

Meeting	Board of Directors
Paper Title	Investigation into the complaints made to the Care Quality Commission (CQC) by Mr Lesley Small: Whether they give rise to matters which engage the fit and proper persons regulations.
Date of meeting	30 <sup>th</sup> July 2020
Date paper was received	23rd July 2020
Responsible Director	David Holden, Interim Director of Governance
Author	Fiona Scolding, QC
Presenter	Ben Reid, Chairman
<b>Executive Summary</b>	
<p>This attached report is the findings of an independent review commissioned by the Trust Chairman, Mr Ben Reid following a complaint by Mr Small to the CQC in 2019.</p> <p>The original incident occurred in 2012 where Mr Small brought an Employment Tribunal claim against the Trust following an incident involving asbestos on the Royal Shrewsbury Hospital (RSH) site.</p> <p>The Employment Tribunal was managed by the then Workforce Director (Ms Maher) and the then Finance Director (Mr Nisbet as the Executive Lead for Estates at that time. In 2013 the Employment Tribunal ruled that Mr Small had been unfairly dismissed for making a protected public interest disclosure and criticised elements of the Trust's evidence. Damages were awarded in 2014 and, until recently, the amount awarded was subject to an Appeal Hearing.</p> <p>In 2014 Mr Small contacted Mrs Clarke as Director of Corporate Governance under the Trust's Whistleblowing reporting system at that time, as he remained concerned that the risks posed by the original incident remained. The handling of the internal investigation and the Employment Tribunal Appeal addressed two separate, although related, issues and were managed by Mrs Clarke and Ms Maher respectively.</p> <p>Mrs Clarke carried out an investigation during 2014 which included interviewing many staff and also brought in independent experts. This report found that the original incident (the removal of a piece of Asbestos Insulating Board, had not been managed appropriately at the time and found much wider, serious failings in relation to asbestos management at SaTH. This investigation also recommended a number of internal disciplinary hearings should take place and these were led by Mr Nisbet (as lead Director for Estates) in late 2014. A full action plan was also drawn up and delivered through subsequently appointed Directors of Estates with Health &amp; Safety who monitored implementation</p> <p>This attached report confirms that the initial response to the incident in 2012 had resulted in Mr Small "being treated badly....and that he had suffered detriment in the termination of his employment". However the report finds that the subsequent investigation in 2014 into the original incident was thorough (although arguably it could have been completed more quickly),</p>	

and resulted in significant changes in both the management of asbestos, including enhanced awareness training for staff and the Trust's whistleblowing policy.

This report also finds that Mrs Clarke provided the Board with transparent information throughout the investigation about what was happening and why. Mr Small was also kept informed during her investigation and Mrs Clarke also met with Mr Small. At the conclusion of the investigation and the disciplinary hearings a full report was presented to the Board in June 2015. Mr Small also received a comprehensive letter from Mrs Clarke immediately after that meeting on behalf of the Board advising him of the outcome of the investigation, which went far wider than his original concerns and thanking him for raising these issues

There was a subsequent prosecution of the Trust by the Health & Safety Executive in 2019 which the Trust fully cooperated with. The judge was clear that the cooperation of the Trust with HSE and the actions taken following Mrs Clarke's investigation showed they had taken their responsibilities seriously, which was reflected in the sentencing (£34,000 for two offences).

The attached report concludes that on the basis of the material considered Mrs Clarke, Mr Nisbet, Ms Maher and Mr Wright are Fit and Proper Persons, although the handling of the initial incident and Mr Small's dismissal are criticised.

This Board of Directors recognise Mr Small's personal contribution to raising awareness of the poor management of asbestos at the Trust in 2012, which the 2014/15 investigation completely accepted. The Board also accepted that Mr Small had been treated badly by senior management in 2012. The improvements that arose from the investigation continue to this day and as well as the annual asbestos surveys a full re-survey across both sites is underway and the Board have invested in compliance roles in the Estates team to provide much greater assurance.

This Board was also very sorry to hear of Mr Small's death in October 2019.

Previously considered by **Not applicable with regard to Trust Assurance Committees**

**The Board (Committee) is asked to:**

<input type="checkbox"/> Approve	<input type="checkbox"/> Receive	<input checked="" type="checkbox"/> Note	<input type="checkbox"/> Take Assurance
To formally receive and discuss a report and approve its recommendations or a particular course of action	To discuss, in depth, noting the implications for the Board or Trust without formally approving it	For the intelligence of the Board without in-depth discussion required	To assure the Board that effective systems of control are in place

**Link to CQC domain:**

<input checked="" type="checkbox"/> Safe	<input checked="" type="checkbox"/> Effective	<input checked="" type="checkbox"/> Caring	<input checked="" type="checkbox"/> Responsive	<input checked="" type="checkbox"/> Well-led
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**Link to strategic objective(s)**

*Select the strategic objective which this paper supports*

- PATIENT AND FAMILY Listening to and working with our patients and families to improve healthcare
- SAFEST AND KINDEST Our patients and staff will tell us they feel safe and received kind care

	<input checked="" type="checkbox"/> HEALTHIEST HALF MILLION Working with our partners to promote 'Healthy Choices' for all our communities <input checked="" type="checkbox"/> LEADERSHIP Innovative and Inspiration Leadership to deliver our ambitions <input checked="" type="checkbox"/> OUR PEOPLE Creating a great place to work
Link to Board Assurance Framework risk(s)	

Equality Impact Assessment	<input checked="" type="radio"/> Stage 1 only (no negative impact identified) <input type="radio"/> Stage 2 recommended (negative impact identified and equality impact assessment attached for Board approval)
Freedom of Information Act (2000) status	<input checked="" type="radio"/> This document is for full publication <input type="radio"/> This document includes FOIA exempt information <input type="radio"/> This whole document is exempt under the FOIA
Financial assessment	Not applicable

**REPORT INTO SHREWBURY AND TELFORD HOSPITAL NHS TRUST**

**INVESTIGATION INTO THE COMPLAINTS MADE TO THE CQC BY MR.**

**LESLEY SMALL: WHETHER THEY GIVE RISE TO MATTERS WHICH**

**ENGAGE THE FIT AND PROPER PERSONS REGULATIONS**

**Introduction**

1. I am Fiona Scolding QC, a barrister in independent practice at Landmark Chambers, Fleet St, London. I have been commissioned by the Chair of the Shrewsbury and Telford Hospitals NHS Trust (“The Chair” and “The Trust”) to carry out an independent investigation and compile a report as to whether or not the issues raised by Mr. Lesley Small (“Mr. Small”) communicated by the Care Quality Commission (“CQC”) to the Chair of the Trust on 21 May 2019. The CQC has asked the Trust to provide details of actions taken in the light of the issues raised by Mr. Small, and to examine the actions of four individuals in respect of these issues to see if they meet the requirements of the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014 (Part 3)). I am asked to consider if any of the issues raised give rise to concerns that these individuals (or any one of them) do not meet the requirements of the fit and proper persons aspect of these regulations (details of which I set out below).

2. The individuals whose actions and conduct I am asked to examine under these Regulations are:
  - (a) Simon Wright, former Chief Executive Officer of the Trust
  - (b) Neil Nisbet, Finance Director of the Trust
  - (c) Julia Clarke, Director of Corporate Governance of the Trust.
  - (d) Victoria Maher, Workforce Director of the Trust.
  
3. I confirm that I do not know any of the individuals involved or mentioned in the investigation. I have never undertaken work, whether paid or voluntary for the Trust or the CQC.
  
4. In undertaking this investigation, I have examined a significant quantity of contemporaneous documents kept by the Trust. In particular, I have had sight of the following:
  - (a) Correspondence from the CQC to the Trust in 2019 asking for its comments upon the issues raised by Mr. Small.
  - (b) Documents presented to the Employment Tribunal by Mr. Small and the Trust for the hearing held in 2013, including the witness statements supplied on behalf of both parties to this litigation and notes of the hearing and Judgment.
  - (c) The Judgment of the Employment Tribunal dated 11 December 2013.

- (d) Documents concerning the remedy hearing and judgement of the Employment Tribunal dated April 2014.
- (e) Documents and decision of the Employment Appeal Tribunal, decision issued on 6 August 2015.
- (f) Documents before, and decision of, the Court of Appeal, Judgment given on 27 April 2017 .
- (g) Documents before the remitted hearing of the Employment Tribunal including schedules filed by both Mr. Small and the Trust and skeleton arguments and witness statements.
- (h) Documents for the appeal against the case management order of the Employment Tribunal by Ms. Small dated October 2018, now promulgated in early September 2019. .
- (i) Various correspondence between Mr. Small and the Julia Clarke (Director of Corporate Governance) and other members of the Trust Board starting in early January 2014 and lasting into 2015 about the issues raised by Mr. Small concerning asbestos.
- (j) Contemporaneous notes and documents around investigation undertaken by Julia Clarke, Director of Corporate Governance, 2014 and into 15 into the events as disclosed to her by Mr. Small.
- (k) Minutes of board meetings 2013 – 2018 dealing with the issues raised by Mr. Small around asbestos exposure and the behaviour of senior personnel in response to the concerns raised by Mr. Small.
- (l) Papers/ notes of information given to the Trust Board 2014 onwards.

- (m) Information about current asbestos and risk register of the Trust
- (n) Information and documents about the HSE investigation and prosecution concerning asbestos which stem from the concerns of Mr. Small.
- (o) Contemporaneous information, including notes of interviews, documents gathered for investigation and details of disciplinary action taken against senior staff 2014 - 2015, including all those to whom Mr. Small reported at the time of his work for the Trust.
- (p) Other information about asbestos within the Trust. <sup>1</sup>

5. Alongside that, I have conducted telephone interviews with Mr. Wright, Mr. Nisbet, Ms. Clarke (on 6 August 2019) and Ms. Maher (on 13 August 2019) - each lasting approximately 45 minutes to clarify matters raised by the documents. Ms. Maher and Mr. Nisbet were both interviewed whilst they were at home. They therefore provided answers without access to their paperwork.
6. There are ongoing Employment Tribunal proceedings between Mr. Small and the Trust on the question of remedy - i.e. what sums of money Mr. Small should be awarded against the Trust. Because of this, the Trust has not provided me with material which is subject to legal privilege, such as the advice of Counsel, in those proceedings. The Trust cannot be compelled to provide this

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<sup>1</sup> I can provide a full chronological index if required: I have examined approximately 7,000 pages of material.

information to me and I have not considered it necessary for them to consider the waiver of privilege in order to reach my conclusions in this matter. Had I considered that sight of this information was required, I would have asked for them to consider the waiver of this privilege.

7. I have also examined the Regulations and guidance issued by the Care Quality Commission to provide advice to Trusts and others about what the Regulations mean and how they should be interpreted by the CQC and others.

### **Executive Summary**

8. Mr. Small was dismissed from his role in 2012 when he should not have been. He raised legitimate concerns about workers continuing to operate when asbestos had been discovered on site. His line manager, in refusing to act or to notify the Health and Safety Team of the Trust, acted wrongly. The Director of Estates, with whom he shared his concerns, acted wrongly. The witnesses to the Employment Tribunal then provided an account which was found to be “incredible” and was unreliable. Mr. Small was found to be a “whistleblower” having made a protected public interest disclosure by the Employment Tribunal and should have been treated as such by the Trust from the outset. He was treated badly. He should not have been so treated. He sought to raise these issues with the correct authorities and was rebuffed and suffered detriment in the termination of his engagement.



9. Once the Employment Tribunal decision was promulgated, the Trust acted responsibly and undertook an internal investigation and a disciplinary investigation of the staff involved in the Employment Tribunal claim and who were working in the Estates Department at the time. Practices, procedures and line management responsibilities were altered following this. The Director of Corporate Governance provided the Board with transparent information about what was happening and why.
  
10. The internal investigation and disciplinary investigations took a long period of time, and could arguably have been completed more quickly, however, it was thorough. As a response to these investigations, Mr. Small was thanked for his courage and perseverance and the Trust acknowledged that they had got things wrong. Mr. Small was sent a detailed letter in June 2015 which outlined the nature of the investigations, the contraventions by members of staff and the Trust apologised to him. They also identified changes to the whistleblowing and Health and Safety processes as a result of this. Ms. Clarke also ensured that Mr. Small was provided with a very positive reference, and also met him personally.
  
11. Furthermore, the Trust reported itself to the Health and Safety Executive over the incident, assisted with the HSE's investigation and co-operated fully. A prosecution did take place but the Judge was clear that the sentence passed and

the actions of the Trust showed that they have taken their responsibilities seriously.

12. Not only was there an internal investigation, but asbestos management has been improved and altered as a result of the issues which Mr. Small raised including:

- (a) Re-writing and re-issuing asbestos management plans and policies, and reviewing them annually.
- (b) Purchasing specialist software to assist with the management of asbestos.
- (c) Providing specific asbestos management training to relevant staff and obtaining qualifications for this.
- (d) The provision of asbestos survey from outside expert companies.
- (e) Provision of an in-house asbestos consultant for two years between July 2016 – July 2018 and having consultants currently employed.
- (f) Opening a risk register entry regarding the management of asbestos and ranking it regularly.
- (g) Having a task and finish group which oversaw all remedial works and is responsible for the overall development of the management of asbestos.
- (h) Undertaken extensive asbestos removal works where possible to seek to reduce the total amount of materials.
- (i) In 2018, employment the service of an independent “Authorising Engineer” to undertake a gap analysis which showed that staff considered there had

been improvements in asbestos management procedures. These are to take place on an annual basis.

13. The report of the asbestos consultant and auditor from October 2018 identified that the “overall feedback was every positive regarding the current asbestos management and the culture of asbestos management.....The individuals agreed that current procedures were robust.....”.

14. My conclusions are:

(1) The Trust undertake adequate steps to comply with its responsibilities under FPPR .

(2) I consider that the Trust acted as a reasonably competent Trust in the steps that it took once senior members became aware of the issues raised by Mr. Small.

(3) On the basis of the material before me, I consider that Ms. Clarke, Mr. Nisbet, Ms. Maher and Mr. Wright are fit and proper persons.

15. I set out the processes followed in the body of this report and comment upon them throughout it. To summarise:

(a) Individuals in the Trust did not alert the Board with sufficient rapidity or seriousness to the situation regarding Mr. Small and the issues raised by

him about health and safety in advance of the decision in his ET claim (decision promulgated in December 2013): I have been given information, however, that the practice has now changed. I do not consider that this failure amounts to serious mismanagement.

- (b) Managers to whom Mr. Small reported and those who were aware of the concerns that Mr. Small raised in 2012/13 did not take them seriously and acted inappropriately in dismissing him for raising legitimate concerns about health and safety. They then were, at the very least, economical with the truth to the Employment Tribunal which criticized them severely. None of those individuals work for the Trust any longer, and all of them were subject to disciplinary proceedings.
- (c) When the Director of Corporate Governance was written to by Mr. Small, she undertook an appropriate investigation into what had gone on, and made changes to corporate governance and health and safety as a result. Her actions were wholly appropriate, and, in fact, commendable.
- (d) Following on from this internal investigation, individuals from the Trust met personally with Mr. Small and kept him up to date during the investigation of what was happening and why.
- (e) Subsequent to these concerns coming to light in late 2013, the Trust has worked closely with the HSE and reported itself to it for the issues that Mr. Small raised.
- (f) The Director of Finance, who was at that time responsible for the Estates team, should have been told about the issues raised by Mr. Small and

should have been told of his employment claim as soon as possible. He told me that he was not told of any issues by \_\_\_\_\_, who was then Director of Estates until many months afterwards and was told it was a minor issue. He was misled by members of staff about this. It could be said, with the benefit of hindsight, that the Director who had ultimate responsibility for those who were criticized by the Tribunal should have asked more questions or had more awareness of what was happening “on the ground”. He told me that he trusted what he was told by senior staff. Practices have now changed with more requirements for reporting and monitoring of the actions of senior staff. However, there is no basis for suggesting that his actions amounted to “serious mismanagement”.

- (g) The Workforce Director told me that again, she was told by the Estates Team that the issues raised by Mr. Small was wrong and she had no reason at that time to disbelieve them. She recognises now that she should have asked more questions but I do not consider that her response was either unreasonable or showed serious mismanagement at the time.
- (h) Both the Director of Finance and the Workforce Director should have informed the Board of the issues raised by the ET claim of Mr. Small. I do not consider that the failure to do so amounts to serious mismanagement.
- (i) The internal investigation into what had taken place once Ms. Clarke, the Director of Corporate Governance was told of the situation was thorough and appropriate action plans were in put into place, and systems changed to avoid a situation like this occurring again.

- (j) Following on from the internal investigation, the Trust launched a disciplinary investigation and took disciplinary proceedings against those individuals who had provided unreliable evidence to the Tribunal. These investigations were thorough, carried out by individuals who were independent of those subject to the investigation, extensive records were kept and staff were disciplined. None of the senior staff involved in the incident in 2012 and in the response to the Employment Tribunal in 2013 are still in post. The Disciplinary investigation of the individuals who had known or been involved in the response to the concerns raised by Mr. Small and in giving evidence to the Employment Tribunal and carried out by individuals who had no intimate knowledge or line management control of those subject to investigation. I consider that the outcomes of those investigations do not demonstrate serious mismanagement, although I would consider that other Trusts may have considered dismissal rather than the lesser disciplinary actions that were taken. It falls within a range of reasonable responses open to the Trust and does not show mismanagement. Mr. Nesbit was part of the disciplinary hearings and also sought advice from an independent individual sitting on the disciplinary panel.
- (k) The actions of the Trust in managing the risk of asbestos has, in my view demonstrated that it has sought outside advice and expertise since 2014 and has sought to ensure that the issues raised by Mr. Small's circumstances are not repeated.

- (l) The actions of the Trust in reporting itself to the HSE and during the course of the prosecution were commendable and demonstrated that it understood that it had acted in error in 2012 and that this would not happen again.
- (m) The litigation has been lengthy and protracted: I deal with this in full in my report, but novel issues of law have been raised about whether such claims should give rise to “stigma” damages, which resulted in an appeal to the Court of Appeal by Mr. Small . From my reading of their judgements and the position taken by the Trust in the litigation in respect of this complicated issue of law (to do with remedy) has not been the subject of criticism by the Courts. The Trust may not have succeeded entirely thus far, but the EAT and Court of Appeal have not criticized the approach taken by the Trust. I would have expected them to do so if they considered that the arguments of the Trust were vexatious, hopeless or scurrilous. The Trust, had it known and appreciated the full facts, would not have defended the ET originally – but the issue of remedy in this case is not clear cut and is plainly the subject of much legal debate. The sums of money claimed by Mr. Small are very large (his claim is multi million pound) and so in those circumstances, the Trust has to ensure that it acts appropriately As important in terms of context is that Mr Small advances very large claims for damages and clearly the Trust has an obligation for careful disbursement of public money.