EMPLOYMENT TRIBUNALS

Claimant: Dr Susan Gilby

Respondents: (1) Countess of Chester Hospital NHS Foundation Trust
(2) Ian Haythornthwaite

Heard at: Liverpool (in person)

On: 25, 26, 27, 28, 29 November, 2, 3, 4, 5, 6, 9, 10, 11, 12, 13.
16, 17 18, 19 & 20 December 2024 (in chambers).

Before: Employment Judge Shotter
Ms M Plimley
Mr J Murdie

REPRESENTATION:

Claimant: Mr O Segal, KC
Respondent: Mr S Cheetham, KC

JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The claimant's resignation was a dismissal under section 95(1) of the Employment Rights Act 1996 as amended and her claim for unfair dismissal brought under section 98 well-founded, (2) the dismissal was unfair under section 103A and (3) the claims are adjourned to an in-person remedy hearing before the full panel on the 6 & 7 May 2025 at the Liverpool Employment Tribunal.

2. The claimant was subjected to detriments by the first and second respondent done on the ground that she had made a protected disclosure, her claims of detriment brought under section 47B of the Employment Rights Act 1996 as amended are well-founded and adjourned to the remedy hearing.

3. The claimant's allegations that were no longer pursued that appear struck though in the list of issues below are dismissed on withdrawal.

REASONS

Preamble

The claims

1. In a claim form case number 2402398/2023 presented on 6 February 2022 following ACAS Early Conciliation, the claimant brings three complaints; constructive unfair dismissal under section 98, automatic unfair dismissal under section 103A of the Employment Rights Act 1996 as amended ("the ERA") and detriment under section 43B(b). In claim form case number 2408654/2023 presented on 10 August 2023 the claimant alleged she had been subjected to further detriments under section 47B of the ERA since commencement of the earlier proceedings. Both claims were combined on the 14 September 2023.

2. There have been a number of preliminary hearings dealing with case management and further particulars had been ordered. The Record of Preliminary Hearing held on the 23 January 2024 before Regional Employment Judge Franey records at para 15 and 16 that the claimant was seeking information about the reasons for her suspension and the respondent "had maintained that…the decision to suspend the claimant in December 2022 had been made on the basis of 'overarching concerns' rather than the granular detail sought. Their position was that they could not provide particulars of what had not been in the mind of the decision maker(s) at the relevant time." The same factors referred to the periodic extension up until employment terminated. "Both sides confirmed no new matters had been raised in any of the letters which confirmed extensions of suspension and therefore that the agreed position remained valid for those extensions too."

3. A preliminary hearing was held before Regional Employment Judge Franey on the 9 April 2024 when orders were made for disclosure by the respondents as set out in the annex including the second respondent's personal email accounts, messages to the claimant's work mobile telephone and "Project Countess" documents. Para 22 made reference to the respondents being asked since "spring of 2023 to ensure that all such communication was preserved." It is notable that "Project Countess" was a term used by a number of individuals who held key positions within the respondent that related to the claimant's employment, or more specifically as found by the Tribunal at the liability hearing, it was a term used that related to exiting the claimant from her employment and it was an attempt to mask the behind the scenes machinations and keep them hidden.

4. In a document titled "Case Management Orders" sent to the parties on 28 June 2024 a number of orders were made concerning disclosure. On the 17 September 2024, Regional Employment Judge Franey in a Judgment sent to the parties referred in the Reasons under para 26- 27 to "The facts in relation to each category" of document. I do not intend to reproduce the findings (which were not appealed) or the reference to the claimant's application to the High Court in May 2023 following which she attempted to access her Trust email account. Para 26 records; "It is a matter of record that the respondents were on notice about their obligation to preserve potentially relevant material from a few days after the claimant was excluded on 2 December 2022." Paras 28, 29 and

33 are particularly relevant, and Regional Employment Judge Franey found "as a fact that there had been deletions of emails from the claimant's work email account without her knowledge, that these deletions included the Wainwright report and the Bungay email…it appears emails prior to September 2022 have been irretrievably deleted…The respondents have not identified the person or persons responsible for these deletions." In respect of this finding the position has not changed, and at the liability hearing the respondent's witnesses denied deleting documents and emails.

5. Regional Employment Judge Franey made findings in relation to WhatsApp and text messages on Ms Price's mobile phones including the fact that the "second respondent has not disclosed any WhatsApp correspondence from his mobile telephone to any of the other participants in the key events in this case nor has been disclosed any messages with Ms Price taken from his telephone." The position had not changed by the time the second respondent came to give evidence at this liability hearing.

6. Finally, the Tribunal notes that "it is common ground that a good deal of material one would expect to find" in the claimant's HR file "is missing" including appraisals from 2019 to 2022. The material from the 2022 appraisal was disclosed by the claimant "and not the respondent" – para 59 and 60. The position had not changed by the liability hearing, and the Tribunal has set out below the adverse inferences raised by the first and second respondent deleting and/or damaging documents irretrievably in light of them having been put on notice that relevant documents should have been safely retained as early as December 2022 when the claimant was suspended on full pay. The findings of fact below refer to the appraisal documents that were never disclosed, and yet reference was made to them by Mr Gill, who failed to disclose messages having "erased messages with Ms Fallon 'last year' when they both moved to WhatsApp as the preferred communication method. He said he used WhatsApp messages with the second respondent too…no messages have been disclosed" – para 58 in regional Employment Judge Franey's Judgment.

7. Regional Employment Judge Franey refused the claimant's application to strike out, and at para 69 he recorded "Tribunals have other ways of resolving issues with documentation, including drawing inferences from its absence and relying on other sources of evidence to reach a conclusion." He found that there had been "selective deletions of emails from the claimant's work email account between 3 December 2022 and 11 May 2023…no explanation has been offered for this" and the emails are no longer retrievable, concluding "the deletion of this material was unreasonable conduct" – para 73. The destruction of Ms Price's WhatsApp and Text messages sent to and from Ms Price "is wholly unexplained. The deletion of such messages is unreasonable conduct…the Tribunal will be able to draw an adverse inference should it consider that any destruction of documents was anything other than innocent, or if it considers that the searches carried out by Ms Price to identify disclosable material was less than adequate" - para 83.

8. With reference to the second respondent Regional Employment Judge Franey found that "it seems likely that he must have used the WhatsApp more extensively than just with the claimant, and the failure to provide further disclosure, or at least a detailed explanation of why there is nothing more to disclose, is unreasonable conduct on his behalf…The Tribunal can draw an inference from the absence of such material depending on the answers he gives on oath…at the final hearing. It may be unlikely that he only used WhatsApp significantly in communications with the claimant herself, but that is a matter

from the Tribunal who hears the case…the same is true of the absence of disclosure of any emails on the second respondent's personal email save for the three that were sent to Ms Fallon and disclosed from her account…the second respondent has given an explanation…which is he periodically cleared out his personal email account." The second respondent gave the same explanation to the Tribunal at the final hearing, which on balance it did not find it credible bearing in mind that communications passed via WhatsApp in connection with Project Countess as found below.

Agreed List of Amended Issues

9. The parties agreed an amended list of issues. Claim 2402398/2023 is referred to as "the First Claim" Claim 2408654/2023 is referred to as "the Second Claim".

Part One: Protected disclosures (Employment Rights Act 1996 section 48)

1. Did the Claimant make one or more qualifying disclosures? The Claimant says she made disclosures on these occasions:

   PD1 telephone call with Ms Fallon on 8 April 2022.

   PD2 meeting with Ms Fallon on 11 May 2022.

   PD3 telephone call with Mr Barker of 28 July 2022.

   PD4 email to Ms Price of 29 July 2022;

   PD5 email to Ms Price of 23 August 2022

   ~~**PD6** email to Ms Price of 24 August 2022~~

   PD7 statement sent to Mr Edwards and Ms Fallon on 13 September 2022 (and the covering email to this statement)

   PD8 statement sent to Ms Price on 29 September 2022

   PD9 Claimant's solicitor's letter to Ros Fallon of 22 November 2022

   PD10 letter to the Lead Governor of 1 December 2022.

2. Did she believe the disclosures of information were made in the public interest and, if so, was that belief reasonable?

3. Did she believe the information disclosed tended to show one or both of the following and, if so, was that belief reasonable?

   (i) a person had failed, was failing or was likely to fail to comply with any legal obligation; and/or

   (ii) the health or safety of any individual had been, was being or was likely to be

endangered.

4. If the Claimant did make one or more qualifying disclosures, were those qualifying disclosures protected? The Respondents accept that the alleged disclosures were made to the Claimant's employer, save **PD3**.

Part Two: Detriments (Employment Rights Act 1996 section 48)

~~Jurisdiction~~

~~5. Does the Tribunal have jurisdiction to hear all or part of the Claimant's allegations of detriment set out below:~~

~~a. Do allegations of detriment **D31**, **D33** and **D37** form part of the judicial process and if so are they covered by the principle of judicial immunity meaning that the Tribunal does not have jurisdiction to hear them?~~

~~b. Have the claims been brought within three months of the date of the act or failure to act to which the complaint relates, taking into account the effect of the 'stop the clock' provisions in respect of early conciliation? If not, does the act or failure to act form part of a series of similar such acts or failures to act of which the last was in time? If not, can the claimant show that it was not reasonably practicable for the complaint to have been presented within time and that it was presented within such further period as the Tribunal considers reasonable?~~

Detriments

6. Did the Respondents do and/or are they continuing to do the following things?

The First Claim (as listed at paragraphs 172 and 174 of the Grounds of Complaint)

D1 ~~Did Mr Haythornthwaite and others repeatedly undermine the Claimant's authority as CEO and her professional reputation in the ways particularised at paragraphs 33 and 35 of the Particulars of Claim?~~ Did Mr Haythornthwaite at a meeting with the Claimant on 18 July 2022 reject her proposal of mediation, focus on what he considered was "wrong" with the Claimant and act in a confrontational and aggressive manner, as particularised at paragraphs 59 to 60 of the Grounds of Complaint?

D2 Was the Claimant subjected to concerted, aggressive and unjustified verbal attacks at the private board meeting on 27 September 2022? It is alleged that these attacks were undertaken at the behest of Mr Haythornthwaite and/or were not 'shut down' by him when he could have and should have done so.

D3 Did Ms Fallon tell the Claimant on 22 October 2022 that it was "time for her to go", and that either she should do a deal or a "process" would be started? It is alleged that this was done at the behest of Mr Haythornthwaite.

D4 Did the Respondents exclude the Claimant from her work and her workplace via the exclusion letter of 2 December 2022 and via further letters dated 22 December 2022 and 24 January 2023, without due process having been followed and without there being any lawful basis for such exclusion?

D5 Did the Respondents direct the Claimant to have no contact with potential witnesses (including long-standing friends and acquaintances) and order her not to access her email account with the Trust, despite her remaining an employee of the Trust? It is alleged that this fettered her ability to defend.

herself against the threatened disciplinary proceedings and hobbled her ability to fully particularise her claims against the Respondents.

~~**D6** Was the Claimant required, "to stand by, embarrassed and with the question "why" being asked by numerous third parties, while an "interim" appointee (sought) to perform her role as CEO"?~~

~~**D7** Was the Claimant denied the opportunity, after having worked in hospitals for 30 years, to have appropriate closure on (and a celebration of) a career that she describes as long and unblemished?~~

D8 Did the Respondents continue to exclude the Claimant from her work and her workplace, without due process having been followed, and without there being any lawful basis for such exclusion? The Claimant alleges that, particularly in light of the appointment of an interim new CEO, it became unrealistic to imagine that she could return to work and credibly discharge the role of CEO for the remaining period of her notice.

D9 Did the Respondents continue to deny the Claimant access to her e-mails and

other materials relevant to her claims against the Respondents?

~~**D10** Did the Respondents remove the Claimant from the circulation list for "All Trust" and/or senior executives/management e-mails and, if so, was this despite her remaining the CEO and an employee of the Trust?~~

D11 Did the Respondents instigate disciplinary procedures against the Claimant which were (a) incipient and/or (b) inappropriate? The Claimant alleges that the Respondents should not have appointed Mr Gill as the Commissioning Manager, given his allegedly central role in the decision to dismiss her or to procure her resignation and his allegedly similarly central role in the decision to exclude her.

D12 Did the Respondents continue to insist on prohibiting or restricting the Claimant's ability to speak to Trust personnel or other potential witnesses in connection with her claims (or the allegations that have been made against her)?

D13 Did the Respondents cause jeopardy to the Claimant's professional reputation by (i) contacting the GMC (allegedly wholly inappropriately) to enquire as to whether they wished to initiate their own action against her; ~~and (ii) prohibiting the Claimant from explaining, either to outsiders or to other members of the Trust, why she felt forced to submit her resignation as CEO?~~

~~**D14** Did the Respondents cause adverse impacts on the Claimant's health by forcing her out of the office and causing her to pursue these proceedings to achieve vindication?~~

<u>The Second Claim (as listed at paragraphs 5 to 27 of the Grounds of Complaint)</u>

D15 Did the First Respondent extend the Claimant's suspension on 16 February 2023, 17 March 2023, 14 April 2023 and 11 May 2023? The Claimant relies independently on both of these factors as causing her detriment: (i) the decision to extend her suspension on each occasion and (ii) the fact that each extension was in breach of the First Respondent's Disciplinary Policy.

D16 Did the First Respondent fail to :

(a) explain to the Claimant what "concerns" they had in relation to her "performance, competence and behaviour" in anywhere near sufficient detail for her to be able to understand the case she might have to meet, to respond appropriately, and thereby to satisfy the First Respondent (or any duly appointed investigator) that it was neither necessary nor appropriate for her exclusion to be continued; and/or that it was neither necessary or appropriate for "disciplinary" measures (including exclusion) to be taken against her?

(b) approach or investigate their professed "concerns" as to the Claimant's "performance, competency and behaviour" on the basis that (even if substantiated) they were capability or conduct matters, and not "gross misconduct" matters such as might justify her exclusion or continued

exclusion?

~~(c) comply with the MHPS (and/or the First Respondent's policy equivalent) requirement that any exclusion (or 'suspension') should not be initiated or extended in the absence of circumstances that were 'exceptional' and such as to justify suspension?~~

(d) enable the Claimant to retrieve (from the laptop or mobile phone supplied by the First Respondent or otherwise, and without risk of deletions, or further deletions) emails, documents and/or data that might have removed, or materially alleviated, the Respondents' professed "concerns"?

(e) enable or permit the provision to the Claimant of evidence relevant to the Respondents' professed "concerns" that might have been provided by other employees of the First Respondent?

(f) disclose to the Claimant the correspondence or other documentation, that might have given rise to the Respondents' professed "concerns"; and/or that might have given rise to disciplinary allegations?

~~(g) terminate the Claimant's exclusion because it was (or became) apparent that the professed "concerns", even if they were to be prima facie underpinned by any evidence, did not (and could not) constitute "gross misconduct"; and that the continued exclusion was not (or no longer) necessary and/or justified?~~

~~(h) refer the Claimant's continuing exclusion to the Practitioner Performance Advice Team (formerly the NCAA) after three periods of exclusion had expired?~~

~~(i) contact the Practitioner Performance Advice Team (formerly the NCAA) for the purposes required by MHPS?~~

from the above-mentioned successive extensions of her exclusion and the termination of her notice on 5 June 2023 (or thereafter)?

D17 Did the First Respondent fail to consider alternatives to the continuation of the Claimant's exclusion as set out at paragraph 8 of the Grounds of Complaint?

Access to material (paragraphs 9 to 13 of the Grounds of Complaint)

D18 Did the First Respondent ensure that the Claimant was deprived of access to emails, documents and data that should have been accessible to her via the laptop supplied to her by the First Respondent and her mobile telephone throughout the Claimant's exclusion?

D19 Did the First Respondent continue to prohibit the Claimant from interacting with other Trust personnel in connection with her bullying and harassment complaints, throughout the Claimant's exclusion?

~~**D20** Did the First Respondent fail to respond to the Claimant's~~

~~Data Subject Access Request ('DSAR') of 2 December 2022 sufficiently quickly and with sufficient material and in particular did the First Respondent fail to respond within the statutory 1-3 month time limit or at any time until 6 April 2023 as set out at paragraphs 11 and 12 of the Grounds of Complaint?~~

D21 Has the First Respondent either deleted relevant data (particularly, WhatsApp messages and emails); or caused such data to be deleted or rendered inaccessible to the Claimant - whether via the laptop computer and mobile telephone supplied to her in connection with her CEO position, or at all?

The investigation of the Claimant's bullying and harassment complaint against the Second Respondent and others (paragraphs 14 to 18 of the Grounds of Complaint)

D22 Did the First Respondent appoint Ros Fallon as the Commissioning Manager for the bullying and harassment investigation (and subsequently maintained that she would remain the Commissioning Manager) notwithstanding that the Claimant alleges Ms Fallon was not a suitable person to carry out this role for the reasons set out in paragraph 14 of the Grounds of Complaint?

~~**D23** Did the First Respondent replace Ms Fallon as Commissioning Manager with Pam Williams and in doing so did the First Respondent appoint someone who was not sufficiently senior and independent and external to the First Respondent?~~

~~**D24** Did the First Respondent restrict the Terms of Reference for the bullying and harassment investigation so that it does not cover instances of bullying and harassment that occurred in and after the period immediately before the Claimant was excluded?~~

D25 Did the First Respondent unreasonably delay the appointment of a suitably qualified and independent third-party investigator to investigate the conduct of the Second Respondent and recommend appropriate responsive action?

~~**D26** Did the First Respondent appoint Mr Newman of Ibex Gale (being the individual referred to a paragraph 16 of the Grounds of Complaint) to investigate the alleged conduct of the Second Respondent who was not suitable for the suitable for the role?~~

~~**D27** Did the First Respondent appoint investigators from Ibex Gale to conduct an investigation into the Claimant's complaints of bullying and harassment in circumstances in which investigators from Ibex Gale have been appointed by the First Respondent to investigate professed "concerns" about the performance, competency and behaviour of the Claimant?~~

The investigation into the Claimant's performance, competency and behaviour (paragraphs 19 to 24 of the Grounds of Complaint

D28 Did the First Respondent appoint Ken Gill as Commissioning Manager for the investigation and/or fail to replace Mr Gill (in circumstances in which the Claimant alleges Mr Gill is unsuitable for the role as alleged in paragraph 19 of the Grounds of Complaint)?

~~**D29** Did the First Respondent appoint any investigator from Ibex Gale in circumstances in which an individual from the same organization (Ibex Gale) has also been appointed to investigate the Claimant's complaints of bullying and harassment?~~

~~**D30** Did the First Respondent (and/or its appointed investigator) repeatedly fail/refuse to disclose to the Claimant the finalised Terms of Reference for the investigation at any point before the date on which the Claimant's second claim was commenced?~~

~~**D31** Did the Respondents (in the Claimant's First Claim Case No. 2402398/2023 and in breach of the Tribunal's direction of 26 April 2023) fail to state what the Claimant is alleged to have done which she should not have done, or did not do that she should have done; in either case such that her continued exclusion and/or a continued investigation into professed "concerns" might have been, or might now be, justified?~~

~~**D32** Has the First Respondent denied the Claimant disclosure of and/or access to emails, documents and data relevant to its alleged "concerns"?~~

~~**D33** Has the First Respondent sought (in proceedings in relation to the First Claim) to defer the disclosure of documents pursuant to the directions of the Tribunal, with a view to making it harder, if not impossible, for the Claimant to~~

~~respond appropriately to the professed "concerns" within the time limit imposed by the First Respondent and/or its appointed investigator?~~

~~**D34** Did the First Respondent fail to accept that the investigation into those professed "concerns" should be paused?~~

~~*Other detriments*~~

~~**D35** Did the First Respondent make an inaccurate statement to the GMC that the Claimant was no longer employed by the First Respondent?~~

~~**D36** Has the First Respondents failed to pass on to the Claimant (and/or deleted and rendered inaccessible to the Claimant) communications to the Claimant including (without limitation) communications relating to her involvement in the Health Service Journal Patient Safety Awards?~~

~~**D37** Did a witness proffered by the First Respondent in proceedings in respect of injunctive relief give a witness statement wrongly suggesting that the Claimant had failed to comply with the First Respondent's procedure as to "waivers" relating to the authorisation of expenditure for improper or corrupt reasons?~~

7. By doing or continuing to do the above matters, did the Respondents subject the Claimant to detriment(s)?

Causation

8. If so, was any of the above done on the ground that she made a protected disclosure?

Remedy

9. What financial losses has the detrimental treatment caused the Claimant?

10. What injury to feelings has the detrimental treatment caused the Claimant and how much compensation should be awarded for that?

11. Has the detrimental treatment caused the Claimant personal injury and how much compensation should be awarded for that?

12. Did the Claimant cause or contribute to the detrimental treatment by her own actions and if so, would it be just and equitable to reduce the Claimant's compensation? By what proportion?

Part Three: Unfair dismissal (Employment Rights Act 1996 sections 95 & 98)

Dismissal

13. Did the Respondents do the following things:

~~**CD1** Did Mr Haythornthwaite and others repeatedly undermine the Claimant's authority as CEO and her professional reputation in the ways particularised at paragraphs 33 and 35 of the Grounds of Complaint?~~

~~**CD2** Did Mr Haythornthwaite behave towards the Claimant in a manner that was repeatedly highly aggressive and intimidatory, as particularised at paragraph 37 of the Grounds of Complaint?~~

CD3 Did the Trust fail to commission an appropriate and independent external investigation into the Maternity FTSU between 9 June 2022 and October 2022 as particularised at paragraphs 52 and 57 of the Grounds of Complaint?

CD4 Did Mr Haythornthwaite at a meeting with the Claimant on 18 July 2022 reject her proposal of mediation, focus on what he considered was "wrong" with the Claimant and act in a confrontational and aggressive manner, as particularised at paragraphs 59 to 60 of the Grounds of Complaint?

~~**CD5** Did Mr Haythornthwaite adopt and endorse the following courses of action during the Claimant's sick leave in July and August 2022 that undermined her authority as CEO, as particularised at paragraph 64 of the Grounds of Complaint:~~

~~a. Without consulting the Claimant Mr Haythornthwaite approved the reappointment of Mr David Williamson, a non-executive director.~~

~~b. Without informing the Claimant of his intention to do so Mr Haythornthwaite appointed Mr Gill to the role of Vice Chair;~~

~~c. Leading the CQC to believe during a visit in late July 2022 that the Claimant was absent due to performance or disciplinary reasons?~~

CD6 Did Ms Fallon fail to perform her duties as SID in relation to overseeing Mr Haythornthwaite's behaviour from around late July 2022 onwards, as particularised at paragraphs 76 to 78 of the Grounds of Complaint?

CD7 Did the Lead Governor fail to take any action in response to the Claimant's concerns regarding bullying and harassment raised in late July and early December 2022, as particularised at paragraphs 82 and 145 of the Grounds of Complaint?

CD8 During the Claimant's absence in August 2022, were communications circulated that gave concerned parties the impression she would not return, as particularised at paragraph 85 of the Grounds of Complaint?

~~**CD9** Did Ms Price indicate in August 2022 that the Trust was anxious that the Claimant should not pursue a formal grievance against Mr Haythornthwaite, as particularised at paragraphs 88 and 90 of the Grounds of Complaint?~~

CD10 Did Ms Price fail to initiate an investigation under the Bullying and Harassment Policy on 30 August 2022 as she ought to have done under relevant Trust policies, as particularised at paragraph 104 of the Grounds of Complaint?

CD11 Did Ms Price fail to send draft terms of reference to the Claimant regarding her complaints against Mr Haythornthwaite between late August 2022 and January 2023, as particularised at paragraph 107 of the Grounds of Complaint?

~~**CD12** Did Mr Edwards on 21 September 2022 unnecessarily demand further information regarding the Claimant's complaints, as particularised at paragraph 115 of the Grounds of Complaint?~~

CD13 Was the Claimant subjected to concerted, aggressive and unjustified verbal attacks at the private board meeting on 27 September 2022, as particularised at paragraphs 116 to 118 of the Grounds of Complaint?

CD14 Did Ms Fallon tell the Claimant on 22 October 2022 that it was "time for her to go", and that either she should do a deal or a "process" would be started, as particularised at paragraphs 126 to 131 of the Grounds of Complaint?

~~**CD15** Did senior members of the Trust continue and intensify moves to undermine the Claimant in performing her role as CEO in late October and November 2022, as particularised at paragraph 136 of the Grounds of Claim?~~

CD16 Did the Respondents exclude the Claimant from her work and her workplace via the exclusion letter of 2 December 2022, in breach of relevant policies, without due process having been followed and without there being any lawful basis for such exclusion, as particularised at paragraphs 149 to 164 of the Grounds of Claim?

14. If the Respondents did those things (or any of them), did that amount to a breach of the implied term of trust and confidence? The Tribunal will need to decide (i) whether the First Respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the Claimant and the First Respondent; and (ii) whether it had reasonable and proper cause for doing so.

15. Was the breach a fundamental one, in other words so serious that the Claimant was entitled to treat the contract as being at an end?

16. Did the Claimant resign in response to the breach?

Fairness - Employment Rights Act 1996 sections 98 and 103A

17. If the Claimant was constructively dismissed, the Respondents do not seek to rely on a potentially fair reason for that dismissal, and it is necessarily unfair under section 98.

18. In addition, was the reason or principal reason for dismissal that the Claimant made a protected disclosure, rendering dismissal also unfair under section 103A?

Remedy

19. If there is a compensatory award, how much should it be? The Tribunal will decide:

    (i) What financial losses has the dismissal caused the Claimant?

    (ii) Has the Claimant taken reasonable steps to replace her lost earnings? If not, for what period of loss should the Claimant be compensated?

    (iii) Is there a chance that the Claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason? If so, should the Claimant's compensation be reduced? By how much?

    (iv) Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply and, if so, did the First Respondent or the Claimant unreasonably fail to comply with it? If so, is it just and equitable to increase or decrease any award payable to the Claimant? By what proportion, up to 25%?

    (v) If the Claimant was unfairly dismissed, did she cause or contribute to dismissal by blameworthy conduct? If so, would it be just and equitable to reduce the Claimant's compensatory award? By what proportion?

    (vi) Does the statutory cap of fifty-two weeks' pay or £93,878 apply?

20. What basic award is payable to the Claimant, if any?

21. Would it be just and equitable to reduce the basic award because of any conduct of the Claimant before the dismissal? If so, to what extent?

Evidence

22. The Tribunal heard evidence from the claimant under oath. In addition, it heard evidence on behalf of the claimant from Andrea Campbell, associate NED from March 2020 to March 2023; Michelle Greene, deputy medical director from October 2019, and acting medical director from May to September 2022 ,who left the first respondent December 2022; Alyson Hall, acting and then substantive director of human resources and organisation development 2019 to March 2020, and Chris Hannah, chair of the board from April 2020 to August 2021, who all gave oral evidence. The Tribunal also took into account the written evidence of Sir Duncan Nichol, chair of the board from 2012 to April 2020, and Darren Thorne, managing director of Facere Melius (Consultants) from 2011 to date, which it accepted as accurate. Claire Raggett, executive assistant working with the claimant 2018 onwards gave evidence following a witness Order obtained on behalf of the claimant.

23. The second respondent gave evidence under oath, and on his behalf and on behalf of the first respondent, the Tribunal heard from Richard Barker, regional director NHS England 2013 to June 2014, Ian Benton, consultant since 2008, director of medical education and senior clinician leader 2014 to June 2023, deputy medical director and lead for patient safety from March 2023, Paul Edwards, director of corporate affairs January 2022 to December 2023, Ros Fallon, NED (latterly senior independent director from April 2020) from May 2016 to January 2024, Peter Fulwell, governor from 2016, lead governor from 2018 to date, Ken Gill, NED January 2021 and deputy chair from May 2022 to February 2024, Michael Guymer, NED from September 2021 to date, Nicola Price, executive director of people & organisational development from September 2019 to date and Rebecca Findley, executive at the assistant to chief executive and the chair line managed by Claire Raggett at the time. Lesley Spruce, medical appraisal and revalidation manager 2009 to date provided a witness statement signed and dated 2 October 2024, and the Tribunal accepts that she had informed the GMC the claimant was no longer employed by the first respondent and the claimant was removed from the first respondent's GMC Connect account as she understood the claimant had left the trust and this was "common knowledge." Lesley Spruce had made a mistake, and the Tribunal accepted her evidence that it was genuine with no causal connection to the claimant's protected disclosures.

24. Pam Williams, associate NED November 2021, NED March 2022 to date, provided a witness statement signed and dated 1 October 2024 setting out the part she played as commissioning manager into the bullying and harassment allegations, which she was not cross-examined on. Pam Williams gave evidence from 11.19 to 11.30 and was asked very few questions. She had difficulty recalling the events that took place.

25. The Tribunal also took into account the written statements of Simon Bond, Cathy Chadwick, Chris Cutts and Melanie Kynaston, referred to where relevant below.

Credibility.

26. There are numerous conflicting statements and evidence between the claimant's witnesses, the second respondent and witnesses who played a core part in "Project Countess" which the Tribunal has had to resolve on the balance of probabilities and with reference to the contemporaneous documentation that was disclosed against a background of non-disclosure and deletion on the part of the first and second respondent, for which a wholly unsatisfactory explanation and/or no explanation has been given. The Tribunal has not dealt individually with each and every witness dealing with their credibility or otherwise, and it has concentrated on key witnesses as recorded in this lengthy judgment and reasons.

27. The Tribunal found the claimant's evidence to be credible, precise, clear and cohesive. She admitted if she did not know the answer and if she could not recall what was said. The claimant answered the questions asked and unlike a number of witnesses giving evidence on behalf of the respondents, she did not try and answer questions put to her on cross-examination by giving evidence on other issues which appeared to follow a prescribed script. The contrast between how the claimant gave oral evidence and how some of the respondent's witnesses gave their evidence was marked. Some of the claimant's evidence was supported by contemporaneous documents, for example, part way through the hearing by consent the claimant produced a series of WhatsApp messages exchanged between herself and Rebecca Findley on 26 May 2022, which undermined Rebecca Findley's evidence before this Tribunal and supported the allegations made at the time about the second respondent's bullying behaviour towards staff. It is notable that neither party disclosed the WhatsApp exchange before the final hearing and both the claimant, and first respondent can be criticised for this. Nevertheless, the evidence was clearly relevant and there was no objection on the part of the respondents to its late production, Mr Cheetham taking a sensible view for which the Tribunal is grateful.

28. Paul Edwards who gave evidence on behalf of the first respondent was found to be a credible witness who gave straight-forward truthful evidence favouring neither party. On cross-examination Mr Edwards was clear that the mediator advised details of the claimant's complaint against the second respondent was not required before mediation took place, which confirmed the evidence given by the claimant, and undermined the evidence given by Ros Fallon and Nicola Price that before mediation could take place the claimant was required to provide detailed information to the second respondent about her complaints. In direct contrast to the second respondent's evidence, the Tribunal found was he not

interested in mediation. Paul Edwards was of the same view as the claimant in that both believed mediation should take place early on in order to give it the best chance of succeeding in resolving the relationship breakdown. Ros Fallon's evidence was unreliable as to why the mediation did not take place; she gave a number of reasons including the second respondent requiring full allegations in order that he knew what he was dealing with, it was put on hold as a result of the CQC and following a conversations with Nicola Price at the end of August, Nicola Price had been having other conversations with the region and ICB and they were concerned whether it should be moved to an investigation rather than a mediation.

29. The claimant's case was that she actively sought mediation up until the time Ros Fallon told her that "it was time for her to go" or a formal process will be started, since after this was said there was no point in mediating. Ros Fallon denies saying this, and on the balance of probabilities the Tribunal found that she did use these words or equivalent informing the claimant that there was no future for her within the first respondent as CEO and a draft compromise agreement was produced.

30. Andrea Campbell was a credible witness who gave straight-forward evidence, she was confident when providing factual information and appeared to answer questions in an objective and balanced way. It is notable that had Andrea Campbell failed to retain her appraisal of the claimant, it could not have been disclosed in this litigation. Contrary to the submissions made by Mr Cheetham, the Tribunal found the claimant's appraisals that had been destroyed sometime after the claimant had made it clear all documents should be retained, highlighted the claimant's excellent performance with no suggestion of any criticisms levied against her for the first respondent's performance and financial issues, in direct contrast to the objectives of "Project Countess" which was to build the appearance of performance and misconduct allegations with a view to exiting the claimant out of the business.

31. Michelle Greene gave credible evidence, particularly around the claimant being upset, shocked and stressed, visibly red and shaking after the confrontational meeting with the second respondent; "she is quite difficult to rattle, and I have never seen her in this state before." Michelle Greene's evidence fitted into the controversial history of the claimant physically attending the hospital to give a lead during the Covid Pandemic, and dealing with the fall out of the Letby murder investigation, supporting the paediatric doctors against a background of whistleblowing issues. Michelle Greene gave oral evidence on cross-examination that Hilda Gwilliams at an executive meeting, informed her the claimant was not returning to the Trust, and Michelle Greene's credible evidence was that she called the claimant at the end of August about this, evidence which fitted into the factual matrix underpinning the attempts by a number of key

personnel, including the second respondent, to consciously manipulate the claimant's resignation, or dismissal in the alternative.

32. Alyson Hall gave credible evidence about the historical background, including her view that the claimant had "inherited a shocking mess" which was supported by other evidence before the Tribunal, including the CQC reports and the Deloitte report. There is a common theme that it would take "several years" to address the problems facing the first respondent, including financial problems exacerbated by the Covid Pandemic which led to substantially increased costs and issues with recruitment. Alyson Hall dealt with the removal of documentation by the respondents, which was a concern in this litigation, particularly with reference to the missing personnel file of the claimant, which included a number of positive appraisals. Alyson Hall confirmed the existence of the files, as had a number of other witnesses, who referenced the actual appraisal documents supporting the claimant that existed and were undisclosed. Alyson Hall explained that as interim executive director of HR she would have access to personal files including the CEO and removal/destruction of those files would require a "clear executive level instruction" in writing. IT specialists would not have accessed any employee's email folders, sub-folders, documents on H drive, emails and documents of the CEO without written authorisation from Nicola Price, Cara Williams, head of IT, and "possibly" the second respondent. The Tribunal has dealt with this further in its findings of facts which reflects that Ken Gill as deputy chair had access to documents.

33. Nicola Price, in oral evidence, was largely in agreement with Alison Hall concerning who could have had access to the claimant's personal file, documents and emails, and was unaware that a large quality of emails had been doubly deleted from the claimant's files explaining "it could have been after I left" in December 2023." No explanation has been given by the first respondent or its witnesses for the missing documents. In her written statement Nicola Price confirmed that the claimant had raised a SAR and Claire Raggett "was not able to disclose it because of…restrictions imposed on the Trust by the Police due to the Letby trial." There was no documentary evidence in the bundle of documents to this effect, and the Tribunal was not satisfied that the first and second respondent's reasons for non-disclosure had any connection with the Letby trial and it is more likely than not that "Project Countess" and the machinations between the key individuals concerned with it, including the second respondent behind the scenes, was the explanation.

34. Claire Raggett gave evidence following a witness order and later production of her witness statement signed on the 27 November 2024 confirmed she and Rebecca Findley, whom she line managed, had access to the claimant's trust email account and did not knowingly delete important emails. Claire Raggett did not have access to the H drive at any stage. Claire Raggett in her written

statement recorded that she did not recall receiving any instructions to delete or preserve emails and documents. The Tribunal found Claire Raggett to be credible on this issue and concluded that neither Claire Raggett or Rebecca Findley was responsible for double deleting documents or deleting the claimant's personal file that included the appraisals.

35. Claire Raggett also gave credible evidence supported by contemporaneous evidence that the second respondent "behaved unacceptably towards her on a number of occasions. I recall one such incident on or around end of May/beginning of June 2022 in a corridor, when he raised his voice and changed his tone towards me because he was irritated at delays in the delivery of new boardroom furniture." Claire Raggett reported this to Simon Bond of Ibex Gale who ignored the implications of this evidence which pointed to the validity of the claimant's complaints concerning the second respondent behaving in such a way towards junior staff that it amounted to bullying. Raising voices and changing tones towards junior members of staff by the most important person in the organisation, the chair, to whom the CEO and directors are answerable, falls squarely under the definition of bullying and the fact that Simon Bond on behalf of the first respondent did not properly investigate this when he concluded that the relationship between Claire Raggett and the second respondent had improved, raised a question mark over the investigation and the contents of his report.

36. Rebecca Findley at para 8 of her witness statement gave evidence that when the claimant was excluded in December 2022 Rebecca Findley's access to the claimant's email account and documents was restricted by the IT department and it was monitored by Claire Raggett, which supports the claimant's case on the non-disclosure issue and the person(s) responsible for deleting documents. In her written statement Rebecca Findley is silent about the second respondent's behaviour over the board room furniture and records, and she had informed Simon Bond that she had not witnessed bullying, harassment, or undermining behaviour from the second respondent. The Tribunal recognises that Claire Raggett was in a difficult position as a junior employee, however, it does give rise to issues over her credibility.

37. On the 26 May 2022 Rebecca Findley sent the claimant a WhatsApp message about a NED meeting that morning, warning her "just to make you aware the chair is not in a great mood this morning." When the claimant asked what was wrong with him, Rebecca Findley responded "I'm not sure, I think he's frustrated at the speed of getting the new offices up to spec." The claimant gave evidence that Claire Raggett had complained to her about of the second respondent's behaviour stating he had "bawled out Claire Raggett about her not having to expediate the delivery of furniture of the board room." It is notable that both Claire Raggett and Rebecca Findley took to warning the claimant about the second

respondent's moods and "forewarn me when this was likely to be turned once more in my direction." The second respondent's evidence is that this did not happen, and it would not be acceptable in the workplace, was not credible and the Tribunal found as a matter of fact it did.

38. The Tribunal concluded, preferring the contemporaneous evidence that supported the claimant's version of events, when it came to Claire Raggett and Rebecca Findley (a) the second respondent was perceived by them as outwardly exhibiting bad moods which affected how he treated them and the claimant, this perception resulted in both discussing the second respondent with the claimant and warning her beforehand, (b) the fact that the second respondent was "frustrated at the speed of getting the new offices up to spec" against the background of a struggling organisation in all respects including an erosion of public faith in the first respondent against the backdrop of a multiple murder inquiry, is indicative of a NED chair prioritising his own self-interest above that of the trust and failing to work collaboratively with the CEO and staff in the most difficult time of the first respondent's history. The second respondent's actions when it came to disregarding the claimant in her position as CEO in relation to a number of key decisions, such as the second respondent's decision to put forward Ian Williamson for a second term as a NED without any reference to the claimant following a discussion concerning his unsuitability for renewal, was also indicative of his attitude towards the claimant after she had complained about his behaviour. The Tribunal refers to the chronology below when dealing with appointments and the second respondent's decision not to re-appoint Andrea Campbell, who had stood up to him.

39. Turning to Chris Hannah, who gave evidence via CVP, she conducted the 2021 appraisal retaining a hard copy, which was fortunate given the appraisals in the claimant's file had disappeared, including those on the H drive. It was undisputed Chris Hannah had consulted with the NEDS, had planned a "comprehensive board development programme" and took it upon her to propose the claimant should take a one month sabbatical due to the personal demands placed upon her in contrast to the second respondent's evidence, which was the sabbatical had been agreed by the second respondent. Chris Hannah was a found to be a credible witness who provided information concerning the background to the claimant's performance and the fact that the first respondent's performance was improving. Darren Thorn gave similarly credible evidence and provided a valuable backdrop prior to the events involving the second respondent and he also clearly set out the first respondent's difficulties that were historical in nature and could not be attributed to the claimant.

40. Sir Duncan Nichol did not give evidence, his witness statement was not challenged and taken as read. Sir Duncan Nichol had retained a copy of the end of year review 2020 concluding the claimant's performance had "exceeded

expectations" against "the task of turning around the fortunes of the trust was always a 2–3-year challenge and no one could have brought greater energy, focus and commitment." The complimentary appraisals were not disclosed by the respondents, and it appears that the professionals involved in preparing reports on the claimant's alleged misconduct, the allegations concerning the second respondent's behaviour and the Trust generally, did not have sight of key documents which reflected the claimant's performance before she went off sick and took the sabbatical she was promised by Chris Hannah, after experiencing the second respondent's behaviour towards her. The Tribunal found the fact that the claimant was awarded a sabbatical reflects her performance, in direct contrast to the picture presented in this case by the first and second respondent to the effect that the claimant was underperforming and guilty of gross misconduct within a matter of months of making the disclosures. This background was not available at the time of the investigation, for example, the limited prism provided to Ibex Gale by the respondents with the claimant having access to limited documents provided out of context with no information as to what they consisted of.

41. Turning to the second respondent, the Tribunal found he was an inaccurate historian and did not give credible evidence, preferring that given by the claimant and the claimant's witnesses on the balance of probabilities when it came to the conflicts in the evidence. The Tribunal has made this clear in the relevant paragraphs of its finding of fact below. It is notable that the second respondent in his written statement denied there was any issue between him and the claimant, which cannot have been the case given the claimant's complaints raised about his behaviour and her offer to mediate. The second respondent put in place obstacles to ensure mediation did not take place, even to the extent of insisting information concerning the allegations was provided in full when there was no requirement to do so, and in the time it took between the claimant raising the protected disclosure and presenting her with a draft compromise agreement, the second respondent took part in Project Countess, ensuring he was hidden behind the scenes and yet discussing the decisions that were to be taken, for example, with Mr Gill. On the balance of probabilities the Tribunal found, drawing an adverse inference on the second respondent's less than credible explanation for his failure to disclose emails and other communications exchanged between himself and the key players in Project Countess, points to a deliberate intention to hide documents which would have thrown light on the true part played by the second respondent when it came to termination of the claimant's employment.

42. The Tribunal has touched upon the evidence of Richard Barker above in relation to mediation, which supported that given by the claimant. The Tribunal reiterates that it found him to be a credible and honest witness. Unlike a number of the respondent's witnesses, Richard Barker gave evidence uninfluenced by internal factions, and he was not party to "Project Countess" the title given to the team

managing the claimant out of the organisation. The Tribunal found the name alone reflected scant respect for the claimant and her position as CEO. It was indicative of the culture and reflected the true intention of a number of key players, which was to protect the second respondent in his role as chair, and retain the NEDS in situ against the possibility of an attack either by the claimant or the regulator against the background of a Trust with severe financial difficulties, an unmanageable waiting list coming off the back of COVID, and "Hummingbird", the codename given to the Letby police murder investigation and criminal trial.

43. Turning to the "key players" in Project Countess, these were Nicola Price, executive director of people and organisational development from March 2022 to December 2023, Ross Fallon, NED from May 2020 to January 2024, and senior independent director from April 2020 and Ken Gill, who played a pivotal part, NED from January 2021 and deputy chair at the second respondent's request from May 2022 to February 2024. The Tribunal found that these three individuals were inaccurate historians and did not give credible evidence on a number of key matters, as recorded below in the findings of facts.

44. The Tribunal was referred to an agreed bundle of documents including a core bundle and other bundles totalling over one million documents, the additional documents produced by the parties at various intervals during this liability hearing, and witness statements. Having considered the oral and written evidence, including a short chronology, and written and oral submissions presented by the parties (the Tribunal does not intend to repeat all of the written and oral submissions, but has attempted to incorporate the points made by the parties within the body of this judgment with reasons), we have made the following findings of the relevant facts. At the end of the hearing the Tribunal thanked counsel, the solicitors, and assistants for the way in which they have managed the excessive number of documents, which has not been easy. The Tribunal indicated that it would be looking closely at a number of the documents, which it did during deliberations. On occasion, finding the relevant documents during deliberations has been akin to searching for the proverbial needle in a haystack, however the Tribunal persevered, and it has attempted, as best as possible, to underpin the factual matrix by contemporaneous documents in the knowledge that latterly a number have been produced with this litigation in mind.

FINDINGS OF FACT

45. The respondent is a large NHS Foundation Trust based in Chester. It is required to perform under the terms of the licence granted by NHS England ("NHSE") the regulator, that dealt with leadership, finance, performance, and quality. NHSE can intervene if a Trust falls in any of these areas including seeking an action

plan for improvement and take formal legal enforcement action. NHSE has the power to remove boards. However, according to Richard Barker, regional director employed by NHSE to cover 59 trusts including the first respondent. contrary to the claimant's case, the first respondent had been no worse affected by the Covid Pandemic than other trusts in the North West, and it also "struggled to return to normal funding in the aftermath."

46. The quality of care and service provided by the first respondent is regulated by the Care Quality Commission ("the CQC"). The CQC can rate trusts "outstanding," "good" "requires improvement" and "inadequate" in published reports that are initially sent to the trust in draft form to allow factual inaccuracies to be put right before the final report is published. The final report is a public document, the draft report is not as it may contain incorrect information. NHSE will work with a trust if the CQC rates a trust "requires improvement" or "inadequate," supporting those trusts to improve their performance. In Richard Barker's experience it is "rare" for trusts to be put into the category of systems oversight framework ("SOF") 4 which reflect inadequacies across a range of functions including finance and quality. SOF trusts are defined by Richard Barker as "trusts with serious concerns that will not deliver without help or support."

47. When Richard Barker took on responsibility for the North West in July 2022 the first respondent had been placed in category SOF3 and action plans were in place to remedy finance, performance and quality which included targets. A Service Improvement Board (SIB) chaired by the regional medical director had been put in place and progress was being made.

48. The first respondent was also experiencing ramifications as a result of investigations into baby deaths at the neonatal unit referred to in this Judgment and Reasons as the "Letby investigation."

The claimant's employment

49. On 1 August 2018 the claimant commenced employment as Medical Director at the first respondent.

50. On the 18 August 2018 the claimant became acting CEO following the resignation of Ian Harvey. As CEO the claimant was answerable to Sir Nichol, CBE, (Chair of the first respondent from 2012 to 2020, leading the board and responsible for the effectiveness of non-executive directors, referred to as NED's). He was charged with carrying out the claimant's appraisal referred to below.

51. According to Sir Nichol, the claimant had a "strong clinical background…it was reassuring…we had a clinically experienced CEO to oversee" the Letby investigation. It is not disputed that there was a loss of public confidence and

issues with whistleblowing including paediatricians who had raised disclosures about the deaths who were supportive of the claimant.

52. Mr Cheetham succinctly set out the first respondent's governance as understood by the Tribunal from the evidence before it. It is complex and witnesses took time to try and explain it to the Tribunal. In short, as a Trust the first respondent is bound by its Constitution. It has a Council of Governors, with a Lead Governor (Peter Folwell), who are all unpaid volunteers. Their duty is to hold the Non-Executive Directors individually and collectively to account for the performance of the Board. The Council of Governors appoints or removes the Chair and the NEDs. The Trust is a unitary board, and the Board of Directors comprises both executive and non-executive directors. The Board has a general duty to act with a view to promoting the success of the Trust. One of the executive directors is the Chief Executive. It is a key fact in this case that the NEDs appoint or remove the Chief Executive. NEDs are part-time office holders for which they receive payment, unlike the Governors. The Chief Executive has the statutory role of Accounting Officer under the NHS Act 2006 Sch. 7 para. 16(1)(a)). As set out in the Memorandum the Accounting Officer, "has responsibility for the overall organisation, management and staffing of the NHS foundation trust and for its procedures in financial and other matters". That is a non-delegable responsibility, and the accounting officer has "personal responsibility".

53. The CEO of a trust is accountable to the chair, who in turn is accountable to the governors. The Trust CEO leads the organisation and is responsible for managing executive directors. The "relationship between the Chair and CEO is a key success to both roles." According to Richard Barker "it is essential" that the Trust board demonstrated cohesion and unity of purpose. The Tribunal concluded that the requirement of a cohesive trust board was particularly key taking into account "the ramifications" of a police murder investigation into baby deaths in the neonatal unit and the performance problems facing the first respondent, as recorded in the public reports provided by the CQC, against a background of leadership changes in the senior team which was "to be almost completely rebuilt" as one of the claimant's first objectives according to Sir Nichol.

54. The claimant in her capacity as CEO worked with the police on the "Letby investigation" and as required by them kept the papers securely locked up in her office along with other documents. There was no requirement for the claimant to share information relating to this investigation with any other executive, NED or director of HR.

55. With reference to draft CQC reports the first respondent's practice was to share the drafts with the relevant consultants/heads of department and not the chair or NEDS. The chair and NEDS, who did not have day-to-day involvement in the

first respondent, had no relevant input to offer when it came to suggesting factual changes to the CQC in order that factually inaccurate reports could be amended.

56. A limited number of people would have had access to the claimant's personal files, and their removal/destruction would require a "clear executive level instruction" in writing, and employees such as Claire Raggett would not have the authority to remove or delete documents including the CEO's emails and so the Tribunal found, accepting Claire Raggett's evidence on this point. The Tribunal also found on the balance of probabilities IT specialists would not have accessed any employee's email folders, sub-folders, documents on H drive, emails and documents of the CEO without written authorisation at executive level including the executive director of HR, head of IT, the chair and deputy chair.

CQC Inspection 2018

57. The CQC inspected the first respondent in November & December 2018 and provided a final inspection report on 17 May 2019. The overall rating for the respondent in this period was "requires improvement" with the exception of providing caring services rated "good." The rating for "safety, effective services, responsive services" required "improvement". There is a reference to the trust board undergoing leadership changes, including the interim chief executive and interim medical director "bringing about service improvement plans…not yet defined and fully embedded."

58. On the 1 April 2019 Dr Gilby was appointed to substantive CEO position.

59. On 17 May 2019 the CQC Report was published following inspections of the first respondent in November and December 2018.

Claimant's first appraisal 2 April 2020 - appraisal period 2019/2020

60. In a report dated 2 April 2020 Sir Nichol appraised the claimant that included a number of objectives ranging from developing a high-performance executive team to setting out achievements of the claimant's objective. The following is relevant:

61.1 Under the heading "leadership, culture and strategy" Sir Nichol commented on the claimant's "strong visible leadership…an excellent comprehensive and inclusive process to produce a compelling vision and a clear strategic direction for the Trust is well underway with excellent results achieved on a corporate and clinical strategy which provide the foundation for aligning, workforce finance, IT and other enabling strategies…high level and quality engagement with all front line clinicians…exemplary preparatory management of the reputational risks of neo natal deaths."

61.2 Under the hearing "Governance" Sir Nichol confirmed "the root and branch review of assurance and risk management from ward to board has led to

fundamental improvements in governance. Board and committee work, and corporate support is more fit for purpose."

61.3 Under the hearing "Operations" Sir Nichol wrote of the claimant's "fresh dynamism and focus…the response to the CQC needs improvement report is thorough, systematic and well led" and "the achievement of 2 percent plus annual cash releasing savings is without recent precedent and an exceptional result. **Exceeding expectations Yes…outstanding first year in her new role. The task of turning round the fortunes of the Trust was always a 2–3-year challenge and no one could have brought greater energy, focus and commitment**" [the Tribunal's emphasis].

61. Sir Nichol produced the 2019/2020 appraisal during this litigation. It was not disclosed by the respondents, who were both unable to give any explanation as to why and how the claimant's appraisals, with the exception of the one carried out by the second respondent in 2022 (which was also disclosed by the claimant and not the respondent) were lost/destroyed/deleted permanently to such an extent that IT were unable to recover lost data.

62. The 2019/2020 appraisal reflects two important matters undermining the first and second respondent's position that the claimant was underperforming to such an extent that her poor performance had merged into gross misconduct. The first matter was the length of time it would take the claimant to turn around the fortunes of the first respondent. It was anticipated the task of turning around a poorly performing Trust would take 2-3 years. This time period did not take into account the adverse effect of the Covid Pandemic, which was not envisaged at the time, taking the first respondent off track and exacerbating a number of existing failings underpinned by a turnover of executive and non-executive directors. The second observation was the claimant exceeded in her role on all fronts, there being no issues personal to her with any financial matters, including waivers which were not mentioned or hinted at. The Tribunal concluded, on the balance of probabilities, the first and possibly the second respondent, through the actions of Ken Gill, intentionally withheld and/or doubly deleted these documents to present a misleading picture of the claimant and the steps she was taking to improve the first respondent's performance in her capacity of CEO. An adverse inference has been drawn and the Tribunal refers to Regional Employment Judge Franey's conclusions recorded above, which have not been appealed.

<u>The Covid Pandemic</u>

63. In March 2020 the UK went into lockdown due to the Covid Pandemic. The "usual business" of the NHS was "confined to essential matters only" and NEDs could not attend the workplace and meetings were remote. Strategic and non-urgent business was suspended, and hospitals concentrated on saving lives.

64. The claimant throughout the Pandemic was visible on the wards leading the hospital.

65. The NEDS were not visible, and it was difficult for them to establish a relationship online with other executives, including the claimant. In 2020 five new NEDS joined the respondent and due to the Pandemic, they were unable to be inducted. The new NEDS had no knowledge of the first respondent's working practices and no experience of the historical difficulties it had faced and continued to deal with, not least the Letby investigation, whistleblowing issues and diminished public confidence.

The claimant's second appraisal 2021/2022

66. Christine Hannah, interim chair from 1 April 2020 to 31 August 2021, carried out an appraisal 26 May 2021 finding, as had Sir Nichol, that the claimant had exceeded expectations. Christine Hannah wrote "**we also discussed the highly unusual year in terms of the financial regime operating during the pandemic resulting in the normal balancing of decisions regarding quality/safety and financial objectives being largely suspended. We acknowledge that the balancing of the triple aims will present more of a challenge when business as usual rules return**" [the Tribunal's emphasis]. The following is relevant:

67.1 Under the heading "Financial Leadership "Christine Hannah wrote; "the unusual circumstances of the last year has meant this objective has been largely superseded and not tested."

67.2 Under the heading "Board Relations" Christine Hannah wrote, "much more attention is needed to improve board effectiveness…providing the positive leadership has been personally demanding but carried out extremely well by Susan." There was a reference to a discussion about a Board Development Programme that had been paused and planned board workshops in June and July, which did in fact take place.

67.3 Under the "Chair's Comments" Christine Hannah confirmed her appraisal "present **an overwhelmingly positive review of Susan's achievements over her time as CEO. There was much to be done when she took up post and she has made great progress across many fronts**" [the Tribunal's emphasis]. With reference to the Board, both the claimant and Christine Hannah took the view relations would improve once there was "a reduction in Covid operations pressures," people would meet face to face and "greater familiarity achieved through time working together."

67. Christine Hannah proposed a sabbatical of one month to be taken in the next 12 to 18 months "**given the unprecedented leadership challenges of the last year and the personal demands placed upon the CEO**. This will facilitate the continuation of energetic and continued leadership going forward" [the Tribunal's emphasis].

68. Unmentioned in the claimant's appraisal was her managing the Letby investigation, code name "Hummingbird," and the fall out within the first

respondent, including concern over whistleblowing detriment and hierarchical bullying. The claimant was solely in charge of liaising with the police murder investigation and as instructed by them, she kept all documents locked away in her office and did not share sensitive information, contrary to the view and expectation of Nicola Price, who was director of people and organisation development in the first respondent having originally led a HR team in West Midland Police Force. Nicola Price was heavily involved in Project Countess and criticised the claimant for not sharing with herself and other board members details of the Susan Letby investigation, unjustifiably so.

69. It is notable that the 2021/22 appraisal produced by Christine Hannah was not disclosed by the respondent. The claimant's undisputed evidence was that the appraisal was kept in her personal file and locked in her office, as were the Letby investigation documents. The first and second respondent have given no explanation as to why this appraisal was not disclosed and appears to have been permanently destroyed. The appraisal is an important document in that it clarifies the backdrop of events prior to the second respondent taking over as chair, the difficulties faced by the first respondent historically and because of the Covid Pandemic, and the excellent performance of the claimant in the face of adversity. Whilst there is no documentary evidence, i.e. NED signatures or Board Meetings, to the effect that the appraisal was "signed off by the NEDS" Christine Hannah's comments and conclusions were put to the NEDs who agreed with her and so the Tribunal found. In short, this appraisal was Christine Hannah's view and that of the NEDs, which makes the actions taken against the claimant in 2022 the more remarkable. The Tribunal has drawn an adverse inference from the respondents' non-disclosure, concluding on the balance of probabilities that the first and second respondent's intention to keep hidden the claimant's excellent performance and paint a different picture from the one that existed, obscuring the reality.

Ken Gill's appointment

70. Ken Gill joined the first respondent as a NED and chair of audit in January 2021. Ken Gill is a chartered accountant who had held several high-profile positions including CEO and honorary roles. Ken Gill resigned from his appointments with the first respondent recently and at the time of this hearing has three current NED roles in national organisations, including chair of audit committee in two, and Independent Board member in the third. In short, Ken Gill was a very experienced operator at executive level. He was then subsequently appointed deputy chair by the second respondent.

Second respondent's appointment.

71. The second respondent, a chartered management accountant, was appointed as chair in September 2021. The second respondent had held a number of high-profile positions of public and private organisations including chief executive and

finance director, in addition to holding a number of NED positions that appear to total a minimum of 11 including two different NHS Trusts, the third being the first respondent. The second respondent had a vast amount of experience, and after he had joined the first respondent, made it known to the claimant that in the past he had been instrumental in the dismissal of a CEO, information which caused the claimant some disquiet.

72. By September 2021 the police investigation into Letby was proceeding, and the second respondent was aware, when he took up the position, the first respondent was facing multiple issues including performance, the murder investigation, low morale and financial concerns. The Tribunal notes that with the exception of the Letby investigation and the whistleblowing/bullying allegations, the problems facing the first respondent were not unique in NHS trusts, including the strain put on staff as a result of the Covid Pandemic and the health risk to individuals and their families as a result.

73. By 2024 the pressures facing the NHS during the Covid Pandemic have been well-publicised, and it clear from the evidence before this Tribunal that the Covid Pandemic derailed the first respondent from the improvement plan and worsened the financial situation as confirmed by Richard Barker. The second claimant should or would have been aware of this, and it is clear from the evidence before the Tribunal, including the contemporaneous documents, that the second respondent was not supporting the claimant against this difficult background. An example of this is the second respondent's attitude towards board room furniture, which underlines his inclination to take out on junior staff his displeasure when crossed, even to the extent of behaving badly over furniture for the board room to such an extent that the claimant was put on notice by Rebecca Findley that on 26 May 2022 the second respondent was "not in a great mood" before a NED meeting, because he was "frustrated at the speed of getting the new offices up to spec."

74. Rebecca Findley had been Executive assistant/PA to the claimant from June 2019 to December 2022, and the executive assistant/PA to the second respondent 2021 to date. The evidence before the Tribunal was that her relationship with the second respondent had improved over time, and there it is no doubt that she has been put in a difficult position, through no fault of her own, by the events that gave rise to this litigation and appearing as a witness on behalf of the first and second respondent when she remained the executive assistant of the second respondent.

75. The claimant's perception was that the second respondent was demanding of her and junior members of staff, he became involved in the minutiae of running the hospital almost as a CEO (a position previously held by the second respondent in a different organisation) and she was unhappy that he was attempting to act more operationally rather than having the overview of strategy and finance expected of a NED who attends a limited number of board meetings per year, and carried out limited tasks for a low annual payment. The claimant believed the second respondent desired to change the way the first respondent was run to what he

perceived to be best practice in other NED's roles held, with an emphasis on financial management, and she was unhappy with this given the myriad of difficulties the first respondent was facing and the fact that she was answerable to the chair. The claimant does not allege that she was bullied by the second respondent at the early stages following his appointment, however, she was concerned with how he treated staff who he had power over, particularly the reports to her about the way he spoke to them. The situation was such that Rebecca Findley and Claire Raggett, (junior employees who worked with the claimant) informed the claimant when the second respondent was in a bad mood. This is telling. In order for junior staff to pass on to their line manager information about the bad moods and demeanour of the chair, they must have perceived him to have been acting inappropriately.

76. In or around 16 December 2021, Ros Fallon, a NED from May 2016 (latterly senior independent director from April 2020) reported to the claimant that she caught Covid at work and may have spread it. The claimant informed the second respondent who emailed on the 16 December 2021 that he had spoken to the employees involved and referred to a discussion he had with the claimant in the following terms; "I am unhappy about sweeping statements about the NED's behaviours and attitudes and saying that the NED's are not respectful of the IPC restrictions as there is no foundation to any of these. If any NED's, ask for something that you or your Exec team deem inappropriate in the future I would ask you to raise it with me before you send emails to the Executives. I want us to learn points from this on all sides and move on." It is clear evidence from this email that the second respondent was assertively challenging and limiting the claimant about how she could carry out her role as CEO against a background of continuing Covid restrictions within less than 3 months of taking on the chair position when social distancing was still a feature of the workplace. The claimant's perception was that the second respondent was directing her and telling her what to do, asserting his will over the way the Trust was being run which made her role all the more challenging.

CQC Draft Report March 2022

77. The CQC inspected the first respondent in February and March 2022. The final report was published on the 15 June 2022; however a draft report was sent to the second respondent before the report was finalised as was usual practice. The CQC report had an overall trust rating of "requires improvement" with the "good" rating for caring services remaining and in response to the question "are services well-led" the rating had dropped to "inadequate." It was the first respondent's historical practice to copy a draft report to executives for checking and amending the factual elements. The draft report was not copied to the chair or NED's as it did not require their input, and it was common practice that the final report would be cascaded to the chair and NED's. This is a common practice throughout a number of organisations and industries, the theory being that NED's need not concern themselves with drafts that they cannot change, remedial action can only be taken on a final report and not a draft report, which may be incorrect.

78. The draft report CQC report reflected "there were several new appointments to the board and the plans the boards had developed has not yet had time to evidence their impact or sustainability. Not all senior leaderships were visible or approached in organisation. Leaders were not always fully sighted on risk or acted upon it in a timely way." There were no express criticisms against the claimant, who throughout the Covid Pandemic had been visibly leading the first respondent through the Pandemic.

79. The CQC report referred to the Freedom to Speak Up (whistleblowing) and found, as had the claimant, that "colleagues were afraid to raise issues with the senior leadership of the trust. We were told this was due to a combination of fear or retribution and that staff did not feel that speaking up would make any difference." It is a factor in this case that the claimant had built a positive relationship with the paediatricians who were supportive of her and the steps she was taking in the Letby investigation. This positive relationship was well-known to the key players in Project Countess and a perceived barrier to their attempts at engineering the claimant's exit.

80. Under the heading "Governance" reference was made by the CQC to a company secretary who had "recently" taken post, and since the previous inspection in 2018 "the trust had carried out a governance review. Some actions from the governance review and its development plan were still in the process of being implemented at the time of the 2022 inspection." The CQC acknowledged the adverse effects of the Pandemic.

81. Richard Barker, regional director NHS England from 2013 until he retired in June 2024, confirmed that when he took over for the North West, a Service Improvement Board ("SIB") was already in place and had been placed into system oversight framework 3, a trust with serious concerns. SOF 4 are trusts "inadequate across a range of functions, often finance and quality. These are really serious (and comparatively few) cases. There was a discussion with the regional team whether the first respondent's score should be escalated to SOF4 and it was decided that it should not because the first respondent was **engaging with the SIB and we were beginning to see issues addressed. We were aware of the shadow cast by the forthcoming Letby trial…there was no agenda to replace the CEO**" [the Tribunal's emphasis].

82. Nicola Price commenced working for the first respondent in March 2022. She had very little knowledge, if any, of the first respondent's working practices and its historical problems and was to become one of the key members of Project Countess.

<u>The CQC Section 29A Regulation 12: Safe Care and Treatment notice and second section 29A warning notice related to good governance.</u>

83. On the 18 March 2022 a section 29A Regulation 12: Safe Care and Treatment notice was served on the second respondent following the February 2022 inspection which found "a lack of oversight of incidents and serious incidents." Maternity Services had not been previously inspected. The notices set out a number of actions for which the first respondent produced action plans which were either completed or in the process of compliance. A number of the actions required referred to clinical processes.

84. The second CQC section 29A warning notice related to good governance that included increased waiting lists, and a staff survey was being planned. In respect of effective governance and systems Hilda Gwilliams, the director of nursing from April 2021 to September 2023, was the responsible officer. The first respondent was required to make "significant improvements" by 30 June 2022.

85. The second respondent received a copy of the Improvement Notices on the 18 March 2022 and insisted on being sent copy of the draft CQC report when he was holidaying in America and before the 360-degree appraisal of the claimant. At the time there was no specific criticism of the claimant by the first and second respondent, and there was no suggestion that she was being investigated personally for underperformance and gross misconduct as a result of the draft CQC report and Section 29A Regulation notices. This is unsurprising given the history of critical CQC reports and Sir Nichol's view as recorded in the claimant's appraisal that it would take 2 to 3 years to achieve her personal objectives without the effect of the Covid Pandemic undermining the progress that could be made even further, and so the Tribunal found from the evidence before it.

86. During this period the claimant was experiencing issues managing the second respondent which she discussed with her mentor and Paul Edwards, the director of corporate affairs, who had been employed by the second respondent from January 2022 until December 2023. Within this litigation the claimant has disclosed a number of text exchanges between herself and Paul Edwards which reflect they were both having issues managing the second respondent. It is notable that the disclosure was made by the claimant and not the first or second respondent. In the text message sent on 22 April 2022 concerning a meeting with Ros Fallon arranged to discuss the behaviour of the second respondent, Paul Edwards wrote "…don't worry about his Lordship, we'll manage him together."

87. The claimant remained concerned with the behaviour of the second respondent and discussed this with her mentor before deciding that it should be raised through the second respondent's appraisal. The claimant did not think to use the respondent's Freedom to Speak Policy, having taken a view that through the second respondent's appraisal, support and development would be offered to change the second respondent's behaviours.

PD1 telephone call with Ms. Fallon on 8 April 2022;

88. On the 8 April 2022 a telephone discussion took place between Ros Fallon and the claimant in relation to the second respondent's forthcoming appraisal. The claimant complained about the second respondent. There is conflict in the evidence as to what was said by the claimant about the second respondent's behaviour. Ros Fallon described the claimant saying she was finding the second respondent difficult due to him getting involved in operational detail and undermined her. The claimant and Ros Fallon agreed to meet face-to-face, the upcoming appraisal process would be used to address the issue and Ros Fallon would separately meet Paul Edwards, director of corporate affairs, who would corroborate the claimant's criticism.

89. The Tribunal found, putting together both versions of the conversation, the following on the balance of probabilities. The claimant contacted Ros Fallon in her role as Senior Independent Director, which she held since April 2020, in addition to the NED maternity safety champion in 2021 and chair of Quality and Safety Committee. The claimant did not use the term bully or bullying; however, she used words to the effect that she found the second respondent difficult to work with, he undermined her, his behaviour intimidated her and others, including Paul Edwards, it was having an effect on her and something needed to be done about it. The Tribunal agreed with Mr Cheetham's submissions that the claimant did not raise specifically any patient concerns and/or the effect of the second respondent's behaviour on the organisation and the problems it had encountered with whistleblowing in the past, taking it as said that Ros Fallon would appreciate the seriousness of the situation and the effect on the running of the first respondent, given the ongoing Letby investigation and CQC reports. The claimant expected Ros Fallon to have read between the lines that this was a CEO raising serious complaints about the Chair against a backdrop of accusations of a bullying and harassment culture brought by neo-natal consultants well known to Ros Fallon and was public knowledge. The claimant's allegations were serious enough for Ros Fallon to respond as described below, however, she did not think to deal with the issues expeditiously by insisting that the first respondent took the claimant's disclosures seriously.

90. Ros Fallon as the only senior independent director, was in a position to assist the claimant in an attempt to improve the relationship difficulties she was experiencing as a result of the second respondent's behaviour. Ros Fallon failed to do so, and later on in the chronology became a key member of Project Countess working closely with Ken Gill, Nicola Price and behind the scenes the second respondent, uneasy with the role she played because she believed the claimant was doing an "amazing job."

91. Ros Fallon in an email sent to the claimant and Nicola Price on the 28 April 2022 strapline "annual appraisal" wrote; "**I believe you do an amazing job at a very difficult time under some very difficult time. Thank you for that and the Countess is very lucky to have you…I value your attention to detail and that**

you appear to know what is going on in the organisation. I value your honesty and integrity…I value the time you are always willing to give and I know if I need to speak to you then you will be available" [the Tribunal's emphasis]. Ros Fallon suggested three things the claimant could do to strengthen the way she worked including "find a way to develop your relationship with the chairman – offload your worries to share the risks you are carrying. It's a lonely place as a CEO." Ros Fallon possessed knowledge of the first respondent's history and had some insight, which the second respondent and Ken Gill did not, about the difficult tasks which faced the claimant. It is unfortunate that after the protected disclosure was made by the claimant concerning the second respondent's behaviour, the claimant's position as CEO became even lonelier as she was facing behaviours that fell well within the statutory definition of a detriment on route to being informed by Ros Fallon on the 22 October 2022 that it was "time for her to go" less than 5 months after the 28 April 2022 email.

The second respondent's input into the claimant's third appraisal

92. The second respondent emailed the claimant on 7 May 2022 "In terms of your performance during the 8 months I have been chair of the Countess **I would like to confirm that I am happy with the leadership you have demonstrated during this very difficult period and I acknowledge the tight grip that has been shown to deal with the pandemic situation**. We talked about the need to reflect on style and I am comforted by your acknowledgment of these…" [the Tribunal's emphasis]. There was no reference to any other matter raised until after the claimant had complained about the second respondent, and no mention of the claimant's culpability for the draft CQC report and Section 29 notices. In the attached CEO proposed objectives 2022/2023 in addition to supporting the chair to develop the Unitary Board and "develop meaningful visibility," deliver a "financial sustainable strategy" the claimant's objective was to "address the concerns related to governance described in the CQC warning letters."

The claimant's 360-degree appraisal

93. Ten out of eleven people responded to requests for feedback in the 360-degree appraisal of the claimant on the 29 April 2022. Feedback was positive with some criticism concerning a failure to delegate; "strengthening relationships by pausing a bit when replying to challenges…building a clear professional understanding and relationship with NED members…taking criticism…"The contributors included Simon Holden, Andrea Campbell, Ros Fallon, Ken Gill, the second respondent and Hilda Gwilliams who wrote "**you espouse the values expected to be demonstrated in all staff, underpinning by a patient-centred approach while balancing all aspects of quality governance, agenda (clinical, financial and corporate**)" (the Tribunal's emphasis).

PD2 meeting with Ms. Fallon on 11 May 2022

94. On the 11 May 2022 the claimant and Paul Edwards met with Ros Fallon to discuss the behaviour of the second respondent. Paul Edwards was particularly keen for his comments to remain anonymous and beforehand had emailed on 28 April 2022 Ros Fallon querying completion of the appraisal form for the second respondent "Is this anonymous. Is there a widish number of respondents so it's less easy to attribute individual responses, plus potentially easier to see themes..." Paul Edwards' concern with his own anonymity was self-preservation and the explanation given at this liability hearing on cross-examination that he was protecting the claimant at the time was not credible. Paul Edwards was in a difficult position and his self-concern strongly pointed to a culture which allowed the second respondent to behave in such a way that people were worried about crossing him and putting their head above the parapet. It is notable Ros Fallon was torn between supporting the claimant and undermining the second respondent, trying to take the middle road in the hope that matters would resolve themselves.

95. The claimant's evidence before this Tribunal is that she and Paul Edwards "did not hold back…with his criticisms of Ian's unacceptable and bullying behaviour" referencing the second respondent "quizzing" a junior employee (who was named) in front of the deputy director of nursing "in ways that made them both feel uncomfortable," his behaviour in one-to-ones and conduct towards Rebecca Findley and Claire Raggett. Paul Edwards surprisingly has little recollection of the meeting other than confirming he had seen the claimant "upset after some of her encounters with Ian," denying the second respondent had bullied him. Ros Fallon's recollection of the meeting was that Paul Edward's informed her "Susan and Ian did not seem able to get on and that it was a two-way thing" (contrary to the evidence of the second respondent before this Tribunal which was that he did get on with the claimant and there were no issues). The claimant raised a number of issues including "laddish behaviour" at board meetings, the second respondent recommending reappointing an unsuitable NED having had a discussion earlier with the claimant agreeing that he was not suitable, and reappointing without informing the claimant or obtaining consensus, and an inappropriate meeting with Hilda Gwilliam, deputy director of nursing at the time.

96. The upshot of the 11 May 2022 meeting was the claimant provided information about the second respondent's behaviour towards her and his bullying behaviour towards others, which she wanted something done about and included within the second respondent's appraisal.

97. On the 16 May 2022 Ros Fallon texted the claimant "I've been reflecting since our conversation. Do you have time to speak again?" underlining the seriousness of what had been discussed previously.

Ros Fallon's meeting with the second respondent 24 May 2022

98. Ros Fallon met with the second respondent on the 24 May 2022 and informed him of the claimant's comments, offering a facilitated discussion to help both with their relationship, which the second respondent refused. The second respondent's refusal to enter into a facilitated discussion with the claimant early on in their relationship was indicative of his inability to take criticism from the CEO, whose view he did not respect and nor was he mindful of the impact on the organisation when the CEO had serious issues with the chair. Ros Fallon did not use the word "bullying" at the claimant's request.

Second respondent's appraisal 2021/2022 on 7 June 2022

99. The second respondent recorded that he had "established myself as chair in what can only be described as a dysfunctional Board…I believe that I have built good relationship with the NEDs and new Executives," With reference to the heading "what I did less well" the second respondent wrote "Despite my best efforts I don't believe that I have built a solid relationship with the Chief Executive" but makes no reference to his part in the poor relationship as described by Ros Fallon a few days before. It is notable that a key priority/objective was to "build a better working relationship" with the claimant. A number of the comments made by others were positive and complimentary. Repeatedly there was a reference to the claimant and second respondent working on their relationship. The Tribunal was not taken to the anonymous response provided by Paul Edwards and it has been unable to find it in the bundle.

100. Deloitte were commissioned to carry out an independent review by the Cheshire Commissioning Board on behalf of the Cheshire and Merseyside Integrated Care Board on 29 June 2022. The final report is dated 25 October 2022.

101. KPMG, the first respondent's auditors provided a draft report dated 9 June 2023. The Tribunal does not have the final report.

15 June 2022 Date of publication of CQC Report following visits in February and March 2022.

102. The final CQC report was received by the first respondent and cascaded.

Freedom to Speak Up "FTSU" concern 9 June 2022

103. Hilda Gwilliams was asked by the second respondent to deal with a FTSU concern about the maternity service. The second respondent gave evidence to the effect he was handed a sealed envelope which he did not open. The claimant alleges the second respondent had opened the envelope and knew the contents of the FTSU by the time he met with her on the 18 July 2022 (see Detriment 1).

Hilda Gwilliams has not provided a witness statement dealing with whether she was handed a sealed or unsealed envelope by the second respondent, and no explanation for this has been given by the respondents other than Hilda Gwilliams was no longer in the first respondent's employment, having been seconded to another Trust under a compromise agreement.

D1 Did Mr Haythornthwaite at a meeting with the Claimant on 18 July 2022 reject her proposal of mediation, focus on what he considered was "wrong" with the Claimant and act in a confrontational and aggressive manner, as particularised at paragraphs 59 to 60 of the Grounds of Complaint?

104. The claimant's perception was that the second respondent's poor behaviour towards her had escalated since his conversation with Ros Fallon, and she discussed with her mentor what could be done about it. It was agreed the claimant should approach him directly and have a discussion along the lines of a pre-drafted script.

105. There are different versions of the 18 July 2022 meeting that are irreconcilable between the claimant and the second respondent. The claimant took notes the afternoon of the meeting which she provided to Paul Edwards and Ros Fallon on 13 September 2022. The second respondent did not take any notes at the time, and on the balance of probabilities the Tribunal found the claimant's version, supported by the contemporaneous documentation, fitted more logically into the undisputed factual matrix (see below) in comparison to the second respondent's version.

106. The second respondent's evidence was that he had been advised by Nicola Price to make a note of the 18 July 2022 meeting, which he did on the 25 July 2022. The note does not make sense, there is no mention of the envelope and the FTSU. The note does not correlate with the second respondent's witness statement and appears to refer to the Deloitte report first draft sent to the second respondent on 10 October 2022, 3.5 months after the18 July 2022 meeting. The second respondent's notes cannot be relied on as an accurate reflection of what transpired on the 18 July 2022.

107. The second respondent's recollection is that the claimant suggested mediation, which he questioned on the basis that there was no fundamental breakdown in the relationship but did not reject the suggestion. The second respondent suggested the claimant attended the Audit Committee the following day to because of the deteriorating financial situation. The claimant raised the issue of the maternity FTSU complaint and asked for details, the second respondent explained he had it with him in an unsealed envelope and would be passing it to Hilda Gwilliams. The second respondent can remember the door was open and Rebecca Findley had brought the claimant some headache painkillers at the start of the meeting. This was in direct contrast to Rebecca Findley's evidence, which was. that she had provided the claimant with paracetamol at the end of the meeting opening the door, and the claimant had not seemed distressed. Either

way, the Tribunal found the evidence unsatisfactory, and it is not credible that witnesses recollected whether the door was closed or open at the start or the end of a one-to-one meeting. We regarded this as difficult private meeting that would have taken place behind a closed door, preferring the claimant's evidence on this point, and so concluding Rebecca Findley would not be able to hear whether the second respondent banged the table or raised his voice.

108. The notes taken by the claimant recorded "I ensured the door was closed…" The claimant stated she had rehearsed the words with her mentor Dame Angela and she said "Before we discuss the finance paper which I agree is not fit for purpose, I think we should talk about the fact that there is an internal and external perception that we are not getting on with each other…we need help or facilitation….his manner was aggressive…his manner of speaking became aggressive and he began to thump his hand on the table repeatedly. I found this extremely threatening and upsetting…I said I feel as if he and the group of…NEDs are trying to get rid of me. The Chairman did not acknowledge or answer this which I found psychological threatening and upsetting" accusing the second respondent of "gaslighting." The claimant made a number of allegations about the second respondent's aggressive behaviour towards her throughout the meeting, informing her of concerns brought to him by executives which he could not share. Towards the end of the meeting the second respondent said "if we have help it can't be someone you know or someone I know. I will think about it" referring to mediation."

109. The claimant recorded the incident with the FTSU concern as follows: "he held up an A4 envelope" Ros Fallon had handed to him regarding a FTSU concern "in which I and other executives were named. He said he still did not know what the concern was but wanted to bring the individual into the room at some point and tell her to "just have a conversation with me". The claimant described how she made it clear the FTSP should be internally investigated and "I still not have had sight of the detail of concerns raised nearly three months after they were first mentioned to me." The claimant described how she had a conversation with Paul Edwards "immediately afterwards…there are witnesses to the way the Chairman tends to interact with colleagues which is consistent with the above account. Prior to his appraisal both the DCA {Paul Edwards} and I met with the SID to discuss this…I have received warning texts when the Chairman is in HQ and displaying his concerns about relatively trivial matters in an aggressive manner…On 25 May a member of staff said they had been "soundly told off" in the corridor. This was heard by two executives who said they shut their doors because they did not want to hear to hear it... to fulfil my role effectively I need to feel psychologically safe…through what will be the most challenging months in its history."

110. On the balance of probabilities, the Tribunal preferred the claimant's version of what had taken place on the 18 July 2022, which is that the second respondent had an envelope with him which he indicated contained the Maternity FTSU. The claimant raised the issue that they should address their relationship "it was not good for the trust and not good for us." As the discussion progressed "he kept

banging his hand on the table emphasising his points, criticising the claimant, and saying somebody had complained about her referring to the document in the envelope "I can't tell you who as it's breaking a confidence" or words to that effect. The claimant felt threatened by the second respondent's behaviour and was so upset she went off sick for the first time during her employment with the first respondent. The claimant came across Michelle Greene after the one-to-one meeting with the second respondent and Michelle Greene witnessed her upset. The claimant recorded notes of the meeting the same evening.

111. The claimant's evidence undermines the second respondent's version of whether he knew that the envelope contained a FTSU about maternity. The Tribunal, on the balance of probabilities, concluded the envelope was not sealed, the second respondent was aware that it enclosed the maternity FTSU and he could, at that stage, have shared the contents with the claimant in her capacity as CEO and chose not to do so, preferring to use the FTSU as leverage against the claimant in a threatening way, motivated by the fact that she had complained about his behaviour.

<u>The claimant's absence immediately after the 18 July 2022 one-to-one meeting</u>

112. The claimant was absent and the second respondent, in his evidence, attributed that absence to the claimant fabricating her sickness to avoid attending the finance audit meeting and being held accountable for the financial state of the first respondent, arranged for the next day. The second respondent in oral evidence on cross-examination stated the claimant "did not go to either of those committee meetings and fulfil her duties" and she had "contrived" a false account in order to do so.

113. The second respondent took the view that the claimant should have reported her absence to him as he was her line manager, despite the fact that he was a NED who had no day-to-day dealings with the running of the organisation. In direct contrast to the second respondent's evidence the claimant was not due to attend the finance audit meeting in any event, having arranged another meeting in London in the House of Commons, followed by annual leave for her daughter's birthday. The undisputed evidence before the Tribunal was that CEO's were not expected to attend finance audit meetings, and yet the second respondent had taken it upon himself not only to line manage the claimant's absence but also control what meetings she should be attending.

114. The claimant was so upset about the second respondent's behaviour that she approached Richard Barker and informed him about the second respondent's behaviour including "banging his fists" on the table. It is undisputed Richard Barker suggested mediation, as he was not in a position to intervene and had only been told one side of the story.

25 July 2022 meeting in the garden centre claimant and Ross Fallon

115. The claimant remained absent from work unwell and arranged to meet with Ros Fallon on the 25 July 2022 away from the first respondent. The claimant informed Ros Fallon of what had taken place on the 18 July and the effect on her health. Ros Fallon's recollection of the meeting was that the claimant had told her she had started the meeting by saying that the claimant and the second respondent needed to work on their relationship, the second respondent responded they did not need anyone, referred to "all of Susan's faults and that the NED's did not have confidence in her." He had banged his hand on the table and waved an envelope "and said he had not decided what to do about the FTSU issue." The claimant's conversation with Ros Fallon largely reflected her handwritten notes and so the Tribunal found, further undermining the second respondent's evidence that he did not bang the table, was not aggressive and did not criticise the claimant.

PD3 telephone call with Mr Barker of 28 July 2022.

116. Richard Barker recalls the claimant emailed him on the 28 July 2022 asking for advice and guidance, following which they spoke on the telephone, and he was told that the second respondent was "demanding," and the claimant was not happy with his behaviour, he had "banged his fists on the table." In one of the three conversations Richard Barker had with the claimant about the second respondent, he cannot recall if the claimant mentioned bullying and harassment, although at some stage he became aware that she was alleging that. Richard Barker was not in a position to act positively, one way or another, because his role was regulatory and not that of employer. Richard Barker suggested mediation, taking the view that the NHSE can only intervene as a last resort and the senior independent director "is the key" to resolving issues "as they can act as an intermediary between the parties…it is a big risk for the trust if chair and chief executive do not get on and it is not acceptable."

28 July 2022 meeting Ros Fallon and second respondent.

117. Ros Fallon, as agreed with the claimant, met with the second respondent in her capacity of senior independent director.

118. Ros Fallon started the meeting by informing the second respondent that she had met the claimant earlier about issues concerning his behaviour. The Tribunal accepts Ros Fallon's evidence that the second respondent was not interested in what she had to say, his concern was that the meeting she had with the claimant was not in the capacity of a SID but as a friend, and she was compromised so could not deal with it.

119. Ros Fallon assured the second respondent that there was no personal friendship, and "we should focus on the positive things Susan had done" to which the second respondent suggested that this was the claimant speaking, not Ros Fallon. He accused Ros Fallon of "overstepping the mark," denied the claimant's

allegations, and did not give any alternative version of events. The meeting was so difficult that Ros Fallon offered to step down as a SID. In oral evidence Ros Fallon stated the second respondent was not listening to her and had not heard what she was saying. The second respondent responded in cross-examination to this allegation, stating "I did not know what we were mediating on" and it would be "quite difficult to be in a room and not listen to her." The Tribunal found the second respondent's evidence was not credible, and it preferred Ros Fallon's evidence that she had raised the issues brought to her attention by the claimant, including the fact the second respondent refused to go to mediation and he had reacted in an aggressive way by attacking her.

120. It was a difficult meeting for Ros Fallon, who was upset by the second respondent's behaviour and made contact with the claimant immediately after it by text; "I've had a difficult meeting this morning and I'm just trying to rationalise it in my head." Can I give you a call… "The claimant responded "…I'm sorry it was difficult but I am not too surprised. I hope you're ok as it's a lot to be dealing with."

121. Ros Fallon and the claimant spoke. Ros Fallon said, "what I have been through gave some credence to what Susan had said" and she complained that the second respondent had bullied her. The Tribunal concluded Ros Fallon was bullied by the second respondent, and this affected the way she dealt with the claimant's complaint from that point onwards, worried about the consequences of crossing the second respondent, including attracting his negative aggressive behaviour and shouting at her. At a later date the second respondent, Ken Gill and Nicola Price made decisions in respect of the claimant under the banner "Project Countess" designed to protect the second respondent and manoeuvre the claimant out of the Trust. Ros Fallon was part of the group and, whilst the second respondent was not an official member, he played a part. An attempt was made, albeit unsuccessfully, to hide the part he played. The Tribunal concluded on the balance of probabilities that Ros Fallon, who liked, trusted, and admired the claimant, struggled with the position she found herself in the SID role, conflicted between supporting the claimant and going along with the second respondent and Ken Gill, who were strong forceful characters supported by Nicola Price, a very experienced HR professional. In short, Ros Fallon was not strong enough to stand up to the second respondent and Ken Gill, with the result that she was unable to resolve the deteriorating relationship and agreed the final outcome should be a forced exit of the claimant, as recorded in the factual matrix below.

122. Ros Fallon contacted Richard Barker, who made it clear mediation should be explored and the first respondent had to deal with it. In oral evidence on cross examination Nicola Price explained how HR representatives from the ICB and NHS England were confusing matters for the first respondent, evidence the Tribunal did not find credible, preferring the position adopted by Richard Barker, which reflected the truth, namely, NHS England had made it clear mediation should take place and there was no suggestion the claimant should be exited. When it became clear to NHS England that the claimant was alleging bullying and

harassment, the advice was the allegations should be investigated before mediation could be considered. No date has been given when NHS England gave this advice, but Richard Barker at some stage took advice from Chris Cutts, chief people officer NHS England, who had significant experience in HR, and it appears the telephone conversation may have taken place after the claimant had indicated she would be raising a grievance against the second respondent.

123. Turning to mediation and the attempts made by the first respondent to arrange for it to take place with an independent mediator, the Tribunal does not intend to set out the history of delay and procrastination. It is sufficient to record the mediation never took place, despite attempts at persuading the second respondent that he did not need to know chapter and verse of the claimant's allegations before a mediation. On the evidence before it, the Tribunal concluded, on the balance of probabilities, that the second respondent never intended to mediate, he put up any obstacle and argument to avoid mediation, and instead pinned his hopes on investigations carried out by Deloitte and Ibex Gale, in the hope that ammunition would be provided against the claimant. It is notable that there was no investigation into the bullying and harassment allegations raised by the claimant until much later after the claimant had resigned. The Tribunal took the view that mediation posed a danger to the second respondent, in that it could expose his behaviour in a more concrete way than his preferred course of action: simply denying the claimant's allegations, turning the table on Ros Fallon and with the support of Ken Gill, building a case of gross misconduct against the claimant with a view to securing his position as chair, which he successfully achieved.

124. Nicola Price, as an experienced high-profile HR professional, would have had some knowledge about the way mediations worked. The Tribunal found she was disingenuous in her evidence concerning the second respondent requiring all of the allegations against him to be provided before mediation could take place, and she did not stop the prevarication by insisting that the second respondent either agreed to mediation or be investigated. The three people involved in Project Countess (discounting the second respondent) were highly regarded professionals with impressive CV's and with all the knowledge they possessed it is not credible that they failed to appreciate the damage that could be caused to a Trust in such dire difficulties when the CEO could not work with a relatively newly appointed chair, due to allegations of bullying and harassment. Richard Barker and Chris Cutts were aware of the implications. At the very least mediation could have been expedited to try and resolve the impasse, and an urgent investigation commissioned outside the Trust to ensure full independence of those involved. It is notable that when NHS England got involved initially it was of the view that retaining the claimant as CEO was best for the first respondent's stability. Eventually, the claimant was offered a different position in another Trust on secondment (see below). The Tribunal wish to record that it is unfortunate for the first respondent, for the staff who work so hard and for the community who have to some extent lost faith in it, that the opportunity was missed very early on when the claimant first raised her issues against the second respondent for a professional mediation to take place with a view to resolving differences, for

example, the second respondent accepting his failings and agreeing to abide by an agreed future course of action, and the claimant in return agreeing to settle differences and find a way to work with the first respondent. The Tribunal has clarified this below and made similar comments in respect of the draft compromise agreement.

29 July 2022 claimant lodged a grievance against the second respondent.

PD4 email to Ms Price of 29 July 2022;

125. On the 29 July 2022 the claimant submitted "a grievance against the chairman of the Trust for bullying, harassment and undermining behaviour towards me. I have made the Senior Independent Director aware of my concerns and she is aware that I am lodging this outline grievance." The claimant did not refer to any other party at this point, however, she had made Ros Fallon aware that others were involved in the past. Nicola Price confirmed receipt of the formal grievance and indicated she would contact regional HRD to support her. By this stage the claimant had been in receipt of legal advice and informed Nicola Price by text that she was seeking a less legalistic approach and she also emailed Richard Barker to that effect.

126. Nicola Price obtained legal advice, and in a handwritten note marked "legal privilege" dated 3 August 2022 discussed the involvement of Richard Barker, and whether Ros Fallon could continue to act as SID, concluding "not at this point" with a list of 6 items in relation to the claimant including "contract, fit and proper, whistleblowing, grievance, Deloitte." Nicola Price was aware on the 3 August 2022 that the disclosures made by the claimant could be protected and she had the experience to understand the implications of this, and so the Tribunal found. The claimant's allegations were not investigated.

The meeting with solicitors including an employment lawyer and a healthcare regulator lawyer, the second respondent and Nicola Price

127. Immediately upon receiving the claimant's formal grievance, Nicola Price and second respondent had a meeting with the first respondent's solicitors. The first respondent has disclosed a legally privileged hand-written note of the meeting that set out a strategy for the claimant's exit and underlined the fact that the prospect of any mediation was a sham. Mediation never took place after a number of barriers were erected, not least the second respondent insisting the claimant set out her allegations in detail and it being made clear to the claimant by Ros Fallon on the 22 October 2022 that "it was time for her to go" or words to the equivalent meaning.

128. The handwritten note was taken by Nicola Price and, much to her surprise, was disclosed at the final hearing by the first respondent. Nicola Price had recorded

on the note "legal privilege" and "legal privileged conversation." The Tribunal heard no argument in relation to the validity of this disclosure and it was satisfied that if there was legal privilege it had been waived. Within the note a reference was made to the KPMG report, and the Deloitte report outcome was referred to as a "critical part of the jigsaw" despite the fact that the respondents were still awaiting the final report, and the CQC report.

129. Nicola Price wrote in the handwritten notes "trust gets Deloitte – catalyst for exit? How? **Feedback to chair.** Mediation?? **Ian H ask chair feedback**. SG informal process!! Grievance I crystal grievance Burden of knowledge NP raise concerns informally …obviously relationship with chair…acting CEO planning for Trust…conduct fit and proper…**notice 12 weeks – come to end**…" It has been difficult to decipher all of the written note, however, the Tribunal is satisfied that on a common sense reading the second respondent (referred to as Ian H and the chair) and Nicola Price were seeking advice on the best strategy to adopt to exit the claimant, and a critical part was the Deloitte report which had yet to be completed. It is notable that the first and second respondent denies the second respondent took any part in meetings and decisions concerning the claimant. Nicola Price's note undermines that position, and the Tribunal finds the second respondent input was pivotal in the decision-making process which ultimately resulted in the claimant leaving her employment, thus securing his position as chair with the assistance of Ken Gill and the key players in Project Countess.

130. Nicola Price posted the claimant a letter dated 18 August 2022 explaining the "region…have made it clear that they have seen resolution of these issues being led by the Trust…". This was contrary to the evidence Nicola Price gave to the Tribunal which suggested NHS England and ICB were leading the mediation process, when they were not, the Tribunal preferring the credible evidence of Richard Barker and Chris Cutts, which is that managing the claimant's complaints and grievance was the sole responsibility of the first respondent as employer. It is notable that the 18 August 2022 letter was yet another document not disclosed by the first respondent, which had gone missing, as had all communications after July 2022. No explanation has been given for this by the first and second respondent, who has been unable to find a number of documents which appears to have been deleted and/or destroyed. The Tribunal has formed adverse inferences from this, particularly given Nicola Price's evidence concerning the part played by NHS England and ICB when the reality was that the issues relating to the claimant could only be dealt with by her employer, the first respondent.

PD5 email to Ms Price of 23 August 2022

131. The claimant remained absent from work initially off sick since the 18 July 2022 one-to one meeting with the second respondent, and then on the sabbatical proposed earlier by Christine Hannah in the second appraisal.

132. On the 23 August 2022 the claimant wrote to Nicola Price confirming she was prepared to facilitate mediation "and would wish to make it clear that I had requested intervention some weeks ago. Of my own volitation, on Monday July 18th, I proposed to the chairman at the beginning of our one-to-one meeting that we attempt to understand and resolve whatever differences had arisen between us only to be met by a barrage of abuse, bullying and threatening behaviour including repeatedly slamming his hand on the table." Reference was made to the "severity of the breakdown in relationship between myself and the Chairman," and "I would expect given that the chairman is involved, the senior independent director will oversee the commissioning of the mediation and associated processes. Given the ongoing challenges facing the Trust and the imminent trial of Lucy Letby, I wish to return to work as soon as possible…I am not prepared to be subjected to the onslaught of undermining and intimidating behaviour that I suffered from him prior to my absence on sick leave…where it is absolutely necessary for us to be in the same meeting I will require a witness to be present and notes taken of the discussion…I am writing to the SID to this effect."

133. The contemporaneous documents reflect that the first respondent sought an assurance (which the claimant gave) that she would not be proceeding with her formal grievance against the second respondent pending mediation taking place. In other words, the first respondent was not interested in investigating whether bullying and harassment had taken place after the claimant had informed Ros Fallon on the 8 April 2022, reported the second respondent's aggressive behaviour on the 18 July 2022, which was also experienced by Ros Fallon when she discussed the claimant's criticisms with the second respondent as recorded above. By this point in the chronology almost 5 months had passed, and the first respondent had not taken any positive steps to investigate the allegations despite their serious nature against a backdrop of general whistleblowing issues and the Letby investigation, which was proceeding to a criminal trial.

134. The first respondent took legal advice and agreed also to provide the second respondent with legal advice on his own exposure. Project Countess remained live, and mediation was not the preferred course of action for Ken Gill, whose objective was to protect the second respondent and exit the claimant, and so the Tribunal found.

135. The second respondent insisted on being provided with more information about the claimant's grievance before the mediation took place, and the claimant wrote to Nicola Price on the 23 August 2022 saying that she was prepared for the whole of her 23 August 2022 email to be shown to the second respondent, and if he rejected this she "would make it known to region that the chair had rejected mediation as a way forward…"

136. Nicola Price responded on 30 August 2022 that an independent investigation was required under the first respondent's Bullying and Harassment Policy; "you have raised complaints which are serious, and which concern a person holding a senior leadership role. You have raised the issue of risk to you and to others,

making specific reference to your safety. **You will appreciate all of these matters go to the heart of the ability of the Trust to secure a working environment for everyone which is consistent with our Values and Behaviours**…" (the Tribunal's emphasis}. It is notable that it had taken months for the first respondent to reach this conclusion, and Nicola Price's evidence before the Tribunal that she was unsure whether the claimant was complaining about the second respondent's treatment of her and others, hence the delay in progressing the grievance and mediation, was not credible given the earlier disclosures made by the claimant, especially to Ros Farrell and the input from NHS England.

137. Nicola Price requested full particulars of the claimant's allegations in order for terms of reference to be provided, despite the claimant having provided sufficient information for an investigation to commence, with an expectation that the investigator would speak to the claimant first about her complaints. The Tribunal found there was no intention at this juncture on the part of the first and second respondent to take part in mediation and/or investigate without any further delay and procrastination. The objective was to circumvent a mediation and investigation by securing the claimant's exit in the knowledge that she intended to return to work on the 1 September 2022 having been away from the workplace since the 19 July 2022 directly as a result of the second respondent's behaviour, and so the Tribunal finds.

138. Nicola Price forwarded the claimant's emails to the second respondent including the 22 and 23 August 2022 email promising to "draft a response and to "bottom out" the claimant's intentions on the grievance, despite the claimant making it very clear that she wanted to proceed down the mediation option. Nicola Price informed the second respondent "we can't challenge the 1st September return as planned, as although we have nothing in writing it is common knowledge. We also need to recognise the mediation request." The email reflects Nicola Price was reporting back to the second respondent, and it is clear that the second respondent had queried whether the claimant could be prevented from returning on the 1 September and the mediation should be arranged "before the 1 September" and "before Susan comes back to work." The mediation did not take place in this timeframe, without a satisfactory reason.

139. The claimant was absent until the 1 September 2022 through a mixture of sick leave and the sabbatical promised in her appraisal conducted by Chris Hannah. Prior to her return the claimant was contacted by a HSJ journalist on the 15 August 2022 "Hi Susan…Being told of changes at Countess due to CQC. Sorry to hear this if true, but have you left on secondment?" There were various rumours around this time that the claimant would not be returning to work as CEO, and she was told by Michelle Greene on the 31 August 2022 that people were not expecting her back despite the fact that she was on a sabbatical. Rumours were rife about the claimant not returning to work for the first respondent, and whist no direct link can be found in the contemporaneous documentation before the Tribunal to the

key players in Project Countess, it is notable that their aim was to ensure the claimant would be leaving the workplace one way or another.

1 September 2022 claimant's return to work from sick leave

140. The claimant returned to work with various protections against contact with the second respondent put in place, including that they would not both be on site at the same time.

141. In an email sent by the second respondent by Ken Gill at his NHS email address on the 9 September 2022 in anticipation of the meeting Ken Gill was to have with the NED's about exiting the claimant, the second respondent wrote; "When you are speaking to the NED's I want to share with you an example of the games that Susan is playing" referring to a note drafted in both their names which the claimant had sent in her name only about the Queen's death originally drafted by the Comms team. The Tribunal was surprised with the contents of this email written against the background of the first respondent's difficulties, not least, the Lucy Letby trial due to take place in less than one month's time. The email reflects the true position, which is that the second respondent was involved in the claimant's exit discussions and sought to weight the scales against her when the NED's came to vote on whether they had lost faith in the CEO and/or in any misconduct proceedings. The Tribunal is mindful of the fact that it is undisputed the second respondent, Ken Gill and Nicola Price exchanged private email addresses, WhatsApp numbers and telephone numbers to be used when communicating on "Project Countess." The Tribunal agrees with Mr Segal that there are a number of undisclosed documents which have been deleted (despite the first and second respondent knowing early on in the process that the claimant was "whistleblowing") and the exiting of the claimant from the position of CEO was both complex and had a litigation risk. It is all the more damming that very few private exchanges have been disclosed, and the evidence before the Tribunal that WhatsApp messages (other than family messages, according to the second respondent) were permanently deleted. The Tribunal has drawn an adverse inference from the fact that these communications have been knowingly deleted so as to present a different picture from the reality, which is that the second respondent was working with Ken Gill and Nicola Price on Project Countess behind the scenes. The explanation given to the Tribunal that the private numbers and email addresses were exchanged to keep confidential information away from the prying eyes of PA's, when they did not have any, reinforced the lack of credibility in the explanation as to why Project Countess communications remained private between the key individuals and the second respondent and screen shots were not taken for this litigation and disclosed as required. Instead, communications and documents were permanently deleted and the inter-relationships far from transparent, particularly the second respondent's input into the claimant's exit, which we found was causally linked to her protected disclosures about his behaviour.

PD7 Statement sent to Mr Edwards and Ms. Fallon on 13 September 2022 (and the covering email to this statement)

142. It is undisputed that the claimant sent a 7-page statement to Ros Fallon and Paul Edwards detailing her allegations of bullying raised against the second respondent at the one-to-one meeting on 18 July 2022 and other allegations involving different people. The claimant referred to the notes she made the afternoon of 18 July after the meeting (see above).

143. On the 22 September 2022 the Council of Governors Committee reappointed a NED for a second term, whose name had been put forward by the second respondent on the 22 August 2022. It is undisputed that the second respondent recommended reappointment of David Williamson as a NED, who was a qualified accountant, having previously agreed with the claimant that he was unsuitable for reappointment, and without informing the claimant he had changed his mind and discussing with her further the decision he had made. As far the second respondent was concerned, the claimant's days employed by the first respondent as CEO were numbered.

27 September 2022 COCH Board Meeting re: budget/finance issues.

D2 Was the Claimant subjected to concerted, aggressive and unjustified verbal attacks at the private board meeting on 27 September 2022? It is alleged that these attacks were undertaken at the behest of Mr Haythornthwaite and/or were not 'shut down' by him when he could have and should have done so.

144. A private board meeting took place on the 27 September 2022 chaired by the second respondent. Ros Fallon describes the meeting as "very tense" with the claimant being blamed for the first respondent's financial situation. The meeting was to discuss the substantial financial deficit and a developing financial recovery plan. The claimant and Ken Gill were in attendance. A consultant from Deloitte observed the meeting for the purpose of its report, and hand-written and typed notes were taken. These have been scrutinised by the Tribunal as a contemporaneous independent observation of what transpired. The handwritten notes reflect that in relation to the Section 29A Maternity Services Notice the CQC was "very positive about maternity and well done to all." The typed notes confirm the Council of Governors approved the recommendation from the Governors Nomination Committee that David Williamson be reappointed for a 3-year term.

145. With reference to the "Section 29A warning notice Trust wide well-led" it was confirmed that "the draft re-visit noted some evidence of improvement, however it is unlikely the Trust would be taken out of CQC special measures...the specific warning notice Well-led action plan is on trajectory however due to extent of improvement required it will take a minimum of 18 months for the improvement areas of quality governance to be implemented."

146. The handwritten and typed up notes taken at the 27 September 2022 board meeting do not reflect the full extent of the claimant's allegation that she was subjected to "concerted, aggressive and unjustified verbal attacks". The handwritten notes taken by the Deloitte consultant make no mention of this. There is a repeated reference to the meeting being "flat". The meeting was not recorded, even though it was usual for recordings to be made and listened to again, for example, Michelle Greene listened to recordings as part of her training. There is no explanation for this.

147. The claimant alleges the second respondent orchestrated a pre-planned verbal attack on her. Ken Gill in his evidence related that Mick Guymer, "led robust and challenging line of questions" about the claimant's role as "accounting officer and reminded her of her statutory obligations." Ken Gill then "indicated" to the second respondent by "raising my pen and catching his eye" that he wished to comment, he was invited to ask his question and made "a statement about the approach to budgeting and culture surrounding finances…and to seek comments from Susan on this…Susan was defensive and lacked any authority as the Accounting Officer…did not like to be questioned or challenged." Mick Guymer confirmed in his interview with Ibex Gale that his view was the CEO (claimant) should be "changed."

148. During the meeting Andrea Campbell, who had joined remotely, and the claimant were exchanging texts regarding what was taking place as they texted. The claimant wrote at 12:17.42 "It's very difficult. The atmosphere is grim. I did certainly feel the aggression as clear that the comments and questions were all planned and orchestrated. Even Simon Bennett saw that. The troubling thing is that the remaining NEDS simply sat there and let it happen." At 1.44.55 the claimant wrote" Why is Ros letting him intimidate her into failing to fulfil MY role. Ian led that interaction. He knew what Mick and Ken were going to say and him summing up was also aggressive and aimed at me (he was looking directly at me as he said it…Pam sat there and let it all happen." Andrea Campbell responded at 12.52:38 "I wish I could give you the answer to that. But I don't know why Ros is not able to stand her ground. The SID role is hard and requires confident strength…"

149. It is undisputed that Mick Guymer referred to the claimant as the "Accountable Officer" and legally she was as CEO, despite not being required to attend finance meetings (see above). The claimant relied on others, for example, director of finance Simon Holden, and chair of audit (Ken Gill) for information about the financial situation, with the objective of the claimant, the executives and the NED's working together on the Improvement Plan. It is not disputed that the meeting was a difficult one, and it became clear to the Deloitte consultant that the executive team were not working together, which is unsurprising given how badly the second respondent, despite his wide breadth of experience, managed the meeting. Ros Fallon was of the view that it was not appropriate for Mick Guymer to apportion blame on the claimant, and what was needed was for the Board to focus on a recovery plan.

150. Ken Gill indicated to the second respondent that he wanted to talk by the raising of a pen and catching of the eye gave the claimant the impression that what she perceived as an "attack" was prearranged. It is more likely than not the claimant had missed the body language between the second respondent and Ken Gill, which is normal factor at large meetings. The consultant from Deloitte commented on a number of occasions that the meeting was "flat" and made no reference in handwritten notes taken at the meeting of inappropriate questions or aggression. Andrea Campbell's perception was that it was further bullying of a female CEO by male executives, and she had good reason to come to this view, and so found the Tribunal.

151. During the break the claimant approached Ros Fallon and told her there had been a planned attack and the chair should have intervened. The claimant asked about the mediation and was told the first respondent would write to her about it.

152. The Tribunal concluded on the balance of probabilities, having considered the different interpretations of what happened at the 27 September 2022 meeting, that it was a difficult one, where the claimant was put on the spot about financial matters by Mick Guymer and Ken Gill over genuine financial concerns. The "elephant in the room" was the relationship breakdown between the claimant and second respondent which had not been resolved and the claimant felt vulnerable as a result, sensitive to aggressive attacks from accountants who she perceived (rightly) were supporting the second respondent and being personally critical of her. The NEDS were split between the chair and CEO camp, and the meeting was a reflection of the first respondent's failure to address the deteriorating relationship that unsurprisingly adversely affected the way the claimant and second respondent perceived each other's interactions with suspicion and negativity. In short, the claimant's mindset was such that she took umbrage and blamed the second respondent for difficult questions being asked of her and the accusation that she ultimately took responsibility for the financial failings of the first respondent, and the second respondent was happy for this line of questioning to continue. The second respondent was content for the claimant to be undermined rather than manage the meeting by improving the relationships between the executive team and the claimant, undermining their cohesion and further cementing the poor relationship he had with her in the knowledge that there was a time when the NED's would be required to vote on her dismissal and/or compromise agreement which was in the process of being drafted and negotiated. The second respondent's actions were, the Tribunal found, causally connected to the protected disclosures.

153. It is notable that by the 27 September 2022 the first respondent had not proactively managed the breakdown in relationship between CEO and chair with the result that the claimant, who had shown strength and commitment in the face of the Pandemic, was upset by the behaviour of the NED's. Difficult meetings can and do take place, it is the chair's role to control them, and the CEO's role is to deal with the issues NED's are bringing to the table. The Tribunal found on the

balance of probabilities taking into account the factual matrix before and after this meeting, that there was a causal connection between the protected disclosures in relation to the second respondent's behaviour and that of Ken Gill. However, it is not satisfied that the questions asked of the claimant and the description of her as "Accountable Officer" by Mick Guymer at this difficult meeting was done on the grounds that she made a protected disclosure, and it was all to do with the frustration experienced by the NED's given the difficult financial situation and substantial deficit. The questions were appropriate, however, according to Ros Fallon the reference to the claimant as Accountable officer was not. It was not appropriate to apportion blame to the claimant, and the NED's should have been looking at the recovery plan, guided by the second respondent and Ken Gill. The Tribunal concluded that a well-managed meeting should have reflected a more objective and constructive approach to the first respondent's financial position, and the reason why this meeting did not is attributable to the second respondent and the reason for this is causally linked to the protected disclosures and the plan to diminish the claimant's reputation before the NEDS in the knowledge that they may become involved in her exit. On balance, the Tribunal finds the 27 September 2022 meeting was a pre-agreed attack on the claimant, the first respondent being of the view that she was responsible for financial matters that were outside her control, and the description of her as "Accountable Officer" who was to blame for the first respondent's financial position, was yet another deflection when half-truths were used to justify the claimant's exit from her employment, the intention of Project Countess all along, as reflected in the suspension set out below within the factual matrix.

Ken Gill's note 3 October 2022

154. A typed undated note was prepared setting out the first respondent's position on mediation. The Tribunal found Ken Gill was more likely than not to have been the author although he cannot recall it, accepting in oral evidence on cross-examination "but it could be me." The Tribunal found the type and layout is very similar to other notes prepared by Ken Gill.

155. This note refers to the following:

157.1 "When we spoke 12 days ago, we thought we were very close to mediation, however further disclosures from the CEO needed reconciling with employment law. CEO and Chairman to receive a letter today (3 October) asking them to enter mediation. **Should mediation fail the CEO will reserve the right for an investigation** – **risk**" [Tribunal's emphasis]. This was the first occasion both the claimant and second respondent had been invited to a mediation, and so the Tribunal found. Ros Fallon cannot recall why it took the first respondent so long to arrange the mediation to take place on 26 October 2022, described her as "almost a four-week delay."

157.2 It is notable that investigation into the allegations against the second respondent were considered to be a "risk." The risk of an investigation into the second respondent is also reflected in the draft compromise agreement (see

below). There was no investigation into the second respondent's behaviour or plans to investigate it by the first respondent, and so the Tribunal found, concluding that this was the intention all along under Project Countess.

157.3 The typed undated note continued; the Board meeting on the 27 September 2022 was described as "unsatisfactory. In the private meeting NEDS rightly probed the financial position, however, one NED referred to the Accountable Officer role on a number of occasions. CEO believed it was a planned attack. Not challenged by the chairman. With reference to the FTSU "every stone unturned brings more issues – not a quick fix years in the making…"

Draft Deloitte report

156. On 7 October 2022 the first draft of Deloitte Report was sent to ICB, and on 10 October 2022 the second draft of Deloitte Report was sent to the second respondent and claimant. The second respondent was not happy with the contents of the report because it did not provide him with the ammunition to take the claimant down the gross misconduct disciplinary route. He forwarded it to Ken Gill on the 11 October with an email stating "I am not happy with it but it has some issues in it for us to discuss."

157. The Tribunal has read the report which it does not intend to set out in any detail other than to record that there were no express criticisms of the claimant personally; some of the relevant paragraphs include the following:

159.1 Under the heading "Board Governance" at 4.2 Deloitte commented on the "Relationship between development areas and board effectiveness…the Trust has an unusually high volume of areas for development across leadership, governance, strategy and culture. **This does not reflect particularly positively on board effectiveness, however, we understand that many of these issues have existed at the Trust for several years and have not necessarily arisen due to lack of oversight and leadership from the current board…improvement plans have existed prior to the CQC inspection. The situation has also been compounded by the pandemic and lack of continuity in executive leadership"** [the Tribunal's emphasis].

159.2 In appendix 1 it was suggested the claimant and second respondent "should consider the merits of undertaking a programme of coaching to address any tensions and improve working relations…the senior independent director should also liaise with the Lead Governor in this respect."

158. Paul Edwards spoke with the claimant on the 10 October 2022 and confirmed in a letter the next day possible mediation dates including 26 October 2022. The second respondent wrote to Deloitte on the same date confirming mediation issues had now been actioned.

Maternity FTSU raised by Hilda Gwilliams 27 September 2022

159. After the private board meeting the director of nursing, Hilda Gwilliams, on 27 September 2022 met with Ros Fallon and Ken Gill. Hilda Gwilliams had been acting as substantive director of nursing from April 2021 to September 2023 and reported that serious incidents had not been reported to the Board prior to July 2022, the situation was "some years in the making and would require two years to fix it" and she did not believe the claimant would be able to "deliver."

PD8 statement sent to Ms Price on 29 September 2022

160. On the 29 September 2022 as requested, the claimant provided her witness statement setting out allegations against the second respondent in order that the mediation could proceed.

Waivers

3 October 2022 Discussion Document for Procurement/Contracts Review issued by MIAA

161. A report in to the design and operations of controls in relation to contracting and Procurement dated October 2022 titled "Procurement/Contracts Review Assignment Report 2022/23 Draft" was prepared by MIAA and distributed to Ken Gill in his capacity of audit committee chair.

162. On the 11 October 2022 the Lucy Letby murder trial commenced.

163. In a note dated 14 October 2022 to "the NED group" from Mick Guymer, chair of finance and performance, concerning the financial deficit forecast following a discussion with the director of finance who outlined work in progress to develop a long-term financial model that built up from activity/staffing to generate forecasts. Whilst this would be a good planning tool and a sound activity, I feel that we are simply rearranging the deckchairs on the Titanic…agency staff was another area of concern…" In the summary he criticises the claimant as the "Accountable Officer…I am not assured. Financial Recovery needs to get started and whilst not detracting in any way from patient safety it will take transformational change and action across the whole organisation (with strong leadership from the whole of the exec team) with long lead times and gradual delivery maybe over 3 to 5 years." The 14 October 2022 note was followed up by Mick Guymer's behaviour at the 18 October 2022 NED informal meeting, which the second respondent chose not to stop by intervening.

18 October 2022 – Ken Gill B18/2615 met with the NEDS in an informal meeting.

164. Ken Gill met with the NED's (excluding Andrea Campbell) on the 18 October 2022 to discuss the exit of the claimant, the first respondent having taken advice from solicitors. Notes record the following was discussed; "as we are in complicated territory…Ros and I have agreed that there are a consistent set of significant, serious and substantial worrying issues emerging…next steps…informal engagement by the SID with the CEO to outline the substantial list of issues…encouraging the CEO to consider an informal route for leaving the organisation, if the informal route does not succeed considering the route of formal disciplinary management and the role of NEDs in that process…Deloitte report…action plan needed from the Board to address the outcome of that review…Thanks Ros and explain what this has meant over the last few months for Ros and lately me." It is notable that Ken Gill made no reference to the 18 October 2022 meeting in his witness statement and could not give a satisfactory answer as to why he had failed to give evidence on it, the Tribunal concluding that the first and second respondent would have preferred for the meeting to have been overlooked, given it was a private meeting which the claimant did not attend.

165. Andrea Campbell who was supportive of the claimant, was not briefed about what was discussed at the meeting and nor was she ever sent any minutes or other record.

21/22 October 2022 meeting claimant and Ros Fallon

D3 Did Ms. Fallon tell the Claimant on 22 October 2022 that it was "time for her to go", and that either she should do a deal or a "process" would be started? It is alleged that this was done at the behest of Mr Haythornthwaite.

The pre-meeting script

166. Ros Fallon met with the claimant to follow a script she had previously agreed with Ken Gill, who had amended Ross Fallon's original script with track changes. and 780 core, 783. Ross Fallon had drafted the initial script as follows:

(i) There was a growing bank of concerns from the NED's, including leadership style issues.

(ii) Concerns relate to judgment as opposed to conduct. This was amended by Ken Gill "in the case of EDG there are some issues surrounding conduct."

(iii) Reference was made to the CQC reinspection – pace of improvement, Deloitte report CEO visibility, deteriorating financial position, productivity, MIAA ports, Mortality governance, procurement.

(iv) Ros Fallon wrote the following in the script; "I have concerns about your mental health, current position of the organisation requires a different skill set and different set of board dynamics. Ken Gill amended this to "well-being and its impact…board performance and dynamics and the current

> range and depth of the challenges facing the respondent…Richard Barker is willing to discuss alternative position ensuring your reputation remains intact and no financial disadvantage…now might be the time to let someone with a different skill set pick up the reins of delivery. Ken Gill commented in track changes;" I think this opens and does not make it clear that **"Now is the time**…" [the Tribunal's emphasis]. Ken Gill made it clear to Ros Fallon that the claimant should be exited and this accords with the factual matrix as found by the Tribunal that the claimant's engineered exit was a foregone conclusion. It is notable the note made it clear that prior to the meeting with the claimant, "ensure the ICB has a replacement CEO in place…"

167. In the interview between Simon Bond of Ibex Gale and Ken Gill the latter confirmed that he and Ros Fallon had rehearsed the script and the first respondent "was basically saying…things aren't exactly working, there's a good way out of this here and wouldn't this just be sensible?" It is notable that Ken Gill does not mention in his witness statement that he had amended and rehearsed the script prior to Ros Fallon's meeting with the claimant on the 22 October 2022. This was a key meeting because of the claimant's allegation set out in D3. It resulted in the claimant deciding that mediation was no longer an option because there was no future for her in the organisation, and she entered into settlement negotiations. Ken Gill's evidence to the Tribunal and Ibex Gale was disingenuous. It is notable he blamed the claimant for leading "us up the garden path for several weeks to get to the point that we had a settlement agreement and a role carved there, and she completely turned tables at the last minute" ignoring the fact that (a) the claimant had been told by Ros Fallon it was time for her to go, (b) the claimant was entering into negotiations with a clear instruction that it was a red line for her to drop the grievance against the second respondent and (c) the first respondent was ignoring the red line and insisting that the claimant's grievance was dropped as a condition of the settlement.

168. The claimant asserts that at the meeting with Ros Fallon she was told it was "time for her to go", and the Tribunal accepts that words to this effect were said, drawing on the script and other information exchanged with the Project Countess team, whose sole aim was to engineer an exit for the claimant out of the organisation. Ros Fallon denies telling the claimant it was time for her to go but her evidence was not credible and raised a question mark over other evidence she gave to the Tribunal. Ros Fallon informed the claimant a deal could be agreed which would involve the claimant resigning, or a "process" would be started. Ros Fallon was unable to explain what the process would consist of, and the claimant understood correctly she was being threatened by some form of disciplinary process and fabricated allegations. The claimant told Ros Fallon that she had done nothing wrong, Ros Fallon agreed and said it was "about fit" which accords with Ros Fallon's original drafted script. She pointed out that the claimant "was not the Susan she had known and worked with for four years." The claimant agreed and said that the reason for this was the way she had been treated by the second respondent, particularly since she had raised concerns. Ros Fallon

suggested the claimant called Richard Baker who knew about the conversation they were having and was expecting a call.

169. At 18.51 on 21 October 2022 the claimant sent a WhatsApp message to Ros Fallon" Ros given our conversation today. It seems to me that at this point mediation meetings would be a waste of public money. I have always been anxious to make the working relationship effective but I really don't see how we can do this in the next few days in good faith."

170. The mediation was to have taken place on the 25 October 2022. Ros Fallon responded "whilst it's your decision I'd agree with you. I also think the chair needs to be advised with the right explanation as to why it has been cancelled or postponed." Ros Fallon's response supports the Tribunal's finding that she made it clear to the claimant that it was indeed "time for her to go."

171. The claimant responded in the WhatsApp; "I don't want to be the one appearing to not engage with the process or holding it up, but I'm not into being dishonest which I would have to be if we were to go ahead at this point." Ros Fallon responded "How about honesty being the best policy? You're considering your future and need to conclude some further discussions that may mean mediation would be wasting everyone's time not to mention public money. You hope to conclude those discussions within a week and will then reengage if you feel it necessary." The WhatsApp exchange supported the claimant's evidence that she had been told it was time for her to go, and undermined Ros Fallon's credibility that she had not. The Tribunal drew on the contemporaneous documents which formed the backbone of the factual matrix in order to arrive at this finding, concluding that as by the 22 October 2022 the claimant was aware that she would no longer be employed as CEO in the trust, either through resignation and a compromise agreement, or a disciplinary process. She rightfully concluded that mediation was pointless, and the spin a number of the respondents' witnesses have put on her decision not to mediate undermines their credibility because they were all fully aware the claimant was facing the classic "resign or you will eventually be dismissed after a disciplinary process" with her professional reputation in tatters. In cross examination Nicola Price confirmed that mediation was redundant.

172. Andrea Campbell met with Ros Fallon on the 31 October 2022 after a special board meeting convened by the second respondent to discuss finances. At the special board meeting the second respondent was visibly angry, aggressively slapping his hand down on the table and referred to the Deloitte report. The claimant was in attendance, as were the NED's and Simon Holden, and sent a contemporaneous WhatsApp message to Andrea Campbell "Even Simon Holden said he's never seen anything like it (the behaviour) in 40 years of the NHS…Execs were horrified. Why is no one doing anything about this? And it's ME who has to leave." Andrea Campbell in her WhatsApp exchanges wrote "I had a session with Ros today and was very clear about my concerns regarding the process and possible outcome…the concept of a public sector board scuffling

allegations under the carpet with no evidence gathering and no discussion on impact of behaviour does not sit comfortably with my value base."

173. At the meeting with Andrea Campbell and Ros Fallon, Andrea Campbell was informed that after a recent meeting with the NED's Ros Fallon had let the claimant know "that she should go," a deal was being sorted out and Region already had someone to act as interim CEO but did not say who. Ros Fallon said "the chairman needs to be dealt with" but it was not possible to challenge him, it needed a development and queried whether Ken Gill should "pick this up" despite Ken Gill acting as deputy chair and being answerable to the second respondent. Andrea Campbell made it clear that an allegation of inappropriate behaviour had been made against the second respondent, it had not been investigated and the complainant (the claimant) was being moved out of the organisation which was not right. An investigation should take place with a report going to the NED's. This did not happen, and so the Tribunal found.

174. Andrea Campbell had a meeting with Ken Gill on an unknown date in late October 2022 to talk about the issues between chair and CEO with a view to gauging where Andrea Campbell stood on it, with no mention of settlement agreement or termination of the claimant's employment. Andrea Campbell told Ken Gill that this was a case where a female member of staff had made an allegation against a male, following which her performance and not his behaviour had become the focus. Andrea Campbell made it clear that she did not agree with what was happening to the claimant, instead the second respondent should be investigated. The second respondent had yet to be investigated and no steps had been taken by the first respondent in this regard, who preferred to grant the second respondent access to meetings with its solicitors to discuss the claimant and her exit, with a view to protecting himself.

175. The 25 October 2022 mediation was cancelled permanently. On the same date the Deloitte report was finalised. It caused Richard Barker concern B3/3704 and he disagreed with the claimant that the findings were biased against her because he had worked with Deloitte for many years "and I don't think that a firm of that standing would be associated with a biased report." Richard Barker discussed "re-assigning" the claimant to another Trust, which entailed a demotion, relocation and a move to the cost of the first respondent who would pay the claimant's salary for a period not to exceed 18 months. The draft compromise agreement was based on this.

176. Ken Gill and Ros Fallon exchanged a number of emails, including on 1 November 2022 when Ros Fallon wrote "Also Hilda called me yesterday evening. There is an interesting game being played out." Ken Gill responded "Nicola called me and I got the same message. EDG senior members are very nervous and see the manipulation that is going on as well as half-truths."

177. Ken Gill and Ros Fallon produced a "taking stock" email on 3 November 2022 sent to a number of individuals including NHS England making it clear the first

respondent "would not be agreeable to the individual moving to a CEO role in another Trust…**the individual would waive any rights to any current dispute. No further action would be taken on two of the current Freedom to Speak Up (FTSU) issues**. One further FTSU issue in Maternity already has an investigation under way therefore the Trust will conclude that investigation and ensure lessons are leant for the organisation. **Assuming there is no evidence of gross misconduct** by the individual from the investigation then the Trust will take no action for the individuals…the Trust expects the process to be concluded by Friday 17 November 2022" [the Tribunal's emphasis]. The reference to "individual" refers to the claimant, the" any current dispute" to the claimant's protected disclosures made against the second respondent, as the first and second respondent were aware she was whistleblowing. Two of FTSU's had not been investigated and clearly, they would not be investigated if the claimant resigned, despite the requirement to investigate whistleblowing.

3 November 2022 Meeting of NEDS, the second respondent and Ken Gill

178. Ken Gill met with NEDs on the 3 November 2022 and no notes were taken or produced, the second respondent was in attendance. The meeting was to discuss the claimant. It was convened at short notice and attended by Andrea Campbell, who was taken aback by the second respondent's presence as he should not have been at the meeting given the subject matter. Andrea Campbell took contemporaneous notes.

179. Ken Gill chaired the meeting and informed the NEDS the claimant was being accused of gross misconduct via FTSU from three separate individuals who were not named. The FTSU concerns were unspecified although there were vague references to "leadership" and "behaviour" on the part of the claimant. When the FTSU's were discussed, Andrea Campbell described the NED's reactions; "a feeding frenzy – a highly charged if not panicked response from some of those present…particularly…a recent NED appointee, who had been conspicuous by her absence for most of the meetings that had taken place since her appointment..." The discussion concerned whether the claimant was a "fit and proper person" to hold public office, whether she should be reported to the GMC and that the claimant will be moving out of the Trust;" "this is what we discussed with the ICB and Region and this is what will happen." The NEDS were told the claimant would be seconded out of region, she would not come back and she would be required not to pursue any issue with the Trust" who could choose to pursue her by lodging a "not fit and proper person allegation" and/or reporting her to the GMC. There was a "deal" on the table, although the specifics were not disclosed. The Tribunal found Andrea Campbell was a credible witness as to what was said at the 3 November 2022, which fits precisely in the factual matrix before and after the meeting leading to the draft compromise agreement and suspension on the grounds of misconduct when the claimant refused to agree to drop her allegations against the second respondent. Alison Campbell's note that Ken Gill described the approach towards the claimant to be one of a "silk glove over a steel

hand" fell squarely into the factual matrix, and the Tribunal finds these words were said describing the consequences of a compromise agreement not being reached.

180. Andrea Campbell was upset by the meeting, and her contemporaneous notes record her feeling; "I need to resign…let it float off…breathe in, breathe out."

181. It is notable that despite accusations of gross misconduct at the 3 November 2022 meeting, a preliminary investigation into the FTSU had not taken place. Further, two of the FTSU was not to be considered gross misconduct according to the "taking stock" email sent on the same date or the compromise agreement. The claimant was not suspended until a month later the 2 December 2022, immediately prior to her returning to work.

182. Ros Fallon gave evidence that the second respondent attended the meeting due to an "admin error," evidence the Tribunal did not find to be credible. Had it been an admin error the second respondent could have left before the NED's discussed the claimant's exit, and so the Tribunal found. The second respondent was not asked to do so by either Ken Gill or Ros Fallon, and remained for the duration of it, and inputting into the negative picture given of the claimant. The second respondent stated that the claimant had pulled out of the mediation, and Ros Fallon did not put this right as she was aware from oral conversations and written exchanges that it was not a good use of time and public money for the claimant to attend a mediation when she was no longer going to be employed by the first respondent.

183. The second respondent also referred to the allegations the claimant had raised against him, stating they were not true, to which Andrea Campbell responded with words to the effect that she was concerned that the allegation had been made and not investigated.

184. It is notable that in the aftermath of the meeting Andrea Campbell received a text from Ken Gill about the point she raised. Ros Fallon and Ken Gill subsequently had a meeting with Andrea Campbell who was unhappy with the situation and told them in no uncertain terms of her feelings about what was happening. Ken Gill confirmed he had concerns over the second respondent, and it would be "pursued." There was no investigation, and nothing happened until the claimant's refusal to enter into the compromise Agreement.

185. The claimant in an email dated 7 November 2022 sent to Christopher Cutts, HR director of NHS England, expressed her gratitude for his agreement to facilitating discussions with the second respondent making it clear "the requirement that I must withdraw the **allegations of bullying, harassment and intimidation I made against the chairman is an absolute red line for me…If this means there can be no settlement agreement then so be it. The treatment to which I and others have been subjected by the chairman has been appalling**" [the Tribunal's emphasis]. To put into context, by the 7 November 2022 there had no attempt to investigate the allegations and the attempts to mediate had been "taken

off the table" when it was made clear to the claimant that she had no future with the respondent.

186. With reference to the FTSU concerns the claimant wrote to Christopher Cutts; "I am not prepared to agree that the Trust can investigate this after my departure (and expose myself to potential gross misconduct allegations as you intimated) when I have absolutely no idea what the allegations raised against me are…my recent experience of the Trust's treatment of me having raised serious concerns has destroyed all trust and confidence I ought to be able to have in my employer. The basis of my concern is why all of a sudden, after nearly 5 months of the FTSU concerns having been raised, the Trust now seeks to want to take some action. **I was made aware of this informally in a phone call from Ros Fallon on June 30…as of today I am still not aware of what the concerns are**" [the Tribunal's emphasis].

187. The Tribunal is aware that this FTSU concern related to maternity provision, a problem area for the CQC which the second respondent had details of in an envelope shown to the claimant which he refused to share with her, as recorded above. Months down the line it had still not been investigated. The claimant raised a valid criticism that "it is ironic that the Trust seeks to sweep under the carpet my serous concerns about the chairman which should also be considered under the FTSU Policy, as these concerns amount to the Trust's breach of a legal obligation to ensure the health and safety of its employees, but wishes to investigate a complaint about me (that I cannot imagine could be any more serious than the concerns I have raised given the total lack of inactivity to date to the concerns raised.)…I am astonished that the Trust has the temerity to threaten me with a formal investigation into concerns about my performance (a) knowing the pressure I have been under as a result of bullying behaviour by the chairman and (b) knowing this had a detrimental impact on my health so I had to take leave of absence and (c) not having raised any concerns with me prior to the informal discussion with Ros Fallon 2 weeks ago. **My track record prior to the chairman's appointment and my ability to work successfully and positively with past chairmen is a matter of record**…the handling of the FTSU leaving me of ignorance as to what I stand accused, **and the recent veiled threats that if I do not go quietly I would be subjected to formal capability procedures without telling me what it is I have supposedly failed on, are blatant acts of victimisation following the concerns I raised of bullying and harassment**" [the Tribunal's emphasis].

Settlement negotiations

188. Settlement negotiations continued. The Tribunal does not intend to record developments in any detail. The claimant was sent a draft compromise agreement on the 18 November 2022. Nicola Price in oral evidence on cross-examination denied that the claimant dropping her grievance against the second respondent was a condition of the compromise agreement, explaining that the agreement contained what she described as "boiler plate" clauses and there was always an

intention on behalf of the first respondent to investigate the allegations of the second respondent, even if a compromise agreement was reached with the claimant resigning. The Tribunal found Nicola Price did not give credible evidence on this point, and it was indeed a condition of the settlement, and always had been as far as the first and second respondent was concerned, that the claimant's grievance complaints against the second respondent would not proceed. Clause 15.2 provides "The Employer acknowledges that the **Employee has a view in relation to the version of events that she considers has occurred whilst she has been an employee of the Trust. The Employee agrees that any grievance or concerns of whatever sort, in relation to those version of events, or otherwise raised by her…are now withdrawn**…" [the Tribunal's emphasis]. On a straightforward interpretation of this clause, giving the words their clear ordinary meaning, it can only relate to the claimant's grievance against the second respondent and how her complaints were being handled by the first respondent.

189. The Compromise Agreement recorded "At the time of signing this Agreement the Trust **does not have information through the FTSU Policy, which would merit the commencement of any disciplinary process against the claimant**" [the Tribunal's emphasis].

190. After the meeting the claimant raised complaints outside the Trust, including to her MP, about the way she had been treated, and the negotiations broke down directly as a result of the respondent insisting on the claimant withdrawing her grievance complaints against the second respondent. Nicola Price's evidence that the first respondent always intended to proceed with investigating the claimant's grievance was not credible and unsupported by the contemporaneous documents underpinning the factual matrix, and at no point did she clarify this with the claimant either directly or through its solicitors during the negotiations. It would have been a relatively straightforward matter to amend clause 15.2 to reflect that the claimant's grievance would be investigated whether or not the compromise agreement was signed by her.

191. On the 15 November 2022 a seminar in Liverpool was attended by the claimant, second respondent and others.

192. On the 16 November 2022 Ros Fallon texted Ken Gill "It gets worse! I understand that S spoke "with another NED" yesterday evening and was informed we had another NED meeting a few weeks ago and the Chairman was present." Ken Gill responded "I can only assume it's the same NED who messaged you this morning Ros…If this is the case we requested confidentiality. That has been breached. It's simply unacceptable…I assume SG alerted you to this?" Ken Gill later wrote "I'm learning a considerable amount about the behaviour of the NHS" to which Ros Fallon responded, "We could both get a job with the United Nations after this!" with a laughing emoji. Ros Fallon and Ken Gill were aware that Andrea Campbell was the NED who told the claimant that the second respondent had attended the 3 November confidential meeting, and she did not think he should have been there. Andrea Campbell was one of the most experienced NED's, over

30 years' experience, with a health background in the NHS in contrast to the accountants on the board. It is uncontroversial that brought a balance to the Board, yet when her term came up for renew as a NED, she was not supported by the second respondent and ceased to be a NED on 31 March 2023. Ros Fallon and Ken Gill made no mention of the texts exchanged in their witness statements.

193. On 16 November 2022 the claimant initiated early conciliation Notification in respect of the First Claim with ACAS. At the very latest, from this date the first and second respondent should have secured all relevant documents and not deleted/disposed of them.

194. On the 17 November 2022 the claimant went on sick leave.

PD9: Claimant's solicitor's letter to Ros Fallon of 22 November 2022

195. The claimant's solicitors wrote to Ros Fallon on the 22 November 2022 stating the draft compromise agreement was a "written repetition of a demand that she should resign her position with the Trust; on terms that are wholly one-sided and completely unacceptable…it is nothing but the latest manifestation of a campaign of bullying, harassment, victimisation and discrimination that has been waged against her in recent months, with increasing ferocity since she indicated her intention to submit a grievance in respect of the bullying conduct of the Chair of the Trust…Our client is considering her options (and hereby expressly reserves her rights) in relation to…conduct by members of the Trust which is not only out with the Trust's policies and procedures, but is a repudiatory breach of express and implied terms of her contract of employment." The claimant's solicitor wrote, "The conduct of senior Trust managers and directors, particularly but not solely Mr Haythornthwaite and Ms Price, has created a situation where Professor Gilby harbours **serious fears for her own health and wellbeing if, in the course of discharging her contractual and statutory duties,** she is continuingly forced to attend meetings or be involved in oral discussions in which Mr Haythornthwaite, Ms Price, and other senior directors who have been displaying similar unacceptable behaviour, are participants" [the Tribunal's emphasis].

196. During this period the claimant's solicitors wrote to the first respondent confirming the claimant intended to return to work when her sick note expired on 2 December 2022.

PD10 Claimant's letter to the Lead Governor of 1 December 2022.

197. On the 1 December 2022 the claimant wrote to Peter Foxwell, the lead governor, asking the Council of Governors ("COG") to intervene including suspending the chair and/or NED Mick Guymer and expediting investigations into the NEDS and Ros Fallon who indicated "to me in a meeting on Friday 21 October

2022 to the effect that it had been decided (apparently by the chair himself) that it was "time to go" i.e. resign from my position as chief executive…the actions of the SID and others identified above, coming on top of an accumulation of other hostile actions directed towards me in recent months, fully entitle me to walk away…on the basis of constructive dismissal. I am prepared to explore alternative outcomes via mediation…" There was no reply or response to this letter.

198. By text on 24 November 2022 Ros Fallon asked Ken Gill "whether we should give Peter Folwell another briefing." The reference to briefing was plural, and yet in evidence on cross -examination Peter Folwell denied having anything to do with the situation. It is also notable that Ros Fallen could not recall having a meeting with Andrea Campbell, and yet there was a reference to this meeting in the text messages exchanged between Ken Gill and Ros Fallon during this period. The Tribunal understands that memories can fade and are not infallible, and there are over one million documents in this case. Nevertheless, the Tribunal would have expected Ros Fallon to have remembered she had exchanged text messages concerning Andrea Campbell breaching confidentiality about the second respondent attending a NED meeting chaired by Ken Gill, and the claimant as a result writing directly to Chris Cutts about the second respondent having meetings behind the claimant's back.

199. The settlement negotiations were unsuccessful due to the first respondent's insistence that, as a condition of settlement, the claimant's grievance/complaints about the second respondent were withdrawn. Had it not been for this condition as set out in the draft Compromise Agreement, the matter would have settled, and the claimant would not have returned to work. The claimant was due to return to work from sick leave. Ken Gill and Ros Fallon decided with the support of Nicola Price that the claimant would not be returning to work, instead she was suspended pending a disciplinary investigation for gross misconduct. It is notable in late November 2022 during the claimant's absence, that Nicola Price wrote a paper for the Renumeration and Nominations Committee regarding the proposed re-deployment of the claimant, and in that report she referred to "leadership deficiencies" and senior leaders raising concerns about the claimant's "ability to lead the organisation through these challenging times…through the Freedom to Speak Up process". Reference was also made to the Deloitte Review highlighting "that tensions exist between the CEO and the Trust Chair. **Whilst both the CEO and Chair agreed to a process of mediation the Trust was advised by the Deloitte Report that it should be considering succession planning…it was considered prudent to support the CEO into a new strategic role**…" [the Tribunal's emphasis]. The Tribunal notes Nicola Price misinterpreted the Deloitte Report, which did not suggest succession planning in relation to the claimant, it was a clear reference to the NED's. The Tribunal finds the first and second respondent were prepared to continue paying the claimant's substantial salary on secondment to another trust providing the claimant agreed to the secondment, which she did, and withdrawing her allegations against the first respondent, which she refused to do having made it clear that this was a "red line" she would not cross. The first respondent had still not investigated the claimant's bullying

allegations raised about the second respondent, despite the passage of time and the early indication from NHS England via Richard Barker, and complaints raised by Andrea Campbell about the mismanagement of the claimant's disclosures, which should have been investigated.

200. Ros Fallon in an email that included Ken Gill, who was working on the paper for the Renumeration and Nominations Committee, wrote "it doesn't describe the story of how we considered a disciplinary route, however as a discussion with ICB and indirectly with NHSE came to the conclusion that Susan's skills would be best used in a strategic role."

201. Paul Edwards on 21 November 2022 emailed a number of recipients including Ros Fallon, Ken Gill and Simon Holden as follows; "the nature of the concerns set out in the paper (**and I should point out that some of the list in the paper have been raised and not proven**). **If any relate to relationship to any individual…NED I would suggest the individual may be conflicted**" [the Tribunal's emphasis] which is an oblique reference to the second respondent. There is also a reference to a disclosure request under the SAR and how to protect documents generated from disclosure, for example, marking papers with "legal privilege." The correspondence exchange made it clear that the claimant was not expected to return, the appointment of an interim CEO was in process and the recipients should be careful with the documents they generate, marking them "legally privileged" to protect them from disclosure.

202. Ken Gill emailed recipients including Ros Fallon pointing out that "In terms of who should chair REMCOM and whether that is Ian needs clear guidance as to the locus of advice as the Chair of Trust will need careful handling if it is not him."

203. Hilda Gwilliams took over the role of acting CEO, Simon Holden, despite being the deputy CEO, was not offered the position.

<u>FTSU email Helen Ellis to Paul Jones forwarded to the second respondent.</u>

204. On the 30 November 2022 Helen Ellis, the Freedom To Speak Up Guardian wrote to Paul Jones in his capacity as NED asking if the claimant was "still the CEO" and why Simon Holden, the deputy CEO, was not acting up." She recorded that staff had approached her and "these are the words used to me:

1. There appears to be no transparency or honesty from the top as to the organisation's current position.
2. This is creating significant unrest within the workforce.
3. It is not helpful when someone's title changes with no clear rationale for it
4. No one understands what is going on, staff as despondent with the senior team.
5. Following CQC there is talk but no action visual on the ground.
6. The numbers of staff wanting to leave or are leaving the organisation continues to increase.

7. How does Hilda Gwilliams have time to be acting CEO when the nursing side of the business is in such a mess?
8. Susan Gilby's presence to staff within the organisation appears to have been minimal since the CQC report was published. I share these with you in confidence as I am unsure what response I may get from Hilda should I have raised it with her.

205. It is notable that Helen Ellis references the claimant's attendance being minimal from time of the published CEO report (and not the draft) which coincides with the claimant's sickness absence and sabbatical. It is an uncontroversial fact that as a direct result of the claimant sickness absence following the alleged bullying by the second respondent, her presence would be minimal.

206. Paul Jones referred the 30 November 2022 email to the second respondent the next day, and the second respondent emailed Nicola Price requesting "a chat about this please." This evidence undermined the position adopted by the key players in Project Countess that the second respondent was kept separate from the claimant's exit. The Tribunal finds it more likely than not the second respondent had an input throughout, both in the NED meetings and behind the scenes, not least, in the comprise agreement and clause to the effect that the claimant's complaints about him be withdrawn. This exchange of emails underlines the total lack of credibility of the first respondent's witnesses who consisted of Project Countess and the second respondent, reinforced by their failures to disclose all relevant documents, given the Tribunal is aware that they were communicating privately behind the scenes. Those communications have largely been destroyed and deleted and they are not set out in written statements. The conversation between the second respondent and Nicola Price has not been referred in their respective witness statements and nor are there any documents setting out what was discussed. The second respondent received the email on the 1 December 2022 and it cannot be a coincidence that by the 2 December 2022 the claimant was "excluded" which is another word for disciplinary suspension ("the suspension").

<u>Solicitor meeting notes pre-suspension 1 December 2022</u>

207. Prior to suspending the claimant, Ken Gill, Nicola Price and Ros Fallon took legal advice on 1 December 2022. The notes have been disclosed by the first respondent, and it reflects an awareness of a possible constructive unfair dismissal and whistleblowing claim, referring to more detail being required in the exclusion letter "decide what we are suspending for…request to clarify FTS. Satisfied she has blown the whistle. Because settlement have broken down now moved to suspension. **Write letter as to the judge**. Chairman had text and call from Raj…How do we deal with other allegations acknowledge need to do something – **need an email trail**. Need to disable communication…**Ian kept Peter informed right from the beginning…Peter now drafted a letter**. Need to be seen to respond – Trust would fund independent advice" which is a

reference to the first respondent funding independent advice for the second respondent [the Tribunal's emphasis]. The notes also reflect the possibility of a "medical suspension". Prior to this meeting Nicola Price made a number of notes, including a reference to "haemorrhaging staff."

208. The 1 December 2022 notes taken at the pre-suspension meeting reflect the following was discussed and the true state of affairs, which is that there was not enough evidence to exclude the claimant on conduct and there was no procedure by which exclusion could be on capability alone as so the Tribunal finds:

1. "Risks to suspension – have we enough ducks in a row. **Not enough evidence yet.**

2. W**hat do we need to gather evidence and exclude on conduct and capability**.

3. **Not about evidence – need to play our cards. Get the charge sheet ready raising safety concerns…risk Whistleblowing…**

4. **Brief the chair. Chair to speak to Raj**…

5. Prepare a paper for the NEDS.

6. Distil public interest point.

7. **Update chairman [ticked as actioned]**

8. **Agree process for suspension [ticked as actioned] …**

9. SG wrote to governor- chairman and KG. **Has no grounds to challenge chairman. Got his ears bent about CEO last week**.

10. **Policy vague on suspension**

11. **GMC reportable – not connected to medical practice concerns about conduct required GMC referral no need to refer herself** [the Tribunal's emphasis].

209. On the 2 December 2022 the claimant send a DSAR to the first respondent. The claimant was not provided with any of the documents, and it is uncontroversial that there was and remains an issue with disclosure on the

part of the respondents. Non-disclosure was a fiercely fought issue between the legal advisors culminating in application for specific discovery referred to above in relation to Regional Employment Judge Franey's findings and judgment.

The respondent's exclusion policy and suspending the claimant in a letter written by Nicola Price 2 December 2022

210. Nicola Price sent the claimant an exclusion letter dated 2 December 2022. Exclusion is the equivalent of a suspension on full pay. The respondent's Disciplinary Policy provides that exclusion "if possible, should be avoided, its imposition is regarded as a 'neutral act'.

211. Turning to the Exclusion Policy, Para 4.1 under the heading "Disciplinary Policy" exclusion can be used in three ways – the initial investigation, during a "formal investigation if the manager suspects that having the employee in work will hinder the investigation or if they are a risk to patients or staff or the service, and where there is no option to moving them to another work area. A number of questions should have been addressed before excluding the claimant, including:

212.1 "Could the employee's continued presence at work result in further potential risk to patients/service/ others;"

212.2 "have relationships at work broken down to such an extent that suspension is required, and

212.3 "will the continued presence of the employee hinder the conduct of an investigation, have we conducted a quick preliminary fact finding investigation to establish there is a prima facie evidence of alleged gross misconduct…"

212. The Tribunal finds that the first respondent did not address itself to the questions and, had it done so, it would have answered the questions in the negative as it could not have realistically concluded the claimant's presence at work resulted in a risk to the organisation. Relationships at work had broken down but this had nothing to do with the claimant, who from the outset had suggested mediation. She had raised the protected disclosure and the first respondent had done nothing about investigating the complaints, in the knowledge that a breakdown between the CEO and chair would be detrimental to the running of the hospital and choosing to exit the claimant and not the second respondent. This was in the minds of the key players in Project Countess, who were prepared to take the "risk" given the suspension took the claimant out of the organisation entirely, thus enabling the first respondent to prepare the groundwork recorded below, including the permanent deletion of her appraisals; evidence of her excellent past performance and the difficulties

the first respondent was in which could not be attributed to her and would take years to remedy.

213. One of the conditions of an exclusion was "they should not contact any member of staff connected with the matter which led to their exclusion, nor should they approach any other staff seeking information relevant to the case…request for such information if it is required to help the employee defend any allegation against them, should be made to the manager either by the employee or their representative…access to the Trust electronic accounts **may b**e suspended." The claimant's access to the first respondent's IT was stopped as soon as she was suspended, intentionally making it very difficult if not impossible, to prepare her defence by accessing emails and documents, at the same time as giving the first and second respondent time to permanently delete and destroy documents in an attempt to build up a different picture from the one that really existed, and so the Tribunal found.

214. Under the heading "Duration" an exclusion will be "for as short a period as possible and will normally be for a period of no more than 4 weeks, but allowing a sufficient time for a full investigation…" The Policy does not provide an exclusion for a 6-month notice period when the Trust does not want the employee physically working and having access to documents including emails, messages and personal files, including appraisals and so the Tribunal found. It is notable that the investigation referred to below was far from "full" for the reasons stated.

Exclusion letter 2 December 2022

D4 Did the Respondents exclude the Claimant from her work and her workplace via the exclusion letter of 2 December 2022 and via further letters dated 22 December 2022 and 24 January 2023, without due process having been followed and without there being any lawful basis for such exclusion?

D5 Did the Respondents direct the Claimant to have no contact with potential witnesses (including long-standing friends and acquaintances) and order her not to access her email account with the Trust, despite her remaining an employee of the Trust? It is alleged that this fettered her ability to defend herself against the threatened disciplinary proceedings and hobbled her ability to fully particularise her claims against the Respondents.

215. The Tribunal does not intend to record the contents of the letter as this is well-known to the parties. The suspension letter is signed by Nicola Price and included 14 unspecified allegations that could not amount to any act of gross misconduct carried out by the claimant in her personal capacity, and so the Tribunal found. The letter was concerned with a mixture of performance related

matters and the claimant as the CEO being ultimately responsible for the shortcomings in the first respondent. The Tribunal notes the exclusion letter appears to have adopted many of the complaints raised by Hilda Gwilliams in her interview as recorded in the Ibex Gale report above, which was not an investigation but an attempt to clarify what Hilda Gwilliams was unable to record in her FTSU, despite her role as director of nursing who then became acting CEO. The Tribunal had not set out the allegations in detail, and has found the following in respect of them:

216.1 Allegation 1 refers to the CQC inadequate rating known to the first and second respondent approximately 6-months previously with no action taken against the claimant. The first respondent accused the claimant of a "lack of adequate expedition and sustainability of the response under your Leadership" in respect of the 2019 CQC report and "current report last updated and published in late September 2022", ignoring the fact that the claimant had been out of the workplace in 2022 and the positive response to the steps taken as set out in the findings of facts above.

216.2 Allegation 2 refers to the Board not been provided by a robust plan. There were five accountants on the board and a financial plan had been produced and was being worked towards. The reference to the claimant as the "Accounting Officer" reflected the criticism of her at the 27 September 2022 meeting, which were unjustified according to Ros Fallon and in the Deloitte report it was made clear that one NED had gone too far by personalising it. The inclusion of this criticism in the suspension letter raises an inference that the 27 September 2022 meeting was a pre-agreed attack on the claimant, the first respondent being of the view that she was responsible for financial matters that were outside her control, and the criticism was yet another deflection when half-truth were used to justify the claimant's exit from her employment, the intention of Project Countess all along.

216.3 Allegation 3: The claimant was allegedly responsible for the respondent scoring 116 out of 120 in the UK staff satisfaction assessment, discounting the fact that the first respondent was in the middle of a serious murder case with whistleblowing implications, coming out of the Covid Pandemic with a high turnover of staff, a new board and a conflict between the CEO and a chair who was prepared to take out his irritation on matters outside the control of lower level employees, such as board room furniture , and when he was in a "bad mood." Deloitte described the Board as "dysfunctional", in factions and unbalanced in its make up with too many accountants. It is unsurprising that staff were unhappy, and the first respondent was aware the staff survey had very few criticisms of the claimant, and the paediatrician involved in Letby allegations were supportive of the claimant. The first respondent was also aware of all the claimant's excellent appraisals, where none of these allegations were made.

216.4 Allegation 4: there is a lack of timely escalations of risks known by you to the Board…There appears to be a failure to systematically and consistently report serious incidents to the Board and a failure to ensure that they are being adequately dealt with to prevent repetition and harm to patients. Mr Cheetham conceded allegation 4 is not relied on part way through the liability hearing, and the Tribunal notes that this was a FTSU made by Hilda Gwilliams and the first respondent sat on the FTSU for months until it was investigated. Allegation 4 never had any basis and the first respondent would have been aware of this at the time it took the decision to suspend, Ken Gill, Nicola Price and Ros Fallon intentionally using it to justify the suspension.

216.5 Allegation 5: With reference to the CQC report, under your leadership governance of the organisation is creating patient safety risks. Ward to Board reporting, for which you are responsible, is still not fit for purpose.

216.6 Allegation 6: Deloitte report highlights serious concerns as to your visibility, leadership and relations with the Trust and with outside stakeholders ignoring the fact that Deloitte repeatedly refer to the tensions in the chair and CEO relations. There is no reference to the fact that the claimant had raised a protected disclosure which had not been addressed in any way. It is notable that the Deloitte report actually referenced the NED internal and external engagement and not that of the claimant. The Tribunal finds incorrectly interpreting the Deloitte report to damage the claimant was intentional on the part of Project Countess, whose key players had in mind disciplinary action against the claimant and justifying this in future litigation, and so the Tribunal finds given the backdrop of party-to-party solicitors' litigious correspondence.

216.7 Allegation 7: the Deloitte report highlights failings in leadership and the need for a systematic report, without any reference to what these words actually meant in respect of the claimant, or which part of the Deloitte report was being relied on. This is unsurprising given the evidence before the Tribunal that the first respondent was still drafting the suspension letter and looking for items to include in it on the day the claimant was suspended. Those involved in Project Countess had various meetings and exchanged communications prior to the suspension, which included the second respondent's input, and yet it was still unable to provide any specific misconduct allegations against the claimant. The first respondent had not carried out a "quick preliminary fact-finding investigation to establish there is prima facie evidence of alleged gross misconduct" before writing the suspension letter and so the Tribunal finds.

216.8 Allegation 8 the claimant was suspended for "preparation for the Letby trial" has demonstrated ignoring the fact that the claimant had nothing to do with the failures leading to the Letby criminal investigation and trial, the

evidence before the Trial was that the claimant was a single point of contact for the police who required her to keep the investigation confidential and under lock and key, which she did. It is not logically possible for allegation 8 to amount to an act of gross misconduct, and raising this allegation points to the first and second respondent using any allegation, no matter how unmeritorious, to build up a sham case against the claimant, and so the Tribunal found who does not use the description "shame" lightly. It is notable that part way though this trial Mr Cheetham conceded allegation 8 was not relied on, and the Tribunal accepts Mr Segal's submission that this item was not sufficient to find a lawful suspension. There was no basis for Ken Gill, Nicola Price and Ros Fallon to conclude that this allegation had any traction as an act of misconduct or under performance and their mental processes were motivated by the protected disclosure when making it, and so the Tribunal found.

216.9 Allegation 9: "There is an endemic lack of collaborative leadership." The Tribunal repeats its observations above in relation to this unspecified open-ended complaint that could be interpreted in any way apart from a gross misconduct issue.

216.10 Allegation 10: "Your capability as Chief Executive to lead to improvement and gain sustained improvement." The Tribunal found it cannot be an allegation of gross misconduct. The key is in the word "capability" and the Tribunal repeats its observations above in connection with the intentions of Ken Gill, Nicola Price and Ros Fallon by including it.

216.11 Allegation 11: Governance issues at fault typified by the incorrect application of the waiver process. Ken Gill confirmed in relation to this allegation the MIAA report was relied upon, however, it became apparent on cross-examination that the MIAA report was published on 21 December 2022 after the date of the claimant's exclusion. Ken Gill also confirmed the waiver issue was around performance and not gross misconduct.

216.12 Allegation 12: a failure to ensure that key clinical and other policies are up to date. This allegation was withdrawn by Mr Cheetham, unsurprisingly given Ken Gill, Nicola Price and Ros Fallon would know the claimant was not responsible for keeping track of updates when this was the role of other executives, against the backdrop of all the claimant's other duties in a failing Trust, not least, a murder trial and loss of staff and public confidence.

216.13 Allegation13: "Your ability as Chief Executive to lead, develop and manage effectively the Executive director's group ("EDG ") particularly those in their first executive group positions." No particulars were given as to when and who was complaining about the claimant's performance and not gross misconduct.

216.14 Allegation 14: "A failure to build effective and consistent relationships with the unitary board and in particular the NED group such as to secure their confidence." Ken Gill, Nicola Price and Ros Fallon were aware of the observations set out in the Deloitte report about the shortcomings of the NEDS and the chair against a background of the claimant arranging workshops to develop the relationship. The truth of the matter, well known to the first and second respondent, was that the unitary board was severely undermined by the claimant raising disclosures about the second respondent's bullying behaviour. As evidenced in the Board Meeting held on the 27 September 2022, the Board was not performing well and was dysfunctional. Unsurprisingly, allegation 14 is also no longer relied on by the first respondent who was prepared to pay the claimant's salary of £225,000 for around 18 months with additional costs the total outlay was £0.5 million whilst she worked in another trust and had confirmed in the compromise agreement that the FTSU did not amount to disciplinary allegations. Had the first and second respondent genuinely believed the claimant could be guilty of gross misconduct the investigations would have started much earlier, for example, on receipt of the CQC draft report and FTSU and they would not have been prepared to put forward the claimant for secondment and payment of half a million pounds out of the respondent's funds given the statutory obligations and the dire financial situation of the first respondent, who had exceeded the budget by millions and this has remained the case to the date of this trial and no doubt beyond.

216. The first respondent made it clear that the list of allegations was not "exhaustive" and yet in the substantial amount of correspondence which followed between the parties, not once did the second respondent clarify the allegations in any detail so that they made sense and amount to gross misconduct if proven. On a straightforward reading of the inadequate suspension letter, there is no hint of gross misconduct, and had gross misconduct been a real issue the first and second respondent would have included the detail to justify the suspension and investigation well before the decision was made to suspend and so the Tribunal finds.

217. The suspension letter made it clear that "…in context of the significant challenges which the Trust is facing at this time. The concerns identified above have a significant detrimental effect on our confidence in your leadership…**it is necessary that you remain off Trust premises…you must not…contact the Trust or anyone involved as an officer or employee of the Trust or who is likely to be involved in the case. Attempts to discuss this matter with any of your colleagues will be taken very seriously and may result in formal disciplinary action to be taken**" [the Tribunal's emphasis]. The claimant's access to her work email account, phone and documents, including the personnel file locked in her office which included appraisals, were no longer available to her, and a number of these documents were destroyed and/or lost and/or never recovered by IT and this resulted in strongly worded

correspondence from the claimant's solicitors and the Judgment of REJ Franey referenced above.

D13 Did the Respondents cause jeopardy to the Claimant's professional reputation by (i) contacting the GMC (allegedly wholly inappropriately) to enquire as to whether they wished to initiate their own action against her.

218. In the penultimate paragraph of the suspension letter Nicola Price wrote "**the Trust has taken advice from the GMC who has suggested you may wish to consider a self-referral. At this time the Trust has not made a referral to the GMC, although it shall continue to review that position as appropriate**" [the Tribunal's emphasis]. It is clear from the wording that the first respondent had contacted the GMC to inquire whether they wished to initiate action against her and the Tribunal finds contact had been made, despite the first and second respondent having no basis on which to suggest the claimant could be guilty of gross misconduct in her medical capacity or as CEO. The 1 December 2022 notes taken at the pre-suspension meeting reflect the GMC referral had been discussed at the pre-meeting. Nicola Price was aware that the GMC had advised that there was no need for the claimant to refer herself to the GMC.

219. The claimant perceived the reference to the first respondent having taken advice from the GMC, suggesting she self-referred and the second respondent reviewing the GMC situation, as a threat. The claimant was a medical practitioner working in a non-medical role and a referral to the GMC was not appropriate. Had one been made (which the first respondent did not do) this could have had serious consequences on the claimant's ability to work as a consultant. The claimant took the reference to the GMC as an act of aggression and was upset by it. It brought into question her professionalism after years of successfully building up her medical reputation. The Tribunal finds, as a matter of fact, that there was no basis for the first respondent to make contact with the GMC regarding the claimant, no basis for it suggesting a self-referral and no basis for it to threaten to review the position. In short, inserting this paragraph in the suspension letter was a veiled threat to the claimant aimed at stopping her in her tracks because the first and second respondent knew litigation was a foregone conclusion. It is a factor in this case that at some point during the claimant's suspension the first respondent reported to the GMC that the claimant was no longer employed by it, which was subsequently rectified.

220. Contrary to the first respondent's indication that suspension was a neutral act, the claimant understandably did not perceive this to be so and believed that her career had been damaged by the first respondent's actions, which she also attributed to the second respondent, damage from which she would not recover given the rumours emanating from employees in the Trust that she would not be returning. The first respondent had arranged for an acting

CEO to replace the claimant on a fixed term contract which was not disclosed in the bundle. The evidence given on behalf of the first respondent to the effect that the fixed term contract included a break clause was not supported by contemporaneous evidence.

221. Mr Cheetham confirmed allegations 4, 8, 12 and 14 were not being relied on as a basis for the suspension. Mr Segal submits this to mean that first respondent accepts these items of conduct are not sufficient to establish a lawful suspension. The Tribunal agrees, taking into account the mental processes of the main players in Project Countess, inferences drawn from the factual matrix and the irretrievable damage to disclosable contemporaneous records, that the insertion of the withdrawn allegations was indicative of ulterior motive on the part of Ken Gill, Nicola Price, Ros Fallon and the second respondent to hide the reality. There were no acts of misconduct on the part of the claimant and the real reason was the protected disclosures and protection of the second respondent against the consequences of them being made. The remaining allegations were vague and did not give rise to allegations of misconduct.

<u>The claimant's resignation 5 December 2022</u>

222. On 5 December 2022 the claimant resigned by letter giving 6 months' notice to the first respondent. The resignation letter confirmed that it was "Notice of Unfair Constructive Dismissal" and alleged the first respondent had breached the implied relationship of trust and confidence culminating in the unlawful exclusion. It set out the claimant's concerns about the second respondent's behaviour, referring to the solicitors' letter dated 25 November 2022, her willingness to enter into mediation from 22 August 2022 and Ros Fallon two days before the mediation telling the claimant she had to enter into a settlement agreement or leave the Trust. The claimant confirmed she was willing to continue performing her duties and explore "mediated solutions...providing her health and safety was protected against the second respondent."

223. On reading the 5 December 2022 resignation letter, Ken Gill in a text message wrote to Ros Fallon "I'm troubled and need categorical assurance the exclusion was lawful; I did raise this matter in detail on Friday."

224. Following the claimant's resignation on 5 December 2022 a meeting took place between the second respondent, Nicola Price, Ken Gill, Paul Edwards and two others. Some notes were taken by Ros Fallon. There is a reference in the handwritten notes of Ros Fallon to "Governors need to be told something different face to face with Peter Folwell internal meetings not provided… **FTSU needs to be investigated**…**still need to investigate her conduct**." The second respondent had against the name "IH" [a reference to the second

respondent] written the words "falling backwards into the trap. Need jointly to agree form of words…stand up the right team." At the top of the note a private email address was set out.

225. After the claimant's resignation and the 5 December 2022 meeting, the first and second respondents continued to prepare for litigation and the correspondence reflects this, including the stance taken by the claimant that she should be allowed to return to her duties in the 6-month notice period. The claimant's request was refused on the basis that there had been an irretrievable breakdown in the employment relationship that prevented the claimant from returning. The first respondent was correct to take this view, and so the Tribunal found. There was no way the claimant could have returned to work without a total reorganisation of the Board and the suspension of the second respondent pending investigation and/or resolving the factions that had developed between the NED's. In her witness statement the claimant acknowledges that the unlawful suspension resulted in the first respondent "eliminating any possibility of my ever being able to return to perform" the role, and the Tribunal agreed. In addition, the claimant was by now in litigation. It evident from the contemporaneous notes that the first respondent had concerns about the risk it was facing in the litigation, and it was not prepared for the claimant to work out her notice, nor have access to documents when she was not carrying any of the CEO duties but preparing for the litigation against them. The first respondent did not consider it appropriate to put the claimant on garden leave, which her solicitors had requested in March 2022, and instead proceeded down the route of instructing investigators to prepare reports dealing with whether the claimant had committed acts of gross misconduct and/or was unperforming, in addition to finally arranging for the investigation into the allegations of bullying and harassment raised against the second respondent. These reports were prepared with this litigation in mind, and so the Tribunal finds.

226. In the aftermath of the claimant's resignation, the claimant with this litigation in mind, was not provided with full access to the documents held by the first and second respondent, despite numerous requests including a SAR. It is uncontroversial that during the claimant's notice period and this litigation, at some stage documents from the H drive, mobile phones held privately and as part of employment, the email folders and personal file had been emptied and deleted. These were documents the claimant required in order to build her defence against the allegations, and it is apparent that those investigating her conduct and the allegations of bullying made against the second respondent did not have access to a number of the contemporaneous documents and records, for example, the claimant's appraisals which contrary to Mr Cheetham's submissions, were found by the Tribunal to be important documents because they formed a context, not only to the first respondent's historical failings that could not be attributed to any underperformance on the part of the claimant, but also to the reports about the claimant's excellent performance in turning around the first respondent and attempting to put in place long term measures that would take years to have effect. The claimant's

performance cannot have been understood without taking the historical context into account.

227. On the 20 December 2022 the first extension of exclusion took place.

228. On the 21 December 2022 the final MIAA Review of Tender Waivers was issued. The MIAA review in its key findings identified examples of non-compliance with the Trust's financial framework and as a result weaknesses, which were set out. There was one reference to the claimant signing off a waiver retrospectively for an invoice to be paid based on specialist expertise provided by Lodestone Communications. Reference was made to a neonatal investigation and 5 tender waivers. The claimant had approved three of the five waivers. MIAA recognised the first respondent regularly used waivers and "they should only be completed where there is a justifiable rationale and a full audit trail." A review of the recent Audit Committee papers confirmed that two tender waiver reports had been submitted in 2020/2021 and 2021/2022, and an interim SFI Procurement Interim Waiver Report reported to the audit committee on 19 July 2022 highlighted that there was an improvement. The responsible officer was the head of procurement contracting.

229. On the 21 December 2022 the first version of Terms of Reference for (i) Investigation into Dr Gilby's "Performance Competency and Behaviour"; and (ii) Investigation regarding "Allegations of Bullying and Harassment" was produced by the first respondent. The Tribunal has not set out the extensive party-to-party correspondence on the thorny issue of terms of reference. It is uncontroversial the investigations did not start until 2023 and Ken Gill was the commissioning manager.

D8 Did the Respondents continue to exclude the Claimant from her work and her workplace, without due process having been followed, and without there being any lawful basis for such exclusion? The Claimant alleges that, particularly in light of the appointment of an interim new CEO, it became unrealistic to imagine that she could return to work and credibly discharge the role of CEO for the remaining period of her notice.

D9 Did the Respondents continue to deny the Claimant access to her e-mails and other materials relevant to her claims against the Respondents?

D11 Did the Respondents instigate disciplinary procedures against the Claimant which were (a) incipient and/or (b) inappropriate? The Claimant alleges that the Respondents should not have appointed Mr Gill as the Commissioning Manager, given his allegedly central role in the decision to dismiss her or to procure her resignation and his allegedly similarly central role in the decision to exclude her.

D12 Did the Respondents continue to insist on prohibiting or restricting the Claimant's ability to speak to Trust personnel or other potential witnesses in

connection with her claims (or the allegations that have been made against her)?

230. In January 2023 the second extension of exclusion took place.

231. On the 25 January 2023 Revised Terms of Reference for Bullying & Harassment Investigation were issued.

ET proceedings issues – claim 1

232. On the 6 February 2023 the ET1 in the First Claim was filed.

233. On the 7 February 2023 the GMC emailed the first respondent regarding the claimant's revalidation. Lesley Spruce, medical appraisal and revalidation manager had informed the GMC the claimant was no longer employed by the first respondent and the claimant was removed from the first respondent's GMC connect account. Lesley Spruce understood the claimant had left the Trust and this was "common knowledge." Lesley Spruce had made a mistake, and the Tribunal accepted it was genuine with no causal connections to the claimant's protected disclosures. The claimant contacted the GMC, and her connection was restored.

D15 Did the First Respondent extend the Claimant's suspension on 16 February 2023, 17 March 2023, 14 April 2023 and 11 May 2023? The Claimant relies independently on both of these factors as causing her detriment: (i) the decision to extend her suspension on each occasion and (ii) the fact that each extension was in breach of the First Respondent's Disciplinary Policy

234. On 16 February 2023 second extension of exclusion took place.

235. On 14 March 2024 Pam Williams, NED, took over from Ros Fallon as commissioning manager of the bullying and harassment claim. She dealt with Simon Bond of Ibex Gale and prepared an initial draft report some 6 months later. In her written statement Pam Williams described the problems she had with the process, the claimant and her solicitors throughout requiring copies of documents, and she took the view that if there were other pieces of relevant documentary evidence of the claimant's allegations, they would have already been provided or located.

236. On the 17 March 2023the third extension of exclusion took place.

237. On the 21 March 2023 the ET3 in the first claim was filed.

238. On the 6 April 2023 the claimant commenced High Court proceedings seeking injunctive relief against the first respondent.

239. On the 14 April 2023 the fourth extension of exclusion took place.

240. On 5 May 2023 HHJ Cawson KC dismissed the claimant's applications for interim injunctive relief.

241. On the 11 May 2023 the fifth extension of exclusion took place, which continued until the expiry of the claimant's contractual notice on 5 June 2023. During the entire period of the suspension the claimant, despite undertaking not to destroy documents, was not provided with full access to her Trust documents and emails despite strongly worded correspondence passing between the parties, which the Tribunal does not intend to repeat. It is undisputed the claimant was not given access to her hard copy appraisal records and the documents saved on the claimant's H Drive were doubly deleted, never to be recovered.

242. **On 5 June 2023** there occurred the expiry of the claimant's contractual notice and therefore the termination of her employment at the first respondent.

Ibex Gale Report 20 June 2023 in to the two FTSU complaints commissioned by Ken Gill

243. Following the claimant's resignation, Ibex Gale produced a report dated 20 June 2023 dealing with the complaints made in October 2022 from the director of nursing, Hilda Gwilliams (who became acting CEO) and the medical director referred to as the two FTSU complaints referenced above. Ibex Gale were instructed "**to clarify those complaints and provide the commissioning manager with insight as to whether those complaints should proceed to separate investigation, and if so, under which Trust policy**" [the Tribunal's emphasis]. Ken Gill was the commissioning manager and his objective was to see if the claimant was a "fit and proper person" under regulation 5 of the Health and Social Care Act 2008 in the event of her requesting a reference, which she never did. The nature of the concerns was such that Ken Gill believed he was the only person who could have acted as commissioning manager in the Trust and he was not prepared to allow an external commissioning manager to take responsibility. The report itself confusingly cited Paul Jones, lead NED for Freedom to Speak Up, as commissioning manager.

244. The ambit of the Ibex Gale report was clear. "**Mismanagement was outside the scope** of the preliminary report…I **regard my instruction under this preliminary investigation to be limited in scope and not to extend to investigating the substance of the concerns raised…in this investigation, unusually**, I am not required to makes findings of primary facts, rather I am asked to provide greater clarity in relation to concerns under investigation in

order to inform the Case Manager as to the best process to take the concerns process."

245. In essence, the 20 June 2023 Ibex Gale report prepared by Jason Prosser is a document reflecting how the director of nursing and medical director put their complaints against the clamant, which includes going back to 2019 CQC inspection report. The newly appointed medical director complaint relates to the first executive director's group meeting he had when the claimant returned after a sickness absence, the friction in board meetings, and lack of visibility, describing "a real palatable lack of leadership…Susan was working from home more than she was working in the hospital…we were in a terrible state…the blame just doesn't sit with one individual…I'm not saying the chair was without blame" referencing the first respondent's financial situation.

246. The Ibex Gale report ends "**the issue of whether there has been in fact been mismanagement and whether that mismanagement is serious are substantive matters that fall outside the scope of this preliminary report**" [the Tribunal's emphasis].

247. The 20 June 2023 Ibex Gale report bought to an end the prospect of any investigation into the two FTSU's raised by Hilda Gwilliams and the medical director. It is difficult for the Tribunal to comprehend how the Ibex Gale report in the form it took came about, given that it was not aimed at investigating the FTSU allegations, only clarifying them, which one would expect the medical director and director of nursing would be capable of doing. In short, the only conclusion that can be drawn by the Tribunal, despite suggestions to the contrary by Ken Gill, is that there was no intention to investigate the FTSU complaints made by Hilda Gwilliams and the medical director, which suggest they were not serious allegations, otherwise they would have been properly investigated given the seniority of the complainants. The first respondent withdrawing a number of the allegations set out in the suspension letter reinforces the Tribunal's findings in this regard. The Tribunal finds that the unusual instructions to Ibex Gale, who provided the report at a cost to the first respondent, reflects Ken Gill's mental processes. Ken Gill could not make out a gross misconduct allegation and/or support a finding that the claimant was not a fit and proper person based on the two FTSU complaints as originally filed by Hilda Gwilliams and the medical director, and those involved in Project Countess were aware of this. The only way forward was to commission professional consultants to look into the FTSU allegations to see if they were serious enough to merit separate investigation, with a view to implicating the claimant and defending the litigation.

248. On the 7 July 2023 the claimant entered into ACAS early conciliation and EC Notification was issued.

249. On the 10 August 2023 the ET1 in second claim was filed.

250. On 18 August 2023 Lucy Letby was convicted.

251. On the **13 September 2023** the ET3 in the second claim was filed.

Ibex Gale investigation into the claimant's allegations against the second respondent

252. Two investigators were involved in investigating the claimant's allegations brought against the second respondent, Darren Newman followed by Simon Bond as a result of Darren Newman making public information about the investigation.

253. In June 2023 of Ibex Gale commenced the investigation into the concerns raised by the claimant under the Bullying and Harassment Policy. Ros Fallon commissioned the report in late January 2023, withdrew as commissioning manager in June 2023 (following objection by the claimant's solicitors) and was replaced by Pam Williams, NED. There is no reference to Darren Newman or Simon Bond being provided with any relevant documents, for example, the earlier appraisals referenced by the Tribunal above. Simon Bond mentioned the appraisal completed by the second respondent prior to the claimant making the allegations against him.

254. Ten employees were interviewed, seven for the respondent and three for the claimant, being herself, Andrea Campbell and person A (Claire Raggett who attended this liability hearing under a witness order). The claimant criticises the number of witnesses as she wanted to call other employees, which Simon Bond refused. It is notable that conflicting evidence was given to Ibex Gale, as it has been at this liability hearing, for example, Rebeca Findley denied she had heard the second respondent raising his voice and banging the table on the 18 July 2022 meeting. The Ibex Gale final report recounted that Rebecca Findley and an anonymous person A (Claire Raggett) "described difficult meetings with IH which both left them upset." IH is the second respondent and at this liability hearing the first respondent denied that employees had been upset by him, despite the contents of the Ibex Gale report.

255. Pam Williams was aware the claimant and her solicitors were seeking copies of documents including a missing "dossier" and she took the view by October 2023 that "if there were other pieces of relevant documentary evidence of the claimant's allegations, they would have already been provided or located." After the 19 October 2023 Weightmans located additional documents. We are not told what the missing documents consisted of, and the Tribunal infers that they cannot have been the documents subject to the specific discovery application and Regional Employment Judge Franey's finding that the first and second respondent had deleted documents and were guilty of unreasonable conduct. It must follow that Pam Williams and Simon Bond were not provided with a number of relevant documents, not least the appraisals. Pam Williams failed to take into account the fact that documents were missing, when she concluded the Ibex Gale report was "well-structed" and "evidence

based" ignoring the fact that bullying and harassment often takes place behind closed doors with no direct evidence of it.

256. Simon Bond concluded the "claimant's belief that she had been bullied by IH and other NED's had arisen from a number of factors: The very difficult circumstances that the Trust has found itself in recent times including the Lucy Letby trial, a worsening financial position and unfavourable CQC report…the undoubted pressures on the claimant and second respondent as a result, different styles of working and focus, different styles, robust and challenging questions, the failure to work collaboratively, and disagreement over the need for external support. SG was in favour of mediation, IH less enthusiastic, but ultimately agreed to it. A scheduled meeting mediation was called but later cancelled at SG's request….A question from G during the 27 September meeting went too far in personalising the issue of finance., I found insufficient evidence to indicate the NEDS in general (or IH in particular) 'crossed the line' from legitimate and robust questioning to bullying…there is little or no objective evidence presented which supported SG's allegation…"

Ibex Gale investigation into the claimant's alleged gross misconduct

257. Ken Gill, in the capacity of commissioning manager, instructed Sarah Dobson of Ibex Gale, having taken the view that excluding the claimant was a neutral act and there was no conflict of interest or bias that precluded him from acting as commissioning manager. Ken Gill's assessment was incorrect. As recorded above, the suspension was far from a neutral act, he was conflicted and biased against the claimant, and so the Tribunal found. Ken Gill's intention was to control the investigation. He was concerned that the first respondent may not have acted legally wen suspending the claimant and controlling the investigation would increase the likelihood of Project Countess achieving the outcome sought, which was having the claimant found guilty of gross misconduct and not a fit and proper person.

258. The Tribunal was not taken to the letter of instruction which appears not to have been disclosed, however, Sarah Dobson's written statement confirmed she started the investigation in February 2023.

Ibex Gale's concerns about disclosure

259. On the 14 September 2023 Sarah Dobson wrote to Ken Gill about the claimant's concerns regarding disclosure. The Tribunal cannot find the 14 September 2023 email in the bundle. There is however an email sent on 3 October 2023 from Ken Gill to Sarah Dobson, in which reference is made to the email informing Sarah Dobson that solicitors will deal with documents.

260. In a separate undated hard copy letter Ken Gill dealt with Sarah Dobson's concerns as follows; "**In your email of 14 September 2023 you asked about Dr Gilby and access to emails and documentation**…**we are preparing through the Trust's solicitors' copies of the appraisal**

documentation from Dr Gilby's network folders. **Trust solicitors will send that to you shortly and I note that you have considered the relevance other documents which Dr Gilby's solicitors have requested and let Arch Law of your position on the relevance of each document that they requested**…**I have decided the investigation that the investigation should now be concluded**. I am mindful of the fact that Dr Gilby is no longer employed by the Trust. **The most important question for the Trust is whether or not there is prima facie evidence of significant concerns in relation to Dr Gilby's conduct or capability which will need to be considered by future employers, (NHS otherwise) or Dr Gilby's regulator (GMC)** a**lthough Dr Gilby has not provided you with her account in response to the concerns you have completed the other interviews and reviewed the relevant documentation**. **The Trust should therefore be in a position to assess the evidence at its highest and to determine whether there is prima facie evidence of significant concerns and determine the appropriate next steps**. **I am mindful that the Trust does not have the means to conduct a contested hearing to resolve any disputed allegations…if there is prima facie evidence of serious concerns…bearing in mind the stage which your investigation has reached**, I would be grateful if you could provide me…with your analysis of evidence to date, together with the associated evidence, **so that I may begin my review of that material**…**can you please prepare a report addressing the question as to whether there is prima facia evidence to support any of the concerns which were considered as part of your investigation and, in particular, setting out your view on whether any concerns in respect on which there is prima facie evidence, which if established call Professor Gilby's status as a fit and proper person into question**…"

261. The Tribunal finds the first respondent had accessed a number of documents, including **"appraisal documentation from Dr Gilby's network folders**" [the Tribunal's emphasis.

262. Ken Gill was clearly aware of the existence of appraisal documentation; copies were not provided to the claimant's solicitors and documents including appraisals were permanently deleted so they could not be included in the trial bundle. Ken Gill, as commissioning manager, clearly had access to all relevant information which he could chose to share or not, as in the case of Ibex Gale. Ken Gill's area of control did not stop there. He also chose to bring the investigation to a close deciding that he will be the one to review the evidence to date to see if the incomplete evidence brought into question whether the claimant was a fit and proper person in the knowledge that the claimant was yet to be interviewed. Ken Gill's behaviour fits squarely in the factual matrix flowing from the first protected disclosure and the machinations aimed at destroying the claimant's professional standing and career. As of 14 September 2023, Ken Gill still had in mind reporting the claimant to the GMC and it is notable that once Ibex Gale requested access to emails and documentation including

appraisals, and before the claimant was interviewed, the investigation was stopped part way through.

263. Ken Gill was provided by Ibex Gale with a folder containing the draft report, the interviews and documents on 12 October 2023, and a brief report as he had requested was promised. However, according to the witness statement of Sarah Dobson, she was instructed by Ken Gill on the 1 November 2022 not to prepare the brief report and had no further involvement in the case. The Tribunal was not taken to any document recording Ken Gill's instructions to Ibex Gale. It is satisfied that, having requested Ibex Gale to prepare a report addressing the question as to whether there existed prima facia evidence to support any of the concerns in Sarah Dobson's investigation and her view on whether there was prima facie evidence calling the claimant's status as a fit and proper person into question, Ken Gill subsequently decided that an independent investigation was not necessary.

264. Ken Gill, having decided with his colleagues in Project Countess and the second respondent that the claimant could not remain in the Trust, and having been party to the decision to exclude, took it upon himself to stop an investigation into the claimant's suspected misconduct and performance and whether she was a proper and fit person. Ken Gill made no mention of this in his written witness statement, was silent about his communications with Ibex Gale concerning disclosure and documents and kept hidden from the Tribunal the fact that he was going to be the decision maker in determining whether the claimant was a fit and proper person should she require a statutory reference. In his written statement Ken Gill confirmed that when looking into the issues of the claimant's performance, competency and behaviour, his role as "commissioning manager was to ensure that there was a process in place that enabled an independent investigator to be appointed, to gather and review evidence…this was a significant cost to the Trust…an enormous amount of money. We were getting nowhere. I therefore decided to close the investigation." Ken Gill blamed the claimant's approach via her solicitors for his decision, describing how it "undermined my core ethical integrity." Ken Gill did not make it known to the Tribunal that he had decided to take it upon himself to make a decision on whether the claimant was a fit and proper person. He was silent on the fact that the Ibex Gale investigation was "abandoned" before the agreed date of the claimant's first interview.

Law and conclusion

265. The legal principles have been largely agreed with the parties, and the Tribunal is grateful to Mr Segal for setting out the law and Mr Cheetham's helpful contribution, which has to some limited extent been duplicated below. The Tribunal has taken into account the legal principles referred to by both when it arrived at its findings of fact and conclusion.

Protected Disclosures

Reasonable belief

266. Under 43B(1) a " qualifying disclosure " means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—

(a)that a criminal offence has been committed, is being committed or is likely to be committed,

(b)that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,

(c)that a miscarriage of justice has occurred, is occurring or is likely to occur,

(d)that the health or safety of any individual has been, is being or is likely to be endangered,

(e)that the environment has been, is being or is likely to be damaged, or

(f)that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.

267. The ET must consider subjectively whether the worker actually believed the information tended to show a relevant failure and whether, objectively (in the circumstances of the worker making a disclosure), such a belief was reasonable: see *Babula v Waltham Forest College* [2007] ICR 1026 per Wall LJ at [81]. In Dr Gilby's case the Tribunal found the test was met, Dr Gilby believed the second respondent's bullying of herself (and others) showed the relevant failures under section 43B(1) because it affected health and safety of employees and was a breach of a legal obligation.

268. In relation to the "public interest" provision, the ET should ask whether (a) the worker actually believed the disclosure was in the public interest (the subjective element) and (b) whether it was reasonable for the worker to have this belief (the objective element) (Underhill LJ at [27] of *Chesterton Global Limited v Nurmohamed* [2018] ICR 731, following *Babula*). The Tribunal found Dr Gilby has a reasonable belief that the disclosure was in the public interest; she was the CEO being bullied by the Chair to whom she was answerable. The Chair also bullied others against a background of whistleblowing and alleged detriments, for example, the paediatricians involved in the Letby investigation who supported the claimant.

The public interest

269. In *Chesterton* Underhill LJ said at [37]: "***where the disclosure relates to a breach of the worker's own contract of employment (or some other matter under section 43B(1) where the interest in question is personal in character), there may nevertheless be features of the case that make it reasonable to regard disclosure as being in the public interest as well as in the personal interest of the worker****… The question is one to be answered by the tribunal on a consideration of all the circumstances of the particular case, but Mr Laddie's fourfold classification of relevant factors which I have reproduced at para 34 above may be a useful tool.*

270. The relevant factors at [34] of *Chesterton* are: (a) the numbers in the group whose interests the disclosure served; (b) the nature of the interests affected and the extent to which they are affected (c) the nature of the wrongdoing disclosed; and (d) the identity of the alleged wrongdoer.

271. Mr Cheetham made reference to a subsequent case, in which *Chesterton* was considered in some detail, the EAT suggested that, "the essential distinction is between disclosures which serve the private or personal interest of the worker making the disclosure and those that serve a wider interest" (*Dobbie v Felton* [2021] IRLR 679, at §27(7)). Taking into account the relevant factors, the Tribunal concluded that even if the claimant's disclosure was limited to her personal contract of employment, the fact that a CEO was raising allegations of bullying against the Chair is of public interest. It is a factor in this case that the first respondent was being damaged by the breakdown in relationship between the second respondent and claimant, which the latter attempted to repair by suggesting mediation very early on rejected by the second respondent and never put in place by the first respondent. The breakdown according to the draft Compromise Agreement would cost the first respondent (and taxpayer) a substantial amount of money against a background of financial difficulties.

<u>Substance of disclosures</u>

272. A protected disclosure must be (in the worker's reasonable belief) a "disclosure of information". The question of whether a specific statement is a disclosure of information which tends to show one of the matters set out at section 43B(1)(a) to (f) of the ERA is a matter of evaluative judgment for the Tribunal ([36] in *Kilraine v London Borough of Wandsworth* [2018] ICR 1850). Mr Cheetham reminded the Tribunal that even if the worker subjectively believes that to be the case, there is also an objective element to that test.

273. The statute requires that the statement must have "sufficient factual content and specificity" such as is capable of tending to show a relevant failure within the meaning of section 43B(1)(a) to (f) ([35] of *Kilraine*).

274. This does not mean that statements phrased as allegations cannot constitute a protected disclosure ([30] of *Kilraine*). In the earlier case of *Cavendish Munro Professional Risk Management Limited v Geduld* [2010] ICR 325 the EAT had suggested there was a distinction between "information" (falling within the ambit of a qualifying disclosure) and an "allegation" (falling outside the ambit of a qualifying disclosure) ([20] of *Cavendish*). In *Kilraine* the Court of Appeal made it clear that "a disclosure of information" and "an allegation" are not mutually exclusive concepts ([33] to [34] of *Kilraine*). The focus for the Tribunal is whether a particular statement (whether phrased as an allegation or not) meets the statutory definition ([31] of *Kilraine*). Mr Segal and Mr Cheetham agreed that there was no requirement for the claimant to use the term whistleblowing and/or protected disclosure or raise the complaint about the second respondent under the respondent's FTSU procedure. Mr Segal is correct in his submission that the first and second respondent understood only too well the claimant had made a protected disclosure as recorded in the findings of facts above, when legal advice was sought by both on 3 August 2022 about their exposure to a claim. Mr Segal was correct that the respondents were advised on the day the claimant was suspended that there would be a Tribunal whistleblowing claim and yet the claimant had not previously used the words whistleblowing or protected disclosures.

275. The context of any statement is highly relevant to determining whether (on the facts) that particular statement contains the "sufficient factual context and specificity". Sales LJ gave the following example at [41] of *Kilraine*: *If, to adapt the example given in para [24] in the Cavendish Munro case, the worker brings his manager down to a particular ward in a hospital, gestures to sharps left lying around and says 'You are not complying with Health and Safety requirements', the statement would derive force from the context in which it was made and taken in combination with that context would constitute a qualifying disclosure.*

276. Both counsel agreed that the practical reality is that if the worker subjectively believes that the information s/he discloses does tend to show one of the relevant failures set out at section 43B(1)(a) to (f) of the ERA) and if the statement or disclosure he makes has a sufficient factual content that it is capable of tending to show that listed matter, it is likely that his belief will be a reasonable belief (see [36] of *Kilraine*). The Tribunal found Dr Gilby had in mind when she made the disclosure her concerns about the second respondent's behaviour on the organisation's culture which was already being questioned publicly as part of the Letby investigation and whistleblowing causing reputational damage, her own health and the health of others. As it transpires, the claimant was correct in her assessment of the second respondent's behaviour and its impact on the first respondent, although this is not the test. It is undisputed the second respondent was and remains the most senior individual within the first respondent, and had power over others including junior employees, which he used, for example, when the board room furniture was not delivered on time, when the claimant complained about his behaviour, when

Ros Fallon unsuccessfully tried to discuss the claimant's complaints with him, and when the first respondent attempted to set up independent mediation. He also used his power and influence to persuade colleagues to set up Project Countess with the sole aim of exiting the claimant to protect his position as chair.

Recipient of protected disclosure

277. A disclosure is a qualifying disclosure within the meaning of Part IVA of the ERA if it is made to the worker's employer (section 43C). The respondent accepts that all of the disclosures made save for PD3 were made to the claimant's employer (paragraph 4 of the List of Issues [C/178]).

278. PD3 was made to Richard Barker of NHS England (which is not claimant's employer). This disclosure qualifies for protection under section 43G. In particular and under section 43G(2)(c) of the ERA, the claimant had previously made a disclosure of substantially the same information to her employer (see PD1 and PD2). Richard Barker, a credible witness, confirmed the claimant had said she was not happy with the second respondent's behaviour and he had banged his fists on the table.

279. In the alternative with reference to PD3, the disclosure qualifies for protection under section 43H of the ERA. The Tribunal accepts the claimant believed the information disclosed and the allegations contained in it was substantially true (section 43H(1)(b) of the ERA); she did not make the disclosure for personal gain (section 43H(1)(c)); the relevant failure was of an exceptionally serious nature (section 43H(1)(d)). In all the circumstances of the case, the Tribunal accepts Mr Segal's submission that it was reasonable for the claimant to make the disclosure to Mr Barker in his position as region director for the North West in NHS England (the identity of the person to whom the matter is disclosed is relevant: see section 43H(2) of the ERA).

Section 43B(1)(b)

280. The claimant asserts that her disclosures qualified for protection because she had the reasonable belief that they tended to show:

1.1. (43B(1)(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/or

1.2. (43B(1)(d)) that the health and safety of any individual has been, is being or is likely to be endangered.

281. Counsel both agree there is little or no authority on the 'health and safety being endangered' provision. There has been case law relating to the 'legal obligation' provision. A disclosure is protected under section 43B(1)(b) if the person making the disclosure reasonably believes the disclosure is in the public

interest and that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject. The worker's identification of that legal obligation need not be detailed or precise, but a worker must believe the conduct is unlawful as opposed to simply immoral (also [46] *Eiger Securities LLP v Korshunova* [2017] ICR 561). The Tribunal was satisfied, taking into account the claimant's mental processes, that she satisfied the test in relation to the health and safety provision, and legal obligation.

282. The question whether a worker reasonably believes that a relevant failure tends to show a breach of a legal obligation, will depend in part on the level of precision in the worker's mind as to the nature and source of the legal obligation. The requisite level of precision in the worker's mind (as to the nature and source of the legal obligation) will depend on the extent to which the failure is an "obvious" breach of a legal obligation

Detriment claims (section 47B of the ERA)

Causation

283. Under 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*".

284. The question is whether the claimant has been subjected to a detriment *"done of the ground that the worker has made a protected disclosure."* The authoritative statement of the effect of this causation test is whether the protected disclosure **materially influenced (in the sense of being a more than trivial influence) the employer's treatment of the worker: [45] of** *Fecitt v NHS Manchester [2012] ICR 372, CA*. [the Tribunal's emphasis].This contrasts with the test under section 103A of the ERA, which requires that the protected disclosure be the reason, or principal reason, for dismissing the complainant (see again [45] of *Fecitt*). In *Fecitt* Elias LJ giving the main speech, Davis and Mummery LJJ concurring, held that the correct test, in relation to a detriment claim, is whether the protected disclosure materially influenced, **in the sense of being more than a trivial influence upon, the employer's treatment of the whistle-blower**, **as opposed to the test being the one that would apply in the unfair dismissal context, of whether the protected disclosure was the sole or principal reason for the dismissal**. See in particular paragraph 45. Further on, the Court of Appeal considered the question of whether such a claim must succeed if the treatment complained of was found to be "related to" the disclosure, or whether it was possible on appropriate facts for the Tribunal to distinguish, for example, between the fact of the disclosure and the manner in which it was made. The Court of Appeal accepted that in an appropriate case such a distinction should be drawn, although caution was required. This was the context and sense of its remarks at paragraph 51.

285. There is a *"less restrictive"* causation test for the purposes of a section 47B claim: see e.g. [62(2)] of *Timis v Osipov* [2019] ICR 655 (this Court of Appeal judgment is referred to below to as *Osipov-CA* to distinguish it from the EAT judgment also cited below). Mr Cheetham agrees there is helpful guidance on the burden of proof and the drawing of inferences in *International Petroleum Limited v Osipov* UKEAT/0058/17/DA. Mrs Justice Simler considered the burden of proof provisions at [115] (emphasis added):

> *115. […] the proper approach to inference drawing and the burden of proof in a s.47B ERA 1996 case can be summarised as follows:*
>
> *(a) the burden of proof lies on a claimant to show that a ground or reason (that is more than trivial) for detrimental treatment to which he or she is subjected is a protected disclosure he or she made.*
>
> *(b)* ***By virtue of s.48(2) ERA 1996, the employer (or other respondent) must be prepared to show why the detrimental treatment was done. If they do not do so inferences may be drawn against them****: see London Borough of Harrow v. Knight at para 20.*
>
> *(c) However, as with inferences drawn in any discrimination case, inferences drawn by tribunals in protected disclosure cases must be justified by the facts as found.*

286. As can be seen from the findings of facts the Tribunal has drawn adverse inferences in the case of Dr Gilby, not least as a result of the respondents' unreasonable conduct when it came to discovery and disclosure and secondly, on consideration of all the evidence in this case resulting in the factual matrix, particularly the first respondent advancing a case of gross misconduct on the part of the claimant without establishing any supporting objectively verifiable evidence. Elias LJ said at [51] in *Fecitt* (emphasis added):

> *…I entirely accept that where the whistleblower is subject to a detriment without being at fault in any way, tribunals will need to look with a critical — indeed sceptical — eye to see whether the innocent explanation given by the employer for the adverse treatment is indeed the genuine explanation.* ***The detrimental treatment of an innocent whistleblower necessarily provides a strong prima facie case that the action has been taken because of the protected disclosure and it cries out for an explanation from the employer****.*

Constructive dismissal

287. Dismissal under the ERA includes constructive dismissal (section 95(1)(c) of the ERA). It is trite law that the ET must be satisfied that (a) there was a fundamental breach of contract on the part of the employer (b) the employer's breach caused the employee to resign in the sense that it is a reason for the resignation, even if not the sole or main reasons, and (c) the employee did not delay too long before resigning thus affirming the contract. Section 95(1)(c) of the

Employment Rights Act 1996, as amended ("the ERA") states that there is a dismissal when an employee terminated his or her contract, with or without notice, in circumstances that he or she is entitled to terminate it without notice by reason of the employer's conduct.

288. The Tribunal's starting point was the test laid down by the Court of Appeal in Western Excavating (ECC) Ltd –v- Sharp [1978] ICR 221 whether the employer was guilty of conduct which is a repudiatory/significant breach going to the root of the contract. The issues to be decided upon in this respect were: Was there a fundamental breach on the part of the employer? Did the claimant terminate the contract by resigning? Did the claimant prove that the effective cause of her resignation was the respondent's fundamental breach of contract? In other words, what was the effective cause of the employee's resignation? Did the claimant delay and therefore act in such a way that is inconsistent with an intention to treat the contract as an end? The Court of Appeal "made it clear that questions of constructive dismissal should be determined according to the terms of the contractual relationship and not in accordance with a test of 'reasonable conduct by the employer."

The implied term of trust and confidence

289. There is an implied term in every contract of employment to the effect that the employer will not without reasonable and proper cause, conduct itself in a manner likely to destroy, or seriously damage the relationship of confidence and trust between employer and employee. In order to constitute a breach of the implied term it is not necessary for the employee to show that the employer intended any repudiation of the contract: the Tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it; or put another way, the vital question is whether the impact of the employer's conduct on the employee was such that, viewed objectively, the employee could properly conclude that the employers were repudiating the contract. The correct test of repudiatory conduct by an employer is set out in the Court of Appeal judgment in the case of Paul Buckland V Bournemouth University Higher Education Corporation [2010] EWCA Civ 121, and this is an objective test.

290. The House of Lords in Malik v Bank of Credit; Mahmud v Bank of Credit [1997] UKHL 23, held that the breach occurs when the proscribed conduct takes place. The employee may take the conduct as a repudiatory breach, entitling him to leave without notice. If the employee stays, the extent to which staying would be a waiver of the breach depends on the circumstances. Lord Steyn referred to the implied obligation covering a diversity of situations in which "a balance has to be stuck between an employer's interests in managing his business as he sees fit, and the employee's interest in not being unfairly and improperly exploited," and to the impact of the employer's conduct being objectively assessed to ascertain whether objectively considered, it is likely to destroy or cause serious damage to

the relationship between employer and employee. If it is found to be so, then a breach of the implied obligation may arise.

291. A course of conduct can cumulatively amount to a fundamental breach of contract entitling the employee to resign and claim constructive dismissal: Lewis v Motorworld Garages Limited [1986] ICR 157 CA. Glidewell LJ said at para 169F "The breach of this implied obligation of trust and confidence may consist of a series of actions on the part of the employer which cumulatively amount to a breach of the term, although each individual incident may not do so. In particular, in such a case the last action of the employer which leads to the employee leaving need not itself be a breach of contract; the question is, does the cumulative series of acts taken e together amount to a breach of the implied term?"

292. The employee must leave in response to a breach committed by the employer. This breach may be an actual breach or an anticipatory breach … it is not enough that the employee expects the employer to repudiate the contract and leaves in anticipation. In Ms McGarry-Gribben's case the proscribed conduct took place on the 1 and 9 July 2019 and yet the claimant remained in employment until her resignation on 20 November 2019, over 4-months later during which she worked a number of shifts that incorporated agreed adjustments before she was absent sick until resignation.

293. Weston Excavating cited above; The employee "must make up his mind soon after the conduct of which he complains; for if he continues for any length of time without leaving, he will lose his right to treat himself as discharged". It is undisputed that the Dr Gilby resigned immediately she was suspended and Mr Segal has referred to case law dealing with suspension accepted by Mr Cheetham.

Suspension

294. It has been well-established law for some 30 years now that employers should not suspend unless necessary, and then for only the shortest necessary period (see e.g. *East Berkshire Health Authority v Matadeen* [1992] ICR 723 EAT). Indeed the ACAS Code provides (para 8) that in cases where a period of suspension is considered necessary the period should be *"as brief as possible [and] should be kept under review"*.

295. Where, as here, an employer characterises suspension as a 'neutral act', that might not be the case, particularly where the employee is a professional person: *Mezey v South West London & St George's Mental Health NHS Trust* [2007] EWCA Civ 106, [2007] IRLR 244 per Sedley LJ *[Counsel for the employer] accepts that it is perfectly permissible to restrain a dismissal, but he contends that a suspension is a qualitatively different affair. It is,* ***he submits in the skeleton argument: "a neutral act preserving the employment relationship".I venture***

to disagree, at least in relation to the employment of a qualified professional in a function which is as much a vocation as a job. Suspension changes the status quo from work to no work, and it inevitably casts a shadow over the employee's competence. *Of course this does not mean that it cannot be done, but it is not a neutral act."*

296. If the suspension is precipitate or otherwise unjustified, it will likely amount to a breach of the implied term of trust and confidence giving rise to a claim of constructive unfair dismissal: *Gogay v Hertfordshire County Council* [2000] IRLR 703,CA. The Tribunal agreed with Mr Segal that Dr Gilby's suspension was unjustified for the reasons set out above, and gave rise to a breach of the implied term of trust and confidence. It accepted the claimant's evidence that the suspension damaged her reputation and there were rumours that she had left the employment of the first respondent against a background of alleged gross misconduct allegations that had no merit whatsoever.

297. Mr Segal in written and oral submissions referred to *the Court of Appeal decision in Crawford v Suffolk Mental Health Partnership NHS Trust [2012] EWCA Civ 138, [2012] IRLR 402, and* Elias LJ's postscript to his judgment in that case:

This case raises a matter which causes me some concern. It appears to be the almost automatic response of many employers to allegations of this kind to ***suspend the employees concerned, and to forbid them from contacting anyone, as soon as a complaint is made, and quite irrespective of the likelihood of the complaint being established. As Lady Justice Hale, as she was, pointed out in Gogay …, even where there is evidence supporting an investigation, that does not mean that suspension is automatically justified. It should not be a knee jerk reaction, and it will be a breach of the duty of trust and confidence towards the employee if it is.*** *I appreciate that suspension is often said to be in the employee's best interests; but many employees would question that, and in my view they would often be right to do so. They will frequently feel belittled and demoralised by the total exclusion from work and the enforced removal from their work colleagues, many of whom will be friends. This can be psychologically very damaging. Even if they are subsequently cleared of the charges, the suspicions are likely to linger, not least I suspect because the suspension appears to add credence to them. It would be an interesting piece of social research to discover to what extent those conducting disciplinary hearings subconsciously start from the assumption that the employee suspended in this way is guilty and look for evidence to confirm it. It was partly to correct that danger that the courts have imposed an obligation on the employers to ensure that they focus as much on evidence which exculpates the employee as on that which inculpates him"* [the Tribunal's emphasis].

Automatically unfair dismissal (section 103A of the ERA)

298. In a constructive dismissal case, the reason for the dismissal is the reason for which the employer breached the contract of employment: see (on the general principle for the purposes of constructive dismissal) *Berriman v Delabole Slate Limited* [1985] ICR 546 at [550H] to [551B].

299. The employee's protected disclosures must be the "reason (or, if more than one) the principal reason" for the conduct which caused the employee to resign (see the wording of section 103A of the ERA).

Conclusion: final amended list of issues that relate to the Tribunal's findings of facts above which the Tribunal does not intend to reproduce.

Part One: Protected disclosures (Employment Rights Act 1996 section 48)

300. With reference to the first issue, namely, did the claimant make one or more qualifying disclosures, the Tribunal found that she did. This is a case in which the claimant made disclosures about matters concerning the second respondent that affected her and others in her workplace.

301. The Tribunal found the claimant made disclosures on these occasions:

301.1 PD1 telephone call with Ms Fallon on 8 April 2022. Mr Cheetham submitted that PD1 fell short of being a disclosure because all the claimant was doing was outlining the second respondent's behavior to her and "possibly" towards Mr Edwards. The Tribunal found the claimant provided enough factual content to come within section 43B(1) when she used words to the effect that she found the second respondent difficult to work with, he undermined her, his behaviour intimidated her and others, including Paul Edwards, it was having an effect on her and something needed to be done about it. As indicated above, the Tribunal agreed with Mr Cheetham's submissions that the claimant did not raise specifically any patient concerns and/or the effect of the second respondent's behaviour on the organisation and the problems it had encountered with whistleblowing in the past. However, she believed Ros Fallon would appreciate the seriousness of the situation and the effect on the running of the first respondent, given the ongoing Letby investigation and CQC reports.

301.2 PD2 meeting with Ms Fallon on 11 May 2022. Mr Cheetham in closing submissions made reference to the Ros Fallon's evidence that the claimant had made a number of critical comments about the second respondent but not about his bullying behavior and patient safety. It was a private matter between them and there was no public interest. Mr Cheetham relied on the comments being made by the claimant during a conversation about feedback for the second respondent's

appraisal, submitting the claimant did not have public interest in mind. The Tribunal on the balance of probabilities accepted the claimant's evidence that the second respondent's treatment of other employees was raised as recorded above, accepting she did not raise patient safety at this meeting but had in mind the repercussions on the first respondent and held a reasonable belief that her disclosures were in the public interest taking into account the claimant's mental processes at the time when she communicated information about the second respondent that fell under section 43B(1)(b) and 43B(1)(d). Mr Segal is correct in his observation that the claimant was not cross-examined on the evidence she had given as to her state of mind, and the Tribunal accepts as credible the claimant's evidence that she was concerned with her own well-being and the well-being of others, the impact on the first respondent's culture which was being questioned at the time in terms of whistleblowing and bullying, and the long-term effect on patients. There are numerous references in the claimant's appraisals to the importance she gave to patient care, and it is plausible the claimant was concerned about the wider workforce and impact on patient care bearing in mind the claimant's knowledge about the "bullying culture" and its effect on pediatricians in the neo-natal unit referenced by the Tribunal above in its findings of facts. Objectively assessed in accordance with the tests set out in *Chesterton Global* (above) the claimant had in mind the fact that the second respondent was the most serious individual in the first respondent, to whom she was answerable, and a bullying culture cascading from the top of the first respondent's management team would cause harm to individuals and ultimately could adversely affect patient care. The Tribunal's findings in this regard are repeated in respect of all the disclosures relied on below.

301.3 PD3 telephone call with Mr Barker of 28 July 2022. Mr Cheetham submitted there was lack of sufficient factual content, and Mr Barker only remembered the claimant telling him she was having a difficult time with the second respondent. Mr Barker's evidence is dealt with above. The Tribunal found the claimant had provided information about Mr Barker banging his fists on the table and unhappiness with the second respondent's behavior as described to the Ros Fallon previously. The disclosure came within section 43G(2)(c) on the basis that the claimant had made a disclosure of substantially the same information to Ros Fallon previously.

301.4 PD4 email to Ms Price 29 July 2022; Mr Cheetham submitted the 29 July 2022 email provided no information about what the alleged behaviour was and nothing that would take the allegation outside the claimant's relationship with the second respondent. The Tribunal has recorded above the relevant part of the email, and whilst it is arguable the communication may lack sufficient content to come within section 43B(1) as submitted by Mr Cheetham, the claimant made it clear that it involved the "chairman" bullying and harassing her and that Ros Fallon had been made aware of the claimant's concerns and intention to lodge the grievance. The 29 July 2022 email cannot be read in a vacuum, and had Ms Price spoken with Ros Fallon she would have discovered additional factual content and public interest. If the Tribunal's analysis of the 29 July 2022 email is incorrect, and it is little more than informing the first respondent the claimant intends to raise a

grievance, the Tribunal was satisfied that the causal link to the detriments relied on by the claimant was PD1 and PD2 culminating in the 18 July one-to-one meeting relied on as detriment 1.

301.5 PD5 email to Ms. Price of 23 August 2022. Mr Cheetham submitted that this email was "squarely about IH's treatment of SG and personal to the two of them" evidenced by the claimant agreeing to resolve the dispute through mediation. The Tribunal has dealt with the 23 August 2022 email above. It accepted the claimant had taken a view that the proposed mediation was the means by which she could get back to work and deal with the "ongoing challenges" facing the first respondent including the Letby imminent trial, and her agreement to this course of action did not undermine the fact the claimant was raising serious issues about the second respondent's behaviour in the public interest.

301.6 PD7 statement sent to Mr Edwards and Ms Fallon on 13 September 2022 (and the covering email to this statement). Mr Cheetham submits that this was a personal matter between the claimant and second respondent. The Tribunal has dealt with this email above, satisfied the claimant had made disclosures about the second respondent in the 7-page statement, updated on the 29 September 2022 referenced in PD8 below. The Tribunal agreed with Mr Segal that the statements gave specific examples of bullying behaviour, the 18 July 2022 meeting and what occurred at a private board meeting on 27 September 2022, where claimant said there had been a pre-planned and orchestrated attack on her by the second respondent. The Tribunal repeats its findings above.

301.7 PD8 statement sent to Ms Price on 29 September 2022 – see above.

301.8 PD9 Claimant's solicitor's letter to Ros Fallon of 22 November 2022. Mr Cheetham's observation that the claimant's solicitor's letter of 22 November 222 did not include any reference to whistleblowing or whistleblower is correct. The Tribunal also found it surprising, however, there is no requirement for the claimant to use such terminology to bring a whistleblowing claim. The claimant's solicitor's letter draws together the complaints made by the claimant in earlier disclosures against a background of the parties preparing for litigation, and the content is referred to by the Tribunal above. In essence, the claimant is repeating the earlier disclosures she had made.

301.9 PD10 letter to the Lead Governor of 1 December 2022. Mr Cheetham submitted the letter did not convey facts but made broad allegations and did not amount to a protected disclosure. The Tribunal on balance accepted the submission put forward by Mr Segal that the claimant was communicating information about "*bullying, harassment…other unacceptable conduct"* and potentially serious mismanagement at the most senior levels in the first respondent, in addition to the claimant being told it was time to go as found by the Tribunal above.

302 With reference to the second issue, namely, did she believe the disclosures of information were made in the public interest and, if so, was that belief reasonable, the Tribunal found the claimant did and the belief was reasonable.

303 With reference to the third issue, namely, did she believe the information disclosed tended to show one or both of the following and, if so, was that belief reasonable, the Tribunal found that the claimant believed the first and second respondent (i) had failed, was failing or was likely to fail to comply with any legal obligation; and (ii) the health or safety of any individual had been, was being or was likely to be endangered. This belief was reasonable.

304 With reference to the fourth issue, namely, if the Claimant did make one or more qualifying disclosures, were those qualifying disclosures protected, the Tribunal found that they were. The Respondents accept that the alleged disclosures were made to the Claimant's employer, save PD3. The Tribunal agrees. PD3 was made to the regulator NHS England and no issue was raised by the respondents concerning this, and the Tribunal was satisfied the claimant has met the legal tests.

Part Two: Detriments (Employment Rights Act 1996 section 48)

305 With reference to the fifth issue, namely did the Respondents do and/or are they continuing to do the following things, the Tribunal with reference to the factual matrix it found, as recorded above, which the Tribunal does not intend to repeat, that they did as follows:

<u>The First Claim (as listed at paragraphs 172 and 174 of the Grounds of Complaint)</u>

306 D1 The second respondent at a meeting with the claimant on 18 July 2022 rejected her proposal of mediation, focused on what he considered was "wrong" with the claimant and acted in a confrontational and aggressive manner, as particularised at paragraphs 59 to 60 of the Grounds of Complaint.

307 D2 The claimant was subjected to concerted, aggressive and unjustified verbal attacks at the private board meeting on 27 September 2022, and the attacks were not 'shut down' by the second respondent when he could have and should have done so. The Tribunal found on the balance of probabilities the second respondent, Mick Guymer and Ken Gill had agreed before the meeting that the claimant would be personally criticized and held accountable for the first respondent's financial position and steps taken to remedy it, and she was described as the "accountable officer."

308 D3 Ros Fallon told the claimant on 22 October 2022 that it was "time for her to go", and that either she should do a deal or a "process" would be started.

The second claimant, Ken Gill, Nicola Price and Ros Fallon who formed "Project Countess" made the decision and it is more likely than not that it was made at the behest of the second respondent.

309 D4 The respondents excluded the claimant from her work and her workplace via the exclusion letter of 2 December 2022 and via further letters dated 22 December 2022 and 24 January 2023, without due process having been followed and without there being any lawful basis for such exclusion. The decision was made by the individuals involved in Project Countess, the second claimant, Ken Gill, Nicola Price and Ros Fallon. The Tribunal finds, following confirmation given on behalf of the respondents, that the only concerns the first respondent had, on the basis of which it suspended the claimant, were those set out in the letter of suspension and the Tribunal found this continued to be the case until the effective date of termination when the contractual notice came to an end, throughout which the claimant was suspended.

310 D5 The first respondent directed the claimant to have no contact with potential witnesses (including long-standing friends and acquaintances) and ordered her not to access her email account with the Trust, despite her remaining an employee of the Trust. This fettered her ability to defend herself against the threatened disciplinary proceedings and hobbled her ability to fully particularise her claims against the respondents. It also enabled the first and second respondent together with Ken Gill and Nicola Price to ensure that key documents never came to light, for example, the destruction of the claimant's appraisals, which on a common-sense reading, would raise question marks over the suspension and disciplinary/performance allegations against the factual background of the substantial difficulties facing the first respondent at the time.

311 D8 The first respondent continued to exclude the claimant from her work and her workplace, without due process having been followed, and without there being any lawful basis for such exclusion as recorded by the Tribunal above. The claimant alleges that, particularly in light of the appointment of an interim new CEO, it became unrealistic to imagine that she could return to work and credibly discharge the role of CEO for the remaining period of her notice. The Tribunal agrees, however, it became apparent that the claimant could not return to work for the first respondent in any capacity as soon as she was suspended due to the complete breakdown in her relationship with the first respondent and the NEDs directly caused by the first respondent's mismanagement of the protected disclosure and the failure on the part of Project Countess to investigate the serious allegation of bullying raised against the chair.

312 D9 The first respondent continued to deny the claimant access to her e-mails and other materials relevant to her claims against the respondents, including the appraisals.

313 D11 The first respondent instigated disciplinary procedures against the claimant which were inappropriate and aimed at undermining and damaging her reputation with the NEDs (reflected in the factual matrix above) with a view to secure her exit from the first respondent, either via a compromise agreement, resignation or dismissal on the grounds of performance and/or misconduct. The Tribunal agrees the first respondent should not have appointed Ken Gill as the Commissioning Manager, given his central role in the decision to dismiss her or to procure her resignation and when she refused to resign, in the decision to exclude her. The part played by Ken Gill is key, and has been set out in the factual matrix above in detail.

314 D12 The first respondent continued to insist on prohibiting or restricting the claimant's ability to speak to Trust personnel or other potential witnesses in connection with her claims (or the allegations that have been made against her) from suspension through to the effective date of termination.

315 D13 The respondents caused jeopardy to the claimant's professional reputation by (i) inappropriately contacting the GMC to enquire as to whether they wished to initiate their own action against her.

The Second Claim (as listed at paragraphs 5 to 27 of the Grounds of Complaint)

316 D15 The first respondent extended the claimant's suspension on 16 February 2023, 17 March 2023, 14 April 2023 and 11 May 2023 for the same reasons as her original suspension in December. On each occasion the suspensions were in breach of the first Respondent's Disciplinary Policy.

317 The first respondent failed to :

(a) explain to the claimant what "concerns" they had in relation to her "performance, competence and behaviour" in anywhere near sufficient detail for her to be able to understand the case she might have to meet, to respond appropriately, and thereby to satisfy the first respondent (or any duly appointed investigator) that it was neither necessary nor appropriate for her exclusion to be continued; and/or that it was neither necessary or appropriate for "disciplinary" measures (including exclusion) to be taken against her. It is notable that a number of those "concerns" were no longer relied on, and were never properly investigated either before or after the claimant's resignation.

(b) approach or investigate their professed "concerns" as to the claimant's "performance, competency and behaviour" on the basis that (even if substantiated) there were capability or conduct matters, and not "gross misconduct" matters such as might justify her exclusion or continued exclusion.

(c) enable the claimant to retrieve (from the laptop or mobile phone

supplied by the first respondent or otherwise, and without risk of deletions, or further deletions) emails, documents and/or data that might have removed, or materially alleviated, the respondents' professed "concerns".

(d) enable or permit the provision to the claimant of evidence relevant to the respondents' professed "concerns" that might have been provided by other employees of the first respondent including the documents made available to Ken Gill referenced in his exchange with the independent investigators Ibex Gale and the appraisals requested which never came to light.

(e) disclose to the claimant the correspondence or other documentation, that might have given rise to the Respondents' professed "concerns"; and/or that might have given rise to disciplinary allegations.

318 D17 The first respondent failed to consider alternatives to the continuation of the claimant's exclusion as set out at paragraph 8 of the Grounds of Complaint, such as garden leave. However, the Tribunal concluded that realistically there were no alternatives once the decision was made that the claimant should go, either through a resignation and Compromise Agreement or dismissal, by which time the claimant's position and reputation had been damaged within the organisation, particularly the NEDs.

Access to material (paragraphs 9 to 13 of the Grounds of Complaint)

319 D18 The first respondent via Project Countess ensured that the claimant was deprived of access to emails, documents and data that should have been accessible to her via the laptop supplied to her by the first respondent and her mobile telephone throughout the claimant's exclusion, albeit under some form of IT supervision as the claimant was not required to carry out her duties and therefore did not require access for work that she was not required to carry out. Being deprived of access came as a natural progression to the suspension and remaining home on full pay, available for work but not being required to carry out any.

320 D19 The first respondent continued to prohibit the Claimant from interacting with other Trust personnel in connection with her bullying and harassment complaints, throughout the Claimant's exclusion.

321 D21 The first respondent deleted relevant data (particularly, WhatsApp messages and emails); or caused such data to be deleted or rendered inaccessible to the claimant - whether via the laptop computer and mobile telephone supplied to her in connection with her CEO position. It is more likely

than not the second respondent through the auspices of Mr Gill was also involved in this process,

The investigation of the Claimant's bullying and harassment complaint against the Second Respondent and others (paragraphs 14 to 18 of the Grounds of Complaint)

322 D22 The first respondent appointed Ros Fallon as the Commissioning Manager for the bullying and harassment investigation (and subsequently maintained that she would remain the Commissioning Manager) notwithstanding that the claimant alleges Ms Fallon was not a suitable person to carry out this role for the reasons set out in paragraph 14 of the Grounds of Complaint.

323 D25 The first respondent unreasonably delayed the appointment of a suitably qualified and independent third-party investigator to investigate the conduct of the second respondent and recommend appropriate responsive action.

324 D28 The first respondent appointed Ken Gill as Commissioning Manager for the investigation and/or failed to replace Mr Gill (in circumstances in which the claimant alleges Mr Gill is unsuitable for the role as alleged in paragraph 19 of the Grounds of Complaint). Ken Gill was biased towards the second respondent and his attitude towards the investigation, including the investigators request for a copy of the claimant's appraisals, as recorded in the findings of facts, underlines his unsuitability.

Causation

325 With reference to the sixth issue, if so, was any of the above done on the ground that she made a protected disclosure, the Tribunal found there was a causal link between the protected disclosures, particularly, PD1 and PD2. Mr Cheetham is correct in his submission that the time when the protected disclosure was made will be very important in determining the causal effect of that protected disclosure. The Tribunal was satisfied, on the balance of probabilities, that the disclosures made to Ros Fallon on the 8 April 2022 and 11 May 2022 materially influenced the second respondent's behaviour at the meeting of 18 July 2022 (D1) and the history which followed, taking into account the mental processes of Ken Gill, Ros Fallon, and Nicola Price.

326 The parties are in agreement that the legal test is whether the protected disclosure materially (in the sense of more than trivially) influenced the first and second respondent's treatment of the claimant. In order to decide whether there was a detriment is on the ground that the claimant made a protected disclosure, an analysis of the mental processes (conscious or unconscious) of the relevant decision makers is required. It is not sufficient to demonstrate that "*but for*" the

disclosure, the employer's act or omission would not have taken place. The Tribunal has carried out this exercise recorded in its findings of facts above, and was satisfied that the actions taken by the second respondent and the first respondent via Ken Gill, Ros Fallon and Nicola Price were materially influenced by the claimant's protected disclosures and their aim to secure her exit against protecting the second respondent in post, evidenced by a host of actions which resulted in the claimant's resignation after she refused to resign and enter into a compromise agreement requiring her to drop her complaints against the second respondent.

327 Mr Segal submitted that it was the claimant's primary case that the second respondent together with Ken Gill, Ros Fallon and Nicola Price together contrived the claimant's removal from the first respondent because (or least in significant part because) she had made protected disclosures in relation to the second respondent's conduct. As can be seen from the Tribunal's findings of facts, the evidence pointed in this direction and undermined the position adopted by the first and second respondent that the second respondent was removed from decision making in relation to the claimant following submission of the grievance. Project Countess was central to the claimant being told by Ros Fallon that unless she left her employment a formal disciplinary process would be followed and the exclusion letter set out 14 listed items. Mr Segal reminded the Tribunal that when explaining their reasons for exclusion, the two decision-makers gave this evidence in cross-examination: Ken Gill accepted that the contents of the exclusion letter related only to *"performance"* concerns; Ros Fallon said that the 14 listed items related to C's *"capability as CEO"* and yet at the time the claimant was suspended pending investigation into misconduct.

328 The Tribunal found the exclusion of the claimant was not a neutral act but directly aimed at engineering her dismissal and ensuring she did not return to work from sick leave in the meantime, which would give her the ability to access all documents and emails necessary to build her defence. The decision to exclude was made by Ken Gill, Nicola Price and Ros Fallon and this formed part of the plan formulated under Project Countess. The exclusion was causally linked to the protected disclosures and their strenuous avoidance of any investigation into them with a view to protecting the second respondent's position who remained in situ and had not been investigated, despite incidents that should have caused questions to have been asked, for example, the second respondent's behaviour towards Ros Fallon and at NED meetings as recorded above.

329 The claimant's access to the first respondent's IT was stopped as soon as she was suspended, intentionally making it very difficult if not impossible, to prepare her defence by accessing emails and documents, at the same time as giving the first and second respondent time to permanently delete and destroy documents in an attempt to build up a different picture from the one that really existed, and so the Tribunal found after drawing adverse inferences from the

non-disclosure and Regional Employment Judge Franey's conclusions about the first and second respondent's unreasonable behaviour. The Tribunal concluded that the first and second respondent's actions were causally linked to the protected disclosures.

330 The Tribunal finds that, once the claimant had made the protected disclosures and refused to withdraw them as part of the compromise agreement, she would be facing a dismissal on the grounds of gross misconduct, with the first respondent relying on fabricated allegations which give the impression of having a valid basis when they did not, if one looked closely at the picture Ken Gill, Nicola Price, Ros Fallon, and in the background the second respondent, were trying to present. It is notable the acting CEO has since been confirmed in post against a background of a further negative CQC report and deteriorating financial position.

331 The Tribunal has drawn an adverse inference as a result of the first and second respondent's behaviour regarding disclosure aimed at ensuring that key documents, which would have assisted the claimant to defend the misconduct allegations, maintain the truth of the allegations brought against the second respondent and help her prove the case in this litigation, were lost forever. Mr Cheetham's argument that the first respondent, in disclosing without prejudice and legally privileged documents in this litigation, has shown that there was no intention to deceive the Tribunal, is noted. The Tribunal does not accept this argument has any validity given the extent of the first and second respondent's failure to disclose.

Part Three: Unfair dismissal (Employment Rights Act 1996 sections 95 & 98)

Dismissal

332 With reference to the seventh issue, namely, did the respondents do the following things the Tribunal found that:

333 CD3 the first respondent failed to commission an appropriate and independent external investigation into the Maternity FTSU between 9 June 2022 and October 2022 as particularised at paragraphs 52 and 57 of the Grounds of Complaint.

334 CD4 the second respondent at a meeting with the claimant on 18 July 2022 rejected her proposal of mediation, focused on what he considered was "wrong" with the claimant and acted in a confrontational and aggressive manner, as particularised at paragraphs 59 to 60 of the Grounds of Complaint.

335 CD6 Ros Fallon failed to perform her duties as SID in relation to overseeing the second respondent's behaviour from around late July 2022 onwards, as particularised at paragraphs 76 to 78 of the Grounds of Complaint.

336 CD7 The Lead Governor failed to take any action in response to the claimant's concerns regarding bullying and harassment raised in late July and early December 2022, as particularised at paragraphs 82 and 145 of the Grounds of Complaint.

337 CD8 During the claimant's absence in August 2022, communications circulated that gave concerned parties the impression she would not return, as particularised at paragraph 85 of the Grounds of Complaint.

338 CD10 Nicola Price failed to initiate an investigation under the Bullying and Harassment Policy on 30 August 2022 as she ought to have done under relevant Trust policies, as particularised at paragraph 104 of the Grounds of Complaint.

339 CD11 Nicola Price failed to send draft terms of reference to the claimant regarding her complaints against the second respondent between late August 2022 and January 2023, as particularised at paragraph 107 of the Grounds of Complaint.

340 CD13 The claimant was subjected to concerted, aggressive, and unjustified verbal attacks at the private board meeting on 27 September 2022, as particularised at paragraphs 116 to 118 of the Grounds of Complaint.

341 CD14 Ros Fallon told the claimant on 22 October 2022 that it was "time for her to go", and that either she should do a deal or a "process" would be started, as particularised at paragraphs 126 to 131 of the Grounds of Complaint.

342 CD16 The respondents excluded the claimant from her work and her workplace via the exclusion letter of 2 December 2022, in breach of relevant policies, without due process having been followed and without there being any lawful basis for such exclusion, as particularised at paragraphs 149 to 164 of the Grounds of Claim.

343 With reference to the twelfth issue, namely, having found the respondents did those things (or any of them), did that amount to a breach of the implied term of trust and confidence, the Tribunal found that it did and is satisfied that objectively assessed (i) the first respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the first respondent; and (ii) it did not have a reasonable and proper cause for doing. The reasons for this conclusion are as recorded in the factual matrix.

344 With reference to the next issues thirteen and fourteen, namely, was the breach a fundamental one, in other words so serious that the Claimant was entitled to treat the contract as being at an end, the Tribunal found that it was.

345 The claimant resigned in response to the breach. The respondent did not argue the claimant had resigned for a different reason, and she was not substantially challenged on the reason for her resignation in cross-examination as pointed out by Mr Segal in submissions. In submissions Mr Cheetham accepted that on any view the working relationship had come to an end. The claimant's resignation was caused in part by her suspension, the final act in a cumulative breach of contract as reflected by the Tribunal in its findings above. Mr Segal submitted the decision to exclude the claimant was the culmination of a series of actions which eroded and eventually destroyed her trust and confidence in the first respondent. The Tribunal agreed.

346 With reference to issue sixteen, namely, was the reason or principal reason for dismissal that the Claimant made a protected disclosure, rendering dismissal also unfair under section 103A, the Tribunal found that it was. At liability stage the Tribunal pointed out to Mr Segal during oral submissions that this issue related to remedy only. Mr Segal asked the Tribunal to deal with it and there was no objection from Mr Cheetham. Mr Segal referred to section 49(2)(b) of the ERA which provides that the amount of compensation awarded in a section 47B claim shall be such as the tribunal considers just and equitable in all the circumstances having regard to any loss which is *"attributable to"* the relevant act. The phase "attributable to" encapsulates the common law concept of "but for" causation: see [58] to [59] of *Roberts v Wilsons Solicitors LLP*. A detriment for the purposes of section 47B of the ERA does not include a detriment which "amounts to a dismissal" within the meaning of Part X of the ERA (section 47B(2)(b) of the ERA). However, it is open to a claimant to recover losses flowing from a termination on the basis that that claimant (a) was subjected a detriment in breach of section 47B of the ERA and (b) that detriment has, as a matter of fact, caused the termination of that claimant's employment (even if that termination is not in and of itself unlawful. The Tribunal concluded that the detriments relied on by the claimant above, have caused the termination of the claimant's employment.

347 In conclusion, the claimant's resignation was a dismissal under section 95(1) of the Employment Rights Act 1996 as amended and her claim for unfair dismissal brought under section 98 well-founded, (2) the dismissal was unfair under section 103A and (3) the claims are adjourned to an in person remedy hearing before the full panel on the 6 & 7 May 2025 at the Liverpool Employment Tribunal. The claimant was subjected to detriments by the first and second respondent done on the ground that she had made a protected disclosure, her claims of detriment brought under section 47B of the Employment Rights Act 1996 as amended are well-founded and adjourned to the remedy hearing. The claimant's allegations that were no longer pursued that appear struck though in the list of issues below are dismissed on withdrawal.

Case Management Orders

348 To assist the parties prepare for a remedy hearing the following case management orders are made:

1. The claimant will update and clarify her schedule of loss no later than 14 days after the date this reserved Judgment & Reasons was sent to the parties, and send to the first and second respondent evidence of mitigation including business accounts relating to any business she has started.

2. The claimant will confirm to the respondents whether she intends to proceed with her claim for personal injuries and any medical reports she intends to rely on, and whether actuarial evidence will be necessary for pension calculations. If this is the case the parties will write to the Tribunal if a preliminary hearing is required in order to discuss and agree case management orders dealing with personal injury, causation, and actuarial evidence.

3. The first and second respondent will send to the claimant a counter-schedule of loss no later than 28 days after the date the Judgment & Reasons were sent to the parties.

4. The parties can apply for the remedy hearing to be taken out of the list and re-listed if counsel and parties are not available, and provide their availability dates for the next 12 months within 14-days.

5. The parties can apply to amend these case management orders by agreement.

Employment Judge Shotter,
12 February 2025

Judgment sent to the parties on:
13 February 2025
For the Tribunal:

Notes

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-

tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

Recording and Transcription

Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here:

https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/