EXTRACT TAKEN FROM EMPLOYMENT TRIBUNAL JUDGMENT 24 AUGUST 2022 IN THE CASE OF DR SHYAM KUMAR V CARE QUALITY COMMISSION CASE NO: 2410174/2019

"The Disclosures

Disclosure 1

52. The claimant was involved in an inspection for the respondent in 2015. This as led by Amanda Stansford. Following some concerns with respect the adequacy of the inspection.

53. In light of his concerns, the claimant sent a letter dated 10 May 2015 to the Chief Inspector of Hospitals, Professor Sir Mike Richards. He summarised his main concerns as being:

1. CQC's failure to act appropriately to address whistleblowers' concerns
2. Curtailing my professional independence and undermining or obstructing me from carrying out my duties in accordance with the GMC's guidance, *Good Medical Practice*.
3. Bullying that I experienced at the hands of CQC officials

54. As part of this letter, the claimant raised a concern that patient safety is being significantly compromised by the behaviour of some CQC staff.

55. Neither Mr Zeiderman or Ms Wood had knowledge of this letter sent by the claimant in advance of the decision to disengage him from the respondent. The tribunal accepted the evidence of Mr Zeiderman and Ms Wood on this point. This was made before MR Zeiderman was in post, and there is no reason as to why either would have had this brought to their attention at a later date.

56. The respondent accepts that this disclosure is a protected disclosure (see para 25 of amended Grounds of Resistance).

Disclosure 2

57. A number of individuals working at the Trust, including the claimant had concerns in relation to the clinical practice of Dr X. A decision was made following a meeting of consultants, that this issue was to be raised with the Trust's MD (pp.199-206). The concerns were far ranging, and included concerns for patient safety and patient harm and issues of probity. These matters were subsequently investigated both internally and externally, with findings that supported the concerns raised by the consultants. The claimant's concerns, and those of the other consultants were found to be justified.

58. On 16 June 2018, the claimant emailed Mr Zeiderman (see p.234). He raised concerns about patient safety, and raised a concern about the trust burying it 'under the carpet'. This was a concern that Mr Zeiderman understood to involve negligently performed operations, concerns around waiting lists being manipulated and significant patient harm. Disclosure 3

59. On 29 June 2018, following up his email of 16 June 2018, the claimant called Mr Zeiderman. During this phone call, the claimant reiterated concerns that matters had been raised with the Trust's Medical Director, but that the Trust was refusing to look into those concerns but was wanting to cover up the issues. The claimant also raised specific examples of to suspicious deaths, after which the Trust had not taken steps to prevent further harm. The claimant provided specific details of the two cases to Mr Zeiderman in this phone call. The claimant was disclosing information of serious and/or potential harm to patients. Mr Zeiderman accepted the claimant's paragraph 38 as being the content of that phone call.

60. Ms Wood could not say either way whether she had knowledge of these disclosures around the time, or by 06 December 2018. However, it is more likely than not that Ms Wood was informed of these concerns raised by the claimant. Ms Wood accepted that this type of information would be shared with her. And that such issues were discussed during monthly engagement meetings. So on balance, the contents of this phone call and the contents of the 16 June 2018 email was likely to have been shared by Mr Zeiderman with Ms Wood.

Disclosure 4

61. On 02 July 2018, the claimant emailed Mr Zeiderman (see p.232). This concerned the decision to send 7 cases out for external review. The claimant raised concerns of the approach being adopted. This included being concerned about having to wait until August for feedback. That the terms of reference had not been shared. And that 'people are scared to submit clinical incidents due to loss of anonymity as some colleagues have started to meet with reprisals'. This email builds upon the previous two disclosures.

Disclosure 5

62. On 16 August 2018, the claimant emailed Mr Zeiderman (see pp.256-258). The claimant provides detailed information of matters concerning patient safety as a result of Dr X being allowed to continue to practice. He explains that this has led to at least 3 further patients being harmed.

63. The respondent accepts that this disclosure is a protected disclosure (see para 21(iv)(d) of amended Grounds of Resistance).

Disclosure 6

64. On 06 September 2018, the claimant emailed Mr Jonathan Driscoll, copying in Amanda Lear (see p.268). He raises concerns around the inadequacy of a CQC inspection. Most notably, he discloses that certain areas have high infection rates and need further investigation and that there are instances of bullying and harassment of doctors at the Trust.

65. The respondent accepts that this disclosure is a protected disclosure (see para 28 of amended Grounds of Resistance).

Disclosure 7

66. On 08 September 2018, the claimant emailed Mr Zeiderman (see p.274) concerning the East Lancashire inspection. He raises similar patient safety issues in this email to that in disclosure 6, raises concerns about documents being withheld during the inspection process

which impacts upon the validity of the inspection and raises concerns about the lack of specialisms in the inspectors.

67. The respondent accepts that this disclosure is a protected disclosure (see para 28 of amended Grounds of Resistance).

Disclosure 8

68. The claimant followed up his email of 08 September 2018, with a further email to Mr Zeiderman on 17 September 2018. This therefore must be read alongside that email. The claimant adds that the issues that he had previously raised concerning bullying and harassment of medical staff. He further reiterates that he has no confidence in the team which di the inspection.

69. Mr Zeiderman accepted that these matters could, if correct, impact upon the health and safety of individuals.

Disclosure 9

70. On 30 October 2018, the claimant emailed Ms Wood, with Mr Zeiderman copied into it (see p.282). This disclosed information relating to clinical concerns raised about a SAS doctor, patient safety matters including the deaths of two patients, issues concerning retaliatory action against the clinicians that had raised concerns, around racial discrimination, and that this is having the effect that '…white colleagues were now terrified to raise concerns about BME doctors'.

71. The respondent accepts that this disclosure is a protected disclosure.

Disclosure 10

72. On 01 November 2018, the claimant telephoned Mr Zeiderman (see claimant's witness statement at paragraph 63). The claimant told Mr Zeiderman of some serious patient safety concerns, including a recent example of an elderly lady, where he explained the following:

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> actions. The most recent example was an elderly lady on who Dr X had performed hip replacements on both sides overlooking a serious dislocation in the pelvis who later presented with severe pelvic discontinuity and inability to walk. This patient later presented as an emergency through the Accident and Emergency department and had to be referred to the regional pelvic unit. In the opinion of some of my colleagues, it is unlikely that this patient's lost limb function would ever be restored. I suggested to Mr Zeiderman that the Respondent should, as the Trust's regulator, ask the Trust to perform a look back exercise and proactively identify any other patients who were at risk of presenting later with irreversible consequences due to Dr X's practices. I also informed Mr Zeiderman that the Trust were reluctant to order a comprehensive review as it would likely cause them reputational damage at the expense of patient safety.

73. This evidence was not challenged through cross-examination and I therefore taken to be accurate.

Disclosure 11

74. The claimant emailed Mr Zeiderman on 07 December 2018 (see p.317). This raised further information about further patient malpractices as a result of operations by Dr X. He raises that there does not appear to be any appetite in the Trust to do a look back exercise.

75. The respondent accepts that this disclosure is a protected disclosure (see para 21(iv)(g) of amended Grounds of Resistance). Investigations into the Trust and the actions of Dr X Case

76. In January 2020, The Tulloch Review into 20 cases involving Dr X was released (see pp.534-552).

77. A Royal College of Surgeon Review was also undertaken. This related to some 46 cases, of which there were concerns highlighted in relation to 26 of those cases. It was agreed between the parties that the following conclusions were found:

a. some surgeries undertaken by Dr X were not completed to an acceptable standard
b. some of the surgery and quality of care provided by Dr X was unacceptable.
c. some clinical decision making to undertake surgery by Dr X was inappropriate.
d. in some cases there was either no or a lack of evidence of a "Duty of Candour""

"**Conclusions**

Were the disclosures protected disclosures?

131. The disclosures that are disputed as being protected disclosures are disclosures 2,3,4,8 and 10. And that is the focus of the discussion here.

132. In respect of disclosures 2,3,4 and 10, these are all brought in the same way: as being disclosure of information, which was in the reasonable belief of the claimant, as being in the public interest and tends to show that the health or safety of any individual has been, is being or is likely to be endangered and/or that information tending to show this is being or is likely to be deliberately concealed. And that he made he disclosed this to the respondent as a prescribed person, for which he reasonably believed fell within any description of matters in respect of which that person is so prescribed, AND that the information disclosed, and any allegation contained in it, are substantially true.

133. Disclosure 2 alone would unlikely to reach the level of being a protected disclosure, as it does not contain the requisite disclosure of information. However, this must be read alongside disclosure 3, which was a phone conversation between the claimant and Mr Zeiderman as a follow up to this email. Given our findings above, this tribunal has no doubt that the claimant across disclosures 2 and 3 (when read together) raised concerns of the health and safety of patients. And that he was concerned that this matter was being concealed by the Trust. Given that this involved the welfare of patients in a clinical setting, this easily satisfies the public interest requirement. The purpose of this disclosure was to ensure that the respondent, that had overarching regulatory oversight of the Trust, exercised its powers to

prevent continued patient harm. It was entirely reasonable that the claimant considered this to fall within the respondent's remit as a prescribed person. And given the findings in the subsequent reviews, the information disclosed and the allegations made were evidently substantially true. Both disclosures 2 and 3 are therefore protected disclosures.

134. Turning to disclosure 4. This builds further on disclosures 2 and 3, and again cannot be read in isolation from these, given that it is a development of the discussion in those two disclosures. This discloses further information that people had become scared to submit clinical incidents and that the MD would not speak to other departments and staff members that have raised concerns. This clearly falls within the category of information tending to show that the health and safety is likely to be endangered. And the information surrounding concerns about not knowing the terms of reference, and the matter about not investigating the concerns raised by other departments and staff members is information tending to show that this information is being or is likely to be concealed. This very much goes back to the burying under the carpet comment made by the claimant in Disclosure 2. We repeat what we stated above. Given that this involved the welfare of patients in a clinical setting, this easily satisfies the public interest requirement. The purpose of this disclosure was to ensure that the respondent, that had overarching regulatory oversight of the Trust, exercised its powers to prevent continued patient harm. It was entirely reasonable that the claimant considered this to fall within the respondent's remit as a prescribed person. And given the findings in the subsequent reviews, the information disclosed and the allegations made were evidently substantially true.

135. And turning to disclosure 10. Given our findings above, this clearly reaches the level of being a protected disclosure. The claimant disclosed specific information in relation to the health and safety of patients, with a clear example provided. He disclosed information that the Trust were reluctant to undertake a comprehensive review for risk of reputational damage, which is further building on previous disclosures concerning concealing of the patient risk. This is clearly within the public interest, being concerned with safety patient. And it was reasonable for the claimant to believe that monitoring a Trust and ordering a review to ensure patient safety where failings had been identified, falls within the respondent's remit. Put bluntly, it does. And, the information was later established as being substantially true through a number of external reviews.

136. For completeness. In respect of disclosure 8, this is brought slightly differently to the others. This is brought solely in whether this was disclosure of information, which was in the reasonable belief of the claimant, as being in the public interest and tends to show that the health or safety of any individual has been, is being or is likely to be endangered. This was pleaded as being to either the claimant's employer (s.43C ERA) and/or to a prescribed person pursuant to s.43F ERA.

137. It seems somewhat surprising that disclosure 7 was accepted by the respondent as being a protected disclosure, and yet disclosure 8, which simply builds upon that disclosure and inevitably would be read alongside it, is not. The claimant is disclosing information about the bullying and harassment of staff, which is information that the claimant reasonably believes is in the public interest, given it is about broad treatment of staff that can impact on patient care, and tends to show that health and safety of individuals was being endangered. A matter accepted by Mr Zeiderman under cross-examination (although this itself is not conclusive). This was made whilst the claimant was undertaking an inspection for the respondent, and therefore they were in the role of employer at the time, and were the body to make the

disclosure to (s.43C of ERA). But also, it would have fallen within s.43F, given it was whilst an investigation was taking place, and therefore it would clearly fell within the remit of the CQC.

138. For the avoidance of any doubt, the disclosures that remained in dispute as to whether they were protected disclosures or not, namely disclosures 2,3,4,8 and 10, are all found to be protected disclosures for the purposes of the Employment Rights Act 1996”