EMPLOYMENT TRIBUNALS

Claimant: Mr E Smo

Respondent: Hywel Dda University Health Board

Heard: by video **On:** 30 & 31 March 2022 and 1, 4, 5, 6, 7, 8, 11, 12, 13 & 14 (in chambers) April 2022

Before: Employment Judge S Jenkins
Mrs J Beard
Mrs C Peel

Representation
Claimant: Mr M Sutton (One of Her Majesty's Counsel)
Respondent: Ms L Chudleigh (Counsel)

RESERVED JUDGMENT

The Claimant's claims of; direct race discrimination, victimisation, unfair dismissal, and wrongful dismissal; all fail and are dismissed.

REASONS

Background

1. The hearing was to consider the Claimant's two claims; an initial claim (1601583/20), submitted on 22 July 2020, whilst the Claimant was still employed, of direct discrimination and victimisation; and a subsequent claim (1602499/2020), submitted on 3 December 2020, after the Claimant's employment had ended, of unfair dismissal, wrongful dismissal and further complaints of victimisation.

2. We received evidence, in the form of written witness statements and orally, on behalf of the Respondent from: Sion James, Deputy Medical Director and Chair of the Disciplinary Panel; Mona Bayoumi, independent barrister and Chair of the Appeal Panel; Andrew Deans, Consultant General Colorectal Surgeon; Caroline Lewis, Service Delivery Manager; Adrian Locker, retired Consultant General Surgeon; Joy Singh, Consultant Laparoscopic Colorectal and General Surgeon; Iain Robertson-Steel, retired Withybush Hospital Director; Mark Henwood, Consultant General Surgeon and Clinical Lead for General Surgery;

Eiry Edmunds, Consultant Cardiologist and Glangwili Hospital Director; Philip Kloer, Executive Medical Director; and Stephen Morgan, Deputy Director of Workforce and Organisational Development. We also received evidence, in the form of a written witness statement and orally, from the Claimant on his own behalf.

3. We considered the documents in the hearing bundle, encompassing over 8,750 pages, to which our attention was drawn, together with some additional documents produced at the start of the hearing. We also had the benefit of an agreed chronology and cast list.

Hearing Chronology

4. We spent the first day and the first two hours of the second day reading the witness statements and documents to which our attention had been directed. After some preliminary discussions regarding late disclosure and an application to amend, discussed further below, we commenced hearing evidence on the afternoon of day two. We heard evidence from the Respondent's witnesses then, on day three, and on the morning of day four, when the point was reached where it was necessary to address, and reach a judgment on, the application to amend.

5. The parties then prepared for that matter on the afternoon of day four and made their submissions to us on the morning of day five. We gave our judgment on that application at the start of the afternoon of day five, and then proceeded to hear from the remainder of the Respondent's witnesses that day and on days six and seven and on the morning of day eight. We started hearing the Claimant's evidence just before lunch on day eight and continued through days nine and ten. We then heard the parties' submissions on the morning of day eleven before retiring to deliberate and to prepare our judgment. In view of the extent of the evidence and the time spent in dealing with the preliminary issue it was not possible for us to deliver an oral judgment at the end of the hearing, and judgment was therefore reserved.

Preliminary Issue

6. As we have noted, we were required to deal with a preliminary issue during the course of the hearing, in relation to the Claimant's application to amend his claim. That arose out of two matters. The first was the submission, shortly before the hearing, of unredacted copies of some redacted internal emails in the bundle, which had been received by the Claimant in early 2017 via a response to a data subject access request under the Data Protection Act 1998, and which had been requested by the Claimant's side shortly before the hearing commenced. The second was the provision of some additional material by the Respondent discovered in the process of searching for complete copies of the redacted material.

7. Arising from that disclosure, the Claimant made an application to amend his victimisation claim to add in six additional claims of detrimental treatment. We gave an oral judgment with reasons on that application and therefore do not provide written reasons here. In summary however, our judgment was that we

concluded that three of the proposed amendments only amplified complaints that had already been advanced in the claim forms, were included in the List of Issues, and therefore did not need to be granted. We rejected two proposed amendments which related to the facts of redaction and late disclosure, although we noted that it was open to the Claimant to make submissions on those matters in relation to what inferences we might draw from them. We then granted one of the proposed amendments and that is set out at paragraph 9 j. in the List of Issues below.

Issues

8. The parties had agreed a List of Issues which were as follows:

Jurisdiction

1. *Were the Claimant's complaints of direct race discrimination and victimisation presented within the time limit set out in s. 123(1)(a) of the Equality Act 2010 ("EqA")?*

2. *If not, was there conduct extending over a period within the meaning of s. 123(3)(a) EqA and was the complaint about that conduct presented within the time limit set out in s. 123(1)(a)?*

3. *If not, whether time should be extended to such a period as the Tribunal thinks just and equitable?*

4. *Whether the complaints of victimisation in the second claim that occurred before the presentation of the first claim on 22 July 2020 should be struck out as being an abuse of process if they were capable of being in included in the first claim. Alternatively, whether the Tribunal should decline to exercise its discretion to extend time in relation to these matters for the same reason.*

Direct Race Discrimination

5. *Whether because he is of Middle Eastern origin and of Syrian nationality the Respondent treated the Claimant less favourably than it treats or would treat other by:*

    a. *Failing from 4 January 2016 until the Claimant's exclusion on 17 October 2016 to agree to pay or pay the Claimant for 11.5 PAs rather than 10 PAs. The Claimant relies as comparators on Mr Deans and Ms Singh.*

    b. *Failing to invoke and give effect to the Respondent's contractual job planning dispute procedure after receipt of an email from the Claimant on 9 May 2016 at 13.33. The Claimant relies on a hypothetical comparator.*

c. *Failing before invoking a disciplinary process on 2 June 2016 to achieve an informal resolution of the issues raised. The Claimant relies on a hypothetical comparator.*

d. *Invoking the disciplinary process on 2 June 2016. The Claimant relies on a hypothetical comparator.*

e. *Failing to conduct the UPSW in accordance with the terms of that procedure by reason of gross and inordinate delays. The Claimant relies on hypothetical comparator.*

f. *On 31 October 2018 side stepping the UPSW procedure and commencing an investigation into the alleged break down in working relationships seeking to dismiss the Claimant by circumventing the UPSW process. The Claimant relies on a hypothetical comparator.*

Victimisation

6. *Whether the Claimant did protected acts within the meaning of s. 27(2) EqA by making complaints of race discrimination as follows:*

   a. *An email from the Claimant to various colleagues dated 18 May 2016 sent at 07.39 am;*

   b. *An email from the Claimant to Dr Kloer dated 19 May 2016 forwarding his email of 18 May 2016.*

7. *If so, were the above acts done in good faith?*

8. *Whether the alleged discriminators knew of the alleged protected acts?*

9. *Whether because of his protected acts the Claimant was subjected to the following detriments by the Respondent:*

   a. *Failing from 18 May 2016 until 17 October 2016 to implement the Claimant's job plan;*

   b. *Failing from 18 May 2016 until 17 October 2016 to give effect to the contractual job planning dispute procedure;*

   c. *The Respondent deliberately abandoning a planned facilitated team meeting between the Claimant and his consultant colleagues after the email of 18 May 2016;*

   d. *From 18 May 2016 until his exclusion on 17 October 2016 Mr Henwood, the Claimant's Clinical Director, and other members of the clinical team namely Phil Kloer, Adrian Locker, Joy Singh, Andrew Deans and Caroline Lewis wilfully avoiding and ostracising the Claimant in consequence of his protected acts by ignoring his requests or instructions, proceeding with meetings in his absence and generally not communicating with him as a colleague;*

e. Failing to investigate the Claimant's concerns set out in his email dated 18th May 2016;

f. The unfair and procedurally irregular conduct of the disciplinary process leading to the Claimant's dismissal, namely (so far as they were relevant to the disciplinary process):

(i) The Respondent's manager(s)' failed to address the concerns about the Claimant's conduct through an informal route;

(ii) Commencing UPSW disciplinary proceedings on 2 June 2016 instead of having a facilitated team meeting;

(iii) From 2 June 2016 continuing the UPSW procedure and failing to adhere to the time limits set out in the UPSW procedure;

(iv) Excluding (suspending) the Claimant on 17 October 2016;

(v) Failing during the UPSW process to give consideration as to the applicability and effect of the Respondent's dignity at work policy;

(vi) The Respondent failed to inquire in the disciplinary process into whether the treatment to which the Claimant had himself been subjected (both in the workplace and externally) provided mitigation for behaviour for which he was criticised.

g. On 1 March 2017 Dr Robertson-Steel placing indirect pressure on the Claimant during an investigation meeting to abandon his discrimination complaints by saying:

'very serious allegations about ethnicity and discrimination …. It's in your interest to tell me'.

'so you either basically withdraw it and don't proceed any further with those issues or you ask, as part of the investigation, to explore them further, in which you will need to make a full disclosure of any evidence….if you submit it we will consider it. If you don't submit we will regard these matters as not being continued with….'

h. On 31 October 2018 commencing and continuing an investigation into the breakdown in working relationships side stepping the UPSW procedure;

i. Dismissing the Claimant on 6 October 2020.

j. The Respondent, by Mr Henwood, taking an immediate step to obtain a report from [GM] in relation to the Claimant's alleged workplace behaviour without seeking the Claimant's account of the event.

Unfair dismissal

10. What was the principal reason for dismissal and was it a potentially fair one in accordance with ss 98(1) and (2) of the Employment Rights Act 1996 ("ERA")?

11. Has the Respondent established a potentially fair reason for dismissal; the Respondent relies on the Claimant's conduct as such a reason.

12. If so, was the dismissal fair or unfair in accordance with s. 98(4) and, in particular, did the Respondent act within a band of reasonable responses, in relation to procedure and the sanction of dismissal

13. If the Claimant was unfairly dismissed:

1) Would the Claimant have been dismissed anyway for some other substantial reason, namely a breakdown in relationships and if so, when?

2) If the dismissal was procedurally unfair, what adjustment, should be made to any compensatory award to reflect the possibility that the Claimant would still have been dismissed had a fair and reasonable procedure been followed?

3) Would it be just and equitable to reduce the amount of the Claimant's basic and compensatory awards because of blameworthy or culpable conduct on his part, pursuant to ss. 122(2) & 123(6) ERA; and if so to what extent?

Wrongful dismissal

14. Was the Respondent entitled to summarily dismiss the Claimant by reason of his repudiatory conduct?

15. If not, how much contractual notice was the Claimant entitled to receive?

Remedy

16. If he succeeds in any part of his claim, whether the Claimant should be awarded:

1) Re-instatement and / or re-engagement

2) Compensation for financial loss and injury to feelings;

3) Interest;

4) A declaration; and

5) Recommendations.

9. The hearing had been listed to deal with liability only and therefore we did not address section 16.

Law

10. The principal legal principles bearing on the issues we had to consider could be addressed under the following headings.

Jurisdiction

Time Limits

11. With regard to time limit issues, the statutory provisions relating to the time period in which claims of discrimination may be brought are set out in section 123 Equality Act 2010 ("EqA"), and are as follows:

"*(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."

12. With regard to conduct extending over a period, the Employment Appeal Tribunal ("EAT"), in **Commissioner of Police of the Metropolis v Hendricks [2003] ICR 530**, noted that the Tribunal must look at the substance of the complaints in question and determine whether they can be said to be part of one continuing act by the employer and thus linked to each other.

13. If we considered that some or all of the Claimant's discrimination complaints had been brought out of time, we would need to consider whether it would be just and equitable to extend time. In that regard, the Court of Appeal, in

Robertson v Bexley Community Centre [2003] IRLR 434, noted that there is no presumption that a Tribunal should exercise its discretion to allow time to be extended, and indeed a Tribunal should not hear a complaint unless the applicant convinces it that it is just and equitable to extend time such that the exercise of the discretion is the exception rather than the rule.

14. The EAT made clear, in **British Coal Corporation v Keeble [1997] IRLR 336**, that, in considering the exercise of discretion, assistance may be drawn from the factors set out in section 33 of the Limitation Act 1980 in relation to civil claims, although subsequent appellate decisions have made clear that a Tribunal is not required to go through those factors, only taking care to ensure that it does not leave a significant factor out of account.

15. The Court of Appeal, in **Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] ICR 1194**, referring to the earlier case law, noted that factors which are almost always relevant to consider when considering the discretion are the length of and reasons for the delay, and whether the delay has prejudiced the Respondent.

Abuse of Process

16. The Respondent also contended, in relation to some of the Claimant's complaints of detrimental treatment amounting to victimisation, namely allegations 9 f. (v) and (vi), that they were an abuse of process and offended against the long-established rule in **Henderson v Henderson (1843) 3 Hare 100**, which requires parties to bring their whole case in a single set of proceedings. The Respondent's contention was that those allegations, which were brought in the Claimant's second claim, could and should have been brought in the first claim, and that it would therefore be an abuse of process to allow them to be pursued. Our approach in considering whether an abuse of process had arisen would be to adopt a broad merits-based approach taking into account all the circumstances.

Direct Discrimination

17. Section 13(1) Equality Act 2010 provides that:

"*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.*"

18. Section 23(1) then notes that there must be "*no material difference between the circumstances relating to each case*" when undertaking the comparison.

19. The Court of Appeal summarised the approach to be taken in relation to section 13, and in particular the required degree of causation arising from the words, "because of", in **Chief Constable of Greater Manchester v Bailey [2017] EWCA Civ 425**, and stated, at paragraph 12:

"*Both sections use the term "because"/"because of". This replaces the terminology of the predecessor legislation, which referred to the "grounds" or "reason" for the act complained of. It is well-established that there is no change*

in the meaning, and it remains common to refer to the underlying issue as the "reason why" issue. In a case of the present kind establishing the reason why the act complained of was done requires an examination of what Lord Nicholls in his seminal speech in Nagarajan v London Regional Transport [1999] UKHL 36, [2000] 1 AC 501, referred to as "the mental processes" of the putative discriminator (see at p. 511 A-B). Other authorities use the term "motivation" (while cautioning that this is not necessarily the same as "motive"). It is also well-established that an act will be done "because of" a protected characteristic, or "because" the claimant has done a protected act, as long as that had a significant influence on the outcome: see, again, Nagarajan, at p. 513B."

20. The House of Lords also noted, in **Chief Constable of West Yorkshire Police v Khan [2001] ICR 1065** that, in relation to causation, the Tribunal must identify *"the real reason, the core reason, the causa causans, the motive*".

21. Section 136 Equality Act 2010 deals with the burden of proof and provides as follows:

"*(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.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision."

22. A two stage test is therefore involved. First, the Claimant had to prove facts from which we could decide that discrimination had taken place, and secondly, if so, the burden of proof would then shift to the Respondent which would have to prove, on the balance of probability, a non-discriminatory reason for the treatment in question.

23. With regard to the first stage of the test, i.e. the conclusion that there are facts from which, in the absence of a non-discriminatory explanation, discrimination could be concluded, the EAT made clear, in **Qureshi v Victoria University of Manchester [2001] ICR 863**, that the Tribunal must look at the totality of its findings of fact and decide whether they add up to a sufficient basis from which to draw an inference that the Respondent has treated the complainant less favourably on the protected ground.

24. The Court of Appeal made clear however, in **Madarassy v Nomura International PLC [2007] ICR 867**, that something more than less favourable treatment compared with someone not possessing the Claimant's protected characteristic is required. In that case, Mummery LJ noted, at paragraph 56, in relation to the burden of proof:

"*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."

25. The appellate courts have also made clear that a Tribunal may draw inferences of discriminatory treatment in certain circumstances, which include an employer's failure to follow its own procedures (**Anya v University of Oxford [2001] ICR 847**) and an employer's failure to respond to requests of information from the employee (**Dattani v Chief Constable of West Mercia Police [2005] IRLR 327**).

Victimisation

26. Section 27 Equality Act 2010 provides as follows:

"*(1) A person (A) victimises another person (B) if A subjects B to a detriment because –*

(a) B does a protected act, or

(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act -

(a) bringing proceedings under this Act;

(b) 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 is given, or the allegation is made, in bad faith.*"

27. In this case, the Respondent contended that the Claimant's allegation was false and had been made in bad faith, and we therefore had to consider the scope of section 27(3). In that regard, the EAT, in **Beneviste v Kingston University (EAT 0393/05)**, noted that there is no need for the allegation to refer to the underlying legislation or to allege a contravention, but the gravamen of the allegation must be such that, if the allegation were proved, the alleged act would be a contravention of the legislation.

28. With regard to the question of bad faith, the EAT, in **GMB Union v Fenton (UKEAT/0798/02 & UKEAT/0484/04)**, which considered the slightly different wording of "*not made in good faith*", set out in the antecedent legislation which differs from the wording of "*in bad faith*" in the Equality Act, noted that the test has two limbs: first, whether an allegation was false, and secondly whether the person making it knew it was false, i.e. "*wrong, erroneous or incorrect*" at the time it was made. The EAT also noted that the existence of a collateral

purpose in doing the protected act (in that case by the bringing of a claim) does not necessarily mean that the claim was brought in bad faith, the issue being not the purpose, but the belief in the claim.

29. The EAT, in the later judgment of **Saad v Southampton University Hospitals NHS Trust [2019] ICR 311**, confirmed that the primary question is whether the employee acted honestly in making the allegation that is said to be the protected act. The issue of whether the employee was acting with an ulterior motive is of less relevance.

30. The causation issue brought in by the reference to detrimental treatment needing to be "because" a protected act has been done brings into consideration the guidance provided by the **Bailey** case in relation to direct discrimination. Other appellate decisions, notably **Panayiotou v Chief Constable of Hampshire Police [2014] IRLR 500** and **Martin v Devonshires Solicitors [2011] ICR 352**, both of which considered detriments said to have arisen because of protected disclosures, noted that there can be a distinction between the disclosure of information and the manner or way in which the information is disclosed, and that it may be permissible to separate out factors or consequences following from the making of a protected disclosure from the making of the protected disclosure itself. However, the EAT in **Panayiotou** made it clear that the Tribunal will need to ensure that the factors relied upon are genuinely separable from the fact of making the protected disclosure and are in fact the reasons why the employer acted as it did.

31. In our view, the references in those cases to there being a potential distinction between the making of a protected disclosure and consequences arising from the way the protected disclosure was made can equally apply to the doing of a protected act and the consequences arising from the way it was done. Again, the **Bailey** case made clear the test here is not a simple "but for" test, i.e. just because the treatment would not have arisen if the protected act had not been made, does not mean that the treatment was because of the protected act.

Detriment

32. With regard to detriment, the House of Lords noted, in **Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337**, that a detriment exists if a reasonable worker would or might take the view that the treatment was in all the circumstances to his or her disadvantage; an unjustified sense of grievance cannot amount to a detriment, but the Court did emphasise that whether a Claimant has been disadvantaged is to be viewed subjectively.

33. The Equality and Human Rights Commission Code of Practice on Employment 2020 also gives some guidance on the definition of detriment as follows:

> "*Generally, a detriment is anything which the individual concerned might reasonably consider changed their position for the worse or put them at a disadvantage.*"

Unfair Dismissal

34. As noted in the List of Issues, the first step for us to take in relation to the unfair dismissal claim would be to consider the reason for dismissal. The Respondent contended that it was the Claimant's conduct, whereas the Claimant contended that dismissal arose in retaliation for his protected act.

35. If we were not satisfied that the Respondent had established conduct as the reason for dismissal then the Claimant's claim would succeed. If however we considered that it had, then we would need to go on to consider whether dismissal for that reason was fair in all the circumstances. That would involve the application of the long-established test set out in the EAT decision of **BHS v Burchell [1978] IRLR 379**, which required us to be satisfied that the Respondent had a genuine belief in the misconduct, that that belief was based on reasonable grounds, and that those grounds were drawn from a reasonable investigation, the EAT, in **Sainsburys Supermarkets Limited v Hitt [2003] IRLR 23**, having confirmed that the reasonableness of an investigation is to be viewed from the perspective of the range of reasonable responses.

36. If we considered that the **Burchell** test was satisfied, we would then need to go on to consider whether imposition of the sanction of dismissal was fair in all the circumstances, the EAT decision of **Iceland Frozen Foods v Jones [1982] IRLR 439** again requiring us to look at that from the perspective of the range of reasonable responses, i.e. considering the action taken by the Respondent in the context of whether it fell within the range of responses open to a reasonable employer acting reasonably in the circumstances.

Gross Misconduct

37. The Claimant was dismissed by the Respondent for gross misconduct i.e. for conduct which was considered to have amounted to a repudiation of the contract of employment by the employee. We noted that there had been discussion within the internal processes in this case as to whether gross misconduct involves a requirement to find a deliberate and wilful breach, or very considerable negligence, on the part of the employee, as noted in the EAT in **Sandwell & West Birmingham Hospitals NHS Trust v Westwood UKEAT/0032/09**. That approach was urged by the Claimant internally but rejected by the Inquiry Panel.

38. However, we noted that the issue had been addressed very recently by the EAT, in **Hope v British Medical Association [2022] IRLR 206**, where Choudhury P noted that an employment tribunal hearing an unfair dismissal claim does not necessarily have to consider whether the employee's conduct amounts to gross misconduct in the contractual sense, i.e. in accordance with the approach adopted in **Sandwell**, but involves consideration of all the circumstances, which might, in some misconduct cases, include the fact that the conduct relied on involved a breach of contract amounting to gross misconduct.

39. We were however conscious, in circumstances where the dismissal of a claimant could have had a significant impact on their career and their ability to

work in their chosen field of employment, that the EAT decision in **A v B [2003] IRLR 405** and the Court of Appeal decision in **Salford Royal NHS Foundation Trust v Roldan [2010] ICR 1457**, required us to apply a strict approach to the question of whether an act or acts of gross misconduct had occurred.

40. If we considered that the decision to dismiss was fair in all the circumstances, we would also have to address whether there had been any procedural deficiencies, both in terms of the Respondent's own policies and, in particular in this case, the application of the agreed policy of Upholding Professional Standards in Wales, and any applicable provisions of the ACAS Code. If we considered that there had been deficiencies in the procedures applied, which led us to a conclusion that there had been an unfair dismissal, then we would have to consider whether adjustments should be made to the compensatory award to reflect the possibility that the Claimant would still have been dismissed had a fair and reasonable procedure been followed, i.e. the principle set out by the House of Lords in **Polkey v A E Dayton Services Limited [1987] IRLR 503**.

41. We were also conscious that the Respondent contended that, even if its dismissal of the Claimant on the ground of his conduct was considered to have been unfair, it would nevertheless have fairly dismissed the Claimant by reason of "some other substantial reason", in the form of the breakdown of relationships between the Claimant and his colleagues. We would therefore need to consider the **Polkey** principle in that wider sense.

42. We would also need to consider whether, if we considered that an unfair dismissal had arisen, the basic and/or compensatory award should be reduced to reflect contributory conduct on the part of the Claimant.

Wrongful Dismissal

43. A completely different approach would need to be taken to assessing the Claimant's wrongful dismissal claim to that taken in relation to the unfair dismissal claim. We were required not to assess the reasonableness of the decision, but to assess whether, on the balance of probability, a repudiatory breach of contract had occurred.

Findings

44. Our findings in relation to the matters relevant to the issues we had to consider, reached on the balance of probability where there was any dispute, are set out below. Before setting those findings out, however, we make some preliminary observations.

Preliminary observations

45. Mr Sutton, on behalf of the Claimant, noted in his submissions the deleterious impact on memory of the passage of time, particularly in the absence of contemporaneous records of critical discussions and events, noting the guidance provided by Leggatt J (as he then was) in **Gestmin SGPS SA v Credit Suisse (UK) Limited [2013] EWHC 3560**. The Judge there warned that

memory is especially unreliable when it comes to recalling past beliefs as memories of past beliefs are revised to make them more consistent with present beliefs. He noted that the process of litigation itself subjects the memories of witnesses to powerful biases where the nature of litigation is such that witnesses often have a stake in a particular version of events. He also noted that considerable interference with memory is also introduced in civil litigation by the procedure of preparing for a trial, and in particular in the way the witness statements are prepared.

46. The outcome of the Judge's observations was that he felt that the best approach for a judge to adopt in the trial of a commercial case was to place little if any reliance on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts.

47. Mr Sutton noted that, in this case, the events which led to the Claimant's dismissal took place in 2016, with the Claimant not having been in work since September 2016. However, we noted that there was indeed considerable documentary evidence within the bundle derived from investigations undertaken in relation to the allegations against the Claimant. Initial interviews were undertaken in August and September 2016 prior to the publication of an initial assessment report in 2016, and then further interviews were undertaken between January and October 2017 prior to the publication of a formal investigation report in October 2017. Further witness evidence was then drawn from witnesses at the Inquiry Panel stage in January 2020.

48. We did not hear from many of the individuals who raised the concerns about the Claimant's conduct, and ultimately therefore we did place a primary reliance on the documentary evidence.

49. We were mindful of the fact that individuals when asked to give accounts of events, whether as participants in the internal investigation or as witnesses at an employment tribunal, will have a tendency to present their version of events in the best possible light. However, in our view, the evidence of the Respondent's witnesses from whom we heard during the course of this hearing was consistent, where relevant, with the evidence they had given during the internal processes and was coherent with the other documentary evidence that we read. Indeed, our view was that it was principally the Claimant who took the approach, both in relation to internal processes and before us, of being someone who had a particular view of events and who took from discussions with others what he felt he would like to take from them in terms of supporting his own views and desires. A particular example of that was the discussions the Claimant had about his job plan, to which we refer in more detail below.

50. We have used the full names of all those who attended as witnesses before us or who played an official part in the variety of investigative processes, but we have referred to others, who provided evidence as part of the internal processes but who did not appear as witnesses before us, by their initials.

51. In relation to our findings of fact, which we set out very largely in chronological order, we have used various sub-headings in an attempt to make them easier

to follow. However, the headings should not, in any sense, be viewed as discrete "compartments", as many sections overlap to a degree.

The Claimant, his appointment and his role

52. The Claimant was born and brought in Syria. He graduated as a doctor in 1998 and qualified as a surgeon in 2003. He moved to the United Kingdom in 2006 and worked at several hospitals in England and Scotland. His most recent role prior to taking up his employment with the Respondent was as a full-time locum Consultant Colorectal Surgeon in Derriford Hospital in Plymouth, where he worked between December 2014 and December 2015.

53. The Respondent is the Health Board covering the counties of Carmarthenshire, Pembrokeshire and Ceredigion. It has four District General Hospitals including Glangwili General Hospital in Carmarthen. At Glangwili the Respondent operates a department of general surgery typically made up of eight consultants supported by registrars. In terms of cultural diversity, the surgical team at the hospital was significantly diverse.

54. At the relevant times, Mr Henwood was the Clinical Lead for general surgery. Each consultant had a specialism, but all participated in an on-call rota for general emergency surgery on a one week in eight basis.

55. Prior to 2015 the department had had three consultant surgeons specialising in colorectal surgery, but that then reduced to two, Mr Deans and Ms Singh. They had both started work as consultants at the Hospital at the same time as each other, in May 2012. During the time they worked together they had developed a team-based approach which included them sharing the care of patients, i.e. by attending to patients who attended at the hospital whether or not they had individually treated the patient previously during their course of treatment, as opposed to operating a process whereby an individual patient was seen, other than in unavoidable circumstances, by the same consultant at all times.

56. By the latter part of 2015, the Respondent identified the need for an additional consultant surgeon at Glangwili General Hospital to specialise in colorectal surgery whilst also participating in the on-call general surgical rota. The Claimant was interviewed for the post in November 2015 and was successful. Two of the five interviewers noted that he would need mentoring and/or supervision.

57. The Respondent then, and it seems now, had no formal mentoring system in place for its surgical staff, and therefore no mentor was ever appointed to the Claimant. However, Mr Deans did operate as an informal mentor to the Claimant, particularly, as the Claimant himself appreciated, in relation to personal issues the Claimant was experiencing. We also noted that the team-based approached operated by Mr Deans and Ms Singh would itself, had the Claimant participated within it, have involved an element of mentoring as the Claimant would have learned from, and drawn on, the experiences of his two more experienced colleagues.

58. Mr Deans, who was part of the interview panel, met the Claimant during a pre-interview visit he undertook the day before the interview. Mr Deans explained the team-working nature of the colorectal team and that the Claimant would work equally with himself and Ms Singh in that.

59. At the time, and it appears subsequently, most of the consultants at Glangwili General Hospital, after an initial period of some six to twelve months, worked 12 sessions of programmes activities ("PA") each week. A PA appeared generally to involve a session of work amounting to half a day, e.g. a morning performing surgery in theatre or an afternoon undertaking an Outpatients Clinic, but can involve non-patient focused activities such as training or administration. It also involved the notional allocation of two PAs each week for the work undertaken on the on-call rota. That did not involve the surgeon working two PAs on call each week, but the time spent on call for a complete week every eighth week was spread out over the general timetable as a notional amount of two PAs each week. That led to the typical allocation of 12 PAs to each consultant surgeon each week on the basis of full-time work Monday to Friday together with the notional on-call allocation.

60. The initial commitment for the Claimant however, as noted in the job description for the post and his contract, was to work for 10 PAs each week. That had been the situation for Mr Deans and Ms Singh themselves when they had started as consultants in 2012, when they had commenced with 10 PAs each week before moving up to 12 towards the end of their first year in post. Mr Deans informed the Claimant that it would be expected that he would also move from a 10 PA arrangement to a 12 PA arrangement in due course.

61. The Claimant was issued with a contract in November 2015, which he signed on 22 December 2015. That noted that the role was a full-time appointment with normal hours of 37.5 per week, equating to 10 PA sessions.

Disciplinary procedures

62. In relation to disciplinary matters, which subsequently became relevant in this case, the contract noted that, if not able to be resolved without recourse to formal procedures, issues relating to conduct, competence and behaviour would need to be handled in accordance with the Respondent's existing medical and dental disciplinary procedures. In fact, just before the Claimant was appointed, in October 2015, an agreement had been reached, after some ten years' negotiation, between NHS Wales and the BMA, on the procedures to be undertaken in relation to such matters, which were enshrined in a document entitled, "Upholding Professional Standards in Wales", referred to as "UPSW".

63. The document noted that, where possible, NHS organisations would seek to address capability and/or performance concerns through training or local remedial action. It also noted that NHS organisations should seek to identify and respond to concerns at the earliest possible stage, with a view if possible to their informal resolution at local level.

64. UPSW encompassed the assignment of a Case Manager, usually a Deputy, Associate or Assistant Medical Director, or a senior clinician nominated by the

Medical Director, whose role would be to evaluate the nature of the problem or concern raised about a practitioner and to assess the seriousness of the matter based on available information. They were to undertake an initial assessment of the concerns raised and to determine whether a formal investigation needed to be carried out or whether the issue could be resolved informally.

65. Where a formal investigation was needed, the Case Manager was to formulate the terms of reference, appoint a Case Investigator, provide progress reports to a Designated Board Member, and determine what action should be taken in response to the findings and recommendations of the Case Investigator. The reference to "Designated Board Member" was to an independent member or non-executive director of the organisation's Board, who would oversee the operation of the procedure and ensure that momentum was maintained.

66. Any appointed Case Investigator was to; lead the investigation as detailed in terms of reference, identify what information needed to be gathered and which witnesses would need to be interviewed, maintain a clear and comprehensive record of all interviews conducted, undertake a thorough and impartial investigation into the relevant circumstances, seek advice, where the concerns involved clinical performance, from an appropriately qualified clinician with no prior involvement with the matters under investigation, prepare and submit a written report to the Case Manager, and advise the Case Manager whether the concerns identified had been established to a standard of proof sufficient to justify the instigation of formal action and the convening of a panel hearing. It was then for the Case Manager to determine what action should be taken after taking due account of the Case Investigator's Advice.

67. In relation to the initial assessment stage, UPSW provided that consideration should always be given to the scope for resolving concerns through informal remedial action, drawing upon guidance and support e.g. from NCAS or other external recourses as appropriate. NCAS (or the National Clinical Assessment Service, which subsequently changed its name to "Practitioner Performance Advice", or "PPA"), is a pan-NHS body providing advice and support in relation to clinical matters.

68. If, following receipt of the Case Investigator's report, the Case Manager considered that a hearing was required, the practitioner had the ability to appeal against that decision, with the appeal being heard by a panel comprising of an independent member or non-executive director, the Chair of the Medical Staff Committee or equivalent, and a consultant nominated by the Chief Executive. The practitioner would then be allowed to be represented by a workplace colleague or representative who could be from a trade union or defence organisation.

69. In relation to formal procedures, UPSW catered for two: the standard procedure, where the sanction was limited to warnings; and the extended procedure, where a final written warning or dismissal could ensue. The extended procedure involved the formation of an Inquiry Panel to establish the relevant facts of the case and to make recommendations as to action. Such a panel was to consist of three members: an independent legally qualified

member who acted as Chair; a professional member chosen after consultation with the WJMCC or BDA as appropriate; and a panel member who should either be a non-medical member or a medical professional member in the same speciality as the practitioner where the matter involved solely allegations relating to the practitioner's clinical capability. The practitioner would be able to be represented throughout the extended procedure, and any appeal, by a workplace colleague or representative who could be from a trade union or defence organisation and who could be legally qualified. The particular NHS organisation also had the right to be represented before the panel, and again that representative could be legally qualified.

70. The Inquiry Panel would establish all the relevant facts of the case, with witnesses being examined and cross examined at a hearing before it. At the conclusion of the hearing, the Panel Chair would be required to write a report, together with the other panel members, to be presented in two parts. The first part would set out the Panel's findings and all relevant facts but would contain no recommendations as to action; whilst the second part would contain a view as to whether the practitioner was at fault and recommendations as to disciplinary action.

71. If the conclusion of the Inquiry Panel was that a disciplinary hearing should take place, then UPSW provided that a Disciplinary Panel would be set up consisting of three members of the NHS organisation, which would normally comprise the Medical Director acting as Chair, an Executive Director, and a Clinical Director. However, no member of the Panel should have had involvement in any formal part of the proceedings concerning the practitioner.

72. The decision of the Disciplinary Panel could not be more severe than that recommended by the Inquiry Panel, but could be a lesser action following pleas of mitigation. The Disciplinary Panel had the ability to impose a range of sanctions, which included dismissal. The practitioner then had the right to appeal against any decision, which would be considered by an Appeal Panel consisting of a barrister or solicitor who would undertake the role of Chair, a panel member nominated by the NHS organisation, and a professional panel member nominated by the WJMCC or BDA. The decision of the Appeal Panel would be final.

73. UPSW also contained requirements relating to the restriction of practice of practitioners or their complete exclusion, i.e., in lay terms, "suspension", of the practitioner whilst the procedures were being implemented.

Job plans

74. The Claimant's contract noted that his specific duties would be set out in a job plan to be agreed at the outset of his employment and to be reviewed annually with the Clinical Lead and the Service Manager. A provisional job plan had been attached to the job description. The contract stated that where it was not possible to agree a job plan, whether initially or at an annual review, the appeal mechanism would be in accordance with the procedure as specified within the terms and conditions of service which applied to medical and dental staff employed in Wales as amended from time to time. That was set out in the

Medical and Dental Staff (Wales) Handbook which provided that, where a consultant disagreed with a job planning decision there would be an initial referral to the Medical Director with provision for subsequent local resolution or appeal if required. The document went on further to say, at paragraph 1.34:

"*If it is not possible to agree a job plan, either initially or at an annual review, this matter will be referred to the Medical Director (or an appropriate other person if the Medical Director is one of the parties to the initial discussion)*."

75. At paragraph 1.35 it stated:

"*The Medical Director will, either personally, or with the Chief Executive, seek to resolve any outstanding issues informally with the parties involved. This is expected to be the way in which the vast majority of such issues will be resolved.*"

76. At paragraph 1.36 it stated:

"*In the exceptional circumstances when any outstanding issue cannot be resolved informally, the Medical Director will consult with the Chief Executive prior to confirming in writing to the Consultant and their Clinical Director (or equivalent) that this is the case, and instigate a local appeals panel to reach a final resolution of the matter.*"

77. The Claimant's job plan was a source of contention for him throughout his time at work. He commenced by working the provisional job plan set out in the job description. In January 2016, however Mr Deans produced a proposed timetable for himself, Ms Singh and the Claimant, showing 12 sessions for Mr Deans and Ms Singh and 11.5 for the Claimant.

78. The Claimant contended that this document was a formal, binding agreement that he should work, and consequently be paid for, 11.5 sessions. However, we did not consider that the document had the character of a binding agreement. It was only a handwritten document which was not translated into a formal plan and was not referred to in any other communication. In addition, any job plan was to be agreed with the Clinical Lead and Service Manager and neither were involved in that discussion. In our view, the documents produced were simply an effort by Mr Deans to set out a possible basis for the way in which the three consultants would deal with the colorectal workload.

79. The Claimant emailed Caroline Lewis on 21 January 2016, having received his first pay, noting that he had been paid by reference to 10 sessions when 11.5 had been agreed. Mrs Lewis replied, noting that the job plan would be completed at a job plan meeting that was shortly to take place. She also noted that there was no budget for the Claimant to be paid for 11.5 sessions.

80. Mrs Lewis then met the Claimant on 3 February 2016 to discuss the job plan. Mrs Lewis stated in her witness statement, which was not materially challenged on cross-examination, that she had been surprised on entering the room to note that the Claimant's secretary was also present, which was not usual for

that sort of meeting. Ultimately, however, she was happy that the Claimant's secretary was present in view of the way the meeting progressed.

81. The Claimant, having never previously met Mrs Lewis, commenced the meeting by saying, "*Are we going to have a fight today?*". The meeting then discussed the job plan, with the Claimant insisting that he wanted an 11.5 sessions contract, and with Mrs Lewis explaining that the Claimant had only been appointed to a 10 session job plan and that there was no budget for more.

82. The Claimant was critical of the allocation of endoscopy work to a locum consultant, albeit it appears a consultant who had worked at the hospital for many years, and was critical of Ms Singh, noting that he did not wish to share patients with her. Mrs Lewis found the meeting uncomfortable and recalled telling the Claimant at one stage that if he did not stop speaking to her in the way he was then she would have to end the meeting. She also recalled the Claimant slamming the table, and that the table actually collapsed at one stage. She described, having met with many consultants over the years, never having felt as intimidated by anybody as with the Claimant.

83. Following the meeting the Claimant emailed Mrs Lewis. In that he said:

"*as you mentioned that you do not have the budget at all to pay for 11.5 sessions that we agreed with Mark [i.e. Mr Henwood], we agreed for me to drop the Friday morning alternative theatre list.*

this will make it up to 11 sessions only.

However, to help the budget further, I am happy to drop the Endoscopy session on Monday as well.

this will mean I will have ten sessions per week (as usual) only..."

84. However, bearing in mind that the Claimant was only working ten sessions at the time, dropping two of them would have left only eight.

85. The Claimant had not relocated, and indeed did not at any time relocate, his family to the Carmarthen area. They remained in Plymouth, with the Claimant commuting between his home and Carmarthen, where he stayed at a hotel, on a weekly basis. It was therefore helpful to the Claimant to try to compress his working week into as short a period as possible, and the proposed timetable that the Claimant set out in his email to Mrs Lewis of 4 February 2016 showed him at work only on Tuesdays, Wednesdays and Thursdays.

86. We also noted that, for a period from March 2016 onwards the Claimant's son suffered a period of ill health which reinforced the Claimant's desire to confine his duties at the Hospital into as short a period as possible. Whilst it was not clear as to precisely when, it appeared that the Claimant was allowed to work a compressed week, spending Tuesdays to Thursdays at the hospital and undertaking one SPA at home in Plymouth on Fridays.

Other areas of dissatisfaction

87. As well as the issues over the job plan, the Claimant raised a number of points of dissatisfaction about what he was being asked to do and the way in which the team's services were being delivered. This included: concerns over being allocated a locum registrar to support him during his first on-call week; dissatisfaction with clinic schedules; the lack of a specific endoscopy list, particularly regarding the fact that the locum consultant had such a list when he did not; and unhappiness with the colorectal team's approach of sharing workloads and patients, as opposed to identifying and treated individual patients from start to finish, which was the Claimant's preference.

88. There also appeared to have been a particular difficulty in the relationship between the Claimant and Ms Singh during this period. Whilst we did not hear detailed evidence about this, it appeared to derive from an incident in early February where the Claimant felt that Ms Singh had asked him to undertake an operation which proved to be more challenging than had been originally anticipated. That led to the Claimant contending, in his email of 18 May 2016, which he contended was a protected act for the purposes of his victimisation claim, that Ms Singh had "*framed*" him.

89. In order to address the job plan and the other issues that had arisen, Mr Henwood and Mrs Lewis arranged to meet the Claimant. Mrs Lewis attempted to speak to the Claimant on Thursday 5 May 2016 to arrange the meeting but could not contact him. She therefore sent him an email that evening asking him to meet her and Mr Henwood on Monday 9 May 2016 at 1.00pm. She did that by forwarding an earlier email exchanged with the subject heading of "*Clinic time change*", which related to a desire by the Claimant to change the way in which a particular clinic was held. The Claimant did not respond, presumably because he had left the hospital to return to Plymouth that evening.

90. The Claimant then emailed Mrs Lewis at 1.33pm on 9 May 2016. In this email he had changed the subject heading of the email to "*Dispute*". In this he said:

> "*Regarding the job Plan, you ignored my emails so I can confirm that there is clearly a DISPUTE here. hence I want things to be escalated to the other level now i.e. the informal mediation such as MD before going to the appeal panel.*"

91. Mrs Lewis replied within a few minutes, explaining that she had been waiting for the Claimant to get back to her to confirm that they could meet to discuss the request to change clinic days. She asked if the Claimant was happy for her to discuss it with him then, and the Claimant replied that he was in his office. Mrs Lewis then emailed the Claimant at 2.28pm asking him to meet her and Mr Henwood in a meeting room.

92. The meeting then took place that afternoon. No formal record of the meeting was made, but it was summarised in a letter Mr Henwood sent dated 10 May 2016, although the letter was not received by the Claimant until 17 May 2016.

93. We accepted the content of the letter as an accurate summary of the meeting, bearing in mind its contemporaneous preparation and Mrs Lewis' confirmation

of its accuracy. In addition the Claimant, notwithstanding his comments in his email of 18 May 2016 in response, did not materially challenge the summary in his evidence, focusing on what he considered to be the unfairness of the discussion in terms of its scope and focus, when he had not been given advance notice.

94. The meeting did not start well, with the Claimant's first comment, directed to Mrs Lewis, being to ask if she had anything for him, because if she did not then he would leave the meeting. The Claimant's job plan was discussed, and it was confirmed that it had been arranged so as to not to require the Claimant to be at the hospital until Monday afternoons and not to be there at all on Fridays. The discussion also encompassed the Claimant's clinic times, which he had wished to change, and the lack of an endoscopy list, with it being explained that Mr Henwood was not prepared to make a change without the other parties' agreement.

95. The discussion also encompassed issues around team working, with it being particularly noted that the Claimant did not wish to work as a team. Mr Henwood noted that team working was absolutely essential and that Mr Deans and Ms Singh had worked very effectively over the previous four years, and he indicated that he would facilitate a meeting of the team to try to ensure good working relationships were applied.

96. The discussion also included some clinical matters and the management of the Claimant's patient clinics, it having been noted that the Claimant had asked his secretary to contact patients to come in earlier on a Thursday, and that the Claimant would often leave at around 3.00pm on Thursdays, on one occasion asking a registrar to attend to finish the clinic to enable him to leave. No reference was made to the escalation of the Claimant's job plan to the Medical Director, and Mr Henwood and Mrs Lewis confirmed in their evidence, which we accepted, that that was not discussed.

97. The Claimant sent an email to Mrs Lewis and Mr Henwood on 11 May 2016 (i.e. before he had received Mr Henwood's letter), which he copied to Mr Deans and Ms Singh, and which he described as "*quick minutes*" of the meeting. He recorded his proposed job plan of ten sessions with Mondays and Fridays free, stating that Ms Singh was to be in on Monday as she did 12 sessions. However, that was not an accurate record of the discussion, as the proposal had only been that the Claimant would not work on Monday mornings, and Ms Singh's job plan did not envisage that she would be in the hospital on Mondays and any change would therefore have had to be agreed with her. The Claimant also noted, without referencing anything specific, that "*few issues/concerns were raised and dealt with initially internally*".

98. With regard to the indication by Mr Henwood at the meeting with the Claimant on 9 May 2016 that he would facilitate a meeting with the colorectal staff, Mrs Lewis sent an email to Ms Singh and Mr Deans on the evening of 9 May 2016 asking them for their availability to meet with the Claimant, Mr Henwood and herself to discuss colorectal services. Ms Singh did not reply, but Mr Deans replied, pointing out that they did have a well-functioning and flexible colorectal

service that, in his experience and opinion, worked well between May 2012 and December 2015, i.e. the period prior to the Claimant joining the team. He went on to say:

"*What has happened since then, to put the proverbial spanner in the works? I agree that right now things are not working well, for example giving up a third of the colorectal lists to cancel gall bladder operations does not seem too sensible.*"

He also said:

"*I find certain comments being made both offensive and unwarranted. Our new 'colleague' was made perfectly aware before the interview how Joy and I work, and was still very keen to join and fit in.*

For now I content myself with the above thoughts as the flow of invective is building up to a head and once started may not stop for some time."

There therefore appeared to be a rather strained relationship between the Claimant and his colorectal surgical colleagues by this stage.

The Claimant's email of 18 May 2016 and subsequent developments

99. As we have noted, the Claimant received Mr Henwood's letter marked "Private and Confidential" on Tuesday 17 May 2016. He then sent an email in response at 07:39 on 18 May 2016. As this was contended by the Claimant to be his principal protected act for the purposes of his victimisation claim, it is appropriate to set it out in full:

"*Dear Mark,*

It confused me yesterday to see a letter on my desk dated 10 May consisting of three pages of minutes of a meeting written by a senior consultant and a clinical lead like yourself.

What confused me further is that there are quite few points in the minutes that did not happen neither we agreed on, as far as I recall.

As you recall, I mentioned in my email on Monday 09 May that there is clearly a dispute, hence I requested to escalate and have an informal mediator Le. Medical Director involved before we go to the appeal panel.

However, what is more worrying here is the clear discrimination that I am/have been experiencing. I hope this is not because the fact that I am ethnically from overseas. There are/have been attempts for deskilling me and frame me as "not doing much" and endanger patient's care mainly by Joy Singh. I did report all to you.

What you need to remember Mark here please (and act accordingly) is that I am a colleague and a senior, member of the staff, being a Consultant

Furthermore, I am a British Citizen who hold a British Passport and I am extremely proud of that I know my rights in both roles.

I am very happy, and very flexible, to work all together in a team with no discrimination, this will enable us to deliver the best care to our patients.

Kind Regards,

Emad"

100. It must be noted that the text of the email was entirely in bold, with the words we have underlined being typed in red.

101. Also, although the letter to the Claimant had been sent from Mr Henwood alone, the Claimant's email was sent, in addition to Mr Henwood and Mrs Lewis who had attended the meeting, to all the consultant surgeons, a registrar, two nurse specialists, and all the surgical department secretaries, a total of 19 people.

102. Mr Henwood forwarded the email later that morning to James Bennett, one of the Respondent's HR advisers, noting that he had not replied, and would not reply, and saying:

"*As I suspected we are into concerning territory and I would be grateful for your help/advice.*"

103. We noted that Mr Henwood had spoken to Mr Bennett prior to meeting with the Claimant on 9 May 2016 to seek advice on how to handle the meeting.

104. Early on 19 May 2016, at 06:42, the Claimant sent an email to Mr Kloer, forwarding his email of the day before at 07:39, which he also asserted was a protected act. In the email the Claimant said:

"*It came to my attention that the staff here are being asked by consultants to start lodging complaints against me to show me as the 'problematic guy', an influx of complaints will/have start now.*

I think you agree with me that this is not a health working environment at all. I have major concerns about patient's care and being framed by the rest as a result of the dispute.

Please help me here as I am very keen for things to improve."

105. Mr Kloer confirmed in discussions with the Claimant later in September 2016 that he had not seen the email and therefore no response was sent or action taken in relation to it.

106. Ms Singh, being directly referenced in the Claimant's email, spoke to a different member of the Respondent's HR department, and then, after a session in theatre, sent an email to that manager and to Mr Henwood at 4.19pm on 18 May 2016. She noted that she wished to make a formal complaint regarding the Claimant's email and said:

"*I find this email unacceptable on the grounds it was unprofessional to make such libellous claims directed against myself and secondly that the email was copied in to numerous members of staff.*"

107. In the meantime, the Claimant had sent a further email on 18 May 2016, at 11.43am, to the same recipients as his earlier email, together with the Respondent's Medical Staffing Officer, headed "*on calls*". He referenced having had a "*chat*" with GM, the registrar who managed the on-call rota, that morning, and he raised concerns that she was fixing her and other registrars' rotas with specific consultants, leaving only the Claimant and one other surgeon to be allocated locums on every occasion. He referred to a "*gray area*" about GM's role, and asked for clarification of whether she was a middle grade or on the consultants' rota. GM was in fact one of the recipients of the email.

108. Before the Claimant had sent his email, GM had spoken to a member of the Respondent's HR department and to Mr Henwood about her discussion with the Claimant that morning. Mr Henwood asked GM to email her account of her interaction with the Claimant, which he would then forward to HR.

109. GM provided that account by an email at 1.03pm on the same day, sent to Mr Henwood, Mrs Lewis, the Medical Staffing Officer and to two HR advisers. GM described the meeting as not a "*chat*", as the Claimant had suggested in his email, but "*a session of intimidation and bullying*". She referred to the Claimant having engaged in finger pointing and having accused her of having been unfair.

110. Mr Henwood, having become aware of the interaction between the Claimant and GM on the morning of 18 May 2016, emailed Mr Bennett noting, "*Unfortunately I understand that there has been some unfortunate behaviour towards [GM] this morning by Mr Smo*", and that he had asked her to email an account of that interaction which he would then forward.

111. A more senior HR employee, Ceri Williams, emailed Mr Henwood the following day, 19 May 2016, noting that some issues he had been dealing with had taken a "*different turn*". She went on to say:

"*Whilst difficult, it seems to revolve around communications rather than patient care although obviously that could be impacted upon if not resolved. I would suggest that [Mr Bennett and Mrs Lewis] meet up on Monday to discuss the way forward including then liaising with the Drs who have raised the complaints to discuss how they want them resolved and whether mediation can be offered, which is the initial stage of the Dignity at Work Policy.*"

112. Ms Williams also suggested that Mr Henwood, on his return from holiday (and he was due to be away for two weeks at this point) should meet again with the Claimant to revisit the issues which had been the reason for his informal meeting, with Mr Bennett's support, and should ascertain the reasons why the Claimant was in disagreement with the notes and also mention how inappropriate his method of response was felt to be. She stated again that if they could, they would try and deal with the issues at local level, but if those

approaches were not successful then they would need to follow a more formal process.

113. On 19 May 2016, an incident arose in the Hospital's A & E department in the evening during a period when the Claimant was on call. A patient was to be admitted from a private hospital following an orthopaedic operation undertaken there a week earlier. The operating consultant had contacted the Hospital and had spoken to the Claimant to arrange the patient's admission. The patient was brought to the Hospital by ambulance and was directed to the Surgical Assessment Unit ("SAU") by the sister in charge, Sister H. The Claimant objected and came back to A & E with the patient, being insistent that he examine the patient in A & E. As a result of that impasse, Sister H called in the Clinical Site Manager, Sister B, to speak to the Claimant.

114. The Claimant and Sister B had a discussion, initially in A & E near the patient, but then, at Sister B's urging, in a private, albeit glass-walled, office within the department. The outcome of that discussion was that the patient was ultimately moved to the SAU.

115. Both Sister H and Sister B complained about the Claimant's behaviour towards them to the A & E consultant who, in turn, referred the matter to Mr Henwood the following day. He asked Sister H and Sister B to email him their accounts of the events, which they did. Both complained of the Claimant being rude and aggressive, with Sister H noting that the Claimant had been confrontational and aggressive and that the way that he had treated the patient had been "*disgusting and unprofessional*", and Sister B saying that the Claimant had been "*wholly unprofessional*". The Claimant was not asked to provide his version of the incident at the time.

116. Mr Henwood summarised the incident to Ceri Williams in an email on 21 May 2016. He noted that he had asked the two Sisters to email him their accounts of the events. He went on to say:

"*I feel I should have approached Mr Smo yesterday to discuss but as he has accused me of discriminatory and possibly racist behaviour, I thought I should not.*

I am deeply concerned.

I accept the desire to resolve this informally but my opinion and that of all others is that there is a complete lack of insight with my colleague and informal measures will fail."

117. The email, in addition to being copied to Mrs Lewis and other HR staff, was copied to Dr Edmunds and Dr Kloer as they may have needed to deal with matters whilst Mr Henwood was on leave. Dr Edmunds replied on 23 May 2016 asking for HR to advise on how to proceed with the matter. Ms Williams replied the following day, noting that she was hoping to get back to Dr Edmunds to arrange a meeting with herself and Mr Morgan in relation to next steps in the next few days and following discussions with Dr Kloer to agree the way forward, and to offer some additional training in the processes before she

embarked on an initial assessment of facts, which she noted did now seem to be the likely route given that attempts had been made to handle the issues on a more local level, but it appeared to be escalating further.

118. Ms Williams went on to say that she had asked Mrs Lewis to be ready to discuss the complaints from the two female doctors in relation to how they wanted them to be resolved, supported by a member of the HR team. She noted however that as there had been a further incident which itself was likely to result in further complaints then it may be best to undertake those discussions as part of the assessment of facts.

119. On 24 May 2016, the Claimant sent a further email regarding GM to the same recipients as his earlier email in respect of her. He commenced the email by saying:

"*I, and most of the staff, have major concerns about [GM] and I am not happy at all for [GM] to run the rota the way she does.*"

120. His views however did not appear to have been shared by his colleagues, as several sent replies indicating their satisfaction with GM's work.

121. GM herself emailed Mr Henwood and others on the management/HR side the following day, referring to the Claimant's emails and expressing her "*increasing concerns about further harassment by this doctor*". She stated:

"*Not only are [his emails] defamatory, but I am now at risk of having my professional standing completely undermined within the department.*

He does not appear to understand any part of how the department is run and is making untrue statements and accusations against me.

Can you kindly address this matter with some urgency please?"

The application of UPSW

122. Following the various events of late May 2016, Dr Kloer took the decision that an initial assessment of facts, under the auspices of UPSW, should be undertaken, and that Dr Edmunds should be appointed Case Manager and should undertake that assessment. He wrote to the Claimant on 2 June 2016 to confirm that, and set out a summary of the concerns as follows:

- "*Issues raised in Mr Henwood's letter dated 10 May 2016 and unresolved at your meeting on 9 May 2016;*
- *Your response to Mr Henwood's letter dated 10 May 2016 whereby you copied in 18 colleagues including Consultant Medical Staff, Nursing Staff and Secretarial Support;*
- *Inappropriate and unprofessional reference in the above email to work colleagues, namely Joy Singh and Mark Henwood;*

- *Approaching your colleague [GM] and displaying intimidating and aggressive behaviour towards her on the morning of 18 May 2016;*

- *Sending two further inappropriate and unprofessional emails dated 18 May 2016 at 11.43am and 24 May 2016 at 7.56am referring to [GM] and again copying in numerous medical, nursing and secretarial staff (18 in total) which could be perceived as professionally undermining by her;*

- *Incident on 20 May 2016 relating to a patient admission at GGH where it is alleged that you displayed aggressive and intimidating behaviour towards the Bed Manager and A & E Sister on the same date.*"

123. Dr Kloer noted that the purpose of the initial assessment was for the Case Manager to assess the facts and to make a recommendation on the most appropriate next steps, and that Dr Edmunds would therefore consider whether the matter warranted further investigation in accordance with UPSW or whether the matter could be resolved less formally.

124. Dr Edmunds also wrote to the Claimant on 2 June 2016, noting her appointment as Case Manager and setting out, in a similar manner, the points contained in Dr Kloer's letter.

125. Dr Edmunds then undertook her initial assessment between July and October 2016. She met first with the Claimant on 12 July 2016 and then met, or spoke on the telephone with, 14 other involved parties, including; Mr Henwood, Ms Singh, Mr Deans, Mrs Lewis, GM, Sister H and the Claimant's secretary, KP; in July, September and October.

126. In her meetings, both with the Claimant and others, Dr Edmunds raised the Claimant's comment in his email of 18 May that he had been experiencing discrimination. The Claimant, whilst maintaining that he felt that he had been discriminated against, did not provide any specifics and noted that he felt that things had improved over the previous couple of months.

127. Mr Henwood when asked about the point stated that he felt that the Claimant had been treated very fairly and at no point had his ethnic background been of any relevance, and he had been treated in the same way as any other consultant. When Dr Edmunds enquired about whether Mr Henwood had interpreted the Claimant's reference to discrimination as an accusation and, if so, against whom, Mr Henwood confirmed that he had taken it as an accusation and, as the email had been addressed to him, an accusation against him. He went on to say:

"*Well I think everyone is, me particularly, is offended by that and it is very easy to make these allegations and I am aware that it is not uncommon these days, because allegations are to be made. I think some people's…one colleague said 'well, it's just lazy and it's just an easy way to use these allegations against people with no evidence' but I think apart from dismissive discussions where we all feel there is absolutely no evidence and hence we dismiss them out of hand, but I think it is offensive that those have been made, because they are*

allegations nonetheless and they are very serious allegations, even if there is no evidence that they are true."

128. In the meantime, the Claimant sent a substantive reply to Mr Henwood's letter of 10 May to him, in the form of a letter marked "Private and Confidential" dated 3 June 2016. In this, he noted that it was also his intention to move forward positively to develop a strong and fruitful working relationship with all his colleagues in a fair way that provided the best possible care for patients. He then responded to the various points raised in Mr Henwood's letter regarding the job plan, team working, clinics and clinical care.

The Claimant's exclusion

129. Whilst Dr Edmunds was undertaking her initial assessment, additional matters of concern relating to the Claimant were brought to the Respondent's attention, relating to the Claimant's clinical work and his relationships with colleagues. Mr Morgan then wrote to the Claimant on 23 September 2016 asking him to attend a meeting with Dr Kloer on 26 September 2016 to discuss *"some patient safety and other concerns relating to [his] behaviour*". The meeting took place as scheduled.

130. In addition to various clinical concerns (which we do not recite as they did not ultimately form part of the decision to dismiss the Claimant), it was noted that two registrars had been uncomfortable in working with the Claimant whilst on call, that there had been occasions when the Claimant had been absent without leave, that he had not attended Multi-Disciplinary Team meetings, and that there had been concerns in relation to his administration backlog and in informing patients of their results.

131. Dr Kloer wrote to the Claimant on 19 September 2016 summarising the concerns relating to patient safety and other matters. He confirmed that he had sought advice from NCAS, and that as the majority of the patient concerns had arisen whilst the Claimant was on call, he had decided that the Claimant should not undertake on-call work. He also noted that he was going to ask Dr Edmunds to expand her initial assessment to include the additional concerns, and that as Dr Edmunds was not a surgeon an appropriate individual would need to be appointed to support her in considering the patient safety issues. Dr Kloer also noted that the Claimant had brought up the email he had sent him in May and he apologised for his oversight in not responding to it.

132. Dr Kloer then sent the Claimant a further letter the following day, noting that a further clinical concern had been brought to his attention which would be added to the issues to be assessed by Dr Edmunds. He also noted that Mr Jegadish Mathias, a Consultant Surgeon at Withybush Hospital, another hospital within the Heath Board, would provide support to Dr Edmunds in relation to the patient safety concerns.

133. The Claimant wrote to Dr Kloer on 4 October 2016 in response to the additional concerns. He also noted:

"*I have raised with you before that I have felt harassed and that I have been experiencing discrimination.*"

134. In October 2016 the Claimant's secretary, KP, wrote to Mr Henwood raising concerns about the Claimant's administration and also about his attitude towards her. She indicated that she wished to withdraw from being the Claimant's secretary, and that was put into effect.

135. On 16 October 2016 Mr Morgan wrote to the Claimant, noting that several additional concerns had arisen over the previous week and that Dr Kloer and he wished to meet with him again, the meeting being arranged for 18 October. The Claimant responded asking if Mr Morgan had received his letter dated 4 October 2016, noting that he understood that Mr Morgan had been away on holiday for two weeks. He noted that as that was the third time that allegations had been raised against him, he wished to be professionally represented at the meeting. He also asked for further details of the additional concerns that had arisen.

136. Mr Morgan replied on the evening of 17 October 2016. He noted that Dr Edmunds had asked Dr Kloer as to whether she was expected to include the most recent concerns in her initial assessment report, as she had already determined that matters should proceed to a formal investigation. Mr Morgan also outlined the three concerns that had recently arisen and asked the Claimant to let him know the organisation that would be representing him so that a convenient meeting could be arranged. He further noted that, due to the potential seriousness of the concerns, Dr Kloer did not wish the Claimant to attend work until the meeting had taken place.

137. The meeting took place on 21 October 2016 with the Claimant being represented by a solicitor. Dr Kloer noted that further concerns had arisen, with one clinical matter being felt to be particularly concerning. Dr Kloer apologised for not responding to the Claimant's 4 October letter, noting that a draft had been prepared, but that in view of the further concerns that had arisen a further meeting was felt to have been the appropriate way forward. He noted that Dr Edmunds had already determined there was a need to move to a formal investigation and that he had directed her that there was no need for her to incorporate the most recent concerns and to complete her report.

138. Dr Kloer also referred to the Claimant's reference to harassment and discrimination, noting that he was mindful that the Claimant had made reference to some concerns previously, although no detail had been provided. He therefore invited the Claimant to provide him with details of any examples of harassment suffered or discriminatory behaviour or practice in order that he could arrange for those matters to be considered.

139. Dr Kloer also informed the Claimant that the most recent concerns called into question patient care on a day-to-day basis and that, after discussions with NCAS, he had decided that the Claimant should be excluded from practice, i.e., in lay terms, suspended, until such time as the clinical concerns could be examined. Dr Kloer wrote to the Claimant on 24 October 2016 to confirm the discussion.

140. The exclusion of the Claimant was regularly reviewed by Dr Edmunds and Dr Kloer and was discussed with the Independent Board Member over the subsequent months, and indeed years, and remained in effect at all times.

Initial assessment

141. Dr Edmunds completed her initial assessment on 21 October 2016. As noted, she did not undertake an assessment of the most recent concerns, concluding, on the basis of the initially identified concerns, that a formal investigation was necessary. She also concluded that informal resolution would not be appropriate due to the nature of the allegations, the number of them, and the number of the individuals involved.

142. In a letter to the Claimant dated 28 October 2016, which addressed the Claimant's contention that it would be appropriate for him to undertake non-clinical duties as opposed to being excluded, with which Dr Kloer confirmed he was not in agreement, Dr Kloer informed the Claimant that he would arrange for Dr Edmunds, in accordance with UPSW, to meet with him to explain the rationale for her recommendation and to provide the name of the Case Investigator and the terms of reference for the investigation. The Claimant confirmed, in an email of 9 November 2016, that he had no objection to Dr Edmunds providing him with the terms of reference without a meeting.

143. Dr Edmunds then wrote to the Claimant on 21 November 2016 confirming that she had concluded that a formal investigation was needed. She attached the terms of reference and noted that she had appointed Dr Iain Robertson-Steel, the Hospital Director at Withybush Hospital, as the Case Investigator.

144. The terms of reference contained two "headline" allegations:

    (1) "*Mr Smo's standard of behaviour and attitude have been unacceptable and that he has failed to display the required standards of behaviour and attitude expected within his role and responsibilities.*"

    (2) "*Mr Smo has allegedly failed to display the required standards of performance in respect of clinical decision making and practice as expected within his role and responsibilities.*"

145. Under those, specific issues were noted, 12 in relation to the Claimant's conduct and 14 in relation to his performance. The terms of reference were amended twice, in January 2017 to provide more detail in relation to the performance issues, and in March 2017 to add two further issues to the conduct concerns.

146. Dr Edmunds wrote to the Claimant on 14 December 2016 to inform him that Dr Robertson-Steel had been appointed as the Case Investigator, with James Bennett providing HR support. She noted that the two of them were due to meet on 20 December 2016 to plan the investigation and that a number of dates in January 2017 had been set aside to interview witnesses. Dr Edmunds pointed out that section 1.22 of UPSW stated that an investigation should be completed within 28 days of the appointment of the case investigator, but that

the policy recognised that there may be circumstances where more time would be required. She noted that, given the scope of the investigation it was highly that Dr Robertson-Steel would need well in excess of 28 days to complete the investigation.

Investigation

147. Dr Robertson-Steel then undertook the interviews in relation to his investigation in the period of January to July 2017. In total he interviewed 23 individuals, meeting Mr Henwood on three occasions and the Claimant on five occasions. All interviews were recorded and transcripts prepared, checked and approved by all parties. Various factors impacted on the progress of the investigation, notably diary commitments, the need to consider patient records in advance of meetings, the transcription and approval of transcripts of the interviews, and, in the case of the Claimant, a period of paternity leave and a family bereavement. Dr Robertson-Steel was again supported by Mr Mathias in relation to the clinical concerns.

148. As Dr Edmunds had done, Dr Robertson-Steel discussed the Claimant's concern, set out in his email of 18 May 2016, that he had experienced discrimination. The Claimant stated, in an interview with Dr Robertson-Steel on 1 March 2017, that he had said to Dr Edmunds that he had evidence of harassment but that he had told her that he had decided not to pursue the matter any further. Dr Robertson-Steel later asked the Claimant to confirm his position with regard to his assertions of discrimination, and the Claimant repeated that he felt that there were matters but that he wished to withdraw everything. Dr Robertson-Steel persisted, noting that it was something he had to explore with the Claimant because his role was to establish the facts, and if the Claimant was being harassed and bullied then that would be entirely pertinent to some of the issues he was exploring. The Claimant noted that he had been preparing a file with his concerns over being bullied and that he had been prepared, when Dr Kloer had replied to his email, which as we have noted above he did not do, to go to a meeting and tell him what had been done and by whom.

149. After a short coffee break, Dr Robertson-Steel returned to the Claimant's email of 18 May and asked if there was anything else the Claimant wished to say about why he had sent it. The Claimant indicated that he was not aware of any specific procedure to report what he had been experiencing but, in retrospect, that did not excuse his email, and that he would not mind being given an opportunity to apologise to the recipients of it.

150. Dr Robertson-Steel then attempted to sum up the discussion, asking if the Claimant was effectively saying that he withdrew the content of the email and wished to apologise to the recipients of it, or whether there were matters which should be considered as part of the investigation about discrimination. The Claimant replied that he would say that there were matters and he would withdraw everything, and he was "*quite happy*".

151. Dr Robertson-Steel continued however to try to obtain detail of the Claimant's discrimination concerns, asking him, with regard to the individuals to whom the

email was copied, whether there had been any issues of discrimination or racially inappropriate behaviour from people on that list. The Claimant confirmed that there were, but that as he had mentioned earlier, he was "*quite happy to grow up on that*".

152. The notes of the meeting indicate that the Claimant continued to be equivocal over the issue, maintaining that he had been the victim of discriminatory treatment from several individuals but that he did not wish to pursue it further. Dr Robertson-Steel noted that the reason he was asking was that some individuals on the list had given evidence to his investigation and that allegations about their behaviour would clearly affect their credibility. The Claimant pointed out that he had started the meeting after the coffee break by saying that he was quite happy to withdraw and apologise to everybody, and he repeated that that was what he was quite happy and prepared to do. He stated however that he had prepared his evidence because he thought he was going to meet Dr Kloer.

153. Dr Robertson-Steel again interjected seeking clarification of the Claimant's position. He noted that it was within his terms of reference to explore the email with him and to establish the facts. He noted that his job was to investigate the facts and consider the very serious allegations about discrimination. He stated that he was "*prepared to go through them one by one if necessary and if [the Claimant] have got evidence of that, [he] will take it into the inquiry*". The Claimant replied that he had to take advice on that because it was a separate issue.

154. Mr Bennett also commented to the Claimant that Dr Robertson-Steel had been tasked with looking into a number of concerns, one of which specifically was that email, and, as part of the discussion about that, they were trying to understand the rationale for the circulation list and the reasons why the email was sent to that circulation list.

155. Dr Robertson-Steel noted that Dr Edmunds had stated that the Claimant had stated that there had been occasions when he had been discriminated against, but then, when asked if he had any specific examples, he had said that he did but that he was not going to show them because things had improved. Dr Robertson-Steel noted that he was now asking whether there were specific examples that the Claimant wished to submit, noting that things had obviously progressed from a situation where the Claimant had felt things had improved in May and June 2016 to March 2017 where he was investigating issues. He asked if the Claimant wished to submit any evidence that he said he had not wished to submit to Dr Edmunds when she had interviewed him. The Claimant replied that, as he had mentioned, he was quite happy to withdraw everything but that if Dr Robertson-Steel wanted him to submit anything before answering the question he needed to have advice on that.

156. Mr Bennett then again referred to the terms of reference and the email that Dr Robertson-Steel had been tasked with looking at, and noted that one of the facts that they were trying to establish was why the people on the circulation list were included and whether anybody on the circulation list had subjected the

Claimant to the issues that are raised within the email, to which the Claimant replied that the short answer was "*yes*".

157. Dr Robertson-Steel then noted that as the answer was "yes", the Claimant should speak to his representative and have a discussion because his investigation had to be completed and he and the Claimant were keen to complete it in minimum time.

158. Dr Robertson-Steel encouraged the Claimant to take advice and noted that if the Claimant had any evidence to support his contentions, he would be happy to receive it as part of the inquiry. He concluded by saying that if the Claimant submitted information he would consider it, but that if he did not then he would regard the matter as not being continued with. The Claimant did not, at any stage, provide any such information.

159. Dr Robertson-Steel completed his investigation report in September 2017. He set out his conclusions in relation to the "headline" allegations and the specific examples underpinning them, and set out the factors mitigating the Claimant's behaviour which he had taken into account. He provided recommendations to the Case Manager that the Claimant should remain excluded from clinical duty, that he should be referred to NCAS for a formal review of his clinical and personal performance, and that he would require coaching and teamworking skills training.

160. With regard to the allegations concerning the Claimant's conduct, Dr Robertson-Steel stated that, in his opinion, the allegation had been established to a standard of proof sufficient to justify the instigation of formal action and the convening of a panel hearing. With regard to the performance concerns, Dr Robertson-Steel's conclusion was that the allegation had not been established to a standard of proof sufficient to justify the instigation of formal action and the convening of a panel hearing, but that the nature of the allegation which had been established suggested that assistance from NCAS or an equivalent body may be appropriate, and that when the outcome of a formal and detailed NCAS assessment was available further action of a disciplinary nature could be considered.

161. He went on to make further observations that it would be likely, with good engagement from the Claimant, that he would be able to return to a role as a consultant general surgeon with an interest in colorectal surgery at some point in the future, in an appropriate environment and with good monitoring and support. He noted however that there had been a breakdown in the working relationships within the surgical team at Glangwili, and that it was his opinion that it would not be impossible to reintroduce the Claimant as a functioning member of the surgical team at the Hospital or elsewhere in the Board. He stated that he felt that it would be in the best interests of the Claimant, the Board, the patients and indeed the Health Service generally for the Claimant, following assessment and appropriate retraining, to seek employment elsewhere.

162. Dr Edmunds sent the Case Investigator's report to the Claimant and his solicitors for their comments on 9 October 2017. UPSW provides for those

comments to be provided within 14 days but, due to the size of the report, in excess of 1,700 pages, an extension was given until 24 November 2017. Comments were then provided by the Claimant's solicitor by way of letter, comments being provided on each set of allegations. Three lever arch files of material were also provided, and all were provided on 29 November 2017.

Decision-making framework

163. UPSW provides for the Case Manager, on receipt of the findings and recommendations of the Case Investigator, to determine what action should be taken. Dr Edmunds, after considering Dr Robertson-Steel's report, prepared a Decision-Making Framework, setting out her decision and the basis for it. In view of the range of matters under consideration, it took Dr Edmunds some time to prepare that Framework, and it was not issued until 20 April 2018. She concluded that the concerns regarding the Claimant's conduct should proceed to a hearing under the UPSW extended procedure, and that the concerns regarding the Claimant's performance should be investigated with the assistance of NCAS.

164. Dr Edmunds also noted Dr Robertson-Steel's observations about working relationships. She informed Dr Kloer, in a letter of 20 April 2018, that she was concerned about the extent to which working relationships with a range of professionals appeared to have broken down. She noted that, having read the witness statements included in the Case Investigator's report, along with the report itself, it did not appear to be a case of a breakdown in relationships between the Claimant and one or two members of a team but with a very large cohort of individuals who worked in a multi-disciplinary environment. She commented that she did not believe it was appropriate for her to consider the relationships issue at that stage in her role as Case Manager, based on the terms of reference. She confirmed however that she had advised the Claimant that she would be writing to Dr Kloer to notify him of those concerns which had materialised as a result of the evidence contained in the Case Investigator's report.

165. Dr Edmunds also wrote to the Claimant and his representatives on 23 April 2018 with her Decision-Making Framework. She noted that paragraph 1.25 of UPSW requires the Case Manager to meet with the practitioner and their representative to explain the decision and to outline the process to be followed. She confirmed that she was happy to meet and would arrange that, but nevertheless enclosed her Framework. She also noted her concern about the breakdown of relationships.

166. Dr Edmunds wrote again to the Claimant on 3 May 2018, noting that she had previously provided him with her Decision-Making Framework and also that she had provided a copy of it to NCAS. She noted that she felt that there were three options in respect of proceeding with the process:

    (1) The Claimant could attend a meeting with his representative where she could explain her decision, making reference to the document previously issued. The Claimant could then appeal against the decision on the

process to be followed within 14 days of receiving written confirmation which would be issued following the meeting.

(2) The Claimant might not consider it necessary to attend a meeting, on the basis that Dr Edmunds had issued a document which explained her decision. Any appeal would then need to be registered within 14 days of receiving written confirmation from her on the process to be followed, which she would issue following confirmation from the Claimant that he wished to follow that option.

(3) The Claimant might not consider it necessary to attend a meeting and not wish to register an appeal, following which Dr Edmunds would formally initiate the extended procedure. She noted that section 1.27 of the UPSW required that an appeal should be registered in writing to the Chief Executive.

Framework appeal (I)

167. The Claimant's solicitor informed the Respondent's Chief Executive on 27 April 2018 that the Claimant intended to appeal Dr Edmunds' decision, and subsequently clarified, in a letter dated 9 May 2018, that the Claimant wished to meet with Dr Edmunds. That meeting took place on 12 June 2018 and Dr Edmunds confirmed the outcome of that by a letter dated 29 June 2018. In that, she confirmed the Claimant's right to appeal her decision, and the Claimant did then appeal by a letter from his solicitor dated 19 July 2018. That appeal was supplemented by a further letter from the Claimant's representative dated 16 August 2018 which provided further information in relation to one of the clinical concerns. The appeal hearing did not however take place until September 2019.

168. There was initially a delay between August and October 2018 before the Respondent wrote to the Claimant's solicitors in relation to his appeal. That letter noted that arrangements for the appeal hearing were being made, and dates of unavailability for the months of November and December 2018 and January 2019 were sought. The Claimant's solicitor replied on 8 November giving the required dates. No further communication about the appeal then occurred until a chaser letter was sent to the Respondent by the Claimant's solicitor on 13 May 2019.

Working relationships investigation and injunction

169. From the middle of 2018, the Respondent took forward the point raised by Dr Robertson-Steel in his report, and also mentioned by Dr Edmunds, regarding the breakdown in relationships. Legal advice was taken, and the Respondent considered that a separate investigation outside the ambit of UPSW should be undertaken to consider the issue. Dr Kloer wrote to the Claimant on 31 October 2018 to inform him that he felt that a separate investigation into working relationships was appropriate. He provided terms of reference for that investigation and noted that he had appointed Dr Roger Diggle, Assistant Medical Director, to undertake it. Dr Kloer then wrote further to the Claimant on 15 November 2018 noting that terms of reference had been issued to Dr Diggle

that day and that he would be making arrangements to commence his investigation shortly.

170. Dr Diggle in fact commenced his investigation in January 2019. He met with several employees between late January and late March 2019, and then wrote to the Claimant on 17 May 2019 informing him that he had arranged an interview with him on 25 June 2019.

171. The Claimant replied to Dr Diggle by a letter dated 21 May 2019. He referenced the significant delay that had arisen, noting that some seven months had passed since Dr Diggle had been appointed. He also observed that the UPSW process had not been concluded and that he disagreed that Dr Diggle's investigation was outside the scope of UPSW. He commented that the facts of his investigation arose from the investigation under UPSW and asserted that UPSW was being circumvented by the commencement of a different process. He therefore felt that Dr Diggle's investigation should be pursued after the conclusion of the UPSW process.

172. Responses to the Claimant's letter were provided by both Dr Diggle and Dr Kloer, to whom Dr Diggle had forwarded the Claimant's letter, explaining and apologising for the delay and, in the case of the latter, confirming that it was felt appropriate for the working relationships investigation to continue.

173. The Claimant and his solicitors maintained that it was inappropriate to continue the working relationships investigation and, in June 2019, the Claimant's solicitors wrote to the Respondent indicating that doing so would amount to a breach of the Claimant's contract, and that if the Respondent maintained its position an injunction would be sought to restrain the process. That led to such an interim injunction being sought and obtained on 25 July 2019. That injunction ordered that the Respondent, as defendant, should not, until trial or further order, require the Claimant to be interviewed by Dr Diggle in respect of the "working relationships investigation". The order also noted that there should be a speedy trial of the matter, which it was hoped would take place in November 2019.

174. In the event, the trial could not take until February 2020, with judgment being delivered in March 2020. In his Judgment, Linden J noted that the order he proposed to make would prevent the investigation of the issues about the Claimant's working relationships by the Respondent other than in the course of the current proceedings under Part 5 UPSW, but would allow the Respondent to review the position at the end of the proceedings.

175. At around the time of the issue of the interim injunction, at the end of July 2019, Dr Diggle retired, and an external HR consultant, Ruth Clacey-Roberts, was appointed in his place at the start of August 2019. She reviewed the statements from the investigation undertaken by Dr Diggle, re-interviewed some of the witnesses he had interviewed, and interviewed several more between late August and early October 2019. She then issued an interim report in October 2019.

176. Mrs Clacey-Roberts concluded that she felt that a number of the relationships between the Claimant and other staff members, most significantly those within the consultant body, had deteriorated to such an extent that it was unlikely that the Claimant could be successfully reintegrated into the team. However, as the pursuit of the working relationships investigation was prohibited by Linden J's order in March 2020, and as, ultimately, the UPSW process led to the Claimant's dismissal, Mrs Clacey-Roberts never met the Claimant nor did she produce a final report and no action was taken in respect of her interim report.

Framework appeal (II)

177. Following discussions in June and July 2019 about availability, the Claimant was notified by Mr Morgan on 16 August 2019 that his appeal against the referral of his case to an Inquiry Panel under section 5 of UPSW would be heard, if needed, over two days, 2 and 4 September 2019, although it appears that only the first day was needed.

178. The appeal was considered by a Panel chaired by Mr Paul Newman, an independent member of the Respondent's Board, who was accompanied by Dr Graham O'Connor, Consultant Psychiatrist, and Dr Meinir Jones, Clinical Lead of the Minor Injuries Unit. Both the Claimant and Respondent were represented by counsel, in the Claimant's case by Mr Sutton who represented him at this hearing.

179. The Appeal Panel upheld Dr Edmunds' decisions to refer the conduct concerns to an enquiry panel and to refer the capability concerns to NCAS, although not in their entirety. Of the twelve examples of concerns relating to the Claimant's conduct, the appeal panel concluded that nine should go forward for consideration by the Inquiry Panel. The Panel also considered that most of the examples of the performance concerns should go forward to NCAS. Its conclusions were circulated on 16 September 2019.

Inquiry Panel

180. Following that, discussions took place about the makeup of the Inquiry Panel and the scheduling of the Inquiry Panel hearing. On 24 October 2019, the Respondent's solicitors informed the Claimant's solicitors that the hearing had been scheduled to take place over five days commencing on 20 January 2020. In November 2019 the Respondent's solicitors were informed of the makeup of the Inquiry Panel, which was that it would be chaired by Angus Moon QC, an independent barrister, who would be accompanied by Dr Satyajeet Bhatia of Cardiff and Vale University Health Board, and Hazel Robinson, Director of Workforce at Swansea Bay University Health Board. Terms of reference for the enquiry panel were then issued on 31 December 2019.

181. During the hearing the Inquiry Panel heard oral evidence from 16 witnesses including the Claimant. It was also provided with bundles of documents from both sides, spanning some 1,600 pages on the Respondent's side and some 1,800 pages on the Claimant's side.

182. The Inquiry Panel also considered the parties' submissions, encompassing particular matters, notably the burden of proof, the Panel considering that it should apply the civil standard of proof of the balance of probabilities, but in such a way that the allegations would only be found proved if there was appropriately cogent evidence to support them. The Panel also heard submissions on the legal concept of victimisation and the extent to which the panel should take account of the fact that the Claimant was claiming that he had been victimised, in the sense provided for by section 27 of the Equality Act 2010.

183. The Panel noted that the question of victimisation was relevant for its deliberations, noting that they had sought to distinguish between the Claimant's complaints of discrimination and the manner or way in which he made those complaints so as to ensure that any allegations found proved against the Claimant were properly and genuinely separable from the making of his complaints of discrimination. The Panel also considered the extent to which witnesses might have been influenced by the Claimant's complaints of discrimination.

184. The Panel also heard submissions on the principle of procedural fairness which required that precise details of a disciplinary charge must be stated in the allegation and that evidence adduced must be confined to those particulars. They noted that they would follow that principle but that, when considering whether any action was unacceptable, unreasonable or inappropriate, the relevant evidence was likely to travel over more ground than that set out specifically in the particulars.

185. Having heard the evidence in January 2020, and the parties' submissions on 23 March 2020, the Inquiry Panel produced Part 1 of their report, their conclusions on the facts, on 23 June 2020. It outlined their findings over several paragraphs, sub-paragraphs and indeed sub-sub-paragraphs, and then concluded that Part 1 of the report would serve as the basis for the Panel's view, to be expressed after the parties had made further submissions, as to whether the Claimant was at fault, and would serve as the basis for any recommendations which the Panel was to make as to disciplinary action.

186. In relation to Part 2, the Inquiry Panel received written submissions from both parties which included, in the case of the Claimant, additional evidence relevant to the issue of fault. A hearing took place on 17 July 2020 to receive the parties' final oral submissions. An issue arose at that oral hearing regarding the applicability of the Respondent's disciplinary policy. The parties were given an opportunity to make further written submissions on that matter. The Inquiry Panel ultimately concluded that matters of disciplinary procedure were governed under the Claimant's contract by UPSW, but also that the provisions relating to the meaning of misconduct, serious misconduct and gross misconduct in the disciplinary policy were also contractually binding.

187. In relation to fault, the Inquiry Panel's conclusions, which they set out in their report dated 30 July 2020, were that two of the issues[1] they had found proved

[1] The issues ultimately found proved by the Panel are set out at Appendix 1.

in relation to the Claimant's conduct, those set out at paragraphs 1 and 8, amounted to misconduct; three of the issues they had found proved, those set out at paragraphs 3, 5 and 7, amounted to serious misconduct; and four issues, those set out at paragraphs 4, 6, 9 (in part) and 10, amounted to gross misconduct. The Panel also concluded that the cumulative effect of the breaches of contract (in relation to the findings of misconduct, serious misconduct and gross misconduct) on the part of the Claimant were such that there had been a fundamental breach of contract by him.

188. In terms of their recommendations, the Panel noted that, having found that the Claimant's conduct had amounted to gross misconduct in relation to paragraphs 4, 6, 9 (in part) and 10, then, in light of all the available information and taking into account all the exculpatory factors in mitigation presented by the Claimant, they determined that the Claimant's gross misconduct struck at the root of his contract with the Respondent.

189. The Panel considered that a final written warning would not adequately reflect the seriousness of the Claimant's misconduct and would not address the damage to the employment relationship between the Claimant and the Respondent caused by that misconduct. In the view of the majority of the Panel, the Claimant's misconduct was so serious that the Respondent was justified in no longer tolerating his continued presence at work. The minority's view was that summary dismissal was too harsh, first on the ground that issues of bullying, sexual harassment and misconduct were best dealt with under the Dignity at Work process and that that process should have been followed in the first place, and secondly that the Respondent should have taken, and should now take, appropriate remedial action to seek to give the Claimant an opportunity to improve and change his behaviour.

Disciplinary panel

190. Following the conclusion of the Inquiry Panel process the Claimant was informed, by a letter dated 28 August 2020, that a disciplinary hearing would be held on 29 September 2020. It was originally intended that the Disciplinary Panel be comprised of Dr June Picton, Associate Medical Director; Dr Warren Lloyd, Associate Medical Director; and Jill Paterson, Director of Primary Care. However, in view of representations from the Claimant that Dr Picton had had some prior involvement in relation to matters relating to the Claimant, as she had been party to some correspondence, in Dr Kloer's absence, with NCAS regarding the initial exclusion of the Claimant in 2016, she was replaced by Dr Sion James, Deputy Medical Director.

191. The letter noted that the Disciplinary Panel would make a decision on what, if any, disciplinary action should be taken in respect of the Inquiry Panel's findings of misconduct and fault set out in their reports. A summary of the Inquiry Panel's findings of fact were set out within the letter.

192. In advance of the disciplinary hearing the Claimant provided further written comments and documents in mitigation. They focused on his prior work and the lack of any complaints and positive feedback he had received, the impact of concerns over his son's health on him in 2016, the impact of the lack of a

mentor, and other stressful factors on him in 2016, notably the health of his mother and the position of his mother and other family members in Syria in light of the civil unrest there at the time. The Claimant also noted that he had continued with his part-time work during his period of exclusion and had received good feedback in respect of that and had undertaken some focused CPD courses to address the issues raised by the investigation.

193. The disciplinary hearing took place as scheduled, with the Claimant and Respondent again being legally represented, the Claimant again being represented by Mr Sutton.

194. The Disciplinary Panel heard evidence orally from Dr Edmunds and the Claimant, as well as from the Claimant's former line manager in his part-time role. The Panel also heard further submissions on behalf of both parties.

195. An issue arose during the course of the hearing as to whether the Disciplinary Panel was bound by the findings of fault made by the Inquiry Panel in its second report. The Respondent's representative suggested that the findings of fault and gross misconduct should be binding on the Panel, in addition to the findings of fact, which it was agreed should be binding, or, in the alternative, that the Disciplinary Panel should only depart from them in very exceptional circumstances. Mr Sutton, on behalf of the Claimant, however, submitted that the Disciplinary Panel was not bound by the findings of fault, that labels such as "gross misconduct" were not in fact applicable under UPSW, and that the Disciplinary Panel was therefore entirely free to judge the seriousness of the fault and to make their own decision.

196. The Panel considered the matter and provided their oral decision on the matter during the hearing, which was that paragraph 5.11 of UPSW made it clear that the Panel was not to go behind the findings of fact of the Inquiry Panel, and that whilst the Panel accepted that UPSW did not specifically preclude it from making different findings of fault to that of the Inquiry Panel, they nevertheless considered it was clear that it was not intended to be their primary function, which was solely to consider evidence of mitigation, paragraph 5.16 of UPSW noting that no further supplementary evidence was to be provided. The Panel noted that they were determined to be fair and would review all the mitigation independently in arriving at their decision on what action should be taken.

197. Following the hearing, the Disciplinary Panel met the following day to consider their decision, and they provided that decision in a letter dated 6 October 2020. The decision was that the Disciplinary Panel unanimously concurred with the Inquiry Panel that the cumulative effect and findings of gross misconduct struck at the root of the Claimant's contract with the Respondent, which resulted in serious damage to the relationship between the employer and employee. They concluded that that conduct was of such a grave and weighty character that it was a breach of the relationship of trust and confidence between the employer and employee. That was so serious that the Respondent was justified in no longer tolerating the Claimant's continued employment. The Panel therefore concluded that the Claimant's employment with the

Respondent was terminated with immediate effect by reason of gross misconduct. The letter reminded the Claimant of his right to appeal.

Appeal panel

198. The Claimant did submit an appeal against his dismissal on 23 October 2020, setting out seven grounds. They were:

    1. *Failure to consider and determine the issue of Mr Smo's "fault" in the light of the Inquiry Panel's findings of fact.*

    2. *Failure to take account of family circumstances and Mr Smo's own health*

    3. *Failure to take account of attitudes amongst departmental colleagues in response to Mr Smo's discrimination complaint*

    4. *Failure to take account of the lack of departmental induction and mentoring*

    5. *Failure to give consideration as to the applicability of the Health Board's Dignity at Work policy (re: Allegations 9 + 10)*

    6. *Failure to take account of Mr Smo's conduct in the context of his dower career progress*

    7. *Failure to give due weight to Mr Smo's mitigation, expressions of insight and apology*

199. An Appeal Panel was then appointed, chaired by Ms Mona Bayoumi, external barrister, who was accompanied by Dr Nikki Pease, Consultant in Palliative Medicine at Velindre Hospital, and Mrs Mandy Rayani, Director of Nursing, Quality and Patient Experience at the Respondent.

200. The appeal hearing took place on 21 December 2020, with both parties again being legally represented, the Claimant again by Mr Sutton and the Respondent this time by Ms Chudleigh, who appeared at this hearing.

201. The Appeal Panel approached grounds 1 and 3 of the Claimant's grounds of appeal (Ground 1 – Failure to consider and determine the issue of the Claimant's "fault" in the light of the Inquiry Panel's findings of fact; Ground 3 – Failure to take account of attitudes amongst departmental colleagues in response to the Claimant's discrimination complaint) as points of law, which they dealt with first before they then considered the other grounds of appeal which, in the view of the Appeal panel, all related to elements of the Claimant's mitigation.

202. The Appeal Panel concluded in to relation ground 1 that UPSW was unequivocally clear that the function and purpose of the Inquiry Panel was to make binding conclusions on the practitioner's fault, before making recommendations as to the appropriate degree of sanction. It did not agree that the Inquiry Panel's "view" amounted to no more than a non-binding

expression of opinion. The Appeal Panel noted however, that, notwithstanding its view, it was self-evident from the disciplinary hearing outcome letter that the Disciplinary Panel did, in fact, review the findings of fault made by the Inquiry Panel and, having done so, expressly agreed with those findings.

203. With regard to ground 3, the Appeal Panel took the view that the decision to instigate an investigation into the Claimant's conduct was not tainted by victimisation, but that the Respondent had been duty bound to investigate the numerous allegations of misconduct which necessitated the use of UPSW.

204. With regard to grounds, 2, 4, 5, 6, and 7, the Appeal Panel concluded that the disciplinary panel had considered all the points of mitigation raised on the Claimant's behalf and felt that the grounds of appeal amounted to no more than mere disagreement with the disciplinary hearing decision and a further attempt to argue the Claimant's case.

205. Specifically with regard to ground 5 (Failure to give consideration as to the applicability of the Respondent's Dignity at Work policy), the Appeal Panel noted that the Disciplinary Panel had had the power to consider whether the Claimant's concerns might have been more appropriately addressed under the Dignity at Work policy, and they had given careful consideration to that power. However the Panel agreed, in the face of findings of gross misconduct, that the proposition that the Dignity at Work process should have been embarked upon four years after the events was not reasonable.

206. The Appeal Panel's ultimate conclusion was that the decision of the Disciplinary Panel to dismiss the Claimant was reasonable in the circumstances and there had been no failure, as alleged by the Claimant, to take into account any relevant mitigation. Its unanimous conclusion was that the appeal must therefore be dismissed.

Conclusions

207. Applying our findings and the applicable law to the issues identified at the outset, our conclusions are set out below. Before reciting our conclusions however, we record our observations on the redacted documents and late disclosure, which formed the background to the Claimant's amendment application, and which we had noted could form the basis of submissions as to the inferences we should draw from the Respondent's actions.

208. As we had anticipated, Mr Sutton, on behalf of the Claimant, strongly criticised the actions of the Respondent in undertaking excessive redactions during the internal SAR process, and in failing to disclose the unredacted material, and other related material, until just before the commencement of the hearing. He contended that they provided material from which we should draw inferences of a discriminatory motivation.

209. In our view, the redactions made, during the SAR process, to various internal emails were unusual and excessive. They did not appear to have been made for the usual reasons such redactions are made, most often to remove personal data of third parties. For example, one redaction removed some wording which

contained no personal data and yet the name of an individual, in that case, GM, was retained. Those involved in the SAR response, understood to have been members of the Respondent's Information Governance team, did not give evidence before us.

210. Similarly, the documents disclosed just before the hearing were of a character which should have led to them being disclosed as part of the general disclosure process, the failure to produce them earlier being put down to error.

211. However, notwithstanding the failures that had occurred, we did not consider that any inferences of discrimination should be drawn from them. We noted that the Claimant, and those advising him, had been aware of the redacted material since the provision of the response to the SAR in 2017, but had only raised a request for the complete material shortly before this hearing. More importantly however, we did not consider that the redacted material, or the freshly disclosed material, involved the concealment of any material evidence. In fact, it seemed to us, if anything, that the material was broadly supportive of the Respondent's overall approach to its management of the Claimant at the relevant times.

212. Our conclusions on the issues we had to decide were then as follows. We first considered the substantive claims i.e. direct race discrimination (issue 5), victimisation (issues 6-9), unfair dismissal (issues 10-13) and wrongful dismissal (issues 14 and 15).

Direct Discrimination

a. Failing from 4 January 2016 until the Claimant's exclusion on 17 October 2016 to agree to pay or pay the Claimant for 11.5 PAs rather than 10 PAs. The Claimant relies as comparators on Mr Deans and Ms Singh.

213. As a matter of fact, the Claimant was paid in relation to 10 PAs from the commencement of his employment on 31 December 2015 through the entirety of his time at work with the Respondent, i.e. up to 17 October 2016, and indeed beyond, up to the termination of his employment on 6 October 2020. That was on the basis that he was recruited to work on the basis of 10 PAs each week, that being included within the job description and the Claimant's contract, and also on the basis that that was the amount of work the Claimant actually undertook on average.

214. The Claimant's case that he suffered discrimination with regard to the amount of PAs, and by extension his pay, focused on his assertion that there was an agreement derived from Mr Deans' handwritten timetable in January that he work 11.5 PAs each week. However, Mr Deans was in no position to agree the Claimant's job plan, and we did not consider that his document amounted to anything other than a basis for discussion of potential timetables between the three colorectal consultants.

215. The Claimant's contract made clear that his job plan was to be discussed and agreed with his Clinical Lead and/or Service Manager, i.e. with Mr Henwood and Mrs Lewis. When the Claimant first raised the query of his pay with Mrs

Lewis at the start of February 2016, she made clear that the Claimant had been engaged on a 10 PA per week basis and that there was no budget for anything other than a 10 PA per week arrangement.

216. By that stage in their careers, both Mr Deans and Ms Singh were working on a 12 PA per week basis, as was the case with the majority of the consultants at the Hospital. However, both Mr Deans and Ms Singh had themselves been initially recruited on a 10 PA per week basis, and both increased their commitment, and consequently their pay, over the course of their first year in post, in both cases moving to 12 PAs per week arrangements towards the end of their first year.

217. We also observed that the Claimant was, for understandable personal reasons, keen to concentrate his working week into Tuesdays, Wednesdays and Thursdays, and indeed it was agreed with him that he would not need to be at the Hospital before Monday afternoons and could then do one SPA at home on Fridays. In the circumstances, it was clear to us that the Claimant did not, on average, work more than 10 PAs per week and therefore had no entitlement to be paid for more than 10 PAs per week.

218. In our view, there was no agreement for the Claimant to work 11.5 PAs per week and then to be paid for that level of work, and the Claimant did not, in fact, work more than 10 PAs on average during the stated period. Our conclusion therefore, was there was no unfavourable treatment of the Claimant. However, even if there had been, we would have considered that it was purely on the basis of his being a recently appointed consultant and was not connected to his race, and would not therefore have involved less favourable treatment of him because of his race.

b. Failing to invoke and give effect to the Respondent's contractual job planning dispute procedure after receipt of an email from the Claimant on 9 May 2016 at 13:33. The Claimant relies on a hypothetical comparator.

219. As a matter of fact, the Claimant, in his email of 9 May 2016 at 13:33, did reference a dispute. He in fact said:

"*Regarding the job Plan, you ignored my emails so I can confirm that there is clearly a DISPUTE here. hence I want things to be escalated to the other level now i.e. the informal mediation such as MD before going to the appeal panel*."

220. The reference to "MD" i.e. the Medical Director, and appeal panel, ties in with the wording of the Medical and Dental Staff (Wales) Handbook relating to job planning provisions, referenced at paragraphs 74 to 76 above.

221. In our view, the reference by the Claimant to "escalation" and to matters being considered by the Medical Director and then possibly an appeal panel, indicated the Claimant was expressing a wish that his job plan be referred to the Medical Director. However, we noted that the Claimant's email was followed, only half an hour later, by his meeting with Mr Henwood and Mrs Lewis. That meeting discussed the Claimant's job plan and no reference was made to the Claimant wishing matters to be referred to the Medical Director. In

our view, it was not unreasonable, or even in any way surprising, that Mr Henwood and Mrs Lewis did not refer matters relating to the job plan on to Dr Kloer at that time, bearing in mind the discussion they had had with the Claimant.

222. We noted that the Respondent contended that paragraph 1.34 of the Handbook envisages a referral to the Medical Director by the consultant, i.e. by the Claimant in this case. We also noted Dr Kloer's evidence that all the job plans referred to him were referred either by consultants, or, more usually, by their union, the BMA. Nevertheless, in the circumstances of the Claimant's very recent appointment as a consultant, and consequently his lack of knowledge of how the process worked, and his clearly expressed wish in his email of 9 May 2016 for the matter to be referred to the Medical Director, had there not been the meeting immediately following the email, which led to ongoing discussions between Mr Henwood and Mrs Lewis on the one hand and the Claimant on the other about the job plan, we would have considered it incumbent on Mr Henwood and Mrs Lewis to have made that referral to Dr Kloer. However, as we have indicated, our view was that the job plan was to be discussed further and therefore that no referral would be made.

223. There were indeed then further discussions about the job plan, and alternative plans were produced by Mrs Lewis as late as September 2016 but with agreement not being reached. It would have been open to the Claimant to refer the matter to Dr Kloer at any time, or even just to make clear to Mrs Lewis and/or Mr Henwood that he did not agree the job plan and wanted the matter to be referred to Dr Kloer, but he did not.

224. In our view, from the meeting between the Claimant, Mr Henwood and Mrs Lewis on 9 May 2016 to the point where the Claimant stopped undertaking work at the Hospital, i.e. the point of his exclusion on 17 October 2016, where the content of his job plan obviously had no direct relevance unless and until he returned to work, there were ongoing discussions about the job plan and therefore there was no failure by the Respondent to give effect to the job planning dispute procedure, regardless of any contention by the Respondent that it was not actually the party which was required to make any referral.

225. In our view, therefore, there was no unfavourable treatment of the Claimant in the manner alleged. However, had we considered that there had been, we did not, in any event, discern that any such failure would have arisen by reference to the Claimant's race and thus the treatment of him would not have amounted to less favourable treatment because of his race. It simply arose in circumstances where the Respondent perceived that there were ongoing discussions, and therefore nothing which would form the subject matter of a referral to the Medical Director.

c. Failing before invoking a disciplinary process on 2 June 2016 to achieve an informal resolution of the issues raised. The Claimant relies on a hypothetical comparator.

226. Whilst UPSW does give a clear direction that matters of concern regarding a practitioner's conduct are to be resolved locally and informally wherever

possible, it does make clear that where a Medical Director considers that an investigation into the nature of the problem or concern is required then he or she is to appoint a Case Manager to take the matter forward.

227. Initially, the concerns raised about the Claimant's behaviour were intended to be considered locally and informally. In addition to Mr Henwood's concern about the Claimant's email of 18 May 2016 at 07:39, which he had forwarded to Mr Bennett, by 19 May 2016 the Respondent had two formal complaints; from Ms Singh in response to the Claimant's email, and from GM in response to her discussion with the Claimant on 19 May 2016 and his subsequent email about her role as the coordinator of the rota. The HR advice then provided by Ceri Williams on the evening of 19 May, notwithstanding that she referred to the issue that Mr Henwood had been dealing with locally as having "*taken a different turn*", revolved around local and informal resolution as she said:

"*…if possible we continue to deal with the issue locally and as informally as possible. Whilst difficult, it seems to revolve around communications rather than patient care although obviously that could be impacted upon if not resolved. I would suggest that [Mr Bennett] and [Mrs Lewis] meet up on Monday to discuss the way forward including then liaising with the Drs who have raised the complaints to discuss how they want them resolved and whether mediation can be offered, which is the initial stage of the Dignity at Work policy.*"

228. Ms Williams went on to say:

"*I suggest that on your return you meet again with Mr S to revisit the issues which were the reason for your informal meeting once again with him with [Mr Bennett's] support and ascertain the reasons why he is in disagreement with the notes and also mention how inappropriate his method of response was felt to be. Again if we can we will try and deal with the issues at a local level.*"

229. She then concluded:

"*If these approaches are not successful then we will need to follow a more formal process and will map this out accordingly at this stage.*"

230. At that stage, therefore, the Respondent was looking to resolve the matters of concern informally. What then occurred, however was the incident in A & E on 20 May 2016, which led to Mr Henwood's email to Ms Williams and others, including Dr Kloer, on 21 May 2016. That incident involved other staff at the Hospital and not just the Claimant's surgical colleagues. It also impacted on patient care. That then brought any discussion about resolving matters informally to a halt, with Dr Edmunds being appointed as the Case Manager under UPSW to undertake her initial assessment.

231. In our view, that was a reasonable response on the part of the Respondent to the more serious concerns that had arisen. It did not, in our view, amount to unfavourable treatment of the Claimant but, again, had we considered that it had, then we did not discern that the reason for the Respondent's decision not to pursue informal resolution prior to invoking the disciplinary process was

connected to the Claimant's race. It was simply a reaction to the disciplinary concerns that had arisen.

d. Invoking the disciplinary process on 2 June 2016. The Claimant relies on a hypothetical comparator.

232. This matter was very much a corollary to item c. Having concluded that the Respondent did not act unreasonably, let alone in a discriminatory manner, in failing to achieve informal resolution before invoking the disciplinary process on 2 June 2016, we saw nothing unreasonable in the Respondent then invoking that process on that date. As we have noted, the event in A & E on 20 May 2016 was of a different character to the issues of concern that had been raised about the Claimant over the previous two days. It involved employees from other departments and, crucially, impacted on patient care.

233. Again, in our view, the Respondent acted reasonably and proportionately in embarking upon the UPSW process. Again however, had we not formed that conclusion and had considered that the invocation of the disciplinary process involved unfavourable treatment of the Claimant, we saw no reason to connect that with the Claimant's race. It was again only a reaction to the disciplinary concerns that had arisen.

e. Failing to conduct the UPSW in accordance with the terms of that procedure by reason of gross and inordinate delays. The Claimant relies on a hypothetical comparator.

234. As the chronology of events indicates, the UPSW took a significant time, we concluded that it would not be inappropriate to describe it as "inordinate", to deal with the UPSW process. It should, in most cases, be possible to conclude even processes as complicated as those contained within UPSW in less than four years.

235. We noted that the Respondent accepted that a delay of roughly six months, between November 2018 and May 2019, when no steps were taken in progressing matters under UPSW, was unjustified. It seemed to us that the Respondent rather lost focus on UPSW at that time, when it was looking to progress the working relationships investigation. We agreed however that it was appropriate for the Respondent to make that concession as, whatever its view on the working relationships investigation, it should nevertheless have continued to make progress with UPSW.

236. Other than that six month period however, we did not see that there was any particular blame that could be attached to the Respondent for the length of time it took to complete the process. As we have noted, UPSW indicates that, where possible, a case investigator will complete an investigation within 28 days of appointment and will submit their report to the case manager within a further seven days. It goes on to note that it is recognised that there may be circumstances where more time will be required to complete the report. In our view, the recognition that there "may" be circumstances where more time will be required is probably an under-assessment of the usual situation. We

anticipate that cases where investigations of practitioners under UPSW are indeed completed within 28 days will be relatively few.

237. In this case, as we have noted, the case investigation took approximately a year, but involved meeting over 20 witnesses, some on more than one occasion, the recording and transcription of all those meetings and the agreement of the transcription, and then the preparation of an extremely lengthy report. Bearing in mind that the Case Investigator and all those interviewed, apart from the Claimant who had been excluded at the time, were themselves busy people carrying out important and demanding roles, it did not surprise us that the investigation took that long.

238. When other matters such as personal situations, e.g. bereavements and holidays, are factored in and then, when getting to the stages where hearings were required, the need to coordinate the diaries of panel members, witnesses and representatives arose, we did not consider that the delays overall, even if they could legitimately be described as "inordinate", were caused, apart from the referenced six-month period, by the Respondent. Consequently, we did not consider, other than in relation to that six-month period, that there was any unfavourable treatment of the Claimant by the Respondent in relation to the length of time taken to complete the UPSW processes.

239. In relation to that six-month period, as we have noted, it seemed to us that the Respondent allowed itself to be side-tracked by the prospect of the working relationships investigation, which itself then took a long time to progress. We did not consider that someone of a different ethnic origin or nationality would have been treated any differently.

f. On 31 October 2018 sidestepping the UPSW procedure and commencing an investigation into the alleged break down in working relationships seeking to discuss the Claimant by circumventing the UPSW process. The Claimant relies on a hypothetical comparator.

240. We did not consider that it was accurate to describe the Respondent's working relationships investigation as an attempt to "sidestep" the UPSW procedure, or certainly that it was an attempt to completely avoid applying UPSW. It seemed to us that the Respondent certainly had in mind that the investigation into working relationships could conclude that relationships had been damaged to such an extent that they could not be rebuilt. That would not necessarily have led to an immediate conclusion. It could equally have been something which was brought to bear following the completion of the UPSW process if that process did not lead to a decision that the Claimant should be dismissed.

241. Whilst we noted the High Court judgment which confirmed that the Claimant's contract would be breached by the Respondent undertaking the working relationships investigation before it had completed the UPSW processes, we could understand the Respondent's rationale for considering it appropriate to do so. Indeed, we noted the comment of Linden J in his Judgment that the rationale for pursuing the working relationships investigation was "*to cut to the chase*". We also noted that Linden J in his Judgment made it clear that it would be open to the Respondent to undertake such a working relationships

investigation once the UPSW process had concluded, should it be necessary and appropriate to do so.

242. We noted that the attempt to investigate the working relationships issue was driven by the comments of Dr Robertson-Steel in his investigation report, which were then echoed and endorsed by Dr Edmunds in her report to Dr Kloer. Dr Robertson-Steel's conclusions were drawn from comments from those he interviewed as witnesses as part of his investigation which suggested that relationships between the Claimant and many staff working at the hospital, i.e. over and above those working in the surgical department, had been damaged to such an extent that, regardless of the outcome of the UPSW process, it would have been difficult for the Claimant to return to his role with the Respondent.

243. In those circumstances, whilst noting that having to face the working relationships investigation at the same time as the UPSW process would have amounted to unfavourable treatment of the Claimant, we saw a clear rationale for that action in light of Dr Robertson-Steel's comments. We did not see that someone in the Claimant's situation with a different ethnic origin or nationality would have been treated any differently.

Victimisation

244. The first issue for us to consider in relation to the Claimant's victimisation claim was whether he had done protected acts, within the meaning of section 27(2) EqA in the form of his email of 18 May 2016 at 07.39am and his email to Dr Kloer dated 19 May 2016, which forwarded his earlier email. The email to Dr Kloer itself does not contain any allegation which could be said to have formed a protected act and therefore we were essentially considering only the content of the Claimant's email of 18 May 2016, either in isolation or on the basis that it had been forwarded to Dr Kloer the following day.

245. In its response, at paragraph 62, the Respondent contended that the email did not expressly or implicitly allege unlawful race discrimination by any person in contravention of the Equality Act 2010 and therefore could not have amounted to a protected act. However, Ms Chudleigh in her closing submissions, noted that there was no doubt that the Claimant had complained of discrimination in the email in question and that the allegations of discrimination were capable of amounting to protected acts. She contended however that section 27(3) EqA 2010 applied on the basis that the Claimant had made a false allegation in bad faith.

246. We noted the guidance provided by the EAT in the **Saad** case. There the EAT concluded that the employment tribunal's finding, that the claimant's subjective belief that the allegation he was making to be true was not reasonable meant that it had been made in bad faith, could not be sustained. The Tribunal had improperly drawn on its conclusions in relation to a protected disclosure claim brought by the Claimant in that case that it had not been made in good faith, as the Claimant had had an ulterior motive. The EAT indicated that motivation can be part of the relevant context but, in determining bad faith for the purposes of subsection 27(3) EqA, the primary focus is on the question of the employee's

honesty. Our focus then was whether the allegation made in the Claimant's email of 18 May 2016 was false, i.e. wrong, erroneous or incorrect, and, if so, whether the Claimant knew it was false.

247. We reminded ourselves that the Claimant, in his email of 18 May 2016, after two opening paragraphs relating to Mr Henwood's letter confirming the meeting on 9 May 2016, moved on, in his third paragraph, to reference that he felt that there was a dispute, i.e. over his job plan, which he had requested be escalated. He then went on, in the fourth paragraph, to state:

"*…what is more worrying here is the clear discrimination that I am/have been experiencing. I hope this is not because of the fact that I am ethnically from overseas. There are/have been attempts for deskilling me and frame me as 'not doing much' and endanger patient's care mainly by Joy Singh. I did report all to you.*"

248. We noted that, in the fourth paragraph of his email, the Claimant first said that there was clear discrimination without referencing any particular protected characteristic. He then went on to express his hope that it was not because of his ethnic background. It was not entirely clear, however, what the Claimant was contending had been the less favourable or detrimental treatment he had experienced because of his ethnic background. It potentially related to the failure to agree the job plan referred to in the earlier paragraph and also potentially referred to what the Claimant described as attempts to deskill him and frame him as not doing as much work as he should, and working to the required quality, referencing specifically Ms Singh in that regard.

249. We have referenced the failure to agree the job plan in other areas and have confirmed out view that the dispute (such as it was, as from March it appeared that the Claimant was not himself in a position to do more than the amount of work envisaged by the Respondent i.e. 10 PAs per week) was not in any sense connected to the Claimant's race. We have also noted that an issue had arisen between the Claimant and Ms Singh in February 2016 regarding an operation which the Claimant had been asked to do by Ms Singh and which proved to be more challenging than originally anticipated. In our view, there was no objective connection of either of those matters with the Claimant's race. However, we were conscious that that was not the test we had to apply; we had to consider whether the Claimant honestly believed that there had been acts of discrimination which formed the subject matter of his allegation.

250. In that regard, we noted that the Claimant had, on many occasions during the investigative and disciplinary processes, been asked to explain what it was he had felt had been the discriminatory treatment of him. However, despite making reference to having "lists" or "files" of such matters, the Claimant was unable, or certainly unwilling, to provide any clarification of his comments.

251. In our view, had the Claimant genuinely felt that he had been the victim of discrimination, he would have provided information as to what it was he contended had happened which had given rise to acts of discrimination. Even taking account of the initial period of June to August 2016, which led the Claimant to indicate to Dr Edmunds that matters had improved such that he did

not wish to take matters further, by the time matters had progressed to 2017 and the Claimant's various meetings with Dr Robertson-Steel, it was clear to the Claimant that, whatever his view of relationships the previous Summer, he was still facing investigation and potential disciplinary action. Even then, he did not seek to provide any confirmation of what he contended to have been allegations of discrimination, despite several requests to do so by Dr Robertson-Steel, and the point having been made clear to him, by Dr Robertson-Steel and Mr Bennett, that it may have been in his interests to do so.

252. In our view, that fundamentally demonstrated the lack of belief that the Claimant had that what he had said in his 18 May 2016 email amounted to an allegation of breaches of the Equality Act. Instead, we considered that the Claimant's email was a reaction on his part to being placed under something of a spotlight by Mr Henwood, not only in relation to the job plan but into broader matters such as his ability to work within a team and his professional competence. We therefore concluded that the Claimant's allegations in his email were false and in bad faith such that he had not done a protected act.

253. In case we were wrong about that, we considered it appropriate to go through the various detriments alleged by the Claimant and consider whether any of them amounted to detriments because the Claimant had done a protected act. We considered each in turn.

a. Failing from 18 May 2016 until 17 October 2016 to implement the Claimant's job plan.

254. The Claimant's job plan was not fully agreed between the two parties, whether before May 2016 or afterwards. However, a job plan was in place at all times, initially the provisional job plan included in the job description, and subsequently the revised job plan enabling the Claimant to minimise his time spent at the hospital, albeit there remained a dispute over clinic times and endoscopy work.

255. Whilst we noted that there was a failure to implement the Claimant's job plan to his satisfaction, we did not consider that that involved any detrimental treatment arising from any protected act. We did not consider that the Respondent's stance in relation to the Claimant's request was unreasonable. The Respondent put forward alternative clinic times which did not suit the Claimant's desire to spend long weekends at home in Plymouth. Also, the Claimant wished for clinics, or the times at which clinics were undertaken, to be allocated to suit his wishes even though they were being undertaken, in the form of endoscopy work by the locum consultant, and in the form of a clinic that the Claimant expected Ms Singh to undertake on Mondays, by others. We saw nothing unreasonable in the Respondent taking the view that it was not willing to accede to the Claimant's requests.

256. Acutely, however, had we considered that there had been detrimental treatment in the form of failing to implement the Claimant's job plan, we would not have considered that it was because of any protected act that the Claimant may have done by virtue of his email of 18 May 2016. First, we noted that any failure to implement the Claimant's job plan in the form of not agreeing to the Claimant's

wishes had existed prior to 18 May 2016. Secondly, we considered that had the Respondent been motivated to treat the Claimant to his detriment, i.e. to retaliate against him, as a result of any protected act, it would not have entered into any further discussion with him over the job plan, and yet there were further discussions, and attempts by the Respondent to reach agreement on a job plan which was acceptable to the Claimant. Indeed, we noted that the Claimant, in his letter of 3 June 2016 to Mr Henwood, noted that he felt that agreement on the job plan was achievable.

b. Failing from 18 May 2016 until 17 October 2016 to give effect to the contractual job planning dispute procedure.

257. We have largely dealt with this in relation to sub-paragraph b. of the Claimant's direct race discrimination claims. That allegation was framed by reference to an asserted failure on the part of the Respondent after receipt of the Claimant's email on 9 May 2016. The first week or so of that alleged failure therefore took place before the Claimant's protected act. Regardless of that however, as we noted with regard to the direct discrimination claim, we felt that any failure (such as it was) on the part of Mr Henwood and Mrs Lewis to refer the job planning issue to Dr Kloer was driven by their perception that the job plan was still in the process of being discussed and agreed, and therefore that there was nothing to refer to Dr Kloer. We would not have considered that Mr Henwood or Mrs Lewis were influenced in that by any protected disclosure on 18 May 2016.

258. We also noted that Dr Kloer, through the Claimant's forwarding of his email of 18 May which referred to there being a "dispute", may have been aware that there was a job plan dispute to resolve had he read the email. However, we have concluded that, at best, we could describe that as a possibility, as there is no reference within the Claimant's email of 18 May 2016 to the dispute being over a job plan, although it is possible the subsequent references to escalation to the Medical Director and appeal panel could have been sufficient to alert Dr Kloer to the fact that the subject matter of the dispute was indeed the job plan. However, we noted, and accepted, Dr Kloer's evidence, that he had overlooked the Claimant's email when it had come in. That was his position on that at the time, and consistently afterwards, as he apologised to the Claimant in September 2016 for overlooking his email.

259. Again therefore, to the extent that the Claimant is contending that Dr Kloer failed to give effect to the job planning dispute procedure, we did not see that any such failure could have been said to have been because of any protected act the Claimant may have done on 18 May 2016.

c. The Respondent deliberately abandoning a planned facilitated team meeting between the Claimant and his consultant colleagues after the email of 18 May 2016.

260. We noted that a facilitated meeting between the three colorectal surgeons and Mr Henwood was discussed in the meeting on 9 May 2016, and that Mrs Lewis wrote to Mr Deans and Ms Singh later that day asking for their availability for such a meeting. However, that was ultimately not pursued.

261. In our view, there was a connection between the Claimant's email of 18 May 2016 and the lack of a planned facilitated team meeting, but only in a basic "but for" way. We noted that the Claimant specifically referenced Ms Singh i.e. one of the three colorectal consultants, in his email of 18 May 2016, and referred to attempts to "deskill" him and "frame" him by her. That clearly, and understandably, did not go down well with Ms Singh and led to her making a complaint.

262. Even then, however, there were plans to deal with matters informally which, although focussing on the complaint she had made, could nevertheless still have encompassed the proposed facilitated team discussion. It was only following the A & E incident on 20 May 2016, and the consequent decision to investigate the Claimant under the auspices of UPSW, that matters reached the stage where the facilitated meeting was no longer appropriate.

263. In our view, whilst, as we have noted, the Claimant's email of 18 May 2016 may have been the initial trigger for the fact that a facilitated team meeting was not pursued, bearing in mind that it contained acute criticism of Ms Singh, we would have felt that it was not the content of any allegation, but the way it was referenced within the email and the fact that the email was circulated to many others, both colleagues of Ms Singh and more junior employees, which would have been the reason for the facilitated team meeting not taking place. However, as we have indicated, we, in any event, considered that it was the A & E incident on 20 May 2016 which ultimately meant that the facilitated team meeting did not take place, and not the Claimant's email.

d. From 18 May 2016 until his exclusion on 17 October 2016 Mr Henwood, the Claimant's Clinical Director, and other members of the clinical team, namely Phil Kloer, Adrian Locker, Joy Singh, Andrew Deans and Caroline Lewis, wilfully avoiding and ostracising the Claimant in consequence of his protected acts by ignoring his requests or instructions, proceeding with meetings in his absence and generally not communicating with him as a colleague.

264. This allegation appeared to have been driven by the transcription of Mr Henwood's comments to Dr Edmunds during his meeting with her as part of her initial assessment. In that he said:

"*I think essentially what's happened now is that we are in a period of avoidance, so people essentially just avoid Mr Smo, I do, I have had no particular reason to try to have to interact with him, which is what I was going to do in terms of when this investigation was completed but I will only interact with him unless I felt there was a patient safety issue, because he has made allegations which I interpret to be against me so if I then try to manage him, it would only make things worse.*"

265. We saw no evidence of anyone wilfully avoiding and ostracising the Claimant in practice, and nor did we see evidence of the Claimant raising any concerns with anyone at any time prior to his exclusion that that was happening. The individuals named, who were identified by the Claimant following a request for further information by the Respondent, all gave evidence before us and we were satisfied that no avoidance or ostracism had taken place. Indeed,

assertions of circumstances when they were considered to have avoided and/or ostracised the Claimant were not put to the witnesses in cross-examination.

266. Mr Deans and Ms Singh did continue to engage with the Claimant in relation to his clinical work, and the Claimant continued to attend internal meetings with his colleagues between May and October 2016. Dr Kloer, as the Medical Director of the whole Health Board, had very little engagement with individual clinicians and therefore had little opportunity to avoid or ostracise the Claimant. Similarly, Mrs Lewis, other than in relation to the job plan, on which she continued to engage with the Claimant, had little regular contact with consultants. Mr Locker confirmed that, both before May 2016 and afterwards, he had little, if indeed any, engagement with the Claimant, although he did send an email to him in response to the Claimant's email to the department about GM, noting that his office door was always open.

267. Mr Henwood, despite his comments to Dr Edmunds, did meet with the Claimant from time to time. However, even if his comments to Dr Edmunds indicate that he was wilfully avoiding the Claimant, as with the previous allegation, we did not consider that any such avoidance would have been because of any protected act. It arose because of Mr Henwood's desire to manage the surgical department in ways which did not cause the situation to deteriorate even further.

e. Failing to investigate the Claimant's concerns set out in his email dated 18 May 2016.

268. We have presumed for the purposes of this allegation that the concerns referred to are the Claimant's assertions in his email of 18 May 2016 that there was "*clear discrimination*" that he had experienced. As we have noted, despite multiple requests to provide details of those concerns, the Claimant consistently did not do so. The Claimant was asked, in the presence of his solicitor, by Dr Kloer in October 2016 to provide such details; he was asked again by Dr Edmunds during the informal assessment; and was asked repeatedly by Dr Robertson-Steel to provide information during his investigative meetings. Dr Robertson-Steel also encouraged the Claimant to take advice on the point and come back with the details, but he did not do so. The Claimant also did not provide any information to the Inquiry Panel about his concerns.

269. In our view, it is difficult to see how the Respondent could be said to have failed to investigate the Claimant's concerns when he repeatedly failed to provide the Respondent with information in order that they could be investigated. If there was any failure, that arose out of the Claimant's failure to provide the required information and not out of any protected act. All the requests to provide information, by definition, post-dated the asserted protected act, and we considered that had the Respondent's employees been motivated to treat the Claimant to his detriment by not investigating the concerns then they would not so regularly and consistently have asked him to provide details.

f. The unfair and procedurally irregular conduct of the disciplinary process leading to the Claimant's dismissal, namely (so far as they were relevant to the disciplinary process):

(i) The Respondent's managers failed to address the concerns about the Claimant's conduct through an informal route.

270. We largely addressed this in respect of the Claimant's direct discrimination allegation c. As we noted there, whilst there was an intention to manage the concerns raised by Ms Singh and GM through an informal route, the incident in A & E on 20 May 2016 was of a fundamentally different character, which led to the application of UPSW and Dr Edmunds' appointment as a Case Manager.

271. After that, UPSW still provided for the possibility that Dr Edmunds, as the Case Manager, could decide that matters could be dealt with informally. However, in light of the concerns that had arisen about the Claimant's conduct, Dr Edmunds considered that it was not appropriate to proceed with an attempt to resolve matters informally, in view of the severity of the concerns that had arisen and the breadth of them. We also noted that a number of additional, principally clinical, concerns had also been identified, albeit Dr Edmunds did not investigate those at the time, concluding that the matters she had already investigated were sufficiently serious to merit referral to a Case Investigator. In our view, those were the reasons for not addressing the concerns through an informal route, and not any protected act.

(ii) Commencing UPSW disciplinary proceedings on 2 June 2016 instead of having a facilitated team meeting.

272. This has largely been addressed by our conclusions at c. above in relation to the assertion that the Respondent had deliberately abandoned a planned facilitated team meeting in retaliation for the asserted protected act. Our conclusions in relation to direct discrimination allegation d. are also relevant here.

273. In our view, there was nothing unfair or procedurally irregular about commencing the UPSW disciplinary proceedings on 2 June 2016 and not having the facilitated team meeting. That meeting was to address issues that had arisen in the working relationships within the colorectal team between the three surgeons in the team. However, matters had expanded beyond that team, initially in relation to GM, and then, more seriously, in relation to the A & E incident. In our view, it was appropriate for the Respondent to investigate those matters. In our view, it was also appropriate for the Respondent not to proceed with the facilitated team meeting, as it would only have addressed working relationships and practices within the colorectal team, it would not have addressed the wider issues of concern about the Claimant's conduct.

274. Again, in our view the reason for the commencement of disciplinary proceedings instead of a facilitated team meeting was not the Claimant's protected act, but was the circumstances which prevailed at the time.

(iii) From 2 June 2016 continuing the UPSW procedure and failing to adhere to the time limit set out in the UPSW procedure.

275. This has also been largely covered in relation to the Claimant's other allegations. As we have noted, we saw nothing unreasonable in the

Respondent continuing the UPSW procedure from 2 June 2016 in light of the concerns that had arisen. In terms of failing to adhere to time limits set out in UPSW, as we have noted, the only specific time limit related to the anticipated completion of the case investigation within 28 days, which UPSW itself notes may not be possible in all circumstances, and which we concluded was never going to be achievable in the circumstances of this case.

276. In terms of looking at the conclusion of the procedure within reasonable time periods, we have noted the six-month period between November 2018 and May 2019 where the Respondent was at fault for not progressing UPSW, due, we felt, to its focus being on the pursuit of the working relationships investigation at the time. However, apart from that, the procedure took so long to conclude because of its nature and depth, and the particular arrangements that needed to be put in place in relation to the investigation processes and the hearing processes. It was not delayed in any sense as a retaliatory measure for any protected act.

(iv) Excluding (suspending) the Claimant on 17 October 2016.

277. We noted that the Claimant was excluded in October 2016, not by reference to any concerns about his conduct, but by reference to the number and range of clinical concerns that had arisen. That initially led to the Claimant's duties being restricted such that he did not do on-call work, arising from Dr Kloer's perception that particular issues arose during the Claimant's on-call work. However, as subsequent concerns about the Claimant's performance were identified in respect of his normal daily activities, Dr Kloer took the decision that the Claimant should be excluded entirely. That was undertaken in discussion with NCAS and arose from Dr Kloer's view that there was a risk that patient care could be compromised. In the circumstances that had arisen, we did not consider that there was anything unfair or procedurally irregular in that decision, and certainly that we could draw any connection between that decision and any protected act.

(v) Failing during the UPSW process to give consideration as to the applicability and effect of the Respondent's dignity at work policy.

278. We noted that there were two occasions when the Dignity at Work policy may have been applied. There were initial references to the Dignity at Work policy following the complaints made by GM and Ms Singh, but the application of the policy more acutely arose in relation to allegations of sexual harassment by MJ and KP. However, neither of those individuals themselves raised the matter under the Dignity at Work process, the concerns being identified following their meetings with Dr Robertson-Steel.

279. By that stage, the Claimant had been excluded, and the incidents had arisen quite some time earlier. We noted that the minority of the Inquiry Panel felt that the Dignity at Work policy could have been implemented. However, in view of the seriousness of the matters involved, the fact that they were being investigated and pursued on a disciplinary basis some time after they had arisen, and in light of the Claimant's absence from work, we did not see that the

decision not to apply the Dignity at Work involved any unfairness or procedural irregularity, let alone one connected to a protected act.

(vi) The Respondent failed to enquire in the disciplinary process into whether the treatment to which the Claimant had himself been subjected (both in the workplace and externally) provided mitigation for behaviour for which he was criticised.

280. We found it difficult to understand this allegation. If the Claimant was referring, in relation to "treatment" to the concerns he alluded to in his 18 May 2016 email, then as we have noted in relation to allegation e. above, he did not provide any detail of that, and therefore we could not see any criticism could be raised of the Respondent about any failure to enquire into that treatment. If the Claimant was asserting points of mitigation more generally, then it seemed to us that those matters were considered by Dr Robertson-Steel at the investigative stage, by the Inquiry Panel when forming their conclusions on fault, by the Disciplinary Panel, and by the Appeal Panel.

281. We did not therefore see that there had been any shortcomings on the part of the Respondent in this regard, and certainly did not see that there was anything which had been unfair and procedurally irregular. Again, even if we had, we could see no basis for connecting that to any protected act.

g. On 1 March 2017 Dr Robertson-Steel placing indirect pressure on the Claimant during an investigation meeting to abandon his discrimination complaints by saying:

"Very serious allegations about ethnicity and discrimination…it's in your interest to tell me.

"so you either basically withdraw it and don't proceed any further with those issues or you ask, as part of the investigation, to explore them further, in which you will need to make a full disclosure of any evidence…If you submit it we will consider it. If you don't submit we will regard these matters as not being continued with…"

282. As a matter of fact these words were accepted, by the Respondent and in particular Dr Robertson-Steel, as having been said as they had been recorded. However, we did not consider that any pressure, whether direct or indirect, had been placed on the Claimant by Dr Robertson-Steel by those words. Consequently, we did not consider that the comments involved any detrimental treatment, whether or not there had been any protected act.

283. As we have noted in our findings, Dr Robertson-Steel did, on several occasions during his meeting with the Claimant on 1 March 2017, press him to provide details of what he had contended, in his email of 18 May 2016, had been discriminatory treatment of him. Despite those several requests, the Claimant did not provide the detail requested, maintaining the position that he had taken during his interview with Dr Edmunds in 2016 that, whilst discrimination had taken place, he did not wish to provide any detail.

284. In our view that left Dr Robertson-Steel in something of a difficult position. He was charged with investigating concerns that had been raised about the Claimant's conduct, which included the Claimant's email, both in relation to its content and its circulation. Part of the background to that included a consideration of the Claimant's rationale in making assertions of discrimination. Dr Robertson-Steel made it clear that he wished to consider the Claimant's concerns as they may have impacted on his consideration of the concerns about the Claimant's conduct.

285. We considered that all Dr Robertson-Steel was doing, when using the words quoted in relation to this allegation, was to make it clear to the Claimant that if he did not provide information about his concerns then it would not be possible for him to look into those matters and take them into account, if appropriate. This was after several questions, from Dr Robertson-Steel and from Mr Bennett, to which the Claimant had given the equivocal answer that he had been discriminated against but did not wish to say by whom or how. We also noted that the use of the word "withdraw" echoed the Claimant's own use of that word when asked about the detail of his allegations.

286. Overall, we did not see that the comments made by Dr Robertson-Steel involved any detrimental treatment of the Claimant. In any event, we did not see any connection of the words to any protected act of the Claimant, other than in the most basic "but for" way. Whilst the discussion of the Claimant's allegations clearly arose from his email, the comments made by Dr Robertson-Steel only arose from the Claimant's indication, when asked about the detail of his allegations, that he did not wish to provide that detail.

h. On 31 October 2018 commencing and continuing an investigation into the breakdown in working relationships side stepping the UPSW procedure.

287. Our conclusions in relation to this issue largely repeat those we drew in relation to the Claimant's direct discrimination allegation f. above.

288. As we noted there, the Respondent sought to embark upon an investigation of working relationships in light of Dr Robertson-Steel's conclusion that relationships appeared to have broken down between the Claimant and many other employees, and Dr Edmunds' subsequent reference to that when providing her Framework to Dr Kloer. As we have already noted, whilst the Respondent's actions in embarking upon an investigation into working relationships was found to have been in breach of the Claimant's contract, we nevertheless could understand the rationale behind the Claimant's desire to look into that question. As Linden J noted in his Judgment at paragraph 113, there was:

"*…an understandable desire on the part of the defendant to 'cut to the chase'. If the reality was that there was no prospect of the Claimant returning to work for the defendant because of an irretrievable breakdown in working relationships it was considered that it would be better for all concerned to face that reality sooner rather than later.*"

289. In our view, that summed up the Respondent's rationale in embarking upon the working relationships investigation. It is arguable that the Respondent's actions in undertaking the working relationships investigation did not amount to a detriment to the Claimant, as there may have been some potential benefits to the Claimant arising from the working relationships investigation if that had led to either an agreement that he should leave the Respondent's employment or indeed to a dismissal of him by the Respondent due to the breakdown of relationships. He would not then have faced the future with a gross misconduct dismissal on his record.

290. However, we recognised that, certainly at the time and indeed up to the hearing before us, the Claimant always pursued the approach of seeking to defend himself against the allegations of conduct and therefore we proceeded on the basis that the implementation of a working relationships investigation would have been to his detriment. However, we did not consider that that detriment arose from his protected act, again in any sense other than the most basic "but for" way. As we have noted, the reason for the action taken by the Respondent in this area was the concern identified, initially by Dr Robertson-Steel that, in practical terms, whatever the outcome of the conduct and performance investigations, there was a likelihood that the Claimant could not have returned to working for the Respondent in any event. That was the reason for the action taken and not any protected act.

i. Dismissing the Claimant on 6 October 2020.

291. Whilst dismissal was clearly a detrimental act in relation to the Claimant, we again did not see that if would in any sense have been connected to any protected act the Claimant may have done.

292. The dismissal took place at the conclusion of the comprehensive processes outlined in UPSW. Those processes included an assessment of the Claimant's conduct by an entirely independent Inquiry Panel, a further consideration of the concerns by an independent, albeit internal, Disciplinary Panel, and a further assessment by way of appeal by an entirely independent Appeal Panel. Throughout those processes, the Claimant was fully legally represented.

293. In our view, the reason for the Claimant's dismissal was his conduct as concluded by the various panels. Acutely, the core conclusions of gross misconduct arose in relation to the Claimant's interactions with GM, Sister H and Sister B, KP and MJ. They did not relate to the allegations arising from the Claimant's email of 18 May 2016. Even therefore had we considered that the Claimant had done a protected act, we would not have concluded that his dismissal was by reason of that act.

j. Mr Henwood taking an immediate step to obtain a report from GM in relation to the Claimant's alleged workplace behaviour without seeking the Claimant's account of the same events.

294. We noted that GM had gone to Mr Henwood with her concerns about her discussion with the Claimant on the morning of 18 May 2016, and his subsequent email about her. In our view, it was entirely appropriate for Mr

Henwood then to ask GM to provide an account in writing of the events. We anticipate that had Mr Henwood not done that and simply relied on his own record of his discussion with GM, then criticisms could have arisen about the accuracy of Mr Henwood's record and the lack of any direct contemporaneous note by the person who was raising the allegation about the Claimant.

295. Whilst we noted that Mr Henwood did not seek to obtain the Claimant's account of the same events, and he could perhaps have done so, we did not consider that any failure to do so amounted to a detriment to the Claimant. The issues raised by GM were serious, but we also noted that they were followed very swiftly by the incident in A & E which was more serious in character, involving employees from other parts of the hospital and also impacting on a patient. In our view, the assertions raised by GM were going to need to be investigated, and certainly when added to the concerns arising from the A & E incident, a form of formal investigation was then bound to happen. In those circumstances, it was probably to the Claimant's benefit, and certainly not to his detriment, for those matters to be put to him formally in the context where he had representation, as opposed to being asked for his version of events in the immediate aftermath of them.

296. Again however, had we considered that Mr Henwood actions amounted to a detriment, we did not see that they would have been connected to any protected act in the form of the Claimant's email of 18 May 2016. They were simply straightforward steps to obtain confirmation about the allegations that had been made.

Unfair Dismissal

297. The first issue for us to address in relation to the Claimant's unfair dismissal claim was what was the reason, or if more than one the principal reason, for dismissal, and whether that was a potentially fair reason in accordance with sections 98(1) and (2) Employment Rights Act 1996 ("ERA").

298. The Respondent contended that the reason for dismissal was the Claimant's conduct which would fall within section 98(2)(b) ERA. Whilst Mr Sutton did not make any specific submissions with regard to the reason for dismissal, it was clear from the Claimant's claims of victimisation that he contended that the reason for dismissal was his protected act. We noted however that the Claimant in his evidence appeared to accept that the reason for dismissal had indeed been his conduct.

299. In this regard, the corollary of our conclusion that the reason for the Claimant's dismissal was not any protected act, whether we had concluded that there had indeed been a protected act or not, was that we considered that the reason for dismissal was the Claimant's conduct. We noted that the Respondent had implemented UPSW to address concerns that had arisen in relation to both the Claimant's conduct and performance and then proceeded to deal with the concerns over the Claimant's conduct through the UPSW extended procedure.

300. That involved an initial conclusion that twelve allegations (several with sub-allegations) should form the basis of disciplinary action, which was later

reduced to ten allegations (again several with sub-allegations). Those allegations were then found proved by the Inquiry Panel and were agreed by the Disciplinary Panel to have amounted variously to misconduct, serious misconduct and gross misconduct. We saw nothing to suggest that the Respondent had any other issues in mind, particularly as it had been prevented from examining the impact of the Claimant's conduct on working relationships independently of the question of the concerns over his conduct. We were therefore satisfied that the reason for dismissal had been the Claimant's conduct.

301. We then moved on to consider whether dismissal by reason of conduct was fair in all the circumstances pursuant to section 98(4) ERA.

302. As we have noted, the principles to be applied by Tribunals in considering dismissals on the ground of conduct have been in place for over 40 years, set out in the touchstone EAT cases of **BHS Limited v Burchell** and **Iceland Frozen Foods Limited v Jones**. The directions provided by those cases were elided together by the EAT in **JJ Food Service Limited v Kefil [2013] IRLR 850** as follows:

> "8. *In approaching what was a dismissal purportedly for misconduct, the Tribunal took the familiar four stage analysis. Thus it asked whether the employer had a genuine belief in the misconduct, secondly whether it had reached that belief on reasonable grounds, thirdly whether that was following a reasonable investigation and, fourthly whether the dismissal of the Claimant fell within the range of reasonable responses in the light of that misconduct.*"

303. The EAT, in the recent case of **Hope** confirmed that the determination of the question of whether an employer acted reasonably or unreasonably in treating an employee's conduct as a sufficient reason for dismissal is to be assessed by application of that four stage analysis.

304. We also note reminded ourselves that the range of reasonable responses test also applies to the reasonableness of the investigation, as directed by the EAT in **Sainsbury's Stores Limited v Hitt**.

305. Considering that four stage analysis, although not in precisely the same order, our conclusions were as follows.

Investigation

306. By virtue of the procedures required to be followed under UPSW, an extremely comprehensive investigation process was undertaken. Even at the preliminary stage of the initial assessment of facts undertaken by Dr Edmunds, interviews were undertaken with 13 witnesses including the Claimant. When the process moved to the formal investigation undertaken by Dr Robertson-Steel, that extended to interviewing 23 witnesses, with two, the Claimant and Mr Henwood, being interviewed on several occasions. In addition to interviewing witnesses, Dr Robertson-Steel also considered a considerable amount of

documentation, both generated internally by the Respondent and produced by the Claimant.

307. When matters moved into the decision-making elements of the process, further consideration of evidence was undertaken by the Inquiry Panel, who heard evidence from 15 witnesses, including the Claimant, and who again considered a great deal of documentation, principally that generated as a result of Dr Robertson-Steel's investigation, but also additional material.

308. Throughout the processes, the Claimant was represented, principally by a solicitor, but on occasion by a trade union representative. He was then legally represented at the Inquiry Panel hearing.

309. In our view, the investigative steps undertaken by the Respondent were reasonable in the circumstances. They certainly fell well within the range of reasonable responses; indeed, in our view, they sat comfortably towards the more comprehensive end of the spectrum of reasonable processes.

Reasonable grounds

310. In light of the evidence obtained from the various investigative processes, particularly the accounts of witnesses, we considered that there were reasonable grounds for the Respondent to form a belief of the Claimant's guilt. We noted that the Inquiry Panel had undertaken a careful examination of the allegations and had concluded that some of them should not be taken forward to the Disciplinary Panel. We also noted that the Inquiry Panel, endorsed by the Disciplinary Panel, undertook a comprehensive examination of the remaining allegations, which involved categorisation of some as misconduct, others as serious misconduct, and others as gross misconduct. They also set out their reasons for reaching their conclusions in relation to the allegations against the Claimant at some length.

311. Focusing on the Disciplinary Panel as the primary decision-maker in this case, we were entirely satisfied that, on the evidence that Panel read and heard, there were reasonable grounds for the conclusions reached on the Claimant's guilt of the various disciplinary offences.

Genuine belief

312. To an extent this derives from our conclusion that the reason for dismissal was the Claimant's conduct. We concluded that the dismissal was not connected to any protected act that the Claimant may or may not have made, but had been the concerns about his conduct that had arisen in May 2016 and/or which had been uncovered during the subsequent investigation. In our view, the Respondent had no ulterior motive in seeking to dismiss the Claimant and undertook a comprehensive process, as required by UPSW, in order to reach its conclusions on the Claimant's guilt.

313. We noted in particular that, whilst the ultimate dismissing Panel was made up of internal employees of the Respondent, they confirmed the conclusions reached by the entirely independent Inquiry Panel. We noted also that the

Disciplinary Panel, whilst made up of internal employees of the Respondent, was made up of individuals who were independent of the processes relating to the Claimant, and in circumstances where the Claimant had had input into the makeup of the panel. The Appeal Panel was also made up of entirely independent individuals.

314. In light of that, we had no hesitation in concluding that the disciplinary decision makers had a genuine belief in the Claimant's guilt of the offences of which he was accused.

Dismissal decision

315. We again noted that the entirely independent Inquiry Panel had concluded that dismissal was the appropriate sanction, and that the Disciplinary Panel had agreed with that contention and had taken the decision to dismiss the Claimant summarily. We also noted that the independent Appeal Panel had agreed with that decision.

316. Whilst we noted Mr Sutton's reliance on the EAT decision in **Westwood** as requiring gross misconduct justifying summary dismissal to be either deliberate and wilful or grossly negligent, we also noted that Mr Sutton fairly referred to the very recent EAT decision in **Hope** where the EAT noted:

> "*In general, the real question is and remains the statutory one of whether the employer acted reasonably or unreasonably in all the circumstances in treating the conduct as sufficient reason to dismiss.*"

317. Applying that guidance, and considering the dismissal decision as the fourth stage in the analysis confirmed in **Kefil**, which drew on the direction in the **Iceland Frozen Foods** case, we were satisfied that the decision to dismiss fell squarely within the range of responses open to a reasonable employer acting reasonably in the circumstances.

Procedural matters

318. Whilst the List of Issues did not specifically refer to the question of whether the decision to dismiss involved any procedural unfairness, we noted that Mr Sutton on the Claimant's behalf did make reference to various aspects of the procedures followed by the Respondent as involving deficiencies in the way that the case against the Claimant was handled. Overall, we were however satisfied that the Respondent had acted fairly and reasonably in terms of the procedures it applied in relation to the allegations regarding the Claimant's conduct.

319. As we have noted, there was a six-month period between November 2018 and May 2019 when the Respondent was responsible for a delay. We have noted what we consider to have been the explanation for that delay, and we did not consider that it had any impact on the ultimate fairness of the processes applied. As we have noted, whilst the processes relating to the Claimant did take an extremely long time, due to the number and range of the allegations it was always likely that the processes would take a long time to conclude,

whether or not there had been any particular delay on the part of the Respondent.

320. With regard to Mr Sutton's other submissions which we could categorise as complaints over procedural matters, we noted as follows.

321. Mr Sutton was critical of the Respondent's failure to apply one of the guiding principles of UPSW; to respond to concerns at the earliest possible stage with a view, if possible, to their informal resolution at local level. However, as we have noted, certainly once the incident in A & E had taken place on 20 May 2016, the issues of concern had become heightened in terms of their extent and their severity, and we saw no reason to criticise the approach taken by the Respondent that all matters therefore needed to be addressed under the UPSW process and could not be resolved informally or locally.

322. Mr Sutton also made reference to the decision taken by the Respondent to exclude the Claimant which ended up lasting for a period of just short of four years. However, we did not see that there was any connection between the exclusion of the Claimant and the fairness of the decision to dismiss him by reason of his conduct. We noted that the rationale for restricting the Claimant's duties, and then for excluding him, arose from concerns over his performance, and therefore had no direct bearing on the consideration of matters regarding his conduct.

323. We noted that Mr Sutton raised concerns that the Respondent had not followed provisions of other policies, particularly the Dignity at Work policy but also the Equality and Diversity policy, which again referred to matters being dealt with informally and swiftly. However, for the reasons we have outlined above relating to the Respondent's decision not to deal with the conduct concerns by way of seeking informal resolution at a local level, we did not consider that there was anything inappropriate or unfair in the Respondent dealing with the concerns relating to the Claimant as matters of conduct, and therefore under UPSW, as opposed to applying other policies.

324. Mr Sutton also raised concerns about the application of UPSW, specifically in relation to the Inquiry Panel's role in relation to the determination of fault and, whether that was something that was, in essence, binding on the Disciplinary Panel. He also raised a concern that the Inquiry Panel and the Disciplinary Panel had sought to introduce elements of the Respondent's general disciplinary procedure i.e. not UPSW, regarding the categorisation of various types of dismissal.

325. We agreed with Mr Sutton's submission that it was only the Inquiry Panel's conclusions on matters of fact which were binding on the disciplinary panel, and not its views as to fault, which was also the view of Linden J at paragraph 31(vii) of his Judgment in relation to the injunction. We were also somewhat surprised at the strength of the views expressed about the matter by the various Panels. However, we did not consider that any material issue arose by virtue of the approach taken.

326. We noted that the Disciplinary Panel, whilst expressing itself as bound to follow the Inquiry Panel's views as to fault, in any event considered the Inquiry Panel's views on the issue of fault and agreed with them. The Disciplinary Panel did not, in any sense, simply endorse or "rubber stamp" the Inquiry Panel's approach.

327. We were similarly satisfied that the Appeal Panel had considered the conclusions that had been reached and had formed their own view about them. In our view, the Disciplinary Panel and Appeal Panel did undertake separate assessments of fault. However, even if they had not, we would nevertheless not have considered that that would have had any material impact on the fairness of the decision, and would not have undermined our conclusions that the four-stage approach to be adopted had been fulfilled in this case.

328. Overall, therefore, we were satisfied that the dismissal of the Claimant was fair in all the circumstances. In light of that decision, we did not need to consider the elements of Issue 13 which only arose for consideration if our conclusion had been that the Claimant was unfairly dismissed.

329. Whilst we did not therefore consider those matters in any detail, we did observe that, in view of the strength of feeling about the Claimant on the part of many of the Respondent's employees, not just those in the surgical department, it seemed to us that it would have been likely, and indeed probable, that the Claimant's employment would have had to have ended in any event due to that breakdown in relationships, and that the termination of employment in such circumstances would have been likely to have been fair on the "some other substantial reason" ground. We do repeat however that we did not give that any detailed consideration and it was merely our general observation.

<u>Wrongful Dismissal</u>

330. Our approach in relation to this issue was fundamentally different to that relating to the Claimant's claim of unfair dismissal. There, we were assessing the reasonableness or otherwise of the Respondent's actions. Here, we were not concerned with the reasonableness of the Respondent's decision to dismiss, but with the core factual question of whether the Claimant had been guilty of conduct so serious as to amount to a repudiatory breach of the contract of employment entitling the Respondent to summarily terminate the contract.

331. Neither representative made much, if indeed any, reference to the wrongful dismissal claim in their submissions. We were however mindful of Mr Sutton's submissions on behalf of the Claimant, in the context of his unfair dismissal claim, in relation to the **Sandwell** case, and the discussion there in relation to what can amount to an act of gross misconduct, gross misconduct being effectively a shorthand term for conduct being so serious as to amount to a repudiatory breach entitling the employer to terminate it summarily. We were also conscious however, that the discussion about gross misconduct in the **Sandwell** case related to a claim of unfair dismissal and not a claim of wrongful dismissal.

332. Ultimately our approach was to examine the evidence we read and heard about the allegations of misconduct against the Claimant, and to draw a conclusion as to whether we considered, on the balance of probability, those acts had taken place and had amounted to acts of gross misconduct.

333. In that regard, we considered closely the evidence put before us, both in the form of the witness statements and the witnesses' answers to questions, and the documents, including the report of the Inquiry Panel, which had itself undertaken a similar exercise in considering the allegations against the Claimant.

334. In undertaking our assessment, we focussed on the allegations which had been found by the disciplinary panel to amount to gross misconduct. Those allegations can be briefly summarised as follows:

    Allegation 4 – approaching GM and displaying intimidating and aggressive behaviour towards her on the morning of 18 May 2016.

    Allegation 6 – displaying aggressive and intimidating behaviour towards the A & E sister, Sister H, and being confrontational and obstructive towards or with Sister B in front of patients and colleagues on 19 May 2016.

    Allegation 9 (second incident) – making inappropriate sexual innuendo comments to MJ, after having bumped into her breast with his elbow, along the lines of, "*Oh that was really nice for me but how was it for you?*".

    Allegation 10 – making an inappropriate comment to KP, along the lines of, "*Well if you want your appendix out because I wouldn't mind operating on your tummy*".

335. Having considered the evidence in relation to those matters, we were satisfied, on the balance of probability, that those acts of misconduct on the part of the Claimant had taken place. In relation to Allegations 4 and 6, there was contemporaneous evidence, in the form of GM's version of the events on 18 May 2016 and the observation of the events by others, and the consistent accounts given of the A & E events by the individuals involved at the time, again supported by the observations of others. We also did not consider that the Claimant's actions prior to his interactions with Sisters H and B on the day were those which would have been expected of a consultant acting reasonably in the circumstances which, in our view, lent weight to the conclusion that the Claimant then misconducted himself towards the two Sisters when they had sought to point out the inappropriateness of his actions.

336. With regard to Allegations 9 and 10, the comments made to MJ and KP, we were satisfied that they had been made as alleged. Both employees raised their concerns indirectly when being asked more general questions by Dr Robertson-Steel and were consistent with their observations on what happened throughout. The Claimant, during the internal processes, and indeed before us, maintained that he had no recollection of making such comments. He did however confirm that he did engage in "banter" within the department.

337. Having concluded that the alleged acts occurred in fact, we then considered whether the acts individually or cumulatively amounted to gross misconduct.

338. Our view in relation to allegation 10, the comment to KP, was that, in isolation, we would not have considered that the act involved an act of gross misconduct. We noted that the Claimant had previously expressed a desire not to operate on patients with high BMI, presumably on the basis that surgery was more straightforward on individuals who were not obese. With that background in mind, we considered that the comment to KP, whilst inappropriate, did not cross over the line so as to amount to gross misconduct. It referenced what we presumed was KP's slim figure, but did not do so in a directly sexual way.

339. With regard to the other three allegations, however, we did consider that they amounted individually to acts of gross misconduct. The Claimant's behaviour during the incident in A & E on 19 May 2016 fell considerably short of the behaviour that would have been expected of an employee in such circumstances, and his level of rudeness and aggression to Sisters H and B was unacceptable, particularly in the context of such behaviour arising in the presence of the patient.

340. With regard to the comment made to MJ, it was explicitly sexual and was directly indicative of the Claimant's view of MJ. By contrast with the comment to KP, we considered that this comment to MJ fell the other side of the line, was a directly sexualised comment towards MJ, and therefore did amount to gross misconduct. It also arose after an earlier, more general, sexual comment by the Claimant to MJ, which she had indicated she did not appreciate.

341. In the circumstances we considered that individually in relation to three allegations and cumulatively in relation to all four allegations, acts of gross misconduct had occurred. As a consequence, we considered that the Respondent had been entitled to summarily dismiss the Claimant because his conduct had been so serious as to amount to a repudiatory breach of his contract.

342. Having reached the conclusions that we did in relation to the substantive issues, and concluded that all the Claimant's claims failed, we did not need to consider the jurisdictional issues.

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Employment Judge S Jenkins
Date: 1 June 2022

REASONS SENT TO THE PARTIES ON 9 June 2022

FOR THE TRIBUNAL OFFICE Mr N Roche

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the Claimant(s) and Respondent(s) in a case.

APPENDIX 1

Allegations found proved by the Inquiry Panel

1. *Of the issues raised in Mr Henwood's letter dated 10 May 2016 and unresolved at a meeting on 9 May 2016 in that Mr Smo acted unreasonably and inappropriately:-*

   1.1. *When seeking to agree and change the job plan for the post to which he was appointed by the Health Board he did so despite the content of the provisional job plan, on which basis the post was advertised and recruited, and the Health Board's attempts to accommodate him.*

      1.1.1. *In particular he informed Mr Mark Henwood, Consultant Surgeon and Clinical Lead, and Caroline Lewis, Service Delivery Manager that:*

         1.1.1.1 *He was not willing to work as part of a departmental team with Consultant Surgeons, Mr Andrew Deans and Miss Joy Singh, and was very forthright about his unwillingness to work with them;*

         1.1.1.2 *He wanted Mr Henwood and Mrs Lewis to provide him with an endoscopy list by taking one from another member of the department, [SD], who was a Locum Consultant, altering Mr [D]'s job plan;*

         1.1.1.6. *He was unhappy with pooled patient lists and wanted his own patients.*

      1.1.2. *He was intemperate in job plan meetings with Mrs Lewis and intimidated her in that: -*

         1.1.2.1 *At his first meeting with Mrs Lewis, at which his timetable was discussed, he said "are we going to have a fight today?";*

         1.1.2.2 *He informed Mrs Lewis that he wanted her to allocate him an endoscopy session from Mr [D];*

         1.1.2.3 *He questioned Mrs Lewis at the meeting on 9 May 2016 saying "did she have anything for him because if she didn't then he would leave the meeting";*

      1.1.4 *He tried to leave the Hospital early on Thursdays.*

   1.2 *In that he did not want to and said he did not want to work with his colleague Miss Joy Singh, Consultant Colorectal Surgeon, and was forthright in his attitude to her.*

   1.3 *In respect of his management of outpatient clinics:*

1.3.1 He made attempts to change the clinic templates, particularly his Thursday afternoon clinic, or arrangements to enable him to leave early. In particular: -

1.3.1.2. He asked his secretary to contact patients and ask them to attend earlier to permit the Thursday afternoon clinic to finish earlier."

3. Of the inappropriate and unprofessional reference in the email dated 18 May 2016 to a work colleague namely Miss Joy Singh in that: -

3.2 He inappropriately challenged or sought to undermine Miss Singh, her integrity, her impartiality and her professionalism by asserting that there had been attempts by her to de-skill him and frame him as not doing much.

4. Of him approaching a colleague [GM] and displaying intimidating and aggressive behaviour towards her on the morning 18 May 2016, in that: -

4.1 He bullied and intimidated [GM], as rota manager, about the rota;

4.2 He told [GM] in a rude manner that the rota was not fair, that certain consultants always had their own registrar on call with them, but that he did not and that was due to the way she ran the rota;

4.3 He pointed his finger at [GM];

4.4 He would not listen to [GM]'s explanations;

4.5 His manner in speaking to [GM] was rude, intimidating and bullying."

5. Of him sending two inappropriate and unprofessional emails dated 18 May 2016 at 11.43 a.m. and 24 May 2016 at 7.56 a.m. referring to [GM] and copying in numerous medical, nursing and secretarial staff which could have been perceived as professionally undermining by her, in that: -

5.1 In the email dated 18 May 2016 he undermined [GM] by asserting to all that "he had noticed that [GM], as rota manager, was fixing the rota for on calls, which led to him and ? Mr WB getting locums on every occasion, while the rest had locums rarely"; and suggesting to all that there was a grey area about the role of [GM], asking for clarity and asking whether she was "a middle grade or on the consultant rota";

5.2 In the email dated 24 May 2016 he undermined [GM] by asserting that he "and most of the staff, have major concerns about [GM] and that he was not happy at all for [GM] to run the rota the way she does". He said "can somebody explain how do you bring a locum doctor who was qualified before I was even born to come and do a heavy middle grade on calls (12 hours on call) each day for a full week in a busy hospital? and without

telling the Consultant on-call in advance? …. I have an alternative person to run the rota and is happy to do it."

6. *Of an incident on 19 May 2016 relating to a patient admission at Glangwili General Hospital where it is alleged that Mr Smo displayed aggressive and intimidating behaviour towards the A & E Sister, [Ms H] on the same date, in that: -*

6.1 Mr Smo was aggressive and rude towards or with Sister [H].

6.1.1 He became rude and aggressive with Sister [H] when she explained that he could not see a patient, who had been sent to the Surgical Assessment Unit ("SAU") but had then brought from the SAU to A&E, in an area in A&E because she had a bed in the SAU and the area in A&E was needed for other patients. His manner was aggressive and he would not listen to or accept Sister H's explanations, in particular that the patient could be admitted to the SAU.

6.2 Mr Smo was confrontational and obstructive towards or with [Ms B], in front of patients and colleagues.

6.2.1 Following his interaction with Sister [H], Mr Smo was obstructive about the patient being moved.

6.2.2 Mr Smo initially refused several requests made by Ms [B] to continue their conversation in an office, saying that if he did so she would move the patient and that patient was not going to the SAU.

6.2.3 Mr Smo informed Ms [B] that the Trauma and Orthopaedics F2 Doctor should care for the patient and that the patient was not his patient.

6.2.4 Mr Smo was insistent that the patient should not be put in his "bed" and that Ms [B] had no right to do so."

7. *That Mr Smo's secretary [KP] raised concerns about his behaviour towards her resulting in her asking on 10 October 2016 to be removed from working with him in that: -*

7.2. On about Wednesday 5 October 2016 he became sarcastic and condescending towards and with Ms [P] and he belittled and patronised her after she brought up an issue of some ungraded patient referrals and asked him to grade them.

7.2.1 He informed Ms [P] that they were not for him to grade and that he would not grade them;

7.2.2 He fired questions at her;

7.2.3 He sarcastically told Ms [P] that she was apparently not even his secretary, so she "should just go work for Mr Henwood";

7.2.4 He talked over what she tried to say.

8. That he did not share responsibilities or workload in the department in that he generated a backlog of administrative work in respect of urgent suspected cancer referrals, the grading of which was then undertaken by Mr Henwood.

9. Of inappropriate sexual innuendo comments made by Mr Smo to [MJ], Advanced Nurse Practitioner in that: -

9.1 On one occasion when Ms [J] had returned from the gym and found it difficult to sit down Mr Smo made a comment along the lines of 'What sort of sex do you indulge in that you can't sit down in the chair'.

9.2 On another occasion when Ms Smo entered the duty room Mr Smo bumped into Nurse [J] and his elbow hit her on her breast. Mr Smo made a comment along the lines of 'Oh that was really nice for me but how was it for you'."

10. Of an inappropriate comment made to a female colleague, [KP], Medical Secretary when Mr Smo made a comment to Ms [P] along the lines of 'Well if you want your appendix out because I wouldn't mind operating on your tummy'.