Case Number: 3201469/2015
& 3201047/2016

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EMPLOYMENT TRIBUNALS

Claimant: **Mr J Adimonye**

Respondent: **Barts Health NHS Trust**

Heard at: **East London Hearing Centre**

On: **17 – 20, 24 & 25 January 2017**

Before: **Employment Judge Ferris**

Members: **Mr N J Turner OBE**
Ms J Owen

Representation

Claimant: **In Person (assisted by Ms E Frayne, Union Representative)**

Respondent: **Mr S Cheetham (Counsel)**

JUDGMENT

It is the unanimous judgment of the Employment Tribunal that the Claimant's complaints of unfair dismissal, age discrimination, race discrimination, breach of contract and victimisation are dismissed. The claim is dismissed.

REASONS

1. By a first Claim Form presented on 14 August 2015, the Claimant brought complaints of direct age and race discrimination, breach of contract and unfair dismissal against the Respondent, his former employer. In simple terms, the Claimant who is employed as a clinical fellow of obstetrics and gynaecology at Newham University Hospital, managed by the Respondent, contends that the Respondent discriminated against him because of race in restricting his duties, removing him from practice, investigating him, subjecting him to formal disciplinary proceedings and eventually dismissing him and referring him to the GMC. The Claimant contends that the Respondent's failure to offer him training as an alternative to pursuing disciplinary proceedings and then dismissing him amounted to age discrimination. The Claimant

contends that the Respondent adopted an unfair process when it dismissed him. The Respondent has defended all those complaints.

2. By a further claim presented to the Tribunal on 14 October 2016 the Claimant complains of victimisation on the grounds of protected acts relating to age and race discrimination. The Claimant identifies as protected acts an appeal against his dismissal by letter dated 12 June 2015 then, as already noted, the presentation of his claim to the Employment Tribunal, in both cases making complaints of age and race discrimination.

3. The Claimant contends that as a result of those protected acts he was subjected to the following detriments:

3.1. His appeal was delayed for approximately one year and two months.

3.2. The Respondent failed adequately to communicate and consult with him about his appeal.

3.3. The Respondent failed to respond or to deal with his concerns raised about the appeal process.

3.4. He was not afforded a fair appeal hearing as the panel was improperly constituted and his case was decided within an hour which was wholly insufficient due to its complexity.

3.5. His appeal was not upheld and he was not reinstated.

4. We remind ourselves that in determining for the purposes of the Employment Rights Act 1996 ("ERA") whether the dismissal of an employee is fair or unfair, it is for the employer to show (a) the reason (or, if more than one, the principal reason) for the dismissal and (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held. And by subsection (2) a reason falls within this subsection if it relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do.

5. Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and (b) shall be determined in accordance with equity and the substantial merits of the case.

6. As to the complaints made under the Equality Act 2010 ("the Act"), the Tribunal reminds itself that age and race (which includes colour, nationality, ethnic or national origins) are protected characteristics and that direct discrimination is defined by Section 13 of the Act as *"A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others"*.

7. By Section 27 of the Act:

> *"(1) A person (A) victimises another person (B) if A subjects B to a detriment because—*
>
> *(a) B does a protected act, or*
>
> *(b) A believes that B has done, or may do, a protected act.*
>
> *(2) Each of the following is a protected act—*
>
> *(a) bringing proceedings under this Act;*
>
> *(b)…*
>
> *(c) doing any other thing for the purposes of or in connection with this Act;*
>
> *(d) making an allegation (whether or not express) that A or another person has contravened this Act. …"*

8. And finally, we remind ourselves pursuant to Section 136 of the Act that if there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred. But that does not apply if A shows that A did not contravene the provision.

9. The Tribunal had a helpful list of issues which had been prepared initially by the Respondent and discussed with the Claimant. The Claimant was not able to agree that list of issues at the outset of the case but it remained in play throughout the case until closing submissions when the parties addressed the Tribunal on that list of issues and therefore by implication the Tribunal has treated that list of issues as an agreed list. The Tribunal heard evidence from the Claimant by agreement as the first witness. The Claimant called no other live evidence. The Respondent called all five witnesses.

10. Dr Alistair Chesser is the Trust's chief medical officer, a role assumed in February 2016. He was ultimately responsible for the Trust's clinical standards and for the professional management of doctors throughout the Trust. His clinical speciality as a consultant was nephrology. He chaired the Respondent's capability hearing panel which dismissed the Claimant in May 2015. Ms Anita Sanghi, a consultant and member of the Royal College of Obstetricians and Gynaecology was the Respondent's case manger for the process involving the Claimant which followed the Trust's policy *"Procedures for Handling Concerns Relating to the Conduct and Performance of Doctors…with regard to 'Maintaining High Professional Standards'"*. Ms Helen Walker, another consultant obstetrician and gynaecologist employed by a different trust, was a member of the appeal panel which was led by Tribunal Judge Laurence Brass which dismissed the Claimant's appeal in July 2016. Amanda Harcus was the senior HR advisor for the Trust who advised the capability appeal hearing panel and who gave detailed evidence about the circumstances in which the conclusion of that appeal was delayed. In the event after Ms Harcus had given her evidence in chief, the Claimant

had no questions to put to her and accordingly her evidence was unchallenged. Mr David Lowe was one of the two senior members of staff from human resources who advised the capability panel which dismissed the Claimant on capability grounds. There were very few questions for Mr Lowe and his evidence was not challenged.

11. The Tribunal was provided with a hearing bundle of about 1000 pages. The Tribunal has not read those pages like a book but rather has considered carefully the documents to which we were taken by witnesses or by the parties or their representatives during the hearing. The Tribunal makes the following findings of fact.

12. The Claimant graduated from the University of Nigeria in 1979 qualified as a medical doctor and he started his medical practice after national service in 1982 in a general hospital in Nigeria. In 1987 he began training in obstetrics and gynaecology at the University of Nigeria Teaching Hospital. He travelled to the United Kingdom to work here permanently in August 1992 and worked at various hospitals throughout the United Kingdom as a registrar starting in 1995. In April 2008 he joined Newham University Hospital (which is now part of Barts Health NHS Trust) as a clinical fellow in obstetrics and gynaecology.

13. During the course of his long career in obstetrics and gynaecology in this country and his extended and continuous period of service with the National Health Service, the Claimant will have attended many courses of continuous professional development in obstetrics and gynaecology. He has not attempted to obtain a more specialist professional qualification during that period of time. The claimant who was born on 21 February 1946 is now 70 years old and will be 71 on 21 February 2017.

14. On the evening of 4 July 2013 running into the very early hours of 5 July, the Claimant was involved in a Serious Untoward Incident ("SUI"). That was the first of the two relevant SUI's. As a result of this first SUI and the Claimant's involvement in it, the Claimant's clinical practice was restricted and the matter was subjected to lengthy investigation. The Tribunal does not intend to examine at this stage (or at all) in any detail the clinical particulars of that SUI. Those particulars are documented in a number of places in the trial bundle. The SUI report dated 4 November 2013 and authored primarily by Mr Matthew Hogg with limited input from Jamna Saravanamuthu, both consultant obstetricians, assisted by a lead midwife explains, in some detail what happened that evening by reference to one patient's records in particular. That patient was delivered of a baby by a colleague of the Claimant's at 4.45am. It was a forceps delivery and the baby required resuscitation on birth and was subsequently transferred to St Thomas' Hospital for cooling and intensive care. The MHPS report (Maintaining High Professional Standards report) into the July 2013 incident was published on 13 January 2014. In that report the Claimant had been singled out for investigation as a result of his involvement in the immediate antenatal treatment of the patient.

15. Following those reports Ms Anita Sanghi concluded:

> *"1. There was a failure of Dr Adimonye to recognize and act on the 'pathological' CTG at 00.50 hours on the 05.07.13. It is difficult to say whether this may have made a difference to the outcome.*
> *2. The documentation has been suboptimal throughout and CTG stickers have not been used as per guideline.*
> *3. There is evidence of poor communication between him and the*

midwifery team particularly when raising concerns and actions around CTG interpretation and abnormalities."

16. She made recommendations:

"There should be an audit of at least 5 sets of notes written in by Dr Adimonye in the labour ward setting 3 weeks to ensure that his documentation is up to the standard.

There should be a phase and supervised period of return to work with supervision by the college tutor/deputy. The period of supervision is estimated as 6 weeks. He should only be allowed to work unsupervised on labour ward and antenatal ward once the college tutor is satisfied with the educational activities and assessments as listed below:-

Learning Objectives:

1. *To achieve competence in intrapartum CTG interpretation at the level of ST3 equivalent.*
2. *Competence in the use of CTGs to inform management decisions during labour at the level of ST3 equivalent.*
3. *To achieve adequate standards of documentation with regards to intrapartum care in general and CTG in particular*
4. *To achieve a good standard of multidisciplinary communication on the labour ward"*

17. There was a requirement for education activities to be undertaken. There was also a requirement for assessment, including undertaking a CTG exam, other assessments, and to write two reflections on intrapartum care. Meanwhile there had been a reference to the National Clinical Assessment Service (NCAS). NCAS provides 24 hour telephone advice to NHS organisations managing serious concerns about practitioners. NCAS can be a very useful and impartial sounding board to assist NHS organisations to identify the issues at each stage of the MHPS process and to support NHS organisations with their strategies for local case management. It also offers assessment of an individual's practice and will assist NHS organisations to formulate a training plan where appropriate. Contacting NCSA for advice is required whenever serious concerns arise by Maintaining High Professional Standards in the Modern NHS (a written policy document) and by the Trust's policy *"Procedures for handling concerns relating to the conduct and performance of doctors…with regard to maintaining high professional standards"*.

18. The decision to refer to NCAS was taken by Ms Sanghi because having reviewed the clinical notes and the CTG she agreed that the CTG had been pathological for a long time on the night of 4 July and that appropriate action did not appear to have been taken by the Claimant.

19. On 4 February 2014 the NCAS suggested a three way meeting which took place on 13 March 2014 between that body, the Claimant, and Dr Sanghi. At that meeting the NCAS advised a remediation programme to take place over six months. The details of what was discussed and recommended at that meeting are contained in a letter dated 21 March 2014 from NCAS to Dr Sanghi. The NCAS commented in the letter that it would be for the Trust to consider if it was reasonable and practicable for

the Trust to proceed with the remediation plan. It stated that the Trust would need to consider *"the availability of supervision on the labour ward and the impact that providing such supervision [for the Claimant] will have, not just on the supervisors but also on training opportunities for junior medical staff and trainees"*.

20. Finally, NCAS set out some concerns it had formed during the meeting as to the Claimant's insight:

> *"[the Claimant appeared reluctant to accept NCAS' advice regarding the scale and duration of such a programme. Furthermore, it is not clear…the extent to which he has reflected upon, understood and accepted that there were deficiencies in his performance. …it was still not clear to us that he has understood the reason why help was required…"*

21. About that time Mrs Sanghi had made enquiries among the obstetric clinical leads at the Trust's sites and it did not appear that there would be the resources available for the Trust to remediate to the Claimant. There was a Trust wide shortage of consultant obstetricians and the Trust had the obligation to train deanery trainees. So Mrs Sanghi accepted that the consultant body did not have capacity to retrain the Claimant over the six month period NCAS had suggested would be appropriate. Her colleague, Dr Jane Hawdon, was the executive clinical academic group director for Women's and Children's Health to whom Mrs Sanghi reported as clinical director. Dr Hawdon was tasked with trying to find a neighbouring hospital with their retraining could be undertake. This was in accordance with how the Trust usually approached issues of remediation when there was no capacity to provide the retraining within the Trust itself. Unfortunately Dr Hawdon did not have any luck with that as her emails of 5 December 2014 demonstrate.

22. Meanwhile in April 2014 there was a further SUI in which a diabetic mother's baby was stillborn as a result of a complicated sequence of events involving a number of clinicians. The second SUI report was not published until 19 September 2014. The grave outcome of that patient's pregnancy which ended in a stillbirth on 11 April 2014 was described by the authors (Dr Susanna Crowe, ST7 in Obstetrics and Gynaecology, supervised by Mr Richard Maplethorpe, Consultant Obstetrician and Gynaecologist) as:

> *"…possibly a consequence of having Gestational Diabetes Mellitus and an earlier delivery around 38 weeks could have prevented the still birth. Dr Adimonye saw the patient on one visit at 33 weeks in the Antenatal Clinic. He actioned on the glycosuria by doing a blood sugar in clinic, but failed to action on the abnormal results by not referring her to the Diabetic Services for further management. This resulted in a possible 2 week delay in the management of her diabetic status and was a contributory factor to the still birth. Dr Adimonye's omission of referral to specialist team was not the sole cause of the outcome. The still birth was not due to a single point of failure but was due to a combination of events, both on behalf of the patient and the care providers, which had a cumulative effect towards the outcome.*
>
> *Dr Adimonye has not been subject to any further complaints or adverse incidents since the 26th of Feb 2014. He has been [compliant] with his*

> *current restrictions on his practice which restrict him to doing non clinical work only."*

23. The Tribunal should point out that immediately after the incident in July 2013 the Claimant had been placed on restricted duties which removed him from the labour ward and confined him to antenatal clinic work. Following the identification of his part in the second SUI he was restricted to non-clinical work only.

24. Meanwhile in June 2014 at Mrs Sanghi's initiative the Respondent had begun an investigation into the Claimant's clinical practice following concerns raised about him arising from the second SUI in line with Maintaining High Professional Standards. The Claimant was notified of those concerns face to face on 18 June and they were confirmed in writing on 19 June by letter written by Mrs Sanghi. The MHPS report (dated sometime in the early part of the second half of 2014) records Dr Adimonye's frank statement on investigation that on the day he examined the patient in February 2014 when she was 33 weeks pregnant *"the clinic was very busy and that he forgot to inform the diabetic team regarding her [grossly elevated] blood sugars"*. Dr Sanghi reviewed the SUI and sent an email to the Claimant on 30 September:

> *"The conclusion from the investigation is the allegation that you did not take appropriate action on noting a blood sugar of 12.2 in a 33 weeks pregnant lady in February 2014, nor did you note that the patients previous blood results and history had been unsubstantiated.*
>
> *I will therefore be putting this case forward for a formal capability hearing in line with the MHPS Policy a copy of which can be found on the Trust Intranet site. I should particularly draw your attention to section 5 and appendix 4. You will be invited in writing to a formal hearing in due course, which will include full details of the process."*

25. On 3 November 2014 the Claimant was invited to a capability hearing on 3 December. A management statement of case was prepared for that capability hearing (dated 23 November 2014). In a summary at the end of that case Dr Sanghi noted:

> "*There have been recurrent concerns about Dr Adimonyes' clinical decision making and management of cases. The findings from the case investigator's report in investigation 1 has raised concerns regarding the interpretation and categorisation of CTGs, decision-making regarding the management of patients in labour and adherence to protocols, sub-optimal documentation and poor communication with the midwifery team. The findings from case investigator's report in investigation 2 has substantiated the allegation that Dr Adimonye did not take appropriate action on noting a blood sugar of 12.2 in a 33 weeks pregnant lady in February 2014, nor did he note her previous blood results and history.*
> *This finding is in addition to the previous concerns raised about Dr Adimonye's clinical capability in 2010/2011, regarding interpretation of CTG, which resulted in a period of retraining.*
>
> *The Trust and the department have given careful consideration to the recommendations from NCAS. The action plan framework suggested was reviewed within the department and the CAG to determine whether it is*

feasible and practical to delivery the plan. The department is already understaffed and it would be impossible to provide additional support and teaching to Dr Adimonye for a 6 month period. The department have explored the possibility of funding a 6 month placement with a neighbouring Trust we have not been able to identify a suitable placement opportunity to support Dr Adimonye. Given the scale and duration of the plan, together with NCAS's advice that there are significant concerns about Dr Adimonye's insight about the deficiencies in his skills, it is unlikely that the remediation plan will be successful. The department is not resourced sufficiently to be able to support Dr Adimonye for an extended period of remedial training.

<u>Recommendation</u>

Dr Adimonye has not carried out his role to the required standard in Obstetrics, due to a lack of knowledge and skill, this puts patients at risk. Regretfully I recommend that a capability hearing under the section 5 of the Trust's Maintaining High Professional Standards be convened."

26. The first day of that capability hearing took place on 3 December 2014. Dr Chesser gave evidence about the capability hearing. It is clear from his evidence (and indeed this was not contradicted by the Claimant) that the Claimant had an ample opportunity to question the Respondent's witnesses and to challenge the management case and he himself gave evidence at that lengthy first day's hearing. During an adjournment at the end of the day, Dr Chesser told us that the panel agreed that having heard all the evidence and the parties' submissions it was still necessary to see whether the NCAS would undertake a further assessment and if it would, then the panel would await NCAS's final advice, but if NCAS declined to undertake an assessment it was agreed that the panel would have no option but to proceed to dismiss the Claimant on the grounds of capability. Dr Chesser referred to his manuscript notes made at the time of the hearing and in particular to what he had noted was said by a consultant obstetrician and gynaecologist, Mr Victor Lewis, who was a member of the panel: Mr Lewis had expressed his surprise that the Claimant was in charge of a labour ward and had no higher professional qualifications, and had noted the Claimant's poor communication and that Victor Lewis had had problems himself understanding what the Claimant had said, so how much more difficult was it for patients and colleagues to understand him; Mr Lewis had also suggested that none of the incidents involving the Claimant were *"earth shattering"* but that taken together they caused considerable concern; the Claimant appeared to have no insight and it was clear that there was no likelihood of remediation because the Claimant did not perceive that he had any need for it.

27. Overall the panel view was that warnings would not affect the Claimant's clinical standards, that he lacked insight and does not feel that he needs remediation and that his capabilities are so far below what the panel would expect that their recommended approach would be to terminate the Claimant's employment. However, their ultimate conclusion which was explained to the Claimant on the day was that due to the gravity of the situation they decided to refer the second MHPS report (relating back to the February 2014 antenatal clinic event) to NCAS for its assessment prior to making a final decision on the disposal of the capability hearing.

28. On 26 March 2015 NCAS replied to the Trust:

> *"We wrote to you on 9 March 2015 with our provisional decision and to let you know when we would be making our final decision, subject to any further comments.*
>
> *We have considered comments received from [Dr Adimonye], and whilst we agree that an assessment of his performance might be helpful, the present restrictions on his practice would severely limit our ability to undertake a meaningful assessment at the present time. Our provisional decision therefore stands and we will not be carrying out an assessment. …"*

29. On 13 May 2015 the capability hearing was reconvened on notice and at the conclusion of that hearing Dr Chesser said:

> *"We have very serious concerns about what we have heard about your clinical practice and your ability to function unsupervised in a clinical environment. In making this judgment we have taken into account the events of 2013 and 2014. We recognise that the mistakes which were made occurred in the context of a busy unit, and that the organisation of the unit may not have been optimal. Nevertheless the errors were potentially serious and would not be expected from a doctor of your seniority. The evidence you presented to us was inconsistent and at times contradictory.*
>
> *We have considered whether a period of retraining would allow you to get to a level whereby you could safely do the job you were appointed to. However we consider that you have displayed a lack of insight which means that any retraining of any duration will be unsuccessful. You have told us that you do not feel remediation is necessary, and this makes us think you will not change your behaviour and approach. This view is consistent with that expressed by NCAS in 2014.*
>
> *We therefore feel it is appropriate that your contract should be terminated. You have a right to appeal, which should be made in writing to the Director of Human Resources within 35 days of the date of this letter.*
>
> *The outcome of this hearing will be reported to the General Medical Council in a manner consistent with Trust Policy relating to Maintaining High Professional Standards."*

30. The Claimant was dismissed on notice, the effective date of termination being 13 August 2015.

31. Meanwhile, prior to the reconvening of the capability hearing in May there had been some email discussion with one of the panel members from outside the Trust, Mr Victor Lewis, consultant obstetrician and gynaecologist. On 13 April 2015 he responded to the invitation to join the reconvened panel with an email:

> *"I confirm I will not be available for the Dr. Adimonye meeting on*

Thursday, 30th April because I consider it to be a total waste of my time and inexcusable waste of public money. You will of course be fully aware that Dr. Adimonye has been suspended from clinical practice for a very long time at 180% of his salary! You will also recall at the meeting on the 3rd December 2014, the Committee were unanimous in recommending that Dr. Adimonye's contract should be immediately terminated on the grounds that he was clinically incompetent as judged by the 3 Clinical complaints against him, his age of 70 years, the fact his English was so poor as to be difficult to understand, and he had no professional qualifications other than the basic medical degree, obtained in Africa, and had made no attempt to take higher qualifications.

When I left the meeting in December you promised that you would forward a copy of our joint report, which I never received, and have no knowledge of what was happening until I received your recent e-mail. I still do not understand the decision of the NCAS or what is the precise purpose of a second meeting when we had clearly made a recommendation. This is a waste of time for busy clinicians with responsibility for patients and a gross waste of public money which it would seem to be almost normal at St. Bartholomews.

As you can see a copy of this e-mail has been sent to your Chief Executive.

Yours sincerely

B.V. LEWIS

MD.FRCS.FRCOG."

32. That email was responded to at the time by the then human resources executive dealing with the management of the capability hearing who contradicted Mr Lewis' recollection. We had the benefit of hearing from Dr Chesser about the events at the capability hearing and in particular, the conclusion reached tentatively by the panel at that hearing in December 2014 and which is recorded in some detail by Dr Chesser in his own handwriting in contemporaneous notes which were produced to us and translated for us by Dr Chesser. Dr Chesser was an impressive witness and the Tribunal felt able to rely on the integrity of his evidence as to what had actually happened at that meeting in December. He explained the intemperate language of Mr Lewis on the basis that Mr Lewis was angry that he was being called back for a further lengthy meeting and Dr Chesser explained that in all probability Mr Lewis had remembered some of the substance of the hearing conducted in the presence of the Claimant on 3 December but had seriously misremembered the conclusion reached by the panel in private and which had been noted at the time by Dr Chesser. The Tribunal accepts that Dr Chesser's explanations and recollections, confirmed by his contemporaneous record, were accurate and that Mr Lewis' intemperate remarks were not.

33. The Tribunal has focused on Mr Lewis' email sent during the interregnum in the capability hearing. The human resources' personnel managing the capability hearing changed during that interregnum. By the time of the reconvened hearing the human

resources executive in charge was Mr David Lowe. He took over on 13 April 2015. On 17 April Mr Lowe received a copy of a colleague's reply sent to an email from Victor Lewis. At the end of a long email chain this original (and unhelpful) email from Victor Lewis' would have appeared. Mr Lowe explained to us and this evidence was not challenged (and we accept it):

"I did not read the email chain fully. I can receive up to 100 emails a day and I do not always have the time to read every email as fully as I would like. This email chain appeared to me to pertain to the arrangements for the capability hearing; I was not directly involved in the process of making those arrangements…I therefore did not read the email Victor Lewis had sent…on 13 April 2015 at the time. In fact I only read the email and became aware of it in December 2016 when I understand it was disclosed by Dr Alistair Chesser to the Trust's solicitors. On reading it I consider that the comments Mr Lewis made in his email about the Claimant were on the face of it inappropriate."

34. Meanwhile, the Claimant through his Union had raised a grievance on 30 April 2015. The substance of the grievance was that:

> *"• [The Claimant] has been suspended from clinical practice since 16 July 2014.*
> • *The Trust has failed to ensure that the issues that triggered the suspension were dealt with promptly and efficiently. To date, all the issues remain unresolved.*
> • *There has been no clarity from the Trust about the status of this case, despite [correspondence]…*
> • *As a consequence of the Trust's failures, Dr Adimonye's re validation with the GMC has potentially been compromised..."*

35. The written outcome of the capability hearing reflected in slightly greater detail the grounds for dismissal which had been explained to the Claimant on the second day of that hearing.

36. The Claimant appealed the dismissal on 12 June 2015. The appeal was listed to be heard on 24 September 2015 but on that date it was postponed. On 25 November 2015 the appeal hearing was reconvened in front of the same panel but it was postponed because the chair was unwell. On 28 January 2016 there was the first day of the reconvened appeal hearing with the same panel. On 20 March 2016, which was planned to be the second day of the appeal hearing, it had to be postponed because a panel member was exceptionally busy with clinical duties as a result of the junior doctors' strike. On 4 July 2016 a new panel heard the appeal. There was a written outcome to that appeal sent to the Claimant on 11 June 2016 to dismiss the appeal.

37. Ms Harcus gave detailed evidence about the chronology of the appeal and the difficulties in the course of that chronology which the Trust experienced through no fault of its own in procuring a fair and effective conclusion to that process. It is not in the circumstances necessary for the Tribunal to examine in any detail the meticulous explanations provided by Ms Harcus because as the Tribunal has already recorded, her evidence was not challenged in any respect when she was called to the witness

table.

38. Nevertheless the Tribunal records her conclusions which the Tribunal accepts. The Respondent made an error in having overlooked whether all the members of the panel appointed for the September 2015 appeal hearing had had the training required under NHPS. That was unfortunate and the Trust acknowledged that mistake at the time and an apology was made to the Claimant. However, the Trust was largely frustrated in its efforts to set up the appeal hearing thereafter by a series of external events over which it had little or not control. Despite its best efforts to set up that appeal hearing on three occasions after September 2015, those are the reasons why the appeal hearing was not heard until 4 July 2016.

39. It is clear from the unchallenged evidence of Ms Harcus that none of the Trust's actions in relation to setting up the appeal had anything whatsoever to do with the Claimant raising race and age discrimination concerns, nor were they in themselves attributable to race or age discrimination. We find as explained and concluded by Ms Harcus that the Trust did respond to concerns raised about the appeal process, that it did consult with the Claimant, and that there was as full communication as was practicable having regard to the events visited on the Respondent which led to the delays.

40. The appeal panel was not improperly constituted. The Tribunal agrees with the unchallenged statement made by Ms Harcus in her evidence that the Claimant had a fair appeal hearing in the end on 4 July 2016 and that the issues experienced in arranging that hearing did not effect the outcome overall. In that context the Tribunal notes that the panel was chaired by a very experienced ex-solicitor and full-time Tribunal Judge, Mr Laurence Brass, and it is apparent from the outcome letter explaining the result of that appeal that his professionalism guided the panel members and the Trust to an effective and reliable conclusion.

41. The following subheadings are taken from the impliedly agreed list of issues.

Unfair dismissal

Was the Claimant dismissed for one of the potentially fair reasons set out in section 94(1) of the Employment Rights Act 1996, namely by reason of capability?

42. The Claimant was dismissed on the ground of capability. That is apparent from the careful investigation of the two SUI's and following from that, the investigation of the Claimant's roles in each of those two SUI's. A number of different senior clinicians played important roles in those investigations but the themes of incompetence identified in all those investigations demonstrate a clear basis for the disciplinary proceedings taken against the Claimant and indeed the ultimate conclusion.

Was the decision to dismiss the Claimant a fair sanction, that is, was it within the band of reasonable responses for a reasonable employer?

43. In the judgment of the Tribunal, it having been identified that on two separate occasions the standard of clinical care evinced by the Claimant's conduct fell below the standard of an ordinarily competent specialist of an equivalent rank to the Claimant's and having regard to the Claimant's own seniority and the level of responsibility held by

him for patient care, the decision to dismiss in the circumstances was not outwith that of any reasonable employer.

Did the Respondent follow a fair procedure having regard to the provisions of Section 98(4) of the Employment Rights Act 1996 in relation to the following:

a. Did the Respondent warn the Claimant in advance of being dismissed of any concerns regarding his capability/performance and the consequence of there being no improvement?

b. Did the Respondent give the Claimant a reasonable opportunity to improve his performance prior to dismissal?

44. In the circumstances of the events of the first and second SUI's, the Tribunal does not regard these two questions as pertinent to this case. Each of those two SUI's was essentially a trigger event, either of which might have led to such serious concerns regarding this senior and responsible employee's capability that a capability procedure would have been justified without more. Moreover, as the Tribunal has already examined, the opportunities for remediation in the Claimant's case were reasonably not regarded as a way forward for two reasons: (a) having regard to the restrictions on the Claimant's clinical practice and the unavailability of resources within the Trust and the non-availability of an opportunity outside the Trust for remediation; and (b) the Claimant's own lack of insight.

c. Did the Respondent conduct a reasonable investigation into the Claimant's performance/capability?

45. There are in this case four high quality detailed reports each of which traduces the Claimant's competence. Although those reports took some time, that is unsurprising in the circumstances where the reports were prepared by senior clinicians who had other priorities in their busy professional lives and were acting within the limited resource environment of the National Health Service. Undoubtedly, there was here a sufficiency of investigation.

d. Did the Respondent give the Claimant a reasonable opportunity to provide an explanation in response to the allegations relating to his capability?

46. Yes, that is undoubtedly so. The Claimant had a full opportunity not only to take advice but on the basis of that advice and a proper opportunity to reflect, to make a full professional and considered contribution to each of those four investigations and indeed also to meet the allegations that were made against him at a lengthy capability hearing which took place over two days.

e. Did the Respondent have adequate evidence of the Claimant's incompetence at the date of dismissal?

47. Yes, the clinical conclusions expressed consistently by all the professionals, all the senior clinicians involved in this case whose opinions were canvassed, were based on matters of fact about which there was unanimity.

f. Did the Respondent consider whether there were any alternative roles that the

Claimant reasonably could have undertaken?

48. Having regard to the Claimant's degree of speciality this was not a reasonably required consideration. It may be that it is relevant to consider remediation again under this heading. The Tribunal has already made the point and reached the conclusion that the Respondent lacked the resources for appropriate remediation in the Claimant's case and also that it was clear from the Claimant's conduct over an extended period of time that he had no, or no sufficient insight, into his own need for remediation to make such a proposal reasonable or worthwhile.

g. Did the Respondent delay the Claimant's appeal for approximately one year and two months?

49. The Tribunal has already reached trenchant conclusions in relation to this aspect of the Claimant's case which he abandoned during the course of the hearing when he decided not to challenge any of the evidence given by Ms Harcus.

h. Did the Respondent fail to adequately communicate and consult with the Claimant about his appeal?

50. Again, this prospective criticism of the Respondent's process fell away when the Claimant decided not to challenge Ms Harcus' evidence.

i. Did the Respondent fail to respond or to deal with the Claimant's concerns raised about the appeal process?

51. Again, the Claimant's prospective case in this regard fell away when he declined to cross-examine Ms Harcus about her careful explanations of these matters.

j. Was the Claimant afforded a fair appeal hearing insofar as the Claimant alleges that the panel was improperly constituted and that his case was decided within an hour which the Claimant says was insufficient due to its complexity?

52. Again, the Claimant's prospective case in this respect fell away when he declined to cross-examine Ms Harcus. Independently the Tribunal has concluded that the appeal hearing conducted over an intense five or six hours of hearing proceeded by extensive pre-reading and followed up with a carefully drafted and clearly expressed outcome letter was entirely sufficient to meet the reasonable needs of the process.

k. The fact that the Claimant's appeal was not upheld

53. The appeal decision was reached following a fair process and the explanations given for the dismissal of that appeal in the outcome letter satisfied any obligation in reasonableness.

l. The fact that the Claimant was not reinstated

54. The Claimant was not reinstated because he had been fairly dismissed and his appeal was not allowed.

55. Accordingly, the Tribunal finds that the Claimant was fairly dismissed on the

ground of capability.

Age discrimination

Did the Respondent treat the Claimant less favourably because of age compared to how the Respondent treated, or would treat others when the Respondent:

a. Made its decision not to follow the Action Plan for re-training as suggested by NCAS; and

b. Dismissed him.

56. The Claimant relies on a hypothetical comparator whose age was not identified The Tribunal infers that the hypothetical comparator would have been of a younger age, perhaps 20 years younger. The Tribunal has found that notwithstanding the intemperate and minority views of the email from Victor Lewis sent during the interregnum that the decision made by the capability hearing panel was one which was reached on the basis that a six month programme of remediation was impractical; (a) because the Trust lacked the resources and because neighbouring trusts were not able to assist and (b) because any remediation would only have worked if the Claimant had enjoyed an insight into his need for remediation which the Tribunal has found in accordance with the views of the capability panel that the Claimant did not. As to the decision to dismiss the Claimant, that was based not upon his age the Tribunal finds but upon the basis of his clinical competence or lack of it as demonstrated in the four reports arising from the two SUI's in which the Claimant was implicated.

Race discrimination

"Did the Respondent treat the Claimant favourably because of race compared to how the Respondent treated or would treat others when, in relation to the incident of July 2013, it:

a. Placed the Claimant on restricted clinical duties and then suspended him from full clinical practice;

b. Commenced a formal investigation under its 'Maintaining High Professional Standards in the Modern NHS' Policy;

c. Referred the Claimant to the National Clinical Assessment Service;

d. Subjected the Claimant to formal capability proceedings;

e. Dismissed the Claimant; and

f. Referred the Claimant to the General Medical Council.

57. The Claimant relies first of all upon a real comparator whom the Tribunal will call "Registrar A" and additionally, or alternatively, on a hypothetical comparator. The Claimant is Black and of West African (Nigerian) national origin. He had a clinical colleague, Registrar A, British South Asian, on duty with him during what could loosely be described as the night shift on the night of 4/5 July 2013. It is clear from the SUI

report prepared into that incident that there were some grounds for criticism of the conduct of Registrar A. However it is also clear not only from that first SUI report but also from the overview into that report written and expressed by Mrs Sanghi that the criticisms which can be made of Registrar A are in a much lesser category than the clinical criticisms which have been made consistently by clinicians of the Claimant arising from his conduct during that shift.

58. Accordingly, there was some contention as to the relative seniority of the Claimant and the so-called real comparator, Registrar A. Registrar A was in training. He had become a registrar earlier this century and at some point after the events of July 2013 had been appointed as a consultant in the speciality of obstetrics and gynaecology. There was some anecdotal evidence to suggest that by the date of that first incident he had already achieved his membership of the Royal College. On that basis the Claimant insisted that Registrar A was obviously senior to him and somehow therefore responsible for the errors and omissions identified and attributable to the Claimant.

59. There is no sense from the records available or indeed any of the senior clinicians' analysis of those records and recollections of the events of that evening which suggests that Registrar A assumed any supervisory position in relation to the Claimant. Registrar A was indeed much younger than the Claimant and clearly still in training notwithstanding his superior qualification and (presumably) imminent appointment to a more senior specialist hospital post. In any event, what the Claimant is unable to deny is that by July 2013 he had been engaged in the speciality of obstetrics for more than 25 years and so though he may have lacked in seniority of qualification he certainly had an advantage in terms of experience.

60. The Tribunal has concluded in any event that there is no sense in which Registrar A was supervising what was done by the Claimant. The Claimant's complaint has been that Registrar A was let off the hook and that the Claimant as a Black Nigerian was treated less favourably. Having regard to the clinical errors made by the Claimant, which were not made by Registrar A and which were much more serious than the errors identified in the performance of Registrar A on that busy night in a chaotic obstetrics ward, the Tribunal rejects the Claimant's case to have been less favourably treated than a comparator. Registrar A was not a true comparator because his conduct was not of the same degree of clinical incompetence.

61. In each of the complaints of less favourable treatment identified by the Claimant as attributable to his race, colour and/or national origin and/or age, the Tribunal has examined these allegations in the context of a hypothetical comparator, a White British registrar. It will be apparent from the conclusions already reached by the Tribunal that it is the Tribunal's judgment that there was a broad and clear basis arising from the Claimant's clinical incompetence which justified the treatment of the Claimant in each of the complaints identified in this claim of race discrimination. The Tribunal has not been able to identify a prima facie case made out by the Claimant to show race discrimination and ultimately it is persuaded that the true reason for the treatment of the Claimant was the clinical incompetence of the Claimant and not one of his protected characteristics.

Breach of contract

Did the Respondent breach the Claimant's contract of employment in:

a. Failing to adhere to the provisions of the contractually binding policy 'Maintaining High Professional Standards in the Modern NHS', which specifies time limits on suspension, with formal reviews required at specific stages. The Claimant's position is that these reviews never took place;

b. Breaching the implied duty of care;

c. Breaching the Grievance Policy by failing to deal with the Claimant's grievance and breaching the implied duty to deal with grievances promptly.

62. Nothing was made of these allegations during the hearing by the Claimant. He did not put this case in any respect to any of the witnesses called by the Respondent. Clearly, in respect of breach of contract the burden of proof lies with the Claimant to demonstrate to the Tribunal that there has been a relevant breach. In the circumstances the Claimant has not achieved that and the claim must fail.

Victimisation

The Claimant alleges that he was subjected to the following detriments for having done the protected acts:

a. The Claimant's appeal was delayed for approximately one year and two months;

b. The Respondent failed adequately to communicate and consult with the Claimant about his appeal;

c. The Respondent failed to respond or to deal with his concerns raised about the appeal process;

d. The Claimant was no afforded a fair appeal hearing as the panel was improperly constituted and his case was decided within an hour which the Claimant says was insufficient due to its complexity;

e. His appeal was not upheld; and

f. He was no reinstated.

63. The Tribunal has held that the reason why the Claimant suffered these events had nothing whatsoever to do with the two protected acts identified in this judgment (or either of them). The circumstances of the appeal were uninfluenced the Tribunal finds by either the allegations of discrimination made in that appeal and/or the allegations of discrimination made in the first Employment Tribunal claim issued by the Claimant in August 2015. The Respondent did not subject the Claimant to any detriments because of either of the protected acts.

64. Accordingly, all of the complaints are dismissed. The Claimant's claim is

dismissed.

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Employment Judge Ferris

21 February 2017