

In The Employment Tribunal

BETWEEN:-

Case N° 42 of 2017

Lawrence Stagnetto

Claimant

-and-

Gibraltar Health Authority

Respondent

BETWEEN:-

Case N° 43 of 2017

Audrey Smith

Claimant

-and-

Gibraltar Health Authority

Respondent

Andrew Cardona for Lawrence Stagnetto and Audrey Smith.
Mark Isola QC for the Respondent.

Throughout this long process both parties have been represented by the same law firms; Phillips LP (“Phillips”) have acted for the Claimants and Isolas LP (“Isolas”) for the Respondent. Mr Cardona from Phillips has acted throughout for the Claimants and Mr Mark Isola QC from Isolas has acted for the Respondent.

JUDGEMENT

Background to Case N° 42 of 2017.

By a Claim form received by the Employment Tribunal on the 19th December 2017, Lawrence Stagnetto (hereinafter referred to as” Mr Stagnetto”), a senior biomedical scientist employed with the Respondent, filed a claim under the Employment (Bullying at Work) Act (hereinafter referred to as “the Bullying Act”). In the statement attached to and forming part of the Claim form filed, Mr Stagnetto stated that on the 20th September 2017 he was physically pushed into his department by Dr Cassaglia who then proceeded to swear at him in a loud voice accusing him in an aggressive manner of blocking a request for information relating to a patient; the whole incident leaving him distressed and alarmed. In said statement attached to the Claim form Mr Stagnetto stated that:-

- *I am issuing the claim now as a protective measure given that I am aware that a 3 month limitation period applies to claims under the Act and the bullying took place on the 20th September 2017”.*

The reason for this statement is that pursuant to the provisions of section 8 (2) of the Bullying Act the three month limitation period for filing a claim expired on the 19th December 2017. In the Claim form it is stated that Mr Stagnetto is claiming damages for injury to feelings, an apology, a declaration and recommendation pursuant to section 9 (1)(a) and (c) respectively of the Bullying Act.

On the 22nd December 2017, Isolass wrote to the Tribunal requesting, for the reasons set out therein, an extension of the time in which to file a Response to the 26th January 2018.

It is pertinent to point out here that an investigative board had by this date been set up by the Respondent and had conducted interviews of all persons concerned to determine whether the complaint made by Mr Stagnetto against Dr Cassaglia had any justification.

On the 28th December 2017, the Human Resources Department of the Government of Gibraltar wrote to Mr Stagnetto advising him that the investigative board set up to investigate whether there was sufficient evidence to justify the complaint made by Mr Stagnetto against Dr Cassaglia had recommended that said complaint be determined by a Disciplinary Board. As a consequence of this letter, Isolass on the 18th January 2018, wrote to Phillips enquiring whether the parties could agree to a joint application being made to this tribunal for the claim filed by Mr Stagnetto to be stayed pending the determination of the disciplinary proceedings against Dr Cassaglia and a general extension of time for the filing and serving by the Respondent of its Response.

On the 22nd January 2018, Phillips rejected the proposal put forward by Isolass but agreed to extend the time for the filing of the Response to the 26th January 2018.

By Notice of Appearance received by the Employment Tribunal on the 26th January 2018, it is stated by the Respondent as follows:-

“In the circumstances, and pending the outcome of the disciplinary proceedings and such other action as the Respondent may consider appropriate to take in light of the Claimant’s complaints, the Respondent denies that it is in breach of the Act and reserves its full right to amend this Response once the disciplinary charges against Dr Daniel Cassaglia have been determined by the Disciplinary Board. In particular the Respondent will aver that not only are steps regularly taken to prevent third parties from bullying, but the Claimant was not bullied in the course of his employment on at least two other occasions by Dr Cassaglia as this complaint relates to one single incident, and will deny that it is in breach of the Act including but not limited to s.14 thereof or otherwise”.

On the 25th April 2018, I was appointed as chairperson to preside over this case N° 42 of 2017 and the first directions hearing took place on the 5th June 2018. I pause here to now turn to deal with the background to case N° 43 of 2017.

Background to Case N° 43 of 2017.

By a Claim form received by the Employment Tribunal on the 19th December 2017, Audrey Smith (hereinafter referred to as “Mrs Smith”), a quality manager/deputy pathology services manager, employed with the Respondent, filed a claim under the Bullying Act. In the statement attached and forming part of the Claim form filed, Mrs Smith stated that on the 20th September 2017, Dr Cassaglia shouted and pointed his finger at her in an aggressive manner saying that she was no one to block his investigation into a patient, the whole incident leaving her shocked, distressed and completely shaken. In the statement attached to said Claim form filed by Mrs Smith the same exact statement as made in Mr Stagnetto’s Claim form with regard to the claim being a protective one and the reason for it appears. Moreover, in Mrs Smith’s Claim form the same exact relief as claimed by Mr Stagnetto is specified.

On the 22nd December 2017, Isolass wrote to the Tribunal requesting, for the reasons set out therein, an extension of time in which to file its Response to the 26th January 2018.

I pause here to point out that in Mrs Smith’s case, for reasons that are not relevant to what is before me, the Respondent did not set up an investigative board to consider her complaint. Notwithstanding this to be the case, on the 18th January 2018, Isolass wrote to Phillips enquiring whether as a result of the action being taken against Dr Cassaglia in the complaint brought by Mr Stagnetto, Mrs Smith would agree to a joint application being made to this tribunal for the claim filed by Mrs Smith to be stayed pending the determination of the disciplinary proceedings against Dr Cassaglia in Mr Stagnetto’s case, and a general extension of time for the filing and serving by the Respondent of its Response.

The reply received from Phillips on the 22nd January 2018, mirrored exactly that given in Mr Stagnetto’s case as set out above and consequently on the 26th January 2018, the Respondent filed its Response, which Response is in exactly the same terms as set out above in case 42 of 2017.

On the 25th April 2018, I was appointed as chairperson to preside over this case N° 43 of 2017. The first practice directions for this case also took place on the 5th June 2018.

Practice Direction Hearings.

On the 5th June 2018, Mr Cardona applied for Case N° 42 of 2017 and Case N° 43 of 2017 to be heard together since both cases arose out of the same incident with the same alleged aggressor so that time and costs would therefore be saved. Mr Isola did not object to Mr Cardona’s application and consequently since that date both cases have proceeded in tandem but have not been joined.

On the 5th June 2018, Mr Isola, whilst accepting that the outcome of the pending disciplinary proceedings against Dr Cassaglia was not definitive of the issues raised in the two cases before the tribunal nevertheless applied to stay the cases for two months, which application was objected to by Mr

Cardona on the basis that the Respondent was merely further delaying the resolution of the cases. Mr Cardona has throughout repeatedly expressed his client's concerns and been critical of what is perceived as the Respondent's continued manoeuvrings to delay the resolution of any tribunal proceedings and/or case against Dr Cassaglia.

On the 5th June 2018, I adjourned both cases until the 5th July 2018, so that Mr Isola could ascertain and report back on the then current state of the disciplinary case against Dr Cassaglia. In point of fact the cases again came before me on the 12th July 2018, and not the 5th July 2018, due to an administrative error on the tribunals side.

On the 12th July 2018, Mr Isola informed the Tribunal that he had received incorrect instructions with regard to the hearing of the disciplinary case in July 2018 from the Respondent, and that the disciplinary proceedings hearing was not in fact taking place in the course of July 2018 but had been postponed to the 3rd September 2018. As matters were to me still unclear as to what stage exactly the disciplinary proceedings were at, I adjourned to the 31st July 2018 so that Mr Isola could obtain a clearer picture from his client.

On the 31st July 2018, Mr Isola informed the Tribunal that Dr Cassaglia's disciplinary proceedings had been set down for three days commencing on the 8th October 2018 and applying for both cases to be stayed until the 30th November 2018 since by then the outcome of the disciplinary hearing would be known. I refused said application and set case management directions which would come into effect as from the 16th November 2018, with the hearing of both cases commencing on the 19th February 2019.

On the 28th November 2018, the dates set in the case management order of the 31st July 2018, where, with the consent of all parties, pushed back to the subsequent dates specified in the order made, and all parties were ordered to file further and better particulars by specified dates.

On the 28th November 2018, Mr Stagnetto and Mrs Smith filed Further and Better Particulars of their respective claims.

On the 14th December 2018, the Respondent issued, with respect to both cases before the tribunal, an amended Response.

On the 24th January 2019, Mr Cardona wrote to the secretary complaining that the Respondent had not as at that date complied with the tribunal's order of the 28th November 2018 with regard to standard disclosure and applying for the issuance of an "Unless Order" in accordance with the provisions of Rule 37 of the Employment Tribunal (Constitution and Procedure) Rules 2016. An Unless Order was issued by this Tribunal on the 25th January 2019, and on that same day the Respondent filed its disclosure list in respect of both cases.

On the 14th February 2019, the Respondent applied to the tribunal for various orders ranging from permission to amend the Response issued on the 14th December 2018, to the adjournment of the hearing of both cases due to commence on the 19th February 2019, to an offer of mediation to Mr Stagnetto and Mrs Smith. Needless to say some of the applications made were objected to by Mr Cardona. The applications were heard and dealt with on the

15th February 2019, the upshot of which was that the Respondent was granted permission to partly amend the amended Response filed on the 14th December 2018; the re-amended Response dated and being filed on the 27th March 2019.

On the 19th February 2019, the hearing of both cases did not commence as Mr Isola was unwell. A new hearing date was set and, subsequently changed, so that in the end the hearing of the cases did not commence until the 28th March 2019.

It is pertinent to point out at this stage that the substantive disciplinary proceedings against Dr Cassaglia with regard to the complaint filed against him by Mr Stagnetto had not been heard by the time the employment tribunal hearings commenced on the 28th March 2019. Dr Cassaglia has denied the two disciplinary charges brought against him; namely of pushing Mr Stagnetto and of using in appropriate/offensive language when speaking to Mr Stagnetto.

The fact that the two employment tribunal cases have been heard some eighteen months after the alleged incidents occurred has to be taken into account when considering witnesses recollections of events, chronology and times and inconsistencies that may arise within and with the voluminous amount of documents produced for the purposes of the cases. I also have to take account of the fact that Dr Cassaglia through discussions held with family members present in the Tribunal when the Claimants and their witnesses were giving evidence, and reading the notes that they took, was indirectly made aware of the evidence of said witnesses.

I point out at this stage that I have read the documents contained in the various bundles before me, as well as all the witness statements and the exhibits attached to those. I have also taken into account the oral evidence given before me spanning over five days and have read the skeleton arguments presented and all the authorities drawn to my attention by both Counsel. I thank Counsel for both parties for all the assistance they have given me throughout the proceedings.

In this judgement I may quote from the verbal evidence given before me as set out in my notes but this does not signify that I have not taken the contents of the witness statements and exhibits tendered and/or the statements made to the investigate board into account when deciding as to the facts of the case.

THE CASE FOR EACH PARTY

In the case of Mr Stagnetto he is alleging that on the 20th September 2017, during the course of one single incident, Dr Cassaglia, an employee of the Respondent, did:-

- physically push with both hands Mr Stagnetto by the shoulders;
- swear at Mr Stagnetto;
- shout at Mr Stagnetto;

- aggressively accuse Mr Stagnetto of interfering with his (Dr Cassaglia's) investigation and/or blocking his (Dr Cassaglia's) request for Modulab information on a patient.

Mr Stagnetto further alleges that the whole incident with Dr Cassaglia left him (Mr Stagnetto) distressed and alarmed.

In the case of Mrs Smith she is alleging that on the 20th September 2017, during the course of one single incident, Dr Cassaglia, an employee of the Respondent, did:-

- shout at Mrs Smith and point his finger at her;
- act in an aggressive manner at Mrs Smith when informing her that no one should interfere with the investigation he was carrying out;
- cornered her in a corridor and instructed her that none of her staff should look into the information he was looking at in Modulab.

Mrs Smith further alleges that the whole incident with Dr Cassaglia left her alarmed, intimidated and distressed.

The Respondent, as a result of the fact that the disciplinary hearing against Dr Cassaglia has not ended, has taken a neutral stance with respect to each of the Claimant's cases and has therefore founded its case on the following submissions; namely:-

- (i) even if the facts as alleged by both Claimants are proved to the satisfaction of the Tribunal, said facts constitute in each of the two cases a single one-off isolated incident and therefore cannot constitute "bullying" for the purposes of the Bullying Act;
- (ii) even if a single act can constitute "bullying" for the purposes of the Bullying Act, the Claimants still have to prove that the conduct complained of constitutes bullying and the tribunal cannot be satisfied on this point if it takes into account all the inconsistencies that exist if one takes into account the evidence given by the Claimants and their witnesses before the tribunal and compares it with the Particulars of Claims filed by the Claimants, witness statements, records of interview before the disciplinary board, e-mail statements made and time lines and/or the evidence of Dr Cassaglia;
- (iii) although the Respondent called Dr Cassaglia as a witness, it does not take sides on his evidence and therefore does not put forward his version of events as statements of fact but avers that if Dr Cassaglia's evidence as to what happened inside and outside the histology department is accepted by the Tribunal, then there was no conduct amounting to bullying and merely reasonable action taken by an employer relating to the management and direction of employees as provided for by section 4(3) of the Bullying Act.

In its Amended Response of the 27th March 2019 the Respondent made certain admissions; namely:-

- (i) it admitted that on the 20th September 2017, in the Pathology Department an argument ensued between Mr Stagnetto and Dr Cassaglia but averred that this argument related to the management and direction of Mr Stagnetto and other employees;
- (ii) it admitted that the Respondent has a statutory duty under the Bullying Act to prevent bullying;
- (iii) it admitted that whilst the Respondent did have a policy and procedure in place to deal with alleged acts of bullying it did not take all reasonable steps to implement and enforce the policy and procedure;
- (iv) it admitted that the Respondent could not reply on the defence afforded by section 6(5) of the Bullying Act.

In said Amended Response the Respondent:-

- (a) makes no admission with regard to Mrs Smiths allegations against Dr Cassaglia; and
- (b) makes no admission as to whether either of the Claimants were alarmed, intimidated or distressed by Dr Cassaglia's behaviour.

That then, is the essence of each party's case.

THE HEARING

The hearing of the two cases commenced on the 28th March 2019, and continued on the 29th March 2019, 1st and 2nd April 2019, 8th and 9th April 2019 and finished on the 17th April 2019. In the course of those days the following persons gave evidence before the tribunal; namely Lawrence Stagnetto, Andrey Smith, Megan Davis, Mohit Mahubani, Jacqueline Barea and Dr Daniel Cassaglia. Mr Isola has urged me to take account of the inconsistencies that there are within the evidence of the Claimants and their witnesses when analysed in conjunction with their respective individual original accounts to the investigative board when interviewed, their individual witness statements in these proceedings and the particulars of claim filed (where applicable) in order to arrive at a conclusion which, Mr Isola submits, can only be that, at the very least, the material events as recounted by them with reference the allegations against Dr Cassaglia have not on a balance of probabilities been proved. Mr Isola suggests that the inconsistencies, especially with regard to the events leading upto what transpired in the corridor leading to and in the histology department, and after Dr Cassaglia was provided with the information he was seeking, are so numerous and glaring that they taint the whole of the evidence given by the Claimants and their witnesses as to the events in the corridor and in the histology department. Whilst there are undoubtedly inconsistencies shown up by the documentation in question, as indeed there are when one comes to consider Dr Cassaglia's evidence, they are not in my view sufficiently material and/or significant in nature that one has to go no further and simply hold that all

evidence given by the Claimants and/or their witnesses as being tainted and therefore to be discarded. The evidence does not warrant such simplification.

The Location

The events that took place on the 20th September 2017, occurred within the Pathology Department of St Bernards Hospital, which department is situated on the 2nd floor of the hospital.

The Pathology Department contains various different departments (eg biochemistry, microbiology, haematology, histology, etc) and various stores, offices and reception areas (eg the office occupied by Ms Davies and Mrs Barea, the office of Mrs Smith, the office of Dr Menez etc) as well as two toilets. All the individual departments, offices etc are on either side of a long corridor that runs down the centre of the Pathology Department. The Pathology Department has two entrances/exits which are situated at either end of the said corridor. The main entrance is situated immediately by, on one side, the office occupied by Ms Davies and Mrs Barea (hereinafter in this judgement referred to as “the Office”) and, on the other side, the office used by Mrs Smith (hereinafter referred to as “the Main Entrance”). The other entrance/exit is at the other end of the corridor and leads onto a lobby area where there are a number of lifts as well as a staircase. This is the entrance/exit used by Dr Cassaglia throughout the events of the 20th September 2017 (hereinafter referred to as “the Blood Production Entrance”).

The Biochemistry Department is roughly half way down the corridor from either end of the corridor whilst the Histology Department is roughly three quarters of the way down the corridor if you come in from the Blood Production Entrance.

According to the evidence given to this tribunal the distance between the Blood Production Entrance to the Histology Department is about 25 to 30 metres. The distances are not great.

Dr Cassaglia has his office on the fifth floor of St Bernards Hospital.

Underlying Current

It is my opinion after reading the transcripts of the statements made to the investigative board and the evidence given before the Tribunal that there is an underlying current of discontent which needs to be taken into account in order to understand why the events of the 20th September 2017 unfolded as they did and perhaps explain the actions of Dr Cassaglia.

There appears to be a long standing ill feeling, mistrust and possibly antagonism felt by Dr Cassaglia towards the policies and procedures of the Pathology Department and/or some senior members of said department. The following statements made by Dr Cassaglia at different times give support to such a view.

In his statement to the investigative board Dr Cassaglia makes the following statements which express his opinion of the Pathology Department:-

“I must add that in my 12 years at the GHA I have found the lab management team inflexible, prone to blocking initiatives and a law unto themselves. Almost as if their department was somehow self-contained and not answerable to the rest of the GHA”.

“Interfering with my investigation on the 20th September was one more example of this dysfunctional attitude and I was not going to let it pass unchallenged”.

“The fact that I have been accused of assault when no such assault occurred is frankly outrageous and malicious. I believe it is a deliberate form of harassment and being used as a tool to undermine my authority”.

In his interview with the investigative board Dr Cassaglia is recorded as saying:-

“If something accused of an assault that didn't take place and really worried that there has been collusion here. And collusion maybe even intimidation from senior members of the lab staff telling people what they have to write in their statement. And that to me is, is incredibly dangerous and incredibly worrying. And if that's what is going on it has to be what is going on in the lab. This takes it to a different level”.

“Good question. The lab guard everything they do absolutely jealously. It's a I think it's a problem within the GHA”.

“Defiance and its trying to put me in my place and not to go anywhere near the lab and not to interfere with the running of the lab. I mean this is a theme that's been going on for years”.

“No, for me it fits into the modus operandi of the lab, que aqui tu no puede venir ah inaudible, you got to it, we decide what information you get, we decide how we deliver the information. Its that kind of attitude. That's the issue I think”.

There are other examples of such statements in the transcript.

In his evidence to the tribunal Dr Cassaglia clearly expressed his views on the subject:-

“I am not going to sit here and say other people are lying. All I can do is give my evidence as to what happened. The only option is that a group of people who work closely together have colluded to come up with their version of events. This is what must have happened. The four persons have got together and concocted the story against me”.

In my view it is irrelevant whether or not Dr Cassaglia was justified in having such suspicions/belief since all that is pertinent for the purposes of these proceedings is that he held them.

Notwithstanding the above, it would appear that Dr Cassaglia felt differently towards Mr Stagnetto personally since at various times Dr Cassaglia mentions

that he had a cordial and good working relationship with Mr Stagnetto. Thus, for example, Dr Cassaglia stated as follows to the investigative board:-

“Si ahveves he’s been very cordial, very positive working relationship. I call upon him with all sorts of issues. Before I become Medical Director if I needed kind of issues with the lab or he was on call he would always be very receptive and very co-operative”.

Protocol

In the course of the tribunal hearing, as indeed in the course of the investigative board interviews, a lot of time was spent on and a lot made out of whether or not there was a protocol governing the disclosure of information by the Pathology department. I therefore need to come to a conclusion about this.

According to Dr Cassaglia he was not aware of any policy or protocol and had never seen a protocol or been referred to a protocol relating/concerning the disclosure of information held on Modulab by the Pathology department. There is no such protocol/policy on the GHA intranet and no document was ever produced to the investigative board or to this tribunal showing such a protocol/policy.

“I am not aware of any policy/protocol. If I request information as the Medical Director it has to be handed over. There was no protocol in place for requesting audit logs or other information from pathology”.

and

“I am aware that the witnesses refer to a protocol. I am still to see this protocol and I am not aware of its contents either”.

And yet both Mr Mahubani and Ms Davis refused to provide Dr Cassaglia with the Modulab information he required ostensibly because he had not obtained the permission/authority required by the protocol. So is the protocol a figment of the Pathology department’s imagination?

According to Mr Stagnetto a protocol did exist (at one stage he said he had never seen it and another that he had seen it once) but no one had explained its workings to him and, as far as he understood it, the protocol required anyone seeking information on Modulab from the Pathology department to obtain the prior authorisation from Dr Menez or Mrs Smith. Mr Stagnetto further stated that a note of what the protocol says was posted on three walls within the department.

Mrs Smith was adamant that a protocol requiring authorisation from Dr Menez or herself existed and that all personnel within the department were aware of the procedures that needed to be followed with regard to disclosure of information on Modulab and that there was a poster in the Office relating to the protocol.

“As I say above, there are departmental procedures in place and he should have followed them. He is aware or should be aware of these procedures”.

Ms Davis was adamant that the sole reason for her not providing Dr Cassaglia in the first place with the information attached to the e-mail was that she required authorisation from Mrs Smith under the protocol.

Mr Mahubani stated that under the rules of the laboratory he could not provide Dr Cassaglia with a print out of the Modulab information requested as the protocol did not permit the giving out of results to anyone asking without the requisite authorisation. He further stated that the protocol/policy was written but he did not know where it was kept.

Mrs Barea referred to the protocol but in a completely different context and therefore she adds nothing to this aspect of the matter.

Dr Cassaglia whilst denying the existence of a protocol admitted that he had previously written in requesting permission to obtain Modulab information and that on the day in question he had sought out Dr Menez, Wayne Acris and Mrs Smith in order to get the Modulab information he desired.

“Before this I had on a number of occasions requested the audit log from the pathology department. I had requested this from Dr Menez and from Wayne Acris. I knew about them and how to find them. Very important with regard to working out timelines especially when things have gone wrong”.

and

“I remember quite clearly that when I went to the lab I went to speak to Alex and it was only when I saw the door locked that is when Mohit volunteered that Alex was away. I then asked what about Wayne and the reply was either he is away or he is not here, my impression was that Wayne was away. I then asked for Audrey and when Mohit said Audrey was away or at lunch I asked if he could help me”.

After having taken account of all the evidence I have concluded that at the time of the incident in question there was no official GHA protocol or validated procedure describing/setting out how the Pathology Department was supposed to act when faced with requests from GHA employees for information from the Modulab system. Having said this, I have also concluded that the Pathology Department of its own accord itself instigated within the department a simple instruction (by no means a GHA sanctioned protocol - the use of this word has caused the confusion) to all employees within the department that they were not to disclose Modulab information to persons outside of the department unless the person concerned had the permission of the PSM. This is the instruction that was posted on the walls of the department. There was no protocol and hence why none was produced. There was an instruction, and interestingly Dr Cassaglia never denied that such instruction was posted, which was put up on the wall to remind staff. And the simple rationale for the instruction was to protect those working within the department and nothing else; traceability and accountability for the

protection of Pathology department staff was the aim. It had nothing to do with confidentiality. Moreover, I have further concluded from the evidence given that Dr Cassaglia knew about this instruction and that before the day of the incident he had been prepared, and I put it no higher than that, to tolerate its existence. Dr Cassaglia was truthful when he repeatedly stated that there was no protocol and no limit on his authority as Medical Director to request the information, especially if one considered the question as referring to an official GHA protocol. No one put it to Dr Cassaglia whether there was an internal departmental instruction to staff within the Pathology department and therefore he never answered this question. Being a departmental instruction it is not surprising that junior staff within the department would consult their superiors before releasing information.

The Law

Save as to one material issue Counsel for the parties are agreed as to the law that applies to this case. The parties agree on the following.

The key provision in the Bullying Act is section 4 which provides as follows:-

“4 (1) A person (“A”) subjects another person (“B”) to Bullying where A engages in conduct which has the purpose or effect of causing B to be alarmed, distressed, humiliated or intimidated.

(2) In subsection (1) the reference to conduct includes:-

- (a) persistent behaviour which is offensive, intimidating, abusive, malicious or insulting;
- (b) persistent unjustified criticism;
- (c) punishment imposed without justification;
- (d) changes in the duties or responsibilities of B to B’s detriment without reasonable justification.

(3) Bullying does not include reasonable action taken by an employer relating to the management and direction of the employee or the employee’s employment”.

Section 4 has to be read in conjunction with section 10 of the same Act which provides that:-

“10. Where on the hearing of the complaint, the complainant proves facts from which the tribunal could, apart from this section, conclude in the absence of an adequate explanation that the respondent contravened this Act, the Tribunal shall uphold the complaint unless the respondent proves that he did not contravene this Act”.

The upshot of reading both said sections together is that:-

- (a) The claimant has to prove on a balance of probabilities (ie that it is more likely than not) that:-

- (i) there was conduct which amounted to bullying; and
- (ii) the bullying caused the claimant to be alarmed, distressed, humiliated or intimidated.

And if the Claimant so proves:-

- (b) The Respondent has the burden of proving that it has an adequate explanation or justification under section 4(3).

Counsel for the parties are at one upto this point. The parties, however, do not agree on the simple but very material question of whether one single isolated incident of conduct, which amounts to bullying, is an act of bullying for the purposes of the Bullying Act.

Mr Cardona submits that “bullying” for the purposes of section 4(1) of the Bullying Act can be a single and isolated instance and makes the following points in support of his submission; namely:-

1. Section 4(1) is in no way restricted by the ambit of section 4(2) since all that section 4(2) seeks to do as a result of the word “includes” used therein, is provide a non-exhaustive list of examples of conduct which can amount to bullying.
2. Of the four examples of conduct which can amount to bullying contained in section 4(2) only two of those examples (section 4(2)(a) and (b)) include wording which require the conduct to be committed more than once (ie the word “persistent” is used) whilst the remaining two examples (section 4(2)(c) and (d)) are clearly acts which need only be committed once. Section 4(2) therefore indicates that a one off instance of bullying can be contrary to the provisions of section 4(1);
3. If Parliament intended that the conduct amounting to bullying for the purposes of section 4(1) had to occur more than once it would have used unequivocal language to that effect within the provisions of section 4. After all, it did so in section 6(3) when dealing with the issue of bullying by third parties:-

“(3) Subsection (2) does not apply unless A knows that B has been bullied in the course of B’s employment on at least two other occasions by a third party and it does not matter whether the third party is the same or a different person on each occasion”.

Consequently, the fact that section 4(1) does not use wording which states or designates that the conduct at fault has to occur more than once, and indeed section 4(2)(c) and (d) indicates that it need only occur once in respect of other examples, means that Parliament did not wish to restrict the ambit of section 4 (1) to conduct occurring only on more than one occasion;

4. Moreover, as could be seen from the addresses made in Parliament during the second reading of the Bill that was to become the Bullying

Act, the members of the House were aware of, and in one case, clearly adopted the stance that a one off instance of bullying was sufficient for the purposes of the Act. At page 8 of the Hansard Report of the proceedings of the Gibraltar Parliament on the 21st February 2014, the following statements were made by the Hon D. J. Bossino during the second reading of the said Bill:-

“Section 4(1) refers to sorry clause 4 (1), I beg your pardon, Mr Speaker, refers to conduct and there is another point I wish to raise with hon. Gentlemen and Ladies, and it is this, there is no further explanation as to whether the conduct is expected to be repetitive or not. Should there not be, for example, a reference to a course of conduct, which I think is the legislative language in the Protection of Harassment Act?”

“Much of the literature that I have read on the subject refers to repeated and persistent behaviour which is what is in fact envisaged in most of the examples set out in clause 4 (2), but not all of them”.

“The suggested amendment I have just made in relation to the course of conduct will also go some way to address concerns, which employers will no doubt have, of being at the end of spurious claims, as I mentioned earlier, as a result of one off actions”.

The issue having been raised in the course of the reading of the bill, Parliament nevertheless did nothing either to correct the Hon D. J. Bossino’s opinion on the wording of the bill, or, amend the provisions of the Bill in order to require conduct to be persistent in all situations;

5. In the case of Honor Hancock v Coral Interactive (Gibraltar) Limited (Case N° Ind Tri 21/2016) Ms Gabrielle O’Hagan, the Chairperson, stated in the course of her decision that an isolated act can be bullying for the purposes of section 4 (1) of the Bullying Act. In the course of her judgement she stated as follows:-

“Save for the section 4(2) bullying conduct examples, section 4(1) also does not define, limit or qualify the word “conduct”. I consider that the employer’s conduct should be assessed subjectively and can be an isolated action or manner of behaviour or a series of actions or manner of behaviour”.

This decision whilst not binding on this tribunal is of some persuasive effect; and

6. Her Majesty’s Government of Gibraltar had implemented a Dignity at Work Policy and Procedure which had been adopted and implemented by the Respondent. This document itself recognised that a single isolated act could constitute bullying for the purposes of the Bullying Act. In said document the following statement appears:-

“Bullying is unlikely to be a single or isolated instance. It is usually but not exclusively repeated and persistent behaviour which is offensive, abusive, intimidating, malicious or insulting”.

Mr Isola, on the other hand, has submitted that a single one off incident of misbehaviour cannot fall within the definition of bullying under the Act since what is required is a pattern of behaviour happening repeatedly and persistently over time. In support of his submission Mr Isola points to the following:-

- (a) the use of the adjective, “bullying”, in section 4(1) indicates that the conduct in question must occur more than once;
- (b) the examples used in section 4(2)(a) and (b) incorporate the word “persistent” which must be given its normal definition of “lasting for a long time or difficult to get rid off”. In other words, the conduct must occur more than once over a period of time;
- (c) whilst it is true that the examples given in section 4(2)(c) and (d) did not incorporate the word “persistent” this was solely because the acts in question had the necessary ingredients of continuation and persistence, in that they are actions which have a long term continuing effect by their very nature;
- (d) the examples of conduct contained in section 4(2) are exhaustive examples due to the word “includes” which appears therein and which should be interpreted in the context of the Act to “mean and include” and therefore have an exhaustive definition which, for the purposes of the Act, must attach to those words or expressions used. In support of this argument Mr Isola referred me to the House of Lords case of *Dilworth and others v The Commissioner of Stamps, Dilworth and others v The Commissioner for Land and Income Tax* (1899) AC 99 at page 106:-

“But the word “include” is susceptible of another construction, which may become imperative, if the context of the Act is sufficient to shew that it was not merely employed for the purpose of adding to the natural significance of the words or expressions defined. It may be equivalent to “mean and include”, and in that case it may afford an exhaustive explanation of the meaning which, for the purposes of the Act, must invariably be attached to these words or expressions”.
- (e) Whilst the wording of the Command Paper issued by the Government of Gibraltar with the draft Bill of the Bullying Act was similar to the Act, it was pertinent to note that the wording used for section 4(2) as contained in the Command Paper referred to conduct “including but not limited to any of the following”. In other words, the fact that the draftsman of the Act omitted such wording when drafting the Act was clearly in order to limit the ambit of the conduct amounting to bullying to instances of persistence and/or unjustified conduct.

That then were the submissions for both parties with regard to the question of whether a one off instance of bullying is caught by the provisions of section 4(1) of the Bullying Act.

The Bullying Act has no equivalent in the laws of England and Wales and no statutory definition of bullying exists in the Laws of Gibraltar outside of the Bullying Act. In my opinion an isolated incident of misconduct, if sufficiently serious in nature when viewed subjectively, can amount to bullying for the purposes of section 4(1) of the Act. Each case needs to be viewed on its own particular facts. In the afore-mentioned case of Honor Hancock v Coral Interactive (Gibraltar) Limited the learned chairperson made the following statements with which I wholly agree and endorse:-

“Save for the section 4(2) bullying conduct examples, Section 4(1) does not define, limit or qualify the word “conduct”. I consider that the employer’s conduct should be assessed subjectively and can be an isolated action or manner of behaviour or a series of actions or manner of behaviour. Although the employer’s conduct may be unintentional I also consider that the conduct must be of sufficient force and I think will generally carry some element of injustice – in order to cause (or be intended to cause) the serious adverse sentiments prescribed in section 4(1). This is confirmed by the 4 Section 4(2) bullying conduct examples, 3 of which involve conduct towards the victim which is without justification, including “(c) punishment imposed without justification”. I also consider that the conduct in question will often carry an element of an abuse or misuse of power, and this is reflected in Section 4(1) of the Act by the use of the verb “subjects” and by the examples of bullying provided in section 4(2)”.

I disagree with Mr Isola’s assessment that all four of the examples provided for in section 4(2) provide for or carry the necessary ingredients of continuation and persistence and that therefore an isolated incident cannot amount to bullying. In my view there is a clear difference between the first two examples and the latter two examples provided for in section 4(2). In this I agree with Mr Cardona. In my view the reason Parliament intended that for the purposes of the examples given in section 4(2)(c) or (d) only one instance of that conduct could amount to bullying is the seriousness of that conduct, and its likely effect on the victim, when compared, in general terms, with one act of offensive or intimidating etc behaviour or unjustified criticism. The seriousness of the conduct, taking into account the context in which it has occurred, and the nature of the parties involved, and the act perpetrated, is what differentiates and justifies that one act be considered to be an act of bullying and, incidentally, more likely to raise the adverse sentiments of alarm, distress or humiliation (but obviously not intimidation due to section 4(2)(a)) required by section 4(1) of the Bullying Act.

Events Leading Up to the 20th September 2017.

The Claimants did not challenge these events.

On or around July 2017 the family of a patient that Dr Cassaglia had been or was treating filed two complaints against Dr Cassaglia. The complaints filed were according to Dr Cassaglia identical but were filed with two different regulatory bodies. One complaint was filed with the General Medical Council in the UK and the other complaint with the Ombudsman in Gibraltar.

With regard to the complaint filed with the General Medical Council, said body requested information relating to blood test results concerning the patient from the Respondent going back a period of nearly two years. Dr Cassaglia delegated the task of obtaining said results to his personal assistant, Mr Roy Piri. On or about the 29th August 2017, Mr Piri requested the results in question from Dr Menez in the course of a telephone conversation, and subsequently that same day in an e-mail. As Dr Menez that same day requested to know from Mr Piri on whose authority this information was being requested, Dr Cassaglia some eight minutes later e-mailed Dr Menez informing him that he was authorising the disclosure of the information. The information on the patient was then disclosed to Mr Piri who proceeded to forward it to the General Medical Council. According to Dr Cassaglia's evidence, the General Medical Council in or around October 2017 decided to proceed no further with the complaint. This incident is relevant to the extent that it shows the Pathology Department asking for authorisation (or as Mr Cardona would put it, traceability) for the disclosure of patient information and that Dr Cassaglia was aware of such a request being made.

Insofar as the complaint filed with the Ombudsman is concerned the following is the sequence of events that took place.

On the 1st August 2017, the complaints co-ordinator at St Bernards Hospital wrote to Dr Cassaglia informing him that "the Complainants have now lodged a complaint" and asking him to provide his" written comments". This letter was e-mailed to Dr Cassaglia on the 1st August 2017, by the complaints co-ordinator who stated in her covering e-mail "that I was advised not to send you this complaint until your return from annual leave hence why it hasn't been done sooner".

On the 11th September 2017, Dr Cassaglia e-mailed the complaints co-ordinator advising her that he had not yet dealt with the matter and asking for further time.

On the 12th September 2017, the complaints co-ordinator e-mailed Dr Cassaglia asking for an indication as to when he would be in a position to provide the statement requested.

On the 20th September 2017, at 14:14, the complaints co-ordinator e-mailed Dr Cassaglia pointing out that the Ombudsman was pressing for progress and asking whether a reply would be received by the 22nd September 2017.

There are two points which arise from this complaint made to the Ombudsman. The first and obvious point is that the complaint co-ordinator's e-mail of the 20th September 2017 at 14:14 must have triggered the events that followed that same day since by 15.24 Dr Cassaglia was already with Mr Mahbubani looking at his Modulab screen. In evidence to the tribunal Dr Cassaglia, whilst accepting that he was being pressed for a reply, nevertheless sought to give the impression that he only attended to the matter that day because he had a free afternoon.

"I was being pressured by the Ombudsman to get a reply back by the 22nd September 2017. I had a free afternoon that day".

“I was under pressure from the Ombudsman to provide the information on the 22nd September. The complaint was dated the 1st August. I was away most of August. I was not in a position to reply until the 20th September when I had a free afternoon. The Ombudsman wanted the report on the 22nd September. I like to comply with the Ombudsman’s request whenever possible”.

“I could have delayed but they had asked for it on the 22nd September and that was my task that afternoon. It was not my task come what may. I wanted to do it. I was not under pressure. It was normal for me to work with time pressure. Not particularly more stressful than normal”.

I do not doubt that Dr Cassaglia had a free afternoon on the 20th September 2017, in the sense of not having meetings/appointments but it seems to me clear that it was the complaint co-ordinators e-mail that pressured Dr Cassaglia into dealing with a matter that had been sitting on his desk for 51 days relating to a complaint made at least some two months previously. There was an urgency to the matter.

The second point that arises relates to the question of whom the Ombudsman wrote to with regard to the complaint. Whilst the letter of the 1st August 2017 to Dr Cassaglia from the complaints co-ordinator has been heavily redacted it appears to me that the letter suggests that the Ombudsman wrote to the Complaints Handling Scheme office of St Bernard’s Hospital and not to Dr Cassaglia directly. This appears to me to be borne out by the wording used in the e-mail exchanges between the complaints co-ordinator and Dr Cassaglia. Thus, for example, the phrases in the e-mail of the 20th September 2017 of:-

“I have spoken to Nick as the Ombudsman is pressing him for progress on this file we are being pressured for answers”.

In his evidence Dr Cassaglia appeared to give the impression that the Ombudsman had written to him as the Medical Director requesting him for a reply to the complaint. Thus, such statements in evidence as:-

“The ombudsman knew the complaint was against me. He was happy for me to write to him answering the complaint”.

“I put together the timeline for the Ombudsman. This was the Ombudsman writing to me as the medical director of the authority. This complaint was being investigated by the Ombudsman I don’t think it was a conflict of interest”.

“Not at all a conflict of interest in my having to collate the information required by the Ombudsman in this complaint. I have a duty of candour”.

In my view the Ombudsman would have followed the proper protocol channels recognising that a clear potential conflict of interest situation existed and therefore formulated his requests for information to the appropriate office of the Respondent, the Complaints Handling Scheme and not directly to Dr Cassaglia. Dr Cassaglia’s role in answering the Ombudsman was as the

Consulting Paediatrician treating the patient and not as the Medical Director, a difference which Dr Cassaglia does not seem to have appreciated.

Time Line for the 20th September 2017.

In the course of the hearing, and from information taken from e-mails, modulab screen shots and telephone records, Mr Isola constructed a time line of events which he presented to the tribunal. Mr Cardona raised no objections to the time line produced. I have reviewed the time line produced and set out below my findings as to what the time line for the 20th September 2017 events were.

- (a) 14:14 – A Sarah De Jesus e-mails Dr Cassaglia stating that the Ombudsman is pressing for progress on the complaint and asking whether a reply would be received by the 22nd September 2017.
- (b) 15:24 – Mr Mahubani at the request of and in the company of Dr Cassaglia logs onto Modulab from his computer and shows Dr Cassaglia the records of the patient.
- (c) 15:39:59 – Mr Stagnetto telephones Mrs Smith and speaks to her for 15 seconds.
- (d) 15:57 – Ms Davies at the request of and in the company of Dr Cassaglia logs onto Modulab from her computer and shows him the records of the patient.
- (e) 16:01 – Mrs Davies at the request of and in the company of Dr Cassaglia again logs onto Modulab from her computer and again shows him records of the patient.
- (f) 16:05 – Ms Davies telephones Mrs Smith and speaks to her for one minute and seven seconds.
- (g) 16:07 – Mrs Smith telephones Dr Menez and speaks to him for four minutes and thirty-eight seconds.
- (h) 16:10 – Dr Cassaglia telephones Ms Davies enquiring as to why he had not received the email with the modulab screen shots of the patient’s records. The telephone call lasts forty-six seconds.
- (i) 16:16 – Ms Davies sends and Dr Cassaglia receives an email with the Modulab screen shots of the patient attached.
- (j) 16:23 – Dr Cassaglia sends and Ms Davies received an e-mail asking Ms Davies to delete the e-mail she had sent.
- (k) 16:38 – Ms Davies sends and Dr Cassaglia receives an e-mail with Modulab screen shots attached. Ms Davies having in the previous e-mail to Dr Cassaglia not attached some modulab screen shots which he had requested. As no

evidence was presented of Ms Davies logging on to Modulab for the purposes of obtaining these screen shots the issue arises as to whether this documentation was still on her computer, this would explain why she did not log on.

- (l) 16:46 – Dr Cassaglia sends and Ms Davies receives an e-mail thanking her for the assistance given.
- (m) 17:16 – Mr Mahubani sends to Dr Menez and Mrs Smith an e-mail setting out his involvement in the events of that day.
- (n) 17:31 – Ms Davies sends to Dr Menez and Mrs Smith an e-mail setting out her involvement in the events of that day.
- (o) 18:14 – Mr Stagnetto sends to Dr Menez and Mrs Smith an e-mail setting out the events of that day.
- (p) 18:36 – Mrs Smith telephones Dr Menez and speaks to him for twelve minutes and fifty seconds.
- (q) 18:49 – Mrs Smith telephones Mr Stagnetto and speaks to him for fifty-one seconds.
- (r) 19:00 approx – Mr Stagnetto telephones Marilyn Bramble of Unite the Union and makes a report to her.
- (s) 19:10 – Mrs Smith telephones Dr Menez and speaks to him for seven minutes and twenty-three seconds.
- (t) 19:17 – Mrs Smith telephones Dr Menez and speaks to him for one minute and forty seconds.
- (u) 21:13 – Mrs Smith telephones Mr Stagnetto and speaks to him for eight minutes and nineteen seconds.
- (v) 22:56 – Dr Cassaglia telephones but does not speak to Mr Stagnetto as Mr Stagnetto does not take the call.
- (w) Not known – Marilyn Bramble of Unite the Union telephones the Principal Secretary to the Minister to inform her of that day's events.

With regard to the above timeline there are two points I should quickly mention.

In the course of the cross examination of Mrs Smith, and as a result of Mr Isola disclosing the details of the calls made from the telephone situated in the Office (where Ms Davies and Mrs Barea work), the issue arose of the disclosure of the telephone records of Mrs Smith's mobile telephone. The details of the outgoing calls were produced by Mrs Smith but the details of the incoming calls were obtained only after I issued an order to Gibtelecom for their production – said company not willing to disclose the information

without a court order. The upshot of all of this is that the information relating to telephone calls made or received by Mrs Smith was never put to any of the witnesses in the course of the hearing.

Secondly, with regard to the Modulab times shown in the timeline there is one issue which arose towards the end of the hearing on which no evidence was heard; namely whether the time given shows the time when the Modulab was accessed or exited. Mr Isola is of the view that it is the exited time. I disagree and have proceeded on the basis that it is the time when the operator logs onto Modulab. In any event it does not seem to me that much turns on the matter.

If one considers the above time line with the evidence given by all the witness the following windows of time are relevant:-

- (a) 15:24 to 15:57 – At some point in time during this period Dr Cassaglia goes from Biochemistry to the Office.
- (b) 16:10:56 to 16:16 – At some point in time during this period the incidents complained of by Mr Stagnetto and Mrs Smith occur.
- (c) 16:23 to 16:38 – At some point in time during this period Dr Cassaglia notices he has not received all the correct attachments from Mr Davies and decides to go to see Ms Davies.

The length of the first window is some 33 minutes; the length of the second is just over 5 minutes whilst the length of the third window is some 15 minutes.

Events for the period after the 20th September 2017

As with the 20th September, Mr Isola constructed a time line of events for the 21st September 2017, to which, once again Mr Cardona did not raise any objections. I reviewed said time line and set out below my findings as to what the timeline for that day should be:-

- (a) 09:12 – Mrs Smith calls Dr Menez and speaks to him for eight minutes and eleven seconds.
- (b) 09:20 – Mrs Smith calls Dr Menez and speaks to him for seventeen seconds.
- (c) 09:21 – Mrs Smith calls Dr Menez and speaks to him for one minute and fifty-five seconds.
- (d) 12:53 – Mrs Smith calls Dr Menez and speaks to him for seven minutes and forty-four seconds.
- (e) 13:16 – Mrs Smith calls Dr Menez and speaks to him for three minutes and twenty-six seconds.

- (f) 16:18 – Mrs Barea sends Dr Menez, Mrs Smith and Audrey Olivares an e-mail setting out her account of what had occurred the previous day.
- (f) 16:23 – Ms Davies sends Dr Menez, Mrs Smith and Audrey Olivares an e-mail setting out her account of what had occurred the previous day.
- (h) 16:31 – Mrs Smith calls Dr Menez and speaks to him for seven minutes and fifty-nine seconds.
- (i) 16:51 – Mr Mahubani sends Dr Menez, Mrs Smith and Audrey Olivares an e-mail setting out what had occurred the previous day.
- (j) 17:44 – the Principal Secretary to the Minister e-mailed Marilyn Bramble of Unite the Union with regard to statements of the events of the 20th September.
- (k) 18:40 – Mr Stagnetto calls Mrs Smith and speaks to her for fourteen minutes and twenty-two seconds.
- (l) 19:05 – Mrs Smith calls Dr Menez and speaks to him for sixteen minutes and fifty-seven seconds.
- (m) Various Times – There were twenty text messages sent by Mrs Smith to Dr Menez in the course of that day.

It is to be pointed out that we do not know how many, if any at all, of the telephone conversations and/or texts which Mrs Smith had with Dr Menez related to the incidents of the 20th September.

On the 22nd September 2017 the Principal Secretary to the Minister contacted Mrs Smith by telephone with regard to the allegation(s) against Dr Cassaglia.

On the 24th September 2017 at 10:45, Mrs Smith sent Audrey Olivares an e-mail setting out what had occurred on the 20th September 2017 with Dr Cassaglia.

On the 25th September 2017 the following two events occurred:-

- (i) at 10:52 Mr Stagnetto e-mails Mrs Smith and Dr Mr Menez about Dr Cassaglia's telephone call in the evening of the 20th September 2017; and
- (ii) Mr Stagnetto, Mrs Smith and Marilyn Bramble from Unite the Union meet and the decision is taken to make a formal complaint about Dr Cassaglia to the Respondent.

Between the 25th September and the 6th October 2017 the Respondent causes an investigative board to be set up to consider the complaint made by Mr Stagnetto against Dr Cassaglia.

On the 6th October 2017, the investigative board meet with Dr Cassaglia.

On a date unknown between the 6th October and 12th October 2017, Dr Cassaglia makes a statement for the purposes of the investigative board's considerations.

On the 16th October, the investigative board met with Mr Stagnetto.

On the 16th October 2017, Ms Davis was interviewed by the investigative board.

On the 16th October 2017, Mrs Barea is interviewed by the investigative board.

On the 16th October 2017, Mrs Smith is interviewed by the investigative board.

On the 17th October 2017, Dr Alex Menez is interviewed by the investigative board.

On the 17th October 2017, Wayne Acris is interviewed by the investigative board.

On the 30th October 2017, Mr Mahubani is interviewed by the investigative board.

On the 20th November 2017, Dr Cassaglia is interviewed by the investigative board.

On the 28th December 2017, the investigative board recommends that Dr Cassaglia face two disciplinary charges.

Contested Facts

The parties are agreed that a few minutes before 15.24 hrs Dr Cassaglia walked into the biochemistry section of the Pathology Department and found Mr Mahubani at his desk and no one else about. The parties are also agreed that at Dr Cassaglia's request Mr Mahubani showed Dr Cassaglia some information relating to a patent on the Modulab screen using his (Mr Mahubani's) login details. The parties are also agreed that Dr Cassaglia requested Mr Mahubani to print out the information on the Modulab screen and that Mr Mahubani did not do so. The parties are also agreed that Dr Cassaglia asked for Wayne Acris, Dr Alex Menez and Mrs Smith at some point during this visit and that for various reasons said persons were not in the laboratory at that time. The parties, or rather the Claimants and Dr Cassaglia, are at odds with each other as to the reason why Mr Mahubani did not provide Dr Cassaglia with a print out of the Modulab screen. With regard to this point the entirety of evidence before the tribunal is as follows.

In Mr Mahubani's interview with the investigative board on the 30th October 2017, the following exchanges are recorded:-

“Mr Gil – Just ask you did you actually show him the logs on the screen?”

Mr Mahbubani – *Yeah he viewed the logs under my, under my cause I was logged in under Modulab.*

Mr Gil – *He viewed.*

Mr Mahbubani – *The log. Under my login name. But he wanted a print out of them as well. And that’s where I did decline cause he had to go to he had to follow proper protocol to get those.*

Mr Gil – *And that’s exactly what you told him.*

Mr Mahbubani – *Yeah.*

Mr Gil – *That he had to follow protocol and get authority.*

Mr Mahbubani – *Yeah.*

Mr Gil – *And how did he react to that?*

Mr Mahbubani – *He was fine. He left as soon as I told him that. He said he’d come back later. Because I told him to speak to Audrey who is acting who is the acting PSM at the time cause Alex was on leave”.*

and later on in the transcript:-

“Mr Gil – *Are you aware that Dr Cassaglia when he left you went to see Megan straight after.*

Mr Mahbubani – *I didn’t know that. I had no interaction with him after, after he saw me I had no interaction with him”.*

It is clear from the above quoted statements that Mr Mahbubani refused to print the Modulab information on the grounds that he was not authorised to do so without the consent of the PSM and that he did not know where Dr Cassaglia went to once Dr Cassaglia left the biochemistry section.

In his witness statement Mr Mahbubani, with regard to this incident, states:-

“He asked for these blood logs to be printed out but I declined and informed him that, as per the correct protocol, he would need to speak to Audrey Smith who was acting Pathology Services Manager to obtain authority”.

This statement is repeated with similar wording in the e-mail which Mr Mahubani sent on the 20th September 2017 to Mrs Smith.

In his evidence to this tribunal Mr Mahubani stated as follows:-

“He asked for a screen shot of the audit log and for it to be printed out. I told him under my authority I could not give him what he wanted because we have a policy in the lab and I could not give it to him. Dr Cassaglia did ask me to print out the results. I would have printed out the screen shot by my computer and I could have printed it out but under the rules of the lab we are not allowed to provide this information to anyone. He asked me who he had to go to see to get authority. This is when I told him he had to go and see the acting PSM. He was fine with this”.

“Dr Cassaglia just went off when I told him I could not give him the screen shot. At no stage was he rude or threatening to me whilst at the lab. I did not tell Dr Cassaglia that I could not print it out. I told him I could not give it to him because of the policy”.

“I don't recall if my keyboard had a print function. I never told him that I could not print from my computer”.

The upshot of all of the above is quite clearly that since the 20th September 2017, Mr Mahubani has consistently and unambiguously stated throughout that he declined to print the Modulab information solely because he had not been authorised by the PSM to provide the information to Dr Cassaglia. On the other hand, Dr Cassaglia's evidence is totally different.

In Dr Cassaglia's interview with the investigative board on the 6th October 2017, the following exchanges are recorded:-

“Mr Grech – And Mohit, Mohit brings out that information, but says that he cannot print, he doesn't know how to print it for you.

Dr Cassaglia – Si that's right.

Mr Gil – Are you sure that, that is what he said?

Dr Cassaglia – Positive. Absolutely positive.

Mr Grech – Because.

Dr Cassaglia – He didn't know porque, how do you print this out? No no se, no se como

Mr Gomez –

Dr Cassaglia – No se I don't know Pero Mohit tells me that he didn't know how to do it.

Mr Grech – *And then you went to Megan.*

Dr Cassaglia – *Si, si and then walked round to.*

Mr Grech – *To Megan.*

Dr Cassaglia – *To the main office to Megan to see if they knew how to do it”.*

and later on in the transcript:-

“Mr Gil – *What’s relevant is something that we asked, I asked you before and I am going to ask again. And tell you why I am asking. You said that Mohit at told you that he wasn’t able to print what was on the screen.*

Dr Cassaglia – *Si claro.*

Mr Gil – *You’re absolutely sure that that’s what he said.*

Dr Cassaglia – *Absolutely. One hundred per cent positive.*

Mr Gil – *He says that what he said to you that he wasn’t authorised to give you that information.*

Dr Cassaglia – *Que va.*

Mr Gil – *Without seeking clearance.*

Dr Cassaglia – *Que va”.*

and later on in the transcript:-

“Mr Grech – *No, no I am referring to the 20th where he says, he asks for these blood logs to be printed but I declined. And informed him he would need to speak to you ask acting PSM to you meaning Audrey.*

Dr Cassaglia – *It’s not what he said to me.*

Mr Gil – *That’s why its important for me to clarify that point.*

Dr Cassaglia – *No, he says to me he didn’t know how to do it”.*

and later on in the transcript:-

“Dr Cassaglia – Si, no, no at that point from my point of view knowing what I know at that point in time Mohit did try to help me to the best of he’s ability, was unable to do so I went on to see someone else who could help me. That was the.

Mr Gomez – And we get to Megan where.

Dr Cassaglia – Yeah.

and later in the transcript:-

“Dr Cassaglia – No, no at the point I’m with Mohit I’m at all and I’m not annoyed in any way shape or form. He tried to help me out he wasn’t able to. I move on to the office”.

Two things are clear from the above quoted statements; namely:-

- (i) that Dr Cassaglia is of the firm recollection that Mr Mahubani did not refuse to print out the Modulab information on the grounds that he was not authorised to do so but rather for the reason that he did not know how to print the Modulab information; and
- (ii) that Dr Cassaglia on leaving the biochemistry office walked directly to the Office.

In the written statement made by Dr Cassaglia sometime in October 2017 for the purposes of the investigative board hearing Dr Cassaglia states as follows:-

“Mohit told me he didn’t know how to print out the information I required from the Modulab programme. I could see that the information I needed was on the computer screen but I also needed a printout. The Modulab log shows that Mohit looked at these results at 15.24. I spent a while talking to Mohit and looking through the logs of two sets of blood results on the same patient. Given that Mohit said he didn’t know how to get a printout, I went to the reception office to speak to one of the clerks to ask if they knew how to print out the log I required”.

Two points arise from this statement; namely that Dr Cassaglia states that he spent a while talking to Mr Mahubani and looking at the logs before he went to the Office and that he re-asserts that the Modulab information was not given to him because Mr Mahubani did not know how to print it.

In the written statement dated the 15th March 2018, Dr Cassaglia states as follows:-

“I was under time pressure to prepare my response and asked Mr Mahubani to open the relevant log on his computer and show me the information I required. The conversation was

friendly and Mr Mahbubani complied with my request straight away. I viewed the log on the screen and asked Mr Mahbubani to print out a copy for me”.

“Mr Mahbubani told me he did not know how to print the information out, so I went to the reception office and spoke to one of the clerks to ask whether they knew how to print out the information”.

The points to note from these statements are that Dr Cassaglia makes no reference to spending time speaking to Mr Mahbubani and looking at the logs and that he confirms once again that Mr Mahbubani did not give him the Modulab information because he did not know to print it.

In his evidence before the tribunal, Dr Cassaglia made the following statements with regard to this aspect of the matter:-

“I asked Mohit to print out the audit log. He said he did not know how to print it out”.

“He told me that he did not know how to print it out. If he had said that I had to contact Audrey I would have called her there and then. He did not say he needed permission to print the logs. That is why I went to the office”.

“He did not at all raise any issue of protocol or line manager. I told him to print out the screen log and he told me that he does not know how to print it out and that is when I go to look for someone else”.

“I went to the office to see the admin staff Megan was there”.

I have two problems with accepting Dr Cassaglia’s evidence on this point.

Firstly, it seems to me strange to say the least that Mr Mahbubani would not know how to print the screen shot. Surely printing information from the computer or from Modulab must not be that rare an event in Mr Mahbubani’s daily work. In this respect it is noted that Mr Mahbubani did state he did know how to print the screen shot. Bearing in mind that Mr Mahbubani and Dr Cassaglia know each other for some time, and that their interaction was by the accounts of both men very cordial, and that Dr Cassaglia admitted to Mr Mahbubani being helpful to him, one would have expected Mr Mahbubani to have offered Dr Cassaglia an alternative option/suggestion to printing (as Ms Davis did later on) if it is indeed true that Mahbubani stated that he did not know how to print the screen shot. But according to Dr Cassaglia he didn’t and he, Dr Cassaglia, just accepted this and moved on. And this brings me to the second problem.

According to Dr Cassaglia he went straight from the Biochemistry section to the Office to speak to Ms Davis. And yet, if the time line previously referred to is correct, this cannot be the case. The time line shows Mr Mahbubani logged onto Modulab at 15.24. On the evidence of Mr Mahbubani and Dr Cassaglia their interaction could not have taken more than ten minutes at the very most, much less possibly. This puts the time at about 15.34 when Dr