Case Number: 3322501/2016

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr O A B Louca	v	London North West Healthcare NHS Trust

Heard at: Watford **On**: 18, 19 & 20 April 2017

Before: Employment Judge Hyams, sitting alone

Appearances:

For the Claimant: Ms Caroline D'Souza, of Counsel

For the Respondent: Miss Hollie Patterson, of Counsel

RESERVED JUDGMENT

The claimant was not dismissed within the meaning of section 95(1)(c) of the Employment Rights Act 1996.

REASONS

The claim determined by me

1 In these proceedings the claimant claims that he was dismissed within the meaning of section 95(1)(c) of the Employment Rights Act 1996 ("ERA 1996"), and that that dismissal was unfair within the meaning of section 98(4) of that Act. The claimant resigned by giving three months' notice in an email sent on 6 October 2015 (at page 314 of the hearing bundle; any reference below to a page is to a page of that bundle). His last day of employment with the respondent was 6 January 2016.

2 The claimant also claims in these proceedings that he was subjected to detriments because he had made protected disclosures within the meaning of section 43A of the ERA 1996. Those claims are listed to be determined separately, along with claims of the same sort made in case numbers 3347573/2016 and 3347575/2016, in a separate (13-day) hearing, starting on 8 September 2017.

3 At the start of the hearing before me, the claimant had not given the respondent or put before the tribunal any evidence of his losses or attempts to mitigate his losses, and the parties and I agreed that I would determine only the issue of liability initially. At the end of the hearing, I concluded, with the agreement of the parties, that if I found in favour of the claimant on liability then I should leave all issues concerning the financial remedy to be determined subsequently, at a subsequent remedy hearing. This was because the application of sections 119 and 123 of the ERA 1996 was not going to be straightforward, so that the question of for example what it was just and equitable to award by way of compensation was going to require further evidence.

4 The case was the subject of several case management hearings. On 10 June 2016, Employment Judge Bedeau recorded the claimant's case in the terms recorded at pages 47C-47D. By the end of the hearing before me, I understood the claimant's case to be as follows.

4.1 The respondent unilaterally changed the claimant's job plan without informing or consulting him, with the effect of the change becoming apparent to the claimant only in early October 2015.

4.2 That change (and the change took several forms, but as far as the claimant was concerned there was one central change, on which he relied in this case; that was the requirement to carry out an all-day operating list on Wednesdays at Ealing Hospital instead of Northwick Park Hospital) was in itself a fundamental breach of the claimant's contract of employment, in that it was in contravention of the parts of that contract concerning job plans, or it was a breach of the implied term of trust and confidence to make that change in that way.

4.3 The encouragement by Dr Charles Cayley of a fellow Consultant, Mrs Asra Saleem, to state the grievance against the claimant stated in the letter dated 28 January 2014 at pages 252-259, and the respondent's failure to inform the claimant of the outcome that grievance, was either a breach of the implied term of trust and confidence or conduct which, taken with the other wrongful conduct of the respondent, was such as to justify the conclusion that the respondent had breached the implied term of trust and confidence. (It was only after the claimant had made this claim that he discovered that the grievance had been upheld

against him in part, and that on appeal further elements of the grievance had also been upheld against him.)

4.4 There was in any event an accumulation of conduct which, taken together, constituted a breach of the implied term of trust and confidence.

5 That is not precisely the manner in which Ms D'Souza advanced the claimant's case, but I believe that it states the essence of the claimant's case. Ms D'Souza declined to rely on the grievance appeal findings, because they were discovered by the claimant only after he had left the respondent's employment and because they were not part of his pleaded case as articulated at the case management hearing of June 2016 (not least because he did not at the time know that there had been an appeal and that Mrs Saleem's grievances had been the subject of further findings which were negative as far as he was concerned). In stating my conclusions, I respond to the manner in which the claimant's case was advanced by Ms D'Souza in her closing submissions.

The applicable law

6 Section 95(1)(c) of the ERA 1996 provides that "For the purposes of this Part an employee is dismissed by his employer if ... the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct". Normally, the application of this provision gives rise to little difficulty. Here, the claimant was on one view relying in part on after-discovered conduct, namely the fact that the grievance of Mrs Saleem had been determined in part against him and the fact that he had not been informed of that determination. Thus, there might have been a need to consider to what extent he could rely on that after-discovered conduct. However, given my findings of fact and the case law to which I now turn, that question did not arise for determination.

7 In paragraph DI[440] of *Harvey on Industrial Relations and Employment Law*, this is said:

> "As a matter of contractual orthodoxy the employee is entitled to raise issues of which they were unaware at the time of dismissal to establish such a breach: *RDF Media Group Plc v Clements* [2007] EWHC 2892 (QB), [2008] IRLR 207. However, this principle when transposed to the unfair dismissal jurisdiction must be treated with caution. This is because it will be difficult for the employee to claim that they resigned in response to the breach if they were unaware of the nature of the breach at the material time of the resignation."

8 The latter words are unsupported by authority but must be read in the light of the discussion in paragraph D1[508] onwards of *Harvey.* One helpful extract from the case law cited in that discussion is the following extract from the judgment of Keene LJ in *Nottinghamshire County Council v Meikle* [2005] ICR 1, at paragraph 33:

> "The proper approach, therefore, once a repudiation of the contract by the employer has been established, is to ask whether the employee has accepted that repudiation by treating the contract of employment as at an end. It must be in response to the repudiation, but the fact that the employee also objected to the other actions or inactions of the employer, not amounting to a breach of contract, would not vitiate the acceptance of the repudiation. It follows that, in the present case, it was enough that the employee resigned in response, at least in part, to fundamental breaches of contract by NCC."

9 The discussion in the passage in paragraph D1[521] of *Harvey*, up to the end of paragraph 521.04, is also very helpful. It shows that (quoting words in paragraph 8 of the judgment of the Employment Appeal Tribunal in *Ishaq v Royal Mail Group* UKEAT/0156/16):

> "it is open to a Respondent to seek to persuade an Employment Tribunal that a reason given in a letter of resignation, even though a sufficient reason for resigning in the sense of being a repudiatory breach, is not a genuine reason so as to give a right to claim constructive dismissal."

10 However, it is necessary to bear in mind that when an accumulation of conduct is relied on as a breach of the implied term of trust and confidence, the final act on which reliance is placed need not be "of the same character as the earlier acts": *Omilaju v Waltham Forest London Borough Council* [2005] ICR 481, paragraph 19. Furthermore, it is also necessary to bear in mind the fact that while an employee might have affirmed the contract of employment by continuing to work for the employer after conduct on which the employee could have relied in claiming constructive dismissal, that conduct can later be relied on by the employee as part of an accumulation of conduct which amounts to a breach of the implied term of trust and confidence (this being the effect of the judgments of the Court of Appeal in *Lewis v Motorworld Garages Limited* [1986] ICR 157, most clearly that of Glidewell LJ at 170A-C, but also that of Ackner LJ at 165E-F).

11 While it is now reasonably well-known and understood, I record here that the implied term of trust and confidence is an obligation on both an employer and an employee not, without reasonable and proper cause, to act in a way which is likely seriously to damage or to destroy the relationship of trust and confidence which exists, or should exist, between them as employer and employee.

The evidence

12 I heard oral evidence from the claimant on his own behalf, and from Mr E A D Manning, who is a Consultant in Obstetrics and Gynaecology. I heard oral evidence from the following witnesses who gave evidence on behalf of the respondent: (1) Mr Mohamed Abdel-Aal, who is currently the respondent's Divisional Clinical Director for Obstetrics and Gynaecology and is himself a Consultant Obstetrician and Gynaecologist, (2) Dr Charles Cayley, the respondent's Medical Director, and (3) Ms Rosemary Heed, the respondent's Divisional General Manager in respect of the respondent's Women and Children's Services.

13 I was referred to relevant pages of the bundle of documents put before me and to which I refer above. Having heard that oral evidence and read the papers in the bundle to which I was referred, I made the following findings of fact.

The facts

(1) The claimant's employment with the respondent and the work done by him both for the respondent and as a private practitioner on his own account

14 The claimant was employed by a statutory predecessor to the respondent as a substantive consultant at Northwick Park Hospital ("NPH") from February 2000 onwards. From then onwards he also worked at the BMI Clementine Churchill Hospital ("the BMI hospital"), which is situated in Harrow and is only a short distance from NPH. As stated above, the claimant's employment with the respondent ended on 6 January 2016. The respondent is part of the national health service of the United Kingdom ("the NHS").

15 Maternity services at NPH have in the past been problematic. Between 2003 and 2005, there were seven deaths from Massive Obstetric Haemorrhage ("MOH"). The claimant was appointed to be the Clinical Director of Women's Services at NPH in 2003. In 2005, the claimant instituted a MOH rota and was in Mr Manning's view (stated in paragraph 8 of his witness statement) a major contributor to that rota in that he was frequently available as a port of call in the event of an incident of MOH. However, the claimant was not on the ordinary on-call rota, because it put his health at risk as a result of him having diabetes. The MOH rota was an additional rota.

16 The claimant's evidence in paragraph 10 of his witness statement was that he did much work when he was at the BMI hospital which had been referred to it by the NHS, and that by 2014, it was 50% of the work he did at the BMI hospital. However, when he worked at the BMI hospital, he was paid by the BMI hospital for that work and it did not have an impact on his NHS salary. The latter was over £189,000 per year at the time when the claimant left his

employment with the respondent. The claimant said in paragraph 39 of his witness statement this about his income from his "private work at BMI Clementine Churchill":

> "My income from my private work at BMI Clementine Churchill varied from month to month and from year to year, between £20,000 and £30,000 pcm, or £240,000 and £360,000 per annum. In addition to the hours I would work during the week at the BMI, I would often do additional weekend procedures, as I would at NPH. It is fair to say that I usually work 6 days a week, and often for more than ten or twelve hours a day."

17 When the subject of his income from his private practice came up in cross-examination, in the context of his reason for leaving his employment with the respondent, the claimant said that he paid some £80,000 per year for professional indemnity for his private work, that he paid approximately £25,000 per year for his secretary for that work, and that he paid also for the use of hospital facilities and assistance in surgery. However, there was in the bundle (in fact co-incidentally; it was the result of a complaint having been made to the General Medical Council about the claimant) at page 337 an invoice for £8,000 sent to a patient, and it included £2,000 for "Use of Hospital Facilities". In addition, in cross-examination, the claimant said that in recent years the amount of private work done by him had dropped. Thus, in cross-examination the claimant sought to diminish the importance to him of any loss of private practice income. In fact, he was the founder and generous donor to the charity to which he referred in paragraph 2 of his witness statement, Wings of Healing, and I accepted what he said in paragraph 3 of that statement, namely that his "biggest motivation has always been to use [his] gifts (money, time and skills) to help others".

18 The claimant's current contract of employment was signed by him in 2008. There was a copy of it at pages 68 and 93-101. There were terms and conditions in schedules, and there were copies of some of those schedules at pages 70-81. There was guidance concerning changes to job plans in the bundle at pages 102-146. There were in the contract itself the following terms.

18.1 Clause 4:

> "Your principal place of work is the North West London hospitals NHS Trust. Other work locations including off site working may be agreed in your Job Plan where appropriate, e.g. for supporting professional activities and some direct clinical care such as audit notes. You will generally be expected to undertake your Programmed Activities at the principal place of work or other locations agreed in the Job Plan. Exceptions will include travelling between work sites and attending official meetings away from the workplace.

You may be required to work at any site within your employing organisation, including new sites."

18.2 Clause 6:

"**6.1 Job Plan**
You and your clinical manager have agreed a prospective Job Plan that sets out your main duties and responsibilities, a schedule for carrying out your Programmed Activities, your managerial responsibilities, your accountability arrangements, your objectives and supporting resources. You and your clinical manager will review the Job Plan annually in line with the provisions in Schedule 3 of the Terms and Conditions. Either may propose amendment of the Job Plan. You will help ensure through participating in Job Plan reviews that your Job Plan meets the criteria set out in the Terms and Conditions and that it contributes to the efficient and effective use of NHS resources."

19 Schedule 3 to the contract, at page 74, stated this in paragraph 1:

"**General principles**
1. Job planning will be based on a partnership approach. The clinical manager will prepare a draft job plan, which will then be discussed and agreed with the consultant. Job plans will list all the NHS duties of the consultant, the number of Programmed Activities for which the consultant is contracted and paid, the consultant's objectives and agreed supporting resources."

20 Schedule 4 to the contract (at pages 77-78) provided for mediation in the event of a failure by the claimant and the respondent to agree to the content of a Job Plan, and for an appeal where it was not possible to resolve the disagreement using the mediation process.

21 Schedule 9 to the contract contained (at pages 79-81) "Provisions governing the relationship between NHS work, private practice and fee paying services". Paragraph 2 of Schedule 9 (on page 79) was in these terms:

"The consultant is responsible for ensuring that the provision of Private Professional Services or Fee Paying Services for other organisations does not:

- result in detriment of NHS patients or services:

- diminish the public resources that are available for the NHS."

22 Paragraph 5 of Schedule 9 was in these terms:

> "Where there would otherwise be a conflict or potential conflict of interest, NHS commitments must take precedence over private work. Subject to paragraphs 10 and 11 below, the consultant is responsible for ensuring that private commitments do not conflict with Programmed Activities."

23 Paragraphs 10 and 11 of Schedule 9 are not material here.

24 The respondent's grievance policy as it stood in January 2014 was at pages 602-619. The respondent's grievance policy as it stood from November 2014 onwards was at pages 159-193. In the latter, but not the former, it was provided that the outcome of a grievance was to be communicated to the person about whose conduct the grievance had been stated: at page 185, it was said that "An individual subject to the investigation will be informed of the next steps as a result of the investigation as soon as possible." At page 175, it was said that after a formal grievance hearing, the action required for the chair of the hearing was to "[ensure that] a written outcome is given to both parties in accordance with the timescales set out in this policy".

(2) The events which led to the claimant's resignation

25 On 28 January 2014, the letter at pages 252-259 was sent by Mrs Saleem to Dr Cayley. Mrs Saleem is a Consultant Obstetrician and Gynaecologist. The letter was stated to be a grievance "against" the claimant. Mrs Saleem wrote that she was "unable to resolve the matter informally, the reasons for which will become apparent in the body of this letter." The grievance concerned (1) the removal by the claimant from Mrs Saleem of her responsibility as College Tutor (the college being the College of Obstetrics and Gynaecology) without notice on 6 January 2014, and (2) the allocation of on-call responsibilities within the Women's Services team at NPH.

26 In her grievance letter, Mrs Saleem referred (on page 257) to a meeting which she had on 9 January 2014 with Dr Cayley and "Roger Sharpe (DME)". She also referred on that page to a "one to one meeting" with Dr Cayley on 16 January 2014. Her description of the meeting of 9 January was in these terms:

> "I outlined my background and the events of the recent meeting on 6th Dec but also explained the background about rota discussions. I was asked again whether I would want to continue as College Tutor, and I said it would be difficult with the lack of support from the CD [i.e. the Clinical Director, namely in the circumstances the claimant]. I was advised to take Human resources advice and that if I wanted to I could take matters further because it was felt I had been treated badly."

27 Dr Cayley's evidence (in paragraphs 10 and 11 of his witness statement) was that he met with the claimant on 15 January 2014 to inform him of the

complaints which Mrs Saleem had made, and that when he saw Mrs Saleem on the following day, 16 January, and told her what the claimant had said in response, Mrs Saleem "remained incredibly aggrieved at her treatment by the Claimant and repeated her request to be reinstated as College Tutor." Dr Cayley went on to say this (in paragraphs 11 and 12 of his witness statement):

> "I advised Ms Saleem that if she wanted her concerns to be addressed formally, then she would have to lodge a formal grievance in accordance with the Trust's Grievance Policy. I certainly did not encourage Ms Saleem to raise a grievance against the Claimant but merely informed her of the means by which she could do so. As a Trust employee, Ms Saleem had a right to raise a formal grievance should she so wish."

I accepted that evidence of Dr Cayley.

28 Dr Cayley's evidence was that a "Stage 2 grievance hearing was held with Ms Saleem on 28 March 2014, chaired by Mr Fitzgerald", and that "Mr Fitzgerald met with the Claimant on 18 June 2014 to discuss Ms Saleem's complaint". Mr Manning accompanied the claimant as his workplace colleague at that meeting of 18 June 2014. Ms Caroline Byrne, a Senior Employee Relations Manager employed by the respondent, was also present at that meeting. Mr Manning's witness statement included this sentence (in paragraph 13):

> "As I understand it, Mr. Louca never received any outcome of the grievance hearing: however, the individual was subsequently re-instated as RCOG Tutor."

29 The outcome of Mr Fitzgerald's investigation into the grievance was dated 1 August 2014 and presumably was sent to Mrs Saleem on that day. The letter was at pages 267-278. It was to the effect that the grievance about the removal of Mrs Saleem from the post of College Tutor was well-founded, but that the other aspects of the grievance were not well-founded. The recommendations stated at page 277 included the review and possible revocation of the decision to make another employee the College Tutor. I infer from these factors that Mrs Saleem was, to the knowledge of the claimant, before the claimant resigned, reinstated as College Tutor.

30 On 26 August 2014, the claimant wrote to Ms Byrne (page 285):

> "Would you please advise about when should I get to be informed about the outcome of the grievance raised by Miss Asra Saleem.
>
> It is worth noting that you did not ask any of the witnesses I suggested when I was interviewed on the 18th June 2014."

31 On the next day, Ms Byrne wrote (page 284): "Dear Onsy, Charles Cayley will be arranging to meet with you to discuss the outcome of the grievance." Shortly afterwards, on the same day, the claimant wrote:

> "Dear Caroline
>
> I need to have the written outcome of the grievance before I consider any further meetings, please.
>
> I hope you will send me the written outcome as soon as possible.
>
> Thank you
>
> Onsy"

32 A few minutes later, Dr Cayley wrote to the claimant: "I have been told that some ammendments may have to be made. Charles c.." Just under 3 hours later, the claimant wrote to the respondent's Chief Executive, Mr David McVittie (page 282):

> "Dear David
>
> I am writing to you regarding the grievance raised by Miss Asra Salim [sic; all textual errors in this indented quotation are in the original] a consultant O & G on the 28th March 2014.
>
> I was first informed about it by Dr Cayley who advised me that I will have a meeting with a senior manager that dealing with the case. I was invited by Mr Anthony Fitzgerald by an email on Good Friday, for a meeting. The invitation happened before I was told what are the issues raised in the grievance.
>
> It took me few emails requesting a copy of the grievance before I attend a meeting. With a lot of reluctance I received a copy of the grievance.
>
> I attended a meeting with Mr Anthony Fitzgerald and Caroline Byrne on the 18th June 2014, accompanied by my colleague Mr Dermot manning. I provided a written response with evidence to all the allegations made in the grievance. I was promised that I will receive the minutes within few days.
>
> It took five weeks and 4 emails from me to Caroline and Anthony ,to send me notes of the meeting which I commented on. Mr manning and I felt the notes were inaccurate and did not reflect what happened in the meeting.

> Up till now I have not received a conclusion from the investigation process. None of the witnesses I suggested was called to give evidence or asked to give a statement.
>
> Today I received an email from Caroline Byrne suggesting that Dr Cayley will give the outcome in a meeting (see the emails below).
>
> I found that this is unacceptable. The outcome has to be in writing. It is not appropriate to meet Dr Cayley especially when Miss Salim mentioned in her grievance that she made the grievance on Dr Cayley's advice.
>
> I need your help to get to know the formal outcome of this case.
>
> I think it is important while the Trust is trying to demonstrate that the employees have a caring altitude that the most senior doctor in the Trust; Dr Cayley shows that he does treat some of the most senior doctors in the Trust with care.
>
> I hope l hear from you soon.
>
> Thank you
>
> Onsy"

33 Mr McVittie's response was at the top of page 282 and was in these terms:

> "Dear Onsy
>
> I sense your concerns and will get back to you once I have had a full briefing. Best wishes, David"

34 That was the end of the communications from the respondent or any of its employees or other agents to the claimant about the outcome of the grievance.

35 At about this time, the NHS Trust which was responsible for NPH, the predecessor to the respondent, was in the process of moving towards a merger with Ealing Hospital NHS Trust. The precise date when that merger occurred was not in evidence, but according to paragraph 1 of Mr Abdel-Aal's witness statement, it occurred "in October 2014". On 21 October 2014, Ms Tina Benson, the respondent's Director of Operations, wrote the following email to the claimant (at page 296):

> "Dear Onsy

> I am writing to confirm the outcome of our recent meeting. The proposed new Clinical Director arrangements for the Women's Service have been reviewed in light of the pending closure of the maternity unit at Ealing. To support this service change, which will require a good deal of time and energy, the existing Clinical Director arrangements will be retained. I therefore ask that you continue with your current Clinical Director responsibilities during this period.
>
> Following the closure it is my intention to appoint a joint Clinical Director for Women's Services. This change is part of the agreed arrangements for the new Trust, which have been subject to discussion with all existing Clinical Directors. I will be asking all consultants in the service including yourself for expressions of interest for the new role.
>
> It is anticipated that this change will take place in 8 months' time and your current Clinical Director role will cease at this point. During this period we will have further discussions to support this change.
>
> I would like to thank you for your continued support of the organisation."

36 Mr Abdel-Aal was at that time the Clinical Director of Women's' Services at Ealing Hospital. The claimant responded to Ms Benson's email of 21 October 2014 in an email sent on the following day, at page 297. It was a detailed statement of his reasons for not applying for the role of Clinical Director for Women's Services of the new, merged, organisation. In it, the claimant wrote that his reasons for not applying for the role included that a grievance had been raised against him by a colleague and that he "had not received the outcome of the grievance". He also wrote that his reasons included the following factors.

36.1 He had met Mr McVittie on 3 October 2014 "after writing to him twice regarding the lack of response to my requests to have the outcome of the grievance sent to me", that Mr McVittie had "promised to come back to me soon", but that the claimant had not heard from him since then.

36.2 Mrs Saleem had mentioned in her grievance that she had been "advised to write the grievance by the interim MD", i.e. Dr Cayley (who was at that time the interim Medical Director of the respondent, after the merger).

36.3 Dr Cayley had offered him (the claimant) "no support at all and continuously undermined me".

37 The claimant concluded the email by saying this:

> "I am prepared to stay in my position if I see a real intention to correct the above.
>
> If I do not feel that the executive team is prepared to support the Women Services, I will have to stop being a CD [i.e. Clinical Director] as of the first of December 2014."

38 On 24 October 2014, Mr Manning and Mr Alvan Priddy, another consultant in the respondent's Women's' Services team at NPH, wrote to Ms Benson the mail at page 298. It was strongly supportive of the claimant. Its final three paragraphs were in these terms:

> "In order that Onsy has the mandate to continue in the role as CD, it is vital that he has the support confirmed to the Department, of the Trust's top management team and Trust Board from the Chairman, CEO, his deputies as well as the interim Medical Director.
>
> Secondly, the grievance against Onsy lodged by one of our Consultant colleagues in our department remains unresolved, in spite of the appropriate investigation under Trust Policy having been undertaken in June 2014. It is imperative that the grievance be concluded in writing, so that Onsy again has his authority and status as CD restored.
> We sincerely hope that these issues can now be rapidly resolved."

39 As I say above, unknown to the claimant, Mrs Saleem filed an appeal against the dismissal of part of her grievance. It was determined after a "Stage 3" hearing to be well-founded, in that further aspects of her grievance were upheld. The outcome letter was dated 13 April 2015 and was at pages 302-307. The writer of the letter was Mr Kevin Connolly, the respondent's Chief Information Officer. As indicated above, he did not send a copy of that letter to the claimant.

40 In the meantime, having heard no more about the grievance, the claimant ceased to be Clinical Director of Women's Services at NPH on 1 December 2014. An interim Clinical Director took over until Mr Abdel-Aal was appointed to the new post of Divisional Clinical Director for Obstetrics and Gynaecology on 1 June 2015, following a competitive interview process.

41 Mr Abdel-Aal then, with Ms Heep, set about changing the job plans of the consultants in the newly-merged directorate. They started the process by having an informal meeting with the claimant on 21 July 2015. By then, the closure of the maternity unit at Ealing Hospital and the intention to move to that hospital all elective gynaecological operations carried out on behalf of the respondent was known to the claimant. That intention was the subject of discussion by the staff of both Ealing Hospital and NPH. Mr Abdel-Aal's evidence in paragraph 16 of his witness statement (which I accepted) was in these terms:

> "At this time, the job plans in place for all consultants working within Women's Services at the Trust were inconsistent following the merger of Northwick Park Hospital and Ealing Hospital. All Northwick job plans were declined by the job plan panel as they were not complying with Trust regulations. Most of these job plans had been authorised by the Claimant himself as Clinical Director at that time. There were also numerous changes to the service taking place as a result of the merger. One such change was the transfer of all elective gynaecological operations to Ealing Hospital so that these operations would take place in Ealing rather than Northwick Park. This decision was made by the surgical division of the Trust after much discussion and many meetings between the Clinical Directors of all departments. It was decided that most surgical procedures would be transferred from Northwick Park to be carried out at other hospitals within the Trust. For example, breast surgery and orthopaedic surgery transferred to Central Middlesex Hospital. By transferring most surgical procedures out of Northwick Park, this meant that more theatres in Northwick Park were available to conduct bowel surgery and cancer operations which were currently being undertaken at St Marks Hospital."

42 Mr Abdel-Aal gave oral evidence that there were a number of meetings to which the claimant was invited, concerning the proposed transfer of all elective gynaecological operations to Ealing Hospital. Some documentation concerning those meetings was put before me, but no minutes of the meetings were put before me, although Mr Abdel-Aal said that minutes were subsequently circulated. Whether or not minutes were subsequently circulated, it is in my view inconceivable that the claimant did not know at least by 21 July 2015 that all elective gynaecological operations were going to be transferred to Ealing Hospital. Thus, I conclude at least on the balance of probabilities that he did know that at that time.

43 Mr Abdel-Aal's evidence was that he opened the meeting by discussing this proposed change with the claimant, and that he (Mr Abdel-Aal) was proposing that the claimant undertook an all-day operating list at Ealing Hospital on every Wednesday. The claimant was unhappy about that, because, he said, of the additional time it would take to travel to that hospital. He said that he was going on holiday shortly to the Canary Islands and Mr Abdel-Aal asked him to have a think about the situation and said that they would have another job planning meeting when he returned from holiday.

44 The claimant's job plan as it then stood was set out by him in paragraph 25 of his witness statement. It included for "Thursday AM" this: "Urogynaecology clinic (BMI Clementine)". It also included for "Friday AM": "Ward round, Antenatal/gynaecology clinic (NPH)". As for Wednesday, this was stated:

> "Wednesday AM/PM Urogynaecology Theatre/Clinic/Admin/MDT (NPH)"

45 The claimant denied in oral evidence before me that he had on 21 July 2015 referred to his Friday morning clinic as a "courtesy clinic". However, both Ms Heed and Mr Abdel-Aal's witness statements referred to him as having done so. They both stood by that aspect of their evidence in cross-examination. I preferred their evidence in this regard. I did so without reference to the notes in the document at page 595, which were, I was told, made by Gill Stanfield at the meeting and overlooked during the initial disclosure process. In fact, however, those notes did refer to the claimant as having called it a "'courtesy' antenatal clinic".

46 Mr Abdel-Aal's witness statement contained this sentence in paragraph 19:

> "It was agreed that the Claimant's new Job Plan would contain a maximum of 10 PA's [i.e. Programmed Activities] and it was agreed that he would not undertake any on call work due to his health."

47 There was discussion at the meeting about the claimant's on-call work. He said (according to Ms Heed; this was stated in paragraph 18 of her witness statement) that he was third on call to support individual consultants on the on-call rota in obstetrics. Ms Heep said that that was unlikely to be required in the future. In paragraph 18 of her witness statement she said that "as the Claimant no longer participated in Intrapartum care I suggested that it might be wise to reconsider participating in an on call rota activity for obstetrics". I accepted that evidence. The witnesses disagreed about the extent of the discussion and whether or not it concerned in terms the MOH rota to which I refer in paragraph 20 above. I did not need to resolve that conflict of evidence.

48 It was the evidence of Ms Heep and Mr Abdel-Aal that the question of the claimant being the "Uro-Gynaecology Lead" (not least because he was the only consultant employed by the respondent whose main specialism was urogynaecology) was discussed at that meeting. The claimant did not in terms say that he did not discuss at that meeting the possibility that he would be such Lead, and Ms Heep's and Mr Abdel-Aal's evidence that it was so discussed was not in terms challenged in cross-examination. Given those factors, but in any event, having heard and seen the witnesses give evidence, I accepted Ms Heep's and Mr Abdel-Aal's evidence in this regard.

49 On 21 August 2015, Mr Abdel-Aal sent the email at pages 309-313. In it, he wrote (at page 310):

> "**Second On Call**
> The second on call will be done for Gynaecology and Major Haemorrhage, and that will be 1 in 14 for each consultant, who does

Gynaecology, apart from Mr Onsy Louca, who does not cover any on calls."

50 Also in that email, Mr Abdel-Aal wrote (at page 312):

"**Consultant Lead Roles**
From the recent interviews held for some of the consultant lead roles, the following roles have been appointed so far:

...
- Uro-Gynae Lead — Mr Onsy Louca

...

Job Planning
The first wave of initial job plans have been completed. As you know, it will be difficult to complete the whole job planning in one meeting. We will try to ensure that everyone is doing an average of 10 PA's and the senior management team have been given strict guidance from the Medical Director to adhere to on this.

During the job planning sessions that we have already completed we have noticed that some consultants have very full job plans and as a result are doing more than they should, and I would like to thank them for that. Some consultants are having less sessions, which is probably due to the changing of the management rules, and we are looking at this.

The aim is to fully complete the job planning exercise by the end of October 2015. It would be really important that we monitor and share with our consultants, the before and after effect, once completed. I hope that this will be able to show the benefits of the safety and quality and care given to our patients."

51 Subsequently, the claimant wrote and sent the message at page 314. It was undated but was sent under cover of an email of which there was no copy in the bundle. It was clearly sent not long after 21 August 2015, as Mr Abdel-Aal soon after sending the email at page 309-313 went on holiday for three weeks, and the claimant's text at page 314 referred to that holiday as being in the future. The claimant's recollection was that he sent his email on 24 August 2015. In the text on page 314 the claimant asked what was meant by "Due to the changing of the management rules", what impact that change had on job plans, and for clarification of the "job description and the role of each lead and the relationship between the different leads (e.g. overlap between urogynae and gynae leads)". The claimant did not there object to the statement that he did no on-call work.

52 After the meeting of 21 July 2015 there was no further meeting with the claimant about his job plan. One was arranged before 14 September 2015, as was evident from the email at pages 332A-332B. It was arranged to take place on Thursday 8 October 2015 at 14:30.

53 The claimant's evidence included (in paragraph 68 of his witness statement) this statement:

> "By early September it had become apparent that my Friday clinics had been stopped because no patients had been booked in after the end of August. I was also conscious that I had not been called on the MOH rota since July. During mid September I was told by the operating list scheduler that there were plans to move the theatre lists to Ealing. The CD did not contact me about this. I had not been given any concrete information about when and how this might happen."

54 As I say above, I concluded that claimant did by then know that his Wednesday theatre list was to move to the Ealing Hospital. I accept that he was not told the precise date until he was told it on 1 October 2015 as described in paragraph 71 of his witness statement, when he was told that he "did not have any operating lists at Northwick Park Hospital going forward" and that he would be "operating at Ealing Hospital all day on Wednesdays".

55 The claimant's witness statement contained this statement (in paragraph 77) under the heading "Thursday 1 October to Tuesday 6 October 2015":

> "I thought long and hard about what had happened. I felt that the unilateral removal of my Friday am clinics and contribution to the MOH rota were unjustified, and were intended to undermine me, especially as the stated intention of reducing cost was not even achieved as I continued to be paid."

56 However, the claimant did not rely at the end of the trial on this as his reason for resigning. My notes of his oral evidence included this passage:

> "Moving my list to another place where I was not going to be able to see patients on the next day was the big thing for me.
>
> It is quite a big job moving the list; theatre time is the most expensive in the NHS. I resigned because of loss of safety resulting from change of job plan."

57 The claimant's evidence in paragraph 78 of his witness statement included more reasons why in his view the move of his operations on Wednesdays to Ealing Hospital would be unsafe. One of those reasons, stated in paragraph 78.6, was this:

> "If I operated at Ealing all day Wednesday I would have been unable to attend the multidisciplinary meeting to discuss the urogynaecology patients that takes place at Northwick Park every Wednesday between 1.30 and 2.30 pm. These MDTs are essential for the care of patients."

58 However, I concluded that the claimant's oral evidence was to be preferred to the detailed reasons given in paragraph 78 of his witness statement: not being able to see his patients on the next day was the "big thing" for him.

59 In addition, I concluded that the real reason why he concluded that he would not be able to see those patients on the next day was that he was doing private work at the BMI hospital in the morning of the next day.

60 It was the claimant's evidence that the journey between NPH and Ealing Hospital could take at least an hour. Mr Manning's evidence was to a similar effect, and he said that sometimes the journey could take rather longer than that. However, Mr Manning (who lives closer to Ealing Hospital than the claimant does) was allocated some time (a quarter of a PA, i.e. a quarter of one of his Programmed Activities) to visit the patients on whom he had operated on the previous day at Ealing Hospital, as he (during the job planning process) negotiated such allocation as he was adamant that he had to see his patients the day after the surgery which he had carried out on them.

61 There was much contested evidence about the safety of doctors other than the claimant being present at Ealing Hospital on Thursdays in order to look after such patients on whom the claimant had operated on Wednesdays as had been kept in hospital overnight. Not all patients on whom the claimant operated needed to stay overnight: a number of them were able to go home by the end of the day. The evidence of Mr Abdel-Aal was that one of the Consultants based at Ealing Hospital, Mr Alak Pal, had sufficient expertise in urogynaecology to be able to give at least the vast majority of such of the patients of the claimant as required specialist urogynaecological care after their operations the care that they required. While the claimant alleged that Mr Pal was not in 2015 sufficiently experienced and qualified to do so, I accepted Mr Abdel-Aal's evidence that Mr Pal was both of those things.

62 Mr Abdel-Aal's oral evidence included a statement that he had looked at the claimant's list of patients after the claimant resigned and that he was able to allocate all of the 100 or so patients to other consultants employed by the respondent except for 2 or 3 whose care needed to be transferred to another consultant employed by another Trust. I accepted that evidence.

63 The claimant's stated reason for saying that the transfer of his Wednesday operating list to Ealing Hospital would be unsafe was that he would not be able to satisfy himself about the transfer of the post-operative care of the patients on whom he had operated. The claimant relied in this regard on the guidance issued by the General Medical Council ("GMC") at page 579. While

it was not in my view determinative of the issue of the safety of the claimant in practice not going to see patients on whom he had operated if they had been kept in hospital overnight, it was not clear to me whether or not that guidance applied to the transfer of post-operative care in the circumstances in issue here.

64 On 6 October 2015, the claimant resigned by the email at page 341. It was written to Mr Abdel-Aal and was in these terms:

> "Dear Mohammed
>
> I would like to inform you of my intention to vacate my post as a consultant obstetrician & gynaecologist
> My last working day will be Wednesday the 6th of January 2016.
>
> The Gynaecology Admissions Office has informed me two weeks ago that I no longer have any operating lists at Northwick Park on Monday pm and Wednesday am with immediate effect. In addition, I have been told that I will be expected to undertake an all-day operating list at Ealing Hospital every Wednesday. This represents a unilaterally imposed change in my job plan that I believe is not in the best interests of my patients . As a result, I shall be unable to provide a safe service with these new constraints.
>
> Kind regards
>
> Onsy"

65 The claimant said in terms in his oral evidence that the failure to revert to him on Mrs Saleem's grievance was not the reason why he resigned.

66 I concluded (given the relevant factors to which I refer above, but also having heard and seen him give evidence, and having taken into account the extent to which his evidence in paragraph 78 of his witness statement constituted something of an elaboration) that the claimant's real reason for resigning was that he would not be able to continue to carry out private work at the BMI hospital on Thursday mornings, and that it was not the safety of the patients on whom he had operated during the previous day.

67 While that safety was uppermost in the claimant's mind when he resigned, and in my view he acted in good faith in resigning, I concluded that he was subconsciously aware that he could not, consistently with the terms of his contract of employment with the respondent, justify continuing to do his Thursday morning BMI hospital clinics if he was required to undertake an all-day operating list at Ealing Hospital on Wednesdays. This is because he could as a matter of routine have gone to Ealing Hospital on Thursday mornings if he had not had his BMI hospital clinics, and if it was in fact unsafe

for him not to go to Ealing Hospital on Thursday mornings to see the patients on whom he had operated on the previous day, then it was contrary to the provisions set out in paragraphs 21 and 22 above to continue to conduct those BMI hospital clinics. I concluded that the claimant wanted to be able to carry on doing his privately-paid work at the BMI hospital as much as he could because of his desire to continue to fund Wings of Healing.

My conclusions

68 In my judgment, the failure to inform the claimant of the initial outcome of the grievance of Mrs Saleem was conduct which was likely seriously to damage the relationship of trust and confidence between the claimant and the respondent, especially in the circumstance that the initial outcome was known to him as a result of the evident reinstatement of Mrs Saleem as the College Tutor, to which I refer in paragraph 28 above. While the absence of any disciplinary action against the claimant was clear evidence that the grievance had not (initially at least) been successful as far as any other element was concerned, that did not in any way excuse the failure to inform the claimant of the outcome of Mrs Saleem's grievance. However, the fact that the claimant did not resign to any extent because of the failure by the respondent to inform him of the outcome of the grievance meant in the circumstances that he could not rely on it as part of an accumulation of conduct which, together, constituted a breach of the implied term of trust and confidence.

69 I have concluded (in paragraph 27 above) that Dr Cayley in no way encouraged Mrs Saleem to raise a grievance. Thus, I concluded that that aspect of the respondent's conduct could not be relied on by the claimant in claiming that there was a breach of the implied term of trust and confidence.

70 As for the manner in which the requirement to carry out an all-day operating list at Ealing Hospital on Wednesdays was imposed on the claimant, in my judgment there were several reasons why if there was any departure from the provisions of the contract concerning job plans, the imposition of that requirement was not in itself a breach of the implied term of trust and confidence.

71 The first of those reasons is that except in one respect, the claimant's job plan was not being changed: he was merely being required to carry out his operating list on Wednesdays at Ealing Hospital rather than NPH. (While that could in some circumstances have been a substantial detrimental change to working conditions such as to fall within regulation 4(9) of the Transfer of Undertakings (Protection of Employment) Regulations 2006, SI 2006/246, as occurred in *Tapere v South London & Maudsley NHS Trust* [2009] IRLR 972, [2009] ICR 1563, the claimant here did not rely on the distance of Ealing Hospital to NPH as a justification in itself for resigning. In fact, I would have concluded that that distance was not in the circumstances such as to enable

him to rely on regulation 4(9) if only because of the possibility of the claimant as part of his 10 PAs going to Ealing Hospital on Thursday mornings.)

72 The second of those reasons is that to the extent that being required to work all day at Ealing Hospital meant that the claimant could no longer attend the multi-disciplinary meeting "to discuss the urogynaecology patients that takes place at Northwick Park every Wednesday between 1.30 and 2.30 pm", the move of that meeting to a different time of the week could have been the subject of discussion with him, and if he had been seriously concerned about the loss of an opportunity to attend that meeting, then he could have raised that concern with Mr Abdel-Aal informally before 1 October 2015. The fact that he did not do so is consistent with his oral evidence that the real reason for his resignation was his concern about the safety of the patients on whom he was going to be required to operate on Wednesdays at Ealing Hospital, but that is not relevant to the question of whether the removal of the ability to attend the multi-disciplinary meeting at NPH between 1.30 and 2.30pm on Wednesdays without that removal being agreed constituted a breach of the implied term of trust and confidence. In my view that removal was not in the circumstances conduct which was likely seriously to damage the relationship of trust and confidence, but in any event even if it was to any extent likely to damage that relationship, there was reasonable and proper cause for it. That reasonable and proper cause consisted in the organisational reasons about which Ms Heed and Mr Abdel-Aal gave evidence for the transfer of all elective gynaecological operations from NPH to Ealing Hospital. The contractual terms set out in paragraphs 18.2, 21 and 22 above (in fact, only the final sentence of the term set out in paragraph 18.2 above is relevant in this regard) were relevant in that regard, but in any event the claimant himself did not contend that the transfer was not justified: in paragraph 20(c) of Ms D'Souza's written closing submissions, she acknowledged that the claimant did not challenge the "legitimate operational reasons" for that transfer.

73 As for the question whether the removal of the claimant's ability to attend the multi-disciplinary meeting at NPH between 1.30 and 2.30pm on Wednesdays constituted a breach of the contractual provisions concerning job plans, in my view it did. However, the breach was in the circumstances a consequence of the organisational reason for transferring the claimant's (and others') elective gynaecological operating lists to Ealing Hospital. In that circumstance, especially when the final sentence of the clause set out in paragraph 18.1 above is taken into account but in any event, in my judgment the breach was not a fundamental breach of the claimant's contract of employment.

74 Turning, then to the question of whether or not the requirement imposed on the claimant to carry out an all-day operating list at Ealing Hospital on Wednesdays was a breach of the part of his contract of employment concerning the agreeing of a job plan, it was an inescapable conclusion that it was such a breach. However, while, as Ms D'Souza submitted, the location at which activities are carried out as part of an employee's employment is

important, it is usually important only because of the distance of that location from the employee's home. Here, in my view the breach was not a fundamental breach of the claimant's contract of employment. This was for the following reasons.

74.1 The change was for good practical reasons (legitimate reasons, as Ms D'Souza called them, as recorded above).

74.2 The claimant was obliged to co-operate in regard to the job plan (as stated in the final words of the part of his contract set out in paragraph 18.2 above).

74.3 The claimant was well aware by 21 July 2015 that all elective gynaecological operations were going to be transferred from NPH to Ealing Hospital.

74.4 The claimant had an opportunity between 21 July 2015 and 6 October 2015 to raise with Mr Abdel-Aal and/or any other member of the respondent's management his concern about that forthcoming transfer of such operations.

75 As for the manner in which the requirement to start operating at Ealing Hospital on Wednesdays was concerned, and the question whether that manner in itself constituted a breach of the implied term of trust and confidence, in my view it was not such a breach. This was for two reasons. The first was that all of the respondent's surgeons based at NPH carrying out all elective gynaecological operations were required to carry them out instead at Ealing Hospital from October 2015 onwards. The second was that the move was known about by all of them several months in advance, and the claimant was himself well aware at that time of the planned move. If there was any wrongdoing on the part of the respondent in regard to the manner in which the change was communicated to the claimant, it was not conduct which was likely seriously to damage the relationship of trust and confidence.

76 Otherwise, in my view the respondent's conduct in regard to the manner in which the claimant's job plan was considered with him on 21 July 2015 until 6 October 2015 was not such as to be likely seriously to damage the relationship of trust and confidence.

77 Standing back and asking myself whether all of the matters on which the claimant in my view justifiably relied here as constituting an accumulation of conduct which, together, constituted a breach of the implied term of trust and confidence (bearing in mind that the claimant could not, for the reason stated in paragraph 68 above rely on the failure to communicate to him the formal outcome of Mrs Saleem's grievance and that the claimant did not rely on the distance from his home to Ealing Hospital), I concluded that that accumulation did not constitute such a breach. This was because in my view it was not

conduct which was likely seriously to damage the relationship of trust and confidence. This was because of

77.1 the final sentence of the contractual term set out in paragraph 18.2 above,

77.2 the final sentence set out in paragraph 18.1 above,

77.3 the terms set out in paragraphs 21 and 22 above,

77.4 the objective justification of the respondent for moving all elective gynaecological operations from NPH to Ealing Hospital, and

77.5 the fact that the claimant was well aware in advance of that move that it was going to happen and that there were legitimate reasons for the move.

78 If I had come to a different conclusion in that regard, then I would have concluded that the claimant did not resign in response to conduct which constituted a breach of the implied term of trust and confidence. This is for the following reasons. I concluded that the claimant did not resign because of the manner in which he was required by the respondent to commence carrying out elective gynaecological operations at Ealing Hospital on Wednesdays (i.e. in breach of the provisions of his contract of employment concerning job plans). Nor did he resign because that practice would in itself be unsafe. He resigned solely because he could not, without himself being in breach of his contract of employment, continue to work at the BMI hospital on Thursday mornings and during those mornings see the patients on whom he had operated on the previous day and who were kept in hospital overnight. I concluded, as recorded in paragraphs 70-74 above, that in requiring the claimant to carry out elective gynaecological operations on Wednesdays at Ealing Hospital rather than NPH, the respondent was guilty neither of a fundamental breach of the express terms of the claimant's contract of employment, nor of conduct which was a breach of the implied term of trust and confidence. I concluded that in the circumstances the claimant resigned so far as relevant purely because of that requirement. Thus, he resigned in response to conduct which was not a fundamental breach of his contract of employment.

79 For all of these reasons, I concluded that the claimant was not dismissed within the meaning of section 95(1)(c) of the ERA 1996.

80 I conclude these long reasons with an observation. The claimant, I concluded, was scrupulously honest when giving evidence to me. If he had not been, then he would not have acknowledged in oral evidence that neither the failure to inform him of the outcome of Mrs Saleem's grievance nor the distance of his home to Ealing Hospital were reasons for his resignation. If and to the

extent that I preferred the evidence of the respondent's witnesses to that of the claimant, I did so purely because I concluded that their recollections were more reliable than the claimant's.

_____
Employment Judge

Date: …28 April 2017……

Sent to the parties on: 11 May 2017

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For the Tribunal Office