*, and set out above in relation to the alleged whistle-blowing detriments.

365. We have decided that the Claimant did not make any protected disclosures in this case so her claim for automatically unfair dismissal under ERA 1996, s 103A must fail. However, we have nonetheless gone on to consider what the position would have been had we concluded that the various communications the Claimant relied upon as constituting alleged protected disclosures in fact qualified for protection under the legislation. This requires us to consider whether the Claimant has raised a *prima facie* case that the sole or principal reason for her dismissal was that she had made protected disclosures (s 103A(1)). The burden of proof works in the same way as for protected disclosures detriments and we have set out the relevant law above.

366. Once the reason for dismissal is established, unless it is an automatically unfair dismissal (which it is not in this case), the Tribunal must go on to

consider the fairness of the dismissal. Not every procedural error renders a dismissal unfair, the fairness of the process as a whole must be looked at, alongside the other relevant factors, focusing always on the statutory test as to whether, in all the circumstances, the employer acted reasonably or unreasonably in treating the reason for dismissal as a sufficient reason for dismissing the employee, taking into account the size and administrative resources of the employer: *Taylor v OCS Group Ltd* [2006] ICR 1602 at [48].

367. Where conduct is relied on as the reason for dismissal, in determining whether dismissal is fair in all the circumstances under s 98(4), the Tribunal must be satisfied that the employer has a genuine belief that the employee committed the misconduct in question, and that that belief is held on reasonable grounds, the employer having carried out such investigations as are reasonable in all the circumstances of the case: *BHS Ltd v Burchell* [1980] ICR 303 and *Foley v Post Office* [2000] ICR 1283.
368. In reaching a decision, the Tribunal must also take into account the ACAS Code on Disciplinary and Grievance Procedures. By virtue of section 207 of the Trade Union and Labour Relations (Consolidation) Act 1992, the Code is admissible in evidence and if any provision of the Code appears to the tribunal to be relevant to any question arising in the proceedings, it shall be taken into account in determining that question.

### *Conclusions*

369. We are satisfied that Dr Bucknall took the decision to dismiss the Claimant and that his reason for doing so was the Claimant's conduct as described by him in the dismissal letter. The communications that the Claimant relied on as protected disclosures were not known to Dr Bucknall and so, even if they did constitute protected disclosures (which they do not), they could not have influenced his decision. Moreover, the Claimant's sex did not influence his decision for the reasons we have already set out above. We have found no evidence at all to support the Claimant's case that Mr Reay or Ms Gillis were pursuing some malicious or sustained campaign against her. In particular, for the reasons already set out above, we have rejected the Claimant's case that Mr Reay had a history of discriminating against women or her particularly, that he sought to engineer disciplinary proceedings against her by encouraging individuals to bring grievances against her or that, once grievances were brought, he tried to steer the disciplinary proceedings. On the contrary, Mr Reay (and Ms Gillis) had very little to do with the disciplinary process once it started: there was no communication between Mr Reay and Mr Youngman at all, nor any communication relating to the matter between Dr Bucknall and Mr Reay. Dr Bucknall was unaware that Mr Reay had any particular desired outcome. For all those reasons, therefore, it is plain that conduct was the sole reason for the Claimant's dismissal.
370. We then go on to consider whether dismissal for that reason was fair in all the circumstances of the case. The Claimant has raised a number of specific issues in this regard, which we have considered individually before standing



back to consider in the round whether dismissal was fair in all the circumstances. In regard to the particular issues raised by the Claimant, we conclude as follows:-

*a. Deciding to dismiss the Claimant prior to the disciplinary hearing and before formulating a justification for doing so (see paras 16 and 17, Grounds of Claim)*

371. This did not happen. Dr Bucknall made the decision to dismiss, and he made it following the disciplinary hearing and conclusion of his investigations and communicated that to the Claimant by letter of 30 December 2019.

*b. Making several different allegations of misconduct against the Claimant which had nothing in common so that one or more would be found to justify her dismissal (see paragraph 16.2, Grounds of Claim);*

372. This did not happen. There was a reasonable basis for each of the allegations raised. Mr Reay/Ms Gillis were not trying to engineer the Claimant's dismissal for the reasons we have already set out. The primary allegations arising from the grievances of Mrs Champion, Mr Topalovic and Ms Barker were each on their face matters of misconduct (potentially gross misconduct). The reasons for raising the PSA allegations and the Project Lego allegations we have dealt with at paragraphs 344-345. We are satisfied that the Respondent acted within the range of reasonable responses in raising all the allegations.

*c. Refusing to provide the Claimant with information about the allegations against her until the last practical moment to provide them with flexibility to change the terms of the allegations they put forward to increase the likelihood that dismissing the Claimant would be justifiable (see paragraph 16.3, Grounds of Claim);*

373. This did not happen. The Claimant fully understood the allegations arising from Mrs Champion's grievance as she had answered questions about her actions at length in the meeting with Mr Thomas and Mr Coombs on 28 March 2019. At the suspension meeting on 17 May 2019, the Claimant was also provided by Ms Gillis with more detail about the allegations than appeared in the letter (see our paragraph 220). It is immaterial that Ms Gillis did not identify who the 'whistleblower' was as the substance of the allegations was clear and bullying someone who has complained is misconduct even if they are not classed as a 'whistleblower'. The additional information given to the Claimant by Ms Gillis at the suspension meeting in our judgment gave the Claimant sufficient material to understand the allegations being made as it was enough to prepare for the investigation interview with Mr Youngman. However, in fact Mr Youngman decided to provide further information by email of 31 May 2019.

374. At the first investigation meeting on 26 September 2019 the Claimant in our judgment had sufficient information already to answer the allegations, but chose to adopt an unreasonably combative and legalistic approach. In any event, this first meeting gave her the opportunity to ask more questions about the allegations, and she was provided with further information in response. At the second investigation interview on 24 October 2019 the Claimant did

answer questions about the allegations fully so it cannot be said that she did not have sufficient information or sufficient opportunity to do so.

375. Once the investigation stage was complete the Claimant was then provided with all relevant material, including Dr Youngman's full report and interview notes and the grievances themselves on 25 November 2019, two weeks before the disciplinary hearing took place on 9 December 2019. In the light of that she was able to prepare a written statement for the disciplinary hearing dealing with all relevant matters.
376. Although it took a long time to get to the point of sending all the material to the Claimant on 25 November 2019 this principally because of the delay occasioned principally by the Claimant being ill. The delay did not render the process unfair. The Respondent in our judgment followed the same procedure as most other employers of similar size and resources in not providing the Claimant with the grievance documents themselves until after the investigation stage of the process was complete.
377. Two weeks to prepare for the disciplinary hearing was also ample in our judgment and well within the range of reasonable responses.
378. Finally, although the suspension letter reserved the right to change the allegations, this was in our judgment 'boilerplate' standard wording and normal practice. In any event, in this case the allegations for which the Claimant was ultimately dismissed did not change in any material respect from start to finish. The only additional allegation the Respondent sought to add in related to Project Lego and that was not proceeded with.

*d. Using opaque language to describe the allegations against the Claimant, and describing them in very general terms, which made it difficult for the Claimant to understand or to respond to the allegations (see paragraph 16.4, Grounds of Claim);*

379. We agree that the language used in the allegations themselves as set out at the suspension stage was opaque, but as set out above the Claimant was given ample additional information which ought reasonably have enabled her to understand the allegations for the purposes of the investigation. The allegations as set out in the invitation to the disciplinary hearing were not 'opaque' and, indeed, it is plain from the written statement the Claimant prepared for the disciplinary that she understood the allegations sufficiently to be able to respond to them at length and in detail.

*e. Changing the allegations against the Claimant several times between her suspension on 17 May 2019 and her disciplinary hearing on 9 December 2019 (see paragraph 16.5, Grounds of Claim);*

380. The allegations against the Claimant did not change 'several times'. The PSA allegations were dropped in line with Mr Youngman's report, and the Project Lego allegations were added (but not pursued) for the reasons we have already dealt with. There were other minor changes as noted in our decision,

but the substance of the allegations remained unchanged between suspension and disciplinary, although much more detail was given in the letter inviting the Claimant to a disciplinary hearing. In our experience, in relatively complex cases such as this, where an investigation is required to establish the facts, it is common for allegations to be reformulated following the investigation stage once the picture has become clear. It is not usually possible for a Respondent in such cases to be more specific about the allegations at the outset of the process. The Respondent's approach in this regard was within the range of reasonable responses and fair to the Claimant as she had ample opportunity to respond to the allegations.

*f. Giving the Claimant minimal opportunity to respond to the allegations by delivering documents not long before the hearing (see paragraph 16.6, Grounds of Claim);*

381. In our judgment, two weeks to prepare for the disciplinary hearing following the full suite of documents was ample and well within the range of reasonable responses.

*g. Forbidding the Claimant to talk to colleagues during her suspension (see paragraph 16.7, Grounds of Claim);*

382. In our judgment this is normal practice, and was in particular justified in the Claimant's case because the allegations of misconduct in relation to her mother's investigation were that she had sought to interfere with the due course of that disciplinary process. In those circumstances, it was reasonable for the Respondent to take steps to ensure that she could not attempt anything similar in relation to the investigation into her own misconduct.

*h. Restricting the information available to Dr Cliff Bucknall (see paragraph 16.8, Grounds of Claim);*

383. The Claimant did not pursue this argument which has no factual basis to it.

*i. Falsely telling the Claimant repeatedly that the allegations against her would be explained in detail at the disciplinary investigation meeting (see paragraph 16.9, Grounds of Claim);*

384. The Claimant did not pursue this argument.

*j. Failing to explain the allegations against the Claimant in detail at the disciplinary investigation meetings on 26 September 2019 and 24 October 2019 (see paragraph 16.10, Grounds of Claim);*

385. In our judgment, the Claimant was provided with sufficient detail of the allegations to enable her to respond. The approach she adopted, especially at the investigation meeting on 26 September 2019, was in our judgment unreasonably combative and legalistic. The Claimant was not facing criminal allegations in a criminal trial, but misconduct allegations in an internal disciplinary process. The substance of the allegations was clear from the

outset and the pernicky approach to the allegations adopted by the Claimant (or those acting on her behalf) was itself indicative of the lack of insight on the Claimant's part into her own conduct that ultimately played a significant part in Dr Bucknall's decision to dismiss her.

*k. Raising further allegations against the Claimant on 26 September 2019 (see paragraph 16.11, Grounds of Claim);*

386. This relates to the addition of the Project Lego allegations. We consider that it was within the range of reasonable responses for the Respondent to add in those allegations for the reasons we have already given.

*l. Kept those additional allegations outside the scope of the disciplinary investigator's investigation and thereby gave the Claimant no opportunity to answer them (see paragraph 16.12, Grounds of Claim);*

387. The Claimant cannot both have her cake and eat it: it cannot both be wrong to have included the allegations and wrong not to have included them. In any event, there was no need for the Claimant to answer the allegations because the Claimant objected to their inclusion and so they were not considered further, or taken into account by Dr Bucknall in deciding to dismiss her.

*m. Withholding Mr Reay's Project Lego allegations for investigation after the disciplinary hearing on 9 December 2019 (see paragraph 16.13, Grounds of Claim);*

388. We consider that it was within the range of reasonable responses for the Respondent to take this approach for the reasons we have already given.

*n. Unfairly making the decision to dismiss in reliance, in part, on the allegations of Ms Champion (see paragraphs 20.1-20.6, Grounds of Claim);*

389. Our findings of fact regarding the issues raised in Mrs Champion's grievance are at paragraphs 0-128 and 136171.

390. We find that Dr Bucknall's conclusions in respect of the allegations arising out of Mrs Champion's grievance were genuinely held, and based on reasonable grounds in the light of a reasonable investigation. Most of the points made on the Claimant's behalf by Ms McColgan in her closing submissions in relation to this point have proved to be factually incorrect. In particular: (i) the concerns raised by Mrs Champion about Dr R were *not* all behavioural concerns; when Hayley Marle ultimately drew up a report on 14 March 2019 many of the concerns were explicitly labelled as clinical "*patient safety*" concerns; and, (ii) the Claimant did not 'pursue' the issues raised by Mrs Champion on 23 October 2018 with Robert Hill or Dr Davies or Dr R in any effective manner for over four months, and only moved matters forward in any significant respect on 12 March 2019, the day after she was informed that Mrs Champion had raised a grievance.

391. Moreover, it was in our judgment reasonable for Dr Bucknall to conclude that the Claimant had undermined and belittled Mrs Champion (albeit not maliciously) and there were similarities between the Claimant's treatment of Mrs Champion and her treatment of Mr Topalovic and Ms Barker. Mrs Champion had raised substantial concerns about Dr R (concerns which ultimately led to the removal of her practising privileges) and had reported to the Claimant a significant issue with staff morale that had necessitated a Chatham House meeting. The situation reasonably called for a prompt and thorough response, but it did not get that. Instead, the Claimant's handling of it was half-hearted and ineffectual and the reasons for this are clear from the accepted content of her meeting with Mrs Champion on 4 March 2019 and what she said to Ms Gillis and Mr Reay in the meeting of 11 March 2019 that she secretly recorded 147). On both occasions, the Claimant said (more or less explicitly) that in her view Mrs Champion was pursuing a personal vendetta against Dr R rather than raising professional concerns. It is thus perfectly clear why the Claimant had not taken any effective action regarding Mrs Champion's concerns: she did not regard them as legitimate.

392. In the circumstances, it was well within the range of reasonable responses for Dr Bucknall to conclude that the Claimant "*displayed insensitivity to the serious concerns raised by a senior member of [her] team*", that this was "*inconsistent with the culture of sharing concerns which [she was] expected to foster as CEO*" and that "*it would have been reasonable for Ms Champion to construe your behaviour towards her as bullying and that is not acceptable conduct by a CEO at HCA*". Given the very significant nature of the concerns about Dr R, it was also reasonable for him to conclude that the Claimant's "*inaction in failing to proactively deal with the serious concerns raised about Dr R risked patient and colleague safety*" and that, even if not deliberate, the Claimant's actions amounted to serious incompetence or gross negligence in a CEO, and as such to gross misconduct under the Respondent's policy.

*o. Reaching a perverse decision that the Claimant could not be permitted to return to work because she would bully staff (see paragraph 20.7, Grounds of Claim);*

393. Given the Claimant's lack of insight and contrition, as demonstrated throughout the disciplinary process and especially at the disciplinary hearing, it was not perverse for Dr Bucknall to conclude that there was a risk of her repeating this sort of conduct if she returned to work.

*p. Unfairly making the decision to dismiss in reliance, in part, on to the allegations of Ms Barker and Mr Topalovic (see paragraphs 20(B), Grounds of Claim);*

394. We consider that Dr Bucknall's conclusions regarding the Claimant's conduct in regard to her mother's disciplinary were genuinely held beliefs based on the outcome of a reasonable investigation by both Mr Youngman and Dr Bucknall himself.

395. The Claimant has levelled various criticisms at Dr Bucknall's conclusions regarding the grievances of Ms Barker and Mr Topalovic. For the most part,

our findings of fact above at paragraphs 172214 mean that these criticisms are without foundation, but we add the following:-

396. First, contrary to Ms McColgan's closing submissions, there was evidence of actual intervention by the Claimant in her mother's disciplinary process. Dr Bucknall in the dismissal outcome letter identifies the following specific examples: the Claimant's email of 17 February 2019 in which she wrote directly to one of the people in HR who she understood to be dealing with the matter and made clear that she considered she was not acting appropriately; her conversation with Mr Thomas on 20 February 2019 in which she sought to question the allegations and their source to the person responsible for investigating them; her meetings with Mr Graveney on 18 and 20 February 2019 and her request that he should accompany her mother at the investigation meeting; speaking with her mother; 'asserting overbearing supervision' over Ms Barker and 'retaliating' against her for her role in the disciplinary investigation against the Claimant's mother; and retaliating against Mr Topalovic for his role in it to such an extent that he felt unable to give evidence as part of the disciplinary investigation into the Claimant's mother. In the light of her findings of fact, there was ample evidence before Dr Bucknall on the basis of which he could reasonably accept the evidence of Mr Topalovic and Ms Barker over that of the Claimant regarding each of these matters. The 'inconsistencies' that the Claimant purported to identify in their evidence were minor, inconsequential or simply wrong. Further, regarding the Claimant's request to Mr Graveney to accompany her mother, we consider that (notwithstanding Mr Graveney's willingness to help) it should have been obvious to the Claimant that it was inappropriate for her as CEO to step in to secure for her mother (on an exceptional basis) support from the Speak-Up Guardian. That could reasonably be viewed as a step intended to protect her mother and to remind those dealing with her case that she as CEO was 'watching' them. Likewise, her attempts to discuss the allegations against her mother, on a defensive basis, with the person responsible for investigating them (and others) was clearly an inappropriate attempt to sway the course of the investigation. Finally, her retaliation against Mr Topalovic did in fact interfere with the investigation as he felt unable to give evidence.
397. The Claimant further argues that there "*was ample evidence that the Claimant was not aggressive or bullying*" from Mr O'Meara, Ms Sullivan, Dr Davies and Stuart James, but the fact is that these people were, in the case of Dr Davies and Mr James, simply not present at the relevant times, while Mr O'Meara and Ms Sullivan were very close to and supportive of the Claimant and the Respondent could therefore reasonably give less weight to their evidence where it contradicted that of other witnesses.
398. The Claimant identifies certain factual inaccuracies in Mr Youngman's report and Dr Bucknall's outcome letter, but these are all in our judgment either wrong for the reasons set out in our findings of fact, or minor matters that are of no consequence. For example: the precise details of Mr Topalovic's sick leave are immaterial as it was clear that Mr Topalovic was seriously affected by the Claimant's conduct as he was signed off sick for a period because of

it, even if that was not ultimately the reason why he left; the erroneous date Dr Bucknall gave for Mr Hill completing his report into the UCC incident makes no difference to the general picture of what Claimant did or did not do during this period; saying there were 84 concerns about Dr R when this was a typographical error and on any view there were a lot of concerns is of no consequence; likewise, although slightly more significant, it makes no difference that Dr Bucknall got the number of months' delay in arranging an LDMG wrong as four-and-a-half months was clearly too long a delay even though not as long as the nine months mentioned by Dr Bucknall.

399. In the circumstances, we find that Dr Bucknall's reasonably concluded that the Claimant had not 'led by example' or remained free of conflicts of interest, and had misused her position of power and conducted herself in a way that amounted to bullying of Ms Barker and Mr Topalovic. This conduct is gross misconduct under the Respondent's policy.

*q. Mr Youngman conducting an investigation into the allegations inadequately and unfairly (see paragraph 21.2 of the Grounds of Claim);*

400. The Claimant in these proceedings has levelled criticisms at some of the factual findings in Mr Youngman's report. In some cases, those criticisms are correct as it has in the light of additional material either obtained by Dr Bucknall at the disciplinary stage, or available to us in these proceedings, become apparent that the facts were not completely as Mr Youngman found them to be. For example, Mr Youngman considered that Mr Graveney was 'reluctant' to accompany the Claimant's mother, but in fact it is clear from his further comments to Dr Bucknall at the disciplinary stage and the text message exchanges between him and the Claimant that we have seen in these proceedings, that Mr Graveney did not express any reluctance about attending, notwithstanding how unusual a request that was. However, a disciplinary investigation is not required to turn over every stone. Mr Youngman's conclusions were reasonable on the basis of the material he had before him. Moreover, what is relevant for the purposes of the unfair dismissal claim is not whether Mr Youngman's investigation was reasonable, but whether the Respondent's investigation as a whole, including the further investigations carried out by Dr Bucknall, was reasonable. We find that the investigation as a whole was more than reasonable. Indeed, even after three weeks of Tribunal hearing, and a great deal more evidence than either Mr Youngman or Dr Bucknall had before them, the factual picture remains in all material respects as they perceived it to be at the time.

*r. Dr Bucknall failing to follow a fair procedure (see paragraph 22 of the Grounds of Claim).*

401. We disagree. We consider that Dr Bucknall did follow a fair procedure. With regard to the points raised in the Grounds of Claim: Dr Bucknall did consider all the documents and evidence as is apparent from the dismissal letter; he did reach clear conclusions on the individual allegations as well as dealing

with them together where they overlapped; and his decision was soundly based on the evidence. It was reasonable for Dr Bucknall to refuse the Claimant's request to call 'live' witnesses for questioning. That would be highly unusual in an internal disciplinary process and was not necessary in this case.

402. As to the allegation that Dr Bucknall was conflicted because he reports to Mr Reay and was personally involved in dealing with the issues relating to Dr R, we do not consider that there was any conflict giving rise to unfairness. In our judgment, the fact that Dr Bucknall reports to Mr Reay was not material for two reasons: first, Mr Reay had no involvement in the matters that Dr Bucknall was going to consider (the PSA and Project Lego allegations having been dropped); secondly, Dr Bucknall is the Chief Medical Officer and in a powerful position within the organisation, with direct reporting lines to the Respondent's American and global Chief Medical Officers. As is usual in a clinical environment, he is expected to exercise judgment on clinical matters independent of the administrative staff and he clearly did not see himself as subservient to Mr Reay in any way. Nor do we consider that the Claimant could reasonably have perceived him as likely to be influenced by Mr Reay given her knowledge of both of them, and the findings of fact we have made in these proceedings about Mr Reay's conduct.
403. As to Dr Bucknall's role in relation to Dr R, this was limited as although he initially took over the handling of those concerns from the Claimant, he immediately appointed an independent investigator. In those circumstances, we cannot see that it could reasonably be perceived as affecting his judgment in relation to the Claimant's handling of matters.

*Overview: fairness*

404. In addition to the specific points raised by the Claimant, we have stood back and considered in the round whether the dismissal of the Claimant was fair in all the circumstances given, in particular: her long service; her previously unblemished disciplinary record; the fact that half of the allegations against her related to the disciplinary investigation of her mother, a highly unusual circumstance which many people would have found difficult to handle wholly appropriately; and the fact that Mr O'Meara escaped disciplinary proceedings when he would not have done so had Dr Bucknall had conduct of the matter earlier than he did. These are all factors in the Claimant's favour. However, we have firmly concluded that dismissal in this case was well within the range of reasonable responses. In our judgment, for the reasons set out above, Dr Bucknall reasonably concluded that the Claimant was guilty of conduct which was listed in the Respondent's disciplinary policy as gross misconduct. As such, it is very hard to see how any organisation could not have dismissed its CEO. Her position had become untenable. We have, though, reflected on how very different the picture would have been if, when first confronted by Mrs Champion, Mr Topalovic and Ms Barker, the Claimant had immediately looked to understand why they were upset, acknowledged her shortcomings (which should have been obvious to her, had she paused to reflect) and



apologised for her handling of those matters. Had that been her approach, we could imagine that some employers would have refrained from dismissal, acknowledging the factors in her favour that we have identified. Unfortunately, however, the Claimant's response to the grievances, and approach to the disciplinary process, demonstrated such poor judgment and lack of insight, that we are wholly satisfied that dismissal was within the range of reasonable responses. Indeed, we cannot imagine any other employer acting otherwise.

Time limits

405. Since the claims have failed we do not have to consider the question of time limits.

**Overall conclusion**

406. The unanimous judgment of the Tribunal is:

- (1) The Claimant's claim for unfair dismissal under Part X ERA 1996 (including automatic unfair dismissal under s 103A ERA 1996) is not well-founded and is dismissed.
- (2) The Respondent has not contravened the EA 2010 and the Claimant's claim for direct sex discrimination under ss 13 and 39 of the EA 2010 is dismissed.
- (3) The Claimant's claim that she was subjected to detriments for having made protected disclosures contrary to s 47B ERA 1996 is not well-founded and is dismissed.

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Employment Judge Stout

Date: 22/02/2022

JUDGMENT & REASONS SENT TO THE PARTIES ON

22/02/2022.

FOR THE TRIBUNAL OFFICE

**ANNEX: LIST OF AGREED ISSUES**

Jurisdiction

1. Are the Claimant's claims for detriment under section 47B of the ERA part of a course of conduct which concluded within the primary time limit?
2. If not, was it not reasonably practicable for the Claimant to bring these claims within the time limit?
3. Are the Claimant's claims for sex discrimination under section 13 of the Equality Act 2010 ('EqA') ERA part of a course of conduct which concluded within the primary time limit?
4. If not, is it just and equitable to extend time to allow them to be heard?

Protected disclosures

5. Did the Claimant make the following disclosures:
  - a. Informing the Respondent on 5 December 2018 of her concerns relating to the proposed reduction in staff levels at The Harley Street Clinic and The Portland Hospital, as per paragraph 5 of the Grounds of Claim;
  - b. opposing John Reay and the Respondent's Management Team's decision to move the medical oncology service from The Harley Street Clinic to The Princess Grace Hospital on 22 October 2018, 6 December 2018, 17 April 2019, 18 April 2019 and 24 April 2019, as per paragraph 6 of the Grounds of Claim;
  - c. informing Michael Neeb, John Reay and Teresa Finch on 4 December 2018, 5 December 2018, 6 December 2018, 12 February 2019, 12 March 2019, 18 April 2018, 24 April 2019 and 2 May 2019 that she did not support the move of oncology services to The Princess Grace Hospital or the reduction in number of medical and nursing staff at the Respondent's sites for which she had managerial responsibility as she considered these changes would damage the health and safety of the Respondent's patients, as per paragraph 7 of the Grounds of Claim;
  - d. informing John Reay on a date between 9 August to 16 August 2018 of her concerns relating to patients at The Princess Grace Hospital who may require out of hours MRI and radiation treatment for which they would be required to be transferred by ambulance to The Harley Street Clinic, as she considered that this was in breach of the Respondent's legal obligations to care for its patients, as per paragraph 8 of the Grounds of Claim;
  - e. informing John Reay on 18 April 2018 that the move of paediatric services would require extra theatres and upgraded imaging services, as she considered not having these would put patient safety at risk, and that the disruption of the move itself would be damaging to the health and safety of the patients, as per paragraph 9 of the Grounds of Claim;

- f. informing Michael Neeb in July and August 2018 that she did not support the move of oncology services, as she considered it posed a risk to patient safety, as per paragraph 9 of the Grounds of Claim;
- g. the discussing on around and from 30 August 2018 of the impact of the move of oncology services by the Claimant at the weekly meeting with Professor Tony Goldstone, Professor Paul Ellis, and Claire Smith, with the Claimant explaining as part of this the risk the move would have to patients and the risks to their health, as per paragraph 10 of the Grounds of Claim;
- h. informing John Reay and Lorraine Hughes on or around 22 October 2018 of four complaints she had received from consultants relating to incidents at The Princess Grace Hospital involving oncology patients, as per paragraph 11.1 of the Grounds of Claim;
- i. informing John Reay, Michael Neeb, Teresa Finch, Nicola Gillis and Lorraine Hughes at a MOR meeting in October, November or December 2018 of her concern that staff shortages and poor services were endangering the safety of oncology patients, as per paragraph 11.2 of the Grounds of Claim;
- j. informing Lorraine Hughes, Mrs Champion and Nicola Gillis in writing on 4 December 2018 of her concern that the Respondent was overly reliant on temporary nursing staff, as per paragraph 11.4 of the Grounds of Claim;
- k. informing Sarah Wheatland, Lorraine Hughes, Neil Buckley, Teresa Finch and John Reay on 5 December 2018 that Prateek Saxena had raised concerns relating to bed numbers at the Portland Hospital and The Harley Street Clinic, as the Claimant was concerned that services were insufficient for patients, as per paragraph 11.5 of the Grounds of Claim;
- l. informing Miranda Dodd, Lorraine Hughes and John Reay on 6 December 2018 of her concerns relating to the lack of beds for oncology patients at The Princess Grace Hospital and that this risked patient safety, as per paragraph 11.6 of the Grounds of Claim;
- m. speaking with John Reay on 12 February 2019 regarding budget cuts and the impact of targets imposed on staffing in the hospitals she managed, as per paragraph 11.7 of the Grounds of Claim;
- n. informing John Reay on 12 March 2019 of her concern that staff shortages and the absence of a Chief Nursing Office endangered patient safety, as per paragraph 11.8 of the Grounds of Claim;
- o. informing Nicola Gillis and John Reay on 2 May 2019 of her concern that the absence of a Chief Nursing Officer endangered the health and safety of patients and could lead to a breach of CQC regulatory requirements, as per paragraph 11.9 of the Grounds of Claim;
- p. informing John Reay and Nicola Gillis on 4 May 2019 of her concern that the absence of a Chief Nursing Officer was a risk to patient safety, as per paragraph 11.10 of the Grounds of Claim;
- q. informing Lorraine Hughes on 13 May 2019 of her concern that the interim Chief Nursing Officer posed a threat to staff and patient safety, as per paragraph 11.11 of the Grounds of Claim;
- r. making the complaint to Nicola Gillis on 12 February 2018 that John Reay bullied and harassed her and other female employees, as per paragraph 12.1 of the Grounds of Claim;

- s. making complaints to Michael Neeb on 13 October 2016, 16 November 2016 and 26 February 2019 that John Reay had bullied and harassed female members of staff, as per paragraph 12.2 of the Grounds of Claim;
- t. making the complaint to Nicola Gillis on 25 April 2018 that John Reay harassed her and other women, as per paragraph 12.3 of the Grounds of Claim;
- u. making the complaint to Nicola Gillis on 22 May 2018 that John Reay bullied her and other women, as per paragraph 12.4 of the Grounds of Claim; and
- v. informing Michael Neeb on 26 February 2019 of her concern that John Reay's behaviour had not improved and that he continued to bully and harass female members of staff, as per paragraph 12.5 of the Grounds of Claim.

6. If so, did each disclosure amount to information which, in the reasonable belief of the Claimant, tended to show one or both of the matters in subsections 43B(1)(b) and (d) of the ERA?

7. If so, was each disclosure, in the reasonable belief of the Claimant, made in the public interest?

8. If so, was each disclosure made, as claimed, to the Respondent so as to be protected within the meaning of sections 43A and 43C of the ERA?

Automatic unfair dismissal

9. If the Claimant made any protected disclosures, were those disclosures the reason or principal reason for her dismissal for the purposes of section 103A of the ERA?

Ordinary unfair dismissal

10. Has the Respondent established a potentially fair reason for dismissal within the meaning of section 98 of the ERA, namely gross misconduct?

11. If so, was the dismissal unfair in all the circumstances of the case? The Claimant relies, in particular, on the following matters as examples of the Respondent's unfairness:

- a. Deciding to dismiss the Claimant prior to the disciplinary hearing and before formulating a justification for doing so (see paras 16 and 17, Grounds of Claim);
- b. Making several different allegations of misconduct against the Claimant which had nothing in common so that one or more would be found to justify her dismissal (see paragraph 16.2, Grounds of Claim);
- c. Refusing to provide the Claimant with information about the allegations against her until the last practical moment to provide them with flexibility to change the terms of the allegations they put forward to increase the likelihood that dismissing the Claimant would be justifiable (see paragraph 16.3, Grounds of Claim);
- d. Using opaque language to describe the allegations against the Claimant, and describing them in very general terms, which made it difficult for the

- Claimant to understand or to respond to the allegations (see paragraph 16.4, Grounds of Claim);
- e. Changing the allegations against the Claimant several times between her suspension on 17 May 2019 and her disciplinary hearing on 9 December 2019 (see paragraph 16.5, Grounds of Claim);
  - f. Giving the Claimant minimal opportunity to respond to the allegations by delivering documents not long before the hearing (see paragraph 16.6, Grounds of Claim);
  - g. Forbidding the Claimant to talk to colleagues during her suspension (see paragraph 16.7, Grounds of Claim);
  - h. Restricting the information available to Dr Cliff Bucknall (see paragraph 16.8, Grounds of Claim);
  - i. Falsely telling the Claimant repeatedly that the allegations against her would be explained in detail at the disciplinary investigation meeting (see paragraph 16.9, Grounds of Claim);
  - j. Failing to explain the allegations against the Claimant in detail at the disciplinary investigation meetings on 26 September 2019 and 24 October 2019 (see paragraph 16.10, Grounds of Claim);
  - k. Raising further allegations against the Claimant on 26 September 2019 (see paragraph 16.11, Grounds of Claim);
  - l. Kept those additional allegations outside the scope of the disciplinary investigator's investigation and thereby gave the Claimant no opportunity to answer them (see paragraph 16.12, Grounds of Claim);
  - m. Withholding Mr Reay's Project Lego allegations for investigation after the disciplinary hearing on 9 December 2019 (see paragraph 16.13, Grounds of Claim);
  - n. Unfairly making the decision to dismiss in reliance, in part, on the allegations of Ms Champion (see paragraphs 20.1-20.6, Grounds of Claim);
  - o. Reaching a perverse decision that the Claimant could not be permitted to return to work because she would bully staff (see paragraph 20.7, Grounds of Claim);
  - p. Unfairly making the decision to dismiss in reliance, in part, on to the allegations of Ms Baker and Mr Topalovic (see paragraphs 20(B), Grounds of Claim);
  - q. Mr Youngman conducting an investigation into the allegations inadequately and unfairly (see paragraph 21.2 of the Grounds of Claim);
  - r. Dr Bucknall failing to follow a fair procedure (see paragraph 22 of the Grounds of Claim).

#### Whistleblowing Detriment

12. Was the Claimant subjected to the following detriments by the Respondent, as alleged in paragraph 13 of the Grounds of Claim:
- a. wrongful suspension of the Claimant on 17 May 2019, as per paragraph 13.1 of the Grounds of Claim;
  - b. suspension of payment of full salary to the Claimant during her period of illness whilst suspended, as per paragraph 13.2 of the Grounds of Claim;

- c. Wrongly informing colleagues of the Claimant that the Claimant had been dismissed, before the Claimant had been dismissed, as per paragraph 13.3 of the Grounds of Claim;
- d. the continuation of the disciplinary procedure, as per paragraph 13.5 of the Grounds of Claim (i.e. 'despite the fact that it was evident from the minutes of the disciplinary investigation meetings that the allegations against the Claimant do not justify disciplinary action).

13. If so, was the Claimant subjected to the detriment(s) in question on the ground that the Claimant had made one or more protected disclosures?

Sex discrimination

14. Was the Claimant treated less favourably than her chosen comparator, Enda O'Meara, or alternatively a hypothetical male comparator, because of sex within the meaning of section 13 of the ERA by being (a) suspended, (b) subjected to a disciplinary investigation, and/or (c) dismissed?

15. Were there any material differences between the circumstances relating to the Claimant and to Mr O'Meara for the purposes of section 23 of the EqA?

Remedy

16. To what compensation, aggravated damages and other remedies, if any, is the Claimant entitled (see the Prayer of the Grounds of Claim)?

17. Should any award of compensation be increased, by reason of section 207A of TULR(C)A 1992 due to the Respondent's failure to comply with the ACAS code?

18. Should any award of compensation be reduced, including on the basis that:

- a. The Claimant failed to submit an appeal against the disciplinary decision, and thus a reduction by reason of section 207A of TULR(C)A 1992 is appropriate (see Grounds of Resistance, para. 26);
- b. Any failure to mitigate loss (including a failure to mitigate any on-going loss after her appointment to new employment following dismissal).

19. To the extent that the Claimant was unfairly dismissed or her dismissal amounted to unlawful sex discrimination:

- a. What is the chance the Claimant would have been dismissed in any event by reason of the misconduct that did lead to her dismissal?
- b. What is the chance the Claimant would have been dismissed in any event by reason of misconduct of which the Respondent was aware, but did not rely on, at the time of her dismissal?
- c. What is the chance the Claimant would have been dismissed in any event by reason of misconduct of which the Respondent was not aware at the time of dismissal but has subsequently discovered?

d. In light of the answers to (a)-(c) above, should compensation for unfair dismissal be extinguished, or reduced, pursuant to section 122(2) and/or section 123(6) of the Employment Rights Act 1996 and/or the Polkey principle and/or because it would not be just and equitable to award any or full compensation?

e. In light of the answers to (a)-(c) above, should compensation for sex discrimination be extinguished, or reduced, pursuant to analogous principles to those in (d) above?