Cases Numbered: 1700084/2013, 1700085/2013, 1701028/2013 and 1701029/2013
Multiple Reference 2537

EMPLOYMENT TRIBUNALS

BETWEEN

Claimants		**Respondents**
Ms C M Sardari (1)	AND	Torbay & Southern Devon Health & Care NHS Trust (1)
Mrs P J B Gates (2)		South Devon Healthcare NHS Foundation Trust (2)

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Exeter ON 13, 14, 15, 16, 17, 20 and 21 January 2014

EMPLOYMENT JUDGE N J Roper **MEMBERS** Mrs S Richards
Mr R M Beales

Representation

For the Claimants: **Miss D Grennan of Counsel**
For the First Respondent: **Miss A Chute of Counsel**
For the Second Respondent: **Mr J Galbraith-Marten of Counsel**

RESERVED JUDGMENT

The unanimous judgment of the tribunal is that:
1. The claimants succeed in their claims that they were subjected to a detriment by the first respondent on the ground that they made protected disclosures; and
2. The claimants succeed in their claims that they were subjected to detriments by the second respondent on the ground that they made protected disclosures; and
3. The claimants' claims for unfair dismissal against the first respondent are dismissed.

REASONS

1. In this case the two claimants bring claims against both respondents alleging that they have been subjected to detriments on the ground that they made public interest disclosures, and bring claims alleging constructive unfair dismissal and breach of contract in respect of their notice pay against their former employer the first respondent. This hearing was to determine liability only in the first instance. Both respondents deny the claims.
2. At a preliminary hearing on 4 October 2013 it was decided, with the consent of the parties, that at all material times the claimants were employees of the first respondent, and were workers of the second respondent.
3. We have heard from each of the two claimants. On behalf of the first respondent we have heard from Mr Philip Waite, Mrs Carole Self, Mrs Julie Dent, Mr Timothy Tamblyn, Mrs Mandy Seymour and Dr Jonathon Andrewes. On behalf of the second respondent we have heard from Mrs Adrienne Murphy, Dr Paula Vasco-Knight, Mr Peter Hildrew and Ms Liz Storey.
4. There was a degree of conflict on the evidence. We have heard the witnesses give their evidence and have observed their demeanour in the witness box. With regard to the evidence, we found both claimants to be measured, sensible and credible in their evidence. They were generally clear in their recollections, and corroborated each other's evidence. Their evidence was consistent with the contemporaneous documents (even those of which they were unaware at the time) and were consistent with their own largely contemporaneous notes. They were also largely consistent with the evidence called independently by the first respondent. This contrasts starkly with the evidence called by the second respondent. As explained further below, much of Dr Vasco-Knight's evidence was inconsistent with many of the contemporaneous documents. Mrs Murphy was vague in much of her recollection, and the weight of both claimants' evidence was against her in respect of their meetings and conversations. Much of Mr Hildrew's evidence was quite simply incredible, and plainly wrong on the face of the contemporaneous documents.
5. Considering all of the above, we found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.
6. The first respondent provides community health services in Torbay and Devon, as well as providing and commissioning adult social care. It employs around 2,000 staff. The second respondent is an NHS Foundation Trust which runs the Torbay Hospital. It provides acute healthcare services and employs around 3,500 staff. The two respondents are separate legal entities and organisations, and put simply the first respondent provides community health and the second respondent runs the large general hospital. Each respondent has its own Chief Executive, Board, Chair, and its own employees.
7. The two respondents have worked together for some time because they are complementary in the services which they offer. They have shared a "Joint Workforce and Organisational Development" function since May 2010. Eventually this resulted in the Director of Workforce and Organisational Development of the second respondent, namely Mrs Adrienne Murphy, being appointed to the post of Director of Workforce and Organisational Development of both respondents. In this capacity Mrs Murphy (apart from being a full Board member of the second respondent) attended meetings of the Board and Senior Executive Team of the first respondent in order to lead the human resources function of both respondents jointly. She did not sign the "honorary contract"

offered to her by the first respondent, but nonetheless was treated by the first respondent as a senior member of its management team.

8. In May 2012 the Board of the first respondent decided it could not remain operating as a "stand-alone" organisation and invited bids from third parties to "acquire" its operations. The second respondent submitted a bid on 31 May 2013 and was selected as the "preferred bidder" on 5 September 2013. At the time of this hearing it remains likely that the first respondent will be acquired by the second respondent in or around July 2014.
9. The first claimant is Ms Clare Mary Sardari who was born on 24 May 1957. She commenced employment with the first respondent on 1 April 2008 and in 2009 became Management Development Lead. She has an unblemished disciplinary record.
10. The second claimant is Mrs Penelope Janet Burnard Gates who was born on 19 January 1962. She commenced employment with the NHS in June 1992 and has worked in a senior management capacity since 1998. She was employed by the first respondent from 1 March 2006. She too has an unblemished disciplinary record.
11. Following the collaboration between the two respondents the second claimant was successful in applying for the new role of Assistant Director of Education and Development for both respondents. She reported to Mrs Murphy who had become the new Director of Workforce and Organisational Development for both respondents. She signed an "honorary contract" with the second respondent, but remained an employee of the first respondent. She was required to perform senior management duties for both trusts as part of the collaborative working arrangement. At all material times she was line-managed by Mrs Murphy.
12. The second claimant Mrs Gates was also the line manager of the first claimant Ms Sardari. Ms Sardari had become the Head of Organisational Development, also spanning both respondents, as part of the shared service arrangements. The two claimants therefore formed part of the senior management team of both organisations and they enjoyed a close and positive working relationship with Mrs Murphy. In short the second claimant reported directly to Mrs Murphy, and the first claimant was the second claimant's deputy.
13. As mentioned above, at a preliminary hearing on 4 October 2013 it was decided, with the consent of the parties, that at all material times the claimants were employees of the first respondent, and were workers of the second respondent, and we so find.
14. Mrs Julie Dent was the Chair of the Board of the first respondent from 1 December 2009 until 28 February 2013. Dr Jonathon Andrewes was appointed as Interim Chair of the first respondent to replace her. The Chief Executive of the first respondent was Mr Anthony Farnsworth, and he was replaced by Mrs Mandy Seymour as Chief Executive on 29 October 2012.
15. The Chairman of the second respondent is Mr Peter Hildrew who was appointed in March 2008. The Chief Executive of the second respondent is Dr Paula Vasco-Knight. She was appointed as Chief Executive in 2008 having started her career with the NHS as a state enrolled nurse. She is now the national lead within NHS England for equality and diversity matters. Although we have heard no direct evidence on the point, it seems from the documents which we have seen that on occasions at least there was a degree of antipathy between both respondents. There may well have been a degree of concern at senior level within both organisations as to who would retain the senior positions following the prospective merger. We have seen one comment which suggests that Mr Farnsworth as the then Chair of the first respondent resented the fact that Dr Vasco-Knight as Chief Executive of the second respondent had not "dissolved" the second respondent's Board.
16. As is to be expected, both respondents have a number of policies which are relevant. Each respondent has a whistle-blowing policy, and they are similar. The second respondent's policy is named "Whistle Blowing Guidelines", and Mrs Murphy is the named director with responsibility for its implementation. It encourages employees to raise concerns if they are troubled about, inter-alia, "a colleague's professional misconduct and/or performance" and "unlawful conduct". Their policy implores employees: "IF IN DOUBT – RAISE IT!". Under the heading "Our Commitment to You"

and "Your Safety" this policy reads "the Board, Chief Executive and Directors are committed to these guidelines. If you raise a genuine concern under these guidelines, you will not be at risk of losing your job or suffering any form of retribution as a result. Provided you are acting in good faith, it does not matter if you are mistaken or if there is an innocent explanation for your concerns. So please do not think we will ask you to prove it. Of course we do not extend this insurance to someone who maliciously raises a matter they know is untrue." Under the heading "Your Confidence" the policy reads "We will not tolerate the harassment or victimisation of anyone raising a genuine concern." The first respondent's policy has identical provisions to these.

17. The second respondent also has a Recruitment and Selection Procedure. This includes the following provisions: an Appointment of Near Relatives Policy which is incorporated by reference (to which we were not referred in the course of this hearing); commitment to equal treatment in access to employment by reference to the protected characteristics; "compliance with equality, human rights, employment legislation, statutory and mandatory requirements in recruitment and selection"; a requirement that a temporary move to a higher band should be undertaken through a competitive recruitment process; a requirement that selection for posts "will be based solely on objective criteria laid down in the Person Specification"; and under the heading "Interview Panels" requirements that "objectivity in the recruitment and selection process is paramount"; and that "Panel members must declare any personal interest in the appointment".
18. There is also a Code of Conduct for NHS Managers which has been given approval by the Secretary of State nationally. This imposes very high standards of behaviour on all senior NHS managers. They are required to be honest and act with integrity and probity at all times.
19. We now turn to the interview process which gave rise to the concerns and complaints from the claimants. The concerns which they raised relate to the appointment of Mr Nick Schenk as Equality and Diversity Manager of the second respondent. The previous incumbent was Kelly Ebdon and when she moved on her post was rebanded by an independent panel to a higher grade from band 6 to band 7 and a recruitment process was commenced to find a replacement. The normal selection process would generally include advertisement for the post, preparation of a person specification, the appointment of a selection panel, shortlisting of candidates by that panel against the person specification, and an interview process. Unbeknown to her, the first claimant Ms Sadari had been named as the recruiting manager responsible for this position. This was not unusual, because she was to be the direct line manager of the new incumbent, but for some reason she was not involved in the early stages of the recruitment process. Before the interviews took place, Mrs Murphy gave her copies of the applications which had been received, together with the names of four candidates whom she said had been shortlisted by her, and by Dr Vasco-Knight (who was also to be on the selection panel with Mrs Murphy and the first claimant).
20. The first claimant had already been told by Mrs Murphy that Dr Vasco-Knight had a preferred candidate in mind for the position. That in itself is not necessarily a serious concern because it is not unusual for known experienced candidates to be encouraged to apply to new positions within the NHS organisation. However, the first claimant was concerned that she had not been involved in the selection process and was being presented with a fait accompli. She checked the four shortlisted candidates to try and discern who was the preferred candidate. As it happens, her initial conclusion was that it was not Mr Schenk.
21. The interview took place on 14 June 2012. During the interview process the first claimant felt that it became clear that Mr Schenk was the preferred candidate because of the change in body language demonstrated by Dr Vasco-Knight. She agrees that Mr Schenk did very well at interview, and was clearly the best of the four candidates, but was suspicious that he might have had some prior knowledge of the questions which were asked. The first claimant agreed that he was the best candidate at interview, and he was appointed to the post by unanimous decision of the panel.

22. Immediately after the interview process Mr Schenk provided dates of pre-booked holiday which he requested should be honoured. These were 24 and 25 July, and 30 July to 14 August 2012. He commenced work in the post from 9 July 2012. The first claimant was his line manager. During his first week of employment Mr Schenk told the first claimant that he had a girlfriend whom he had met through an internet dating site and had been seeing her since December 2011. He then took 24 and 25 July 2012 as pre-booked holiday having told the first claimant that he needed this time off to attend his girlfriend's graduation in Leeds.
23. On 26 July 2012 the first claimant attended an "all managers meeting" and Dr Vasco-Knight explained that she had been absent for the last couple of days because she had attended her daughter's graduation in Leeds. It was at this stage that the first claimant says "the penny dropped" and she was extremely concerned that Mr Schenk had been appointed to his position without any declaration by Dr Vasco-Knight that he was her daughter's boyfriend. This concern was heightened when Mr Schenk apparently took some or all of his August holiday with Dr Vasco-Knight and her family.
24. The first claimant raised her concerns with her line manager the second claimant on the following morning. She was concerned that Dr Vasco-Knight was in a very senior position and was national leader on equality matters. The first claimant believed that the appointment had involved nepotism and favouritism and was contrary to equality procedures. More specifically, she felt that there had been a breach of the general duty of equality which applies under the Equality Act 2010 to all public bodies.
25. The claimants then raised their concerns with Mrs Murphy. The first claimant says that Mrs Murphy acknowledged that she already knew about the relationship and that the matter should not be taken any further. The second claimant also confirmed that Mrs Murphy told her not to speak to anyone else about it and that the information should not be allowed to get out. Between July and October 2012 the claimants remained concerned about the position, but did not take it any further. The first claimant, who was Mr Schenk's line manager, also became gradually concerned that Mr Schenk was not sufficiently experienced for the post, and was concerned about Dr Vasco-Knight's unusually close involvement in his day-to-day duties. In addition, the second claimant was wrestling with her conscience as to whether to take the matter further. The second claimant felt that Dr Vasco-Knight had acted in breach of the duties towards the second respondent in terms of honesty, integrity and failing to declare interests. She felt that Dr Vasco-Knight had acted in her own interests rather than the interests of the second respondent which was both unlawful and unethical. She felt her actions to be quite wrong in terms of equality, proper recruitment requirements and practices. She had these serious concerns, but equally was afraid of jeopardising her own senior position by raising complaints against more senior personnel in the organisation.
26. Eventually on 10 October 2012 the second claimant had a chance meeting with Mr Farnsworth the then Chief Executive of the first respondent. She discussed her concerns with him. He advised that the claimants could not simply ignore these issues and later that day he telephoned the second claimant to confirm that he felt that he had to report the content of their conversation. The second claimant was concerned about this and asked for time to allow her to discuss the matter with Mrs Murphy her line manager.
27. The two claimants then had three meetings with Mrs Murphy on 11 October 2012. They told her in the morning that Mr Farnsworth was going to help them pursue their complaints. Mrs Murphy was extremely concerned and said words to the effect that the claimants "were going to get her the sack". She left to speak to Mr Farnsworth on the telephone. She returned to say that she was "incandescent" but that she had persuaded Mr Farnsworth not to refer the matter to the Audit Commission or the Department of Health as he had threatened to do. She stated that she was not angry with the claimants and would revert to them further in the afternoon.
28. There was then a further meeting on the afternoon of 11 October 2012. The claimants have contemporaneous minutes of this meeting, and these corroborate their joint evidence. Mrs Murphy tried to persuade them to retract their allegations. She said that if the matter was pursued then she would lose her job, and the claimants would lose their

jobs as well. She said words to the effect that she would be sacked immediately and that the claimants would lose their jobs "through dirty means". She told them that it would be "catastrophic" if they pursued the issue and reminded them that Dr Vasco-Knight would be their Chief Executive within a year following the merger of the two respondents. Mrs Murphy also made threats against Mr Farnsworth. The claimants were very shocked and upset at the content and tone of the conversation and they felt intimidated. The second claimant reported to Mr Farnsworth later that afternoon to the effect that they were both very afraid for their positions and that they felt bullied and threatened. Mr Farnsworth suggested that they put their concerns in writing and they did so.

29. Each of the claimants then wrote a letter dated 16 October 2012 to their Chief Executive Mr Farnsworth. The first claimant complained that Dr Vasco-Knight had made no declaration either before, during or after the recruitment of Mr Schenk that he was related to her because he was her daughter's boyfriend. She explained why she had become suspicious (as explained above). She confirmed that she had raised her concerns with her line manager the second claimant. She felt the situation "may be in conflict with the Trust's Equality policies and procedures". The second claimant complained that Mr Schenk was in a personal relationship with Dr Vasco-Knight's daughter and that Dr Vasco-Knight had been involved in the shortlisting of the post and sat on the appointment panel as chair. She felt that "without raising this I am complicit in a situation which is untenable and goes against the Trust's HR policies and procedures".
30. We now deal with the process adopted by way of investigation into these whistle-blowing allegations. Although our remaining findings of fact are then slightly out of chronological order, it is important to see the actions of both parties towards the claimants in the context of their conduct during the investigation, and their knowledge of the result. This is because we find that there was a concerted effort by the second respondent to manipulate the investigation; accuse the claimants of malice; suppress the report; and to mislead the other parties as to its contents, with the apparent aim of protecting Dr Vasco-Knight and Mrs Murphy against the force of the claimants' allegations. This was completely contrary to the protection which should have been offered under the Whistle Blowing Guidelines.
31. In the first place Mrs Murphy tried to dissuade her chairman Mr Hildrew from pursuing an investigation. She wrote an undated letter to Mr Hildrew which was probably in or around mid-October 2012. She stated "You need to consider whether the complaint is based upon personal malice towards Paula [Vasco-Knight] from Anthony Farnsworth. I am aware that you have some concerns with this regard and I have personal evidence which supports this - I will be willing to share those experiences with you. It is possible that Anthony Farnsworth is trying to cause as much upset and trouble for Paula and he would know that an enquiry would cause that significant distress and reputational damage to Paula. He has waited until he resigned before doing this ... unless there is clear evidence from an initial fact-finding by the line manager that there is a case to answer I would claim that it is completely unsupportive of employees to launch into a formal process simply to clear names ... An enquiry or formal investigation would cause significant ramifications for Paula, myself and the Trust. Any form of formal investigation would become public ... this would cause personal (to me and Paula) and trust reputational damage. Could this compromise the acquisition process??? ... I think that the risk of personal damage (in terms of career) distress suffering from a long drawn out process and dealing with the publicity plus reputational damage for the Trust must be weighed against my initial point that this is purely a malicious act that will be fuelled by a formal investigation." This is clear example of a contemporaneous document which is contrary to the second respondent's oral evidence, in this case that it did not believe the allegations to have been malicious.
32. In any event, following receipt of the claimants' allegations, the most senior members of the first respondent held a meeting to agree the way forward. This meeting was on 23 October 2012 and was attended by Mrs J Dent the Chair, Mr Farnsworth the Chief Executive, Mrs Self the company secretary, and Mr Tamblyn (a non-executive director). They then joined subsequently by Mr Hildrew the Chairman of the second respondent.

Both respondents then agreed to commission a joint preliminary investigation and review. Mr Hildrew had sought advice from a senior NHS colleague who recommended that Sue Johnson, an independent consultant, should conduct a preliminary investigation and prepare a report. The first respondent agreed to that suggestion. On 25 October 2012 a joint letter was written to each claimant, signed by both Mr Hildrew and Mrs Dent as Chairman and Chair respectively of both respondents. This letter referred to the two respondents' whistle-blowing policies, and enclosed terms of reference for the investigation. These terms of reference stated: "This review is being undertaken on behalf of the Chairs of [both respondents] ... The terms of reference for the preliminary review are: to establish whether or not there is a case to answer in relation to: (1) the process for the appointment to the post of Equality and Diversity Manager, South Devon Healthcare, for which interviews were carried out on 14 June 2012; (2) The response of the current director of Workforce and Organisational Development when staff sought to express their concerns regarding the above appointment process. If the review recommends that there is a case to answer in relation to either of these concerns, to establish the most appropriate policy under which a formal investigation should be undertaken." The claimants agreed to this process taking place, and were both interviewed by Sue Johnson in the course of the investigation.

33. This is another example of a contemporaneous document which is completely contrary to the evidence of the second respondent, in this case Mr Hildrew's repeated assertion that there was no jointly agreed investigation, and that the process and resulting report were in the ownership of the second respondent. Counsel for the claimants described this assertion as "ludicrous", and we agree. It is obvious from the contemporaneous documents that this was a joint process: the claimants and the first respondent agreed with the second respondent to take part in this joint investigation; and it was the agreed and reasonable expectation of both claimants, and the first respondent, that they would share in the findings of the resulting report.
34. Both respondents had agreed at their meeting that six people would be interviewed by Sue Johnson in this process: Mr Farnsworth, each of the two claimants, Dr Vasco-Knight, Mrs Murphy, and Mr Schenk. For reasons which have not been explained, Mr Hildrew removed Mr Schenk from the list of interviewees without telling the first respondent or seeking their permission. Mr Tamblyn, who was a non-executive director of the first respondent, attended four of these interviews as an observer. At each interview Sue Johnson introduced herself as "an independent third-party experienced in handling complaints" and explained that she had been appointed on behalf of both respondents.
35. On 24 October 2012 Mr Hildrew received a letter from Mr Schenk, expressing concern about the allegations. He confirmed that he had become an online acquaintance through a dating website with Dr Vasco-Knight's daughter Tahnee in December 2011. He stated that for the period between March and June 2012 "our friendship is largely based online" and "it was not until after the interview that we actually had time to talk properly and decided to start a relationship at the end of July". He also stated "I found out about the advert on NHS jobs and knew Tahnee's mum was the Chief Executive so I mentioned it to Tahnee who told me Paula said I sounded like a strong candidate and suggested I look at the job description."
36. In addition Tahnee Vasco-Knight wrote to Mr Hildrew on 25 October 2012. She stated: "... Nick and I did develop a friendship in December 2011; we began speaking over the Internet. However I would like to make it clear that we did not begin a romantic relationship until July 2012 ... Nick and I did become close friends ... When Nick saw the job for the equality and diversity manager advertised on NHS jobs he did contact me asking for advice, I mentioned this to my mum and explained his background experience, she advised him to contact Adrienne. Throughout the time prior to the interview this was the only contact my mum and Nick had which only occurred through me."
37. As an aside, and based on these two letters, Dr Vasco-Knight's best case as to the circumstances of the interview is that Mr Schenk had been an acquaintance of Tahnee for over six months; Tahnee had discussed his possible application with her; she agreed that he was a strong candidate and referred him to Mrs Murphy; yet failed to disclose any

of this to the interview panel. The worst case is much more serious, namely that Tahnee Vasco-Knight had been Mr Schenk's girlfriend for some months, Dr Vasco-Knight knew as much, knew that they were about to go to the graduation and on holiday together, and failed to disclose this personal interest. It is not necessary for us to make specific findings on this point in the course of these proceedings. However, even if it were not a technical breach of the recruitment procedures because Mr Schenk was neither a near relative nor a close friend, it is our unanimous view nonetheless something which Dr Vasco-Knight should have disclosed. Her failure to do so in our judgment was a breach of the NHS Code of Conduct for Managers, a breach of the Recruitment and Selection Policy which requires the disclosure of any personal interest, and a breach of her implied duty of good-faith to her employer. To this extent we do not agree with the subsequent findings of Sue Johnson's report.

38. In any event Mr Hildrew failed to disclose these two letters to either the claimants, or the first respondent, despite the fact that they were directly relevant to the claimants' complaints. He was unable to explain why they had both written these allegedly unsolicited letters at approximately the same time, and why Mr Schenk was not interviewed by Sue Johnson as he and the first respondent had agreed that he would be. These letters were then disclosed to Sue Johnson.
39. Sue Johnson's Preliminary Review Report was agreed to be produced by 9 November 2012. She produced a draft report which was shown to Mr Hildrew, without the appendices, on Friday, 9 November 2012. He therefore had some foreknowledge and potential input on the draft report. The final version was prepared after the weekend on 12 November 2012, but was dated 9 November 2012. Mr Hildrew did not inform the first respondent that he had seen a draft or had any input into the draft. Indeed, the second respondent continually denied during the course of these proceedings that there had ever had been a draft report, and it was only under cross-examination at this hearing that Mr Hildrew eventually admitted that he had seen and commented on the draft report. This is another example of the second respondent being inconsistent and unreliable in its evidence.
40. The report made the following conclusions. With regard to the first allegation (against Dr Vasco-Knight) it reads: "However a brief review of the most relevant Trust policies suggests that no policies have been breached either by the appointee or the Chief Executive even if Nick and Tahnee could be demonstrated to have been "going out" prior to the appointment decision. In the opinion of the reviewer it would be helpful for the Trust to review its policies to ensure sufficient guidance is given to staff on disclosure of connections with applicants to avoid any appearance of wrong doing and so the staff better understand where a whistleblowing situation has occurred. The NHS Code of Conduct for Managers clearly sets out the very highest standards of behaviour for managers in the NHS. This issue needs to be considered by those within the Trust who have to decide what further action to take about this complaint. *The evidence collected in this preliminary review suggests there is no case to answer in relation to Trust policies.*"
41. The conclusion on the second allegation (against Mrs Murphy) reads as follows: "*The policies under which this allegation has been made relate to the manner of response to an individual. Two individuals have complained in similar terms about their treatment by Adrienne and largely corroborated each other's version of events. In these circumstances I do not believe it is possible to dismiss the allegation on the basis of a preliminary review of the evidence and therefore I conclude there may be a case to answer.*"
42. The position as at 9 November 2012 is in our judgment extremely clear: all parties agreed to a joint investigation to prepare a preliminary report; this was to be shared by both respondents and the claimants in reply to the claimants' allegations; Mrs Murphy had written a detailed letter accusing the claimants of malice even though she was one of the subjects of the investigation, and that letter was not disclosed to the first respondent or to the claimants; Mr Hildrew had altered the agreed list of witnesses without authority by excluding Mr Schenk without telling the first respondent or seeking its approval; Mr Schenk and Miss Tahnee Vasco-Knight wrote letters to Mr Hildrew and may well have been encouraged to do so without the claimants or the first respondent knowing this; on

the first allegation against Dr Vasco-Knight Sue Johnson's conclusion was that there was no case to answer as to any specific breach of a Trust policy, but that by implication the high standards of behaviour required by the NHS Code of Conduct for Managers might not have been met and the issues needed to be considered for possible further action; and that the allegations against Mrs Murphy could not be dismissed and there might be a case to answer.

43. In reply to this the second respondent adopted an astonishing course of action which in our unanimous view amounted to a dishonest attempt to suppress the findings of this report. The second respondent refused to accept that it was a joint report; refused to disclose it to the first respondent; and misled both the first respondent and both claimants as to its content by contending that Dr Vasco-Knight was wholly exonerated, and that the allegations against Ms Murphy were inconclusive and that there was no merit in proceeding further. The circumstances in more detail were as follows.
44. With regard to the non-disclosure of the report, the second respondent had received letters of concern from the trade unions representing Dr Vasco-Knight and Mrs Murphy to the effect that the report should not be disclosed to the first respondent. The second respondent sought advice (from a professionally unqualified adviser) and states that it relied on that advice that the report need not have been disclosed. We strongly disagree. Despite these objections it is obvious that the whole process was a joint investigation on behalf of both respondents. The first respondent had joint ownership of the process and had as much right to see the report as the second respondent. There was no agreement that the report would be in any way confidential as between both respondents, or the claimants for that matter. The second respondent's failure to disclose the report was in our judgment wholly unjustified. Indeed, the second respondent only disclosed the report a few weeks ago in the course of late disclosure in these proceedings, a year after the report was first produced. The second respondent's failure to disclose the report was in our view in bad faith, and if there was any suspicion on the part of the claimants, or the first respondent, as to the second respondent's conduct and motives in this respect, in our view that suspicion was entirely justified.
45. On 12 November 2012 Mr Hildrew informed his opposite number Mrs Dent that he had received the report but refused to disclose it. On 30 November 2012 Mrs Dent wrote to him to complain, and asked him to reconsider. They met on 14 November 2012 and Mr Hildrew continued to refuse to disclose the report. He told Mrs Dent that there was no case to answer against Dr Vasco-Knight, and that the other allegation against Ms Murphy was "six of one and half a dozen of the other" meaning that the claimants and Ms Murphy were equally at fault. He made it clear that he was not going to take formal action against either Dr Vasco-Knight or Mrs Murphy. Mrs Dent remained frustrated and spoke to Sue Johnson. She confirmed her understanding that no further action was to be taken, which Mrs Dent took to mean that there was no case to answer.
46. We now return to the chronology of the events, but the actions of the parties must be seen in this light: in our judgment the second respondent acted in bad faith by suppressing the details of the report and misleading the other parties as to its content; the first respondent believed what Mr Hildrew had told them, and despite complaints were never provided with the report until well after the relevant events; and the claimants remained distressed and suspicious at the alleged conclusion, and the second respondent's failure to disclose the report.
47. At the time of the conclusion of the report the second claimant had already been so distressed at the turn of events that she was absent on certified sick leave from the end of October 2012. The first claimant was still at work. Mr Hildrew told Mrs Dent his version of the findings of the report, and Mrs Dent then met with the claimants on 14 November 2012. They were distressed at the news that there was no case to answer, and suspicious and upset that they could not see the report. Mr Hildrew had wanted to meet with them to discuss it, but Mrs Dent advised that they should wait until they were well enough to do so. They therefore postponed the meeting. Mr Hildrew then wrote to both claimants later that day on 15 November 2012 to tell them what he had planned to explain at the meeting. He explained in that letter that "I have reached my own

conclusions, taking into account the interviews conducted by Sue Johnson as part of the preliminary review, and the report she sent me following those meetings". He explained that Dr Vasco-Knight had been found not to have breached any policies, but failed to mention that further investigation might have been appropriate under the NHS Code of Conduct for Managers. He also stated in connection with the complaint against Mrs Murphy that "I have concluded that these positions are unlikely to be reconciled by further rounds of questioning". He did not disclose the report and did not tell the claimants that their whistle blowing complaint had resulted in the finding that Dr Vasco-Knight's possible breach of the NHS Code of Conduct for Managers might require further action, nor that the case against Mrs Murphy could not be dismissed and that there might be a case to answer against her.

48. The claimants were dissatisfied with his conclusion and wrote a joint letter dated 20 November 2012 to Mrs Seymour who was now their Chief Executive. They stated "We raised concerns with Anthony Farnsworth on 16 October 2012 and met with Julie Dent and Tim Tamblyn on 14 November 2012 but feel the situation is still unresolved. Please may we have your formal written response as soon as possible." Mrs Seymour then met with Dr Vasco-Knight on 22 November 2012 and explained that she was deeply troubled by the second respondent's failure to disclose the report. Dr Vasco-Knight responded to the effect that the report had demonstrated that there was no case to answer against her or Mrs Murphy and that Mr Hildrew had received legal advice and he was not obliged to disclose the report. Mrs Seymour urged her to reconsider the position because she wished to ensure that the claimants were able to return to work following their complaints. Although the first claimant had remained at work, she commenced certified sick leave on 4 December 2012.
49. It was from this stage that despite the first respondent's attempts to persuade the second respondent to allow the claimants to return, the second respondent adopted the stance that the claimants would not be allowed to return to their previous roles under the joint collaborative working arrangements. It was made clear by Dr Vasco-Knight that the claimants' continuation in their current roles was impossible and that operationally they could not continue with Mrs Murphy. Mrs Seymour says this occurred at the meeting on 22 November 2012, and at subsequent meetings with Dr Vasco-Knight and during telephone conversations. Her contemporaneous notes of their conversation support her recollection, and are contrary to the second respondent's case. Mrs Seymour understood that Dr Vasco-Knight and Mrs Murphy felt that the submission of the complaints had been vexatious and motivated by malice on the part of Mr Farnsworth. Mrs Seymour did not agree with that. On 23 November 2012 Mrs Seymour then took the decision to withdraw the involvement of the joint team operated by the second respondent from the management of the claimants' complaints. She also removed Mrs Murphy from line management of the two claimants and Mrs Self was appointed as their line manager instead.
50. Mrs Seymour was keen to ensure that a consultation process commenced with the claimants with a view to securing their return to work, but equally felt that their hands were tied in the sense that they were being blocked by the second respondent from returning the claimants back into their substantive collaborative posts. On 3 December 2012 Mrs Seymour wrote to both claimants to explain that Mrs Dent had been given personal assurances that there was no case to answer as a result of the report and inviting the claimants to explore with Mrs Self the best way forward in these difficult circumstances. Mrs Seymour also confirmed "in line with the trust's whistle-blowing policy, if you are not satisfied with the outcome, or the concerns remain unresolved, you have the right to refer the matter to the trust chairman ... " This was consistent with the Whistle Blowing Policy which afforded the claimants the right of appeal which also included referral to outside agencies and statutory bodies in appropriate circumstances. The claimants did not exercise any right of appeal, formal grievance, or other formal complaint with the first respondent following receipt of this letter.
51. On 6 December 2012 Mrs Self, the first respondent's company secretary and now line manager of the claimants, wrote to each of the two claimants to the same effect. The

letter offered support and assistance, and if necessary a referral to occupational health. It invited the claimants to meet to discuss the way forward. The letter also included the comment "as there has been a breakdown in relationships it means that a return to your previous role is not possible so it would help if you gave some careful thought and consideration as to what your expectations for the future might be in order that we can have a meaningful discussion". This was consistent with the earlier stance taken by the second respondent that the working relationship was unmanageable and the claimants would not be allowed to return to their previous collaborative roles. In any event that letter (and the comment that there had been a breakdown in relationships) had been specifically approved by Ms Storey on behalf of the second respondent before it was sent.

52. There has been much debate in the course of this hearing as to the exact nature of the "barrier" which existed to defeat attempts to return the claimants to their substantive roles. The second respondent has argued that the claimants made it clear that they would not return to work unless Dr Vasco-Knight and Mrs Murphy were first removed from their posts. The claimants deny this, and we find that the claimants made no such assertion and imposed no such condition. It is another example of an assertion by the second respondent which is not supported by the contemporaneous documents. There was an increasing breakdown in relationships, but effectively the second respondent refused to allow the claimants back to their original collaborative roles whilst they refused to accept their version of the findings of the report.
53. Nonetheless, the first respondent continued to consult with both claimants from early December through to March 2013 in an attempt to facilitate a return to work. The first claimant then met with Mrs Self and Mr Waite (an assistant director of the first respondent). She attended on behalf of the second claimant also who was too ill to attend. She was informed that neither of them would be permitted to return to their posts and that they would have to be redeployed to alternative work. The claimants concluded that Mrs Murphy's earlier threats that they would be removed from their jobs were now the reality. Their solicitors then wrote to the first respondent alleging that they had been subjected to detriment as a result of their public interest disclosures. Mrs Self responded by letter dated 19 December 2012 to both claimants to confirm that the first respondent had now accepted the outcome of the investigation report and that there was no case to answer. It stated the first respondent considered that their concerns had been properly addressed. The letter asked to explore an alternative to their current roles. The letter also stated "I would of course be prepared to discuss the arrangements you consider that might enable you to return to your existing post. Given the circumstances it is difficult to understand how returning to that post would be possible." A further meeting was proposed.
54. The second claimant met with Mr Waite on 10 January 2013. The effect of this meeting was that the second claimant was told she could not go back to her previous role because of Dr Vasco-Knight and Mrs Murphy, and that the first respondent had accepted the outcome of the investigation report. In addition Mr Waite gave the claimants a number of options by way of alternative employment within the first respondent. There was then a further meeting on 17 January 2013 when the second claimant met with Mrs Self and Mr Waite. The second complainant objected to the fact that her job had been taken away even though she had done no wrong. She was told that Mrs Murphy felt that the relationship had been broken, but the second claimant confirmed that she was willing to return to work and build on the relationship, and agreed to potential mediation if necessary ahead of returning to work. She could not understand why she was not allowed to go back to her job because she had raised a genuine concern at work.
55. Meanwhile, although the first claimant was unaware of this until 11 January 2013, the second respondent had appointed someone to replace her in her position. The first claimant had gone sick on 4 December 2013. By 17 December 2012 Mrs Murphy had appointed Chris Edworthy to be acting Head of Workforce and Organisational Development which was the first claimant's role. The appointment was for six months with effect from 17 December 2012, and the second respondent's Recruitment and

Selection Policy had not been followed in connection with this appointment. The second respondent says that this was a temporary cover only because of the absence of management of the relevant unit, and the substantive post was not confirmed until May 2013.

56. On 19 February 2013 Mrs Seymour sent an e-mail to Dr Vasco-Knight and Mr Hildrew which attached a confidential briefing document on the current position regarding the claimants (which we have not seen). She stated "I believe we are on the verge of having to make a difficult decision but I would want us to do so in the light of knowing what the potential risks are for both organisations. Please let me know how you would like to proceed?" Dr Vasco-Knight replied as follows: "I want to be really clear the behaviour and false accusations of these two employees ... supported and encouraged by the former CEO was unacceptable, broke trust policy and trust. It is within the gift of [the second respondent] to not wish to continue a partnership with staff who have behaved in such a way. The process followed by Peter Hildrew as chairman was robust and fair and legally advised. The two members of staff cannot be terminated by [the second respondent] as we do not employ them. On a personal level I found the allegations as nothing less than personal slander and I wonder if a white middle-class male CEO would have been treated with such disrespect."
57. It is clear to us from this e-mail that the second respondent, and in particular Dr Vasco Knight as Chief Executive, continued to feel that the complaints raised by the claimants were malicious and unfounded, and that they were refusing to allow them to return to their substantive post. In other words the barrier stopping them from returning to their earlier substantive posts was one imposed by the second respondent only. This is another example of a document which contradicts the second respondent's evidence, namely the suggestions that they did not consider the claimants' complaints to be malicious, and that the barrier to their return to work was their alleged insistence that Dr Vasco-Knight and Mrs Murphy should first be removed from their posts.
58. In late February there was an exchange of correspondence between the claimants and Mrs Self. The first respondent was trying to arrange a meeting to discuss a return to work, and the claimants wished to seek clarification as to whether they could return to their pre-existing substantive roles. On 1 March 2013 Mrs Self wrote to each of the two claimants to confirm the position as follows: the first respondent had no issue in principle with the claimants returning to their pre-existing jobs, but they were part of a collaborative working arrangement with the second respondent, and the second respondent had confirmed that it was not prepared to continue with that arrangement. There would therefore inevitably have to be some changes to their working practices as result of the second respondent's stance but the first respondent wished them to discuss how to return on that basis.
59. The first respondent had arranged for both claimants to attend occupational health appointments, and was then a meeting on 5 March 2013 between Mrs Self, Mr Waite, and both claimants. Mr Waite confirmed that the second respondent's belief was that the relationship had broken down and the first respondent was unable to change their stance. He confirmed that "ultimately it is the Chief Executive's decision" meaning that of Mrs Vasco-Knight. The first respondent reiterated that the claimants were able to return to their substantive collaborative posts with the second respondent. Mr Waite was unable to give any long-term guarantee as to the security of these positions bearing in mind the prospective merger of the two respondents, and that he could not control the actions of the second respondent. In any event the claimants would have statutory protection under the TUPE Regulations and/or the victimisation provisions.
60. On 15 March 2013 Mrs Self wrote the same letter to each of the two claimants following a meeting on 5 March 2013 which discussed potential arrangements for facilitating a return to work. She confirmed that they could return to work with the first respondent only, because the second respondent had made it clear that they did not wish to continue the collaborative working arrangements with them. Mrs Self confirmed that their role would remain the same with exactly the same status, remuneration and written terms and conditions of employment. The working practices would inevitably change somewhat

because of the second respondent's refusal to allow them to return to that post. Mrs Self felt that "this would seem to be the only option for a reasonable way forward". She invited each claimant to return to work in order to discuss her role and working practices, including reporting arrangements and objectives.

61. By letter dated 19 March 2012 the claimants wrote a joint letter to Mrs Self resigning their employment with immediate effect. It was a detailed letter running to just over two pages that stated "the reason for this action is the treatment that we have received since the events of last year when we raised concerns with Anthony Farnsworth ... and the subsequent behaviour of Paula-Vasco Knight and Adrienne Murphy ... as a result of raising our concerns, we were told that we could not return to our posts at all ... more recently we have been informed that we cannot return to our posts as they were before and that we cannot return to any form of collaborative working with [the second respondent] ... it is quite clear that the [first respondent] has simply capitulated to the [second respondent] ..."
62. Mrs Seymour sent a detailed four-page letter in reply dated 3 April 2013 addressing each of the claimants' concerns. She confirmed that they were precluded from returning to the collaborative working arrangements by the second respondent, but otherwise their substantive posts with the first respondent remained. She felt that the first respondent had acted reasonably in seeking to address the claimants' concerns with regard to the second respondent's actions and that despite requests the investigation report had not been provided by the second respondent, and confirmed that the claimants appeared to have no right to challenge the decision of the second respondent as to its withdrawal from the collaborative working arrangements. Similarly, the first respondent had no right to challenge that decision. With regard to the decision to resign, Mrs Seymour was then able to confirm that following recent discussions (and for the avoidance of doubt since the resignations were submitted) the first respondent had received confirmation from the second respondent that it was now prepared to continue with the collaborative working arrangements in so far as they related to their joint roles. The claimants were now able to return to their substantive roles within the collaborative working arrangement, and reminded them in any event that their substantive roles remained available within the first respondent. She asked that the claimants confirmed whether they wished their resignations to stand, or whether they wished to retract their resignations so that they could resume their collaborative roles with the second respondent, or merely wished to return on the same terms of employment with the first respondent. The claimants opted to continue with their resignations. We were given no explanation by the second respondent as to why it changed its stance at this very late stage and was now prepared to allow a return to work to the collaborative arrangement.
63. Even after their employment had ended the first respondent continued to try to secure alternative employment for the claimants. They managed to secure offers of comparable employment with the Clinical Commissioning Group, a separate legal entity within the NHS organisation. The first claimant declined, but the second claimant was prepared to accept that offer of alternative employment. This offer was subsequently withdrawn when Dr Vasco-Knight intervened and claimed that the offer of employment should not be made to either claimant unless they withdrew these tribunal proceedings. The offer of employment was subsequently withdrawn.
64. Having established the above facts, we now apply the law.
65. Under section 43A of the Employment Rights Act 1996 ("the Act") a protected disclosure is a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H. Section 43B(1) provides that a qualifying disclosure means any disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show one or more of the following – (a) that a criminal offence has been committed, is being committed or is likely to be committed, (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject, (c) that a miscarriage of justice has occurred, is occurring or is likely to occur, (d) that the health or safety of any individual has been, is being or is likely to be endangered, (e) that the environment has been, is being or is likely to be damaged, or (f)

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

66. Under Section 43C of the Act a qualifying disclosure is made in accordance with this section if the worker makes the disclosure in good faith – (a) to his employer, or (b) where the worker reasonably believes that the relevant failure relates solely or mainly to – (i) the conduct of a person other than his employer, or (ii) any other matter for which a person other than his employer has legal responsibility, to that other person.
67. Under section 43K of the Act there is an extended meaning of worker which includes someone who works or worked for a person in circumstances in which – (i) he is or was introduced or supplied to do that work by a third person; and (ii) the terms on which he is or was engaged to do the work are or were in practice substantially determined not by him but by the person to whom he works or worked, by the third person or by both of them.
68. Under Section 47B of the Act 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. This provision does not apply to employees where the alleged detriment amounts to dismissal. Under section 48(2) of the Act, on any such complaint it is for the employer to show the ground on which any act, or deliberate failure to act, was done.
69. Under section 103A of the Act, an employee is to be regarded as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.
70. Under section 95(1)(c) of the Act an employee is dismissed if he terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.
71. If the claimant's resignation can be construed to be a dismissal then the issue of the fairness or otherwise of that dismissal is governed by section 98 (4) of the Act which provides ".... the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) – (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and – (b) shall be determined in accordance with equity and the substantial merits of the case".
72. In connection with the public interest disclosure and detriment claims, we were referred to the following authorities: Cavendish Munro Professional Risks Management Ltd v Geduld [2010] IRLR 38 EAT; Darnton v University of Surrey [2003] IRLR 133 EAT; Korashi v Abertawe Bro Morgannwg University Local Health Board [2012] IRLR 4 EAT; Hibbins v Hesters Way Neighbourhood Project [2009] IRLR 198 EAT; Woodward v Abbey National plc [2006] IRLR 677 CA; Ministry of Defence v Jeremiah [1979] IRLR 436 CA; Shamoon v Chief Constable of the RUC [2003] IRLR 285 HL; El-Megrizi v Azad University (IR) in Oxford UKEAT/0448/08; Burton v de Vere Hotels Ltd [1997] ICR 1 Melia v Magna Kansei Ltd [2006] IRLR 117 CA; Local Government Yorkshire and Humber v Shah [2012] All ER (D), 20 UKEAT/0587/11/ZT; Abertawe Bro Morgannwg University Health Board v Ferguson UKEAT/0044/13/LA; London Borough of Harrow v Knight [2003] IRLR 140 EAT; Fecitt and Public Concern at Work v NHS Manchester [2012] IRLR 64 CA; Kuzel v Roche Products Ltd [2008] IRLR 530 CA; and the relevant passages in Harvey; and on potential compensation: Way v Crouch [2005] IRLR 603; London Borough of Hackney v Sivanadan [2013] EWCA Civ 22 and Catanzano v Studio London UKEAT/0487/11.
73. We were not referred specifically to any authorities in respect of the claimants' constructive unfair dismissal claims. The law as we understand it, particularly with regard to trust and confidence cases, is explained below by reference to the following authorities: Western Excavating (ECC) Limited v Sharp [1978] IRLR 27 CA; Malik v Bank of Credit and Commerce International SA [1997] IRLR 462 HL; Omilaju v Waltham Forest London Borough Council [2005] IRLR 35 CA; Woods v WM Car Services (Peterborough) Ltd [1981] ICR 666 CA; Buckland v Bournemouth University Higher Education Corporation [2010] IRLR 445 CA; Claridge v Daler Rowney [2008] IRLR 672; Sainsbury'

Supermarkets Limited v Hitt [2003] IRLR 23 CA; Lewis v Motorworld Garages Ltd [1985] IRLR 465; Nottingham County Council v Meikle [2005] ICR 1 CA; Abbey Cars (West Horndon) Ltd v Ford EAT 0472/07; and Wright v North Ayrshire Council [2014] IRLR 4 EAT.

74. With regard to the meaning of "detriment", this is not defined in the Act. We apply the definition in Shamoon where it was held that a worker suffers a detriment if a reasonable worker would or might take the view that he/she had been disadvantaged in the circumstances in which he/she had to work.
75. We have also heard submissions on the meaning of "subjected to" in section 47B of the Act. It seems from Ferguson that the word "caused" had not been used because the words "subjected to" better expressed how an "act" and a "deliberate failure to act" could result in a detriment. However, a failure to act in a certain way would not be sufficient to amount to a failure to act for these purposes. We agree with the first respondent's contention that, applying Ferguson and Knight, for an employer to fall foul of section 47B of the Act an employer does not need to be obliged, under statute or contract, to take action and failed to do so, but it does need (i) to have the power or ability to act; and (ii) to choose not to do so because of the fact that a complainant has made a protected disclosure.
76. With regard to causation, and the burden of proof (including section 48(2) of the Act), applying Knight there must be a causative link between the protected disclosure and the reason for the treatment, in the sense of the disclosure being the "real" or "core" reason for the treatment, and applying Fecitt the test is whether the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistleblower.
77. The best known summary of the applicable test for a claim of constructive unfair dismissal was provided by Lord Denning MR in Western Excavating (ECC) Limited v Sharp [1978] IRLR 27: "If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment; or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract; then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of his employer's conduct. He is constructively dismissed. The employee is entitled in these circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he 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. He will be regarded as having elected to affirm the contract."
78. It is clear from Meikle, Abbey Cars and Wright, that the crucial question is whether the repudiatory breach "played a part in the dismissal" and was "an" effective cause of resignation, rather than being "the" effective cause. In need not be the predominant, principal, major or main cause for the resignation.
79. With regard to trust and confidence cases, Dyson LJ summarised the position thus in Omilaju v Waltham Forest London Borough Council [2005] IRLR 35 CA: The following basic propositions of law can be derived from the authorities: 1. The test for constructive dismissal is whether the employer's actions or conduct amounted to a repudiatory breach of the contract of employment: Western Excavating (ECC) Limited v Sharp [1978] 1 QB 761. 2. It is an implied term of any contract of employment that the employer shall not without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee: see, for example Malik v Bank of Credit and Commerce International SA [1998] AC 20, 34H – 35D (Lord Nicholls) and 45C – 46E (Lord Steyn). I shall refer to this as "the implied term of trust and confidence". 3. Any breach of the implied term of trust and confidence will amount to a repudiation of the contract, see, for example, per Browne-Wilkinson J in Woods v WM Car Services (Peterborough) Ltd [1981] ICR 666 CA, at 672A; the very essence of the breach of the implied term is that it is calculated or

likely to destroy or seriously damage the relationship. 4. The test of whether there has been a breach of the implied term of trust and confidence is objective. As Lord Nicholls said in Malik at page 35C, the conduct relied on as constituting the breach must: "impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer".

80. This has recently been reaffirmed in Buckland v Bournemouth University Higher Education Corporation [2010] IRLR 445 CA, in which the applicable test was explained as: (i) in determining whether or not the employer is in fundamental breach of the implied term of trust and confidence the unvarnished Malik test should be applied; (ii) If, applying Sharp principles, acceptance of that breach entitled the employee to leave, he has been constructively dismissed; (iii) It is open to the employer to show that such dismissal was for a potentially fair reason; (iv) If he does so, it will the be for the employment tribunal to decide whether the dismissal for that reason, both substantively and procedurally (see Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23 CA) fell within the range of reasonable responses and was fair."
81. The same authorities also repeat that unreasonable conduct alone is not enough to amount to a constructive dismissal (Claridge v Daler Rowney [2008] IRLR 672); and that if an employee is relying on a series of acts then the tribunal must be satisfied that the series of acts taken together cumulatively amount to a breach of the implied term (Lewis v Motorworld Garages Ltd [1985] IRLR 465). In addition, if relying on a series of acts the claimant must point to the final act which must be shown to have contributed or added something to the earlier series of acts which is said, taken as a whole, to have broken the contract of employment (Omilaju v Waltham Forest London Borough Council [2005] IRLR 35 CA).
82. We now turn to our unanimous judgment which is as follows.
83. We find in the first place that Mrs Murphy was at all material times a worker of first respondent. Although she was not an employee of the first respondent, she was its director of Workforce and Organisational Development under the collaborative working arrangements, and a non-voting member of its Board. She falls within the extended definition of "worker" within section 43K of the Act. Accordingly the first respondent is potentially liable for any detriments caused by Mrs Murphy as its worker on the ground of public interest disclosures.
84. We now turn to the alleged public interest disclosures, of which there were three claimed in the claimants' first proceedings, and now extended to four in their second proceedings. The first respondent disputes the first disclosure, but does not challenge the remaining three. The second respondent now accepts that the claimants did make these public interest disclosures. Despite the earlier allegations of malice, the second respondent does not now accuse the claimants of bad faith. The four disclosures are these: (a) the first claimant's verbal disclosure to the second claimant on 26 July 2012 regarding an alleged irregularity in the selection process for the Equality and Diversity Manager vacancy; (b) the second claimant's verbal disclosure of that alleged irregularity to the then Chief Executive of the first respondent on 10 October 2012; (c) both claimants' verbal disclosure to Mrs Murphy on 11 October 2012; and (d) both claimants' written disclosure on 16 October 2012 to the then Chief Executive of the first respondent about the alleged irregularity, and also the conduct of Mrs Murphy at the meeting on 11 October 2012.
85. The claimants rely on section 43B(1)(b), namely the disclosure of information which in the reasonable belief of the worker making the disclosure tends to show ... that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject, and section 43C(1) that the disclosure is made in good faith to his employer.
86. We find that the claimants held a reasonable belief that Dr Vasco-Knight failed to comply with legal obligations, including possible breach of the equality provisions for public bodies; possible breach of the second respondent's policies and/or fiduciary duties owed to the second respondent; and a possible breach of the implied term of trust and confidence. In connection with the fourth disclosure only, the claimants also held a

reasonable belief that Mrs Murphy had failed in her legal obligation not to subject them to a detriment on the ground of their having raised a public interest disclosure. Each of these disclosures was made to their employer, respectively: the first claimant to her line manager the second claimant; the second claimant to her Chief Executive; both claimants to their line manager Mrs Murphy; and both claimants to their Chief Executive.

87. We find therefore that the claimants made public interest disclosures within the statutory definition and are therefore entitled to the statutory protection against detriment as employees of the first respondent, and workers of the second respondent. We have been asked by the second respondent to record that the claimants gave no evidence that they believed that Dr Vasco-Knight was guilty of misconduct in public office.

88. We now turn to the claims for detriment. The detriments alleged are these: (a) intimidation from Mrs Murphy designed to dissuade the claimants from taking their complaints any further (alleged against both respondents); (b) pressurising the claimants to leave their current roles and to accept an offer of redeployment or secondment (alleged against the first respondent only); (c) refusal to permit the claimants to return to collaborative working and to return to the duties they had fulfilled prior to making the disclosures (alleged against both respondents); (d) refusal to deal with the claimants' complaints under its whistle blowing and/or grievance procedures, thus leaving them with no form of internal redress (alleged against the second respondent only); (e) failure to undertake any investigations or make any findings as to any alleged breakdown in relationships and/or the reasons for this (alleged against both respondents); (f) failure to properly question and challenge the actions of the second respondent and/or to apply the key principles of its own whistle-blowing policy in the case of the claimants (alleged against the first respondent only); (g) failure to consider or give any assurances to the claimants as to the highly vulnerable positions they would find themselves in if the proposed merger went ahead (alleged against the first respondent only); (h) failure to undertake a fair and impartial investigation into the matters raised by the claimants, to conduct the process fairly and/or to reach reasonable conclusions (alleged against the second respondent only); and (i) allocation of the first claimant's role to someone else before her employment had ended (alleged against the second respondent only). We deal with each of these in turn.

89. (a) The claimants succeed in this first allegation. We find that both claimants were subjected to detriment by Mrs Murphy in that they felt threatened and intimidated by her in her attempts to dissuade them from pursuing their complaints. This detrimental treatment was on the ground of the protected disclosure to her. Mrs Murphy was their line manager, and was a worker of the first respondent and an employee of the second respondent. The claimants succeed in this aspect of their claim as against both respondents who are jointly and severally liable. As can be seen below, this is the only claim in respect of which the claimants succeed as against the first respondent.

90. (b) We do not find that the claimants were subjected to a detriment on the ground of their public interest disclosures in that the first respondent can be said to have pressured them to leave their current roles and to accept redeployment or secondment. This is linked to (c) below. The first respondent tried repeatedly to restore the claimants to their pre-existing collaborative working arrangements. The barrier to this was the second respondent's refusal to allow it. The first respondent acted reasonably and responsibly in telling the claimants that they were unable to persuade the second respondent to change its mind, but that they could return to work with the first respondent on exactly the same terms but for the change of roles. We do not accept that the claimants were subjected to this detriment by the first respondent of being pressured to leave their previous roles on the ground they had raised protected disclosures. On the contrary, the first respondent would have preferred them to have returned to their previous roles, but was unable to persuade the second respondent to agree to this.

91. (c) This is linked to the above second allegation (b), and is against both respondents, namely that the claimants were not permitted to return to the collaborative working arrangements. We find that it was the second respondent's refusal to allow this, whilst the claimants failed to accept the second respondent's version of the report, which was the

barrier which prevented them from returning to their previous roles. This occurred despite the first respondent's conduct in seeking to persuade the second respondent to allow the claimants to return. We find that the second respondent's refusal was on the grounds of the claimants' public interest disclosures. The second respondent did not want them back whilst they persisted with their complaint. We find that the claimants were subjected to this detriment by the second respondent on the grounds of their public interest disclosures. The second respondent had the power and ability to allow the claimants to return to work in the collaborative arrangement, but chose not to do so because the claimants were persisting with their complaints.

92. (d) As to this fourth allegation, we do not accept as a matter of fact that the first respondent refused to deal with the claimants' complaints in this way. The joint investigation was set up under both respondents' whistle blowing policies. The claimants had the right of appeal under the first respondent's policy against the unfavourable decision following the report, and the right to raise a formal grievance. They were both senior managers well versed in HR procedures. They did not pursue their complaints in this way. They do not succeed in this allegation as against the first respondent.
93. (e) Similarly, as a matter of fact, we do not accept that either respondent subjected the claimants to a detriment by failing to investigate the reason for the breakdown in relationships. The reason was obvious. The second respondent failed to agree to the return to work and there was a breakdown in relationships between the claimants and Dr Vasco-Knight and Mrs Murphy because the claimants had raised a complaint and did not accept the results, and the second respondent refused to entertain the prospect of a return to work whilst they refused to accept the result. It is not true as a matter of fact that either respondent failed to make such an investigation on the ground of the claimants' public interest disclosures. This claim against both respondents is rejected.
94. (f) As to the sixth allegation, which is against the first respondent only, again we cannot accept as a matter of fact that the first respondent failed properly to question and challenge the second respondent, and apply key principles of its whistle blowing policy. The first respondent repeatedly challenged the second respondent's actions, and tried to persuade them to act differently. Representations were made at senior level by Mrs Seymour the first respondent's Chief Executive and Mrs Dent its Chair. The second respondent remained intransigent. The claimants were not subjected to this detriment by the first respondent on the ground that they had raised public interest disclosures.
95. (g) As to this seventh allegation, which is against the first respondent only, again we do not find as a matter of fact that the first respondent failed to give the claimants reassurance as to the potential vulnerability of their positions on the ground that they have made protected disclosures. The first respondent was unable to give any such reassurance as to what the second respondent might do in the future, other than to the effect that the claimants enjoyed potential protection, for instance under the TUPE Regulations or the public interest disclosure victimisation provisions. This claim is rejected.
96. (h) We entirely agree with this eighth allegation against the second respondent. We find that the second respondent subjected the claimants to a significant detriment by failing to undertake a fair and impartial investigation, failing to conduct the process fairly, and failing to reach a reasonable conclusion. Our findings of fact on the process are set out above. The claimant was subjected to this detriment on the grounds that they had pursued their public interest disclosure complaints against Dr Vasco-Knight and Mrs Murphy. They succeed in this claim against the second respondent.
97. (i) Finally we reject the ninth allegation that the second respondent allocated the claimant's role to another before her employment had ended on the ground of the public interest disclosure. At the relevant time in December 2012 the second claimant had been sick for some time, and the first claimant just gone sick, and the second respondent lacked management presence in the relevant unit. The appointment of Chris Edworthy was temporary, and despite being made in a rushed way which might not have complied fully with the terms of the Recruitment Policy, the appointment was made to ensure that

sufficient managerial cover was in place. The first claimant was not subjected to this detriment on the ground of her public interest disclosure.

98. The claimants therefore succeed in their detriment claims against the first respondent only in respect of the first alleged detriment (a). They succeed in their detriment claims against the second respondent in respect of the first (a), third (c), and eighth (h) alleged detriments.

99. We now turn to the claimants' constructive unfair dismissal claim. These claims fall against the first respondent only in its capacity as the claimants' former employer. The fundamental breaches of contract relied upon are that the first respondent acted without reasonable or proper cause in a way which was calculated or likely to destroy or seriously damage the trust and confidence between employer and employee, and that the first respondent failed to apply its whistle blowing and/or grievance policies properly.

100. In the first place we find that the first respondent acted reasonably and responsibly in dealing with the claimants' concerns and complaints. The complaints were processed under the first respondent's whistle blowing policy with the consent of the claimants by way of the agreed joint investigation and report. Given the second respondent's refusal to disclose the report, and its (misleading) assurances to the first respondent as to the findings of the report, the first respondent was left with no real option other than to accept this conclusion. The first respondent did its upmost to persuade the second respondent to disclose the report, but could not force it to do so. The first respondent's preferred course of action was to assist the claimants to return to their previous collaborative role with the second respondent, but this was refused by the second respondent. At all times the claimants were reassured that their positions remained open with the first respondent, on identical terms save for their collaborative roles. The first respondent continued to seek to persuade the claimants to return to work with them, and this continued even after the termination of their employment. We find that the first respondent genuinely and responsibly tried to arrange for the claimants to return to work. They tried without success to persuade the second respondent, and were never in a position to force the second respondent to accept the claimants if the second respondent refused to do so. Effectively their hands were tied. In the circumstances we do not accept that the first respondent adopted a course of conduct which without reasonable or proper cause was calculated or likely to destroy or seriously damage trust and confidence between it and the claimants.

101. Similarly, we do not accept as a matter of fact that the first respondent failed to apply its whistle blowing policy and/or its grievance policy. The whistle blowing policy was applied by way of the joint investigation. The claimants were offered the right of appeal under the policy against the finding, which included under the policy the right of referral to outside statutory agencies. The claimants were senior managers and well versed in HR policies and procedures, and did not pursue that option. Similarly, they did not raise a formal grievance under the relevant grievance procedure, which they were entitled to do. We do not accept as a matter of fact that the first respondent failed to allow the claimants to pursue either of these two procedures, or other procedures. There was no breach of contract in this respect.

102. Accordingly we do not accept that the first respondent acted in fundamental breach of the claimants' contracts of employment. In these circumstances their resignations cannot be construed to be dismissals, and they were not dismissed. Accordingly we dismiss the claimants' unfair dismissal claims.

103. It follows from this that the claimants were not dismissed by the first respondent in breach of contract, and we also dismiss their claims for breach of contract against the first respondent.

104. There will now be a case management preliminary hearing in order to make directions ahead of a further hearing which is now required to determine the appropriate remedy. We have not heard any evidence or submissions on the matter of remedy, but to assist the parties we would add that our finding that the first respondent was jointly and severally liable for the actions of Mrs Murphy in subjecting the claimants to the first detriment (a) relates to a detriment which in our judgment cannot be said to have been

causative of the claimants' resignations. We would expect to hear representations from the parties at the remedy hearing as to the extent to which the remaining detriments caused by the second respondent can be said to have been causative of the claimants' resignations.

105. For the purposes of Rule 62(5) of the Employment Tribunals Rules of Procedure 2013, the issues which the tribunal determined are at paragraph 1; the findings of fact made in relation to those issues are at paragraphs 6 to 63; a concise identification of the relevant law is at paragraphs 65 to 81; and how that law has been applied to those findings in order to decide the issues is at paragraphs 83 to 103.

Employment Judge N J Roper
Dated 28 January 2014
Judgment sent to Parties on

28 January 2014