EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		*Respondent*
Mr Michael Gibson	**AND**	**Newcastle upon Tyne Hospitals NHS Foundation Trust**

JUDGMENT OF THE TRIBUNAL

Heard at: **North Shields** **On: 8, 11-14 18-20 June 2018**
Deliberations: 5 July 2018 and 18 0ctober 2018

Before: **Employment Judge A M Buchanan**
Non-Legal members: Mr S Hunter and Mr S Moules

Appearances

For the Claimant: **Mr D Bayne of Counsel**
For the Respondent: **Mr A Blake of Counsel**

JUDGMENT

It is the unanimous Judgment of the Tribunal that:
1. The claim of direct age discrimination is well-founded in part and the claimant is entitled to a remedy.
2. The claim of harassment related to age is well-founded in part and the claimant is entitled to a remedy.
3. The claim of indirect age discrimination in not well-founded and is dismissed.
4. The claim of victimisation is well-founded in part and the claimant is entitled to a remedy.
5. The claim of less favourable treatment pursuant to the Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations 2002 is not well-founded and is dismissed.
6. The claim of less favourable treatment pursuant to the Part Time Workers (Prevention of Less Favourable Treatment) Regulations 2000 is not well-founded and is dismissed.
7. The claim of unfair dismissal is well-founded and the claimant is entitled to a remedy.
8. The alternative claim for a redundancy payment is well-founded.
9. The claim of wrongful dismissal in not well-founded and is dismissed.

10. A Remedy Hearing will take place at 10:00am on 13 December 2018 at North Shields.

REASONS

Preliminary Matters

1. By an ET1 filed on 17 January 2017 the claimant brought complaints to the Tribunal of age discrimination pursuant to the provisions of the Equality Act 2010 ("the 2010 Act") and for breach of the Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations 2002 ("the 2002 Regulations") and for breach of the Part Time Workers (Prevention of Less Favourable Treatment) Regulations 2002 ("the 2000 Regulations"). The claimant relied on a conciliation certificate on which Day A was 13 December 2016 and Day B was 13 January 2018. The respondent filed its response on 28 February 2017 and denied all liability to the claimant.

1.2 A private Preliminary Hearing ("PH") by telephone took place before Employment Judge Hargrove on 14 March 2017 when orders were made. Further private preliminary hearings by telephone took place before Employment Judge Buchanan on 28 April 2017 and 28 July 2017 and were adjourned to enable internal procedures of the respondent in relation to the employment of the claimant to be completed.

1.3 A further private PH by telephone took place on 30 October 2017 before Employment Judge Buchanan when permission to amend the claim form to add claims of unfair dismissal, further allegations of age discrimination, victimisation, wrongful dismissal and a claim for a redundancy payment were permitted to be added. All such claims were set out in an amended claim form filed on 19 October 2017. The respondent filed an amended response on 27 November 2017 which again denied all liability to the claimant.

1.4 A further private PH by telephone took place before Employment Judge Buchanan on 18 December 2017 when the claims and issues arising were identified. Case management orders were made to bring the matter on for a final hearing on the above dates.

1.5 On 9 May 2018 witness orders were granted on the application of the claimant to secure the attendance at the Tribunal of Paul Sanderson, John Andrews, David Fender, Alistair Irwin, Andrew Bowey and Dorothy Gillespie.

1.6 The Tribunal was unable to sit on 15 June 2018 as had been the intention. At the conclusion of the hearing the Tribunal reserved its decision. This Judgment is issued with full reasons in order to comply with the provisions of Rule 62(2) of Schedule I to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013. The Tribunal felt it necessary to deliberate over two days. The second day of deliberations could only be arranged for 18 October 2018. The consequent delay in completing this Judgment and Reasons is much regretted.

The claims

2 The claimant advances the following claims to the Tribunal:-

2.1 A claim of direct age discrimination relying on the provisions of sections 5, 13 and 39 of the Equality Act 2010 ("the 2010 Act").

2.2 A claim of indirect age discrimination relying on the provisions of sections 5, 19 and 39 of the 2010 Act.

2.3 A claim of harassment related to age relying on the provisions of sections 5, 26 and 40 of the 2010 Act.

2.4 A claim of victimisation relying on the provisions of sections 27 and 39(4) of the 2010 Act.

2.5 A claim of breach of the Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations 2002 ("the 2002 Regulations").

2.6 A claim of breach of the Part Time Workers (Prevention of Less Favourable Treatment) Regulations 2000 ("the 2000 Regulations").

2.7 A claim of ordinary unfair dismissal relying on the provisions of sections 94/98 of the Employment Rights Act 1996 ("the 1996 Act").

2.8 A claim for a statutory redundancy payment (in the alternative to the unfair dismissal claim) relying on the provisions of sections 135-146 and 162-165 of the 1996 Act.

2.9 A claim of wrongful dismissal – breach of contract (unpaid notice pay).

The issues

3 The issues in the various claims are:

Age

1. To which particular age group does the Claimant say he belongs, such that he is a member of a group which shares a protected characteristic?

2. What particular age group does the Claimant compare himself to? It is **noted and recorded** that the claimant is 63 years of age and the comparators, who are six consultant orthopaedic surgeons specializing in paediatric deformity surgery, are aged between 36 and 56 years.

3. Does the Claimant have an actual comparator? If so, who?

4. If there is no actual comparator and the Claimant compares himself to a hypothetical comparator, what are the circumstances and/or characteristics of the hypothetical comparator?

Direct Discrimination - Issue One

5. Was it an act of direct discrimination for the Respondent to put in place in or about 2013 and then implement a succession plan that resulted in the dismissal of the

Claimant in September 2017?

6. It is agreed the act of dismissal is capable of being less favourable treatment.

7. Why is it said that this less favourable treatment is because of the Claimant's age?

8. Can the Respondent show that this act was objectively justified, i.e. a proportionate means of achieving a legitimate aim?

Direct Discrimination - Issue Two

9. Were the Respondent's offers of employment on fixed term contracts each an act of direct discrimination; those being from:

(i) 3 April 2014 for 12 months;
(ii) 3 April 2015 for 12 months; and
(iii) 3 April 2016 for 6 months (ending 30 September 2016).

10. What is the less favourable treatment complained of by the Claimant in relation to this treatment?

11. Why is it said that this less favourable treatment is because of the Claimant's age?

12. Can the Respondent show that this act was objectively justified, i.e. a proportionate means of achieving a legitimate aim?

Direct Discrimination - Issue Three

13. Was it an act of direct discrimination for the Respondent to notify the Claimant in September 2016 that it would not extend his contract of employment beyond 30 September 2016?

14. What is the less favourable treatment complained of by the Claimant in relation to this treatment?

15. Why is it said that this less favourable treatment is because of the Claimant's age?

16. Can the Respondent show that this act was objectively justified, i.e. a proportionate means of achieving a legitimate aim?

Direct Discrimination - Issue Four

17. On 1 October 2016, the Respondent extended the Claimant's employment to permit him to appeal against the termination of his employment and placed him on special leave of absence against the Claimant's wishes. Was this an act of direct discrimination?

18. What is the less favourable treatment complained of by the Claimant in relation to this treatment?

19. Why is it said that this less favourable treatment is because of the Claimant's age?

20. Can the Respondent show that this act was objectively justified, i.e. a

proportionate means of achieving a legitimate aim?

Direct Discrimination - Issue Five

21. What if anything, did the Respondent say to its employees regarding the Claimant's absence and/or status after 1 October 2016 and is that act or omission direct discrimination?

22. What is the less favourable treatment complained of by the Claimant in relation to this treatment?

23. Why is it said that this less favourable treatment is because of the Claimant's age?

24. Can the Respondent show that this act was objectively justified, i.e. a proportionate means of achieving a legitimate aim?

Direct Discrimination - Issue Six

25. Was it an act of direct discrimination for the Respondent to fail to meet with the Claimant to discuss his appeal against the decision to terminate his employment until 11 April 2017 and to fail to communicate its decision to the Claimant until 12 April 2017?

26. What is the less favourable treatment complained of by the Claimant in relation to this treatment?

27. Why is it said that this less favourable treatment is because of the Claimant's age?

28. Can the Respondent show that this act was objectively justified, i.e. a proportionate means of achieving a legitimate aim?

Direct Discrimination - Issue Seven

29. Was it an act of direct discrimination for the Respondent to dismiss the Claimant?

30. What is the less favourable treatment complained of by the Claimant in relation to this treatment?

31. Why is it said that this less favourable treatment is because of the Claimant's age?

32. Can the Respondent show that this act was objectively justified, i.e. a proportionate means of achieving a legitimate aim?

Did the Respondent's Actions Amount to a Continuing Act of Discrimination

33. What acts of the Respondent can be grouped together to constitute a continuing act and what acts are unconnected?

34. Which continuing acts are in time and which continuing acts are out of time?

35. Would it be just and equitable to extend the time to present a claim?

Indirect Age Discrimination

36. What relevant protected characteristic does the Claimant say he has? It is **noted and recorded** that the protected characteristic relied on is that of age.

37. What is the provision, criterion or practice ("PCP") that the Claimant alleges the Respondent applied? It is **noted and recorded** that the criteria relied on are those employed by the respondent which resulted in the claimant being selected for a succession plan rather than any of his colleagues.

38. In relation to each act or omission, the Tribunal will have to determine:

(i) did the Respondent apply the PCP to other Consultants with whom the Claimant does not share the protected characteristic?

(ii) whether the PCP put persons with whom the Claimant shares a protected characteristic at a particular disadvantage when compared with persons with whom the Claimant does not share that protected characteristic and if so what disadvantage?

(iii) whether the application of the PCP put the Claimant at that same disadvantage?

39. Can the Respondent show that the application of the PCP was a proportionate means of achieving a legitimate aim?

40. In particular:

(i) what was the Respondent's aim?

(ii) was the aim legitimate?

(iii) was it a proportionate means of achieving the relevant legitimate aim:

(a) is the aim sufficiently important to justify limiting a fundamental right;

(b) is the application of the PCP rationally connected to the aim; and

(c) are the means chosen no more than is necessary to accomplish the objective?

Harassment - Issue One

41. If the Tribunal accepts that David Deehan (Clinical Director) made the comments pleaded by the Claimant, was this an act of harassment?

42. Did the alleged unwanted conduct relate to the Claimant's age?

43. Did this act have the purpose or effect of:

(i) violating the Claimant's dignity; or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

Harassment - Issue Two

44. On 1st October 2016, the Respondent extended the Claimant's employment to permit him to appeal against the termination of his employment and placed him on special paid leave of absence against the Claimant's wishes. Was this an act of harassment?

45. Did the alleged unwanted conduct relate to the Claimant's age?

46. Did this act have the purpose or effect of:

(i) violating the Claimant's dignity; or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

Harassment - Issue Three

47. What, if anything, did the Respondent say to its employees regarding the Claimant's absence and/or status after 1st October 2016 and is that act or omission harassment?

48. Did the alleged unwanted conduct relate to the Claimant's age?

49. Did this act have the purpose or effect of:

(i) violating the Claimant's dignity; or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

Victimisation - Issue One

50. It is accepted the decision not to extend the Claimant's contract of employment beyond 30 September 2016 is capable of constituting a detriment.

50A. Which "protected act" in s.27(2) of the Equality Act 2010 does the Claimant rely upon? It is **noted and recorded** that the first protected act relied on in relation to all five discrete allegations of victimisation is the letter from the solicitors for the claimant to the respondent dated 27 September 2016 containing allegations of age discrimination. Those allegations were subsequently repeated in various ways and at various times and will be detailed in witness evidence.

50B. Did the alleged detriment occur because of a protected act (or because the Respondent believed the Claimant may do a protected act)?

Victimisation - Issue Two

51. On 1 October 2016, the Respondent extended the Claimant's employment to permit him to appeal against the termination of his employment and placed him on special leave of absence against the Claimant's wishes. Was this a detriment ?

52. Which "protected act" in s.27(2) of the Equality Act 2010 does the Claimant rely upon?

53. Did the alleged detriment occur because of a protected act (or because the Respondent believed the Claimant may do a protected act)?

Victimisation - Issue Three

54. What, if anything, did the Respondent say to its employees regarding the Claimant's absence and/or status after 1 October 2016 and is that act or omission a detriment?

55. Which "protected act" in s.27(2) of the Equality Act 2010 does the Claimant rely upon?

56. Did the alleged detriment occur because of a protected act (or because the Respondent believed the Claimant may do a protected act)?

Victimisation - Issue Four

57. Did the Respondent subject the Claimant to a detriment by failing to meet with the Claimant to discuss his appeal against the decision to terminate his employment until 11 April 2017 and to fail to communicate its decision to the Claimant until 12 April 2017?

58. Which "protected act" in s.27(2) of the Equality Act 2010 does the Claimant rely upon?

59. Did the alleged detriment occur because of a protected act (or because the Respondent believed the Claimant may do a protected act)?

Victimisation - Issue Five

60. It is admitted that dismissal is an act which is capable of amounting to a detriment.

61. Which "protected act" in s.27(2) of the Equality Act 2010 does the Claimant rely upon?

62. Did the alleged detriment occur because of a protected act (or because the Respondent believed the Claimant may do a protected act)?

Breach of Fixed Term Employee Regulations - Issue One

63. It is admitted that the refusal to extend the fixed term contract on 20 September 2016 and the dismissal on 30th September 2017 are acts of less favourable treatment.

64. To whom does the Claimant compare himself? Does he have an actual comparator and if so whom?

65. Is the treatment less favourable than that of the comparator?

66. Was the alleged less favourable treatment on the grounds that the Claimant is a fixed term employee?

Breach of Fixed Term Employee Regulations - Issue Two

67. On 1 October 2016, the Respondent extended the Claimant's employment to permit him to appeal against the termination of employment and placed him on special paid leave of absence against the Claimant's wishes. Was this less favourable treatment? To whom does the Claimant compare himself? Does he have an actual comparator and if so whom?

68. What detriments(s) did the Claimant suffer as a result of the less favourable treatment?

69. Is the treatment less favourable than that of the comparator?

70. Was the alleged less favourable treatment on the grounds that the Claimant is a fixed term employee?

Breach of the Part Time Workers Regulations - Issue One

71. The Respondent accepts that with regard to its custom and practice the Claimant was a part time worker from 1 January 2016 until 30 September 2017. The Respondent admits that the refusal to extend the fixed term contract after 30 September 2016 and/or his dismissal on 30 September 2017 is less favourable treatment.

72. To whom does the Claimant compare himself? Does he have an actual comparator, if so whom?

73. What detriment(s) did the Claimant suffer as a result of the less favourable treatment?

74. Is the treatment less favourable than that of the comparator?

75. Was the alleged less favourable treatment on the grounds that the Claimant is a part time worker?

76. Can the Respondent show that the alleged less favourable treatment was justified,i.e. a proportionate means of achieving a legitimate aim?

Breach of the Part Time Workers Regulations - Issue Two

77. On 1 October 2016, the Respondent extended the Claimant's employment to permit him to appeal against the termination of employment and placed him on special paid leave of absence against the Claimant's wishes. Was this less favourable treatment?

78. To whom does the Claimant compare himself? Does he have an actual comparator, if so whom?

79. What detriment(s) did the Claimant suffer as a result of the less favourable treatment?

80. Is the treatment less favourable than that of the comparator?

81. Was the alleged less favourable treatment on the grounds that the Claimant is a part time worker?

82. Can the Respondent show that the alleged less favourable treatment was justified,i.e. a proportionate means of achieving a legitimate aim.

Unfair Dismissal

83. Has the Respondent established the reason for the dismissal?

84. What was that reason and did it fall within Section 98(2) Employment Rights Act 1996 or was the dismissal undertaken for some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the Claimant held?

85. In the circumstances (including the size and administrative resources of the Respondent's undertaking) did the Respondent act reasonably or unreasonably in treating it as sufficient reason for dismissing the Claimant, as determined in accordance with equity and the substantial merits of the case, and in particular:

(i) was it reasonable for the Respondent to draft and then implement a succession plan for the Claimant alone that involved it employing two additional Spinal Deformity Surgeons at Consultant level then dismissing the Claimant when these two new Surgeons were up to speed?

(ii) if the Tribunal concludes that a potential redundancy situation existed, was is reasonable for the Respondent to select the Claimant for dismissal without pooling all of the consultants specialising in paediatric deformity surgery or the wider group of spinal surgeons and using an objective, reasonable and non-discriminatory selection criteria to select which of the consultants should be placed at risk of redundancy and then dismissed?

(iii) If it was unfair, would following a fair procedure have made any difference to the outcome?

(iv) To what extent, if any, did the Claimant cause/contribute to his dismissal by his conduct?

Wrongful Dismissal

86. Given that the fixed term contract of employment of the Claimant had expired on 30 September 2016, was the Claimant dismissed wrongfully and in breach of

the statutory minimum notice provisions set out in Section 86 Employment Rights Act 1996 when his employment was terminated by the Respondent in September 2017?

87. If so, what was the Claimant's date of commencement of continuous service?

88. And what minimum period of notice of termination was required by Section 86 ERA?

Statutory Redundancy Payment

89. If the Tribunal holds that the Claimant was dismissed by reason of redundancy, the Respondent accepts the Claimant is entitled to a Statutory Redundancy Payment.

90. If so, what was the Claimant's date of commencement of continuous service?

91. And to what statutory redundancy payment was the Claimant entitled under Section 162 ERA?

Witnesses

4. In the course of the hearing we heard from:

4.1 The claimant who produced a witness statement of 325 closely typed paragraphs and 74 pages. The claimant is a forceful individual and has a strong sense of grievance against the respondent arising from the way he perceives he was treated after 25 years' exemplary service with the respondent. We assessed his evidence as credible and truthful in spite of his sense of grievance.

4.2 Paul Sanderson ("PS") – Consultant Orthopaedic Surgeon. We found this witness to be somewhat defensive in the way he gave his evidence.

4.3 David Fender ("DF") - Consultant Orthopaedic Surgeon.

4.4 Andrew Bowey ("AB") - Consultant Orthopaedic Surgeon. This witness was the most impressive of the consultant witnesses called before us. He gave evidence in a very straight forward way and he was entirely credible. We prefer the evidence and the recollection of this witness in respect of the meeting in January 2016 over that of the witnesses DD and PP called by the respondent. We accept the evidence of this witness that he expected when he began work for the respondent to be working as a pair with the claimant in complex cases.

4.5 Nigel Brewster ("NB") - Consultant Orthopaedic Surgeon and former Clinical Director of the respondent. This witness gave a short statement which was not controversial except in respect of the last sentence. He did not attend. His statement was not accepted by the respondent. We gave it very little weight. The final sentence of his short statement was to the effect that there was no plan that

the claimant should completely stop work for the respondent on the appointment of AB.

4.6 John Andrews ("JA") - Consultant Orthopaedic Surgeon.

4.7 Dorothy Gillespie - Senior Medical Secretary. This witness was not called before us. We read her statement and accepted the contents of it by agreement of the parties. The statement was not of assistance to us.

4.8 Alistair Irwin ("AI") - Consultant Orthopaedic Surgeon.

For the respondent:

4.9 Philip Powell ("PP") – Directorate Manager of the Musculo-Skeletal Services Directorate. We conclude that this witness was caught in the middle of a dispute between the consultant surgeons and the clinical directors DD and Craig Gerrand ("CG") and in particular two very forceful individuals in the form of the claimant and DD.

4.10 David John Deehan ("DD") – Consultant Orthopaedic Surgeon and at the material time Joint Clinical Director from October 2015 when NB ceased to be clinical director. This witness is equally as forceful as the claimant but found himself in a position of greater authority and influence at the material time and used it to do the claimant down and settle old scores. His relationship with the claimant was very poor at best and dysfunctional at worst. As clinical director he was intent on taking a much more proactive role than his predecessor NB. We assess him as evasive and defensive as a witness.

4.11 Angela Frances Dragone ("AD") – Finance Director. This witness saw the situation in relation to the claimant's employment as a funding issue and nothing more. She did not engage with the wider allegations of age discrimination and accepted what was relayed to her by PP and DD.

4.12 Angela Carver ("AC") – Solicitor. This witness was invited by the respondent to carry out the consultation with the claimant in respect of the redundancy situation which had been identified by AD. She was invited to act as an independent person to carry out the consultation. In fact, she is a solicitor who works for a firm of solicitors engaged by the respondent and on her assessment spends around 50% of her time doing work for the respondent. We saw this witness as someone who was placed in a difficult position by accepting the assignment she was offered. This witness saw evidence of a succession plan known to the claimant. We do not agree with that central conclusion.

4.13 Neil William Watson ("NW") – Director of Pharmacy. This witness was the dismissing officer. He took the report of AC at face value and effectively rubber stamped it. He did not have the inclination to look behind the conclusion reached by AC.

4.14 Hilary Parker ("HP") – non-executive member of the Board of Corporation of the respondent and the person who dealt with the appeal of the claimant against his dismissal. She supported the decision of NW and with it the conclusion of AC without rigorous challenge. She reached the conclusion that communication between the claimant and the central players for the respondent was poor. In that conclusion she was absolutely correct. The communication of the respondent in respect of the plans of the claimant and his employment generally was woefully inadequate. We attribute much of this to an unwillingness by the respondent, through its officers, to address matters with the claimant given the forceful nature of his personality.

4.15 Two central players in the events of relevance in this matter were the then Chief Executive Officer ("CEO") of the respondent LF and the then Medical Director (now joint acting CEO) AW. By the time of the hearing LF had left the respondent suddenly some months before and he was not called as a witness. AW attended the Tribunal hearing on at least one occasion but was not called to give evidence. Another less central figure who appears in relevant correspondence and meetings is CG who was joint clinical director with DD. We did not hear from CG.

Documents and Interpretation

5.1 We had three lever arch files of documents running to over1123 pages. Any reference in this Judgment to a page number is a reference to the relevant page from the trial bundle. Many documents were added to the trial bundle as the hearing progressed and they were appropriately numbered.

5.2 We refer to PA's. This is shorthand for a period of programmed activity for surgeons. Each period lasts 4 hours and a typical week for a full-time surgeon will entail 10 or more PA's.

Findings of fact

6. Having considered the oral and documentary evidence placed before us and having considered that evidence and the way in which it was given, we make the following findings of fact of the balance of probabilities:

6.1 The claimant was born on 6 July 1953. He obtained the degrees MB BS from the University of London in May 1977, became a Fellow of the Royal College of Surgeons of England in May 1982 and received the Certificate of Accreditation of Higher Surgical Training in June 1988. He was appointed as a Consultant in Traumatic and Orthopaedic Surgery with the Respondent on 14 November 1990 effective from 1 January 1991. He is a surgeon of national and international reputation. The claimant was the President of the British Scoliosis Society ("BSS") from October 2010 until October 2012.The circumstances of his dismissal which is central to these proceedings do not in any way whatsoever

question his universally recognised surgical skills nor do they involve allegations of misconduct of any kind against the claimant. The claimant was 60 years of age when he applied to retire and return in October 2013. He was eligible to make such an application after he had attained the age of 50. The normal retirement age under the NHS pension scheme is 67.

6.2 The events here arise from the Musculoskeletal Services Directorate of the respondent which has three areas of speciality namely Rheumatology, Adult and Paediatric trauma and Elective Orthopaedics. The Elective Orthopaedics divides into foot and ankle, lower limb, upper limb, spinal, sarcoma and paediatric sub specialities. The Clinical Director supervises consultants and clinical governance and a Directorate Manager covers strategy, finance, performance, staff and operational matters. The Directorate has an annual budget of between £45 and £46m.. Specifically, this matter relates to the work of the spinal unit ("the Unit"). Before the claimant's application to retire and return there were 5 consultant surgeons in the Unit which had increased to 6.7 surgeons by September 2016. It was accepted by PS that no business case had ever been advanced for an increase to 7 surgeons or indeed to 6.7 surgeons.

6.3 The respondent has a Retirement Policy Procedure and Guidance ("the Policy" - pages 97-121) effective from 1 May 2013 and said to expire on 30 June 2014. The arrangements covered included the option of flexible retirement through the NHS Pension Scheme for members "*approaching or thinking about retirement*".

6.4 The Policy referred to the Respondent's Flexible Working Arrangements Policy which contained details of "*reduced hours, including part-time hours, job share and term-time working, flexible working and career breaks".* The aim of the Policy was said to be "*To demonstrate the Trust's commitment to tackling age discrimination in retirement and promoting age diversity in its workforce".* The Policy included guidance to managers to enable them to plan ahead and "*support preparation for the transition of employees from work to retirement".* Under the heading "*flexible retirement*" an option to "*retire and return to the NHS"* was designed to enable employees to retire taking all their pension benefits and then to return to NHS employment and at paragraph 7.4 it was said that any new contract would be on a fixed term basis of no more than 12 months. Appendix 4 included a procedure to review fixed term contracts. We find the procedure there laid down was not followed by the respondent on the two occasions when the claimant's fixed term contract was renewed particularly in terms of meetings with the claimant.

6.5 Section 7 of the Policy was changed effective from 7 October 2014 (page121c). The agreed terms of return to work are to be confirmed in writing by the respondent and there is no longer reference to any fixed term contract: even that reference has been removed from the policy effective from 2 February 2017

(page 1210) in which an example when a flexible retirement request may not be granted is where the "*medical consultant wishes to retire and return without performing on-call duties"* (page 121P).

6.6 The BSS issued recommended standards of care for infant children and young people with spinal deformity (page 264A). The standards set out in were expressed as the minimum requirements for a paediatric spinal deformity service to be achieved over a period of time and the standards were to promote excellence in spinal deformity care. The guidance notes (page 264D) that some spinal deformity surgical procedures are so complex that two consultant surgeons are required to enable completion of the operation within a reasonable time both for patient safety and clinician fatigue. The guidance seen by the Tribunal was not dated but it was agreed to be the relevant guidance at the material time for these proceedings. The BSS is a professional group of surgeons and others with an interest in spinal deformity care. The recommendations were not binding but were to act as a guide "*for clinicians, managers and commissioners when commissioning and developing spinal deformity services locally regionally and nationally".*

6.7 There had been issues between the medical members of the Unit and its managers in the years leading up to 2013. These find reference in an email written to the claimant by a potential consultant member of the Department on 20 January 2013 (page 299). We infer that the claimant had had issues with the management of the respondent over the years particularly in relation to increasing the head count of the consultant body. The claimant was plain speaking and could be abrasive and dictatorial. He did not suffer fools gladly. He had upset the management of the respondent and was known to be a difficult character to handle.

Events in 2013

6.8 In July 2013 the claimant formed a plan to retire at the end of February 2014 and to return to work. He wished to take his NHS pension and return to work on reduced hours – it was a common strategy amongst consultant and managers to take their pension before it exceeded lifetime limits and then to return to work on reduced hours but with no appreciable drop in earnings. The claimant wished to return to work on a part-time basis but he recognised that he could not do so until other consultants had been appointed who could take up his work. He discussed this plan in principle with LF in July 2013 who assured the claimant that he could work part time on his return for as long as he wished. LF had himself retired and returned. The claimant's plan was not unusual. The discussion with LF was long and rambling and lasted for over one hour and was not minuted. LF was a very "hands on" CEO and had been in post for many years. His style was to micro manage. No important decision was taken without his approval. Managers were in thrall to him and we infer would not take decisions of importance without his

approval and support. His writ ran widely and deeply across the whole organisation. The claimant felt he needed the approval of LF to his plan and he got it.

6.9 On 17 October 2013 the claimant applied for retirement and return in accordance with the Policy. The application (page 304) stated "*I wish to retire and return to work on a part-time basis doing primarily paediatric spinal deformity surgery".* The date he wished this arrangement to begin was expressed to be 1 March 2014. In answer to a question asking the reason for the request the claimant wrote: "*To improve succession planning for the spinal deformity service and allow smooth transition when I retire completely".* In answer to a question about how the change would affect his colleagues the claimant wrote: "*There will need to be additional appointments to cover the on-call service, the scoliosis service and the sarcoma and primary tumour service...There needs to be further appointment to allow smooth transition for the service".*

6.10 In an email to the Clinical Director on 4 November 2013 (page 312) the claimant wrote in relation to a meeting to discuss his application: "*Issues to be clarified are my job plan and succession planning. For a smooth transition we need to be making more appointments very soon we need a Spinal Deformity surgeon and a Spinal Tumour Surgeon and we should be making a business case for these appointments now….".*

6.11 A meeting took place on 11 November 2013 between the claimant and PP and the then clinical director NB and it was recommended that the claimant would retire at the end of February 2014 and return in the last week of March 2014 working half-time doing paediatric spinal surgery only. The recommendation was to grant the claimant's application. At some point PP made an assumption that the claimant's intention to retire and return and the appointment of two additional consultants were connected and that the claimant would fully retire when those two posts were filled. That was not the position of the claimant and he had not said and did not say that it was at any time. No agreement was reached at this or any other meeting that the claimant would retire when the two new appointees were in post.

6.12 On 12 November 2013 (page 314) PP sent an email to HR and stated the arrangement for the retirement and return of the claimant had been agreed by LF and AW. On 13 November 2013 (page 316) the claimant wrote to PP saying that he would prefer his contract on return to be for 2 years in the first instance "*as it will take that long to properly institute the succession plan that the spinal surgeons as a group favour".* The application was subsequently passed to AW who endorsed his consent to it on an email dated 19 November 2013 (page 317). On 22 November 2013 (page 318) the claimant devised a job plan which would see him working 6.75 PA's per week which was a little over half time. The

claimant understood he would return to work on a series of fixed term contracts until such time as he decided to retire from work. The "*succession plan*" to which the claimant referred was a plan seeing the appointment of two new surgeons namely a full time spinal oncology surgeon and a full time spinal deformity surgeon with whom the claimant would work alongside on a part time basis until he retired fully at a time of his choosing. He anticipated the respondent would then employ another spinal deformity surgeon to replace him.

6.13 The need to have two spinal deformity surgeons was to follow the BSS guidelines and this is how the claimant's colleagues DF and JA had operated for some time. There was no discussion about funding the new posts with the claimant. The two additional appointments were not just to replace the 4PA's per week which the claimant was to surrender but were to help deal with the increased amount of work caused by additional referrals to the Unit and the instigation of an on-call service to provide emergency operative treatment for spinal cases outside normal working hours.

6.14 On 22 November 2013 the claimant wrote (page 320) to NB and asked: "*how are you getting on with the job plans for the 2 posts….1 post should be advertised as a spinal tumour surgeon deformity linked to the sarcoma service…while the second should be a deformity surgeon appointed to work with me and take over my practice when I finally retire completely….Obviously I am acutely aware of the urgency of the problem as of the 1 March someone has to be available to cover my adult service".* NB replied the same day to say he had been told to go through "*the formal business planning approach for these posts"* and that it would be unrealistic to have someone in post by 1 March 2014.

Events in 2014

6.15 On 22 January 2014 (page 323) PP wrote to the claimant to confirm the claimant's request to retire and return had been granted and that medical Staffing "*will be writing to you with confirmation".* That confirmation (page 396) was issued by an HR Officer Claudia Sweeney on 27 January 2014 and it indicated that the claimant would return to work on a part time basis working 5 PA's per week.

6.16 Job descriptions for the two new consultant orthopaedic spinal surgeon posts were prepared: first for a surgeon (page 344) expected to have a major interest in the management of spinal tumours and secondly for a surgeon expected to have a major interest in the management of spinal deformities (page 378). The job purpose for the second post was described as: "*This is a substantive post created to develop the Specialist Spinal Deformity Service and to help to deal with the increasing demand for general spinal surgery. The responsibilities of the post are to be part of the Scoliosis Service working closely with their 3 colleagues with similar interests. The Spinal Deformity Service involves two pairs of Surgeons who work together closely. The new appointee*

will be paired with Mike Gibson who they will in part be proleptically replacing"

6.17 In January 2014 the claimant offered to return to work on a full-time basis. He stated that despite reasonable notice the respondent had done nothing about appointing new consultants and his colleagues did not have the capacity to take up the work he would surrender by working part-time. That offer from the claimant was happily accepted by NB on 23 January 2014 (page 392).

6.18 The claimant then spoke to AW who indicated that the respondent were not going to appoint new consultants. On 27 January 2014 the claimant wrote to NB (page 394) and stated that if that was the case, he would not return to work full-time on 24 March 2014 as he had offered.

6.19 On 30 January 2014 (page 405) the claimant chased NB for an answer as to whether he should return to work on a full time or a part time basis and indicated that his then present intention was to work on a part time basis "*doing mainly paediatrics as has been agreed"*. By 28 February 2014 the situation was still not clear and NB wrote an email to HR in which he advised the claimant would not be on call after his return, that the PA's he would work were *"up in the air"* but would be 6.5 if he worked part time and he concluded *"but we hope that we can persuade him to stay on current contract until we get a replacement".* These matters were not agreed by the time the claimant retired on 28 February 2014. On 3 March 2014 a letter (page 416) was issued to the claimant by HR confirming that his last day at work had been 28 February 2014 and offering a fixed term part time appointment working 6.5 PA's per week from 3 April 2014 until 2 April 2015.

6.20 On 10 March 2014 PP completed a template (page 874) for permission to advertise a post in the Unit. He noted that the appointment was "*partly succession planning for the retirement of Mr Gibson but also is development of the Spinal Service…".* On 11 March 2014 PP requested that the business case he had written for the other consultant post have the "*financy bits"* added by a colleague in finance and he wrote: "*The post-holder will pick up Mike's adult work (clinics/list) and will initially work with Mike on his paediatric case load until taking this over too, at which point Mike is likely to fully retire from the Trust".* The claimant did not see that correspondence.

6.21 A meeting of the Medical Director's Group took place on 18 March 2014 and a report was written for that meeting (page 847) by NB which indicated that the Directorate wished to advertise and appoint consultant spinal surgeons to the Unit. "*The first post is a proleptic appointment to work alongside Mike Gibson following his retirement (he will return to a part time post, which is currently unfilled). It is our intention that this person will develop increased skills in paediatric spinal deformity and be able to replace Mr Gibson's role as a Scoliosis Surgeon".* The resulting minute of that meeting reads: "*Mike Gibson wishes to*

drop to 5 sessions for a period of 2 years. It was suggested that the funding was available from the post held temporarily by D Fagan. It was acknowledged that a successor to MG was required to take over the paediatric commitments". There is no mention in this minute of any succession plan having been agreed with the claimant.

6.22 The claimant returned to work as a new starter on 3 April 2014 and agreed to return full-time for the first six months but reducing to part-time for the next six months. This was gladly agreed by NB in an email on 31 March 2014 (page 432). On 16 April 2014 a letter was sent to the claimant confirming full-time work until 4 October 2014 and part-time work thereafter until 2 April 2015 (page 463).

6.23 An investment proposal was written by PP (pages 849-855) in which it was noted that the claimant had retired on 1 March 2014 from his full time post to return on a part time flexible retirement contract "*although the surgeon has agreed to work full time for an initial period of six months in order to ensure continuity of service provision in the period until appointment to replacement posts…..In order to fully address the loss in experience and skills the Directorate has looked to appoint to two posts to ensure that the Spinal Unit can continue to provide the core services…The Deformity Consultant Surgeon appointment will work alongside Mr Gibson sharing his operating lists and clinics until such point that Mr Gibson retires fully. Funding for this post is available from within the Directorate".* There was then a request made for a new consultant post as a Tumour Consultant Surgeon. It was noted that with those two appointments the consultant body would number 6 as opposed to 5. In fact, with the claimant working part time the consultant body would then number 6.7 consultants. It is clear from these documents that the author PP was of the view that the claimant would retire fully at some point after the appointments were made but we conclude that was his assumption and was not as a result of anything said by the claimant.

6.24 The two new consultant posts in the Unit were advertised with a closing date of 11 May 2014. Interviews took place and AI was appointed to the tumour consultant post and took up his duties in May 2015. AB was appointed to the spinal deformity consultant post and took up his duties in December 2015. AB was told at interview that he would work with the claimant who would be working part-time. He was also told that as and when the claimant retired, another consultant would be appointed in order to ensure that the four consultants could operate in the Department working in pairs as recommended by the guidelines of the BSS.

6.25 On 9 July 2014 the claimant wrote (page 489) to NB saying he was pleased that the Trust had been good to its word and had appointed two more spinal surgeons and continued: "…..*as you know I always believed Andy was on our side but I was not so sure about (LF). We now need an agreed plan on how to*

ensure a smooth transition and provide appropriate support for the new appointees when they start…". The claimant subsequently offered (page 488) to continue to work full time *"doing adults until Alistair starts when he could take over my adult practice. When Andy starts he could take his share of the adults and work with me in the paediatric service. But I appreciate that this deprives the trust of its best excuse for the waiting list which is "that I have retired". Other solutions will involve the work being divided between the other spinal surgeons but they are all hard pressed because of the extra work from the acute disorder service. The situation will therefore need to be discussed with my colleagues..".*

6.26 On 18 July 2014 NB wrote (page 490) to HR and stated: "*Mike will continue on his present "full time" contract until the new surgeon is able to start probably in May 2015".* That reflected the reality of the situation as then understood but in the event AB did not start until December 2015.

Events in 2015

6.27 On 7 January 2015 (page 501) HR wrote to the claimant in respect of the review of his fixed term contract which was due to expire on 2 April 2015 asking if he wished to renew the contract. In reply the claimant indicated that he would work full-time at least until 1 December 2015 which was the date he understood AB would begin work and then he would work on a part time basis on a plan to be discussed and agreed with NB. He raised the question as to whether after flexible retirement the contract given to him was a permanent one rather than an annual fixed term contract as he understood the rules had changed. He indicated he was looking forward to working part-time and wrote: "*One thing is for certain I am not working for the money since retirement and loss of my merit award… my salary has reduced significantly….The trust… is getting an excellent deal with a lot of surgical expertise for very little money".*

6.28 The clinical director agreed to a renewal until 2 April 2016 but that a new job plan would be agreed when AI came into post (page 493). AW agreed this arrangement on 11 March 2015 (page 496). The claimant was told that the rules had changed and he no longer needed to take a 14 day break between contracts and it was confirmed his contract would be extended for one year to 2 April 2016 (page 499). On 19 March 2015 (page 504) the extension of the contract was confirmed. The claimant continued to work 11 PA's per week.

6.29 In September 2015 the spinal service introduced a formal on-call rota and six surgeons agreed to serve on the rota including the claimant whilst he was working full time (page 510). 6 weeks out of 8 weeks cover was provided by the consultant surgeons. When AB took up his post he replaced the claimant on that rota.

6.30 On 23 October 2015 (page 511) the claimant proposed a revised job plan to take him down to part-time hours of 7.25 PA's per week and on 9 November

2015 he indicated it might be better for him to continue full-time work until 1 January 2016 to help AB avoid a *"rough start".* By this time NB had been replaced as clinical director in October 2015 by DD and CG who held the post jointly. DD had had dealings with the claimant before and the relationship between the claimant and DD was not a good one. Both individuals are highly intelligent and assertive and do not suffer fools gladly. Over the following months, their relationship went from bad to worse. The mood of DD was not improved by the claimant's colleague DF writing to him and others on 2 December 2015 (page by 518) indicating a crisis in paediatric outpatients. On 3 December 2015 the claimant wrote to PP and others asking what hours he was to work after AB took up his duties on 14 December 2015: he noted that if he worked the part time job plan previously agreed, there would be a reduction in adult operating time and an increase in paediatric operating time which was the exact opposite of waiting list pressures. On 4 December 2015 (page 524) PP replied to the effect that it was expected the claimant would revert to part time working and wrote: "*Indeed the Directorate only has funding to accommodate Andy's appointment and a part-time Job Plan for yourself as per conversations over the last 12 months….".*

6.31 On 17 December 2015 (page 528) the claimant was asked by HR in a letter copied to DD and CG if he wished to renew his fixed term contract. The claimant responded (page 531) to the effect that he was reducing to part-time hours from 1 January 2016 and indicating that he thought that he now had security of tenure and did not need to re-apply on a yearly basis. No reply was received to that enquiry. The claimant tried to arrange a meeting with DD and CG at this time to discuss his job plan but one was not thought to be necessary by CG who thought the part time plan was "*almost sorted"* (page 532). When AB came into post in December 2015 the funding for the claimant's post was transferred over in the Finance Department to AB leaving the claimant's post unfunded in the budget for the Unit.

Events in 2016

6.32 A disagreement arose in early January 2016 about the removal of the offices of the claimant and his consultant surgeons to a different site and the claimant expressed his views which were unfavourable to the move in forthright terms. On 8 January 2016 the claimant wrote to PP (page 545): *"….if you cannot guarantee this, I am not moving..".* The claimant's correspondence was copied to DD and CG amongst others. We infer that that correspondence was typical of the claimant's approach to management and it did not find favour with DD and CG and PP amongst others.

6.33 In December 2015 HR began asking whether the claimant's contract should be renewed in April 2016. On 13 January 2016 (page 550) DD indicated he was unsure what question was being asked but he wrote to PP in these delphic terms:

"We simply state that in line with previous plans the replacement appointment is in post and we feel that there is no need to change this established and agreed plan and to simply allow for Mr Bowey to take over and develop his practice as part of the longstanding succession planning".

6.34 A meeting between AB and DD and CG took place on 12 January 2016. We accept the evidence of AB in respect of this meeting which was given in clear terms compared to the evidence from DD which was neither clear or convincing. AB understood when he was appointed that he would work alongside the claimant in dealing with paediatric deformity cases and that the claimant would be replaced when he eventually retired. AB understood he was to take up the claimant's adult deformity practice immediately on his appointment. At the meeting in January 2016, AB made it clear that he did not need to be mentored by the claimant in relation to his general work as he was a fully qualified consultant but he did not say that he could operate alone on paediatric deformity cases or that he did not wish to continue working jointly with the claimant in such cases as recommended by the BSS. In the event when the claimant ceased to work at the end of September 2016, the consultants JA DF and AB had to reorganise their rotas to ensure that there were two surgeons operating in complex cases and as a result the work load of AB moved from 50:50 to 75:25 in favour of paediatric work with consequent adverse effect of adult waiting list. We reject the version of this meeting by PP as not credible.

6.35 On 3 February 2016 PP wrote to HR (page 556) to the effect that the agreed Directorate recommendation in line with "*the agreed succession planning structure within the Orthopaedic Spinal Service"* was that the claimant's contract should be extended only for six months to 30 September 2016. On 11 February 2016 the personal assistant to the LF noted that he was aware and supported the extension for six months and that the claimant would retire on 30 September 2016 "*as his successor/replacement will have had handover for one year*". This view was made known to AW who was the nominal decision maker on any renewal. AW (amongst others) was in thrall to LF as demonstrated by an exchange of emails with HR in late February 2016: only when he was satisfied that LF had agreed a six month extension did he authorise it (page 558).

6.36 The intention to renew the claimant's contract for only six-month was shared with AB and other consultant members of the Spinal Unit before the claimant himself was advised. On 19 February 2016 PP wrote to DD and CG (page 561) and told them he had shared "*in confidence the plan re Mike Gibson's contract"* with AB and further reported that AB had indicated the two surgeon operating *"will be addressed by a new Fellow who is coming into post in August".* We assess the actions of PP and others in speaking to other members of the Spinal Unit about the claimant's contract before speaking to the claimant himself as at best an act of startling discourtesy and in part a result of an unwillingness to approach matters directly with the claimant on account of his reputation for being

difficult.

6.37 On 17 March 2016 HR wrote to the claimant (page 571) indicating an extension of his contract to 30 September 2016. In response the claimant wrote (page 570) on 31 March 2016 saying that the six-month extension did not reflect the agreed succession planning for the spinal surgeons, that the plan was that the spinal Deformity Service would comprise 2 teams of 2 surgeons, that JA and DF were one of the two teams and that the plan was for AB to be appointed to work with the claimant in a shared practice until the claimant finally retired when he (AB) would be joined by a newly appointed spinal deformity surgeon thus leaving two teams of two surgeons to do the spinal deformity work. The claimant was upset at the way the matter had been communicated to him and said so in forthright terms.

6.38 DD was copied into the claimant's response and commented on 31 March 2016 (page 576) in a reply redolent with antipathy towards the claimant and clearly evincing the poor relationship of DD with the claimant "*someone who has taken a pension and is on a fixed term contract which has expired is dictating terms to the trust: don't think so".*

6.39 At the same time and in another example of the discourtesy being shown to him, the claimant was told by PS that DD had told him that his (the claimant's) contract was not to be renewed beyond 30 September 2016.

6.40 News of the six-month extension was not well received by the other consultants in the Department and PS wrote to LF on 2 April 2016 (page 585) expressing his concerns and those of his colleagues. The message ended in these terms:
"It would seem sensible to extend Mike's contract so that there are then two teams of scoliosis surgeons and Mike can help Alistair with difficult tumours. As time progresses this help will not be needed as Alistair gains in experience. We do need to employ another scoliosis surgeon but at present there is no one out there. If Mike's contract is extended this gives us time and seems to be to everyone's benefit. We do not envisage this being much more than a year to 18 months". Later on 10 June 2016 (page 604) PS wrote to PP and DD and CG stating that the obvious answer to the problems envisaged was to extend the claimant's contract by a further 6 months to April 2017.

6.41 A meeting to discuss matters was arranged for 21 April 2016 between the claimant and DD CG and PP. That meeting was postponed and the claimant was most unhappy. The claimant wrote to PP (page 594) setting out that one of the clinical directors (by whom he meant DD) had been openly telling other members of the department that the claimant's contract would not be renewed beyond the end of September 2016 but that no one had had the courtesy to meet him and explain the reasons. He had spoken to LF and AW both of whom had

denied any knowledge of the situation. We accept that the claimant had done so and that both men had misled him in their replies to him. We accept the evidence we heard that such conduct on the part of LF was not untypical. He had a tendency to say what people wanted to hear even if not accurate. The claimant noted that he had received an invitation to attend a long service award ceremony and that he was being treated shabbily.

6.42 The meeting was rearranged for 28 April 2016. It was attended by the claimant and PP and CG and DD. No minutes were taken. The meeting was bad-tempered and resulted in the claimant walking out of the meeting having lost his temper with DD who also lost his temper with the claimant. The outcome of the meeting was inconclusive. The relationship between the claimant and DD which was never good became dysfunctional after this meeting and we conclude the relationship was beyond repair after this point. Page 703 sets out the claimant's version of that meeting. We prefer the claimant's version of this meeting to that of DD. In the course of the meeting, DD told the claimant that he would decide when the claimant should leave his employment and that if he was really nice to him, he might extend his contract for another six months.

6.43 The colleagues of the claimant were universally unhappy with the decision not to renew the claimant's contract beyond September 2016 and JA wrote to the DD and CG setting out the problems consequent on that decision on 13 May 2016 (page 597).

6.44 At the medical directors group meeting on 7 June 2016 it was agreed that a spinal consultant post could be advertised on the basis that the claimant's contract would cease on commencement of the new post (page 603). The minute went on to record the claimant as having stated his intention to retire no later than July 2016 (this should of course have read 2017). We accept that the claimant had referred to July 2017 particularly because he was due to address an international conference in June 2017 and felt that he could not do so with credibility unless still in a consultant post at the time. This suggests money was available to fund that new post and the post of the claimant in the interim.

6.45 On 10 June 2016 (page 605) DD wrote to CG and to PP to "*nail down some truths"* as he put it. In the course of that email he posed various questions including: "*The directorate and board have known about this retirement for more than 2 years – no action has been done – we have been in post for 9 months – and we are expected to manage this situation – true or false. At least 4 previous clinical directors have written expressing concerns about the behaviour of this retired person – true or false….we had a succession plan but this has now been abandoned – true or false. Mike Gibson will definitely leave summer 2017 because of a conversation over a beer in a pub somewhere in Gosforth at an indeterminate time – true or false?".* CG added his idiosyncratic contribution to the exchanges in these terms: "*Inconsistent. Retrograde. Threatening. Project*

Fear. Happy to discuss before responding". We infer that by this time the attitude of the key players DD CG and PP was that the claimant was a partially retired person and they could effectively dictate to him when he should leave his employment: this approach and attitude was tainted with their view of the claimant's retired status which was itself informed by the claimant's age.

6.46 PP wrote a short paper (page 610) in June 2016 setting out the history of the claimant's retirement and return stating that "*post September 2016 there is no funding available to further extend Mr Gibson's contract".* He went on later in the paper (page 610) "*It is the Directorate's management team considered opinion that Mr Gibson's contract should not be further extended past September 2016, indeed there is no identified funding to do so".*

6.47 That paper (page 615) was further worked on and presented in its final form by Louise Robson to an Executive Team Meeting of the respondent on 22 June 2016 (page 618a). In that paper LR stated that "*the full time surgeons are looking to actively drive, develop and innovate the service….Discussions …...had led to an agreement to appoint to a further consultant post….to further increase capacity and activity within the deformity surgery service".* The claimant was the only part time consultant in the Directorate. After the meeting on 21 June 2016, the clinical directors and the managers concluded that the claimant's lists could safely be cleared in six months. Those discussions which impacted on the future employment of the claimant were undertaken without any input at all from the claimant himself.

6.48 On 8 July 2016 (page 636) AW wrote a highly confidential email to DD and CG amongst others on the subject of the claimant's contract which included the following: "*my understanding is that any contract extension should only be for a maximum of three months to the end of the year…. MG is under no illusions from my discussions with him that he should not be dictating the direction of the Department nor his succession - which in any event is already in place. If an additional spinal surgeon is subsequently approved then priority should be for adults not children… I have put the matter into the hands of the CDs on this basis and they are seemingly in agreement. Undoubtedly there are forces at work here that are muddying the waters but this explains the situation as I see it. (LF) is aware and supportive too".*

6.49 In a classic case of the left hand not knowing what the right hand was doing, on 4 July 2016 HR contacted the claimant (page 627) asking if he wished his contract to be extended from 30 September 2016. The claimant applied on 5 July 2016 for an extension to 1 August 2017 (page 629) and the purpose of that request expressed by the claimant was *"to facilitate succession planning and to enable minimal disruption of the spinal deformity service and to maintain the BOA/BSS recommended structure of working for deformity units with 2 consultants/deformity operation, team working in clinic and discussion of all*

cases in departmental MDT". The claimant was sent the extension request by HR as a matter of course and without checking if it was appropriate. The clinical directors were unhappy with HR for their action in this regard. We conclude that when applying for a 12 month extension, the claimant was under the impression that that was the maximum extension which could be allowed at any one time.

6.50 On 13 July 2016 the claimant's request for an extension was not approved by CG by reason of "*planned structural changes…..previous succession planning involved a funded overlap period which will be completed at the end of September 2016"* (page 631/632). CG referred in the form to a meeting with the claimant to discuss the matter having taken place on 28 April 2016 some 3 months before the application for renewal had been made. This breached the respondent's policy on the procedure to be adopted on renewal/non-renewal of fixed term contracts. To make matters considerably worse than they already were, the claimant was not told in July 2016 that his request for an extension to August 2017 had been refused. He was not given this information formally until his last working day in September 2016. The claimant asserts that this document was not completed by CG in July 2016 but in April 2017. We do not accept that assertion.

6.51 At this time the claimant's colleagues understood that his contract would be extended to 1 August 2017 and they were very supportive of that position. The claimant spoke to LF by telephone conference on 11 July 2016 and LF led the claimant to believe he was supportive of the claimant remaining in post until August 2017 and possibly thereafter on a 6 month rolling basis and said he would speak with AW to sort the matter out. The claimant gave that news to PS.

6.52 However, within two days that position had changed and was confirmed in an email from LF to PS which the claimant saw (page 640). On 12 July 2016 LF sent an email to the Medical Director, the Clinical Directors, PP and the claimant which set out what he stated to be matters consistent with the determination of the Medical Director's Group and stated that the claimant was to clear his waiting list as the overriding priority and commented "*This should not take a year!".* The wish of the claimant to stay for another year was noted "*but the evolving needs of the service are the overriding determinant for the Directorate to follow through".* The claimant wrote to LF on 13 July 2016 (page 639) and expressed his dissatisfaction with the way the matter had been managed and in respect of what he described as "*the appalling lack of communication".* The claimant commented that the management of the Directorate were clearly trying to *"get rid of me at all costs".* The claimant commented that there had been for many years a mismatch between the quality of service offered and the resources offered to the service by the respondent.

6.53 The email of the claimant of 13 July 2016 angered DD who wrote an email on 14 July 2016 (page 644) to CG which bristles with indignation and criticism of

the claimant. He refers to the claimant's colleagues and states: "..*these are the characters of the future and they should be supported – not to the detriment of an individual who has had 25 years to deliver a service and now believes that by staying another 9 months he will sort everything out…..we have met with Mr Gibson on a number of occasions as has (LF) and the medical director – it would be fair to say that I personally find him intimidating and confrontational, unreasonable and unwilling to listen – at best his manner is demeaning and at worst openly threatening".* He concludes "*time to move on – build the unit – and help nourish and support individuals who could become world leaders and not simply character(ise) success as an invite to give a lecture to a meeting on one occasion".* It is not a coincidence that on this same day CG refused the claimant's extension of contract to 1 August 2017 (paragraph 6.50 above).

6.54 On 22 August 2016 and not having heard from HR about his application for an extension to his contract, the claimant wrote to HR expressing his surprise and disappointment at not having had the courtesy of a reply. There was consternation amongst the clinical directors and PP that the refusal of the extension had not been notified as they thought. In response to an enquiry from AW, CG wrote that the request had been turned down and "*the finish date previously agreed was end September and is part of the long agreed and funded succession plan…".* On 25 August 2016 Claudia Sweeney from HR wrote to the claimant and said that she was "*looking into this".* On 31 August 2016 she wrote to the claimant again and said she understood the claimant had been told his contract would not be extended beyond 30 September 2016 "*due to funding"* and that he would leave the respondent on 30 September 2016. The claimant replied on 5 September 2016 saying he had not had official confirmation of the position but that he had been copied into some emails "*that suggest that this may be the case"* and he concluded that after 25 years working as a consultant in Newcastle, he would have expected a reply.

6.55 The claimant decided at this time that he should take legal advice and he did so. On 23 September 2016 (page 676) he wrote to PP and to AW and DD and CG saying that as he had been employed by the respondent for more than 2 years since his return in April 2016, he had acquired the rights of a permanent employee and "*can continue to work as long as I wish"* and so expected his contract to be renewed pursuant to his previous request. The matter was referred to HR for advice and PP wrote (page 677) to the clinical directors on 23 September 2016 advising that nothing had changed because "*succession planning has been completed to mean there is no active caseload going forward and cost pressure temporary and non-recurrent funding expires 30/9/16, no funding available to extend any contractual arrangement".* We do not accept there was no active case load for the claimant after 30 September 2016. We prefer the evidence of all the consultant colleagues of the claimant which was starkly to the contrary.

6.56 On 27 September 2016 (page 681) the claimant's solicitors wrote to LF and indicated that the claimant would consider making application for unfair dismissal if his contract was not extended and that the claimant was of the view that the nonrenewal of his contract amounted to age discrimination. The letter made it plain that LF had told the claimant he was welcome to remain in employment as long as he wished and, relying on that representation, he had taken the decision to retire on 28 February 2014 and enter a fixed term contract with the respondent for one year initially. The claimant made clear his intention to institute proceedings for unfair dismissal and age discrimination if his contract was not extended until 31 July 2017 being "*the date on which our client has already informed the trust he intends to retire permanently".* The letter noted that the department had fought hard to secure the fourth consultant to make the workload and the waiting lists bearable and the reversal of the level of resourcing in the department would place too much stress on consultant colleagues. The claimant did not accept for a second that his role was redundant and that in any event no redundancy procedure of any kind had been followed. This letter was a protected act for the purposes of section 27 of the 2010 Act.

6.57 The letter was acknowledged by the solicitors for the respondent (page 685) who advised a reply had been sent direct to the claimant. That short reply (page 686) was sent by AW to the claimant and told the claimant that his application to renew his fixed term contract had been rejected. It was acknowledged that he should have been advised earlier of the decision. Thus, AW advised that he had taken the decision to stay the dismissal for 14 days pending a potential appeal from the claimant within that period. It was noted that "*there is currently no work scheduled for you as it was anticipated that your final date with the trust would be 30 September 2016. I therefore propose to place you on paid absence".* This reply was delivered to the claimant at the same time as the reply from HR to which we refer in our next paragraph.

6.58 On 30 September 2016 PP was asked by HR to collect a letter (page 687) from their offices and hand it to the claimant personally at the same time as the letter from AW. The letter from HR advised the claimant of his right to appeal the decision not to renew his contract . This PP did in the course of that afternoon, and so it was that the claimant was formally advised some twenty minutes before his working day ended and his contract expired that it was not to be renewed. In that manner the employment of the claimant after 25 years' service with the respondent came to an end subject to a right of appeal.

6.59 On 3 October 2016 (page 688) the claimant wrote to AW confirming he was considering his position and asking whether in the 14 day period allowed for an appeal he was allowed to work. AW confirmed the claimant could not work during the extension.

6.60 All of the consultant colleagues of the claimant wrote letters (pages 692-

698) to the management of the Directorate in support of the claimant's request to extend his contract to August 2017 and requesting that the claimant be allowed to work for a further period.

6.61 On 12 October 2016 (page 701-707), in a prolix letter, the claimant formally appealed the decision to dismiss him by nonrenewal of his fixed term contract. The outcome requested was an extension of his fixed term contract to 31 July 2017 at which time he would retire fully without the need for the respondent to engage in any consultation process at that time. The letter referred to the claimant's belief that the respondent had committed and was continuing to commit acts of age discrimination. The claimant was not allowed to work during the time the appeal process was ongoing despite his requests to be allowed to do so and his willingness to do so. In the event the period of time which the appeal process took was 12 months. At no time during that period did the respondent give any consideration to reviewing the decision that the claimant should not be allowed to work and no consideration was given to the fact that the claimant might be becoming de-skilled as a surgeon. Throughout the 12 month period of the appeal process, the claimant was paid at the full salary for the part time hours he had been undertaking at the time of his dismissal. There were no competence or disciplinary issues of any kind alleged against the claimant at this or any point in time and there was no reason why he could not have been allowed to work. There were large waiting lists in the Spinal Unit and patients could have benefitted from the presence of the claimant in the workplace. If the claimant had been suspended for disciplinary matters (which he was not) there would have been regular reviews of that period of suspension when, amongst other matters, the question of de-skilling would have been actively considered.

6.62 The appeal was scheduled to take place on 7 November 2016 before AD. Paul Turner of HR attended to assist her. The management case was to be presented by the clinical directors assisted by Tracey Mitchell. The management case (pages 718 – 721) was that the contract was not renewed on the basis of the needs of the service in line with the agreed succession planning process. The case was supplemented by other papers (pages 722-741) including a two page precis prepared by PP (pages 722-723) detailing the meetings which had taken place from November 2013 to September 2016.

6.63 The appeal began at 1.32pm but was adjourned at 2.11pm.. AD was hopeful a solution could be found and so she resolved to adjourn the appeal but not before the claimant had made the point that he considered he had done nothing wrong in the whole process and that his reputation had been damaged by the actions of the respondent.

6.64 By letter dated 29 November 2016 (page 744-745) the solicitors for the claimant wrote to the respondent setting out claims he intended to pursue and recording that the letter was to be seen as a formal grievance "*against the Trust*

itself and all of those executives and employees who have acted or omitted to act and thereby subjected our client to the above acts of discrimination and/or victimisation". The solicitors for the respondent replied on 2 December 2016 (page 755) stating that any grievance should be raised by use of the appropriate grievance procedure and refusing to accept the letter of 29 November 2016 as raising a grievance.

6.65 By the end of December 2016 it was clear that discussions had broken down and arrangements were therefore put in place to reconvene the adjourned appeal. That process took over three months.

Events in 2017

6.66 The appeal took place on 7 April 2017 (pages 771-778). The management case was presented by the clinical directors and PP and the claimant was accompanied by JA. The claimant had submitted further papers for consideration (pages 765-770) which included a change in his position as to the time he wished to work for the respondent. Having been forced to take time off since 1 October 2016, the claimant said he had re-charged his batteries and realised how much he would miss working for the NHS and may wish to work longer than 1 August 2017 as had been indicated previously. The claimant was presented with additional documents from the respondent at the outset of the hearing which he did not have a proper opportunity to read or assess. The hearing lasted some two hours.

6.67 The outcome of the appeal was communicated by letter of 12 April 2017 (pages 779 – 783) from AD to the claimant. At paragraph 4 of the letter, the decision not to extend the contract beyond 30 September 2016 was upheld as fair. However, the failure to follow a redundancy procedure was acknowledged and the appeal was upheld on that point. The appeal was upheld on the basis that there should have been better consultation and communication before 30 September 2016. AD concluded that the need for the claimant's role had ceased following the appointments of AI and AB but that the organisational change and redundancy policy ("the OC Policy") had not been followed and should have been and the management were to be asked to engage that policy and consult as soon as possible. The claimant's employment was continued again on special leave with no requirement to attend work whilst the OC Policy was followed. The claimant was told he had no further right of appeal.

6.68 The claimant replied on 17 April 2017 (page 784) saying that the intention to launch the OC Policy was a futile gesture and he did not wish to play any part in a sham redundancy procedure.

6.69 A decision was taken by the respondent to appoint an employment solicitor AC who works for a firm of solicitors who advise the respondent. AC spends around 50% of her working time dealing with matters arising from the respondent

and its employees. The same firm had been instructed to defend the proceedings the claimant had by then intimated through his solicitors. AC could not therefore properly be described as impartial or independent. In saying that we imply no criticism whatever of AC – she did as she was asked by her employer and the respondent. AC was instructed by letter dated 8 May 2017(page 918) to "*act for the Trust in handling a redundancy consultation process in respect of the above named employee".* The letter continued "*Mrs Dragone asked the Directorate Management Team to engage the policy and consult with Mr Gibson on the question of redundancy. Given that the team had ended Mr Gibson's employment, been closely involved in his appeal, and had a grievance submitted against them (and others) by Mr Gibson's legal representative, it was resolved in the interests of fairness to task the consultation process to a person who is independent and external to the Trust…"* Effectively AC acted as agent for the respondent.

6.70 On 24 May 2017 (page 793) AC wrote to the claimant stating that she had been "*asked to engage the Trust's Organisational Change and Redundancy policy and consult with you on the question of redundancy".* She sought to reassure the claimant that no decision had been taken to dismiss him and that she had been appointed to maintain objectivity and independence. She invited the claimant to attend a meeting on 9 June 2017. She set out in her letter the background as she understood it. It was indicated that there was no service need to fund an establishment for the paediatric spinal deformity role which the claimant had undertaken and that that post was at risk of redundancy. It was proposed to place the claimant on the Respondent's redeployment register for a maximum of eight weeks.

6.71 AC met PP on 22 May 2017 before she wrote to the claimant. The meeting was minuted (page 786). In that meeting PP sought to explain that following AB taking up his duties in December 2015, MG became a supporting surgeon and was a supernumerary who did not have his own waiting list, did not take on new patients and did not run his own clinic. PP told AC that the claimant had made it plain that he did not wish to undertake adult work after dropping to part time working and that if the claimant returned he would have no designated lists or theatres: it would be like employing a chef without a kitchen for him to work in. PP confirmed that there were no plans to recruit additional surgeons in the Directorate and no clinical need to do so. In the view of PP, the claimant had been a supernumerary mentor since January 2016. We conclude that the claimant had been nothing of the sort and that those statements of PP to AC were less than accurate.

6.72 The claimant wrote to AC in advance of their meeting and asserted (page 797) that there was no link between the new consultants being appointed and him ceasing to work save that they would be doing some of the work he used to do. He asserted in his letter (page 798) that until June 2016 (not 2014 as he

wrote) DD had been telling spinal surgical colleagues that after the claimant had gone there would be 2 new appointments and it had been agreed for a long time that the spinal service needed to expand to 8 consultants *"if it was going to deliver the acute on call service which started on 1 May 2015 when AI took up his post and considerably increasing the workload of a department that had been under long term pressure, massively under resourced and failing to hit 12 month waiting time targets: as well as being one of the major regional Spinal Deformity Centres providing the spinal input into the regional Sarcoma Service as well as being a busy adult elective spinal surgery service….it is a nonsense to claim there is no service need in the paediatric deformity service. There is a crisis in the paediatric outpatient times….the other spinal surgeons have had to change their timetables in a way that is not sustainable to cover the gap in the scoliosis service".*

6.73 The claimant met AC on 5 June 2017 (page 800) and asserted there was no link between the new appointments of consultants and him stopping work. He asserted that it was completely untrue that he was there to mentor the new appointees although he did work with them. He was unhappy at the suggestion from the respondent that after the new appointees had taken up their duties that he had nothing to do. He was continuing a deformity practice he had built up over 25 years. He confirmed that he continued to run a weekly Thursday morning clinic which was also attended by AB and this was no different to how he had worked when full time save that AB was now present. He continued a monthly adult clinic to review complex patients and continued to operate on complex adult patients with colleagues. Since he had ceased work the 3 remaining deformity surgeons were doing more paediatric and less adult surgery. In moving away from adult work and concentrating on paediatric work, the claimant was enabling the service to develop in a way that he and the other spinal surgeons wished it to develop.

6.74 On 13 June 2017 AC met DD and CG and PP together. The meeting was minuted (page 810). In further evidence of the disfunctional relationship between the claimant and DD, DD expressed his view that the claimant had a reputation of reducing colleagues to tears. DD stated that the claimant did not speak the truth and that just because the claimant says he has spoken to God does not make that true. CG stated that in retaining the claimant after April 2016 they were trying to be nice given the claimant's service but he was surplus to requirements. Both DD and CG repeated what PP had told AC namely that after AB had taken up his post the claimant was supernumerary and did not have his own waiting lists, did not take on new patients and did not run his own clinic. DD told AC that the claimant was manipulative and probably led when working in surgery with AB. PP confirmed that the ultimate decision on non-renewal of the claimant's contract in September 2016 was taken by AW. DD confirmed to AC that the Directorate could use another adult surgeon but there was no funding for such a

post. PP confirmed that the claimant's post was funded out of non-recurrent funding after the two appointees were in post and that the claimant was not set to work alongside AB and AI indefinitely.

6.75 AC met again with PP on 21 June 2017 and the meeting was minuted (page 818). In recalling the details of the meeting with AB in January 2016, PP confirmed it was attended by DD and AB and himself and they had agreed that the claimant should stay for 6 to 9 months as AB would benefit from the claimant's advice and guidance during that period. We note that the claimant was not present at that meeting and did not know it had occurred until some time afterwards.

6.76 On 21 June 2016 AC met with AB (page 821) and the meeting was minuted. AB confirmed his understanding that if appointed to the post for which he applied he would be paired with the claimant, that the claimant would retire at some point and then another surgeon would be appointed to continue the pairing arrangement. He had never seen the claimant as a mentor as such – simply his partner in the pairing arrangement. AB stated that following the January 2016 meeting with DD and PP, he had a feeling that the claimant would be pushed out or that he would retire. He confirmed he had never seen his appointment as a replacement for the claimant but as an expansion of the Spinal Department. Other than AB and the claimant, AC did not see any of the consultant surgeons from the Unit.

6.77 On 22 June 2016 AC met AD. The meeting was minuted (page 827). AD confirmed that when AI was appointed he was seen as a direct replacement for the claimant in funding terms and the claimant's post was then an overspend. When AB began work, his salary was added into budget and the claimant became non-recurrent costs and was in essence double running. She confirmed the non-recurrent cost would have been authorized by LF and AW as a means of keeping the Department stable while AI and AB settled into their roles. She confirmed that the flow of information between management could have been better and the handling of the ending of the claimant's contract could have been better. She confirmed that if the respondent is fined for not meeting waiting list targets, the respondent has the facility to sign agreements with the Commissioning Group so that fines can be ameliorated and thus the respondent does not in fact suffer a financial detriment. AD confirmed that adult waiting lists were high and in an ideal world it would make sense to recruit an additional surgeon but there was no funding forthcoming to enable that to be done.

6.78 A second meeting with the claimant took place on 14 July 2017. PP and DD and CG also attended. The meeting was minuted (page 877) and lasted over two hours. AC felt it necessary to remind the claimant and DD that she would not tolerate aggression from either party. AC set out the position that she was looking into whether the claimant's role was redundant and if so whether it was a stand-

alone redundancy or whether there was a general redundancy situation and so requiring consideration of a pool of candidates and selection or whether there was no redundancy situation. The claimant indicated that the situation had changed so far as he was concerned when the new Clinical Directors came into post in January 2016.

6.79 On 17 July 2016 AC wrote to the claimant and advised that her decision had been reached and that she would present her recommendation to the respondent at a hearing to take place on 20 July 2017 to be chaired by Neil Watson Director of Pharmacy supported by Christine Mann Senior HR Manager. The claimant was invited to attend and the letter set out what would happen if the panel concluded that the role of the claimant was redundant in terms of redeployment, redundancy payment and a right of appeal.

6.80 AC prepared a report dated 19 July 2017 (page 901). The report set out details of the meetings which had taken place and the conclusions were summarised (page 905):

1. The claimant was not acting as a supernumerary mentor to AB

2. The claimant's post at the relevant time was that of consultant paediatric surgeon

3. There was no redundancy situation within the Department either as a stand-alone redundancy or within a pool

4. No redeployment was required

5. No redundancy payment was owed and she concluded finally:

" Mr Gibson's fixed term contract has come to an end as the purpose under which he was retained on the fixed term contract has ceased. The non-renewal was fair and in line with the succession planning route in place whereby two surgeons were recruited to replace Mr Gibson's post".

6.81 The detailed conclusion (page 907) was that the respondent had used fixed term contracts "*for a genuine specific purpose namely to enable succession planning and the smooth transition of the new consultants surgeons into the service. At the point at which the new consultants were competent, the fixed term contract under which Mr Gibson was working had realised its purpose and no further extensions were required. The purpose of the fixed term contract in essence no longer existed".* AC further concluded the post of AI was a new post which had been specifically authorised. The post of AB was a direct replacement for that of the claimant and the cost of the claimant's post once AB was in post was met through nonrecurrent costs and represented dual running. In considering whether there was a redundancy situation, AC concluded "*I believe the genuine reason for the termination of Mr Gibson's fixed term contract was*

that the purpose under which Mr Gibson had been assigned a fixed term contract had ceased. The succession plan was decided back in 2013 – 2014 and in 2016, after the appointment of the new consultants, the purpose for which Mr Gibson was retained on a fixed term contract ceased". The Tribunal disagrees with that conclusion.

6.82 The final recommendation in the report of AC was expressed as follows:

"It is my recommendation that Mr Gibson's post is terminated for some other substantial reason namely as a result of succession planning being realised and the requirement for a further fixed term contract ceasing. I determine that Mr Gibson retired and returned to ensure the succession planning and smooth transition of the two new surgeons into his post. I understand and accept that due to the complexity of the work undertaken by Mr Gibson, a decision was taken to recruit two surgeons to replace the post held by Mr Gibson and as such two appointments were being made to cover one post. It is my belief that Mr Gibson was working under a fixed term contract for such period until new appointments had been made and were up and running in post: this ultimately occurred and there was no requirement to extend Mr Gibson's fixed term contract further. As I have not found there is a redundancy situation, there would be no need to consider alternative employment and redeployment. Mr Gibson would not be afforded a redundancy payment". Appendices attached to the report run from pages 916 - 994.

6.83 The report of AC was made available to the claimant just before the meeting on 20 July 2017. It was a very lengthy document. It was agreed that the claimant needed more time to consider the report of AC and the meeting was adjourned until 23 August 2017.

6.84 The meeting resumed on 23 August 2017 (page 1004). The claimant was accompanied by PS. AC attended supported by Lesley Simpson and NW chaired the meeting accompanied by Christine Mann of HR. AC presented her report. She was asked by the claimant why she had not spoken to other spinal surgeons and that she had therefore obtained a biased view. AC is recorded as saying the instruction was to undertake a redundancy consultation and there was no need to speak to other surgeons. The claimant referred to his wish to work part time for two years once the appointments had been made (page 1005). The claimant made the point that there had been no discussion prior to his retirement and return as to how his post would be funded once he had returned. The claimant set out his view that LF had said he could work as long as he wished part time but then two new Clinical Directors came into post and found him difficult to work with and forced him out. He linked this attitude to his intransigence over the office removal in January 2016. At one point in the meeting the claimant is recorded as saying (and we accept he did) *"Failure of communication. I would have gone by now if the Trust had given me what I wanted. Gross*

mismanagement, gross incompetence to leave me at home, paid and work waiting to be done". There was detailed discussion of the information produced by PP showing waiting list statistics and the like and AC confirmed her understanding that such figures were internally and externally verified. The meeting ended and NW considered his decision.

6.85 By letter dated 4 September 2017 (page 1012) NW summarised the meeting. NW accepted the figures produced to him and concluded that it was never the intention of the respondent to continue the employment of the claimant other than on a temporary above establishment basis. NW indicated that he accepted the conclusion and recommendation of the AC report and accepted the recommendation from the Carver report and therefore terminated the claimant's contract for some other substantial reason namely that the purpose of the employment on a temporary fixed term basis had come to an end. Specifically as planned and intended the claimant's post had been replaced by two posts and the individuals recruited were competent. The claimant was dismissed from his post and the letter continues: "*your fixed term contract ended on 30 September 2016. It was extended temporarily until conclusion of the appeal on 7 April 2017 and then further extended until this latest process concluded. That has now taken place. I would be within my rights to end employment immediately without notice. However, I have decided the contract will end on 30 September 2017. You will be paid until this date and remain on paid leave of absence".* The claimant was advised of his right to appeal.

6.86 The claimant appealed at length (page 1023) and prepared his case for the appeal (page 1030) and annexed to it copies of letters of support from October 2016 from his consultant colleagues. In addition, PS wrote a letter on 7 November 2017 (page 1041) as head of the Orthopaedic Spinal Service in which he made it plain that the non-renewal of the claimant's contract came as a total surprise and had led to the paediatric surgeons giving up some of their adult commitments and increasing waiting times for adults for up to two years. The plan had been for the claimant to be replaced by a fourth paediatric surgeon so that there would be two pairs of paediatric surgeons and it had never been the intention for AB and AI to replace the claimant in the short term.

6.87 By the time of the appeal DD and CG had ceased to be clinical directors and LF had also ceased to be CEO.

6.88 The appeal against dismissal took place on 29 November 2017 and was taken by non-executive directors Hilary Parker and Keith Godfrey. AW attended accompanied by Christine Mann of HR and the claimant attended accompanied by AB. NW presented the respondent's case (page 1069).

6.89 By letter dated 1 December 2017 (page 1098) and the conclusion reached was to dismiss the appeal. In the course of the letter confirming that decision it

was stated that:

1. There was no issue with the investigation or decision made by NW.

2. NW had taken appropriate steps to investigate the claimant's concerns regarding financial and other data.

3. AC's role was to undertake a redundancy consultation and as such there was no requirement to speak to the other surgeons unless she deemed there was a redundancy situation which she did not.

4. It was appropriate to look at the context in which the term replacement had been used throughout the process

5. Irrespective of funding arrangements it was clear the succession plan had been fulfilled and the purpose of the fixed term contract had concluded. The workload of the department had no relevance to the specific points of appeal.

6.90 In April 2018 a decision was taken to appoint a locum consultant orthopaedic surgeon and a suitable candidate had been identified. It is hoped that appointment will become permanent. Funding for the post was found in part by using savings against breach penalties (page 1160). This appointment was linked to operating theatre capacity increasing.

6.91 We accept the evidence from all the consultant colleagues of the claimant to the effect that JA and DF were to be one team for scoliosis operations and AB and the claimant were to make up the second team. The consultant body had discussed that on the retirement of the claimant ,another paediatric scoliosis surgeon would need to be appointed. None of the consultants knew anything about the claimant's employment being terminated once AB had settled into his role. We accept that none of these consultants knew of any other case where an NHS surgeon had had his retirement pre-empted as was the case with the claimant. None of the consultants knew or accepted that there was any reason to force the claimant into retirement for the safety of patients or to enable the respondent to meet waiting list guidelines. In the period when the claimant was on special leave and being paid by the respondent between September 2016 and September 2017, the respondent had to pay DF and JA to undertake regular additional sessions to try and cope with the waiting lists. There was ample work available for the claimant to carry out in that period. We accept the evidence of AI that after the claimant began to work part time in January 2016, he assisted AI with the complex spinal oncology patients. None of the consultants in the Spinal Unit wished to see the claimant retire or leave employment when he did in 2016.

6.92 DD is a consultant orthopaedic surgeon specialising in knee surgery. He became clinical director with CG in October 2015 for two years. There are some 40 consultants in the Directorate. DD had meetings in late 2015 to review the Directorate including a meeting with the claimant and his colleagues at which the

claimant was seen by DD to be very protective of the team. DD had understood from a chance remark from NB that AI and AB were replacements for the claimant. He perceived a huge waiting lists in adult spinal deformity but not in paediatrics and saw no reason to retain the claimant to do paediatric work if demand was not there. DD made no attempt to discuss with the claimant that he might undertake adult work.

6.93 The other consultants in the Spinal Unit were aged in their 30's up to their 50's.

Submissions

7. On behalf of the respondent Mr Blake filed written submissions extending to 38 pages which were supplemented by oral submissions. The submissions are very briefly summarised:-

7.1 Certain aspects of the case are not minuted or reduced to writing particularly in relation to the succession plan. Reference was made to **Blue -v- Ashley [2017] EWHC 1928** where it was recommended that judges base factual findings on inferences drawn from documentary evidence and known or probable facts. In respect of the unfair dismissal claim, it is not for the Tribunal to consider whether on balance of probabilities there was a succession plan agreed but whether the respondent's decision makers believed there was such an agreed plan on reasonable grounds. It was noted that no agreement in respect of any succession plan was recorded in writing and the Tribunal should consider contemporaneous documents and the conduct of the parties to decide what, if any, agreement was reached. It was submitted that it was possible for the respondent to have agreed the claimant's retire and return application and the succession plan on the basis that the adoption of the plan was conditional on funding being made available. If funding was not made available the succession plan would not have been achieved. Given the complexity of obtaining additional funding, it is difficult to see how the retire and return/succession plan could have been agreed in any way other than on a basis that it was conditional on the recruitment and funding for that recruitment being achieved. It was submitted that the contemporaneous documents supported the fact that a succession plan was agreed and it was submitted that the claimant's contention for a three surgeon succession plan was not borne out by the evidence of the consultant colleagues who accepted that no business case had been put forward to fund a seventh consultant surgeon post.

7.2 It was accepted that the best evidence in support of the claimant's argument for a three surgeon succession plan was the job description and advertisement for the spinal deformity role. It was submitted that no weight should be given to the statement of NB.

7.3 It was accepted that it would have been preferable to document the succession plan in a written agreement with the claimant. Based on the contemporaneous documents the most likely explanation is that the claimant was aware of and agreed the respondent's approach to the succession plan and had indeed himself initiated the discussions.

7.4 It was submitted that the claimant had later changed his mind and felt he could renegotiate the agreement in part based on his alleged discussions with LF and in part

because he was a forceful personality who was not afraid to fight hard for what he wanted. The claimant cannot counter the position that there is not funding within the Directorate to fund the consultant head count in spinal surgery to 6.7 or indeed to 7 in the longer term. The demand was there but the funding was not.

7.5 It was submitted that the evidence given by PP in respect of waiting lists should be accepted.

7.6 It was submitted that time limit issues arose in respect of many allegations relating to events which occurred on or before 14 September 2016 namely three months before Day A on the early conciliation certificate.

7.7 In relation to the direct discrimination claim it was noted the claimant relied on his consultant colleagues as comparators who were all younger than him. It was submitted there was a material difference between the claimant and those colleagues because the claimant had an agreed succession plan with the respondent and none of the other consultants had such a plan. The existence of a succession plan was a material issue in the case.

7.8 Reference was made to the **Chief Constable of Greater Manchester Police -v- Bailey [2017] EWCA Civ 425** and the guidance of Underhill LJ contained in that case. It was submitted that the claim of direct age discrimination founded on the fact that there was an agreed succession plan at least on the respondent's understanding. It was submitted that whether the treatment was because of the claimant's age required an assessment of the reason why a decision had been taken.

7.9 Reliance was placed on **James -v- Eastleigh Borough Council [1990] ICR 554, Amnesty International -v- Ahmed [2009] ICR 1450** and **Chief Constable of Greater Manchester Police -v- Bailey [2017] EWCA Civ 425**. It was submitted that there was no inextricable link between age and the succession plan and there was no discriminatory motivation linked to having a succession plan and not renewing the claimant's employment when the purpose of the plan was achieved.

7.10 Reference was made to **Seldon -v- Clarkson Wright & Jakes [2012] ICR 716** in respect of "justification".

7.11 In respect of the claim for unfair dismissal it was submitted that the respondent considered the claimant was dismissed for some other substantial reason namely that the succession plan and fixed term contracts had achieved their purpose and reliance was place on **Fay -v- North Yorkshire County Council [1986] ICR 133**.

7.12 In respect of the allegation of dismissal being an act of discrimination it was reiterated that the consultant comparators were not appropriate comparators. The respondent believed the claimant had agreed to retire when the succession plan had been achieved. It is the presence of the succession plan which means that the dismissal of the claimant was not because of his age. In any event it was submitted that applying a succession plan to the claimant in the case of a misunderstanding would still be proportionate given the limited funding and the need to provide continuity of care.

7.13 It was submitted that the putting in place of the succession plan in 2013 was not direct age discrimination. The succession plan had nothing to do with the claimant's

age but everything to do with the fact the claimant wanted to build a succession plan into his retire and return application process.

7.14 It was submitted that the allegation that offering fixed term contracts was direct age discrimination was not clear. The claimant was offered fixed term contracts because that was the policy when he retired and returned. It was submitted the fixed term contract issue was a red herring and was out of time.

7.15 It was submitted that the non-extension of the claimant's contract from September 2016 was part and parcel of the eventual decision to dismiss. There was no evidence that the Trust wished to invest in the Spinal Surgery Unit in the summer of 2016 and chose not to do so because of the claimant and his age. That cannot be an act of victimisation on the basis of the letter from the claimant's solicitor of 27 September 2016 because all matters were agreed before that date. The decision to place the claimant on special leave was a pragmatic response to the procedural failings prior to 30 September 2016 and more favourable treatment in simply permitting the contract to expire with the employment also terminating on 30 September 2016. The claim of harassment is not made out because such conduct was not related to the claimant's age but to the fact that the respondent had not provided the claimant with an opportunity to appeal before 30 September 2016.

7.16 The allegation in respect of a failure to communicate the claimant's status to other employees cannot be made out for to have done so would have been a breach of the claimant's privacy.

7.17 It was submitted that there was no delay in moving the matter forward from January 2017 until April 2017 when the appeal hearing took place on 7 April 2017.

7.18 In respect of indirect age discrimination, it was submitted the claim could not succeed for the PCP relied on had not been applied wider than the claimant.

7.19 The first allegation of harassment in respect of the comments of DD by speaking with PS in April 2016 cannot amount to harassment as such conversation did not relate to the claimant's age. It was submitted that the part time and fixed term worker claims were not clear.

7.20 In respect of the unfair dismissal claim, it was submitted the claimant was dismissed because the respondent's decision makers considered the purposes of the succession plan had been achieved. The belief was genuinely held and amounted to a substantial reason. It was accepted that the reasonableness of the decision was more complex. The Tribunal had to assess the reasonableness of what had occurred from the standpoint of the reasonable employer. If the Tribunal considered the process unfair then issues of **Polkey** and contributory fault must be considered. It was submitted that any unfairness would have made no difference to the length of the claimant's employment and the claimant contributed to his dismissal through his unreasonable behaviour during, and in his approach to, the appeals process.

7.21 In oral submissions the Tribunal was urged to look at the documents as a best guide to the matters and to assess credibility. It was recognised that in the period February to September 2016 there had only been one meeting of relevance between the parties on 28 April 2016. There was much communication between the parties but

none of it could be said to have been good or meaningful. It was submitted that the discrimination allegations were all advanced effectively as an attempt to remove the compensation cap. They were not about age, they were not about retiring and returning, they were all about a succession plan. In respect of the succession plan it was submitted that the claimant felt he had a right to change matters because of his conversation and discussions with LF but those discussions could not trump any subsequent agreement with the clinical directors. Submissions were made in relation to the meeting involving AB on 12 January 2016. It was submitted that AB's evidence was unconvincing and he clearly did not wish to undermine the claimant. It was submitted that the evidence of PP in respect of the meeting of 28 April 2016 should be preferred over anyone else. PP was a witness who was honest and had a good recollection of events. The late disclosure during the case indicated that the consultants knew that a business case was necessary for a consultant position such as the claimant's and that they cannot believe that funding was there for the claimant's part time post when no such business case had ever been made as they well knew.

Submissions - Claimant

8. On behalf of the claimant Mr Bayne made written submissions extending to 68 paragraphs which were supplemented orally. These are briefly summarised:-

8.1 The legal background in relation to the claim of direct age discrimination was set out. It was noted that an employer's use of language associated with younger or older individuals may be sufficient to shift the burden of proof onto the employer and may constitute harassment – **Gomes -v- Henworth Limited t/a Winkworth Estate Agents & Another ET/3323775/2016**.

8.2 In respect of the claim of unfair dismissal it was submitted that where dismissal occurs following expiry of a fixed term contract, the reason for the dismissal is the reason for not renewing the contract. Unless the reasons relate to the specific individual rather than the needs of the employer the reason for dismissal is redundancy – **University & College Union -v- University of Stirling [2016] 1AER524**. It was submitted that even if the non-renewal of a fixed term contract was for some other substantial reason, it would only be fair if the employer adopted the use of the fixed term contract for a genuine purpose known to the employee – **North Yorkshire County Council -v- Fay [1985] IRLR 247**.

8.3 It was submitted that the central factual issue between the parties is what succession plan was agreed between the respondent and the claimant in November 2013. In particular was it agreed between the claimant and the respondent that the respondent would advertise for two new posts to enable amongst other things the claimant to go part time as the claimant contends or that it would advertise for those posts so that the claimant could and would retire completely as the respondent contends.

8.4 It was submitted that prior to applying to retire and return the claimant had a conversation with the Trust's CEO who told him he could stay working part time for as long as he wished and it was submitted that there was no documentary or oral evidence to suggest that the claimant had anything contrary on his mind at his meeting with PP on 11 November 2013. That arrangement was what was understood by all of the existing consultants in the spinal team and there was no suggestion in any document

that the return after the retire and return would be time limited. The fact that the medical director himself was not called to give evidence was submitted to be significant.

8.5 There was nothing in the following 18 months after the claimant's return to suggest that anyone believed the claimant would retire fully after a short period of mentoring AB.

8.6 At the meeting on 12 January 2016 a conversation took place between AB and DD and PP in which it was made plain to AB that the claimant would be unlikely to be employed by the Trust much longer. The Tribunal was invited to accept AB's account of that meeting.

8.7 It was submitted that after that January 2016 meeting for the first time there appears in the documents a suggestion that the claimant's contract should not be renewed in April 2016 and DD could not adequately explain where that understanding came from. Detailed submissions were made in respect of the events which followed and the Tribunal was invited to reach various findings of fact in relation to those matters.

8.8 In respect of the allegations of direct age discrimination, the claimant's age group is said to be that of being partially retired and perceived to be close to full retirement or alternatively being in his 60s. The hypothetical comparator is a younger consultant who goes part time for a reason other than retirement such as a younger person with childcare responsibilities. The Tribunal was invited to infer that had the claimant not been in that age group, a properly funded arrangement would have been put in place for his continued part time post beyond AB's appointment. The Tribunal was invited to infer that had the claimant not been the age that he was, the respondent would have approached his December 2015 request for renewal differently. It was submitted there could not be objective justification of what was clear age discrimination in respect of the succession plan.

8.9 The offering to the claimant of a fixed term contract as someone who had retired and returned was the policy in place at the time the claimant retired and returned. The hypothetical comparator would have been offered a permanent contract. It cannot be objectively justified.

8.10 It was submitted that failing to advise the claimant of the non-renewal of the fixed term contract was clear less favourable treatment but it could be inferred that the hypothetical comparator would not have been treated with such disdain.

8.11 In respect of the failure to permit the claimant to continue to work after 1 October 2016 the Tribunal was invited to infer that the reason for that was the claimant's challenge to the authority of AW by way of the solicitors letter of 27 September 2016.

8.12 It was submitted that failing to advise the claimant's colleagues of the position was because of the claimant's challenge to the respondent Trust.

8.13 The Tribunal was invited to infer that the delay in fixing the appeal against dismissal was because of the claimant's challenge to the Trust.

8.14 It was submitted that the reason why the claimant was dismissed related to the needs of the business rather than to himself and therefore was properly characterised

as a redundancy dismissal. Even if the dismissal was for some other substantial reason, it was not fair because the real reason the claimant was on a series of fixed term contracts was the Trust's then policy requirement and the claimant did not know he was on a series of fixed term contracts for the genuine purpose of succession planning. Even if it is appropriate to assess the fairness of the decision by considering whether Mr Watson made a reasonable decision, it was not reasonable because he did not know the claimant had returned on a fixed term contract for policy reasons and the basis on which he rejected the claimant's version of the succession plan was that it was at odds with his e-mail of 22 November 2013. On any proper review of that e-mail Mr Watson accepted that it was not at odds with the claimant's account.

8.15 In oral submissions it was noted that all the claimant's consultant colleagues supported his version of events. The medical director who doubtless had pertinent evidence did not come to the Tribunal to give evidence although he did attend. When the claimant was dismissed he was a surgeon of national and international repute at the top of his game. The respondent had shown that it could find funding for other posts when it needed to but no attempt was made in this case. It was clear that there was a stark and surprising decision made at the highest levels of the respondent Trust that the claimant was for some reason no longer welcome. There were communication failures across the board. Was that simply incompetence or more than incompetence? The Tribunal should approach its analysis of the documents on the basis that they show a very clear picture of what happened. The Tribunal was urged to go through the documents and reach conclusions of the nature set out in submissions.

8.16 It was submitted it was very rare to find a silver bullet on which clear evidence of discrimination can be shown but in this case, there was at least a bronze bullet in respect of the remarks made by DD and the Tribunal should draw inferences from that. It was clear that the misunderstandings which arise in this case only arise because the claimant was close to retirement and they would not have arisen in the case of a younger man.

8.17 The notice pay claim was not pursued but the first allegation of harassment was pursued on the basis that the remarks were humiliating. The dismissal of the claimant was the last in a series of discriminatory acts.

9 **The Law**

Direct Age Discrimination

9.1 We have reminded ourselves of the provisions of section 5 of the 2010 Act and also of section 13 which reads:

(1) 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.

9.2 We remind ourselves that direct evidence of discrimination is rarely forthcoming and thus there are particular rules in respect of proving unlawful discrimination referred to below. It is now readily accepted that discrimination need not be conscious. Some people have an inbuilt and unrecognised prejudice of which they are unaware. A discriminatory reason for the conduct need not be the sole or even the principal reason for the discrimination; it is enough that it is a contributing cause in the sense of

'significant influence', see Lord Nicholls in **Nagarajan v London Regional Transport [1999] IRLR572** at page 576. In some cases discrimination is obvious. However, the Tribunal in most cases will have to discover what was in the mind of the alleged discriminator. In **Nagarajan**, Lord Nicholls said at page 575 that:

"Direct discrimination, to be within section 1(1) (a), the less favourable treatment must be on racial grounds. Thus, in every case it is necessary to enquire why the complainant has received less favourable treatment. This is a crucial question. Was it on the grounds of race? Or was it for some other reason, for instance, because the complainant was not so well qualified for the job? Save in the obvious cases, answering the crucial question, will call for some consideration of the mental process of the alleged discriminator. Treatment, favourable or unfavourable, is a consequence which follows from a decision. Direct evidence of a decision to discriminate on racial grounds will seldom be forthcoming. Usually the grounds of the decision would have to be deduced, or inferred, from the surrounding circumstances".

9.3 The Tribunal has reminded itself of the provisions of section 136 of the 2010 Act and the detailed guidance in **Igen -v- Wong & Others 2005 IRLR 258.** That case of course was dealing with sex discrimination under the Sex Discrimination Act 1975 but is equally applicable to age discrimination claims under the 2010 Act

9.4 In **Madarassy v Nomura International Plc**, in the Court of Appeal, Lord Justice Mummery said at paragraph 56:

*"The court in **Igen v. Wong** expressly rejected the argument that it was sufficient for the complainant simply to prove facts from which the tribunal could conclude that the respondent "could have" committed an unlawful act of discrimination. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination".*

And later at paragraphs 71 and 72:

*"Section 63A(2) [Sex Discrimination Act] does not expressly or impliedly prevent the tribunal at the first stage from hearing, accepting or drawing inferences from evidence adduced by the respondent disputing and rebutting the complainant's evidence of discrimination. The respondent may adduce evidence at the first stage to show that the acts which are alleged to be discriminatory never happened; or that, if they did, they were not less favourable treatment of the complainant; or that the comparators chosen by the complainant or a situation for which comparisons are made are not truly like the complainant or a situation of the complainant; or that, even if there has been less favourable treatment of the complainant it was not in the grounds of her sex or pregnancy. Such evidence from the respondent could if accepted by the tribunal, be relevant as showing that contrary to the complainant's allegation of discrimination, there is nothing in the evidence from which the tribunal could properly infer a prima facie case of discrimination on the proscribed ground. As Elias J observed in **Liang** (at paragraph 64), it would be absurd if the burden of proof moved to the respondent to provide an adequate explanation for treatment which, on the tribunal's assessment of the evidence, had not taken place at all".*

9.5 The Tribunal has reminded itself of the guidance in the decision of Underhill J in **Amnesty International –v- Ahmed 2009 IRLR 844** who after dealing with cases of inherently racist behaviour went on to give this guidance in relation to cases which are not inherently discriminatory:

*But that is not the only kind of case. In other cases – of which **Nagarajan** is an example - the act complained of is not in itself discriminatory but is rendered so by a discriminatory motivation, i.e. by the "mental processes" (whether conscious or unconscious) which led the putative discriminator to do the act. Establishing what those processes were is not always an easy inquiry, but tribunals are trusted to be able to draw appropriate inferences from the conduct of the putative discriminator and the surrounding circumstances (with the assistance where necessary of the burden of proof provisions). Even in such a case, however, it is important to bear in mind that the subject of the inquiry is the ground of, or reason for, the putative discriminator's action, not his motive: just as much as in the kind of case considered in **James v Eastleigh**, a benign motive is irrelevant.*

9.6 The Tribunal has reminded itself of the words of Lady Hale in the Supreme Court decision in **R-v- JFS** (above):

"The distinction between the two types of "why" question is plain enough: one is what caused the treatment in question and one is its motive or purpose. The former is important and the latter is not. But the difference between the two types of "anterior" enquiry, into what caused the treatment in question, is also plain. It is that which is also explained by Lord Phillips, Lord Kerr and Lord Clarke. There are obvious cases, where there is no dispute at all about why the complainant received the less favourable treatment. The criterion applied was not in doubt. If it was based on a prohibited ground, that is the end of the matter. There are other cases in which the ostensible criterion is something else – usually, in job applications, that elusive quality known as "merit". But nevertheless the discriminator may consciously or unconsciously be making his selections on the basis of race or sex. He may not realise that he is doing so, but that is what he is in fact doing. As Lord Nicholls went on to say in Nagarajan, "An employer may genuinely believe that the reason why he rejected an applicant had nothing to do with the applicant's race. After careful and thorough investigation of a claim members of an employment tribunal may decide that the proper inference to be drawn from the evidence is that, whether the employer realised it at the time or not, race was the reason why he acted as he did . . . Conduct of this nature by an employer, when the inference is legitimately drawn, falls squarely within the language of section 1(1) (a) " (p 512)".

Harassment related to age: section 26 of the 2010 Act

9.7 The relevant provisions of section 26 of the 2010 Act provided:

(1) A person (A) harasses another (B) if—
(a) A engages in unwanted conduct related to a relevant protected characteristic, and
(b) the conduct has the purpose or effect of—
(i) violating B's dignity, or
(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B…..

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

(a) the perception of B;
(b) the other circumstances of the case;
(c) whether it is reasonable for the conduct to have that effect.

(5) The relevant protected characteristics are--.race;

9.8 In relation to what is required to establish a case of discrimination by harassment the Tribunal has reminded itself of the guidance given by Underhill J in **Richmond Pharmacology Limited –v- Dhaliwal 2009 IRLR 336** and in particular that the Tribunal should focus on three elements namely:

(a) unwanted conduct
(b) having the purpose or effect of either violating the claimant's dignity or creating an adverse environment for him and
(c) being related to the claimant's race.

Victimisation – Section 27 2010 Act

9.9 The Tribunal has reminded itself of the provisions of this section which read:

(1) A person ("A") discriminates against another person ("B") if A subjects B to a detriment because-
(a) A does a protected act, or
(b) A believes that B has done, or may do, a protected act.

(2) Each of the following in a protected act-
(a) bringing proceedings under this Act;
(b) giving evidence or information in connection with proceedings under this Act;
(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.

(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information given , or the allegation is made, in bad faith…….

9.10 The Tribunal has reminded itself that a claim for victimisation requires the Tribunal to make an enquiry into and to determine the reason why the alleged discriminator did a particular act. That reason must be because the victimised person has done a protected act as defined by the 2010 Act. The protected act need not be the only or main reason for the action complained of: it is sufficient if the protected act materially influences those actions.

9.11 We have reminded ourselves of the relevant provisions of section 23 of the 2010 Act:

(1) On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case.

9.12 The relevant provisions of section 123 of the 2010 Act provide:

(1) Proceedings on a complaint within section 120 may not be brought after the end of--

(a) the period of 3 months starting with the date of the act to which the complaint relates, or
(b) such other period as the employment tribunal thinks just and equitable.

(3) For the purposes of this section--
(a) conduct extending over a period is to be treated as done at the end of the period;
(b) failure to do something is to be treated as occurring when the person in question decided on it.
4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something--
(a) when P does an act inconsistent with doing it, or
(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

9.13 The relevant provisions of section 136 of the 2010 Act provide:

(1) This section applies to any proceedings relating to a contravention of this Act.

(2) 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.

9.14 The relevant provisions of section 212 (1) of the 2010 Act provide:

.."detriment" does not , subject to subsection (5), include conduct which amounts to harassment

Indirect age discrimination

9.15 We have reminded ourselves of the provisions of section 19 of the 2010 Act.

Part time workers less favourable treatment

9.16 We have reminded ourselves of regulation 5 of the Part Time Workers (Prevention of Less Favourable Treatment) Regulations 2002:-

"(1) A part time worker has the right not to be treated by his employer less favourably than the employer treats a comparable full time worker –

(a) as regards the terms of his contract, or

(b) by being subjected to any other detriment by any act or deliberate failure to act of his employer.

(2) The right conferred by paragraph (1) applies only if –

(a) the treatment is on the ground that the worker is a part time worker, and

(b) the treatment is not justified on objective grounds".

Fixed term worker discrimination

9.17 We reminded ourselves of the Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations 2002 and in particular regulation 3 which reads:-

"(1) A fixed term employee has a right not to be treated by his employer less favourably than the employer treats a comparable permanent employee –

(a) as regards the terms of his contract, or

(b) by being subjected to any other detriment by any act or deliberate failure to act of his employer.

(3) The right conferred by paragraph (1) applies only if –

(a) the treatment is on the ground that the employee is a fixed term employee, and

(b) the treatment is not justified on objective grounds".

Ordinary Unfair Dismissal Claim – Section 98 Employment Rights Act 1996 (the 1996 Act)

9.18 The Tribunal has reminded itself of the provisions of section 98 of the 1996 Act which read:

"*98(1) In determining for the purposes of this part 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 in 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.

(2) The reason falls within this subsection if it –
(a) relates to the capability or qualifications of the employee for performing work of a kind which he was employed to do;
(b) relates to the conduct of the employee …

(4) In any other case 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 reasons 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".

9.19 We have reminded ourselves of the definition of dismissal contained in section 95 of the 1996 Act and section 95(1)(b) which means that the non-renewal of a fixed term contract amounts to a dismissal for the purposes of the 1996 Act. We have noted the guidance of Browne-Wilkinson LJ in the decision in **Fay -v- North Yorkshire County Council 1985 ICR 133:**
"… Merely to say that this was a fixed term contract does not by itself establish that there was a substantial reason for dismissal within section 57 (1). But, in my judgement, if it is shown that the fixed term contract was adopted for a genuine purpose and that fact was known to the employee and it is also shown that the specific purpose for which

the fixed term contract was adopted has ceased to be applicable then for the purpose of section 57 those facts are capable of constituting some other substantial reason.."

9.20 We remind ourselves that in considering the questions posed by section 98(4) of the 1996 Act, we must not substitute our view for what the respondent should or should not have done. We remind ourselves that there is no burden of proof resting on either party in respect of the matters to be considered pursuant to section 98(4) of the 1996 Act. Those matters must be judged from the standpoint of the objective reasonable employer and we must consider whether what the respondent did fell within the band of a reasonable response and only if it did not, can we strike down the dismissal as unfair. We have reminded ourselves of the guidance of Aitkens LJ in **Orr –v- Milton Keynes 2011 ICR 704** in respect of the matters for us to consider pursuant to section 98(4) of the 1996 Act. Whilst that was a case in respect of a misconduct dismissal, the guidance on the approach to the questions in section 98(4) of the 1996 Act holds good.

"…..the ET must consider, by the objective standards of the hypothetical reasonable employer, rather than by reference to its own subjective views, whether the employer has acted within a "band or range of reasonable responses" to the particular misconduct found of the particular employee. If it has, then the employer's decision to dismiss will be reasonable. But that is not the same thing as saying that a decision of an employer to dismiss will only be regarded as unreasonable if it is shown to be perverse.[7] (7) The ET must not simply consider whether they think that the dismissal was fair and thereby substitute their decision as to what was the right course to adopt for that of the employer. The ET must determine whether the decision of the employer to dismiss the employee fell within the band of reasonable responses which "a reasonable employer might have adopted".[8] (8) A particular application of (6) and (7) is that an ET may not substitute its own evaluation of a witness for that of the employer at the time of its investigation and dismissal, save in exceptional circumstances. [9] (9) An ET must focus its attention on the fairness of the conduct of the employer at the time of the investigation and dismissal (or any appeal process[10]) and not on whether in fact the employee has suffered an injustice.[11]

9.21 We have reminded ourselves that the Court of Appeal in **Whitbread plc –v- Hall 2001 ICR 699** confirmed that the band of reasonable responses test applied not only when considering the substantive decision to dismiss but also when considering the procedural steps taken by an employer.

9.22 We have reminded ourselves of the provisions of Section 123 of the 1996 Act in relation to the fact that compensation must be 'just and equitable' and have reminded ourselves of the decision of **Polkey –v – A E Dayton Service Limited 1988 ICR142**. We note that the Polkey principle applies not only to cases where there is a clear procedural unfairness but what used to be called a substantive unfairness also. However whilst a Tribunal may well be able to speculate as to what would have happened had a mere procedural lapse or omission taken place, it becomes more difficult and therefore less likely that the Tribunal can do so if what went wrong was more fundamental and went to the heart of the process followed by the respondent. We have noted the guidance given by Elias J in **Software 2000 Limited –v- Andrews 2007 ICR825/EAT.** We recognise that this guidance is outdated so far as reference to section 98A(2) is concerned but otherwise holds good. We note that in cases involving allegations of misconduct a **Polkey** assessment is likely to be more difficult than in a redundancy dismissal case and that a misconduct case will likely involve a greater degree of speculation which might mean the exercise is just too speculative. We note

that a deduction can be made for both contributory conduct and **Polkey** but when assessing those contributions the fact that a Polkey deduction has already been made or will be made under one heading may well affect the amount of deduction to be applied for contributory fault.

Redundancy

9.23 I have reminded myself of the words of Judge Clark in **Safeways Stores plc –v- Burrell 1997 IRLR 200 ("Burrell")** and in so doing it has noted section 139 of the 1996 Act is the provision which has replaced section 81 to which reference is made:
"Free of authority, we understand the statutory framework of s.81(2)(b) to involve a three-stage process:
(1) was the employee dismissed? If so,
(2) had the requirements of the employer's business for employees to carry out work of a particular kind ceased or diminished, or were they expected to cease or diminish? If so,
(3) was the dismissal of the employee (the applicant before the industrial tribunal) caused wholly or mainly by the state of affairs identified at stage 2 above?"

9.24 We have reminded myself of the words of Lord Bridge in **Polkey –v- AE Dayton Services Limited 1988 ICR 142 ("Polkey"):**

"In the case of redundancy, the employer will not normally act reasonably unless he warns and consults any employees affected or their representative, adopts a fair basis on which to select for redundancy and takes such steps as may be reasonable to avoid or minimise redundancy by redeployment within his own organisation".

9.25 We have reminded ourselves of the authority to which we were referred by counsel for the respondent in respect of evidence from recollection – **Blue -v- Ashley 2017 EWHC 1928.** We note that guidance was given in that case that the best approach to adopt in cases where evidence is given by witnesses based on their recollection of what was said in meetings and conversations is to base factual findings on inferences drawn from the documentary evidence and known or probable facts. We have followed that guidance. We have drawn our findings of fact mainly from the many documents to which we were referred. It has of necessity taken us some time to go through those documents thoroughly. The authors of the contemporaneously created documents had no reason to set out anything other than the truth when they did so and in a case such as this, we conclude that the documents are the most reliable source from which we can make findings of fact.

Discussion and Conclusions

10.1 We approach our conclusions by considering first the central factual issue in this case namely whether a succession plan was agreed with the claimant by the respondent at any time and our conclusions on the question of why the respondent reached the position it did. We will then turn to deal with each of the complaints advanced by the claimant and resolve the various issues set out in section 3 above. Finally, we will make some comment in respect of the disposal of this matter in the hope that such comments may assist the parties bring about a speedy resolution to this long running matter.

The Succession Plan - factual issue.

10.2 We considered in detail the documentary and oral evidence placed before us on the vexed question of whether or not a succession plan was agreed with and by the claimant at any point in the lengthy history of this matter. We reach the conclusion that there was no succession plan agreed by the claimant at any time which would involve his retirement as soon as the appointments were made to the posts of consultant tumour surgeon and consultant scoliosis surgeon and we do so for these reasons:

10.2.1 The claimant considered his option to retire and return under the Policy and put plans in motion in 2013 to take up that option and did so because he was concerned that his pension arrangements were approaching lifetime limits and if he continued pensionable employment there would be disadvantageous taxation and financial consequences. The claimant saw this as an opportunity to release his pension income and to return to work on a part time basis without any appreciable loss of income. This was a device many others have adopted for similar reasons and we accept the unchallenged evidence that those others have included LF and AW. The scheme of retirement and return allowed for a return to full time work (although no longer pensionable) as well as part time work which was the claimant's preferred route.

10.2.2 The claimant prepared his ground by approaching LF in July 2013 who readily agreed that the claimant could take the retirement and return option and could return to work part time for as long as he wished. That was in itself not surprising for others who had exercised that same option had returned to work for a period of their choosing. It was common ground amongst the witnesses called before us that that was the sort of thing that LF would have said as it reflected what was his style of management and it reflected the reality of the position that nothing of significance occurred in the respondent without his imprimatur. It was also common ground that the claimant was the first and only example of a consultant surgeon employed by the respondent not being allowed to choose for himself the date of his final retirement from employment.

10.2.3 The claimant submitted his formal application to retire and return in October 2013 (paragraph 6.9 above) and in it referred to "succession planning" but not a specific succession plan. There is reference to the appointment to two posts but there is no reference in that application, or indeed anywhere else, that the claimant would retire fully when the two appointments had been made let alone when the two appointees were settled into their duties and fully able to take up all the duties of the claimant - as later became the position of the respondent.

10.2.4 In an email written to NB on 22 November 2013 (paragraph 6.14 above) the claimant stated that the second post (which was ultimately awarded to AB) should be appointed on the basis that the appointee would work alongside the claimant and take over his practice when he decided to retire completely. Again, there is no reference to the claimant retiring once AB had been appointed.

10.2.5 The claimant prepared the draft advertisements for the two posts as requested by the respondent (paragraph 6.16 above). The advertisement for the post eventually awarded to AB spoke of the appointee working with 3 scoliosis colleagues and working in a pair with the claimant as one of the two pairs of surgeons in that area of activity. The appointee was to work with the claimant who the appointee was to in part "proleptically" replace. The claimant understood the advertisement to mean that the appointee would replace him fully when he decided to retire. The respondent accepted that wording without challenge or question and eventually placed advertisements to that effect and AB applied for the post to which he was appointed on that basis.

10.2.6 In January 2014 the claimant's application to retire and return was formally approved and he ceased work for the respondent under his full-time contract at the end of February 2014 with an agreement that he would return on a part time basis. The respondent had not started any recruitment process to appoint to the new posts at that time and had to ask the claimant to return to work on a full-time basis which he agreed to do. We conclude there was no evidence at all of the so called succession plan being in place when the claimant retired and returned. The claimant retired and returned on the basis that he could continue in work (full time as it happened but preferably part time) for as long as he chose and as had been agreed between himself and LF before he began the formal process. Nothing said by PP or AW or NB at any time up to the point of his retirement on 28 February 2014 altered that position and understanding. Furthermore, it was in line with arrangements which many others had had in place before the claimant.

10.2.7 In a template completed by PP on 10 March 2014 it was stated that the claimant had retired from the Trust and was returning on "*a flexible retirement"* until such point *"that he fully retired from the Trust".* There is no mention that the claimant will retire at the point when the two appointees are in post but rather a reference to the point when he fully retires and we infer that means the point at which he would chose to retire. We find further evidence in the investment proposal form prepared by PP (paragraph 6.23 above) where he again records that the Deformity Consultant Surgeon would work alongside the claimant sharing his operating lists and clinics "*until such point as Mr Gibson retires fully".* The matter of the retirement and return was dealt with in an relatively informal way with HR eventually being instructed to issue documentation to reflect the matters agreed between the claimant and the respondent in the guise of the clinical and medical directors and PP. We infer that that was not untypical of the way the employment contracts of consultant surgeons were arranged with the consultants being granted a fair degree of autonomy to dictate their contractual requirements in terms on PAs to be worked and the like. In the Unit the consultants worked closely together and agreed matters between themselves on a day to day basis and then effectively told the managers how things were going to be arranged which the managers were generally happy to go along with. That latitude did not extend to appointing additional posts into the establishment and the consultants, including the claimant, were aware that for certain initiatives the formal business case planning route was required hence the reference to that in the email to the claimant from NB in November 2013 (paragraph 6.14 above). In common with most, if not all, of his colleagues, the claimant had little grasp of the business planning process and had not

put his mind to the question of the funding of his own contract on his return and merely assumed his funding would continue albeit with some surplus available for the general budget when he dropped his working hours to part time. Nothing was said to the claimant at any time to disabuse him from that view.

10.2.8 We accept the evidence of all the other consultants in the Unit to the effect that they were not aware of any succession plan let alone that asserted by the respondent. None of them had any idea that the claimant was to retire once appointments had been made to the two new posts. That is compelling evidence for given the way matters were discussed and managed between them, we infer that they would certainly have been aware if any such plan had been agreed. The claimant was a valued and respected colleague who had worked in the Unit for upwards of 25 years and if he was to retire, they would surely have been aware and they were not.

10.2.9 The claimant was willing to assist the respondent on his return by working full time as opposed to his preferred 6.5 PA's per week and, in the event, he did so for 21 months until he eventually dropped to part time hours in January 2016. He had indicated he wished to work for two years or so on a part time basis. We infer he would not have cooperated in this way with the respondent had he known that his employment was to end once AI and AB were in post and settled.

10.2.10 We conclude that in referring to succession planning the claimant was first advancing his view that new appointments were needed to take up the duties he would surrender by only returning to work part time and secondly, he was seeking to achieve an expansion of the spinal consultant body which had long been his ambition and that of his colleagues. We infer the claimant was the de facto leader of the consultant body within the Spinal Unit and he wished to see the number of consultants increase as did his colleagues for various reason. First, there was a wish to work in pairs on scoliosis surgery in order more easily to meet the guidelines of the BSS, secondly, the work of the Unit was increasing through the number of referrals being made to it, thirdly, the on-call service was set to place greater strain on the consultant body which further appointments would help alleviate, fourthly the waiting lists for patients in both adult and children cases were too long and there was a wish to see them reduced in order to provide an improved service for the patients using the Unit and finally, the claimant wished to see two new appointments in order that he could achieve his stated wish to reduce to part time hours without it having any adverse effect on the service provided by the Unit.

10.2.11 The ultimate decision maker in respect of new appointments and the continued employment of the claimant was the Medical Director AW. He is the one figure in these events who remained in the same post throughout and still remains with the respondent as joint acting CEO. He appears in many of the crucial documents and was a central figure. However, he did not come to the Tribunal to give evidence although he did attend as an observer. We infer there was a reason he did not want to give evidence and that he could not gainsay the evidence of the claimant.

10.2.12 In the period of time from the claimant's return to work in April 2014 until the first quarter of 2016, there is no reference at all to the alleged plan that the claimant would retire once the two appointments were made. Once the managers of the respondent had formulated the decision that the claimant's contract was not to be extended beyond September 2016, this was not mentioned to the claimant and yet it was mentioned in confidence to other consultants including PS and AB. That enables us to infer that it was known that the claimant would object: but why would he object if it was a plan with which he had agreed? There is nothing in writing anywhere which records the claimant having agreed to retire when the two appointments had been made. The fixed term contracts themselves make no mention of the purpose for which the respondent asserts they were entered into. If the plan had been formed as the respondent asserts, a contract could have been entered into to expire on a date (say three months) after the second of the two posts was filled. There is no such mention in those documents.

10.2.13 In reaching our central conclusion on the succession plan issue, we have given attention to the documents and matters which pointed in support of the respondent's position that there was a succession plan agreed with the claimant. These documents were referred to in detail by Mr Blake in his submissions to us and we have weighed them all in the balance before reaching our conclusion on this point. The application made by the claimant for retirement and return refers to "*succession planning*", the claimant does speak of "*a smooth transition*" in an email of 4 November 2013, the claimant does refer to an initial contract for "*2 years in the first instance"* in an email of 13 November 2013 and in an email of 22 November 2013 the claimant does speak of the new posts being replacement posts. There are several documents completed by PP in respect of the business case for the new posts which are supportive of the position of the respondent but these are completed for the most part at a considerable distance from when the respondent asserts the agreement was made in late 2013/early 2014. There are documents and other pieces of evidence which point in favour of the position of the respondent and we have weighed them all in the balance in reaching our conclusion. We accept the claimant's evidence that at no time was he asked if he agreed to cease work for the respondent when the two new posts to which he had referred in his application were filled.

10.2.14 There was reference in evidence to the claimant's succession plan involving an increase in the consultant body after he retired to 7 full time posts in that he would be replaced by a full time surgeon who would absorb the part time hours of the claimant and bring an additional resource to the Unit. We accept that that was the aspiration of the claimant and his consultant colleagues but we see no evidence that the respondent had agreed such a plan which in any event was not due to be implemented, even on the claimant's evidence, until the indeterminate time in the future as he chose to retire fully and when the situation generally could have been very different.

10.2.15 For those reasons, we conclude that there was no agreed succession plan involving the claimant retiring fully once the two appointments were made for the Tumour Surgeon and the Scoliosis Surgeon.

The respondent's position.

10.3 We conclude that, through its officers, the respondent has made assumptions that the claimant had agreed to retire once the two appointments had been made and the appointees were in post. It is clear that PP proceeded on that basis as did DD and CG when they came into post and indeed as did others involved in this matter from the management side of the respondent. It is clear that PP in particular proceeded on that basis but he did so without the knowledge, let alone the agreement, of the claimant.

10.4 The question with which we have had to grapple is why were those assumptions made when there had been no agreement to it by the claimant? We conclude that assumptions were made first by PP and then others that the claimant would retire fully when the two appointees were in post and settled. We infer that those assumptions were based mainly on the fact that the claimant had applied for and been granted a retirement and return otherwise called a flexible retirement. Assumptions have been made that because the claimant had applied to "retire" and speak at the same time about succession planning and even give some indication of how long he might work on after "retirement" that he was saying he would retire when the two succession planning posts were filled. At no time did the claimant say that. We infer such assumptions would never have been made had the claimant applied at a younger age to step down from a full time post and return on a part time basis even if that younger person also spoke in the application of succession planning. We infer that in such a case the position of the claimant would have been properly considered and documented and funding for the continued part-time employment of the claimant properly identified. This is not what happened in this case. The respondent allowed the application from the claimant to be granted at a time when there was no plan in place for his work to be taken up to the extent that, had the claimant returned on a part time basis in April 2014, the respondent would have had very considerable difficulties in maintaining the service provided by the Unit. The difficult position in which the respondent found itself, through its own mismanagement of the situation, was only resolved by the claimant's willing agreement to return on a full-time basis ultimately until the end of December 2015 some 21 months later when both AI and AB were settled in post. We conclude that the assumptions made by the respondent's officers were because the claimant had "retired" and returned. As such the assumptions were materially influenced by the claimant's age for the option to "retire" was not available until he had reached a particular age. Those assumptions ultimately led to the claimant's contract of employment not being renewed in September 2016 against his wishes and to what amounted to the dismissal of the claimant – the first and only dismissal in such circumstances of a consultant surgeon that any witness called before us could recall: that much at least was common ground. It was open to the respondent to have refused the claimant's application to retire and return until it had put in place the required staff to take up the duties the claimant was set to surrender. It did not do so and to that extent it was the author of its own misfortune.

10.5 That this was the attitude of the respondent is clearly evidenced by the reference in the email of DD of June 2016 (paragraph 6.45 above) when he refers to the claimant as "this retired person" and later in July 2016 (paragraph 6.53 above) when he refers to

the younger consultants in the Unit being the future of the Unit who do not measure success in the way he characterised the claimant as measuring it. We note that none of the recipients of those messages took DD to task for his discriminatory comments and that all agreed with him that the services of the claimant as a "retired" person could be dispensed with as and when the respondent so chose without reference to the claimant's wishes. Putting to one side the ignorance of the legal position which that attitude demonstrates, we infer that such comments and attitude and assumptions would not have been made had the claimant not "retired" and we conclude that the assumptions and actions taken by the respondent were materially influenced by the age of the claimant. We infer and conclude that all that occurred once those assumptions were in play was tainted with age discrimination.

The overall picture

10.6 We have taken stock of the history of this matter generally and we set out without comment a summary of the relevant events. The claimant was a fully competent surgeon of national and international reputation who in common with many before him had taken an option available through the policy of the respondent to retire and return. He wished to work part time on return but to assist the respondent to put in place adequate cover to take up the duties he was to surrender and to bring additional resource into the Unit, he agreed to work full time for 21 months. The claimant had been led to believe he could continue to work on part time for as long as he wished and nothing to the contrary was agreed with him or indeed mentioned until 2016 when AI and AB were in post. In the ensuing 9 months there was a lack of communication with the claimant - as the respondent accepted. The only meeting of any substance with the claimant in that period was on 28 April 2016. It was common ground that that meeting was bad tempered and unsatisfactory and resulted in an unseemly spectacle of two consultant surgeons namely the claimant and DD losing their tempers each with the other and the claimant storming out of the meeting when he was told by DD that he, and not the claimant, would decide when the claimant would retire. In the next 5 months the claimant was not seen formally by any officer of the respondent and ultimately received written confirmation that his contract was not to be renewed some 20 minutes on what was to be his last working day. The respondent realised that the claimant had not been offered the right to appeal against what was his dismissal on 30 September 2016 (by the non-renewal of his fixed term contract) and so extended his employment to allow him to appeal if he wished. He did appeal and the appeal was ultimately heard almost seven months later. The appeal was not upheld but AD decided that the respondent should have implemented the OC Policy and adjourned for consultation with the claimant to take place. AC was instructed to undertake that consultation exercise. The conclusion reached by AC in her report in July 2016 was that the OC Policy was not applicable and consultation was not appropriate. The matter was referred to a hearing before NW who decided to dismiss the claimant by reason of the non-renewal of his fixed term contract which he characterised as a substantial reason for dismissal. From 1 October 2016 until 30 September 2017 the claimant received full pay from the respondent but was not permitted to work. The period of his absence from the workplace was never formally reviewed by the respondent. The claimant was dismissed on 5 September 2017 on notice with the dismissal to take effect on 30

September 2016 and offered the right to appeal. The respondent paid the claimant 12 weeks' notice pay to the claimant and realised later that was an error and required it to be repaid: the claimant did so. The claimant appealed against his dismissal and the appeal was turned down in December 2017. We conclude that that situation is one which by any standard requires an explanation from the respondent.

Other factors

10.7 Before moving to our specific conclusion we record our finding that in the history of this matter over some four years many factors were in play which led to what was on any view a very unsatisfactory situation. The claimant had been a consultant surgeon with the respondent for many years. He was forceful and at times difficult with the management of the respondent as is evidenced by his stance over the move of offices in early 2016. The claimant did not enjoy a good relationship with DD and indeed the animosity between them was starkly evident in the Tribunal room itself. The claimant had a long-held wish to see the number of surgeons in the Spinal Unit increase and saw an opportunity when he sought to move to part time working to increase the number of consultants, in particular so that there were two teams of surgeons to carry out scoliosis surgery as recommended by the BSS. The claimant was perceived as difficult by the respondent and we infer there was an unwillingness to confront him. The then CEO of the respondent himself directed that the claimant's contract should not be extended beyond September 2016 in stark contradiction to the position he had led the claimant to believe would be the case before the claimant filed his application to retire and return in October 2013. The question to which we now turn is whether the age of the claimant was another factor in play over this period.

Specific Conclusions

11. We turn now to our conclusions in relation to the specific complaints brought to the Tribunal by the claimant.

Issues 1 to 4: protected characteristic of age/comparators

11.1 We conclude that the claimant belonged to an age group of being in his 60s or one who was partially retired and perceived to be close to full retirement.

11.2 In relation to comparators we remind ourselves of section 23 of the 2010 Act and that there must not be a material difference between the circumstances of the claimant and his chosen comparator(s). The claimant refers from time to time to his consultant colleagues as comparators and they are all younger than the claimant and prima facie valid comparators.

11.3 We note the submission made by Mr Blake that they are not valid comparators because none of them had agreed a succession plan with the respondent – at least on the understanding of the respondent. We have concluded that the claimant had not agreed a succession plan and that any understanding to the contrary by the respondent relied on stereo-typical assumptions which were materially influenced by the age of the

claimant. We conclude that that difference between the claimant and his chosen comparators is associated with the age of the claimant and thus can and should be ignored in considering whether the circumstances of the claimant and the comparators are materially different: **Lockwood -v- DWP 2013 EWCA Civ 1195.**

11.4 The claimant also seeks to rely on a hypothetical comparator and we will consider the question of the appropriate comparator(s) in relation to each individual allegation of discrimination.

Issues 5 to 8 – Implementation of a succession plan: allegation of direct discrimination

11.5 We accept the submission of Mr Bayne that the correct comparator to use to test this allegation is a hypothetical younger consultant surgeon who goes part time for a reason other than a retirement in the way the claimant did by using an opportunity to retire and return under the terms of the Policy – an opportunity which would not be available to anyone under the age of 50.

11.6 We refer to and adopt our conclusions set out at paragraphs 10.3 – 10.5 above. We conclude by inference that had the claimant been a younger person the assumptions made by PP in 2013/2014 would not have been made in that if a younger person was seeking to reduce to part time hours, proper consideration would have been given to the funding for that person's post after return to part time work both before and after the appointment and the coming into post of AB. In this case little, if any, thought was given to the funding for the claimant's post after the arrival of AB because the assumption was made that the claimant would then retire fully and that assumption was materially influenced by the claimant's age.

11.7 We conclude that PP proceeded on the basis he did because he assumed (and did not check) that the claimant's references to succession planning meant the claimant would retire fully when the appointments envisaged under that plan had been made. That assumption would not have been made had the claimant been younger and not been able to take advantage of the flexible retirement policy to retire and return. We conclude that the officers of the respondent assumed that the claimant, having opted to retire and return and having spoken at the same time about succession planning, was happy to leave when AB was in post. That assumption would not have been made in the case of a younger person.

11.8 Later on in the process in December 2015, when the claimant's application to renew his fixed term contract from April 2016 came for consideration, DD had become involved by reason of his appointment as Clinical Director and clearly made the same assumptions as PP had done. His attitude is clearly demonstrated by his reference to the claimant as a "*retired person"* and having taken his pension and being on a fixed term contract. Those references are sufficient for us to infer that DD was treating the claimant as he did (and in particular decided to allow no more than a 6 month extension in April 2016) because the claimant had retired and taken his pension. That decision was tainted with age discrimination. The word "*retired"* seduced DD and PP before him

and NW after him to make assumptions which would not otherwise have been made and certainly not in the case of the hypothetical comparator.

11.9 Further we accept the submission of Mr Bayne that AD would have given much closer consideration than she did to the question of the funding for the claimant's part-time contract had she also not assumed that the claimant was to retire on the coming into post of AB. Again, that assumption was materially influenced by her perception encouraged by what PP presented to her that the claimant had retired and had spoken of succession planning. Unintentionally she fell into the same trap as DD and PP before her.

11.10 We conclude that there is considerable evidence of less favourable treatment of the claimant and sufficient additional factors to say the burden shifts to the respondent to explain that treatment. The absence of evidence from AW who was the final decision maker in relation to all aspects relating to the claimant's contract and its various extensions would have been sufficient in itself to provide the additional factor sufficient to shift the burden. But there is much more than that in this case as we have set out above.

11.11 The explanation advanced is that none of this would have occurred had the claimant not referred in his application to retire and return to a succession plan and that he had had no need to do so and could have simply asked to retire and return part time without reference to a succession plan. We have considered that explanation carefully. We note the claimant did not refer to a succession plan but rather to "*succession planning"* which is very different. Any responsible surgeon dealing with the complex cases dealt with by the claimant would be concerned to see that his practice and his patients were taken over properly and efficiently on his reduction to part time hours not least to ensure he could reduce to part time hours without having to field requests to work additional hours. We do not accept that explanation from the respondent. Notwithstanding the reference to succession planning, there were in play in this matter stereo-typical assumptions that a person who had retired would be content to retire fully when appointments had been made without any checking of that position with the claimant. The claim of direct discrimination in this regard is well-founded.

11.12 We have considered whether the act was justified. The respondent did not advance any particular case on justification. Even if a legitimate aim could be identified, we would have no hesitation in saying that the way the process was implemented was not a proportionate means of achieving any legitimate aim. We have set out above our criticisms of the process. We conclude there was no succession plan agreed by the claimant. Thus, the respondent sought to enforce a succession plan ultimately by refusing a renewal of contract beyond September 2016 without discussing the matter with the claimant in any formal and properly conducted meeting and the absence of any such consultation and discussion is sufficient in itself to enable us to say the respondent did not act proportionately. To seek to unilaterally implement a succession plan without consulting with the claimant and to remove from post a senior employee of the Trust of over 24 years' service (albeit with a short break in service) is

not a proportionate means of achieving any legitimate aim. The acts of age discrimination which we find well founded in this regard were not justified.

11.13 We have considered the time issues. Given that these matters begin in 2013 but move through effectively to the date of dismissal of the claimant, we conclude that this is conduct extending over a period within section 123(3)(a) of the 2010 Act and effectively this complaint is in time. The date which is three months prior to Day A on the conciliation certificate relied on by the claimant is 14 September 2016. If that conclusion is wrong then we would conclude that an extension of time to consider this matter would be just and equitable within section 123(1)(b) of the 2010 Act.. We have had regard in respect of all questions of time limits raised in this matter to the guidance in **British Coal Corporation -v- Keeble 1997 IRLR 336** and the factors set out in section 33 of the Limitation Act 1980. The question of the succession plan lies at the heart of all allegations in this matter and was an ongoing matter of discussion between the parties up to and beyond the date of the claimant's dismissal on 30 September 2017. Any delay in respect of raising these allegations is because the matters were being discussed in the workplace, the claimant did not immediately recognise what was happening to him as acts of age discrimination and he did not seek legal advice until late in the process. The respondent has been able to deal with these allegations without any notified difficulty in respect of the availability of evidence and the like, the evidence of the parties was not affected by the passage of time and the prejudice to the claimant in not being able to advance this claim is considerably greater than any prejudice to the respondent caused by the delay. If necessary, we conclude it is just and equitable to extend time to enable these matters to be considered for remedy.

11.14. We conclude this allegation of age discrimination is well-founded and the claimant is entitled to a remedy.

Issues 9 to 12 – fixed term contracts: allegation of direct discrimination.

12.1 We conclude that the claimant's age group for the purposes of testing this allegation is being over the age at which retirement under the NHS pension scheme was permitted.

12.2 The hypothetical comparator relied on in respect of this claim is a younger consultant surgeon who ceases to work full time but returns on a part time basis for a reason other than retirement. An example would be a surgeon ceasing full time duties for child care reasons and returning to work part time.

12.3 We conclude that under the terms of the Policy in force when the claimant retired and returned in April 2014 he was to return under a fixed term contract of not more than 12 months (paragraph 6.4 above). The Policy had changed (paragraph 6.5 above) by the time of the claimant's renewal in April 2015 and all reference to fixed term contracts had been removed. Notwithstanding that, the claimant was renewed on a fixed term contract in April 2015 and then again for six months in April 2016. The claimant asked on at least two occasions why he was not being allowed a permanent part time contract after the Policy had changed but received no reply. We have considered how the

comparator would have been treated and conclude that s/he would have returned to work on a part time permanent contract and not on a fixed term contract and that would have been so whether the return was in 2014 or at any other time and thus any question of renewal would not have arisen. That is less favourable treatment of the claimant. Is there sufficient to shift the burden of proof to the respondent to explain that treatment? We conclude that there is because this is a situation envisaged in **James -v- Eastleigh BC 1990 ICR 554** because the effect of the treatment on those over the NHS retirement age is inherently discriminatory. Furthermore the absence of a reply to the questions raised by the claimant is concerning and would persuade us to shift the burden of proof in any event.

12.4 We have considered the explanation advanced by the respondent which is that the claimant was offered a fixed term contract because that was the policy of the respondent at the time and that, in any event, it is irrelevant because the employment of the claimant would have come to an end when the purpose of the succession plan was achieved. We reject that explanation in respect of the renewals in April 2015 and April 2016 for that was no longer the policy of the respondent at that time. We reject the explanation in so much as it depends on the succession plan for there was no succession plan agreed with the claimant. In any event to have employees of the age group of the claimant return to work on a fixed term contract with the consequent necessity and uncertainty of renewal as opposed to younger employees returning on permanent contracts is inherently discriminatory because of age. The allegation of discrimination is well-founded.

12.5 We have considered justification. The respondent did not seek to advance this defence in submissions and in its form of response the respondent makes general reference only to efficient succession planning and the career progression for other surgeons. That aim, which could well amount to a legitimate aim, was not related to the Policy and indeed the rationale for the Policy was not explained. We conclude that the defence of justification, even if pursued, fails. We infer that the Policy was changed as it was recognised it was discriminatory because of age and that accounts for the failure of the respondent to respond to the enquiries of the claimant in respect of the renewals in 2015 and 2016.

12.6 We have considered the question of whether these allegations are in time. Again, we conclude that there is a series of actions in this case in which it is sufficient to enable us to say that the last act of granting a fixed term contract brings into consideration the two previous contracts. However the last renewal was in April 2016 and proceedings should have been commenced by July 2016 and they were not. We have therefore considered whether it would be just and equitable to extend time in this matter. Given the fact that these acts are inextricably linked to the narrative of the succession planning we conclude that it would be just and equitable for time to be extended to enable this allegation to be considered. We adopt the same reasoning as set out in paragraph 11.13 above. That said we do not consider that this allegation adds much to the first allegation which we have found proved for it is simply a subset of allegations which is encompassed by the more general allegation in respect of the succession plan.

Issues 13 to 16 – failing to notify the claimant of non-renewal of his contract: allegation of direct discrimination.
Issues 50, 50A and 51: allegation of victimisation.

Direct Discrimination

13.1 There was some inconsistency between the representatives in their submissions as to the nature and extent of this allegation. For the claimant, Mr Bayne treated the allegation as limited to the failure of the respondent properly to notify the claimant of the non-renewal of his contract until 30 September 2016 shortly before his departure. Mr Bayne did not advance any written submissions on the allegations of victimisation. For the respondent, Mr Blake treated the matter more widely and considered the rationale of the non-renewal in September 2016. We consider the allegation in the narrower way in which the claimant chose to present it.

13.2 The age group of the claimant for the purposes of this allegation is being partially retired and perceived to be close to full retirement or alternatively being in his 60's.

13.3 The hypothetical comparator constructed to test this allegation is a person younger than the claimant who had returned to work part time but on a fixed term contract.

13.4 The claimant was not officially notified of the non-renewal of his contract until some 20 minutes before he left work on the last working day before the contract expired on 30 September 2016. Even by the standards of the respondent, that formal notification was very late and ought to have been given many weeks earlier than it was. We infer that the comparator would not have been treated in such an unreasonable and disdainful matter. We infer that the respondent would not set out to notify someone on their last afternoon in the office after almost 25 years' service (albeit with a short break) that they were effectively dismissed. There is sufficient in our judgment to shift the burden of proof to the respondent and seek an explanation.

13.5 The explanation advanced by the respondent was that the claimant was notified of the non-renewal on 28 April 2016 in the meeting with DD, that he was told that his contract was not to be renewed on 13 July 2016 by letter and that on 31 August 2016 the claimant was informed by HR that his contract would end on 30 September 2018. In essence, that the notification on 30 September 2016 was simply conveying information the claimant already knew.

13.6 We have considered that explanation. In so far as the explanation relies on the meeting of 28 April 2016 informing the claimant of non-renewal, we reject that explanation for our findings of fact make it plain that no such decision had been taken at that time. There was no email sent to the claimant on 13 July 2016 which advised him of the non-renewal. There is at that time the correspondence from LF which was unclear as to the end date of the claimant's employment but simply indicated that the claimant's clearing of his lists should not take a year. The letter from HR of 31 August 2016 (paragraph 6.54) from Claudia Sweeney tells the claimant that she understood

that *"your department have let you know that a further contract has not been approved due to funding. Your contract with the Trust will end as scheduled on 30 September 2016".* The claimant did reply and say he had not been officially notified but that he had been copied into emails suggesting that was the case. We accept that the claimant was notified of the non-renewal by that email at the end of August 2016. We are supported in that conclusion by the claimant recounting in his witness statement that he was in the act of clearing his desk when PP arrived on 30 September 2018 to hand the letter from HR to him which gives him the official notification he wished to receive. Therefore we accept the explanation of the respondent in respect of this particular allegation and the complaint of direct discrimination is dismissed.

Victimisation

13.7 We are satisfied that the letter sent to the respondent by the solicitors for the claimant amounted to a protected act for the purposes of section 27(2)(c) and/or (d) of the 2010 Act (paragraph 6.56 above).

13.8 The decision not to extend the contract beyond 30 September 2016 is a detriment as referred to in section 27(1) of the 2010 Act.

13.9 Given that we have concluded the claimant was in fact notified of the decision, albeit not "officially", on 31 August 2016, the decision was clearly taken before the date of the protected act and so it follows this claim is not well-founded and it is dismissed.

Issues 17 to 20 – placing the claimant on special leave: allegation of direct discrimination.
Issues 44-46: allegation of harassment.
Issues 51-53: allegation of victimisation.
Issues 67-70: allegation of breach of the Fixed Term Employee Regulations.
Issues 77-82: allegation of breach of the Part Time Workers Regulations

Harassment

14.1 We deal first with the allegation of harassment. We accept that the placing of the claimant on so called special leave was unwanted conduct by the claimant. We do not accept that the intention of the respondent in so doing was to violate the claimant's dignity or create for him an intimidating, hostile, degrading, humiliating or offensive environment.

14.2 We have considered whether the effect of placing the claimant on special leave was to violate his dignity or to create the prohibited environment. We have taken account of the perception of the claimant, whether it was reasonable for the conduct to have that effect and the other circumstances of the case.

14.3 The claimant was a senior consultant surgeon who had served the respondent for almost 25 years. He had - and still has - a national and international reputation of the highest order. He was a former President of the BSS and was a well-known figure in

the organisation of the respondent. Through no fault of his own he found himself placed on special leave of absence by the respondent due to the administrative morass which the respondent and no one else had created. In the event, that leave lasted 12 months during which time the respondent made no attempt to review the terms of the special leave particularly as regards the embargo on the claimant carrying out any work in the respondent's hospitals: no consideration at all was given to the fact that the claimant might be becoming de-skilled. There was work to be done, there were patients to be treated, the claimant was receiving full pay but being made to stay away from the workplace. The claimant was rightly proud of his status as a consultant surgeon and of his many achievements not least being asked to give a prestigious lecture in June 2017 but he was reduced to being paid but not allowed to work. His absence was not explained and rumours circulated that there were conduct or capability issues. There were no such issues but it is easy to understand how that rumour mill would take hold. It is difficult to imagine a clearer case of someone perceiving that his dignity had been violated or that an environment had been created which was humiliating and that perception was entirely reasonable.

14.4 We have considered if the conduct of the respondent was related to the age of the claimant. The requirement for something to be "related to" a protected characteristic is the loosest test to be found in the 2010 Act and it has a broad meaning. We conclude that the actions of the respondent in this regard were related to the claimant's age. It was submitted by Mr Blake that the reason for the special leave was because the respondent had omitted to provide the claimant an opportunity to appeal his dismissal by non-renewal of contract before his last day at work on 30 September 2016. We conclude that that was indeed the proximate cause of the decision to place on special leave but it is right to consider why the right to appeal was required in the first place. The claimant was being dismissed because the respondent had decided not to renew his contract because a succession plan had been fulfilled by the appointments of AI and AB. The succession plan was wrongly seen by the respondent as having been agreed by the claimant. The respondent had reached the wrong conclusion on the existence of an agreed plan because of stereo typical assumptions having been made about the claimant's willingness to retire because he had "retired and returned". The claimant could not have done so had he not been over pensionable age and thus the decision to place on special leave is related to the claimant's age. There is sufficient causal nexus in this case between the age of the claimant and the decision to place on special leave for us to conclude that that is so.

14.5 There are no time issues in respect of this allegation. In those circumstances, the claim of harassment is well-founded and the claimant is entitled to a remedy.

Direct Discrimination

14.6 In those circumstances the claim of direct discrimination falls away and cannot be considered further.

Victimisation

14.7 We have turned to the claim of victimisation. The protected act relied on is again the letter of 26 September 2016 from the solicitors for the claimant. The decision to place the claimant on special leave was communicated by letter from AW dated 30 September 2016 (page 686). In that letter AW specifically refers to the letter from the claimant's solicitors which he had "reviewed". That letter made serious allegations against the respondent and made clear his intention to sue for unfair dismissal and age discrimination. We did not hear evidence from AW. The decision to place the claimant on paid leave of absence is on the face of it irrational. There was no reason why the claimant should not do some work for he was being paid by the respondent. There was work to be done and the was no reason why the claimant could not have done it. Public money was being used to keep someone at home who could have treated patients and helped in some way to reduce waiting lists.

14.8 The hypothetical comparator we construct is a surgeon whose contract had come to an end but who was to be allowed to appeal against that termination and who was to be paid whilst doing so and in respect of whom there were no conduct or capability issues and who had not made allegations of discrimination against the respondent. We infer that such a comparator would have been allowed to remain at work whilst the appeal was dealt with for otherwise public money would be wasted for no purpose. The claimant was treated differently and less favourably. He was subjected to a detriment and we conclude that AW (from whom we did not hear) was materially influenced by his reading of the letter of 26 September 2016. The claim of victimisation is well-founded and the claimant is entitled to a remedy.

Claims under the 2000 Regulations and the 2002 Regulations

14.9 No submissions were made to us in support of the claim advanced in this regard pursuant to the 2000 Regulations of the 2002 Regulations. We see no evidence at all that the claimant was treated in this regard less favourably by reason of his fixed term status or his part time status. The claimant was a fixed term and a part time employee but we have no more than those bare matters placed before us. In the absence of submissions to consider, we dismiss these claims.

Issues 21-24 – failure to notify colleagues: allegation of direct discrimination.
Issues 47-49 – allegation of harassment.
Issues 54-56 – allegation of victimisation.

15.1 We feel able to deal with this allegation summarily.

15.2 The allegation is that the claimant was subjected to harassment or direct discrimination and/or victimisation by reason of the respondent failing to notify his colleagues why he was not at work.

15.3 We go straight to the reason why the respondent says it failed to do so. That reason is said to be because to notify the claimant's colleagues would have breached

the claimant's right to privacy. We note the claimant did not ask the respondent to advise his colleagues formally of the reason for his absence from the workplace and it is abundantly clear that all the colleagues in the Unit were aware of the situation and were writing to the respondent about it. We accept the explanation advanced by the respondent in this regard.

15.4 These claims are therefore dismissed.

Issues 25-28 –delay in listing the appeal until 11 April 2017: allegation of direct discrimination.
Issues 57-59: allegation of victimisation

16.1 We feel able to deal with this allegation summarily.

16.2 This allegation relates to the listing of the hearing before AD in April 2017 after she had taken the decision to adjourn the hearing in December 2016 to enable a possible solution to the matter to be discussed. In written submissions, Mr Bayne confined his case to the allegation of victimisation.

16.3 As with the last allegation, we go straight to the explanation advanced by the respondent in respect of this matter. We accept that it was only at the end of December 2016 that it became clear that a further hearing before AD would be required (paragraph 6.65 above). Arrangements were put in place for the hearing on 7 April 2017 by 20 February 2017. The claimant made no complaint about the delay nor did he suggest before proceedings were instituted that the delay amounted to victimisation or direct discrimination. We accept that given the necessity to coordinate the diaries of the various attendees including the claimant, AD, DD and others the hearing was arranged reasonably quickly. It could have been quicker but we accept the explanation that it was arranged as quickly as diary and other commitments allowed.

16.4 As we accept the explanation of the respondent, the claims of direct discrimination because of age and victimisation in respect of this matter fail and are dismissed.

Issues 41-43 – comments made by DD to PS in March/April 2016: allegation of harassment

17.1 This allegation relates to the fact that DD spoke to PS in early April 2016 and made him aware that the claimant's contract was not to be extended beyond September 2016 before any mention of that matter was made to the claimant (paragraph 6.39 above).

17.2 We accept that the conversation of DD with PS which was then promptly reported to the claimant by PS was unwanted conduct by the claimant.

17.3 The relationship between the claimant and DD was by this point in time very poor notwithstanding that these events occurred before the 28 April 2016 meeting. DD found himself in a position from which he believed he could dictate to the claimant when and

how his employment should end. Old scores were being settled. We infer that in speaking as he did to PS, DD was deliberately seeking to undermine the claimant and to violate the claimant's dignity and to create for the claimant a humiliating environment. At best the conduct of DD was discourteous and at worst it was unlawful harassment. We conclude it was the latter. After what was in effect 25 years' service, the claimant found out from a colleague that his contract was perhaps not to be renewed beyond September 2016.

17.4 If that conclusion should be wrong, then we conclude that the effect of the conduct of DD was to violate the claimant's dignity and to create for the claimant a humiliating environment.

17.5 We have considered whether the conduct was related to the age of the claimant and we conclude that it was. The reason the claimant's contract fell for renewal at all was that he had retired and returned on a fixed term contract pursuant to the Policy. Had the claimant not been of pensionable age that situation would not have arisen. There is sufficient nexus between the conduct of DD and the claimant's age to render those actions an act of harassment related to age.

17.6 This event occurred in March/April 2016. The claimant did not bring proceedings until January 2017 relying on a conciliation certificate which served to bring matters from 14 September 2016 in time. This claim is therefore six months out of time. It was not a continuing act. We have considered whether time should be extended on a just and equitable basis.

17.7 This act of harassment is not part of a continuing act but it is a discrete event. We have considered whether it would be just and equitable to extend time to allow this matter to be considered for a remedy when proceedings in respect of it should have been advanced by the end of June 2016. These proceedings were begun some six months later. We have balanced the factors set out in section 33 of the Limitation Act 1980 proceedings and the guidance in **Keeble** (above). Time limits are there for a reason and to be observed. If the claimant saw this as an allegation of harassment he did nothing to pursue the matter. He made no complaint about it to the respondent. We weigh the relevant factors and conclude that in respect of this matter, it is not just and equitable to extend time to enable this matter to be considered for remedy. Accordingly, this complaint of harassment is dismissed.

Issues 29-32 – dismissal: allegation of direct discrimination.
Issues 60-62 – allegation of victimisation
Issues 63-66: allegation of breach of the 2002 Regulations.
Issues 71-76: allegation of breach of the 2000 Regulations

Direct discrimination

18.1 We conclude that the claimant's age group for the purposes of this allegation is that of someone who had retired and returned under the provisions of the Policy and was perceived to be close to retirement age or alternatively someone in his 60's.

18.2 The claimant was dismissed by letter of 4 September 2017 effective from 30 September 2017. That is detrimental treatment.

18.3 The comparators relied on were the other spinal consultant surgeons who were all younger than the claimant and were not dismissed. The claimant was treated less favourably. It was argued by the respondent that the consultants were not appropriate comparators because they had not agreed a succession plan or at least the respondent did not think they had done so. We conclude that for the purposes of testing this allegation, the other consultants are appropriate comparators because our conclusion is that there was a redundancy situation amongst the spinal consultant surgeons in September 2016 and as such that body of consultants formed the appropriate selection pool. There was no succession plan agreed with or by the claimant nor was there any such plan for the other consultants. Any belief by the respondent that such a plan existed relied on stereo typical assumptions related to the age of the claimant.

18.4 We have considered if there are sufficient factors to shift the burden of proof to the respondent to prove why the claimant was dismissed. There are many features leading up to the dismissal which are concerning. We refer to and adopt our findings set out in paragraph 10.6 above. The background to the hearing before NW on 23 August 2017 is sufficient to cause us to shift the burden of proof to the respondent. But there is more than that. The hearing before NW on 23 August 2017 concentrated on the report prepared by AC. In preparing that report AC had not seen it necessary to speak to any of the consultant colleagues of the claimant despite them all having relevant evidence to give in respect of the vexed question of the succession plan – a plan which everyone accepted was not clearly set out in any document. In such circumstances to ignore a rich vein of relevant evidence as to the existence or otherwise of the plan is concerning. In addition, during cross examination NW confirmed that he would have expected a succession plan to be “crystal clear” but it clearly was not. In such circumstances why not take account of all relevant evidence? NW concluded that it was clear that the claimant had changed his mind about leaving the employ of the respondent once the two replacements were in post but did so without any direct evidence to support such a conclusion. NW went on to say that he had heard what the consultant body had said to this Tribunal about being unaware of any succession plan but that evidence had not made any difference to him. That was a concerning remark given that the clear evidence from all the consultants was that they were none of them aware of such a succession plan. In addition, NW told us that he agreed that LF was known to say one thing and do another and did not doubt the claimant’s honesty when he said that LF had said he could work on a part time basis for as long as he wished. It also emerged during cross examination that NW had no appreciation at any time until the hearing before this Tribunal that the claimant had entered into a fixed term contract because that was the policy of the respondent at the time of the claimant’s return to work in 2014. However, that did not give NW cause to think that his conclusion that the contracts were entered into for the purpose of the succession plan might be wrong. NW told us that he had not examined the terms of the fixed term contracts. He had not thought to question why, if the contracts were entered into for the purpose of keeping the claimant employed until the two replacements were in post, a contract had not been

entered into for a term until that purpose had been achieved. All those matters cause us to conclude that there are sufficient factors to shift the burden of proof to the respondent to explain the reason for the dismissal.

18.5 The explanation advanced by the respondent is that NW moved to dismiss the claimant because he believed the purposes of a succession plan agreed to by the claimant had been achieved. We accept that NW did have the report from AC before him which had concluded that the claimant was supernumerary. NW relied very heavily on that report and that was clearly a material influence on his decision to dismiss. However, we have to consider whether there were any other material influences and in particular whether the age of the claimant was a material influence on the decision to dismiss.

18.6 The conclusion of the AC report was a happy outcome for the respondent for it provided a reason to avoid a redundancy consultation amongst the surgeons in the Unit. The respondent had through mismanagement of the claimant's position created a situation where there were 6.7 surgeons in the Unit but only funding for 6. Whilst there was work for 6.7 surgeons and more, there was only funding for 6. The respondent had the ability to find extra funding in the short term if needed (and indeed did so for the claimant from January 2016 until September 2017) but we accept there was only funding in the budget of the Unit for 6 surgeons. The claimant was dismissed and the other 6 surgeons were not even considered for redundancy. NW gladly seized on the conclusion of AC and dismissed the claimant. NW did not approach his task with any rigour as we set out in paragraph 18.4 above. We conclude that NW did not bring any independent thinking to the situation with which he was faced but simply accepted the conclusion of AC. We infer that in doing so, and like PP and DD before him, he saw the claimant had retired and returned and without proper investigation of the circumstances decided that the claimant should be dismissed. In so doing NW made stereotypical assumptions about the claimant because of his age: we infer that NW saw the claimant had "retired and returned" and concluded he must have agreed to retire when the two appointees were in post without challenging or assessing the conclusion reached by AC to that effect. That thinking would not have occurred if the claimant had been younger and returning to part time work without having "retired". It may be that such assumptions were subconscious but we conclude they played a material influence in the thinking of NW in accepting the AC report and dismissing the claimant for a reason which did not in our judgment exist. That was a startling conclusion and we infer that age was a material factor in the decision-making process of NW. The claim of direct discrimination in respect of the dismissal of the claimant is well found.

18.7 The respondent did not attempt to seek to justify this act of discrimination and we need not consider that matter further. The claim is in time.

Victimisation

18.8 By the time of the dismissal there were three protected acts namely letters from the claimant's solicitors of 27 September and 29 November 2016 and the institution of proceedings on 17 January 2017.

18.9 NW was not cross examined as to whether he was aware of either act during the time of his involvement in this matter. We see no evidence that he did have that knowledge and so we conclude that the protected acts were not an influence on the thinking of NW. The claim of victimisation is dismissed.

Fixed Term and Part Time Worker Status

18.10 The claimant was both a part time and a fixed term employee when he was dismissed. These claims were not however pursued with any vigour. We are not satisfied that there is a prima facie case made out that the dismissal of the claimant was influenced by the part time or fixed term status of the claimant let alone that either factor was the effective and dominant cause of the dismissal. These claims are not well-founded and are dismissed.

Issues 36-40: allegation of indirect age discrimination

19.1 This matter was not addressed by the claimant in submissions and indeed was not pursued at the hearing with any conviction. The allegations of indirect discrimination in this case all relate to the claimant's individual position and we see no evidence of any relevant provision criterion or practice (PCP) applied by the respondent. The PCPs contended for in the pleadings were those which resulted in the claimant being selected for a succession plan rather than any of his colleagues. In this case we have decided that there was no succession plan as such. Anything the respondent did in this matter related to the claimant and the claimant alone and we see no evidence of application of PCPs to a group and any necessary group disadvantage.

19.2 In the absence of submissions on the point and the matter being pursued in cross examination, we dismiss this allegation.

Issues 83-85: allegation of unfair dismissal

20.1 We remind ourselves that we move now to deal with the provisions of the Employment Rights Act 1996 and the different tests which arise for consideration.

20.2 We have considered whether the respondent has proved the reason for dismissal. The respondent asserts that the reason for dismissal was some other substantial reason as set out in section 98(1) of the 1996 Act. We remind ourselves that the expiry of the fixed term contract of the claimant is not the reason for the dismissal – it is merely the mechanism of dismissal. The respondent must prove the reason on the balance of probabilities. The reason advanced was that the decision makers considered that the purposes of the succession plan had been achieved and that the belief was genuinely held. However, we conclude that there was no succession plan agreed with or known to the claimant and that such succession plan as the respondent considered there to be was tainted with age discrimination.

20.3 For the respondent Mr Blake submitted that so long as the decision makers had a genuine belief in the substantial reason for dismissal then the reason was made out. He supported this by a submission that a dismissal for contravention of an enactment under section 98(2)(c) of the 1996 Act was made out if a genuine belief in the contravention was established. We do not agree that that is so. An employer must show that the continued employment of an employee does in fact contravene a statutory enactment. It is not enough to show — as it would be in the case of a conduct or capability dismissal — a genuine belief on reasonable grounds and after reasonable investigation that there would be such a contravention. We conclude that the same is true if the respondent seeks to establish a substantial reason for dismissal. The respondent must show on the balance of probabilities that such reason exists. In this case the respondent has failed to do so and has failed to establish a potentially fair reason for dismissal.

20.4 If that is wrong, then relying on the authority of **North Yorkshire County Council -v- Fay** (above), a substantial reason will only be made out if a fixed term contract was adopted for a genuine purpose known to the employee. In this case we do not accept that the claimant knew that the reason for the fixed term contract being used was to ensure that he could be dismissed once the two consultants were in post. That matter not discussed with the claimant, was not agreed by the claimant and he did not know that that was the reason he had been employed on a series of fixed term contracts. We note that the claimant entered the first fixed term contract in April 2014 before any mention of a succession plan (as opposed to succession planning) finds mention in any of the papers: we conclude the fixed term contract was used because that was the Policy of the respondent in April 2014 and the respondent continued to apply that policy notwithstanding that it changed before the two subsequent renewals. When the contract was later twice renewed no mention at all was made by the respondent of any reason for the renewal beyond the claimant remaining in employment. When the contract was renewed in April 2015, there was little discussion. In April 2016, there was discussion but the respondent did not make it clear to the claimant that the sixth month renewal was because it considered the succession plan had been achieved but rather that the respondent could decide if and for how long the contract should be renewed – in the words of DD, he would decide when the claimant would retire. The stated purpose of the contract does not appear in any of the contract papers. In the absence of that knowledge by the claimant, the substantial reason contended for by the respondent cannot not in any event be made out.

20.5 If that is wrong, then we accept the submission of Mr Bayne that if the decision of NW was that the dismissal was in line with an agreed succession plan and there was no funding available to continue the employment of the claimant, then that would relate to the needs of the respondent's business rather than to the individual circumstances of the claimant and as such would be properly characterised as a dismissal for redundancy. In essence that AD got it right when she decided there was a redundancy situation and AC got it wrong. The consultation which AD rightly considered was necessary did not occur. The respondent did not seek to say the reason for dismissal was redundancy and thus that reason is not proved by the respondent.

20.6 If that is wrong, then we have to give consideration to the questions posed by section 98(4) of the 1996 Act. Was the decision reached by NW a reasonable one viewed from the standpoint of the reasonable employer? We conclude that it was not. In terms of substance, NW accepted that he did not know that the claimant had returned to work in April 2014 on a fixed term contract because that was the policy of the respondent at the time. NW concluded that he could not accept the claimant's version of a succession plan because it was at odds with an email written by the claimant on 22 November 2013. In cross examination, NW accepted that the email was not at odds with the claimant's account. On any reasonable and objective view of the documents before him, NW could not have rejected the account of the claimant as to the position in November 2013 and after that point in time nothing further was agreed at any time with the claimant. NW did not seek evidence as to the succession plan from the claimant's colleagues and they had much relevant evidence to give. No reasonable employer would have ignored that rich vein of relevant evidence. The approach of NW lacked any reasonable rigour and effectively gladly rubber stamped the report and recommendation of AC without reasonable challenge and enquiry: no reasonable employer would have acted in that way.

20.7 In terms of the procedure adopted, we refer to and adopt our findings in paragraphs 10.6 above. There was no consultation with the claimant worthy of that name at any time before the last contract expired on 30 September 2016. The claimant only received formal confirmation that the contract was not to be renewed 20 minutes before he left work on his last day after 25 years' service (albeit with a break in 2014). There then followed a period of 12 months before the decision that the contract was not to be renewed was confirmed during which time policies were engaged and then disengaged and the claimant was paid in full but not allowed to work with no consideration being given by the respondent to the effect of that delay on the skills of the claimant. There then followed an appeal against dismissal which was delayed for some 9 weeks and which did not set out to correct the unreasonable procedure and conclusions which characterised the decision to dismiss. No reasonable employer would have acted in that way. Judged from the standpoint of any reasonable employer, the decision to dismiss the claimant was comprehensively unfair.

20.8 For all those reasons, we conclude that the dismissal of the claimant was unfair and the claimant is entitled to a remedy.

Issues 86-88: allegation of wrongful dismissal

21.1 During the course of oral submissions, Mr Bayne indicated that we should not trouble with this matter but the claim was not formally withdrawn. We consider it briefly.

21.2 The claimant began work for the respondent in January 1991 and ceased employment when he "retired" in February 2014 at which point he had accrued 22 years' service. He returned to work for the respondent in April 2013 and was dismissed on 30 September 2017 by which time he had accrued 3 years' service. He was given notice of termination of his employment with effect from 30 September 2017 by letter

dated 4 September 2017. The claimant received that notice on 5 September 2017 and thus received 25 days' notice – 3 weeks 4 days.

21.3 When the contract was terminated on 5 September 2017 the claimant having accrued 3 years' service was entitled to 3 weeks' notice pursuant to section 86 of the 1996 Act. He received more than that and therefore this claim is not well- founded.

21.4 We have considered whether the continuity of service of the claimant was continued by the provisions of section 212 of the 1996 Act when he returned in April 2013 after his so-called retirement. We accept the submissions of Mr Blake that none of those provisions operated to maintain continuity of service in the period between retirement and return. The break was not a temporary cessation of work within section 212(3)(b) nor was there any arrangement or custom within section 212(3)(c) which maintained continuity in the period.

21.5 For those reasons, the claim of wrongful dismissal fails and is dismissed.

Issues 89-91: application for a redundancy payment

22.1 The respondent does not advance redundancy as the reason for dismissal. The claimant seeks a redundancy payment. This is effectively a claim in the alternative to the claim for unfair dismissal.

22.2 The provisions of section 163(2) of the 1996 Act provide that an employee who has been dismissed shall, unless the contrary is proved, be presumed to have been so dismissed by reason of redundancy for the purposes of a redundancy claim.

22.3 The respondent sought to prove that the claimant was dismissed for some other substantial reason within section 98(1) of the 1996 Act. We have concluded that the respondent has failed to do so. The claimant seeks a redundancy payment and the presumption in section 163(2) comes into play and assists him in this claim. The respondent had created a position where there were 6.7 consultant surgeons in the Unit but only budgeted funding for 6. There was a diminution in the need for employees to carry out work of a particular kind in the Unit. The definition of redundancy contained in section 139 of the1996 Act was met.

22.4 We conclude that the claimant is entitled to a redundancy payment calculated on three complete years' service. There can be no double recovery if this claim is effectively met by an award of a basic award for unfair dismissal.

Remedy considerations

23.1 We have concluded that the claimant was the victim of age discrimination and also was unfairly dismissed. When it comes to assessing any remedy due to the claimant, we will be obliged to consider the position of the claimant as it would have been but for the unlawful conduct. That will bring into sharp focus the question of for how long the claimant would have worked on with the respondent if the acts of age discrimination

and unfairness had not occurred. We have not reached any conclusion on these matters at all but we consider that it may assist the parties if we express our preliminary views on some of these issues.

23.2 There are several references in the papers we have reviewed to an intention on the part of the claimant to work on for a limited period on a part time basis. We have seen more than one reference to a two-year period of part time working by the claimant. If we conclude that that is what would have occurred (and again we reiterate we have reached no conclusion) then the two-year period of part time work began in January 2016 and would have ended in December 2017. We note that the claimant was paid on a part time basis by the respondent until September 2017 and thus, if that is our conclusion, then the period of recoverable loss would be a short one.

23.3 We have concluded that the claimant was dismissed by reason of redundancy. Another question with which we will have to engage is the chance the claimant could and would have been made redundant fairly and without discrimination and when. Would the claimant have been fairly selected for redundancy? These are all questions which could result in the period of recoverable loss being short and it being reduced by the chance of a fair dismissal even earlier than the end of the period of loss.

23.4 Other questions will arise in respect of whether or not the claimant has mitigated his losses. Has he sought other employment? Has the claimant continued any work in the private sector? In addition, the respondent raises issues that the claimant contributed to his dismissal by culpable and blameworthy conduct. Those matters will involve us making further findings about the conduct of the parties.

23.5 We have concluded that there have been several acts of age discrimination in respect of the claimant over a lengthy period. Whether we look at the acts individually or as part of a series of related acts, our initial view on present information is that any award for injury to feelings is likely to reach the level of the upper band of the Vento guidelines as adjusted and updated. Interest will need to be added to any award.

23.6 It seems to us that it is a very great pity that this matter ever reached the Tribunal. The matter was eminently suited to resolution at an early stage. There were many missed opportunities to resolve this matter and at the heart of it lay entrenched positions borne out of a mixture of pride, stubbornness and poor, not to say dysfunctional, working relationships. A very considerable amount of public money has been spent on this matter without any appreciable benefit to anyone - least of all the users of the service provided by the respondent. With this Judgment on the legal issues in place, an opportunity presents itself to the parties to move from their entrenched positions and seek to bring this matter to an early agreed conclusion and we strongly urge them so to do.

23.7 In case the parties are not able to agree then a date for a remedy hearing is set out above. If case management directions are required, application should be made to the Tribunal in writing in the usual way.

EMPLOYMENT JUDGE A M BUCHANAN

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON 1 November 2018

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JUDGMENT SENT TO THE PARTIES ON

6 November 2018

AND ENTERED IN THE REGISTER

Miss K Featherstone

FOR THE TRIBUNAL