# EMPLOYMENT TRIBUNALS

| **Claimant** | | **Respondents** |
|---|---|---|
| **Mr Ross Collins** | **v** | **(1) Steris IMS Ltd**<br>**(2) Mr Matthew Robinson**<br>**(3) Mr Matthew Watts** |

**Heard at**: Watford by Cloud Video Platform **On**: 15-23 March 2021 & 26 & 12 April 2021 (in chambers)

**Before:** Employment Judge Bedeau
Mrs I Sood
Mrs J McGregor

**Appearances**

**For the Claimant:** Mr T Kibling, Counsel
**For the Respondent:** Mr C Edwards, Counsel

## RESERVED JUDGMENT

1. The claim of unfair dismissal, section 98(4) Employment Rights Act 1996, is not well-founded and is dismissed.

2. The claim of unfair dismissal, section 103A Employment Rights Act 1996, is not well-founded and is dismissed.

3. The claims of public interest disclosure detriment are not well-founded and are dismissed.

## REASONS

1. By a claim form presented to the Tribunal on 3 April 2019, the claimant made claims of public interest disclosure detriment; public interest disclosure dismissal; and ordinary unfair dismissal. The claimant was employed as a

Supervisor/Technical Repairer. His employment was from 12 October 2006 to 9 November 2018, when he was summarily dismissed.

2. In the response presented to the Tribunal on 16 May 2019, the claims are denied. The respondents assert that the claimant was dismissed for gross misconduct, in that he had been dishonest about his reasons for taking 18 October 2018 off work. A fair investigation was conducted and there were reasonable grounds for believing in his guilt. Dismissal fell within the range of reasonable responses. The other claims are denied.

3. The claimant notified ACAS on 7 February 2019 and a certificate was issued on 7 March 2019.

4. At the preliminary hearing held in private by Employment Judge Clarke QC, on 30 January 2020, the issues were set out in respect of each claim with a further issue, in respect of the detriment claims, being whether they have been presented in time. The case was listed for a further preliminary hearing on 16 July 2020, to consider possible applications for specific disclosure.

5. On 16 July 2020, the Judge in this final hearing, considered the applications and refused the claimant's request for the appointment of a health and safety expert to investigate the respondent's procedures and practices. The Judge determined that it was not a case in which expert evidence was required. The claimant was ordered to serve his response to documents disclosed to him by the respondents' representatives on 10 July 2020, by not later than 4pm 6 August 2020. He was further ordered that his response must not include any further requests for specific disclosure as it would not be proportionate to the issues in the case. The respondents were at liberty to respond to the claimant's response by not later than 4pm 3 September 2020.

## The issues

6. Protected Disclosures

   6.1 The claim form identifies 18 disclosures. Did the claimant make those disclosures?

   6.2 If so, were they disclosures of information which, in the reasonable belief of the claimant, were made in the public interest and tended to show:

      6.2.1 In respect of disclosures numbered 1 to 18, that the first respondent had failed to comply with its legal obligations and/or health and safety obligations, within the meaning of section 43B(1)(b) or (d) of the Employment Rights Act 1996?

      6.2.2 In respect of disclosures numbered 6 and 18, that the first respondent was deliberately concealing matters within the meaning of section 43B(1)(f) of the 1996 Act.

6.3 It is noted that if in producing the schedule ordered below, the claimant shall assert that any of the disclosures tended to show that a criminal offence had been, or was being, or was likely to be committed, then whether that was so will also be an issue in the case.

6.4 Whether the disclosures were, in each case, made in accordance with section 43C of the 1996 Act.

7. Detriment

7.1 If it is shown that the disclosures were made, were they made to an appropriate person and were they disclosures of information in respect of which the claimant reasonably held the relevant belief and which tended to show one of the relevant matters.

7.2 Whether the first, second or third respondent subjected the claimant to the detriments numbered 1 to 7 and 10 particularised in the claim form, or any of them.

7.3 If so, whether such detriments were on the grounds that the claimant had made protected disclosures, within the meaning of section 47B of the 1996 Act.

7.4 In respect of the alleged detriments numbered 9 and 11, it is accepted by the respondents as a matter of fact, that the claimant was dismissed and that his appeal was not upheld. It is the respondents' position that matters relating to the dismissal and subsequent appeal are properly matters which fall within section 103A of the 1996 Act and are not capable as a matter of law of being detriments within section 47B. The tribunal need to resolve that matter. If the respondents' contention in this regard is incorrect, the issue for the tribunal will be whether such detriments were on the grounds that the claimant had made protected disclosures, within the meaning of section 47(B) of the 1996 Act.

8. Unfair dismissal

8.1 With regard to "ordinary" unfair dismissal (within the meaning of section 98 of the 1996 Act):

8.1.1 What was the reason for dismissal? The first respondent's case is that the reason for dismissal was conduct, a potentially fair reason, specifically gross misconduct relating to the claimant's dishonesty regarding the reason for leaving work on 18 October 2018;

8.1.2 Whether the first respondent genuinely believed in the misconduct based on reasonable grounds;

8.1.3 Whether this belief was reasonably held after a reasonable investigation;

8.1.4 Whether the dismissal fell within the range of reasonable responses available to it as a reasonable employer dealing with the facts and situation in question.

8.2 As regards "automatic" unfair dismissal (within the meaning of section 103A of the 1996 Act), if the claimant made the protected disclosures referred to above, was the reason (or if there was more than one reason, the principal reason) for the dismissal, that the claimant had made one or more of those protected disclosures.

9. Remedy

9.1 If it is found that the claimant was subjected to one or more of the detriments alleged on the grounds that he had made protected disclosures, to what compensation is he entitled.

9.2 If the claimant is found to have been unfairly dismissed, what compensation is he entitled to? In particular, what, if any, reduction should be made by reason of the claimant's conduct and/or in accordance with the principles set out in Polkey v AE Dayton Services and/or what uplift in the compensation should there be for failure to comply with the ACAS code of practice on disciplinary and grievance procedures.

10. Claim in time points

10.1 It is not disputed that the unfair dismissal claims were presented within the primary limitation period.

10.2 If, as would appear to be the case if they are viewed in isolation, the claims in respect of one or more of the alleged protected disclosures are presented outside the primary limitation period set out in section 48(3) of the 1996 Act, were the acts in question "similar acts", or acts "extending over a period" (for the purposes of section 48(3) or (4) of the 1996 Act) such that it is the date of the last such act, or when the act culminated, that is material. If an insofar as any claim in respect of any protected act was presented outside the primary limitation period, was it reasonably practicable to have presented it within that period and, if not, was it presented within a further reasonable period.

11. The claimant produced a further document covering the alleged protected disclosures and public interest disclosure detriments. (Pages 48-60 of the joint main bundle)

**The evidence**

12. The tribunal heard evidence from the claimant who called Mr Lewis Cameron-Mitchell, former Repairer, as a witness.

13. On behalf of the respondents evidence was given by: Matthew Keith Robinson, Operations Manager; Mr Peter Andrew Fairhurst, Quality Manager; Mr Matthew Watts, Director – Device Repair; Mr Anil Patel, Human Resources Advisor; Ms Valerie Jones, General Manager, Reading; and Ms Carolyn Denaro, Regional Human Resources Manager – North West.

14. In addition to the oral evidence, the parties adduced a main bundle of documents comprising 936 pages. There were two supplemental bundles, one comprising of 134 pages, the other 53 pages. References will be made to documents by page numbers in the bundles. The first respondent shall be referred to as the "respondent" and the second and third respondents by their last names. Where we have referred to "respondents" it is to all three respondents.

**Findings of fact**

15. The first respondent, Steris Instrument Management Services (IMS) Ltd, is a leading industry expert in the management of surgical instruments and devices. It is based in Swindon, Wiltshire. It is also part of the Synergy Group business which is based in the United States of America.

16. Mr Matthew Robinson was employed as Operations Manager at the first respondent's Hoddesdon site in Hertfordshire and was the claimant's line manager.

17. Mr Matthew Watts was employed as Director – Device Repair. He was responsible for two of the respondent's facilities, namely the Hoddesdon and Northampton sites, as well as the sales team. He worked four days at Hoddesdon and one day at Northampton.

18. The claimant was initially employed by Phoenix Surgical Instruments Ltd as a Repair Technician from 6 November 2006. He progressed to become Workshop Supervisor with particular responsibility for training younger members of staff who were technically less experienced in the repair of medical instruments. He was based at the Hoddesdon site.

19. The owner/Managing Director of Phoenix Surgical Instruments Ltd, Mr John Twigger, issued to the claimant his contract of employment with regular updates. In addition, a staff handbook covering attendance; training and personnel development; policies and procedures including anti-harassment and bullying, disciplinary, grievance, public interest disclosure or whistle-blowing, health and safety; factory policies and procedures; sales staff policies and procedures; and general matters.

20. In relation to absence, the handbook states:

> "Absence can be treated in a variety of ways. You should discuss your preference with your manager, who retains overall discretion in the matter. A number of options as set out below:
>
> (a) Treating the absence as annual leave.

(b) Treating the absence as flexi-time or time off in lieu.
(c) Making up the lost hours within a reasonable time.
(d) Treating the absence as special unpaid leave.

Adverse weather sometimes leads to school or nursery closures or the unavailability of a nanny or childminder."

(88)

21. As regards the disciplinary procedure, it states that there should be an investigation; that the employee will be advised in writing of the nature of the complaint; given the opportunity to state their case; the right to be accompanied at all disciplinary and appeal hearings; and shall have the right to appeal against any disciplinary action.

22. In addition, minor problems could be dealt with through informal counselling and advice. Formal action would be taken where the gravity of the problems and informal approach is inappropriate.

23. Where the complaint is justified, possible courses of action are, a written warning; final written warning; or dismissal.

24. In relation to examples of gross misconduct, it includes "making false statements to the company", "theft or fraud". (93)

25. Under the appeals provision it states:

"An employee may appeal against any disciplinary decision, including dismissal, to the managing director within five working days of the decision. Appeals should be made in writing and state the grounds for appeal. The employee will be invited to attend an appeal hearing chaired by the managing director. At the appeal hearing, the employee will again be given the chance to state his or her case and will have the right to be accompanied by a fellow employee of his or her choice or trade union representative. Following the appeal hearing, the employee will be informed of the decision, and the reasons for it, in writing.

The company's decision on an appeal will be final.

Every effort will be made, through the internal appeals procedure, to ensure that employees feel that they have been treated totally fairly."

(94)

26. It is not clear whether the appeal would either be a review or a re-hearing.

27. The claimant's terms and conditions of employment, paragraph 16, dated 14 July 2016, states that the disciplinary procedure did not form part of his terms and conditions of employment.

28. In paragraph 18.4, it states that Phoenix was entitled to dismiss at any time without notice or payment in lieu of notice if the claimant committed a serious

breach of his obligations as an employee or was no longer entitled to work in the United Kingdom.

29. In paragraph 17.3, it states that nothing in the claimant's contract would prevent the respondent from terminating his employment summarily or otherwise in the event of any serious breach by him of the terms of his employment or committing any act or acts of gross misconduct. (142-152)

30. He was entitled to 20 days holiday for each complete calendar year in addition to the usual Bank and Public holidays. The company may require him to take up to 5 days holiday from his 20 days' annual entitlement on specific days as notified to him during the annual shut down over Christmas and New Year. He would be paid his normal remuneration during such holidays, paragraph 9.2.

31. He told the tribunal that those at Hoddesdon were required to take 3 days between Christmas and the New Year, which meant that they did not have a choice as to when to take those 3 days leave as the factory premises would be closed.

32. As regards public interest disclosure or whistle-blowing, the policy applies to full-time and part-time employees, contractors and sub-contractors, agency staff and those on work experience or trainees. It gives information relevant to what constitutes disclosure and states that the disclosure should always be reported confidentially to the managing director. The whistle-blower should make it clear that the disclosure was being made within the terms of the policy. This would enable the recipient of the disclosure to take the necessary investigative action. It further states that anonymous disclosures would be taken seriously and fully investigated. Following the outcome of an investigation, disciplinary action against the wrongdoer may be taken; or disciplinary against the whistle-blower if the claim is found to be malicious or in bad faith; and no action if the allegation proves to be unfounded. The disclosure could be to a third party. The employee is also informed that they could approach an independent group called "Public Concern at Work" for confidential and impartial advice and their telephone number is given. (83-101)

33. In the Synergy Health Handbook, it has policies and procedures in relation to a wide range of matters, including equal opportunities; leave; absence and lateness; work and families, to include flexi-working; general rules, to include a code of ethics; disciplinary; grievance management; whistle blowing, amongst others.

34. In relation to the disciplinary procedure, paragraph 10.2 states that no disciplinary action will be taken unless the case has been fully investigated and there has been a disciplinary hearing. It further states:

> "Disciplinary hearings may be adjourned, for example because further investigation or consideration of the case is required. It will be a general principle, however, that disciplinary proceedings will be conducted as quickly as is consistent with the justice of the case."

35. In relation to recording meetings it provides:

> "Arrangements will be made to take written notes of any meeting/hearing and you will be provided with a copy. You will have the opportunity to review the notes taken and make changes if you believe the notes are not a true reflection of the meeting/hearing. You and your chosen companion are permitted to take notes of your own during the meeting/hearing. You will be asked at the commencement of any meeting/hearing if you are carrying any recording device and will be required to switch it off, or remove it."

36. The policy sets out the staged approach to disciplinary action. Stage 1 being the issue of a verbal warning. Stage 2 for more serious offences or a further less serious offence, the issue of a written warning. If there is a further offence, a final written warning is issued. If there is a further offence or if, exceptionally, the offence is serious enough to justify dismissal without prior warnings, the employee will be dismissed with the appropriate notice. Such actions may be taken by a senior manager or a director.

37. Where the employee is at risk of being dismissed the policy states:

> "As an alternative to dismissal, the company may, at its discretion, impose as a disciplinary measure, a demotion (temporarily or permanently) or transfer to another job (with or without a reduction in pay) or suspension without pay for up to five working days. Such measures would always be applied in addition to the issue of a final written warning, but should remain live for a period of twelve months from the date of issue.
>
> Full reasons for dismissal or alternative action will be confirmed in writing, and this communication will notify the employee of the right to appeal."

38. Examples of gross misconduct include fraud, falsification of records, misappropriation of funds and other offences involving dishonesty.

39. The disciplined employee has the right of appeal against the disciplinary decision taken which must be exercised within five working days of the disciplinary action and to the manager named in the written outcome document. The policy then states:

> "An appeal hearing will be arranged at which the employee will have the opportunity to present their appeal, and at which they may be accompanied by a fellow employee of their choice or a trade union representative."

40. If possible, the appeal hearing should take place within five working days of receipt of the appeal letter and the manager hearing the appeal will, if possible, notify the employee of the decision within five working days of the appeal hearing. Longer periods may be required if circumstances dictate, or if further investigation has to be undertaken. (102-125)

41. We were not taken to Synergy's whistle-blowing policy.

42. Steris Plc has a policy on global ethics and compliance which is a code of conduct enabling it to establish a work environment free from harassment and discrimination. (126-133)

43. We understand that there was a scheduled training day on the ethics policy, but the claimant was unable to attend because he was ill.

44. The evidence given by Mr Anil Patel, Human Resources Advisor for Hoddesdon, was that a copy of the policy was sent to each employee at the Hoddesdon site.

45. Steris Plc, which includes the first respondent, is part of Synergy Healthcare, which operates in over 100 countries with a global workforce of 13,000 employees, processing more than 100 million surgical instruments a year with annual revenue exceeding $3 billion. The company's headquarters are in Ohio, USA.

46. In 2016, Steris Plc acquired two surgical repair businesses, one based in Northampton and Phoenix Surgical Holdings Ltd, based in Hoddesdon.

47. Mr John Twigger, owner and Managing Director of Phoenix, left and was replaced by Mr Peter Woolston, who was appointed Director of Instrument Repairs in April 2017.

48. Ms Amanda Howard is Regional Human Resources Manager; Ms Charlotte Johnson, the Senior Human Resources Business partner; and Mr Anil Patel and Roberta Petkute, are Human Resources Advisors. They do not work at Hoddesdon but in the respondent's southern division.

49. As Factory Supervisor, the claimant was responsible for, "all workshop quality inspection activities to ensure product and process conformity; and the cleanliness and smooth operation throughout the factory; and machinery maintenance and safety." (153)

50. He was later issued with updated terms and conditions of his employment as Workshop Supervisor with effect from 1 April 2017. His duties were similar to those of a Factory Supervisor. He was responsible together with the three workshop supervisors, for ensuing that the technicians followed the required processes when handling repairs; that the workshop was run in an orderly way and was kept tidy; for overseeing all quality inspection activities; and for ordering of stock. If the stock was running low, he would inform Mr Phil Deal, Quality Technician, as to what was needed, and Mr Deal would then put an order in.

51. The updated terms and conditions given by the respondent, were issued as part of an alignment and relabelling exercise following the acquisition of Phoenix.

52. In a letter from Steris Instrument Management Services, staff at Hoddesdon were informed that Phoenix would change its name to Steris IMS Ltd, the first respondent, from 1 September 2017. (156)

53. The respondent employs 13 staff at the factory in Hoddesdon. Four were supervisors. The claimant was a senior team member, who supervised the Repairs Department jointly with Mr Buckner and managed one trainee and one experienced technician who had over 40 years industry experience. Mr Buckner managed one experienced technician and one trainee.

54. The other supervisors were Mr Chris Grist, who supervised the Powder Coating Department and managed two employees including an apprentice, and Mr Peter Bainbridge, who supervised the Manufacturing Department and managed two experienced employees.

55. On 6 November 2017, Mr Peter Woolston, Director of Instrument Repairs, issued a staff announcement covering several issues, including clocking in and out. He wrote in relation to clocking in and out:

> "Staff are reminded that they should not clock in or clock out another member of staff".

56. In relation to personal protection equipment, he wrote:

> "Protection of our workforce from injuries paramount. The company will provide all PPE, but it is your duty and responsibility to look after it. The following PPE rules apply:
>
> - Safety shoes will be worn in all non-office areas and the shipping office;
> - Safety glasses will be worn during working hours in the workshop (ie not required during breaks) including when on the designated red pathways;
> - In addition to standard PPE (shoes and glasses), FFP3 face masks will be worn in the polishing shop when using the polishers, grinders and all other rotating equipment."
>
> (301-302)

<u>Clocking-in</u>

57. In or around May 2018 it was noticed by Mr Robinson and by Mr Watts that occasionally, the claimant would arrive late to work. It was observed that on a particular morning he entered the building late, walked down the side of the building and entered the premises from the rear which was unusual as employees entered from the front. Mr Robinson and Mr Watts checked his timesheet for that day, and it became clear that his timings did not add up. An informal meeting was held with him during which he stated that he had asked his trainee, Mr Harlee Grover, to clock him in on time. Mr Robinson and Mr Watts were concerned that the claimant had involved his trainee in dishonest conduct giving the impression that such conduct was acceptable. He was a Supervisor who had instructed a junior colleague to behave in that way. He was warned, informally, that such behaviour was unacceptable and should not happen again. There were grounds for escalating the matter to Human Resources as a potential disciplinary issue, but as a member of his team, Mr Robinson wanted to give him another opportunity to prove himself.

58. Mr Robinson stated in evidence that after issuing the informal warning the claimant was left in no doubt how serious the matter had been taken.

59. The claimant accepted in evidence that he had been spoken to about his conduct. He said that he was on his way to work and was due to pick up Mr Grover, but Mr Grover had made his own way to work. On route into work, he was delayed by traffic and instructed Mr Grover to sign in for him just before his start time. When he arrived, he was 20 minutes late.

60. He told us in evidence that other staff arrived for work late and got others to sign them in purporting to be on time. The example he gave was when the employees would travel together as a group to work. The person who would be driving and parking the car on the premises would ask someone in the group to clock him in on time although they may be a few minutes late.

61. In our view, there is a difference between the example he gave and his conduct in May 2018. Those who travelled as a group would arrive for work before time or on time, but for the fact that the driver had to park the car, which would take a few minutes, he would have arrived for work also on time. In the claimant's case he knew he would be late and instructed his trainee to sign him in as being at work on time. Which, as a Supervisor, was dishonest conduct.

Holiday, Time off in lieu and sickness

62. In relation to booking annual leave, the claimant's Phoenix contract dated 14 July 2016, states the following:

> "9.9 Holidays must be taken at times convenient to the company. You must obtain approval of proposed holiday dates in advance from the Workshop Supervisor. You will not be allowed to take more than two weeks at any one time, save at the company's discretion. You must not book holidays until your request for approval has been formally agreed."

(145)

63. In relation to time off in lieu, at the Hoddesdon site, Mr Robinson, as Operations Manager, from time to time would authorise requests for time off in lieu to be taken. This would be in circumstances where the employee had raised the matter with him in advance and sought permission, at least a day before, and arrived early on the day in question to offset the time that they wanted to leave early. Whether he would approve the employee leaving early would depend upon the workload for the day and any resourcing issues. Staff at the site were not permitted to decide unilaterally that they could take time off in lieu of time worked.

64. The respondent's sickness absence reporting procedure states that when employees are absent from work because they are unwell, they are required to notify the company 30 minutes before the start of their shift.

65. The unchallenged evidence from the claimant was that he would arrive for work one hour early at 7am, instead of 8am and work his shift. This allowed him to build up overtime or TOIL. He regularly accrued one hour overtime each day during his working week.

66. From his overtime clocking in card, for the week ending 6 October 2018, he had 6 hours overtime; week ending 13 October, he had 2.5 hours overtime. Reference is made to 1.75 hours for week ending 20 October overtime. We take the view that that figure is a minus figure because the total overtime for that month was 6.75 for which the claimant was eventually paid at time and a third around 27 November 2018. 6 hours added to 2.5 hours is 8.5, minus 1.75 gives the total of 6.75 hours overtime. (162, 912)

Events of 18 October 2018

67. The events on 18 October 2018 ultimately resulted in the claimant's dismissal.

68. On 11 September 2018, the claimant booked a flight for two adults leaving on Thursday 18 October 2018 from Gatwick Airport at 15.25 to Larnaca, Cyprus. He was due to return on Wednesday 24 October 2018 to Gatwick Airport at 01:35. (647)

69. On 18 September 2018, he put in his holiday request for two days' leave from 22 to 24 October 2018, which was approved by Mr Robinson. On 1 October 2018, Mr Robinson allowed him to have Friday 19 October 2018 as holiday in lieu of one of the three days at Christmas. (642-643)

70. On Thursday 18 October 2018, at 9:30am, the claimant was outside of the factory building at a sandwich van. Mr Watts was also present purchasing food for his breakfast. The claimant indicated to him that he felt unwell as he was rubbing his stomach. Mr Watts asked him what was wrong, to which he replied that he had an upset stomach. He was asked whether he had taken any medication and said that he had not.

71. Mr Watts believed that the claimant enquired of several staff members whether they had any Imodium or medication to help him. At around 9.45, after he had eaten his breakfast in his office, the claimant entered and asked to speak to him. Mr Watts asked whether it was a matter that the claimant could discuss with his Mr Robinson, his line manager, as he was mindful of using the normal reporting line. The claimant at that point left which Mr Watts understood, to discuss whatever he wanted to discuss with Mr Robinson.

72. The claimant again entered Mr Watt's office at 10.10am and asked to speak to him. He told Mr Watts that he felt unable to discuss the issue with Mr Robinson because of a personal matter outside of work which made him feel uncomfortable. The unchallenged evidence was that the claimant had previously been in a relationship with Mr Robinson's sister who has a child with him. His current partner at the time was pregnant. He proceeded to tell Mr Watts that he wanted to go home as he was not feeling well. He also said that he was worried about his partner as she was in the early stages of her

pregnancy and was also unwell. He said that they wanted to check that all was well with her and their unborn baby before going on their holiday to Cyprus the following day, 19 October.

73. Given the circumstances, Mr Watts gave permission for the claimant to leave work and to go home because he said that he was unwell with an upset stomach and there was the urgent need to check on his partner who was pregnant with their unborn baby by attending an appointment with their medical practitioner before taking their flight to Cyprus. Before leaving his room, Mr Watts instructed the claimant to inform Mr Robinson, his line manager, out of courtesy and to take into account any resourcing issues. The claimant was then to clock out.

74. Mr Watts told the tribunal that he agreed to send the claimant home because he said he was sick and that he had wanted to seek medical attention for his pregnant partner. He had no knowledge that the claimant and his partner were due to take their flight that day, 18 October.

75. We find that the claimant said to Mr Robinson after speaking to Mr Watts, that he was leaving work early because his partner was feeling unwell and that he wanted the hours covering his absence to be deducted from his overtime hours. He was told by Mr Robinson that that was fine. He also said to Mr Robinson that he had spoken to Mr Watts who gave him permission to go home.

76. We are further satisfied that the claimant did not discuss TOIL with Mr Watts prior to speaking to Mr Robinson.

77. At 14:12 on 18 October 2018, the claimant's partner made a social media post informing her friends that they were on their way to Larnaca, Cyprus. Ms Tara Stamp, Office Assistant at the Hoddesdon site, brought to Mr Watts' attention the post and informed him that the claimant would be at Gatwick Airport boarding a flight that day. Mr Watts recalled Ms Kerry Fitzgerald, Office Administrator, showing him a photograph of the claimant at the airport eating a burger/chips and drinking a pint. To Mr Watts this contrasted with the claimant's claimed sickness early that morning. (644-646)

78. Mr Robinson gave a similar account to that of Mr Watts. He recalled that Ms Fitzgerald, who was a social friend of the claimant's girlfriend, went on social media during her afternoon break and saw the posts of the claimant being at the airport. Both Ms Stamp and Ms Fitzgerald showed Mr Robinson the posts before they brought them to Mr Watts' attention. Mr Robinson knew that they were due to go on leave from Friday 19 to the following Tuesday 23 October 2018, which was pre-authorised, but not from 18 October.

79. Mr Watts contacted Human Resources to bring the incident to their attention and possibly for it to be investigated. He later became aware that the claimant and his girlfriend had flown out on holiday on 18 October 2018 at 15:25, the day before his approved holiday took effect and the day on which he reported for work and was sent home as he was unwell.

80. When the claimant returned to work in the morning of 24 October 2018, Mr Watts spoke to him around 8am, with Mr Robinson present. He explained that he had asked Human Resources to meet with him to discuss some concerns they had regarding his recent time off. He was informed that a short informal investigation meeting was scheduled to take place with Ms Roberta Petkute, Human Resources Advisor, the following day at 9am. His response was that he was unable to work due to tonsilitis and a chest infection which he contracted following his return from holiday. He did not raise any alleged connection between his tonsilitis and the upset stomach he had told Mr Watts about on 18 October. He also said to Mr Watts and Mr Robinson that he was due to get a doctor's appointment once his doctor's surgery opened. He was instructed by Mr Watts to inform either him or Mr Robinson once he had the doctor's appointment.

81. The claimant later returned to Mr Watts' office to inform him that he had a doctor's appointment at 10:40am. He was instructed to produce his flight ticket. He again returned to Mr Watts' office at around 9:45am and proceeded to admit that he had deliberately taken it upon himself to decide to leave work on 18 October without discussing it with either Mr Robinson or Mr Watts. He said that his rationale for deciding to leave was that he had worked overtime previously that week and had enough hours to cover his absence. He repeated that he was unwell and wanted to check that his partner could travel. At that point Mr Watts instructed him to stop discussing the matter with him as he would be given the opportunity to do so with Human Resources the following day.

82. According to Mr Watts, and we do find as fact, the respondent's procedure allowed the claimant to request time off in lieu on 18 October 2018 in place of overtime previously worked. There was, however, no guarantee that such a request would be granted by Mr Robinson, his line manager. We find that Mr Robinson did not approve every request put before him as he required that they be made in advance and for the employee to arrive early on the day to make up for the time from when they would leave. In considering a request, he had to take resourcing issues and the workload for that day.

83. On 24 October 2018, the claimant was prescribed penicillin by his doctor and was absent from work from 25 to 30 October 2018, suffering from tonsilitis and a chest infection.

84. On 23 October 2018, Ms Stamp gave an account of the events on 18 October. She wrote:

> "On Thursday 18th around 9am Ross Collins came into the office and was complaining of a stomach ache and how he couldn't stop going to the toilet.
>
> He asked if anyone in the office had any medication for this.,
>
> Kerry Fitzgerald said I've got some Buscopan, so he took one of those. I also said Do you want some ginger biscuits as they settle nausea and you shouldn't be taking tablets on an empty stomach. He took two biscuits.

> He left the office and came back about half and hour later and asked Kerry Fitzgerald for another Buscopan. Kerry told him that they would have to read the instructions about what time to take another one and not to take it straight away.
>
> When Ross was in the office I said to him "Your supposed to be on holiday tomorrow aren't you" (meaning Friday 19th). He said: "Yes I am". I then asked him "What time is your flight?" He replied "9:28am from Luton Airport, flying out with EasyJet." But seemed hesitant about his answers.
>
> He also mentioned that his girlfriend has been really ill with a bad stomach and was really concerned as she was nearly 12 weeks pregnant and going for tests that day and she wanted him to be with her.
>
> I didn't know that she was pregnant and just said "congratulations". This was the first time any of us had heard this news.
>
> He then left the room and went back out in the workshop.
>
> Around 10:40 he then left the building and said goodbye."
>
> (648)

85. On the same day Mr Watts also put his account in writing, similar to the one we have referred to earlier. He stated that he authorised the claimant to go home as he said that he was not well and there was an urgent need to check on his partner and their unborn child before they flew to Cyprus on Friday 19th. He repeated that he asked the claimant to inform Mr Robinson before leaving the building and clocking out. (649)

86. Mr Watts made another statement on 24 October 2018 as part of the investigation. He dealt with the meeting with the claimant on 24 October at 8am and what was said and that he left ten minutes later after being told that the matter was going to be investigated by Ms Petkute, HR Advisor. Mr Watts then continued. He stated that at 9:45am on 24 October, the claimant returned to his office and openly admitted that he deliberately took it upon himself to decide to leave on Thursday. He explained that he had taken that decision himself without discussing it with Mr Robinson or Mr Watts. His rationale in doing so was that he had worked overtime that week and would have had enough hours to use in lieu. He and his partner were unwell, and he wanted to check that she was alright before they went on holiday. At that point Mr Watts suggested to the claimant that he should stop discussing the matter and that he would have an opportunity of ding so the following day, Thursday 25 October with Ms Petkute. (650)

87. Mr Robinson met with Ms Petkute at 1:30 in the afternoon on 30 October 2018. He told her that the claimant said that he was leaving early because his partner was feeling unwell, He said he wanted to deduct hours from his overtime hours. I said, "Its fine". In answer to the question whether he had deducted the hours from the claimant's overtime, Mr Robinson was not sure and passed the matter to the appropriate person. He was asked what were the arrangements with regard to overtime at Hoddesdon, to which he

responded by saying, "We pay staff at an enhanced rate end of each month. Some people take an hour, let's say to go to their appointments, but it wouldn't be half day or something."

88. It is recorded that the meeting ended at 1:40. It, therefore, took 10 minutes. It is clear from the very brief notes that this is not a verbatim account of the interview.

89. The claimant was interviewed on the same date, 30 October at 12:45. He confirmed that his annual leave was booked from 19 October 2018. He was asked to recall the events on 18 October. He said:

> "I came to work in the morning, 7am or 8am. I was doing my work. My partner is pregnant. We had a flight that afternoon at 4pm from Gatwick airport. I didn't have enough of annual leave left to book Thursday afternoon off, but we do overtime and I wanted to take this time back. I had around 15/16 hours of overtime. I made sure the work was completed. I had also apprentice started working with us."

90. In relation to the overtime procedure, he stated that he had to inform his line manager and went to speak to Mr Robinson saying that he was sick. He said to Mr Robinson that he could take the hours from his overtime and left at 10:45. He said he would not use overtime to cover sickness absence as he normally would not call in sick. His latest sickness absence was not covered by overtime. It would be unpaid. He was asked whether he was sick on the day. He replied, "I wasn't sick. I've used that as an excuse to catch the flight later in the afternoon." He acknowledged that he had booked his annual leave seven to eight weeks earlier. The flights were booked before booking his annual leave. He was asked, "At the time you were requesting for your annual leave, why haven't you requested for an extra day?". He replied, "I didn't have any annual leave left." He was then asked whether he had the option to take Thursday off using his overtime hours, to which he replied, "Maybe, but I went to Matt Robinson and I've said 'You can take my hours (Thursday afternoon) as overtime hours'. He said, 'cool'." He was asked whether it was something that he could discuss with Mr Robinson to which he replied, "I thought that Matt Robinson will refuse my suggestion". He was asked about his conversation with Mr Watts. He said that he said to Mr Watts that he did not feel well. Mr Watts replied that he should speak to Mr Robinson. He said that it was tonsilitis and chest infection. He later informed Mr Robinson by email that he was on sick leave. He said he could not sleep at the time as he was coughing. He had taken a sleeping pill and then got an email from Mr Watts informing him of the correct reporting procedure.

91. He was asked by Ms Petkute if he would like to add anything, to which he replied:

> "What happened next? My sick records are good. I got sick in Cyprus and I'm not getting paid. We are getting paid for overtime at enhanced rate end of each month. Sometimes we would take time off in any emergency, doctors' appointment or home inspection. I understand I was dishonest, but I said Matt Robison to use my overtime hours on Thursday."

92. He was then asked whether he could have dealt with the situation differently, to which he replied:

> "Obviously, because I was dishonest. I could have said I need to leave early on Thursday, but I made sure everything was done on a shop floor. I got home from my holidays at 3am in the morning, but I still came to work the next day. I wasn't feeling well. I was on antibiotics."

93. The meeting ended at 1:25pm. (653-654)

The claimant's suspension

94. Mr Robinson was given instructions to suspend the claimant and met with him on 30 October in the company of Ms Petkute, to inform him that he was suspended. He was then handed the suspension letter in which it stated that was suspended on full pay pending an investigation to the allegations of gross misconduct regarding "dishonest and fraudulent behaviour". Following the conclusion of the investigation Mr Robinson would contact him to arrange another meeting. Mr Robinson wrote that should he have any information that might be of assistance to the investigation, or he wished to discuss anything, to contact either him or Mr Watts. (651)

95. Ms Amanda Howard, Human Resources Manager, took the decision that Ms Petkute should carry out the investigation.

The investigation

96. In conducting her investigation, Ms Petkute looked at the disciplinary policy and procedure; had the notes of the meeting with the claimant dated 30 October 2018; the two statements from Mr Watts; two statements from Mr Robinson; and a statement from Ms Stamp. She also interviewed the claimant, Mr Watts, Mr Robinson, and Ms Stamp. In her conclusion she wrote the following:

> "I recommend the case to be heard at a disciplinary hearing due to the nature of concerns – dishonest and fraudulent behaviour. Ross Collins has confirmed that his flight was booked for 18th October afternoon and his annual leave started from Friday, 19th October. In addition, Ross admitted that he was not sick on 18th October and he used it as an excuse to leave work earlier to catch his flight in the afternoon of 18th October.
>
> I would also recommend taking into consideration Ross' annual leave request, which was made after he bought his flights as well as sickness reporting procedure, which Ross hasn't followed when reported his sickness on 25th October.
>
> My recommendations regarding the outcome of the DP to be final written warning however dismissal could also be justified. Although he was being honest during this investigation meeting this does not cover up the fact that he calculated this time from the start and he had every intention to leave early on Thursday to catch his flight."

(656-661)

97. Mr Robinson's first statement was very brief, just a short paragraph. He wrote:

> "10:35 – Ross came to my office to inform me that he was leaving after a discussion with Matt Watts, this was due to having an appointment with his girlfriend for a scan as she was pregnant, he told me it was only a precautionary scan due to the fact that his girlfriend and himself had both been ill and wanted to check everything was ok before flying on holiday on Friday."

98. This was later added to following a request from Mr Holder during the appeal stage. (784)

99. On 1 November 2018, Mr Anil Patel, Human Resources Advisor, wrote to the claimant inviting him to a disciplinary meeting scheduled to take place on Wednesday 7 November at 11 o clock at Hoddesdon. The allegation being dishonest and fraudulent behaviour in that, "On Thursday 18th October 2018 you did purposely and with intend deceive your line manager, fain [feigned] illness to gain sick leave so you could go on holiday without seeking approved annual leave."

100. He was warned that should the allegation be "found to be true, a possible outcome may be summary dismissal on grounds of misconduct." He enclosed a copy of the Synergy disciplinary procedure. Mr Anil Patel referred to paragraph 5 of the procedure which states that fraud, falsification of records, misappropriation of funds and other offences involving dishonestly will be dealt with as gross misconduct. He enclosed the information gathered during the course of the investigation, namely, the statements from Mr Watts; two statements from Mr Robinson; Tara Stamp's statement, the claimant's statement, the interview notes; flight tickets; annual leave request; timesheet; social media notifications. He was informed of his right to be accompanied at the meeting and that it would be conducted by Ms Valerie Jones, General Manager at the Reading site. (662-663)

101. The claimant alleges that the investigation hearing notes of his meeting with Ms Petkute should not be relied on as she did not speak good English and did not have a good command of TOIL and how it worked. In relation to her background, Mr Patel told the tribunal that he had been working with Ms Petkute for five years and considered that she speaks very good English and is a natural communicator. She had delivered various training sessions during her employment without any issues, and he was not aware of anyone previously questioning her level of English. Further, she had been living in the United Kingdom for 10 years and is a university graduate. The notes taken were just summaries of the questions asked and answers given, and not verbatim.

102. Upon reading the notes, we find they do not demonstrate a lack of understanding of TOIL by Ms Petkute and we accept Mr Patel's evidence, who having worked with her for five years, described her command of English as very good.

103. Ms Jones had no prior dealings with the claimant and did not have any prior knowledge of any alleged protected disclosures made by him. She had never been employed by Phoenix and was not aware of the TOIL provisions in the Phoenix Handbook. Since the acquisition of Phoenix, she stated that she had been involved either five or six disciplinaries and had not dismissed anyone

in relation to TOIL. Ms Petkute and Mr Patel were her Human Resources Advisors in relation to the Hoddesdon site. Although Ms Petkute recommended a final written warning or dismissal, Ms Jones said that that recommendation had to be considered after the hearing with the claimant and after considering all relevant evidence.

Disciplinary hearing on 7 November 2018

104. The claimant attended the meeting with Mr Ralph Spooner. Ms Jones was assisted by Mr Patel. The meeting commenced at 11am. The claimant said that he had not been well two days prior to leaving for Cyprus. Ms Jones put to him that the initial reason given for going home was that he did not, nor did his partner, feel well as she was pregnant, and that he said that he was going away the following day on holiday. In evidence before us he denied making that last statement that he said that he was going away the next day on holiday. He stated that he suggested taking away the time from his overtime. He was asked what was his reason for taking the approach he had taken. His reply was that he was not thinking rationally. It had not happened to him before, and his colleagues only received 17 days annual leave. There was going to be a meeting to discuss an increase in leave and he was hoping to get the holiday, the extra day, or days in but that had not happened by the time he had booked his leave. When he was asked whether he could think of another way of handling his leave, he replied that, "I probably should have said that I will work another half day over Christmas and make up for the Thursday". He was asked what he would have done if his leave was rejected. He said that it had never happened annual leave being refused. He said that he would not say that he was not unwell, only not feeing the best and that he could have stayed. It was put to him by Ms Jones that he could not have stayed as he had a flight to catch. He was sked why did not say that he had a flight to catch in the afternoon and make up the time in his own time. His response was, "In hindsight, I should have said that." He was asked "But why did you not?" His answer was, "I'm not sure; I don't know."

105. In relation to Mr Robinson, the claimant said that he has a child with Mr Robinson's sister. He still speaks to Mr Robinson although he had broken off the relationship with his sister. It was put to him that in one of the statements he said that he was going to take his partner for a scan and whether she had gone to the doctor. He replied she had not, she did not bother. He said that he was ill in Cyprus and was still unwell following his return to this country. He went to his doctor and on Thursday morning he emailed Mr Robinson. He was asked how his conduct would affect his working relationship with his colleagues and his managers, he replied that he was not sure and did not know. He said people have left work to watch a football game and he had never questioned it. He said that he had never heard of anyone's request to use their overtime being rejected. He was asked why he did not do that. His response was that he was not sure, and he was not thinking but could have done so. He said, "I do not think this would impact any of my colleagues; I have a good relationship with them all. I made that decision that day and obviously it was the wrong one, as I am sitting here now. Moving forward I need to be honest with my line manager." In evidence, he denied saying that he would need to honest with his line manager.

106. Mr Spooner said that things had been done differently in the past but as Phoenix has been acquired by a big company the position needed further clarification. Mr Patel responded by saying that the matter was being looked into, there were going to be changes, for example, over the Christmas days' leave. It was compulsory to take Christmas Days off but that was due to change.

107. Ms Jones put to the claimant, "I'm struggling to understand that fact that you are saying, you do not know any cases that leaving early has been refused even if it is on the day. It is common practice for you to take overtime hours back, but what made you go down this route. It is dishonesty".

108. The claimant replied, "I don't know; there's a lot of dishonestly around here, I come in and do my job." He had asked in the past for getting his time back and that had been granted to attend sports day. He came back to work. He said that he should have said that he needed to take overtime to catch a flight.

109. Mr Patel then put to the claimant:

> "What Val is saying is that you had overtime to use, so why go down the route of using sickness as an excuse. Sickness implies that you are not well and going home to recuperate and not catch a flight."

110. The claimant responded,

> "I understand what you are saying. People have done this in that past and did not think people look into this at the time."

111. He was then asked by Ms Jones:

> "So basically, you did not think people would catch you out that you lied?"

112. To which the claimant replied:

> "Pretty much, yeah. But I could have stayed at work."

113. In evidence the claimant denied the last response. He also denied saying that he was going to book half day Thursday.

114. At the end of the meeting, Ms Jones informed him that she would contact him the following, Monday, to give him her outcome decision.

115. Of note is that neither the claimant nor Mr Spooner took notes at the meeting. The only contemporaneous account are the notes taken by the respondent. The claimant alleges that Mr Patel interrupted him and Mr Spooner during the meeting while they were speaking asking them to repeat what they had said. The claimant asserted that Mr Patel's notes were incomplete and incorrect in places. This Mr Patel denied. He said in evidence that he wanted to make sure that he wrote down accurately what was said and invited those who were speaking to repeat what they have said.

116. Also, in Mr Patel's notes the claimant asked the question, "I appreciate that, who makes the decision now". The reply given by Ms Jones was

> "It would be AP and me, any decision we make you will have a right to appeal, and this will be given to you in writing. The letter will contain what the outcome is and your right to appeal."

117. The claimant relies on this statement as Ms Jones saying that it was going to be a joint decision taken by her and Mr Patel. Both Mr Patel and Ms Jones denied that that was the case as it did not happen. Apart from that statement in the notes there is no other evidence suggesting that the decision taken was going to be a joint one between Ms Jones and Mr Patel. We find as fact that the disciplinary outcome was taken by Ms Jones alone.

The disciplinary outcome

118. We find that prior to Ms Jones' outcome decision, she contacted Mr Robinson. He told the tribunal that he gave her his views on the claimant's conduct and possible consequences. He said to her that the claimant did not set a good example for other trainees and staff and that he, the claimant, was a line manager. Ms Jones contacted Mr Robinson because she wanted to understand how the time off in lieu at Hoddesdon operated. It was during that conversation that Mr Robinson expressed his view about the claimant's conduct.

119. Ms Jones called the claimant on 9 November 2018, to inform him of her decision. The claimant made what he titled as a Telephone Attendance Note of the conversation. He wrote that Ms Jones said that she had looked at the evidence and had come to the decision saying, "You have been sacked with immediate effect and are no longer employed by Steris as of Monday 12 November." She said that the decision to sack him was for gross misconduct. This was challenged by Ms Jones in evidence. She said that she does not use and would not have used the word "sacked". The claimant maintained that his account of the conversation is accurate as it had been typed up later that evening. He told the tribunal that during the conversation he did not make notes of the phone call but remembered it well. Later that evening he wrote down his recollection of the conversation. He had not seen a lawyer prior to typing his notes. He saved it in a folder as a Word document. (668)

120. Ms Jones did not make her own notes of the conversation with the claimant. We are satisfied that the claimant was informed during the conversation, that he was dismissed.

121. On 9 November 2018, Ms Jones sent her outcome letter to the claimant in which she stated that the meeting was held under the terms of Steris' disciplinary procedure and cited the allegations set out in Mr Patel's invitation letter to the claimant to attend the disciplinary hearing. She then wrote the following:

"Having considered all the facts presented by all parties concerned, and taken due note of the statements made by yourself, I can confirm my decision given verbally by telephone today is as follows:-

You have in your statement admitted to lying.

During the meeting you did admit to lying to your line managers about the state of your health on Thursday 18th October.

You admitted to booking your flight tickets and holiday prior to gaining authorised annual leave, which you state is common practice within the unit. You originally only booked and gained authorisation for two days annual leave, Monday 22nd and Tuesday 23rd as you did not have enough annual leave to cover the full holiday time booked. On finding out that you could use your saved Christmas leave, you did then book Friday 19th Oct as well. When asked why you did not also book Thursday 18th you could not give any clear reason.

You admitted that you did not tell your line managers you had a flight on Thursday18th Oct but faked illness to be allowed to go home early. You also spoke about your partner, who is pregnant, being ill and wanted to take her to the doctors. When questioned about this you stated that she was unwell but did not have time to go to the GP because you had to catch your flight.

You agreed that you could have used overtime hours on the Thursday which would have allowed you to leave early. You stated that was common practice. You did, however, tell your line manager you wanted the "sick leave" on Thursday to be taken from your gained overtime so it would not be recorded as sick leave. You could not give a clear reason as to why you did not use these overtime hours legitimately on the day to leave early to catch your flight, but rather use the overtime hours to reinforce the lie about you ill health.

Whilst I appreciate that you state there have been practices on site where overtime hours have been used too for sickness previously this is not a reason to take advantage of this to ensure you could go on your booked holiday.

Since booking your holiday you have made no attempt to discuss this issue with your management team or seek and acceptable resolution covering the extra day needed for your leave. You agreed there were several acceptable options available to you however your chose not to take them.

Through the meeting you were asked several times about how your actions impacted on your work colleagues and managers. You disregarded this as you did not believe your actions did. You did state that if you need to apologise you would.

Looking at the above this leaves me to be to believe that you did fabricate illness on Thursday 18th Oct with the intent to deceive your manager to allow you to go home early and this was premeditated. You had no intention of telling your line manager you had booked flights without having the authorised leave and made no attempt to find an acceptable resolution. You preferred to pretend you were unwell and unable to work so they would allow you to go home early. This clearly shows you had no intention to following any acceptable procedure regarding leave and little or no care of how this potentially impacts your colleagues.

As a result of the above, I take your actions to constitute gross misconduct, and under the terms of the Company Disciplinary Procedure, the appropriate sanction is summary

> dismissal. I can confirm therefore that I'm terminating your employment with the company with immediate effect.
>
> You have the right of appeal against my decision, should you wish to exercise this right you should do so in writing to Kevin Holder, Managing Director Europe and Middle East, Steris Instrument Management Services, Rutherford House, Stevenson's Way, Derby… within five working days of receipt of this letter. Pending the decision of any appeal, we will implement the above decision and should the decision be altered on appeal, these arrangements can be reversed. A copy of the minutes from the meeting held have been enclosed for your information.
>
> (669-671)

122. Ms Jones told the tribunal that the seriousness of the case fell within either a final written warning or dismissal. She did not look at the disciplinary record or length of service or his personnel file.

123. The claimant did not say during the disciplinary hearing nor indeed during his conversation with Ms Jones on 9 November, that he had been subject to disciplinary proceedings because he had made protected disclosures.

The appeal

124. On 16 November 2018, the claimant lodged his grounds of appeal against his dismissal. His letter was sent to Mr Kevin Holder, Managing Director of Europe, and the Middle East. He asserted that he was unlawfully dismissed for gross misconduct and raised a number of points. He stated that Ms Jones' outcome letter had six typographical mistakes, spelling mistakes and lacked logic. He explained that his absence in the afternoon of Thursday 18 October 2018, had been approved by his line manager. His explanations did not feature in the notes taken by Mr Patel which he described as "gibberish". They had not been copied to him for prior approval and were factually inaccurate and self-serving. He further alleged that the respondent had committed a criminal offence in breach of Regulation 25(1)(a) of the Company, Limited Liability Partnership and Business (Names and Trading Disclosures) Regulations 2015. He questioned whether Mr Matthew Watts was a Director of the company, registered at Companies House. That Ms Jones purported to be in charge of Human Resources in Reading but signed her letter as General Manager, and there was no information on how she can be contacted which, he alleged, was illegal. The meeting with Ms Petkute on 30 October 2018, was "little more than a farce". She spoke broken English and had never previously attended the Hoddesdon site, and the disputed minutes were prepared by her or others.

125. He then set out his account of the facts. He stated that he had no intention of being fraudulent as he was unwell at the time and wanted to take the afternoon off. He tended to use his overtime as time in lieu as that had been the practice of members of staff for many years. At no stage had he been refused time off in similar circumstances or disciplined in any way. He asserted that he had been victimised and dismissed unlawfully in order to save the company costs of redundancy. His dismissal was part of the Group's

overall determination to reduce costs by whatever means. He challenged the account in Mr Watts' statement dated 24 August 2018, in which he wrote that the claimant, "deliberately took it upon himself to decide to leave on Thursday 18 October that I took the decision myself without discussing this with a manager or himself". However, in Mr Robinson's statement he understood that the clamant wanted to set the afternoon of 18 October against some of the overtime hours accrued, and he agreed. The evidence provided by the managers, the claimant continued, "is entirely contradictory". Contrary to what Mr Patel had stated, he had only received one statement by Mr Robinson and not two.

126. The claimant further asserted that the respondent had failed to comply with the laws and regulations governing health and safety matters. He referred to his "unimpeachable 30-year record of employment stands as testimony to my loyalty to the company. No warning letters have ever been sent to me for any disciplinary matter and my record speaks for itself."

127. He then wrote in paragraph 4.4, the following:

> "I admit to the exaggeration of my illness which some 4/5 days later developed into full blown tonsillitis. I did seek to mislead but received sanction from Matt Robinson to use my overtime hours against the time off that I felt I not only needed but deserved in an effort to assist my pregnant and unwell fiancé."

128. He stated no prejudice had been suffered by the respondent or any of its employees. In fact, the respondent was better off by not having to pay him enhanced overtime rates. The punishment did not fit the crime. At no stage did his actions constitute fraudulent misrepresentation as his time off was approved. He asked that he be accompanied by a friend or advisor who would be "truly independent and in no way compromised by being an employee of the Group." If the request was declined, he would be entitled to infer that the respondent recognised that it acted unlawfully and was unwilling to afford him the luxury of a fair hearing. Should his request for an independent witness be refused, it may be appropriate to dispense with the appeal process in recognition that your "Kangaroo Court" approach was destined to continue and that the matter be best dealt with before an Employment Tribunal. (672-677)

129. The claimant had raised the issue of him not receiving documents referred to at the disciplinary hearing. In email correspondence by Ms Charlotte Johnson, Senior Human Resources Business Partner, on 6 December, she provided him with the missing documents, as well as a copy of his contract of employment. He was also sent a copy of the Employee Handbook. (685-690)

130. The claimant requested that because of his stress and anxiety, he would require, as a reasonable adjustment, to be accompanied by a friend. The respondent arranged for a consultation with Occupational Health on 8 January 2019 and in an email dated 1 February 2019 from Ms Johnson to the claimant, she stated that having been examined and assessed by a doctor, he was not a disabled person under the Equality Act 2010. However, the respondent was willing to extend the right to be accompanied to allow him to bring a friend to the appeal meeting, and it was rescheduled to take place on Wednesday 20 February 2019 at 11am. He was not allowed to bring a lawyer to the meeting. (691-697)

131. On 6 February 2019, his solicitors, Pennington's Manches LLP, wrote to Ms Johnson setting out an account of his case. They acknowledged that it was "unwise" of the claimant not to have disclosed his travel plans but he had approval for time off in lieu of overtime and that it was immaterial whether his flight was that day or the following day. They referred to his 12 years' good service, and that dismissal fell outside the range of reasonable responses.

132. They referred to the respondent's "serious financial problems". They then set out a chronology of events starting with the appointment of Mr Peter Woolston, as Director of Instrument Repairs. They asserted that he was concerned about procedures within the workshop which involved basic health and safety failings. This included animal veterinary and human surgical instruments being repaired side by side. They gave summaries of meetings during which the claimant allegedly raised concerns about the respondent's operations at the Hoddesdon site giving rise to health and safety issues. They covered events in June 2017; itchy boxes; events in November 2017; December 2017; March 2018; April 2018; July 2018 and October 2018.

133. In relation to the claimant's "legal claim" they wrote:

> "The obvious inference, and one we will be asking the tribunal to draw, is that Steris has retaliated against our client for regularly raising health and safety concerns. The involvement of the line manager and site managing director, Matthew Robinson and Matthew Watts, who our client spoke to about his concerns and who, at times aggressively, instructed our client to ignore them, is telling.
>
> The obvious conclusion is that our client has been subjected to the detriment of a disciplinary process commenced against him for the reason that he "blew the whistle". The influence of Matthew Watts and Matthew Robinson in this process, one which led to our client's dismissal, is of great concern and it is our client's intention to join them as individual respondents to the legal actions…."
>
> (711-715)

134. Having regard to the concerns raised by the claimant in relation to the accuracy or otherwise of the notes of the disciplinary hearing, the appeal was recorded and later transcribed. The transcription is included in the joint bundle covering 50 pages.

135. The claimant attended and was accompanied by Mr Allen Walker, a friend. Mr Kevin Holder conducted the hearing in accordance with the Phoenix procedure. Also, in attendance was Ms Carolyn Denaro, Human Resources Manager for the North West. Mr Walker introduced himself as a retired chartered accountant with extensive industrial and professional experience. He stated that the claimant was heavily medicated and had asked him to help with his appeal. His grounds of appeal together with his solicitor's letter constituted his appeal. Mr Walker wanted to discuss his alleged whistleblowing to which Mr Holder responded by saying that the whistleblowing allegations would be raised at some point in the process. First

and foremost, he said, he was concerned with the decision taken to dismiss the claimant.

136. On the substantive issues, Mr Walker argued that the claimant was entitled to take time off, as the respondent habitually allowed its staff to take time off for whatever reason, such as to attend football matches or dental appointments. In the claimant's case, he felt and said that he was unwell, and he subsequently went to Cyprus for five short days. He returned to the United Kingdom and collapsed with tonsillitis. He did not handle the situation particularly well, but he had full sanction and permission from Mr Robinson, his line manager. He explained to Mr Robinson that his work was already up to date and Mr Robinson gave him permission to leave. Mr Robinson's statement contrasted with Mr Watts' who said that the claimant did not seek permission to offset his overtime. At the time the claimant was unwell, as was his partner who was pregnant. He had booked the flight in the evening of Thursday 18 October and left with permission from Mr Robinson who knew that he had asked for his hours be set off against his overtime. In the past the managers had not refused permission to take time off in lieu.

137. The claimant was asked by Mr Holder whether he needed to ask for permission or was it automatic. The claimant replied that he needed to ask for permission. The claimant then gave an account of his booked leave and the flight. It was put to him by Mr Holder that he accepted that at the point in time when he took the additional day, 19 October, he was still short by one day if he was to leave on 18 October. He replied by saying he would have taken it against his overtime as had happened before. What was being put to the claimant was that on 17 September, he booked his holiday from 22 to 24 October which was Monday to Wednesday. He later added on 1 October, leave on 19 October. His holiday was booked from 18 October and his flight was at 15:25 in the afternoon on that day.

138. It was put to the claimant that in the morning on 18 October he felt unwell and had stomach pains when he was at the food van with Mr Watts. He then later had a conversation with Ms Stamp saying that he was unwell with stomach pains and was given Buscopan to settle his stomach. He said to her that he was flying on holiday the following day at 9:20. The claimant replied saying that he did not remember a conversation with Ms Stamp. When it was put to him whether he was saying that Ms Stamp's statement was incorrect, he responded by saying that he could not remember the conversation with her. He said that he went to see Mr Watts because Mr Robinson was busy at the time. It was not common knowledge that his partner was pregnant. As the Managing Director, Mr Watts, said that he was approachable at any time, so he went to speak to him. He told Mr Watts that he was unwell with stomach pain. He said that Mr Robinson was his child's uncle which Mr Watts understood but said that he needed to speak to Mr Robinson.

139. It was put to him by Mr Holder that according to the notes, which he had not challenged, he stated that he informed Mr Watts that his wife was pregnant, that she was also ill and that as he was flying the following day, he needed to go to hospital to have her checked out. The claimant replied saying that he

just said he wanted to make sure that she was ok. Mr Holder noted that the claimant had not asked Mr Robinson to attend to make a statement but if necessary, he, that is Mr Holder, would ask Mr Robinson to give his account. Mr Walker objected to Mr Robinson's attendance as he, according to Mr Walker, was "a defendant". Mr Holder disagreed saying that the hearing was not a court but if he wished to clarify the evidence he would do so.

140. From the notes of the investigation meeting, it was put to the claimant by Ms Denaro whether he was sick, and his answer was "I wasn't sick. I used that as an excuse to catch the flight later in the afternoon." The claimant replied that Ms Petkute did not understand what he was saying. Mr Walker asserted that she did not speak English properly. At that point Ms Denaro said that she worked with Ms Petkute.

141. The claimant agreed that he spoke to Mr Watts and told him that he was ill and that his partner was also ill, and he needed to get her checked out prior to flying the following day. It was put to him, "So, do you accept that at that point in time you were lying because you were travelling the same day?" The claimant replied, "Yeah… No, I said I was flying – I just said I was not well to Mr Watts." He denied saying to Mr Watts that he was flying the following day. It was put to him that both Mr Watts and Ms Stamp said that he had told them that he was flying the following day.

142. He acknowledged that he did not go to the doctor. He was asked if he was ill and needed to take time off work why did he not go to the doctor. He replied that he took medication and was not well for the whole time he was in Cyprus. He was asked why he did not go home to have a lie down, his reply was "no, I went home and just made sure that my partner was ok, dosed up on cold and flu tablets and left for the airport late in the afternoon."

143. The timings were put to him, in that discussions took place at or around 11am and that it takes an hour and a half to get to Gatwick, and he had to be there an hour and a half before the flight "so pretty well you'd have had to have gone home and jumped straight in a car and gone straight to the airport." The claimant replied, "I didn't jump straight in the car and leave, no." He could not recall what time he left home for the airport. It might have been between 12:30 and 12:45. He acknowledged that there was no attempt to go to a doctor.

144. He was asked to give his account from leaving Mr Watts' office. He said he walked into Mr Robinson's office and said, "I need to go, I don't feel too well, can I take the time off against my overtime?" He was like, "Yeah, of course you can." He had done 20 plus hours overtime and asked whether he could leave. Mr Robinson replied. "Yeah, no problem."

145. He said that he suffers from tonsillitis quite often but the last time he had it was six months previously. In the morning, following his return to work, he asked Mr Watts if he could go back to his doctor because he was not getting any better as he needed more antibiotics. He then saw his GP in Buntingford. He showed Mr Watts the doctor's note, a photocopy of which was placed in the respondent's system. He said that Mr Watts said that he appreciated him coming back to work.

146. Mr Walker asserted that the original decision was taken following instructions from senior management to "get rid of Ross Collins, he's a nuisance, he's caused difficulties." He was asked to provide evidence. He responded that evidence would be provided. Mr Holder then said, "Well, this is your opportunity….Why come to an appeal and make allegations if you don't wish to present the evidence?" Mr Walker responded by saying that they had all the evidence why the senior management wanted to get rid of the claimant. It engaged in illegal practices by breaking health and safety rules.

147. It was put to Mr Holder that having received the letter of 17 November 2018 raising health and safety issues, the workshop got a complete makeover and the itchy boxes disappeared. This was after speaking to Mr Robinson. This was denied by Mr Holder, and the health and safety issues raised were also challenged by him.

148. Mr Holder said:

> "So my role and my only role is to determine whether the decision she took, based on the evidence that she had at that moment in time justified a dismissal and I will refer you to the Disciplinary Handbook, which was a Phoenix Handbook, the prior employer as well as the current employer, one of the examples of gross misconduct includes making false statements to the company, including falsification of qualifications. It's a complete – you know, it can't be any clearer."

149. He said that the claimant had made false statements to the company. This was stated in his own letter and that he had to decide whether the decision to dismiss was appropriate. There was then a discussion about alleged financial conduct of the respondent with Mr Walker accusing the respondent of not complying with its financial reporting obligations. This was not relevant to the issues he had to consider.

150. The claimant then raised a further issue about the respondent's instruments used for repair as being of lesser quality than those from NHS hospitals. He said he raised this issue with Mr Peter Fairhurst and was thereafter called to a meeting with Mr Robinson who said to him do not get involved, "It's none of your business, blah blah blah." He said he was trying to do the right thing. He questioned the process of blackening instruments and accused the respondent of cheating the NHS by selling average instruments. He was then called into the stock room by Mr Robinson and told to, "Shut the f' up, keep your nose out." He was a problem to Mr Robinson, Mr Fairhurst, Mr Watts, and the Human Resources representative. He was the only one speaking out.

151. The claimant queried why Ms Stamp was watching social media, and who asked her to fish for evidence. He asked why he had been victimised.

152. Mr Holder said that the issues raised in relation to health and safety matters, he was not in a position to consider as part of the appeal process. It was, however, fair and proper for the claimant to raise them, provide evidence, and for the respondent to carry out an investigation. He further stated that the claimant had the opportunity of referring the matter to the respondent's

Quality Department, HSE Department, or the Ethics Hotline, all of which he knew about.

153. The claimant said that Mr Woolston shared his views, whereupon, Mr Holder asked him to bring him as a witness. In relation to the assertion that Mr Woolston was removed for allegedly raising health and safety matters, there was no evidence in support. The claimant said that Mr Woolston had told him that he would deal with the issues raised. At that point Mr Holder responded, "You've never said that up until now." As far as Mr Robinson and Mr Watts were concerned, had the claimant called them, they would have been listened to. He had been asked repeatedly who he would like to bring to the hearing. Mr Walker accused Mr Holder of remodelling the workshop and scrapping evidence.

154. Towards the end of the meeting Mr Walker said that the letter from the claimant's solicitors made it clear that the appeal hearing chaired by Mr Holder they did not accept should be chaired by him as he was not impartial; and that Mr Holder refused to hear matters relevant to health and safety issues raised by the claimant to Mr Robinson and Mr Watts. Mr Holder responded by saying that the disciplinary policy in relation to the conduct of the appeal states that it must be heard by a Managing Director. Mr Holder thanked them for being patient and concluded the meeting. (719-769)

155. In his letter dated 20 February 2019, Mr Holder wrote to the claimant informing him that although he had told him that he would send his outcome by the end of the week, as there was a considerable amount of detail covered in the appeal meeting and having regard to the seriousness of the issues, he felt it was necessary to review the full transcript of the meeting before making his decision. As the transcript would not be available until the following week, he would provide his appeal outcome by Wednesday 27 February 2019. (782)

156. Mr Watts and Mr Robinson provided Mr Holder with further statements dated 21 February 2019. In Mr Watts' statement he wrote:

> "On the day in question which was Thursday 18 October 2018 at no point during the only discussion with Ross Collins in relation to him leaving work was there any reference or mention about deducting overtime worked to compensate for time lost.
>
> Ross Collins was authorised to leave work on the basis that I specifically approved for him to leave work on sickness absence grounds which would have been paid in accordance with his contractual sick pay.
>
> Once the conversation had finished I asked Ross Collins to inform Matthew Robinson his direct line manager that I had approved for him to leave work sick."
>
> (783)

157. Mr Robinson wrote:

> "10:35 – Ross came to my office to inform me that he was leaving after a discussion with Matt Watts, this was due to having an appointment with his girlfriend for a scan as she was pregnant, he told me that it was only a precautionary scan due to the fact

that his girlfriend and himself had both been ill and wanted to check everything was ok before flying on holiday on Friday,

Note that this is an addendum following a request from Mr K Holder to comment on statements made on the day regarding accrued overtime.

He told me that the time would be taken from his overtime which he had accrued and that this was agreed with Matt Watts.

21 February 2019

I confirm this is a true statement of the event."

(784)

Instrument repairs

158. On 21 February 2019, Mr Holder sent to the respondent's Ethics Committee his response to the claimant's allegations that veterinary instrument repairs were being conducted alongside human instrument repairs. He referred to the maters set out in the claimant's solicitor's letter 6 February 2019. He was unaware of the allegations previously and immediately contacted the Director for Instrument Repairs and ordered an investigation. It was also reported by email to the Chief Compliance Officer, Ms Kathie Bardwell, on 12 February 2019. He referred to his findings. In paragraph 1 he stated that it was correct that on occasions the site had accepted repair orders from companies which were clearly in the veterinary business and the acceptance of such instruments for repair dated back to 2014, well before the business was acquired by Steris. This was not best practice and the new Director of Instrument Repairs ordered this to stop in the summer of last year. Emails were sent to veterinary companies on or around 31July 2018, stating that the respondent could no longer accept their repairs. In the second paragraph Mr Holder noted that the previous Director of Instrument Repairs had never raised his alleged concerns about the practice. He had discussed whether the respondent could repair veterinary endoscopes at Hoddesdon and that he, Mr Holder, made it clear that this could only be done through physical segregation on an alternate site.

159. In the third paragraph when the Animal Health business in the UK was established a year ago, it was done to segregate that part of the repair business and all new instrument sales were managed, processed, and stored at a totally different site.

160. In the fourth paragraph he wrote that handwritten contemporaneous records of meetings held by Peter Fairhurst, Quality Manager at Hoddesdon, have been kept and on no occasion was there a record of the claimant raising health and safety concerns.

161. As regards to the fifth paragraph he stated that there was no evidence of the claimant raising the matter with HSE or Quality Control at site level, nor had he reported his concerns to the Ethics Hotline. Mr Holder also made

reference to him attending the Hoddesdon site on occasions to meet with staff on a one-to-one basis. During his meeting with the claimant only one matter was raised by him which was his request for a pay uplift.

162. Mr Holder stated that the level of veterinary repairs undertaken at the site was extremely small and at no time would animal and human instruments have been mixed on the workbench as orders were dealt with on a one-by-one basis which was self-evident that the same tools would have been used for both, paragraph 6**.**

163. Human instruments, once returned to the hospital, would automatically be washed, inspected, wrapped, and sterilised prior to use and, as such, the respondent could be confident that no cross contamination would have occurred, paragraph 7.

164. In paragraph 8 he dealt with "itchy boxes" stating that it was a term not recognised by those at the site. It is a reference to boxes at workstations that contained reclaimed parts, such as screws for box joints. The site uses lathes and other machinery to effect the manufacture of parts for repair. Those at the site stated categorically that old instrument parts have never been used to create whole instruments to be sold as new, nor any major part, such as a scissor arm, would be matched with the arm of another scissor to create a replacement used item. The practice of using used ancillary items had been stopped as a result of his investigation.

165. As regards paragraph 9, he stated that the site said that they did not recognise the alleged practice of "blackening instruments" using "car oil" but said that instruments post repair are sometimes hardened by heating and then dipping in oil and this was a recognised process for re-hardening steel.

166. He wrote that in 2016, to the best of his knowledge, there were questions raised by a handful of customers, one in particular, regarding the quality of the respondent's new instruments. Under intense magnification burrs could sometime been seen on the new instruments. This was immediately prior and post-acquisition and resulted in Steris taking up the concerns with the manufacturer. Processes have been improved and there have been marked improvements since 2017. The customer who had the biggest concerns with the early instruments, had since conducted their own three-day audit of the site and instrument quality and provided "extremely positive response", paragraph 10.

167. In paragraph 11 Mr Holder wrote that Mr Woolston was not dismissed but left on a voluntary basis.

168. There was absolutely no evidence of the respondent cheating the NHS as stated in paragraph 12.

169. In the final paragraph, although part of it has been redacted, Mr Holder wrote the following:

> "It should be said that none of these issues were raised at the disciplinary hearing that resulted on Mr Collins' dismissal and this appears to be an attempt to claim

> that he was dismissed because he was a whistleblower… However, there is a concern that the individual, particularly if not reinstated, will use these allegations in the media. Whilst it is clear we were not following "best practice", I am confident that we can refute any claims of impropriety and, more importantly, any claim that we have put patients at harm."
>
> (785-786)

Appeal outcome 26 February 2019

170. In Mr Holder's appeal outcome letter dated 26 February 2019, sent to the claimant, he summarised his findings and stated that in relation to the whistleblowing allegations, they did not feature as part of his decision making as both sides acknowledged that Ms Jones was employed in a totally unconnected part of Steris' business and lacked knowledge of the repair business. As such she was independent and could not have any proper knowledge of any malpractices or whistleblowing. Further, the matter was not raised by the claimant during the disciplinary hearing.

171. Having considered the documents presented at the disciplinary hearing, the additional statements from Mr Robinson and Mr Watts, as well as the accounts given during the appeal by the claimant and Mr Walker, he decided to dismiss the claimant's grounds of appeal and uphold Mr Jones' decision to dismiss him. His letter is quite detailed setting out his findings of fact and rationale and is replicated below. (787-793)

> "Dear Mr Collins
>
> **FINDING IN RELATION TO APPEAL AGAINST DISMISSAL FOR GROSS MISCONDUCT – MR R COLLINS**
>
> Please find below, a summary of my findings during the appeal held on 20 February 2019. In making a determination regarding the Appeal against Dismissal for Gross Misconduct by, I have taken the following into consideration:
>
> 1. I accepted that Mr Collins be fully represented by his colleague Mr Walker a Retired Chartered Accountant, on the basis that Mr Collins was unable to represent himself as he stated he was adversely affected by medication. It should also be noted that the acceptance of Mr Collins was agreed even though it was not considered as a 'Reasonable Adjustment' under the Equalities Act 2010 as Mr Collins was not able to demonstrate a defined 'Disability'.
> 2. That the process used was in full accordance with the Disciplinary and Appeal procedure stated in 4.9 of the Staff Handbook, originally issued by Phoenix Surgical Ltd and adopted by STERIS IMS Ltd., and on the basis that contracted terms and conditions were unaltered post acquisition.
>
> 3. That the Appeal could only consider those matters presented by both sides at the original Disciplinary Hearing of 7 November 2018 and that led to the determination of Dismissal by the Chair, Val Jones. Whilst it is acknowledged that Mr Walker was forthright in his opinion that the Appeal panel should also consider the additional matter of alleged malpractice and associated whistleblowing, this has not featured as part of my decision-making process as I believe it to be out of scope for the following reasons:

a. Both sides acknowledged that the Chair of the Disciplinary Hearing, Val Jones, was employed in a totally unconnected part of the STERIS business and with a consequential lack of knowledge of the repair business. As such, she was independent and could not have had any prior knowledge of malpractice or whistleblowing and therefore did not take the matter into consideration when determining the sanction of Dismissal.

b. The matter was at no point raised by Mr Collins at the disciplinary hearing.

4. That since prior records/minutes of the original meeting were deemed inaccurate by Mr Collins, STERIS engaged, without objections by the appealing party, the firm of Auscript Ltd, a London based Transcription Service to produce verbatim notes via note taking and recording of the proceedings. It was agreed that the transcript would be provided to Mr Collins within 7 days of the hearing.

5. As Chair, I acknowledged the alleged statement of malpractice contained in the letter of 6 February 2019 from Pennington Manches and thanked Mr Collins and his colleague for bringing it to the attention of STERIS. I confirmed that the matter had been passed to our Global Compliance team for full investigation.

**Facts Derived from the Appeal Hearing**

Having set out the process for reaching the decision made at the foot of this letter, I hereby set out relevant facts determined during the hearing

1. Mr Collins' main contention is that dismissal was disproportionate, and that the 'authorisation' from Mr Robinson for time off in lieu of accrued overtime, was justification for leaving work and that consequentially the Company was not financially disadvantaged in any way.

2. Mr Collins confirmed to the Appeal panel that offsetting accrued overtime against annual leave was not a right and had to be requested and approved depending on work circumstances at the time.

3. Mr Robinson was not called as a witness to support Mr Collins' argument that the time-off was approved by Mr Robinson and at that moment in time the Appeal Panel could only refer to the two statements from Mr Robinson provided to the original disciplinary panel. These confirm that Mr Collins did state he wished to use his overtime, but they do not state that an approval request was made to the line manager, but more a statement of intent. Further Mr Robinson's statement explains to the investigating officer that it is not normal practice for accrued overtime to be used for such a long period of time off and state, "Some people take an hour, let's say to go to their appointments, but it wouldn't be half day or something". Since this aspect of approval, nor not, is at the heart of the appeal, I was surprised that Mr Robinson was not called as a witness and stated so in the hearing. Mr Collins' friend stated that they did not believe that Mr Robinson would tell the truth and thus declined to allow him to appear. For this reason, I felt it necessary, post appeal, to take a further statement from Mr Robinson – see below.

4. Mr Collins confirmed that he paid for his holiday on 11 September 2018 and that the period of holiday was 18-23 October 2018 inclusive. Departure was at

1525 from Gatwick Airport on 18 October and arriving back at the same airport at 0135 on 24 October 2018.

5. Mr Collins confirmed that on 17 September 2018 he initially requested 2 days Annual Leave for the period 22-23 October, with planned return to work on 24 October. It is agreed that he did in fact return to work on 24 October, subsequently self-certifying sick leave the following day 25th October through to 30 October, citing tonsillitis.

6. Mr Collins confirmed that on 1 October he requested Annual Leave for the day of 19 October, but even at this late stage he did not request Annual Lave for the 18th, nor did he make a request for time off in lieu of overtime worked. Mr Collins acknowledged that he could have made such a request, but chose not to do so. Indeed he did not make a request for paid time-off in lieu at any point in time prior to 18 October, even though he was adamant that taking time off in this matter was something that regularly occurred and would not have been declined.

7. Mr Collins confirmed that on the morning of the 18th, despite knowing that he had to be at Gatwick Airport for a 1525 flight, he attended work as normal. He confirmed that at about 0945 he asked to meet Mr Watts, Director of the Instrument Repair business, where he stated that he was feeling unwell and stated that he had stomach pains. He also told Mr Watts that his 12 week pregnant partner was also suffering from stomach pains and that as they were due to fly on holiday the following day, he felt it appropriate that she be checked-out by a doctor. He accordingly requested and was given, time-off for such medical consultation. It was not disputed that at no time did Mr Collins request or discuss with Mr Watts, time off in lieu of accrued overtime, but instead simply time off for sickness.

8. Mr Collins did not dispute the statement of Tara Stamp, in that he also told her that he and his pregnant partner had stomach pains and that he needed to get her checked prior to going on holiday or that he accepted Buscopan from her as a form of medicinal relief. He did however state that he did not recall saying to her that he was due to go on holiday the following day (Friday the 19 October) at 0928.

9. Mr Collins agreed that he advised Mr Watts that he wished to bypass the normal route for requesting time off ie through his line manager Mr Robinson, as he did not wish Mr Robinson to know that his partner was pregnant and that there were personal reasons why he did not want him to know.

10. Mr Collins confirmed that neither he or his partner actually went to see a doctor or indeed request an appointment to see one. Instead Mr Collins went home and shortly after, went to the airport.

11. Maria Walker, Mr Collins' partner, made a social media post at 1412 on 28 October 2018 from Gatwick Airport advising her friends that they were on their way to Larnaca. The post was visible to staff at Hoddesdon and the matter was reported to management.

12. Mr Collins was asked and he confirmed, that Gatwick Airport was some 90 minute drive from his home and that he needed to be at the airport approximately 2 hours prior to the flight ie by 1325. On this basis he would have needed to leave home at about 1200 and the request and final agreement to leave work for

a medical check-up occurred no earlier than 1045 ie after leaving Mr Robinson's office.

13. Mr Collins confirmed that in his Appeal letter dated 16 November, he wrote the following statements:

    a. "I accept that I embellished the reference to illness to ensure I could catch a flight…."

    b. "I admit to the exaggeration of my illness which some 4/5 days later developed into full blown tonsillitis. I did seek to seek to mislead, but received sanction from Mr Matt Robinson to use my overtime hours against the time off that I felt I not only needed but deserved in an effort to assist my pregnant and unwell fiancée"

14. Although, in generality, the notes of the original disciplinary meeting of 7 November were not deemed to be accurate by Mr Collins, I must also refer back to the following recorded notes:

    a. VJ – So you basically you did not think people would catch you out that you had lied

    b. RC – Pretty much yeah, but I could have stayed at work

    c. VJ – No you could not, as you had a flight

    d. RC – I appreciate that

15. Mr Collins returned to work on 24 October, but subsequently went off sick (self-certified) the following day, citing tonsillitis.

**Further investigation**

Since Mr Collin's main defence was that although he misled the Company, everything was acceptable because he ultimately gained approval for accrued overtime in lieu, it was important that as Chair of the Appeal, I investigate this matter further. This was not possible at the Appeal as the persons involved, Mr Watts and Mr Robinson had not been called as witnesses. Mr Collins had been offered the opportunity to call witnesses on 4 separate occasions prior to the appeal hearing and declined to do so. Given a further opportunity to do so at the hearing, Mr Collins, via his colleague, again declined, citing likely impartiality. On this basis I felt it necessary to seek further information post Appeal hearing.

On 21 November I contacted Mr Robinson and Mrs Johnson, Senior HR Business Partner, separately contacted Mr Watts to get additional statements regarding this specific point. From the statements taken independently and in different geographical locations on the same day, the attached additional statements provide the following information:

1. Mr Collins did not at any point in his meeting with Mr Watts request time off in lieu of overtime, merely to leave for sickness. Mr Watts states that he advised Mr Collins to report to his line manager, Mr Robinson, and inform him that approval for sickness absence had been given. This is consistent with the notes of the Appeal hearing.

2. Mr Robinson states that when Mr Collins came to see him, he stated that Mr Watts had approved him to leave and that this time could be deducted from accrued overtime. No request for approval for such use of accrued time was made to Mr Robinson.

**Findings**

After due consideration and full review of the verbatim transcript of the Appeal Meeting, I find the following:

1. Mr Collins is a Supervisor at the Hoddesdon site and in a position of authority and receiving salary commensurate with that authority. He is in a role whereby others report to him and where he would be expected to demonstrate appropriate behaviours and standards.

2. Mr Collins was fully aware of the rules regarding annual leave and had been provided with and had access to, the Staff Handbook. He was aware that there was a non-contractual agreement in place whereby he could request, via his line manager, time-off in lieu of any accrued overtime.

3. There is irrefutable evidence that Mr Collins booked a holiday from 18 October to 24 October 2018 inclusive. Annual leave was originally booked 22-24 October and subsequently 19 October was added. No leave request was needed for 20 and 21 October as this was a weekend. At no stage was a leave request made for 18 October.

4. It became a matter of common knowledge in the Hoddesdon workshop, including by his subordinates, that Mr Collins did in fact go on holiday on the same day that he had sought to mislead numerous people about his and his partners illness.

5. Mr Collins, by his own admission, states in writing on 16th November "I did seek to mislead the Company" and "I accept that I embellished the reference to illness to ensure I could catch a flight"

6. At any point in time prior to the events in question,, Mr Collins could have requested to take 18 October off as time in lieu of overtime worked but this was not done. Mr Collins acknowledges that a request for time off in lieu is not guaranteed and the original statement from his line manager Mr Robinson, indicates permission may not have been automatic because of the short notice and the number of hours required.

7. Mr Collins not only feigned his own illness, but that of his pregnant partner in an attempt to increase the gravity of their situation and ensure time off was approved. Moreover, whilst Mr Collins states he could not approach his line manager because of confidential information regarding his partner's pregnancy, he could have approached his line manager by simply referring only to his own illness; the fact that he did not do so, leads me to believe that there was an ulterior motive in approaching Mr Watts for approvals. In any event, Mr Collins was open about his partner's pregnancy to others in the open plan office, so the need to keep it secret from Mr Robinson was clearly self-undermined.

8. Even on the day of travel and probably to reinforce the story, Mr Collins lied to another member of Staff, Tara Stamp saying that he was ill and due to fly the

following day. He also told Tara Stamp that he needed to take his partner for a scan when it is now clear that he had no intention of doing so.

9. Mr Collins does not appear to have been concerned enough regarding his partner and unborn child (in relation to the alleged sickness), since he made no attempt to visit a GP or Hospital prior to flying. This leads me to conclude that the illness of both parties was in fact a ruse to ensure he was able to leave work immediately. Leaving work immediately, was a necessity in order to allow for travel time to Gatwick Airport for a 1525 flight.

10. Mr Collins falsely stated to Mr Robinson that Mr Watts had approved his time off in lieu of overtime. Indeed, why would Mr Watts have given such approval when he had already approved sick leave and when Mr Collins accepted that no discussion about overtime in lieu had occurred with Mr Watts.

11. If, as Mr Collins states, he did not say to Mr Robinson that time in lieu had been approved by Mr Watts, why was it even necessary to convert the sickness absence to time off in lieu? I can only infer that by conveying that Mr Watts, Mr Robinson's superior, had approved time off in lieu, Mr Robinson would not question the matter and have little opportunity to object to short notice or effect on workload. Also, again presuming Mr Collins is correct and that he simply went to Mr Robinson saying that he was leaving for the day and to deduct the time from his accrued overtime, why was the elaborate exaggeration of sickness for him and his partner even necessary? I can only come to the conclusion that Mr Collins did not want to seek permission for time off in lieu, in case it was rejected and that he would then not be able to go away on holiday. Thus, it was necessary to create an alternate reason in order to avoid approaching his line manager until the sickness had been approved. I conclude that he then took matters to the extreme and lied to ensure that he was paid for the day he was travelling on holiday.

**Decision**

The Staff Handbook clearly states that 'Making false statements to the Company' is an example of Gross Misconduct. As a Supervisor at the Hoddesdon site, you were placed in a position of authority and Trust and it was a clear expectation of that role that you set appropriate examples of behaviour and integrity to those that report to you, as well as the wider workforce. I am wholly satisfied that you repeatedly made false statements regarding your sickness and that of your pregnant partner, to your Director, line manager and other members of staff, with the sole aim of ensuring you could go on holiday on the same day; this being necessary as you neither had any annual leave remaining or, any prior approval to take a significant numbers of hours off in lieu of accrued overtime. I am also satisfied from the additional evidence attached, that the statement made by yourself that Mr Robinson approved your time-off is yet another lie, and that in reality you merely told him that it had already been approved by Mr Watts. There appears to have been a high degree of pre-meditation throughout the series of events, dating right back to the point at which the holiday was booked.

The Staff Handbook further states:

> If, on completion of the investigation and the full disciplinary procedure, the Company is satisfied that Gross Misconduct has occurred, the result will normally be summary dismissal without notice or payment in lieu of notice"

> The supervisory position you held was one where trust and integrity are key factors and by your own admission you 'sought to mislead (the Company)' and therefore there is clear evidence of Gross Misconduct. In my opinion, the existence of such pre-meditated gross misconduct and the elaborate nature of the underlying lies, leads me to conclude that the trust and confidence in you as an employee in any role, let alone Supervisor, at STERIS IMS Limited has been irretrievably damaged. I therefore uphold the decision to Dismiss and confirm that the internal Appeal process is now exhausted.
>
> Kevin Holder
> Managing Director"

172. Mr Holder has since left the respondent. We understand that his departure was not on good terms. We were told that Ms Johnson left in January 2021. However, MR Kibling stated in his written submissions that she still works for the respondent. In any event she was not present during the appeal. Both did not give evidence before us.

Alleged protected disclosures

173. Having dealt with matters leading up to the claimant's dismissal and appeal outcome, we now consider the evidence relevant to the claimant's public interest disclosure claims.

174. In an email dated 31 July 2018, Mr Fairhurst emailed the respondent's customers stating that:

> "Firstly, hopefully you have received the scissor and towel clips backs and I hope these are ok now, thank you for the clarification on the numbering.
>
> Secondly, I need to advise you that we have had a direct instruction from Steris Head Office that we are to no longer offer repair services for any animal health products.
>
> We realise and apologise for the inconvenience that this is likely to cause you, to help with this we are able to offer to continue the service until 1 September 2018 to give you time to find an alternative service supply."
>
> (447)

175. It is clear that the respondent took the decision in July 2018, to no longer engage in animal instruments repair. This was well before the events in October 2018 which led to the claimant's dismissal.

176. In respect of itchy boxes, we accept the evidence of Mr Watts, that the practice was not itself in breach of any health and safety concerns. As Director – Device Repair, from April 2018 onwards, it was considered that the practice was not strictly necessary in most cases because Steris already had a commercial agreement with a German provider DANmed, which it had previously partnered with to supply it with new spare and replacement parts to be used in the repairs process. He became aware that Steris had an existing revenue spend with DANmed and that there was DANmed's

catalogue of spare repair and replacement parts which could be ordered by Hoddesdon workshop. He verbally educated the workforce at Hoddesdon and instructed the technicians that they should always order new spare and replacement parts from DANmed. He encouraged staff to use this as he felt investing in securing new parts and equipment was the right approach to be taken. He informed them that there were no restrictions on spending, and they should order whatever they needed. This change took place in the summer of 2018, before the claimant was dismissed.

177. Mr Watts said in evidence that although he was not aware of the term 'itchy boxes' there was a practice of repairing instruments and repurposing certain instrument parts. He believed that it was in practice for about 20 to 30 years, and industry-wide which, historically, was a result of there being a lack of new spare parts readily available to purchase in an open market, particularly older instruments. It was not possible for a technician to fabricate or make a new screw, nut, or bolt. It was possible for them to salvage such parts from another instrument which would safety fit into the instrument being repaired. The practice did not pose any health and safety concerns given that all repaired instruments containing repurposed parts are ultimately subjected to the same rigorous inspection and quality control checks as any other instrument to ensure that they are fit for purpose, otherwise they are rejected and returned for further repair until deemed fit for purpose. All surgical instruments which are received from customers are required to be cleaned and sterilised prior to being sent to the respondent and its customers must provide a decontamination certificate as proof. Further, a sterilisation process is undertaken by customers prior to the instruments being used. He asserted that the respondent had not breached its contract with the NHS.

178. He became aware when he transferred to Hoddesdon in 2018, that there had been an historic practice to cover boxes in the workshop using plywood. He was unsure when he became aware of this. However, he confirmed that the practice was not in place by the time he moved to the site. He was unsure of the historic reason for the previous practice and could not be sure what the contents were within the covered boxes as he was not working at Hoddesdon at the time. He confirmed that he had never given any specific instructions to cover up anything in the workshop, including boxes nor did he have knowledge of anyone else given such instructions.

179. We were shown photographic evidence of the workshop before and after the refurbishment had been carried out at the Hoddesdon site around Christmas 2018. We were also shown pictures purporting to be the itchy boxes containing old instruments used for carrying out repairs.

180. On 4 April 2019, Mr Robinson tendered his resignation and left the respondent on 29 June 2019 to take up a new challenge.

181. Also in April 2019, the roof to the factory was repaired.

182. In the claimant's lengthy witness statement, covering 27 pages, he alleges 18 protected disclosures and 11 consequential detriments. In view of the large number of alleged disclosures we have decided to give our findings of fact and conclusions in respect of each one set out below.

183. Dealing with the claimant's alleged protected disclosures, in protected disclosure 1, he alleges that he expressed concerns, repeatedly, at four meetings in May 2017, at which Mr Woolston was present, about the practice of instruments logged onto the respondent's systems as required by NHS Trusts, and that veterinary instruments were being brought to him on a tray with a request to fit the repairs.

184. We were taken to monthly notes by Mr Fairhurst dated from 18 May to 31 November 2017. He stated that they were notes of monthly Workshop Improvement meetings also attended by Mr Woolston when he was available, and the supervisors which were held mainly on Fridays. Mr Fairhurst said that the notes were a To do list, a monthly list of tasks to be done. However, his notes dated 31 November 2017, appear to be of a staff meeting. The notes do not record any of the claimant's concerns in May 2017. Mr Fairhurst told us that the claimant was generally quiet at the meetings. (175-181)

185. The respondent's business is highly regulated, covering the quality of incoming materials, design, development, manufacture, storage, handling and distribution of its products and delivery of its services. In the Synergy Staff Handbook, it expressly states that "Compliance with local and international quality standards is critical to the success of our business." (110)

186. The claimant was required to comply with the respondent's policies and procedures as part of his contractual obligations. He was encouraged to raise any issues of concern or suspicion of malpractice at the earliest possible stage. (97-101, 144)

187. Personal protective boots and glasses must be worn at all times in the factory. Gloves and facemasks are optional. A notice was issued to employees on the 6 November 2017, on the wearing of protective equipment including the wearing of face masks. (301)

188. FFP3 face masks instead of FFP1 face masks, had to be worn when operating certain equipment in the polishing room

189. The Corporate Health and Safety team regularly visited the Hoddesdon site to carry out risk assessments and risk management, and work areas are regularly inspected.

190. During the claimant's employment there were two Health and Safety representatives, Mr Fairhurst and Mr Phil Deal, with whom he could discuss any health and safety issues of concern to him and his staff in the workshop.

191. In evidence Mr Fairhurst categorically denied that sometime in May 2017, the claimant raised concerns about practices on site during meetings with Mr Woolston, Mr Robinson, Mr Buckner, Mr Grist and Mr Bainbridge, such as

veterinary equipment were brought to him on a tray with a request to fit the repairs into his team's routine without them being logged onto the respondent's systems.

192. Mr Fairhurst said, and we find as fact, that the respondent's procedures do require that all instruments and components in repair, including historically those for veterinary repairs are logged onto the computer system to generate job cards for full traceability and accountability. The alleged discussion was denied by Mr Robinson. In July 2018, as already referred to, customers were told that veterinary instruments repair would cease from 1 September 2018.

193. This alleged qualifying disclosure is vague as to the specific dates and precisely what was said, and the exact discussions which took place nearly two years prior to the claimant's dismissal and presentation of the claim form. We do not find that the claimant had made any disclosure of information from which the respondent was of the view that he was raising health and safety concerns. There was also no protected disclosure made to the named individuals as they stated that the claimant did not make the alleged qualifying disclosures to them.

194. In relation to alleged protected disclosure 2, which is alleged to have taken place in May 2017, this is an allegation that the claimant spoke to Mr Robinson about the machines in the workshop being unsafe due to lack of or faulty guards and that the repair technicians needed adequate dust masks, goggles, and safety gloves. Mr Robinson told the tribunal that no such discussions took place. He did, however, recall that around October 2017, the claimant raised a concern with him regarding the safety guards on machinery, facemasks, and ventilation in the workshop. It was a one-off conversation during a general supervisory staff meeting in the boardroom at the Hoddesdon site. Also in attendance were the supervisors, Mr Grist, Mr Bainbridge, and Mr Buckner. Mr Woolston and Mr Fairhurst were also present. This was viewed by Mr Robinson as a priority and told the claimant that it would be escalated to the Mr Martin Beardmore, Health and Safety Officer. There was also Health and Safety Executive visit to the site following an anonymous complaint in October 2017. The outcome of the visit was that the complaint was unfounded. No evidence had been produced by the claimant suggesting otherwise.

195. The respondent required that everyone working in the workshop during working hours must wear safety glasses. The claimant had to be reminded on a number of occasions to adhere to this requirement and to ensure that those whom he supervised adhered to the rule.

196. We found Mr Robinson's account of events and as a witness to be very credible. He volunteered evidence beyond what the claimant was alleging, namely events in October 2017 whereas the claimant alleged that he had raised concerns in May of that year. We find as fact that the alleged qualifying disclosure did not take place in May 2017. There may have been a protected disclosure in October 2017 as described by Mr Robinson, but this is not part of the claimant's case and there was no application to amend.

197. The claimant in alleged disclosure 3, said that he asked Mr Robinson and Mr Fairhurst at one of the meetings in May 2017, what would happen if NHS Trusts found out that animal health instruments were being repaired alongside human ones. It is alleged that Mr Robinson respondent by saying that the Trusts "would not find out". This account was denied by Mr Robinson who said that no such discussion ever took place.

198. We were satisfied that at all times processes were in place to ensure that veterinary and human instruments were segregated when being repaired and, indeed, the claimant as supervisor should have ensured that that was the case. The respondent did not receive any complaints either internally from staff or externally from customers, raising concerns about the fact that animal health instruments were also being repaired alongside human instruments. We also find that it was the industry norm for repair companies to advertise as undertaking veterinary instrument repairs along with human instrument repairs.

199. Mr Fairhurst also denied ever having such a conversation with the claimant and supported Mr Robinson's account of the separation of veterinary and human instrument for repairs. We have accepted their evidence.

200. As regards alleged disclosure 4, this is an allegation against Mr Patel. The claimant alleges that during his meetings with Mr Patel at the Hoddesdon site in June 2017, he expressed to him that he and other employees were deeply worried about the improper working practices being imposed by management and the danger to health and safety as surgical instruments may have been faulty or substandard which would be used on the general public.

201. Mr Patel was clear in his evidence that the meetings took place with the management team to discuss employment related matters, such as holidays, overtime, working arrangements and to review materials needed in the workshop. He was unsure of when those meetings took place but he and his colleague, Ms Amanda Holder, as well as others from human resources, would have attended. He attended about 18 meetings and said that the claimant did not raise any concerns regarding issues of health and safety, improper work practices, equipment, or related matters to him. He recalled the claimant raising after the meetings his case for a pay rise; how he had ideas about moving the business forward; and a welding training course he wanted to attend. He was advised that he needed to provide a business case in writing for a pay rise. He followed this up by putting in a request in writing on 30 July 2018 for a pay rise. He received a response from Mr Watts on 22 August 2018, who stated that over the previous five years he had received salary increases of 34% averaging 6.8% each year. This was better than the company's average of 2.5% a year. "Targets and objectives would be set to ensure performance [is] measured and rewarded accordingly." He did not receive a pay rise at that time. (858-859)

202. The consistent evidence given by the respondent's managers was to the fact that the claimant's main concern was his pay and his requests for a pay rise which he raised at various meetings.

203. We do not find that the claimant had made such alleged protected disclosure 4 to Mr Patel.

204. In relation to his alleged disclosure 5, the claimant states that in 2017, on numerous occasions, he told Mr Robinson and Mr Fairhurst that there was not enough stock and parts to replace components in each instrument. Both denied ever having such conversations with the claimant. The precise dates were not given to enable the respondent to produce relevant documentary or other evidence in rebuttal.

205. We accept the accounts given by Mr Robinson and by Mr Fairhurst that the claimant was required to order parts in his position as supervisor. Technicians needed to frequently sharpen and reset instruments during the repairs process for customers and this did not require spare parts to replace components. Furthermore, the workshop held a level of stock which were spare parts required to repair needle holder instruments which the supervisors had responsibility to maintain. Should stock levels fall, the supervisors, including the claimant, would put in a request to Mr Phil Deal, Quality Technician, for more stock. Mr Deal's role was to ensure that spare parts were ordered and available. This function was later taken over by the office staff from around May-June 2017.

206. Mr Fairhurst could only recall one occasion when there was a shortage of one size of needle holder inserts because the supervisors had failed to notify Mr Deal of the need to reorder more stock. This was quickly remedied.

207. Again, then precise date/s and circumstances of the alleged conversation/s were unclear. Even if the claimant's account is accepted, simply stating that there was not enough stock and parts, does not disclose, on its own, facts tending to show that there was a breach, likely breach or had been a breach of health and safety or of a legal obligation. We find that no such qualifying and protected disclosure/s were made.

208. The claimant in alleged disclosure 6, states that every morning on the day of each visit from the Health and Safety auditors/inspectors, or visits from healthcare clients, Mr Robinson instructed him and other staff members about the auditors'/inspectors' time of arrival and told them not to let any veterinary or animal health paperwork be seen, to which the claimant response was that he should not be doing this. Mr Fairhurst is also named.

209. Mr Robinson and Mr Fairhurst in evidence denied that the claimant made such disclosures to them. There were never monthly visits from healthcare clients nor annual audits from the auditors/inspectors. The respondent arranges external ISO audits which involves an inspection of the Hoddesdon workshop. According to Mr Fairhurst, he recalled one HSE visit during his employment with the respondent, and this was the result on an anonymous complaint which proved to be unfounded.

210. Both Mr Robinson and Mr Fairhurst went on to deny ever saying that there would be a separate place for veterinary work in the garage to avoid cross contamination. It had been an idea suggested during an informal discussion

that if there was enough of a volume of animal healthcare repairs, the respondent could look to convert a garage on site into another repairs workshop to concentrate on undertaking that type of work with a specific team based there. We were satisfied that the discussion was in the context of the future of the animal health business from a commercial perspective and was not in any way driven by any concerns about cross contamination, which for the respondent, was never an issue.

211. In relation to alleged disclosure number 7, this states that throughout 2017 and 2018, the claimant spoke to Mr Robinson, Mr Woolston and Mr Fairhurst about the use of the bucket with car oil on surgical instruments rather than the correct coating process. He said that the correct process was to use a tank with the right chemicals and powder coating. He said that the car oil would be used in the blackening of instruments. They would be immersed in the oil, then heated to blacken them.

212. Mr Fairhurst told us that blackening, as shown by the claimant's video, is not authorised within the respondent's quality procedures. (773)

213. He said that the correct coating process is not blackening but gold or silver plating using a special machine. No other form of coating has ever been approved or added to the respondent's processes.

214. The video is of the claimant carrying out the unapproved "blackening" process. It does not show other staff following that process. Both Mr Robinson and Mr Fairhurst have said that they did not recognise the blackening process as being an accepted standard procedure. They denied such conversations took place. Mr Robinson denied saying to the claimant on an occasion in November 2017, that he should not focus on his concerns about the process and instead should carry on with his job.

215. Mr Lewis Mitchell, the claimant's witness, also gave evidence in support of the claimant's account that car oil has been used in the hardening process. We find that that may have been the practice by some of those in the workshop but was not of general use. Even if it was, the question is, was there such a qualifying disclosure. The precise dates and full context were not disclosed. Even if he did make a qualifying and protected disclosure in respect of the needle holders, throughout 2017 to 2018, apart from the claimant's account, there was no other credible evidence that Mr Robinson told him to ignore his concerns and focus on his job, or by November 2017, Mr Robinson, Mr Fairhurst and Mr Woolston regularly avoided speaking to him. The claimant's evidence was that he had a good working relationship with Mr Woolston. Mr Robinson was his line manager, therefore, he, Mr Robinson, had to converse with him. Likewise, Mr Fairhurst who was engage in quality management would have to speak to him in relation to ordering of stock and quality control issues. The broad sweep of the claim is devoid of any credible supporting evidence.

216. We do not find that such disclosures were made by the claimant.

217. As regards alleged protected disclosure 8, this concerns the discussion the claimant alleges that took place with Mr Fairhurst in Mr Fairhurst's office in December 2017, about the quality of new stock and that someone was failing to do their job properly. The claimant said that Mr Fairhurst response was that all new stock were checked and passed by him, so there could be no issue. The claimant showed him the defects in a new instrument compared with the one he had repaired. He produced photographs in support of his case. (825-827)

218. Mr Fairhurst denied that such a conversation ever took place. He, however, acknowledged that the claimant had a conversation about needle holders with holes or gaps within the braizing. These were instruments the respondent received at the site prior to a new inspection procedure being implemented. He looked at what the claimant was showing him. For some reason the claimant had taken exception at the rejection of repaired needle holders because of the faults in them, such as pits and crevices. Mr Fairhurst's view was that as the claimant had more junior trainees under his supervision, he was experiencing more instances of these problems resulting in a higher rework rate. Others in the repairs team had the same rejects but did not complain. Mr Fairhurst did acknowledge that the claimant had pointed out his concerns in relation to the old stock and newer instruments which required addressing. The claimant was asked to rework the instruments which he refused to do. The instruments were, therefore, quarantined and not returned to stock.

219. Mr Fairhurst raised the defects pointed out by the claimant with the manufacturer which was addressed.

220. We find that this disclosure was not raised by the claimant as a qualifying disclosure but as a complaint about the rate of rejection of his repaired instruments when compared with the defects in the new ones. We are satisfied that it was not raised either as a health and safety issue or breach of a legal obligation.

221. Alleged protected disclosure number 9, concerns Mr Robinson calling the claimant to his office on an unspecified day in December 2017 and telling him that Mr Fairhurst had come to see him complaining about his conduct in interfering with the quality control side of the business, and that he, the claimant, was complaining about Mr Robinson's work being, potentially, substandard, and that the "practices were wrong". Mr Robinson told him not to get involved in quality control and that he was a repairer and should stick to that role.

222. Mr Robinson denied that the conversation took place in the way described by the claimant. While they did have a discussion in the stockroom around that time, it was in the context of him raising a concern about the claimant's repair rate that had significantly fallen and to understand whether there were any issues which might explain the drop. Further, to encourage the claimant to address it. The repair rate is a reference to the number of repairs undertaken by a technician or supervisor, and it does not refer to the proportion of

instruments rejected. The claimant did complain to Mr Robinson that his reject rate was unfair. Pinholes on needle holders had caused him to have the repairs rejected on a number of occasions. He showed Mr Robinson the issue with needle holder instruments having pinholes. He did not raise the practices in place as being wrong or having posed risks to health and safety or had breached any legal obligations.

223. Mr Robinson reminded the claimant that Mr Fairhurst's role was to address the concern he had raised, and reiterated that in carrying out his job, he needed to concentrate on his repairs and the general running of the factory. He needed to complete the work assigned to him and was waiting on his bench in order to meet deadlines. He undertook to meet with Mr Fairhurst to discuss his reject rates. Reject rate is not something management viewed as a criticism of a supervisor's performance. In fact, the claimant's reject rate was good. He was told that the quality of new instruments should be left to the quality department to deal with which was part of Mr Fairhurst's role.

224. We find that the claimant was not making a qualifying disclosure as Mr Robinson understood that he was complaining about his reject rate, and that Mr Robinson's response was to remind the claimant of Mr Fairhurst's role.

225. Alleged disclosure 10 is the assertion by the claimant that he challenged the health and safety aspects of the workshop by speaking to Mr Woolston and Mr Robinson in January 2018 about the lack of safety guards, goggles and gloves and problems with extraction units and dust.

226. Mr Robinson denied such conversation/s had taken place in January 2018. The date is unclear, but he recalls a discussion with the claimant in October 2017 about safety guards. After the respondent had acquired Phoenix Surgical Instruments Ltd in 2016, it had been working on integrating the organisation into its corporate structure and as part of that ongoing review and to support the introduction of new bench-top grinders which the business had purchased in September 2017, it engaged an external trainer, a grinding wheel engineer, in order to provide abrasive wheels training to its technicians including the claimant, which took place on 15 September 2017. (158-160)

227. During the training the external trainer had advised that the existing FFP1 dust masks should be increased to FFP 3 to improve the level of protection afforded to technicians. The respondent purchased two versions of the recommended FFP three facemasks and made these available to all Technicians.

228. The claimant did not raise with Mr Robinson any specific concerns either to him or during any meetings, in relation to safety goggles or safety gloves. He acknowledged that the claimant did raise a concern during a general supervisory staff meeting in the boardroom at the Hoddesdon site, in around October 2017, at which the other three supervisors were present including Mr Woolston and Mr Fairhurst, about machinery guards and facemasks and the ventilation in the workshop. This was viewed as a priority and the matter was escalated to Mr Beardmore, as referred to earlier.

229. As can be seen, the alleged disclosure refers to either a meeting or meetings in January 2018 at which Mr Robinson and Mr Woolston were present. Any discussions as alleged during that month, Mr Robinson denied having taken place. Precisely how the discussion/s started and the views of those present were unclear. We find that the claimant did not make qualifying disclosure/s during that month.

230. In relation to alleged disclosure number 11, the claimant said that at the end of February 2018, he noted that as part of the inspection process not all instruments were being inspected, for example, only 10% of a box of needles were to be checked. He raised concerns with Mr Robinson in the stockroom and demonstrated this by selecting at random 20 Mayo needle holders showing 3 were free from imperfections and pinholes.

231. Again, Mr Robinson denied such a discussion had taken place. A discussion did take place around December 2017 when the claimant raised concerns in relation to his reject rate and pinholes in needle holders referred to above in respect of alleged protected disclosure number 9. We accept Mr Robinson's evidence and do not find that the claimant made a qualifying disclosure and protected disclosure in February 2018. He was concerned about his reject rate.

232. The alleged protected disclosure in number 12, is the statement by the claimant that in April 2018, he became "deeply concerned by the continued lack of professionalism within the company. He and other members of the workforce spoke with the second respondent and asked when things would change. He wanted to know when Steris would stop hiding away the itchy boxes, stop carrying on with hazardous procedures and when they would eventually action his concerns regarding machinery and safety guards, in particular, the issue that a number of the machines, including banders, linishers, scissor sharpening wheel, bead blast machines, degreasing/cleaning tank and golding machines did not have safety guards." He discussed the matter with Mr Robinson who said that everyone should carry on as usual until informed otherwise, and that no one would know where the itchy boxes were located.

233. The precise date was not given as to when this alleged discussion took place.

234. Mr Robinson denied having had such a discussion with the claimant and staff at the Hoddesdon site. He, however, recalled a conversation, though not the date, with the claimant, the claimant's trainee, Mr Harlee Grover, and Mr John Walker, Repair Technician 111, who were also present. The claimant asked when things would change for him referring to financial matters and why the respondent was proposing to cease the veterinary line of its business. At no point did he raise the issue of safety guards, itchy boxes, or hazardous procedures, or any of the matters referred to in the alleged protected disclosure. The only discussion about safety guards was around October 2017 which has already been referred to above.

235. The precise date of this alleged disclosure is unclear. What is clear is that the alleged conversation in April 2018, is denied by Mr Robinson who, nevertheless, went on to give an account of a different conversation unrelated to any qualifying disclosures. We accept his evidence.

236. Alleged protected disclosure 13 concerns Mr Fairhurst. The claimant alleges that he told Mr Fairhurst that he believed the respondent was cheating the NHS as the hospitals believed they were paying for new instruments when they were in fact repaired and sold as rejects. This discussion is alleged to have taken place in July 2018. The claimant provided no documentary evidence showing a deception on the part of the respondent leading to a reasonable belief that the disclosure was in the public interest.

237. This alleged protected disclosure was denied by Mr Fairhurst who stated that no such disclosure took place. There would be no foundation for it because the NHS were aware that they were not being sold new instruments from the paperwork the respondent provided which stated that it was a repair.

238. Having considered the evidence, we find that no such qualifying and protected disclosure took place. The paperwork provided by the respondent to the NHS Trusts would show that they were not being sold as new, old instruments. Not even the claimant's witness provided any documentary or video evidence in support.

239. In relation to alleged protected disclosure 14, this states that as part of the claimant's role he was required to inspect instruments with a microscope. One thing that worried him was the common occurrence of pin holes on needle holders regularly found in repaired trays. The pinholes are a breeding ground for bacteria which could endanger patients by increasing the risk of infection. He raised this with Mr Fairhurst in July 2018.

240. In response, Mr Fairhurst said in evidence that the claimant did not make such a disclosure to him. The only conversation he had with the claimant regarding holes in new instruments was the claimant's attempt to justify why the same in repairs should not be rejected and returned for rework. We have already accepted Mr Fairhurst's evidence. He came across as a competent and knowledgeable person in the field of the respondent's quality control and was able to provide to the tribunal a detailed account of its processes and procedures including health and safety.

241. The claimant alleges in protected disclosure 15, that on or around 20 July 2018, he raised concerns at a meeting with the supervisors, Mr Robinson, and Mr Watts, about the safety of guards on machinery in the workshops and questioned why the respondent was "not addressing these issues." He cites Mr Robinson and Mr Watts.

242. Both denied such a conversation took place. The only relevant conversation with the claimant was when he raised the issue of safety guards with Mr Robinson in October 2017, in the context of a general concern, PPE face masks and ventilation in the workshop. This has been dealt with in relation to our findings in respect of the alleged protected disclosure 2.

243. We find, having regard to Mr Watts' evidence, that various risk assessment reports in 2017 and 2018, revealed that numerous items of machinery were checked and confirmed as having been fitted with appropriate guards, for example, the belt driven motor on lathe machinery is recorded as not being

operable if the guards on it are open. The reports do not state that guards fitted on certain machines were faulty or a risk to health and safety. (189-193, 195, 196, 417-419, 422-423)

244. The only two items of machinery which were recorded as not having guards fitted during 2017 and 2018, were two banders, Chappell and Grief. The report states that the machines were only used for delicate polishing during which it was recommended that dust masks are worn to protect the worker. (205,431, 210, 436)

245. We find that the two banders were considered as low risk.

246. Mr Watts denied saying to the claimant that he was very negative and to stop complaining, and that it would take time to implement changes. He told us that he would not dismiss anyone's concerns regarding health and safety issues.

247. Our finding of fact is that this alleged qualifying and protected disclosure were not made by the claimant as alleged.

248. In his alleged disclosure 16, the claimant states that in July 2018, before Mr Watts, Mr Robinson and Mr Fairhurst, he questioned why surgical instruments were still being repaired side by side, itchy boxes, the use of old instruments, and car oil. The equipment provided, he believed, were sub-standard and carried the risk of contamination because of the alleged poor processes operated by the respondent. Again no specific date is given and is the absence of detail in relation to the discussion.

249. Mr Robinson repeated his evidence that a discussion did take place but not as asserted by the claimant and referred to his response to alleged disclosure 12. He had a discussion at the claimant's workbench and he challenged Mr Robinson on the decision to cease the veterinary instruments business as it meant turning away revenue. Veterinary and human instruments were segregated with clearly defined processes being followed, and the claimant would have been aware of them. No concerns were raised with him by the claimant with reference to itchy boxes. Car oil was not used for blackening instruments.

250. Mr Watts denied having such a discussion with the claimant in July 2018. His evidence is consistent with Mr Robinson's on veterinary and human instruments always being segregated and the decision on 31 July 2018 to cease veterinary repairs. In relation to itchy boxes, the practice or repurposing certain instrument parts was a recognised historic practice by the respondent and is industry wide as a result of a lack of new spare parts for particularly older instruments. If it was not possible for the Technician to fabricate or make a new screw, nut or bolt, it was possible to salvage such a part from another instrument. This practice did not pose risk to health and safety as the instruments would be subjected to rigorous inspection and quality control checks. Shortly after he was appointed as Director-Device Repair, he gave instructions in the summer of 2018, that new parts could be ordered from DANmed.

251. He stated that the respondent do not normally blacken instruments unless requested by the customer. Rye oil is used in the hardening and tempering process. Mr Watts also disagreed with the claimant that the same tank was used for degreasing, polishing and wheels and repairing tools for veterinary and human instruments giving rise to cross contamination. He repeated that the respondent's processes avoids cross contamination.

252. Mr Fairhurst also gave a consistent account with Mr Watts and Mr Robinson.

253. Having considered the evidence, we find that the claimant did not make the qualifying and protected disclosure as alleged.

254. In respect of the alleged protected disclosure 17, the claimant states that when Mr Robinson came to his workbench in August 2018, he, the claimant, asked him when things were going to change with regard to the alleged disclosures he had made previously. He believed that the equipment provided to the NHS were substandard and carried the risk of contamination. He said that Mr Robinson told him to "stop moaning about it every other day" and that too many rumours were circulating and that he was beginning to annoy management, detriment 6.

255. Again Mr Robinson denied such a discussion took place. He maintained that the only discussion was in or around October 2017 regarding guards on machinery which had been addressed, and that the claimant frequently raised questions about the cessation of the veterinary side of the business.

256. The claimant did not give a precise date when this alleged disclosure took place. We accept Mr Robinson's account and do not find that the claimant made a qualifying and protected disclosure at that time.

257. The alleged protected disclosure 18, also cites Mr Robinson. The claimant asserts that before a visit from a hospital client, in October 2018, he was instructed by Mr Robinson to hide both the itchy boxes with plywood boards and any veterinary paperwork. He said that he questioned the working practices but was again told by both Mr Robinson and Mr Watts that he always had something to say, detriment 7; that he did not need to get involved in questioning the instructions of management; and he did not question to operations of Phoenix at the time. He replied that he was unaware of all the wrongdoing until Mr Woolston pointed them out. The claimant also asserted that Mr Woolston was "fired!" by the respondent. The assumption being for addressing health and safety issues. He was not, however, called by the claimant as a witness.

258. In the Scott Schedule this claim is only against Mr Robinson who denied that such a disclosure was made to him and denied giving that instruction. He recalled the claimant speaking to him in 2016, about a forthcoming ISO inspector/trade standard visit and suggested that he should cover the boxes with spare parts and asked whether he should, to which Mr Robinson agreed. Inspections, however, were dealt with by the respondent's Quality Department, in particular, Mr Fairhurst.

259. We have accepted Mr Robinson's evidence and do not find that the claimant had made a qualifying and protected disclosure on the occasion in question.

260. Mr Woolston left at the end of his probationary period for reasons which are unclear. He was asked to stay on for a further six months to oversee the implementation of the new Oracle system but he declined.

261. It follows from our findings that the claimant did not make any qualifying disclosures relating to health and safety or breach of a legal obligation. The alleged detriments are only now of academic relevance but are considered below.

**The alleged detriments**

262. After one meeting in May 2017, the claimant was told by Mr Robinson in his office to shut up, stop being a nuisance and to repair whatever was placed on his bench (Detriment 1).

263. Following raising the use of the red bucket with car oil as part of the blackening process, on an occasion in November 2017, Mr Robinson is alleged to have told him to continue with his job and that he, Mr Robinson, Mr Fairhurst and Mr Woolston, regularly avoided speaking to him, (Detriment 2).

264. In December 2017, he raised with Mr Fairhurst that new stock ordered showed imperfections more so than the repaired items, (Protected Disclosure 8). He was spoken to by Mr Robinson who told him that he was a repairer and should stick to that. He raised the issue about the new instruments with Mr Fairhurst (Protected Disclosure 9); he was allegedly told by Mr Robinson that he should "not get fucking involved", (Detriment 3).

265. In July 2018 he spoke to Mr Fairhurst stating that he believed the respondent was cheating the NHS as the hospitals believed that they were paying for new instruments when they were in fact being repaired and sold rejects, (Protected Disclosure 13); he also raised concerns about pin holes found in repaired trays which were a breeding ground for bacteria and could endanger patients by increasing the risk of infection, (Protected Disclosure 14). The claimant alleged that Mr Watts called him into his office and told him to stop being so nosy and not to get involved with quality control, that his job was to repair instruments, and he did not want to hear about his concerns anymore, (Detriment 4).

266. During a meeting on or around 20 July 2018, he raised concerns in the presence of Mr Kevin Buckner, Mr Chris Grist, Mr Peter Bainbridge, Mr Robinson and Mr Watts about safety guards on the machinery in the workshop and why Steris was not addressing issues raised, (Protected Disclosure 15); in addition, he questioned why animal and human instruments were still being repaired side by side, then issue in relation to the use of itchy boxes, the use of old instruments and car oil, (Protected Disclosure 16). He alleged that Mr Watts told him that he always had something to say and that he should focus on his work, hitting targets, (Detriment 5).

267. Soon after the meeting various work colleagues allegedly told him that they had heard that Mr Robinson and Mr Watts were extremely frustrated by his continuous questions about health and safety issues and about misleading the NHS, that it might be a good idea for him to just keep his head down and continue with his work. In August 2018, Mr Robinson came to his workbench and he asked Mr Robinson when things were going to change at Steris in light of the alleged disclosures he made, (Protected Disclosure 17). As referred to above, it is alleged that Mr Robinson said he did not know and that he, the claimant, should "stop moaning about it every other day", too many rumours were circulating and that he, the claimant, was beginning to annoy management, (Detriment 6).

268. The claimant wrote that in October 2018, prior to a hospital visit, he had been instructed by Mr Robinson to hide both the itchy boxes with plywood boards and any veterinary paperwork, and again he questioned the working practices, (Protected Disclosure 18). He further alleged that Mr Robinson and Mr Watts told him that he always had something to say and that he did not need to get involved in questioning the instructions of management, (Detriment 7)

269. Detriment 8 concerns subjecting the claimant to the disciplinary process.

270. Detriment 9 is Ms Jones' decision to dismiss the claimant.

271. Detriment 10 is Mr Holder's decision to only consider the decision to dismiss and not the matters referred to in the claimant's solicitors' letter, namely the alleged protected disclosures.

272. Detriment 11 is the appeal outcome upholding the decision to dismiss.

273. All of the detriments were denied by the respondents and their witnesses. In respect of the alleged detriments numbered 9 and 11, the respondents accept that as a matter of fact the claimant was dismissed and that his appeal was not upheld. It is their position that matters relating to the dismissal and subsequent appeal are properly matters which fall within section 103A and are not capable, as a matter of law, of being detriments within section 47B.

**Submissions**

274. We have considered the written and oral submissions by Mr Kibling, counsel on behalf of the clamant and by Mr Edwards, counsel on behalf of the respondent. We do not propose to repeat their detailed submissions herein having regard to Rule 62(5) Employment Tribunal's (Constitution and Rules of Procedure Regulations) 2018, as amended. We have, in addition, taken into account the authorities they have referred us to.

**The law**

275. Section 98(1) Employment Rights Act 1996 ("ERA"), provides that it is for the employer to show what was the reason for dismissing the employee. Dismissal on grounds of conduct is a potentially fair reason, s.98(2)(b).

Whether the dismissal is fair or unfair having regard to the reason shown by the employer, the tribunal must have regard to the provisions of s.98(4) which provides:

> "Where the employer has fulfilled the requirements of subsection (1), and 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 employees 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."

276. In the case of British Homes Stores v Burchell [1980] ICR 303, the EAT's judgment was approved in the Court of Appeal case of Weddel & Co Ltd v Tepper [1980] ICR 286. The following has to be established:

> First, whether the respondent had a genuine belief that the misconduct that each employee was alleged to have committed had occurred and had been perpetrated by that employee,
>
> Second whether that genuine belief was based on reasonable grounds,
>
> Third, whether a reasonable investigation had been carried out,
>
> Finally, in the event that the above are established, was the decision to dismiss reasonable in all the circumstances of the case. Was the decision to dismiss within the band of reasonable responses?

256. The charge against the employee must be precisely framed Strouthos v London Underground [2004] IRLR 636.

257. Even if gross misconduct is found, summary dismissal does not automatically follow. The employer must consider the question of what is a reasonable sanction in the circumstances Brito-Babapulle v Ealing Hospital NHS Trust [2013] IRLR 854.

258. The Tribunal must consider whether the employer had acted in a manner a reasonable employer might have acted, Iceland Frozen Foods Ltd v Jones [1982] IRLR 439 EAT. The assessment of reasonableness under section 98(4) is thus a matter in respect of which there is no formal burden of proof. It is a matter of assessment for the Tribunal.

259. It is not the role of the Tribunal to put itself in the position of the reasonable employer, Sheffield Health and Social Care NHS Trust v Crabtree UKEAT/0331/09/ZT, and London Ambulance Service NHS Trust v Small 2009 EWCA Civ 220. In the Crabtree case, His Honour Judge Peter Clark,

held that the question "Did the employer have a genuine belief in the misconduct alleged?" goes to the reason for the dismissal and that the burden of showing a potentially fair reason rests with the employer. Reasonable grounds for the belief based on a reasonable investigation, go to the question of reasonableness under s.98(4) ERA 1996. See also Secretary of State v Lown [2016] IRLR 22, a judgment of the EAT.

260. The range of reasonable responses test applies to the investigation as it does to the decision to dismiss for misconduct, Sainsbury's Supermarket Ltd v Hitt [2003] ICR 111 CA.

261. In the case of Taylor v OCS Group Ltd [2006] ICR 1602 CA, it was held that what matters is not whether the appeal was by way of a rehearing or review but whether the disciplinary process was overall fair.

262. The seriousness of the conduct is a matter for the employer, Tayeh v Barchester Healthcare Ltd [2013] IRLR 387 CA.

263. The Court of Appeal acknowledged that employment tribunals are entitled to find whether dismissal was outside the range of reasonable responses without being accused of placing itself in the position of being the reasonable employer or of adopting a substitution mindset. In Bowater-v-Northwest London Hospitals NHS Trust [2011] IRLR 331, a case where the claimant, a senior staff nurse who assisted in restraining a patient who was suffering from an epileptic seizure by sitting astride him to enable the doctor to administer an injection, had said, "It's been a few months since I have been in this position with a man underneath me" was the subject of disciplinary proceedings six weeks later. She was dismissed for, firstly, using an inappropriate and unacceptable method or restraint and, secondly, for the comment made. The employment tribunal found, by a majority, that her dismissal was unfair. The EAT disagreed. The Court of Appeal, overturned the EAT judgment, see the judgment of Stanley Burnton LJ, paragraph 13. See also Newbound v Thames Water Utilities Ltd [2015] EWCA Civ 677, in which the Court of Appeal held that the tribunal is required to consider section 98(4) ERA 1996, when considering the fairness of the dismissal.

264. The level of inquiry the employer is required to conduct into the employee's alleged misconduct will depend on the particular circumstances including the nature and gravity of the case, the state of the evidence and the potential consequences of an adverse finding to the employee. "At the one extreme there will be cases where the employee is virtually caught in the act and at the other there will be situations where the issue is one of pure inference. As the scale moves towards the latter end, so the amount of inquiry and investigation which may be required, including the questioning of the employee, is likely to increase.", Wood J, President of the EAT, ILEA v Gravett [1988] IRLR 497.

265. In relation to public interest disclosure, we have taken into account sections 103A and 47B Employment Rights Act 1996 on dismissal and detriment.

266. Section 47B(1), Employment Rights Act 1996 provides,

> "A worker has the right not to be subjected to any detriment by any, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure."

267. A protected disclosure means a qualifying disclosure as defined under section 43B made by a worker in accordance with sections 43C to 43H, ERA 1996, section 43A.

268. Section 43B defines what is a qualifying disclosure. It provides,

> "(1) In this Part a 'qualifying disclosure' means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following --
>
> (a) that a criminal offence has been committed, is being committed or is likely to be committed,
>
> (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,
>
> (c) that a miscarriage of justice has occurred, is occurring or is likely to occur,
>
> (d) that the health or safety of any individual has been, is being or is likely to be endangered,
>
> (e) that the environment has been, is being or is likely to be damaged, or
>
> (f) that information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed."

269. What is a detriment under section 47B is not defined in the legislation? In this regard the judgments of their Lordships in the case of Shamoon-v-Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285, will apply. It is whether or not the worker was put at a particular disadvantage having made a protected disclosure? The disadvantage could be either physical, such as being instructed to engage in degrading work; or denying them benefits such as a company car, medical cover or membership of a sports or social club; being denied the opportunity of promotion, or a delay in addressing an issue. It may also be psychological, financial or not being offered employment, amongst other things.

270. The qualifying disclosure must be a disclosure of information, that is conveying facts, Cavendish Munro Professional Risks Management Ltd v Geduld [2010] IRLR 38, a judgment of the Employment Appeal tribunal.

271. A reasonable belief is assessed objectively taking into account the particular characteristics of the worker in determining whether it was reasonable for him/her to hold that belief, Korashi v Abertwe Bro Morgannwg University Local Health Board [2012] IRLR 4, EAT.

272. In the case of Fecitt and Others and Public Concern at Work-v-NHS Manchester [2011] EWCA Civ 1190, the Court of Appeal held that the causal

link between the protected disclosure and suffering a detriment under section 47B, is whether the protected disclosure "materially influenced", in the sense of being more than a trivial influence, the employer's treatment of the whistleblower.

273. In section 48(2), the statutory test is whether the worker was subjected to the detriment by the employer "on the ground that" they had made a protected disclosure. It is for the worker to prove, on the balance of probabilities, that there was a protected disclosure, that there was a detriment, and the employer subjected the claimant to the detriment. If established, the burden shifts to the employer to show the ground on which the detrimental act was done. If the tribunal rejects the reason advanced by the employer, it is not bound to accept the reason given by the worker and may find, on the facts, that there was another reason for the detrimental treatment.

274. Causation will be established unless the employer can show that the protected disclosure played no part whatsoever in its acts or omissions, Fecitt.

275. In a breach of a legal obligation case, the tribunal should identify the source of the legal obligation and how the employer failed to comply with it. Actions could be considered wrong because they were immoral, undesirable or in breach of guidance without being a breach of a legal obligation, Eiger Securities LLP v Korshunova [2017] IRLR 115, EAT.

276. Section 103A ERA provides that, "An employee who is dismissed shall be regarded for the purposes of the Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure."

277. It is for the employer to prove the reason for the dismissal. Where the employee lacks the relevant qualifying period of service the burden will be on the employee to prove the reason for the dismissal was by reason of making a protected disclosure, Kuzel v Roche Products Ltd [2008] ICR 799.

278. A claim under section 47B must be presented within three months beginning with the date of the act or the failure to act, section 48(3).

279. This time is extended under section 207B where there has been conciliation before the presentation of the claim, section 48(4A).

280. If a detriment claim is well-founded the tribunal can make a declaration to that effect and award compensation, section 49(1) Employment Rights Act 1996. The claimant is under a duty to mitigate, section 49(4), and the tribunal can consider whether the claimant either caused or contributed to the act complained of, section 49(5). Compensation is assessed on the same basis as a discrimination claim and can include an injury to feelings award, Virgo Fidelis Senior School v Boyle [200] IRLR 268.

281. In addition we have considered the case of Royal Mail Group Ltd v Jhuti [2019] UKSC 55, on the issue of the real reason for a section 103A ERA dismissal.

282. In Norbrook Laboratories (GB) Ltd v Shaw [2014] ICR 540, disclosures can be aggregated.

283. Where there are multiple protected disclosures, the tribunal is required to ask itself whether, taken as a whole, the disclosures were the principal reason for the dismissal, El-Megrisi v Azad University (IR) in Oxford, UKEAT0448/08.

284. When considering the employer's potential liability, the tribunal must focus on the mental processes of the individual decision-maker, in asking whether the employer was materially influenced by protected disclosures. However, that the general rule may be displaced in circumstances where a manipulator with an unlawful motivation who is in the hierarchy of responsibility above the worker, procures the detriment via the innocent decision-maker, Jhuti.

**Conclusion**

Unfair dismissal, section 98(4) Employment Rights Act 1996

285. We are satisfied that the reason why the claimant was dismissed was that he had lied to the respondent as to the reason for him leaving on 18 October 2018. It was an allegation of conduct, "On Thursday 18th October 2018 you did purposely and with intend deceive your line manager, fain [feigned] illness to gain sick leave so you could go on holiday without seeking approved annual leave." That was the reason why Ms Jones dismissed him.

286. In her outcome letter she wrote, "Looking at the above this leaves me to be to believe that you did fabricate illness on Thursday 18th Oct with the intent to deceive your manager to allow you to go home early and this was premeditated. You had no intention of telling your line manager you had booked flights without having the authorised leave and made no attempt to find an acceptable resolution. You preferred to pretend you were unwell and unable to work so they would allow you to go home early. This clearly shows you had no intention to following any acceptable procedure regarding leave and little or no care of how this potentially impacts your colleagues."

287. Had the respondent conducted a reasonable investigation? The respondent engaged the service of Ms Petkute to carry out the investigation. She spoke to the claimant. Other statements were obtained. The claimant was invited to a disciplinary hearing and he attended and gave his account to Ms Jones. He also attended the appeal in the company of Mr Walker and together they put forward their accounts of events and issues of concern. Mr Holder carried out his investigation. He was invited to call witnesses but did not do so.

288. We are satisfied that the respondent had embarked and did conduct a reasonable investigation into the allegation the claimant faced.

289. Were there reasonable grounds upon which the respondent, in particular, Ms Jones and Mr Holder, formed a genuinely held belief in the claimant's guilt? We are satisfied that there were such reasonable grounds. The accounts given by the claimant amounted to him misleading Mr Watts and Mr Robinson as to the real reason for him leaving work in the morning of 18 October 2018.

The claimant had initially booked his flight to start from 18 October 2018, the day he had not booked as holiday. There was every reason to believe that because of the pressure on him and his partner to arrive at the airport in time, he left work on 18 October late morning. There was no time to visit the doctor as he claimed but enough time to get home, pack his bags and travel to the airport to arrive at least 1½ hours before the flight departure time of 3.25pm. Both Ms Jones and Mr Holder had statements from Mr Robinson, Mr Watts, Ms Stamp and had the claimant's accounts in which he made admissions that he had not been truthful as to the reason leaving in the morning. It is acknowledged that Ms Jones was independent of all matters prior to the disciplinary hearing. There was no ulterior motive on her part to dismiss the claimant and the claimant did not refer during the disciplinary hearing, to any alleged protected disclosures he made. There was no evidence that Mr Patel was involved in the disciplinary outcome decision. It was solely the decision of Ms Jones.

290. The Disciplinary Policy requires the appeal to be conducted by the Managing Director and it was. Mr Holder believed that the claimant had lied to Mr Robinson and to Mr Watts. He accepted the account given by Ms Stamp of her conversation with him. That he was due to fly the following day, namely on 19 October 2018. Although Mr Holder was challenged on not being impartial, there was nothing to suggest that his mind had been made up prior to the appeal hearing outcome. The appeal was lengthy with contributions from both Mr Walker and the claimant. His outcome letter is very detailed setting out his findings of fact and the rationale behind his decision to dismiss the appeal.

291. Was dismissal within the range of reasonable responses? Although they considered the claimant's length of service and alternatives to dismissal, he was in a position of trust with a trainee who was being trained at the time. He had lied and all matters taken into account meant that the respondent could no longer continue with his employment. While it may be the case that an employer in possession of the same evidence may take a course of action short of dismissal, as was the recommendation by Ms Petkute, another may very well decide that the conduct on the part of the claimant and his position of trust, were so serious that they merited termination forthwith.

292. We do not substitute ourselves for the reasonable employer. Ms Jones having considered all the evidence before her and having spoken to Mr Robinson decided to dismiss the claimant. He did not have a disciplinary record and had worked for the respondent since November 2006. He, however, had committed the act alleged and was in a responsible position of trust, engaged in supervising a trainee. It is for the employer to determine the seriousness of the conduct, Tayeh v Barchester Healthcare Ltd. It was not about time off in lieu but the lies of the claimant as to his reasons for leaving early on 18 October 2018. The range of reasonable responses may cover a broad spectrum. Does the decision to dismiss fall within that range? Applying Newbound, we conclude that dismissal fell within the range of reasonable responses. Accordingly, his ordinary unfair dismissal claim is not well founded and is dismissed.

293. Much has been made about Mr Holder's refusal to deal with the alleged protected disclosures. We bear in mind that his reason was that he was considering the decision to dismiss by Ms Jones before whom the claimant did not raise qualifying and protected disclosures. Although he was aware of the alleged protected disclosures and had submitted a report on the health and safety issues raised by the claimant prior to his appeal outcome, from reading his detailed outcome letter and having regard to the evidence given by Ms Denaro, there was no evidence that his decision was influenced by the concerns raised by the claimant. He focussed on the reasons as found by Ms Jones, the documentary evidence before him, and the claimant's account during the appeal hearing. It is difficult to see how any alleged protected disclosures could explain the claimant's deception on 18 October 2018. As a result of his lies to Mr Robinson as to why he was leaving early, he was allowed to take the time off in lieu.

Public interest disclosure

294. Mr Kibling withdrew the section 103A claim in respect of Ms Jones decision as she was unaware of the alleged protected disclosures at the time she took the decision to dismiss.

295. The claimant first raised qualifying disclosures within a general sense in his grounds of appeal to Mr Holder on 16 November 2018, particularly, in paragraph 3.1. A more detailed account was given in his solicitor's letter of 6 February 2019. It seemed that if he felt that he had been victimised because he had raised protected disclosures involving health and safety issues, that would have been borne out prior to or during the disciplinary hearing.

296. We considered the evidence given by the respondent's witnesses. We accepted their evidence and have concluded that the claimant did not raise qualifying disclosures. He did not disclose facts and specific dates which enabled the respondent to form the view that health and safety of any individual has been, is being, or was likely to be endangered or there had been breaches or potential breaches of a legal obligation. The respondents and Mr Fairhurst denied that he had made qualifying and protected disclosures on the alleged occasions relied upon by him.

297. If the respondent's processes and procedures gave rise to health and safety, breaches of a legal obligation, and the deliberate concealment of matters falling within the alleged qualifying disclosures, no evidence had been produced of any patient being infected, any adverse health and safety reports, or auditor's reports.

298. From our findings and conclusions, it legally follows that the claimant is unable to establish that he suffered any detriments.

Credibility

299. Of importance to us was the issue of credibility. The claimant lied to his employer as to where he would be on 18 October 2018. He challenged Ms Petkute's understanding of English when she recorded his admissions to her.

He also challenged the admissions made to his managers, in the notes of the disciplinary hearing despite not having made notes at the time. He made a similar challenge to the appeal notes. If he genuinely felt that he had suffered detriments because he made several protected disclosures, this would have been articulated before Ms Jones but he did not do so. From reading his witness statement and from his oral evidence, his allegations were generally not specific in terms of dates and contexts to enable the respondents to adduce evidence in rebuttal. He did not convince us that he was a credible witness. The witnesses on behalf of the respondent were credible and consistent in their accounts.

300. It is academic to consider whether the protected disclosure claims were presented in time.

301. It follows from our findings and conclusions that all the claims are not well-founded and are dismissed.

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Employment Judge Bedeau

Date: 16 July 2021

Sent to the parties on: 20 July 2021

S. Bhudia

For the Tribunal Office