



EMPLOYMENT TRIBUNALS

Claimant: Mr D Hopkins

Respondent: Derbyshire Healthcare NHS Foundation Trust

FINAL HEARING

Heard at: Nottingham **On:** 19 to 22 &
(deliberations in private) 23 November 2018

Before: Employment Judge Camp **Members:** Mrs GK Howdle
Mr MJ Pavey

Appearances

For the claimant: Mr R Oliver, lay representative (consultant)

For the respondent: Mr J Boyd, counsel

JUDGMENT

The claimant's claim fails and is dismissed.

REASONS

Introduction, complaints & issues

1. The claimant has been employed by the respondent from January 2001 as a mental health support worker. He brings a 'whistleblowing' claim, alleging that he has been subjected to a series of detriments for making protected disclosures, in accordance with sections 47B and 48 of the Employment Rights Act 1996 ("ERA").
2. The claimant went through early conciliation from 5 October to 17 November 2017 and presented his claim form on 31 December 2017. This means that any complaint about a detriment to which he was allegedly subjected before 19 August 2017 may have been presented outside of the time limits set out in ERA section 48(3).
3. There have been a number of preliminary hearings to deal with case management and the claimant has clarified his claim a number of times. The precise complaints being brought, and the issues arising in relation to those

complaints, are definitively set out in the written record of the preliminary hearing before Employment Judge Heap on 15 June 2018. The claimant's representative confirmed at the start of the hearing that the claimant agreed this was the case. To the extent the claimant sought to backtrack from this during the hearing, we have not permitted him to do so. Apart from anything else:

- 3.1 Employment Judge Heap gave the claimant only limited permission to amend his claim, the claimant having abandoned a much more extensive amendment application;
 - 3.2 at a further preliminary hearing on 16 August 2018, Employment Judge Hutchinson decided that the tribunal would not be considering any other complaints than those set out by Employment Judge Heap;
 - 3.3 Employment Judge Hutchinson's decision has not been appealed or reconsidered.
4. The only liability issue that potentially arises and that does not seem to be mentioned in the written record of the hearing before Employment Judge Heap is the "time limits issue": were all of the claimant's complaints presented within the time limits set out in ERA sections 48(3)(a) & (b)?
 5. We have not dealt with any remedy issues. Had the claimant won his case, there would, if necessary, have been a separate remedy hearing.
 6. At the start of the hearing, then, the claimant's case relied on a series of alleged protected disclosures ("PD"s), numbered 1 to 9 by Employment Judge Heap, and consisted of 13¹ allegations of detriment:
 - 6.1 allegations a) to k) in the claimant's original "*Grounds of Claim*" attached to the claim form, which we shall refer to as allegations 1 to 11 (with 1 corresponding to a), 2 to b), and so on, as set out in the appendix to respondent's counsel's written closing submissions);
 - 6.2 allegation 12, as set out in paragraph 8 of the *Grounds of Claim* and paragraph 25 of the "*Claimant's Replies to Request for Further and Better Particulars of Claim*" of April 2018 (the "*Further Particulars*");
 - 6.3 allegation 13, concerning an alleged breach of trust and confidentiality, as set out in paragraph 36 of the *Further Particulars*.
 7. We note that there are only, really, 7 alleged protected disclosures, because:
 - 7.1 PDs 3 and 4 are the same document, namely an email from a Mr Thompson of 26 February 2016 to various people, including Mrs Edwards and the claimant;
 - 7.2 PDs 8 and 9 are also the same document – an email from the claimant to the respondent's Acting Chief Executive, Mr I Majid, and Interim Chairman, Mr R Gregory, of 19 June 2016.

¹ Arguably, some of the 13 allegations can be split into more than one complaint each, making more than 13 complaints in total.

8. Part of the way through the hearing, the claimant conceded no one was motivated to act to his detriment by his alleged protected disclosures apart from Mrs L Edwards, his line manager. In practice, this meant that his entire claim failed, because there was no evidence that Mrs Edwards had had any significant involvement in the things he was complaining about that happened within the time limit for bringing this claim. We shall explain why this is so in more detail in the section of these Reasons in which we give our decision on the issues.

The law

9. In terms of the relevant law, we refer, first and foremost, to the relevant sections of the ERA: sections 43B, 47B and 48.
10. This case has mostly not been won and lost because of legal issues but because of factual ones. There are, though, two legal issues that would have come to the fore had the claimant's claim been stronger on the facts than it is: limitation / time limits; what respondent's counsel referred to in his written closing submissions as "*the principle in the case of Royal Mail Group Ltd v Jhuti [2018] ICR 982*".
11. In relation to limitation / time limits, the relevant parts of ERA section 48 are as follows:
- (3) *An employment tribunal shall not consider a complaint under this section unless it is presented-*
- (a) *before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them, or*
- (b) *within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.*
- (4) *For the purposes of subsection (3)-*
- (a) *where an act extends over a period, the "date of the act" means the last day of that period, and*
- (b) *a deliberate failure to act shall be treated as done when it was decided on;*
- (4A) *.... section 207B (extension of time limits to facilitate conciliation before institution of proceedings) appl[ies] for the purposes of subsection (3)(a)*
12. In relation to these provisions, all we need to note for now is that if a case has not been brought within the time limit in section 48(3)(a), it is for the claimant to satisfy the tribunal that it was "*not reasonably practicable for the complaint to be presented before the end of that period of three months*".
13. As to the case law relating to time limits, we note, in relation to whether there was "*a series of similar acts or failures*" or any "*act extending over a period*", Arthur v London Eastern Railway Ltd [2006] EWCA Civ 1358.

14. In relation to the Jhuti case, what we are concerned with is ERA section 47B(1) – “*A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure*” – and, in particular, the meaning of “*act ... by his employer done on the ground that the worker has made a protected disclosure*”. We are concerned with this specifically in the following situation: one person (“A”) is manipulated by another person (“B”) into subjecting a worker to a detriment, where B acts because the worker has made a protected disclosure but A does not. In that situation, can the worker bring a claim – sometimes called an ‘lago claim’ – for being subjected to that detriment on the ground that he made a protected disclosure, even though the person who subjected him to it is wholly innocent? Putting it briefly, we agree with counsel that as a matter of law, the answer to that question is: no. It would, however, perhaps be helpful for us to expand on that.
15. One of the difficulties we have had is that the claimant’s case changed considerably between the beginning and the end of the final hearing. The claimant’s ‘pleaded’ case – by which we mean that set out in the claim form and (with the restrictions imposed by Employment Judges Heap and Hutchinson) Further Particulars and Amended Grounds of Claim – is that four individuals subjected him to particular detriments. For example, one of his complaints, taken from the Further Particulars, was that his, “*new line manager ... breached his trust and data protection policies by disclosing his personal and sensitive e-mails ... without permission or justification ...*”. This is complaint 13.
16. As already mentioned, the claimant effectively withdrew his allegations against everyone except for Mrs Edwards part of the way through the final hearing. One of the three people against whom allegations were withdrawn was the “*new line manager*” referred to in complaint 13. But the claimant did not withdraw any complaints. Instead, to the extent we could understand what his case now was, it seemed to have become that Mrs Edwards had somehow manipulated the three others to act to his detriment.
17. The claimant was not changing his case to say that Mrs Edwards had done something he was previously accusing someone else of doing. He was making a wholly new accusation. Again using the example of complaint 13, the accusation had been that the respondent subjected him to a detriment on the ground that he had made a protected disclosure by his new line manager doing something, with the detriment being the thing his new line manager had done. The wholly new accusation was that the respondent, through Mrs Edwards, had subjected him to a detriment by manipulating his new line manager into doing something.
18. The problem is that, despite having a wholly new case, the claimant never applied to amend his claim. (We put to one side the fact that it is unlikely we would have granted an application to amend at that stage of the proceedings). Our understanding of the Jhuti case and, generally, of the law as it applies to lago claims², is that something is not normally “*done on the ground that the worker has made a protected disclosure*” if an innocent person does it. Going back to complaint 13, when the claimant’s case changed, the thing that had supposedly been done on the ground that he made a protected disclosure was

² See, in particular, Co-operative Group Ltd v Baddeley [2014] EWCA Civ 658 at paragraphs 41 to 42.

no longer what the new line manager had done, but what Mrs Edwards had allegedly done some time before.

19. This is not merely a 'pleading point'. Apart from anything else, a respondent and its witnesses need to know what is being alleged in order to defend the allegations. In a whistleblowing case, this means: who is alleged to have done what and when on the ground that the claimant made a protected disclosure? An allegation that, say, Mr X suspended the claimant on that ground in January is quite different from one that Ms Y planted evidence against the claimant on that ground in December, which led to the claimant being suspended in January. In the present case, we never discovered what Mrs Edwards was supposed to have done and when in terms of manipulating others. Had the claimant made an application to amend we would have insisted on clarity in this respect, but he did not make one.
20. We also note paragraphs 2 to 9 of counsel's written closing submissions, with which we broadly agree, and the following case law:

20.1 in relation to whether or not something constitutes a detriment, St Helens MBC v Derbyshire [2007] UKHL 16, in light of which we understand the position to be as follows: the test is an objective one – would a reasonable employee, in the claimant's position, consider the treatment to be to his detriment?; another way of putting the same objective test is to ask: did the claimant honestly and reasonably believe the treatment to be to his detriment?; an unjustified sense of grievance cannot constitute detriment, and although being caused distress and worry can, it will only do so if it was objectively reasonable in all the circumstances for the employee to view such distress and worry as a detriment; it is not a defence *per se* that the employer behaved honestly and reasonably, but save in the most unusual circumstances, it will not be objectively reasonable for an employee to view distress and worry caused by honest and reasonable conduct of the employer as a detriment;

20.2 Ibekwe v Sussex Partnership NHS Foundation Trust UKEAT/0072/14/MC (20 November 2014) in which HHJ Peter Clark endorsed an Employment Tribunal's statement of the law relating to the burden of proof under section 48(2) of the ERA along these lines: where, following the making of a protected disclosure, the claimant is subjected to a detriment and there is no substantial evidence explaining the reason why the employee was subjected to that detriment, the claimant does not win by default; there remains an evidential burden on the claimant to establish a causal link between the making of the protected disclosure and the detriment.

The facts

21. Many of our findings of fact are not set out in this section of these Reasons; they are set out in the section headed "*Decision on the issues*". It should also be noted that we are not going to mention and/or deal with every factual issue and dispute that was raised during the hearing. For the most part, all we have dealt with are the things it has been reasonably necessary for us to deal with in order to make and explain our decision on the issues referred to above. We are afraid that, almost inevitably, this will mean we have not dealt with some of the things that either or both of the parties wanted us to.

22. We heard evidence from five witnesses: the claimant himself; Mrs Edwards; Mr D Tucker, a General Manager at the respondent, whose relevant involvement was to meet with the claimant on 16 January 2017 to tell him he was being suspended; Ms C Biernacki, at the relevant time employed by the respondent as a Temporary General Manager; Mrs J Wombwell, a Service Manager.
23. The documentary material that was put before the tribunal was extensive: five over-filled lever-arch files worth. We have read only a fraction of the 2000 or so pages of documents in those files. All we read, and all we had time to read, were the things we were taken to and/or told we needed to read. Only a small part of the documentary evidence we looked at was particularly relevant to the issues.
24. We refer to the respondent's chronology, which should be deemed to be incorporated into these Reasons. We appreciate that the claimant may not consider it to be entirely neutral in its wording, but his representative, Mr Oliver, accepted the accuracy of dates in it. The parties agreed that the following additions should be made to it:
 - 24.1 26 February 2016 as the date of the email relied on as PDs 3 and 4;
 - 24.2 31 August 2017 was the date of a letter to the claimant (appearing at pages 324 to 334 of bundle 2) giving the outcome of one of his grievances.
25. We also note that in the chronology, a meeting on 26 October 2016 is referred to as a "*Disciplinary meeting*" and we probably wouldn't call it that. It was about the claimant, but did not involve him. At the time it was called a strategy meeting and it was to discuss concerns that various people had about the claimant and how they should be dealt with.
26. The claimant worked in the Bolsover area. His role is to help people in the community who have mental health problems and who are under the care of the respondent Trust. He works as part of a team, including medical and nursing staff and other healthcare professionals, with him and the other support workers as the most junior members of it.
27. This case is concerned with events between February 2016 and October 2017. However, it is relevant that the claimant had first raised a grievance within the respondent in 2014 and that that grievance had not been fully resolved at the start of those events. The claimant was dissatisfied with various things that had happened during and in connection with his employment that had nothing to do with what this claim is about (and nothing to do with Mrs Edwards). It seems to us that those things coloured – and, to an extent, distorted – his perception of the respondent and of its treatment of him during 2016 and 2017.
28. During February and April 2016, the claimant sent Mrs Edwards three emails in total that are alleged to be protected disclosures – PDs 1, 2, and 5. They related to two patients: "SA" and "SW". As already mentioned, an email relied on as a relevant protected disclosure (PDs 3 and 4), from a Mr Thompson, was sent on 26 February 2016. It related to SA's care.
29. PDs 6 and 7, of 1 and 3 June 2016, are part of an email chain passing between the claimant and Mrs Edwards relating primarily to the claimant himself. His 2014 grievance had just been, to all intents and purposes, finally resolved but he had, in May 2016, raised another one, connected to the first. Although this

second grievance, like the first, had nothing to do with Mrs Edwards, it did concern Mrs Edwards's manager, a Ms Lowes. This, in the claimant's words in the email to Mrs Edwards that is PD 6, made it "*extremely difficult for me to talk to you honestly about my situation*".

30. PDs 8 and 9, the claimant's email of 19 June 2016 to Mr Majid and Mr Gregory, is again primarily about the claimant's personal situation and his two grievances. In the email, he makes ten points, one of which seems to us to be potentially relevant to his claim in these proceedings: "*As a band three, I am regularly given band six nurse work to do, due to a lack of nurses. I was given a client with no Consultant, no CPN, no GP, all had discharged him for being violent and aggressive. He had had no assessment. He had a history of taking a consultant hostage. Yet as a band three, my manager gave me this client through a duty call. Where is my safety net, where is the procedure? Once a consultant did get involved, he gave the client seven times the prescribed dose of medication, and as I was the only person visiting, this put me at risk from the client's violent and aggressive behaviour.*" The reference to "*my manager*" was to Mrs Edwards. The "*client*" being referred to was SA. And the things relating to SA that were mentioned mostly occurred in or before February 2016 and some of them had featured in PDs 1 to 5.
31. Mrs Edwards's evidence was that she knew nothing at all about the claimant's email of 19 June 2016 until she was sent an email about a "*Whistle Blowing Investigation*" by someone she describes as "[Mr] *Majid's secretary*" on 16 February 2017. The claimant believes Mrs Edwards must have found about it 'through the grapevine', as it were.
32. The alleged detriments about which the claimant makes his claim occurred between around July 2016 and October 2017. Many of them relate, directly or indirectly, to disciplinary proceedings to which the claimant was subjected. The key events are these (we shall be making more detailed findings about events of August to October 2016, in particular, later):
 - 32.1 between 2 and 12 August 2016, there was a string of emails between the claimant and Mrs Edwards about whether the claimant should attend a funeral, on 22 August 2016. The funeral was of the husband of one of the respondent's patients, KD. There were also some separate communications between each of them and the Community Psychiatric Nurse (CPN) assigned to KD, who we'll refer to as "KH". The claimant felt he should attend to support KD; Mrs Edwards that he shouldn't. The claimant attended, contrary to Mrs Edwards's instructions. He took annual leave to attend, which Mrs Edwards had not authorised. In an email of 12 August 2016, he told Mrs Edwards that, "*I ... will be attending the funeral. I am asking for my future management to be done by [Mrs Wombwell], as I am very unhappy with your management*". This is one of the things that led to the disciplinary proceedings against the claimant;
 - 32.2 on or in the days immediately before 19 August 2016, the claimant made what he described as "*formal complaints about the way in which my client [KD] has been treated*" in a letter to the police. This is another thing that led to the disciplinary proceedings;

- 32.3 on or around 23 August 2016, KH allegedly told the claimant that Mrs Edwards had told her he was going to be sacked for not following Mrs Edwards's orders. This is half of detriment complaint 2: "*Spreading rumours about the claimant's status within the Trust*";
- 32.4 in late August 2016, between the 25th and the 30th, there was a multi-agency strategy meeting, involving the respondent, the Council, and the Police, to discuss KD, which both the claimant and Mrs Edwards attended. Detriment complaint 3 – "*Disrupting the claimant's relationships with clients*" – concerns this meeting;
- 32.5 the claimant went on sick leave from 30 August 2016 onwards;
- 32.6 on 5 September 2016, Mrs Edwards sent the claimant the email to which detriment complaint 4 relates, in which she told him she had discharged some of 'his' patients;
- 32.7 around 15 September 2016, the claimant's access to the respondent's IT systems and to his work mobile phone was cut off. Detriment complaint 5 is about this;
- 32.8 also on or about 15 September 2016, there was a meeting involving (amongst others) Mrs Edwards and Ms Biernacki where concerns they had about the claimant were discussed. One of the conclusions of that meeting was that there needed to be a meeting with the claimant as a matter of urgency. By a letter of 19 September 2016, the claimant was invited to a meeting on 3 October 2016, "*in line with the Trust Health and Attendance Policy*". The claimant did not attend;
- 32.9 on or about 30 September 2016, there was a telephone conversation between the claimant and Ms Biernacki that detriment complaint 6 relates to;
- 32.10 as already mentioned, there was a 'strategy' meeting on 26 October 2016. The people present included Mrs Edwards and Ms Biernacki. It was decided that the claimant should face a disciplinary process into various allegations when he returned from sickness absence. Detriment complaint 8 – "*Making false allegations of misconduct*" – seems partly to relate to this;
- 32.11 on 16 January 2017, the claimant returned to work from sick leave and was immediately suspended from duty, by Mr Tucker. Detriment complaint 7 is: "*Suspension from duty without just cause*". The suspension letter stated that the allegations against the claimant included:
- *That you have contacted service users whilst you have been on sickness absence*
 - *That you have not declared secondary employment as set out in the Secondary Employment Policy and Procedure*
 - *That you have used your Trust mobile phone in pursuit of undeclared secondary employment*
 - *That you have worked during a period of sickness absence*
 - *That you have been non-compliant with a direct instruction from your Line Manager*

- *That you have taken unauthorised leave in direct opposition to managers instruction*
- *That you have communicated with external organisations and represented yourself as advocating for a client outside the boundaries of your role*
- *That you have represented yourself as advocating for a service user and undertaken activity related to this and not recorded this within Trust systems for recording information.*

32.12 on 17 January 2017, the claimant emailed various people, including Mr Gregory and Mr Majid, complaining, for the first time, that he had been victimised for whistleblowing. He referred to PDs 8 and 9 and his suspension. Following this, the respondent instigated a full-blown whistleblowing investigation;

32.13 probably (based on what is stated in a disciplinary investigation report of 4 August 2017) around March / April 2017, Mrs Edwards, possibly indirectly, provided the team investigating the disciplinary charges against the claimant with a laptop bag, thought to be the claimant's but which he denies was his. It contained a CD the claimant had recorded of his own songs. On 21 July 2017, the disciplinary investigation team emailed him to ask him questions about it, suggesting that the songs on the CD might not be appropriate for someone working in the NHS. Detriment complaint 9 – *"Planting false evidence against the claimant"* – arises out of this;

32.14 in or around late July 2017, the claimant sought to recover personal belongings from offices that had been cleared and then refurbished the previous year. Some of his things had gone missing. This forms detriment complaint 10: *"'Losing' the claimant's personal belongings from his office"*;

32.15 on 4 August 2017, the report into the disciplinary charges against the claimant was produced. Essentially, the claimant was found guilty only of technical breaches of policy and no disciplinary sanction against him was recommended;

32.16 in late September 2017, the claimant put in a claim for his mileage allowance. There was a short delay in paying it. This is detriment complaint 11: *"Failing to pay the claimant's mileage allowance"*;

32.17 on 9 October 2017, the claimant attended his workplace to hand in a sick note and was told by the receptionist that he was not allowed on the premises and that staff were forbidden from talking to him. Detriment complaint 12 is (as summarised by Employment Judge Heap): *"the claimant was refused entry to his place of work and ... a directive was issued to that effect to all other staff by [Mrs] Wombwell together with a warning that any staff member who talked to the claimant would face dismissal"*;

32.18 on or about 13 October 2017, the claimant received an unsigned anonymous letter or statement, the relevant part of which is, *"I cannot bring myself to talk about the vile rumours circulating about why [the claimant and a colleague] were suspended, and I am sure that these are the result of management manipulation. Joanne [Wombwell] speaks with*

Lesley [Edwards] on a daily basis and Lesley is still calling the shots". This is the second part of detriment complaint 2, concerning Mrs Edwards allegedly "*Spreading rumours*".

33. The final detriment complaint – number 13 – relates to Mrs Wombwell forwarding to Mrs Edwards on 17 July 2017 an email sent by the claimant the previous day about the disciplinary investigation and annual leave, which ends with, "*I cannot take a holiday until all of this is completed, as I am not in the right frame of mind. Please can you take out my A/L and I shall use it later*". The complaint is that Mrs Wombwell, "*breached the claimant's trust and data protection issues by disclosing his personal and sensitive emails to [Mrs Edwards] without permission or justification with the sole intention of discrediting the claimant*".

Decision on the issues

34. We start by looking at the time limits issue. We look at that issue together with the question of whether the claimant's concession that the only person he is now alleging was motivated to act as they did by his whistleblowing was Mrs Edwards. The reasons for looking at those issues first and at the same time are:

34.1 we refer to ERA sections 48(3) & (4);

34.2 bearing in mind the date the claim was issued and the dates of early conciliation, any complaint about something that occurred before 19 August 2017 is out of time unless it is part of a relevant "*series of similar acts or failures*" or is part of a relevant "*act [that] extends over a period*", or unless time were extended on the basis that it was "*not reasonably practicable for the complaint to be presented*" on time;

34.3 there is no evidence before us supporting an extension of time on a "*not reasonably practicable*" basis. The claimant chose not to deal with this issue at all. We do not know why he presented his claim form when he did and not sooner;

34.4 none of the alleged detriments is part of a relevant "*act that extends over a period*", a relevant act being one that started before 19 August 2017 and ended on or after that date;

34.5 on the facts of this case, detriments might only be part of a "*series*" if the same person was responsible for them;

34.6 in any event, because of the claimant's concession, any complaint about any alleged detriment for which Mrs Edwards was not directly or indirectly responsible would necessarily fail.

35. What we are asking is:

35.1 first, which complaints are about detriments for which Mrs Edwards was directly or indirectly responsible?

35.2 secondly, of those complaints, which of them dates from on or after 19 August 2017?

36. Complaint 1 is "*Management refusal to sign off the Claimant's annual leave*". It relates to July 2016 and Mrs Edwards is alleged to be responsible. Complaint 2,

concerning “*Spreading rumours*” is against Mrs Edwards. Part of it dates from August 2016 and the other part – the “*vile rumours*” letter / statement – from October 2017. Complaint 3 is about Mrs Edwards’s actions at a meeting in August 2016 and Complaints 4 and 5 (“*Discharging patients from the Claimant’s caseload without consultation*” and “*Disconnection of the Claimant’s mobile phone and laptop computer*”) also allegedly concern Mrs Edwards, and date from September 2016.

37. Complaint 6 (“*Rude and aggressive conduct*”) is about how Ms Biernacki allegedly was towards the claimant during a telephone conversation on 30 September 2016. It was not suggested to Ms Biernacki or to Mrs Edwards that the latter had persuaded or in some way manipulated the former to be rude and aggressive and there is no evidence to support that suggestion. This complaint therefore fails. If such evidence existed, the complaint would still fail, because it would be an *lago* claim.
38. Complaints 7 and 8 are “*Suspension from duty without just cause*” and “*Making false allegations of misconduct*”. They relate to the period from September 2016 to 16 January 2017. Neither of these has been made as a potentially valid complaint against Mrs Edwards.
39. On the evidence, Mrs Edwards did not take the decisions to suspend or discipline the claimant. The claimant’s case – as it developed during this hearing – has become that, prior to the ‘strategy meeting’ on 26 October 2016, she supplied information to those who took the decisions to suspend and discipline and did so maliciously. We have already noted that no application to amend was made to us. In the absence of a successful application to amend, we think that no case along those lines is properly before us. Nevertheless, for the sake of argument, and because it now seems to be the main part of the claimant’s claim, we shall assume that he is entitled to expand upon his pleaded case in this way.
40. The only date attached to complaints 7 and 8 in the Further Particulars is 16 January 2017 and, on the face of them, they are complaints made against Mr Tucker, not Mrs Edwards.
41. The claimant’s real complaint is not about making “*false allegations*”. As we shall explain later in these Reasons, almost all of the allegations were true. What he is really complaining about is that things that, in his view, were minor misdemeanours at worst were used as an excuse for persecuting him by suspending and disciplining him. This simply does not work as an allegation against Mrs Edwards, though. If the accusation were that she had told lies and others had believed her and had suspended and disciplined as a result, we would not accept that accusation, but at least the complaint would be coherent. But how is she supposed to have persuaded others, mostly senior to her, to treat as more serious than they really were allegations that were substantially true, particularly given that what Mrs Edwards actually did was not so much make allegations as provide accurate information?
42. Complaint 9 is the one about “*Planting false evidence*”. This appears to be an allegation that Mrs Edwards was responsible for providing to the investigation team a CD belonging to the claimant and – possibly – persuading them to consider adding as a disciplinary charge something to do with that CD. As mentioned above in our findings of fact, although the claimant was questioned

about the CD in July 2017, it seems to have been provided to the investigation team – ‘planted’, if that is how it was – well before then, around March/April time.

43. The only relevant thing there is any evidence of is that Mrs Edwards provided the CD in a bag to the investigation team. There is no evidence that she encouraged the investigation team to examine the CD with a view to anything about it being added to the ‘charge sheet’, or anything else remotely along those lines. The alleged detriment is deciding to question the claimant about it and then questioning him about it. Mrs Edwards was not responsible for either of those things. They were done by the investigation team on advice from the commissioning manager. This complaint is unsustainable.
44. Complaint 10 concerns the alleged loss of some of the claimant’s personal belongings. It is very unclear who this allegation is made against. However, we are satisfied that the person who had responsibility for clearing the part of the office where those belongings were allegedly located was Mrs Wombwell. Whoever is to blame for any belongings going missing, it is not Mrs Edwards. Further, on the undisputed evidence of Mrs Wombwell, old desks, such as the desk where claimant alleges his belongings were, were removed / destroyed in 2016, i.e. well before 19 August 2017. This complaint therefore fails too.
45. Complaint 11 is about late payment of the claimant’s mileage allowance. By the end of his evidence, it seemed to us that not even he was alleging Mrs Edwards had anything to do with this, the person allegedly responsible being Mrs Wombwell. We refer to paragraph 33 of Mrs Wombwell’s witness statement, which we accept. We don’t, we think, need to go into any more detail than to say that if Mrs Edwards was somehow involved in this – and we have decided she wasn’t – it would not be by doing anything directly and this complaint would be the kind of ligo claim that does not work as a matter of law, in accordance with Jhuti.
46. The allegation made in relation to complaint 12, which concerns what the claimant was told by a receptionist at his workplace on 9 October 2017, is that Mrs Wombwell issued some kind of “directive”. It appears the receptionist thought Mrs Wombwell had said what she said at Mrs Edwards’s direction. That is the only evidence that Mrs Edwards had anything to do with this. We don’t know why the receptionist thought this, but we think she was wrong. All this probably came about because Mrs Wombwell, on advice from HR and completely uninfluenced by anything Mrs Edwards did or said, had, in January 2017, told staff about the claimant’s suspension and at the time told them he was not supposed to be on Trust premises and not to speak to him; and staff had not been told his suspension and the related restrictions had been lifted before 9 October 2017. There is no proper basis for connecting this incident with Mrs Edwards. And if it was in some unknown way indirectly linked to her, it would be another ligo claim and would fail for that reason.
47. Complaint 13 is about the forwarding of an entirely innocuous email. The claimant may well genuinely have seen this as (paraphrasing his words in the Further Particulars) breaching his trust by disclosing a personal and sensitive email to Mrs Edwards, but, objectively, it was not close to being that; and the idea that, again in the claimant’s words, it was done, “*with the sole intention of discrediting the claimant*” is almost preposterous, not least because there was nothing discreditable in the email. There was an inconsistency in the

respondent's witnesses' evidence as to precisely why it was forwarded, which we need not go into, but:

- 47.1 on any view, the person who forwarded it was Mrs Wombwell;
- 47.2 no suggestion was made in cross-examination either of Mrs Wombwell or of Mrs Edwards that Mrs Edwards was directly or indirectly responsible for Mrs Wombwell forwarding it to her, and there is nothing before us to support such a suggestion;
- 47.3 if the claimant is now putting this forward as an iago claim, it fails in accordance with Jhuti.
48. In summary, Mrs Edwards was not to any extent responsible for the alleged detriments to which the following numbered complaints relate and those complaints therefore fail: 6 & 9 to 13.
49. Of the remaining complaints, the only one about something that may have happened on or after 19 August 2017 is the part of complaint 2 that relates to the "*vile rumours*" letter / statement. We shall therefore deal with that now.
50. This entire complaint is based on two words in what is presented as an anonymous document, said to have been received by the claimant following a request he made to the letter's author (quoting from the letter itself), "*to discuss poor work experiences as part of an investigation*". Apparently, the author cannot bring him or herself to talk about the "*vile rumours circulating*" as to why the claimant was suspended. We don't know what the vile rumours are. We don't know from whom, when, and in what circumstances the author of the letter heard them. We don't know who the author of the letter is and have no basis on which to judge their veracity. We have seen no evidence that Mrs Edwards had anything to do with any rumours that were circulating about the claimant; and nothing specific was ever put to her about these vile rumours in cross-examination. We don't even know what the claimant's case is as to when Mrs Edwards supposedly did whatever it is she is accused of having done to cause these unspecified rumours to circulate, and whether it was after 18 August 2017. This complaint is hopeless and we dismiss it.
51. What all of that means is that, whatever else, the entire claim fails on the basis that the tribunal has no jurisdiction to deal with it because of time limits.
52. We shall nevertheless consider whether the claimant would have won any part of his claim had he presented his claim form in time. (The short answer is: no he wouldn't). We shall start by examining each of the alleged protected disclosures.
53. PD 1 – an email of 11 February 2016 – is irrelevant. The claimant said during his oral evidence that he had not been subjected to any detriment because of it. We do accept that it was a protected disclosure, though. Amongst other things, the claimant told Mrs Edwards that a patient "*has not taken medication for many months*". This is something that 'ticks' the "*health or safety*" 'box' under ERA section 43B(1)(d).
54. PD 2, an email of 25 February 2016, which includes information that a patient "*has been on lithium for months and not been sent for blood tests*" is another "*health or safety*" protected disclosure.

55. PDs 3 and 4, Mr Thompson's email of 26 February 2016, may well be protected disclosures but are not relevant because they were not made by the claimant. Perhaps the claimant agreed with what was in the email. Perhaps he discussed it with Mr Thompson before he sent it. But ERA section 47B protects only the individual who "*has made a protected disclosure*" and, in this instance, that was Mr Thompson and not the claimant.
56. We also note, in passing as it were, that one of the things the claimant was apparently concerned about was this patient – SA – not being assigned a CPN. The email shows that Mr Thompson, a CPN, had been assigned to this patient within a few weeks of the problem being drawn to Mrs Edwards's attention.
57. PD 5, an email of 8 April 2016, is essentially a complaint about a GP and a consultant. We agree with the claimant that it was a protected disclosure. He was disclosing information that we accept he reasonably believed – whether it was the case or not – tended to show danger to two patients' health and safety.
58. PD 6 is an email of 1 June 2016 about the claimant's own previous grievance and its outcome. It relates purely to him and his own personal situation. The basis upon which this is alleged to be a protected disclosure – see paragraph 9.2 of Employment Judge Heap's Case Management Summary – is danger to health and safety of patients and/or breach of a common law duty of care to patients, but there is nothing in the email about that. The claimant does not rely on breach of any legal obligation to himself as the basis. In any event, he could not, in our view, reasonably have believed that disclosing these things about himself to Mrs Edwards was in the public interest. This was not a protected disclosure.
59. Pausing there, we note that none of the alleged protected disclosures we have been discussing so far contain any explicit or implicit criticism of Mrs Edwards. And the only one which we would not describe as routine and unchallenging is the last one, which we have decided was not a protected disclosure.
60. The respondent concedes that PD 7, an email of 3 June 2016 (see page 143 of bundle 1), contains one or more protected disclosures. We agree. The part of the email beginning, "*You gave me a client from a duty call, with no consultant, no CPN, and no GP...*" is information that the claimant reasonably believed tended to show that his own health and safety, and possibly that of patients, had been put at risk.
61. Protected disclosures come in all shapes and sizes. It is not necessarily the case – not remotely – that any protected disclosure of any kind made in any circumstances provides a possible motive for somebody to subject the maker of the protected disclosure to a detriment. If whistleblowers are persecuted it is almost always for one of two reasons: either they have caused some inconvenience or embarrassment or something of that kind by blowing the whistle and the person subjecting them to detriment is punishing them and/or making an example of them; or they have blown the whistle to a certain level and the person subjecting them to detriment is doing so by way of threat, with a view to dissuading them from blowing the whistle again and/or to other people such as senior managers within a company or the regulatory authorities.

62. At the end of PD 7, the claimant writes that it “*is purely to get things off my chest*” and the email does not invite a response, or give the impression that a response is expected. However, this is the one alleged protected disclosure that challenges Mrs Edwards and criticises her to an extent. There is no threat to take the criticisms of her further, but this is the first of the alleged protected disclosures that it is reasonably conceivable might have annoyed Mrs Edwards.
63. In relation to all the previous alleged protected disclosures, it is inherently very unlikely that anyone in Mrs Edwards’s position would be motivated to punish the claimant for sending the emails (or, indeed, to punish Mr Thompson or the claimant for Mr Thompson’s email of 26 February 2016).
64. We know that Mrs Edwards reacted to PD 7 by seeking advice from a manager: she sent an email on 6 June 2016 to Ms Biernacki (her line manager’s line manager), forwarding the claimant’s email of 3 June 2016. If Mrs Edwards was sufficiently cross with the claimant for having sent the email of 3 June 2016 to want to subject him to detriments as a result, some hint of this would appear in her email to Ms Biernacki, sent just 3 days later. Mrs Edwards would have had no reason not to be candid and open with Ms Biernacki at this time. In any whistleblowing or discrimination case, the difficult task for the claimant is proving the discriminatory or victimising mindset. No one can know what was going on in someone else’s mind, and the best evidence we have as to Mrs Edwards’s state of mind at the time of the claimant’s protected disclosures is her email to Ms Biernacki.
65. When we examine that email, which is at page 750 of bundle 3 and to which we refer, there is nothing in it even hinting that Mrs Edwards was at all concerned about the criticisms the claimant had made of her. What she was evidently concerned about, understandably and reasonably so, was becoming embroiled in the claimant’s historical grievances, and about the claimant apparently feeling unable to be open with her because he had taken a grievance out about her line manager, Ms Lowes. Ms Edwards wrote to Ms Biernacki positively about what was going on in June 2016, her only negative comments being about the claimant being stuck in the past, i.e. fixated on his grievance that dated from before she was his manager. She asked for advice in a measured, neutral way; and the advice that was then given by Ms Biernacki, which seems to have been the advice Mrs Edwards was after, was focussed on issues other than any criticisms of Mrs Edwards.
66. We also note that if Mrs Edwards was at all concerned about the claimant’s criticisms of her, she would surely not have forwarded his email to Ms Biernacki, who was two tiers of management above her. Further, Ms Biernacki was not critical of Mrs Edwards at this time. In other words, she did not view the allegations and criticisms made of Mrs Edwards by the claimant in his email as serious or even worthy of comment.
67. It is clear to us that Mrs Edwards did not, in June 2016, see herself as being criticised to any significant extent by the claimant and that she was not at all concerned about him criticising her.
68. Moreover, we note that neither Mrs Edwards nor Ms Biernacki was particularly critical of the claimant at this time in their emails and that if they had had negative criticisms of him, they would have had no reason to hide them in what

they would have thought of as private correspondence strictly between themselves.

69. Generally, the whole contents and tone of this correspondence is completely inconsistent with claimant's case that Mrs Edwards was so angered by his criticisms of her that she started orchestrating a campaign to do him down.
70. We also note later correspondence between the claimant and Mrs Edwards which suggests that, from her point of view, the relationship between them was still reasonable many weeks after PD 7, for example an email of 5 August 2016 which she ended with, "*Thank you for supporting this lady a good job as always*".
71. As to the final alleged protected disclosures – PDs 8 and 9, which are the email to Mr Majid and Mr Gregory of 19 June 2016 – it is accepted that the email contains protected disclosures. However, most of it is not about and does not contain protected disclosures. Instead, it is concerned with the claimant's personal situation. He was perfectly entitled to complain about his personal situation, but he could not reasonably have believed it was in the public interest for him to raise it.
72. The protected disclosures in the email are contained in one numbered paragraph out of the ten containing allegations. The protected disclosures in this paragraph are not predominantly about patient care but about the claimant's own health and safety. It is also the only paragraph that relates to Mrs Edwards at all, but she is not mentioned by name.
73. In short, this is not an email about Mrs Edwards, but merely one that mentions her peripherally.
74. The claimant's case, broadly, is that he made a series of protected disclosures of escalating seriousness relating to Mrs Edwards and ultimately was forced to bring them to the attention of the Trust's Acting Chief Executive and Interim Chairman due to her failure to deal with them. This is simply not what happened. Hardly any of his concerns related to her. Such concerns about her as he had raised with her were not, in our view, serious ones when judged objectively. And we accept evidence she gave that the matters he raised with her, whether they related to what she had done or to patient care, were dealt with in good time and appropriately.
75. It is an important part of the claimant's case that he was subjected to detriments because, in particular, of PDs 8 and 9. He alleges Mrs Edwards really did not like the fact that he had not just gone over her head, but made serious criticisms of her to top management. However, we do not accept Mrs Edwards saw the email of 19 June 2016 until after he presented his tribunal claim, and that she knew nothing directly or indirectly about it before February 2017. In submissions, Mr Oliver suggested she must have known about it because within organisations like the respondent, gossip is rife and if someone raises a serious complaint about their line manager to senior managers, everyone is talking about it very quickly. That might be so if what the claimant sent to Messrs Majid and Gregory were a serious complaint about Mrs Edwards. But it wasn't. Almost all of it related to claimant's historical grievance and its aftermath.
76. In addition, it wasn't treated as a complaint about Mrs Edwards (and understandably so). No one sought to speak to Mrs Edwards about it or to

investigate her. It was not treated, and we would not have expected it to have been treated, as a potential protected disclosure relating to her until after he sent a further email, immediately after being suspended, on 17 January 2017, referring to having 'whistleblown' "*my manager for persistently giving band 6 nursing duties to a band 3 support worker*". This email of 17 January 2017 was inaccurate. PDs 8 and 9 referred, in passing, to "*regularly [being] given band six nurse work to do, due to lack of nurses*", but that was not what the email of 19 June 2016 was actually about.

77. It was only after 17 January 2017 that the claimant's concerns impinged adversely on Mrs Edwards in any way, shape or form, when she was contacted in February 2017 as part of the whistleblowing investigation. Although Mrs Edwards knew in or around August / September 2016 – because claimant himself had told her – that he had had discussions with Mr Majid, she thought those discussions related to the claimant's previous grievance and its aftermath, in particular to a disagreement between him and the respondent (which didn't involve Mrs Edwards) about whether he had been offered particular training.
78. To us, it is perfectly plausible that Mrs Edwards would know nothing about this complaint about her before February 2017; there is no evidence that she did; and we accept that she didn't.
79. Putting all of that together, there is no proper evidential basis for us to conclude that anything Mrs Edwards did – prior to February 2017 at the very least – in relation to the claimant had anything to do with him blowing the whistle.
80. We now return to the individual detriment complaints.
81. Complaint 1 concerns annual leave. The claimant's case has not been very clear, but the core allegation is to the effect that Mrs Edwards was difficult about authorising annual leave. The first time the subject matter of this complaint seems to have been raised was around February 2018. It relates to something that happened 18 months or so before then. The claimant raised complaints and a grievance about many other things in the intervening period. Given this, we think that if anything happened that he felt was to his detriment, he would have raised it sooner. We are therefore not satisfied the claimant's recollection of events is accurate. We note that there was correspondence between him and Mrs Edwards about annual leave in August 2016 – around the time claimant is now saying he had problems getting her to authorise it. In that correspondence, there is no suggestion of any problems at all. Further, there were no adverse consequences to her not signing off annual leave, to the extent that she failed to do so, in that the claimant took all of the leave he wanted to. So this claim fails on the facts, as well as on the other bases already identified.
82. The part of complaint 2 we have not yet discussed concerns an alleged conversation between the claimant and KH in August 2016. The only evidence that Mrs Edwards said something she ought not to have done is what the claimant remembers KH saying to him. Nothing from KH we have been taken to supports the complaint. We note that KH is not and never has been the respondent's employee and that it has at all times been open to the claimant to obtain evidence from her if he wanted to do so and that he has chosen not to do so. In the absence of any evidence from KH, there is every possibility that the

claimant misunderstood and/or misheard something she said to him and/or that she misunderstood and/or misheard something Mrs Edwards said to her.

83. We are not satisfied that Mrs Edwards said to KH anything similar to that which she is alleged to have said. In any event, this has nothing to do with any protected disclosures.
84. Complaint 3 is about the meeting concerning a patient in late August 2016. The claimant has put it as a complaint about 'disruption' – "*Disrupting the claimant's relationships with clients*". In fact, the allegation made by the claimant in his oral evidence was simply that Mrs Edwards had ignored him during this meeting. He conceded in cross-examination that apart from ignoring him, she did not disrupt the meeting or do anything inappropriate at it. We are not satisfied that anything happened that constituted a detriment to him as a matter of law; and, certainly, his pleaded case is not made out.
85. We make the following findings in relation to complaint 4, which concerns discharging patients without consultation. The claimant was off sick. It would not have been appropriate for the respondent to have contacted him while he was off sick to discuss inessential matters. All that Mrs Edwards did was, having consulted with the relevant CPN (who was effectively in charge of the claimant in this respect), remove from a list patients who had not been seen for a very long time and who therefore should not still have been on it. The claimant did not give evidence to us to the effect that any particular patient was discharged inappropriately. The gist of what Ms Biernacki told us, which we accept, is that Mrs Edwards would have been acting inappropriately had she not discharged these patients. Nothing happened that was a detriment to the claimant as a matter of law.
86. We take complaints 5, 7 and 8 together. They are all part of what became the key part of the claimant's claim – that Mrs Edwards made exaggerated allegations about him and manipulated others to take disciplinary action against him for which there was no reasonable and proper cause. What we have decided happened is set out immediately below.
 - 86.1 The husband of one of the respondent's patients, for whom claimant was the support worker and KH was the CPN, died in difficult circumstances.
 - 86.2 There was an ongoing discussion between the claimant, Mrs Edwards and KH as to whether or not the claimant should attend the funeral to support that patient.
 - 86.3 That discussion culminated in the claimant flatly refusing to obey an instruction given to him by Mrs Edwards and in him unilaterally deciding to take holiday on a day that Mrs Edwards had not authorised.
 - 86.4 During the discussion, the claimant told Mrs Edwards that KH felt the patient needed support from the respondent at her husband's funeral. KH then told Mrs Edwards that this was not true and moreover that the claimant had said to her that he did not think it was necessary for him to discuss the matter with Mrs Edwards, and that KH had instructed him to discuss it with Mrs Edwards. So from Mrs Edwards's point of view, the claimant had disobeyed an instruction from KH and had flatly lied to Mrs Edwards. In the absence of evidence from KH, we are not in a position to

assess whether, in fact, it was she or the claimant who was not telling the truth, or whether there was some genuine misunderstanding between them; but we do find that Mrs Edwards had no way of knowing that what she was being told by KH was – allegedly – incorrect.

- 86.5 Although, on the basis of the evidence they looked at (which is different from the evidence we looked at), the people who investigated the disciplinary allegation of insubordination were not particularly critical of the claimant in relation to this, based on the evidence before us, we do think the claimant was insubordinate. It comes as no surprise to us that this was considered, both by Mrs Edwards and Ms Biernacki, as potentially a disciplinary matter which needed investigation. What does come as a surprise to us is that there was no disciplinary sanction at all imposed on the claimant in relation to this.
- 86.6 After the funeral on 22 August 2016, which the claimant attended in defiance of Mrs Edwards's instructions, there was the meeting. At the meeting, amongst other things, Mrs Edwards discovered that the claimant had been writing to the police one or more letters which, it appears to us, had not been checked by the relevant CPN and had not been uploaded to the respondent's computer system and so did not appear on the respondent's files relating to that particular patient. In our view, the particular letter that we have seen was completely inappropriate, in tone and in content, and was not one that should ever have been written by someone of the claimant's grade.
- 86.7 This is another of the things that turned into disciplinary allegations against the claimant where we are surprised that the outcome of the disciplinary proceedings was that no action was to be taken against him. It most definitely was a legitimate cause for concern on the part of Mrs Edwards and the respondent more generally. It was entirely understandable and appropriate for the respondent to investigate this as a disciplinary matter.
- 86.8 The claimant went off sick on 30 August 2016. Around early September, Mrs Edwards was told that one or more patients had been contacted by claimant while he was off sick. Given what happened in relation to the funeral, given the letter to the police, and given the information about the claimant contacting patients while off sick, it would have surprised us if Mrs Edwards had not taken the kind of steps that she did take to raise a potentially disciplinary matter relating to the claimant with her superiors. She spoke to the Safeguarding Lead, a Ms Billyeald, and from then onwards the process was not, we find, driven by her at all but by others, in particular by Ms Biernacki and Ms Billyeald.
- 86.9 The claimant's original claim against Mrs Edwards was that the allegations that she had made were false. They weren't. The claimant had failed to obey her instructions. He had inappropriately contacted another agency (the police). He had been in contact with patients whilst off sick (albeit not inappropriately). He had used his Trust mobile phone for his own private affairs and also in relation to his wife's business. The one allegation that turned out to be unproven, namely that he had worked for his wife's business whilst he was off sick, was made because there was substantial evidence suggesting that this was the case. The claimant's allegation to

the effect that Mrs Edwards knew for months that he moonlighted as a puppeteer for his wife's business (as he did) is missing the point – the core concern that lead to disciplinary action in relation to secondary employment was that he had been working whilst off sick.

86.10 So far as concerns the claimant's repeated complaint that he should have had the allegations put to him before they became the subject of disciplinary action, the intention was to put them to him at the planned meeting on 3 October 2016, which he was notified of by a letter of 19 September 2016, but which he declined to attend.

86.11 Given all this, the decisions (none of which was made or driven by Mrs Edwards) first, to temporarily take away his access to his work telephone and laptop, secondly, to instigate a disciplinary process against him, and thirdly, to suspend him (in accordance with the respondent's usual procedures) were, in our view, understandable and reasonable.

86.12 Even if we had decided that Mrs Edwards had duped others into making those decisions, these complaints would be lingo claims and would fail for that reason.

87. We have dealt with complaint 9 already. This is the allegation about planting false evidence. What we wanted to add about it is a perhaps obvious point that there was no "false evidence": it was a CD which belonged to the claimant. And if – as he contends – there was nothing remotely wrong with what was on it, what would the problem have been with Mrs Edwards passing it on to someone else?

Conclusion

88. The claimant's claim fails completely. It fails for a number of reasons, including technical reasons, but most importantly because we are satisfied, on the evidence, that the claimant has not been subjected to any detriments because he blew the whistle. We think he has convinced himself and now sincerely believes his allegations are true. However, there is no objective basis for that belief.

89. Finally, it should be noted that our decision completely clears Mrs Edwards of the very serious allegations the claimant has been making against her for the last two years.

90. Mr Tucker, Ms Biernacki, and Mrs Wombwell are cleared as well, but in relation to them, the claimant himself unconditionally withdrew his allegations. It is, to say the least, unfortunate that he should have persisted with his claim against those three for so long.

91. We found nothing at all in the evidence suggesting any link whatsoever between anything any of the four of them did that was to the claimant's detriment and any of his alleged or actual protected disclosures.

Case No. 2600001/2018

EMPLOYMENT JUDGE CAMP

11 February 2019

Sent to the parties on:

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For the Tribunal:

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