RM

EMPLOYMENT TRIBUNALS

Claimant: **Mr A Nakhla**

Respondent: **Basildon & Thurrock University Hospital NHS Foundation Trust**

Heard at: **East London Hearing Centre sitting at Central London**

On: **25, 26, 27 January 2017; 31 January 2017, 2 February 2017 13 March 2017 (In Chambers)**

Before: **Employment Judge Russell**
Members: **Mr G Tomey**
Mr L O'Callaghan

Representation
Claimant: **In person**
Respondent: **Ms B Criddle (Counsel)**

JUDGMENT

The unanimous judgment of the Tribunal is that:-

1. **The claim of unauthorised deduction from wages in respect of mileage and programmed activities succeeds.**

2. **The reason for dismissal was some other substantial reason.**

3. **The Claimant was not unfairly dismissed.**

4. **The claim of race discrimination fails and is dismissed.**

5. **The claim of public interest disclosure detriment fails and is dismissed.**

REASONS

1 By a claim form presented on 24 May 2016, the Clamant brought claims of unauthorised deduction from wages, race discrimination, protected interest disclosure detriment and automatic unfair dismissal and/or ordinary unfair dismissal. The Respondent resisted all claims except the unauthorised deduction claims. It accepts that the Claimant is owed money for mileage and programmed activities but as the amount

could not be agreed at this hearing, a remedy hearing will be required in due course.

2 The list of issues to be determined was agreed at a Preliminary Hearing before Employment Judge Hyde on 31 October 2016. We adopted this list of issues in determining the case. We note that there were a number of issues identified at paragraphs 4A to M which the Claimant wished the Tribunal to consider but which the Respondent did not accept were relevant. It seemed to us that a number of those disputed issues were relevant to determining the genuine reason for dismissal and s.98(4) fairness, for example about recruitment to the substantive consultant post. We considered those additional issues to the extent relevant and as set out in our reasons.

3 We heard evidence from the Claimant and on his behalf from Dr Al Hakeem (Consultant Anaesthetist and LNC Chairman). For the Respondent we heard evidence from Dr Celia Skinner (Medical Director), Mr Sean Symons, (CSU Lead Trauma and Orthopaedic Surgery Head and Neck Surgery and Pain), Mr Samir Shah (Divisional Director for Surgery) and Ms Barbara Riddell (Non-Executive Director and Deputy Chair of the Trust). We were provided with an agreed bundle of documents and read those pages to which we were taken in evidence.

4 The Claimant had exchanged a written witness statement setting out his evidence in accordance with the Case Management Order of Judge Hyde. On the first morning of the hearing, he attended with an amended statement containing further evidence upon which he wished to rely. The Respondent had not previously been provided with a copy. The Tribunal took some time to read the statements and a copy was provided to the Respondent. The Claimant is a litigant in person, although one with experience of conducting his own cases in the higher courts. The Respondent was represented by Counsel and, having been given some time to take instructions, Ms Criddle was able to deal with the additional evidence fairly. Accordingly, we decided that it was in the interests of justice to permit the Claimant to rely upon his expanded statement.

Findings of Fact

5 The Respondent is an NHS Foundation Trust operating in Essex. In early 2013 it was placed in special measure as a consequence of higher than expected mortality rates and safety concerns. Dr Celia Skinner was appointed Medical Director in February 2013. She has worked hard to improve the Respondent's safety record and in May 2014 the CQC gave it a finding of "good" in all areas, allowing it to exit special measures. Part of the work done to achieve that result was to encourage incident reporting and scrutiny of practice to allow improvements in care to be made.

6 The Claimant, who is of North African origin, commenced employment on 2 April 2012 as a Locum Consultant in Trauma and Orthopaedics. The contract was stated to be for a six months fixed term duration. At the end of the six month period, employment continued under the terms of the original contract, which granted the Claimant the same terms and conditions as a permanent member of staff and entitling him to continuity of employment from 2 April 2012 and three months' notice of termination.

7 From early 2014, the Trauma and Orthopaedic Unit was led by Mr Sean Symons. The Claimant's relationship with Mr Symons was initially friendly, socially and professionally, so much so that they discussed purchasing a boat together.

8 The consultant team at the Respondent is racially diverse. As at 1 December 2015, the Respondent employed a total of 224 consultants: 106 were Asian, 15 black, 2 mixed race, 64 white and 37 other. The Trauma and Orthopaedic Unit comprised 17 consultants, including locums, of whom 7 are Asian, 3 other and 7 white. Initially when referred to these statistics, the Claimant described them as "fabricated" although upon reflection overnight he accepted them as accurate. We note that here only because it became something of a characteristic of the Claimant's approach to the Respondent's evidence where any document with whose contents he disagreed was described as fabricated. The Claimant demonstrated no ability to accept that a mistake may be genuine rather than a deliberate lie.

9 As a locum, the Claimant did not hold the full range of responsibilities of a substantive consultant nor was he guaranteed a substantive post at some future date. In order to be appointed a substantive consultant, a doctor is required to be admitted onto the GMC Specialist Register. There are two means of admission: by a certificate of completion of training issued by the GMC or by a certificate of eligibility to specialist registration. The latter route applies where the doctor is not fully trained in the UK but where they can demonstrate that their training and/or qualifications in their chosen speciality are equivalent to those required for the certificate of completion of training.

10 The Claimant applied for specialist registration via the equivalence route in January 2012, submitting evidence relating to his medical practice first in Egypt and then in the UK. His application was unsuccessful. The Claimant successfully appealed to the County Court. The GMC in turn appealed to the Court of Appeal where the case was heard on 28 November 2014. We were provided with a copy of the Court of Appeal judgment which held that the GMC panel had properly directed themselves in law and that their evaluation of the evidence was one which it should respect. There was one area (paediatric orthopaedics) where the Court of Appeal considered that the GMC panel may have adopted too mechanistic approach and referred the matter back for reconsideration in light of more recent evidence which the Claimant had submitted. The Claimant's description of his having won the appeal was rather misleading in the circumstances.

11 Although originally appointed only to undertake elective adult hip and knee surgery, as his skills developed, the Claimant began to perform work on the trauma rota which required a more varied practice covering as it could any part of the lower body including hip, knee, foot and ankle surgery. This was consistent with his consultant colleagues, each of whom specialised to a greater or lesser extent in a particular joint in the lower limb but who also undertook a wider range of trauma work.

12 At the end of 2013, a patient died following hip replacement surgery. An investigation found that the Claimant was undertaking the operation, complications arose when a bone fractured and he called urgently upon the services of one of his colleagues, Mr Hearth, who measured and then inserted a screw. Regrettably, in doing so the vein was cut and the patient suffered fatal internal haemorrhaging. Whilst the Claimant's conduct was not the proximate cause of the bleed as it was Mr Hearth who fixed the screw, the Respondent was concerned about the Claimant's initial decision to operate in that way upon the patient in light of their medical history. In other words, the concern was not the Claimant's technical ability as a surgeon but his pre-operative judgment.

13 In October 2014 the Claimant was involved in a "never event", which is an incident on the operating table which should never happen. An investigation concluded that the

incorrect implant had been used in a total hip replacement and consequently the patient required a revision operation. Whilst the Claimant had not personally procured the wrong sized implant, he had not checked prior to insertion. In an email sent on 22 October 2014 he apologised for his part in the incident which, he said, came at a time when they were all aspiring to reach the highest standards of care and patient satisfaction. In this email, the Claimant acknowledged that as the surgeon, he carried ultimate responsibility for what had happened and proposed a number of actions to ensure that it did not happen again.

14 The Respondent's case is that as a result of the never event, Mr Symons discussed his concern about the Claimant's pre- and peri-operative decision making with Dr Skinner. With her agreement, he drafted a mentoring agreement under which another consultant, Mr Shoaib, would mentor the Claimant in lower limb, hip and knee arthroplasty surgery and Mr Symons would act as the Claimant's mentor for on-call trauma. The document which appears in the bundle is not signed. Mr Symons' evidence is that he showed the agreement to the Claimant who refused to sign it as he considered the reference to mentorship was an insult. Mr Symons did not wish to press the point as he felt that the same outcome could be achieved more informally through case discussion, without signature of the document.

15 The Claimant's case is that the agreement was not signed because it was not produced at the time but was, as he put it, "cooked up" in January 2015 as part of the capability case against him. The Claimant relies upon an email sent on 16 January 2015 referring to mentorship being introduced at that date, without reference to any earlier period of mentorship. This overlooks the references in minutes in December 2014 to supervision from October 2014. This is more consistent with the contemporaneous production of the mentoring agreement than a fabrication in January 2015. The Claimant also refers to the internal appeal against dismissal hearing on 10 December 2015 in two ways. First, it was suggested that Mr Shah, another consultant, was also to be his mentor after the never event, yet Mr Shah's name did not appear in the purported agreement. We find there is nothing in this point. It was a simple mishearing and consequent error in the transcription of the surnames "Shoaib" and "Shah" which, when spoken, sound so similar that in evidence the Tribunal often required clarification of which doctor was being discussed. Second, no copy of the mentorship agreement was produced to the appeal. To the extent that this is true, we do not consider it material as Mr Symons' description of the agreement was consistent with the content of the document as it appears before us.

16 On balance, we preferred the evidence of Mr Symons whom we found to be a truthful and measured witness as opposed to the Claimant who had a tendency to describe documents as fabricated without evidence or good foundation. We find that the mentorship agreement was produced at the time of the never event but was not signed because the Claimant objected and so a more informal, case discussion process of supervision was introduced instead.

17 In December 2014, there were three incidents concerning the Claimant which arose in quick succession and which caused concern to the Respondent.

Patient 1

On 9 December 2014, the Claimant had included on Mr Symons' general trauma list an elderly lady who required a hip revision. Mr Symons refused to operate believing that she presented complications that rendered her unsuitable for the general list.

Patient 2

On 12 December 2014, the Claimant operated on a man involved in a road traffic accident. The patient experienced post-operative complications possibly due to a failure to achieve an accurate reduction.

Patient 3

On 12 December 2014, the Claimant used a minimally invasive technique to perform a hip replacement on a morbidly obese lady with a range of clinical problems.

18 Mr Symons was annoyed that Patient 1 had been placed in the general trauma list and there followed a heated team meeting when Mr Symons he expressed his irritation with the Claimant and two other doctors involved in the decision. Mr Hearth was concerned about Patient 3 and completed an incident report. Incident reports for the other two patients were produced by Mr Symons in January 2015. The Claimant's case is that the late production of the incident reports by Mr Symons supports his contention that there were no genuine grounds for concern about his judgment in any of the three cases. Indeed, he goes further, alleging that the incident reports were fabricated as part of a conspiracy by Mr Hearth and Mr Symons against him. This is a very strong allegation given the formal nature of such reports and their impact upon the Trust and its safety record.

19 We find that whilst the delay in reporting was regrettable, as was Mr Symons' further error in confusing the patient numbers for the respective incidents, these were due to administrative errors. Each of the incidents occurred and gave Mr Symons genuine cause for concern at the time and which he deemed merited further investigation. We are making no finding as to whether Mr Symons was correct to be concerned nor whether the Claimant was correct in maintaining that he had done nothing wrong. We consider these to be matters of clinical judgment on which Mr Symons and the Claimant disagree. Nevertheless, we find that Mr Symons had objectively reasonable grounds to raise his concerns with Dr Skinner in the context of the earlier fatality, the never event and the fact that the three incidents had arisen in such a short period of time. To suggest that the reports are fabricated is fanciful and is indicative of the Claimant's tendency to hyperbole when faced with documents whose content he does not agree.

20 On 22 December 2014 there was a case conference held to discuss the three patient incidents. It was attended by Ms Clare Panniker (Chief Executive), Mr Shah, Ms Lawton (HR), Dr Skinner and Ms Nikki Dyson. The serious nature of the concerns is supported by the seniority of those attending the case conference. Brief notes record that those attending the conference discussed the three patient incidents, referred to the Claimant's supervision after the never event in October 2014 (albeit wrongly recording Mr Hearth as one of the supervisors) and the contemporaneous discussion with Mr Shah in his capacity as Clinical Director of Surgery. Whilst the outcome of the case conference was that there was no question about the Claimant's technical ability as a surgeon, there was a great deal of concern regarding his judgment and decision making both before and during operations. A number of action items were agreed, these included submission of the outstanding incident reports, further investigation and arranging an external review. In the meantime, restrictions were be placed upon the Claimant's duties.

21 The notes of the case conference include "**Mr Shoaib to review patient when he comes back**". The Claimant relies upon this as evidence that there was only going to be an internal review and that the external review was decided upon later. We disagree. The external review was expressly decided in the action part of the notes. We find that the earlier reference to Mr Shoaib was specific to one of the patients and was part of the ongoing internal treatment of that patient, albeit that his review may provide some additional evidence as part of the broader, external investigation.

22 As Mr Al Hakeem made clear, since the appointment of Dr Skinner there had been a culture change and a greater desire to investigate conduct or capability issues with consultants. Whilst Mr Al Hakeem felt at times the pendulum had swung too far in favour of formal action, and matters appear to have settled down since, his evidence was consistent with Dr Skinner's overriding aim of improving safety and incident reporting. Dr Skinner had commissioned nine investigations of consultants, of whom three were Caucasian. Each of the Caucasian consultants were subsequently taken to a conduct or capability hearing. We infer from these findings that any other surgeon in the same position as the Claimant would similarly have been investigated externally and more formally than might previously have been the case.

23 On 29 December 2014 Dr Skinner contacted the National Clinical Assessment Service, an independent body, to obtain advice about the proposed restriction upon the Claimant's practice. NCAS subsequently confirmed the contents of that conversation in a letter of 30 December 2014, which included a statement that it was likely that the Claimant may leave the Trust as:

> "**the Trust is due to go out to advert for a new orthopaedic consultant and so will be giving [the Claimant] three months' notice. You explained that [the Claimant] is unable to apply for this substantive post as he does not have CCT. You explained that [the Claimant] is in legal dispute with the GMC regarding this."**

24 NCAS proposed lesser restrictions upon the Claimant's practice to prevent him from becoming deskilled. Dr Skinner agreed. She met with the Claimant on 29 December 2014 and told him about the three incidents which had given cause for concern, particularly in the context of the never event in October 2014. Dr Skinner told the Claimant that there needed to be an independent review as part of an investigation and that, in the meaning, NCAS had advised that there be some form of restriction on his practice, the detail of which would be discussed with Mr Symons after his return to work on 5 January 2015. The letter confirming the content of this discussion referred to the need for an external orthopaedic surgeon to review the case notes and provide evidence into the capability investigation, as decided at the earlier case conference. The Claimant did not and still does not accept that there was any genuine cause for concern in respect of the three patients.

25 On 5 January 2015, Mr Symons sent an email to all of the surgeons within the department, copied to a number of other individuals including some administrative support workers. The email referred to the investigation of three recent trauma cases being operated or managed by the Claimant, stated that there will be an external independent investigation pending which the Claimant had agreed to work under restrictions which meant that he would not undertake any surgery or see new patients in his out patient clinic. As the Claimant's trauma commitments needed to be rearranged and cover provided, Mr Symons asked for volunteers for on call work. He concluded that the

investigation must be extremely stressful for the Claimant and that he would require their support throughout.

26 The Claimant was unhappy that the email was sent making public the investigation into his capability which he found to be undermining of his reputation. He contrasts the position with that of Tim Peckham, a white consultant, who in October 2014 was unable to undertake his trauma theatre commitments for health reasons. On that occasion, Mr Symons had emailed those in the department informing them that Mr Peckham would not be working and that cover would be required. He did not however give the same degree of details as to the reasons as he did subsequently in the Claimant's case.

27 We accepted Mr Symons' explanation that in both emails he had been concerned to ensure cover for the trauma service. He did not give more information about Mr Peckham's health issues as these were already common knowledge within the department and, as such, he believed that no further explanation was required. By contrast, the email about the Claimant had been sent immediately after his return from holiday and Mr Symons believed that the rest of the department did not already know about the reasons why cover was needed for the Claimant. Both in an internal appeal and in evidence to this Tribunal, Mr Symons frankly admitted that his email about the Claimant was ill judged and insensitive, should not have been sent to all in the team and he apologised to the Claimant. He maintained that he acted out of naivety and error of judgment rather than malice. Mr Symons' evidence was plausible, demonstrated a great degree of insight and his acceptance of personal responsibility was appropriate. On balance, we find that the email was sent to arrange the workload in the team and that the same email would have been sent in these circumstances irrespective of the Claimant's race.

28 On 8 January 2015, Mr Shoaib wrote to confirm the outcome of his review of Patients 2 and 3. The Claimant interprets this letter as a total vindication obviating the need for further investigation. We do not agree. Mr Shoaib stated that the standard of care had not been up to the mark for Patient 2, noted that he would have carried out a different procedure but understood how the situation may have arisen. As for Patient 3, he noted that the Claimant had used a rather minimally invasive approach and that his recommendation to the Claimant would have been a bit more generous with his incision given the high BMI of the patient and to make an effort to check for the kind of complication experienced. In both patients' cases, Mr Shoaib recognised however that different approaches are possible and that known complications may arise. Read fairly, we accept Dr Skinner's evidence that it did not resolve the underlying concerns about the Claimant's decision making and that an external investigation remained necessary. The Claimant later sought Mr Shoaib's opinion about Patient 1. On 21 January 2015, Mr Shoaib confirmed that he would have considered the same procedure as undertaken by the Claimant. He did not address the concern about whether she should have been in the general trauma list.

29 With the Claimant's agreement, Professor Briggs was appointed as the external reviewer. Professor Brigg's professional abilities and opinion are held in high regard by the Claimant and Respondent alike and his ultimate assessment was accepted by both.

30 On 21 January 2015, the Claimant emailed Dr Skinner taking issue with many of the points recorded in the letter confirming her discussion with NCAS. Despite his

detailed rebuttal of a number of points made by Dr Skinner to NCAS, the Claimant did not take issue with the reference to supervision after the earlier never event. We considered this consistent with our finding set out above that the mentoring was not a later fabrication devised by Mr Symons as the Claimant suggests.

31 The Claimant had his own conversation with NCAS, the contents of which are recorded in a letter dated 22 January 2015. The Claimant had raised a number of concerns about the behaviour of Mr Symons which he suggested had changed towards him following the disagreement at the departmental meeting on 9 December 2014 about the clinical management of Patient 1. He told NCAS that Mr Symons was overcritical and over-sensitive about aspects of his practice. NCAS advised that the Claimant include the actions of Mr Symons within the scope of the investigation.

32 On 23 January 2015, the Claimant raised a grievance about Mr Symon's actions since 9 December 2014, noting that until that date he considered Mr Symons not only a clinical lead but also a friend. The Claimant set out in detail the reasons why his management of the patients was appropriate. He complained about Mr Symons' anger in the departmental meeting, criticism of a colleague (Mr Waheed) and the 5 January 2015 email to the team. The Claimant did not allege race discrimination nor did he suggest that Mr Symons was involved in some sort of plan to secure his dismissal, both matters which the Claimant has alleged subsequently. We find that the contents of the grievance are consistent with a professional difference of opinion and falling out between former friends. The Claimant was unable to accept that there could be questions about his professional judgment and in turn questioned the professional judgment of Mr Symons.

33 Upon receipt of the grievance, Mr Shah tried to meet with the Claimant to discuss the grievance informally. This did not prove possible due to Mr Shah's diary commitments and the matter drifted whilst the capability investigation was progressed and due to organisational changes with HR personnel. We do not accept that the delay was malicious or an attempt to avoid resolving the Claimant's concerns.

34 On 2 February 2015, Mr Symons sent the Claimant a memo referring to mentoring stating "**this memorandum has been put in place so that there is a more defined structure to the process of mentorship by Mr Shoaib with regard to elected hip surgery in adults and elective knee surgery"**. We find that the reference to a more defined structure is consistent with the informal arrangement after the October never event. The Claimant was set criteria to achieve before returning to unsupervised primary total hip replacements. The focus of the mentorship upon pre-operative and post-operative outcome discussions with Mr Shoaib is consistent with concern about the Claimant's judgment and decision making rather than his technical skills.

35 Dr Skinner appointed Mr Ojotiku (Consultant in Obstetrics and Gynaecology) to investigate the capability procedure. We did not consider it relevant to the issues to be determined by us to find whether he was technically a case manager or an investigating officer. Mr Ojotiku was to investigate by way of interviews with the Claimant, Mr Symons and any other relevant colleagues and be provided with an external expert report from Professor Briggs. An early email from Dr Skinner accepted that the investigation would include Mr Symons' motivation as alleged in the Claimant's grievance. On the advice of HR, Dr Skinner subsequently changed her mind and decided instead to focus on the clinical issues. Dr Skinner had sought to accommodate the Claimant's concerns about the expert and legal adviser originally proposed. We find that she sought to be fair to the

Claimant in the process and that her decision to exclude his grievance from this clinical investigation was taken for genuine operational reasons, despite NCAS advice that they be considered together.

36 The Claimant attended an investigation meeting with Mr Ojotiku on 17 March 2015. He expressed his concern that Mr Symons had been picking on him since their professional disagreement on 9 December 2014 but he did not express any concern about race discrimination. Due to the time taken for Professor Briggs to provide his report, the investigation report was not finalised until 7 May 2015. It concluded that there was no case to answer. Relying heavily on Professor Briggs' opinion, Mr Ojotiku accepted that there were different professional views about methods of patient care which were genuinely held and equally valid such that the Claimant's decision making had been acceptable. As Professor Briggs made clear, the Claimant's care of the three patients was neither perfect nor negligent, his outcomes were not unreasonable and there was no evidence of persistent poor performance or decision making.

37 Upon receipt of the reports, Dr Skinner met with the Claimant on 3 June 2015 and the restrictions on his practice were lifted on 9 June 2015.

38 Following the conclusion of the clinical investigation, there was an informal discussion about the grievance on 25 June 2015 between the Claimant, Mr Symons and Mr Shah. It was not a meeting which had been pre-entered into the Claimant's diary. Rather, the Claimant had expressed a desire to move forward and maintain a good working relationship, particularly as the process to recruit substantive consultants was due to take place. There is a dispute of evidence about the extent to which the grievance was discussed on 25 June 2015. The Respondent's case is that there was a detailed discussion of the particular parts of the grievance. The Claimant's case is that there was no discussion at all. On balance we find the truth to be somewhere in between. There was discussion about the grievance insofar as it covered the professional disagreement between Mr Symons and the Claimant on 9 December 2014 and their mutual desire henceforth to move on and to work together professionally. This is consistent with Mr Shah's contemporaneous emails and the Claimant's contemporaneous conversation with NCAS, recorded in the letter dated 30 June 2015. In his evidence to this Tribunal, the Claimant suggested that he had been threatened or intimidated into withdrawing his grievance. This is not consistent with the contemporaneous documents, including the NCAS letter, which lead us to find that the Claimant willingly withdrew his grievance. We considered this to be a further example of unreliability in the evidence of the Claimant and a tendency to re-interpret with hindsight and through the prism of his subsequent disappointment. We would go so far as to say that had the Claimant been successful in his application for the substantive consultant post, we very much doubt that the grievance, or the professional disagreement at its heart, would have been raised again.

39 In the background, the Respondent was proposing to recruit for substantive consultant posts in orthopaedics. This had been anticipated for some time, as may be seen by the reference in the NCAS letter dated 30 December 2014.

40 In order to be eligible for a substantive consultant post, the applicant must be already on the specialist register or within six months of admission. In January 2015 the Claimant informed Dr Skinner that his legal challenge to the GMC refusal had been "**finalised in my favour**". This reference to the Court of Appeal judgment was overly optimistic and rather misleading given the qualified and limited extent on which the matter

had been remitted. It is not that the Claimant sought to mislead rather, we find, indicative of his tendency to hear and accept information only to the extent that it supports his existing view and to reject all that does not. In fact, in April 2015, the GMC had again refused to admit the Claimant onto the specialist register. The Claimant again appealed this decision. In July 2015, and without making reference to the April 2015 refusal, the Claimant confirmed to the Respondent that his assessment would take place on 21 and 22 September 2015. The Claimant was not successful in that assessment either. He has appealed to the County Court but, as of the final day of this Tribunal hearing, the Claimant had still not been admitted onto the specialist register.

41 On 12 June 2015, the Respondent advertised for consultant orthopaedic surgeons for lower limb. The Respondent originally intended to appoint a consultant in hip and knee surgery. A draft advertisement was produced but, before being published, the Respondent decided instead to advertise for consultants in hip surgery and/or knee surgery and/or foot and ankle surgery. The Respondent's case is that Mr Symons carried out a review of the orthopaedics department in which he identified a deficit in foot and ankle capacity other than in routine trauma, where work was being sent away to other hospitals or organisations. We accept Mr Symons' evidence that he wanted to recruit the best orthopaedic consultants. If they specialised in a particular type of work, whether it be hip or knee or foot and ankle, the work would then be re-arranged internally to enable it all to be covered at the Trust. The decision to advertise for the wider role was discussed and approved by the Trust Board.

42 It was expected that the Claimant, and the other two locum consultants, would apply for a substantive post. The Claimant had made clear to Mr Symons that he intended to apply. The Respondent delayed publication of the advertisement so that, when he did apply, the Claimant could do so without being subject to restrictions on his practice. In July 2015, Mr Symons offered to help the Claimant with his application. Efforts were made by the Claimant and Mr Symons to set up a meeting to prepare for the interviews. These efforts were unsuccessful but contemporaneous texts show that the Claimant was as keen to be helped by Mr Symons as the latter was to offer his help.

43 The Claimant's case is that there was so much hip and knee surgery, which he undertook as the busiest practitioner in the team, that it made no sense to replace a hip and knee surgeon (him) with a foot and ankle surgeon. In essence, the Claimant alleged that the advertisement was changed as an act of bad faith to prevent him from obtaining a substantive consultant post. When cross-examined about the Respondent's attempts to improve the Claimant's prospects of appointment (for example in delaying the advertisement), the Claimant suggested that this was some sort of plan to encourage him to apply, then not select him and dismiss him as a consequence. We reject this as fanciful and implausible. If the Respondent had wished to secure the termination of the Claimant's employment, it would have been far easier to advertise the post when the Claimant was working under restrictions. Further, it is not consistent with the December 2014 conversation with NCAS which had already identified the problem with the Claimant not being on the specialist register. Nor is it consistent with the Claimant's desire to secure Mr Symons' help and support in his application.

44 There were three orthopaedic posts available in this recruitment exercise: children, upper limb and lower limb. The panel for all three posts included Ms Panniker (CEO), Dr Skinner (Medical Director), Ms Sarker (Head of Nursing), Mr Shah (Clinical Director), Miss Hing (external Royal College representative) and Ms Omoleigho (HR).

Invitation letters sent to the applicants also identified an additional interviewer as follows: Mr Targett for lower limb, Mr Symons for children and Mr Peckham for upper limb. In fact on the day of the assessment, each of these sat on all three interviews. The letter inviting the Claimant to his interview did not state that Mr Symons would be on his interview panel. On the day, the Claimant did not object. We do not find this surprising given the mutual resolution of the grievance and the fact that the Claimant had been seeking Mr Symons' help with interview preparation.

45 On 24 August 2015, the Claimant provided a presentation to stakeholders. There is a dispute as to the strength of the Claimant's performance in the presentation. The Respondent relies upon notes by an HR representative, which we accept were taken contemporaneously, which suggest that the Claimant was ranked second overall for the lower limb candidates as his answers were more focused on what he would do personally rather than the broader picture. By contrast, the Claimant relies upon a letter sent on 3 December 2015 by Mr Shoaib, one of the stakeholders who heard the presentation, who referred to the Claimant's performance as being quite impressive and ranking him as first of the lower limb candidates. The Claimant asserts that the HR note is a fabrication after the event.

46 Whilst there is a difference in the content of the HR note and Mr Shoaib's letter, we put this down to the fact that the latter was produced three months' later whereas we accept that the HR note was contemporaneous (being referred to as an appendix to Mr Shah's report to the subsequent appeal against dismissal). On balance, we find the HR note more accurate and accept that Mr Shoaib's recollection was mistaken due to the passage of time.

47 On 25 August 2015, the Claimant attended his interview. Some of the interviewers made notes as an aide memoire, some made no notes at all. No notes were taken as part of a formal scoring process. As a Foundation NHS Trust the Respondent is free to adopt its own recruitment procedures and the NHS standard process which requires more formal note taking and scoring is not directly applicable. The decisions on appointment were reached by agreement, following discussion between the interviewers. Ms Omoleigho compiled a summary of points made in the discussions. The subsequent appeal hearing management case refers to this document which is stated to be attached as an appendix. We accept on balance that the extract of that summary relating to the Claimant's interview was created contemporaneously and based upon the comments and notes of the interviewers on the day. Similar summaries were produced for the other candidates but were redacted in the bundle.

48 It is not in dispute that the Claimant performed strongly in his interview and exceeded the threshold required for appointment. The interviewing panel concluded, however, that another candidate performed even better on the day. As Mr Targett subsequently confirmed in a contemporaneous email to the Claimant, the standard of candidates was high and there had been a fine difference between the Claimant and the successful candidate.

49 As might be expected, different panel members formed different views about the detailed performance of the candidates. These views were discussed as part of the process for agreeing the preferred candidate. We do not accept that this amounted to "arm twisting" as the Claimant characterised it. In the industrial experience of the Tribunal lay members, this is a perfectly common process and the fact that some views will have

changed following discussion does not render it inappropriate. There was no evidence that the discussion was inappropriate or that any interviewer was improperly pressured to change their view.

50 The contemporaneous notes of the Claimant's interview show some weaker areas of the Claimant's responses in the eyes of particular interviewers. These include Mr Peckham, who had not been involved in the earlier clinical investigation, and Ms Hing, the external interviewer. The Claimant sought to carry out a forensic analysis of the interview notes as part of his case that they were inconsistent and/or fabricated after the event. We do not consider that it is the role of the Tribunal to reach its own conclusion about the correct candidate for appointment. We do not have the benefit of seeing the performance of all of the candidates on the day. As for the suggestion that the notes were fabricated or otherwise not genuine, we do not agree. The notes are detailed and consistent with being written during the interviews, with comments noted in a variety of places on the pages and different interviewers noting different features of the Claimant's performance. The allegation of fabrication is made without supporting evidence, based only on the Claimant's suspicion and inability to accept that he was not the strongest candidate. It was a feature of this hearing, as already noted, that the Claimant at times made such allegations to answer evidence which did not accord with his own view. We consider that this is a further such occasion. We accepted the evidence of the Respondent, in particular that of Dr Skinner, that the notes were contemporaneous and recorded the genuinely held views of the panel at the time.

51 Some of the weaknesses identified in the Claimant's interview included Dr Skinner's note that the Claimant was rather verbose and "all about him". Dr Peckham regarded him as not being a convincing team player. Mr Symons considered the Claimant to be overly confident. None of these observations was inconsistent with the Claimant's presentation in his evidence to the Tribunal, even if other interviewers did not reach exactly the same conclusion at the time.

52 Overall the Claimant was ranked as the third preference for appointment. No interviewer placed him as first choice, although Ms Hing did put him in second place. The successful candidate was English Pakistani and from an external hospital.

53 The Claimant was told by Mr Symons and Mr Shah on 26 August 2015 that he had not been successful at interview and provided some informal feedback. On 1 September 2015 the Claimant challenged the decision and asked for formal feedback from Mr Symons and Mr Shah. At the same time, the Claimant approached some of the other interviewers to ask for their informal feedback. One, Mr Targett, suggested that he had not regarded the Claimant as weak on team performance. The Claimant relies upon this as evidence that the interview was not fair and/or the assessment of other interviewers was not genuine. We disagree. It is not surprising that there were different views of the Claimant's strengths and weaknesses. That there were differences is due to the subjective nature of an interview. Here, the Respondent attempted to minimise the degree of subjectivity by asking the same questions of each candidate, having a large panel and moderating subjective views in a group discussion before reaching consensus overall. In any event, we note that whilst the Claimant relies upon Mr Targett's comments about teamwork, he disagreed with other parts of Mr Targett's assessment which he considered unfairly critical.

54 The Claimant asked for formal feedback on more than one occasion. No formal

feedback was provided to him. This is regrettable as it has contributed to the Claimant's suspicion of the fairness of the process. Whilst formal feedback might have helped the Claimant to develop insight into his own performance, we doubt that he would have accepted it as genuine or valid even if given. The Claimant demonstrated a tendency to refuse to accept the validity of any point of view with which he did not agree, whether that be the interviewers at the Respondent, the GMC in its refusal to admit him onto the specialist register, the professional view of other surgeons in the case of the three patients where investigation was required and even the Respondent's decision to include foot and ankle within the advertisement for the substantive consultant posts. It is one thing to consider that somebody has reached the wrong decision, quite another to then suggest that the decision must be made in bad faith as the Claimant has sought to do on more than one occasion in evidence before us.

55 On 1 September 2015, the Claimant purported to reinstate his earlier grievance on grounds that it had never been dealt with. This is not accurate as the Claimant had agreed to withdraw his earlier grievance and there was nothing to reinstate. The Respondent refused to re-open the earlier grievance but advised him that he could present a new grievance.

56 Also on 1 September 2015, the Claimant raised concerns to Dr Skinner about Mr Symons' clinical management of two patients. Over the subsequent few days, the Claimant added further concerns about other patients. On 8 September 2015, the Claimant emailed Dr Skinner, copied to Ms Panniker, setting out particular patient concerns and a more general concern that a recent audit had shown Mr Symons to be an outlier for standard routine procedures. The Respondent concedes that the email was a protected disclosure raising concerns about the safety and appropriateness of Mr Symons clinical practice. The Claimant's email was forwarded to Mr Shah on 9 September 2015. Mr Shah's evidence was that he did not know that there had been a protected disclosure until he read the emails and replied on 10 September 2015.

57 In a further discussion with NCAS on 1 September 2015, the Claimant expressed his unhappiness with the interview process and fears that the panel had been biased against him. NCAS recorded the confirmation by the British Medical Association that the Claimant's length of service to date did not give him a right of tenure. NCAS advised that having submitted himself to an open appointment process and being unsuccessful, the Respondent may now terminate his contract. This advice was broadly consistent with the evidence given by Mr Al Hakeem that, whilst it is not impossible for a locum to be retained even after a substantive appointment has been made, it would be unusual and certainly not automatic or standard practice. Once a substantive appointment has been made, the employer no longer has the budget for a locum, unless a sufficient business case can be made the locum will then leave.

58 On 9 September 2015, the Claimant met with Mr Andy Boden (HR) and Mr Shah to discuss arrangements surrounding the termination of his employment. The Claimant covertly recorded the conversation. Judge Hyde at a Preliminary Hearing ordered that a transcript be provided and the Claimant has since produced a transcript of parts of the conversation. In the course of our hearing, the Respondent produced a transcript of the full conversation on 9 September 2015 which provided a better sense of context and tone. Mr Shah repeatedly made it clear that the Claimant would be given one month's notice, that another locum (Mr Waheed) was in the same position, that there was work to be done pending the new consultant taking up their role and that there may be further backlog work

to be done which would be discussed with both the Claimant and Mr Waheed. At the time of the discussion, Mr Shah believed that the Claimant was only entitled to one month's notice. There is nothing in the conversation to suggest that Mr Shah was aware at the time of the protected disclosure. The tone of the conversation is supportive and not consistent with the Claimant's case that Mr Shah was part of the plan to ensure that he was not appointed to the substantive post in order to dismiss him.

59 We considered Mr Shah to be a credible and reliable witness. We accept Mr Shah's evidence, consistent with the transcript read fairly, that at the time of the conversation he did not know about the protected disclosure but was keen to ensure that the expiry of the Claimant's notice would coincide with the start date of the new substantive consultant. This was to enable the Respondent to continue to provide knee and hip work in the meantime. Mr Shah was clear that he was making no promises to the Claimant. On balance, we find that Mr Shah did not agree to work out capacity and demand for surgery before notice was given. At most, Mr Shah indicated an intention to consider the general workload of the department pending the start of the new consultant. In the event, the hip and knee work in the unit was rearranged amongst the surgeons following the Claimant's departure, for example Mr Shoaib now does more hip and knee work and Mr Ranjith reduced his foot and ankle work to take on more primary hip and knee and complex knee work.

60 On 16 September 2015, the Claimant was served with notice of termination of employment. Mr Shah had been advised in the days following the 9 September 2015 meeting that the Claimant was entitled to three months' notice (not one month as Mr Shah had erroneously believed).

61 The complaints raised by the Claimant against Mr Symons were taken seriously by the Respondent. Dr Skinner referred them to the patient safety manager. The number of clinical incidents raised by the Claimant increased between his original emails and a case management conference on 30 September 2015, attended by Ms Panniker, Mr Danny Hariram (Workforce and OD Director) and Mr Shah. By the date of the case conference, a scrutiny panel had reviewed 11 of the cases raised by the Claimant. The scrutiny panel made a number of recommendations including commissioning an external independent expert review and a review of the Trauma and Orthopaedic service more generally. The case conference concluded that there were areas of improvement for Mr Symons and that he should be subject to further monitoring. No restriction on practice was required formally as Mr Symons had agreed to discuss all trauma cases with a colleague. This is consistent with the informal supervision and/or mentoring process intended to apply to the Claimant after the never event in October 2014.

62 The Respondent subsequently contacted Professor Briggs for assistance with the independent expert review. On Professor Briggs' recommendation, the Royal College of Surgeons undertook a wide-ranging departmental review which considered some of Mr Symons' cases but also some from other surgeons. Mr Symons was not subject to a formal capability investigation as Dr Skinner regarded him as an experienced, specialist substantive consultant with no background of concerns to his practice beyond those raised by the Claimant and which spanned a large period of months. We accepted her evidence that, in this regard, she regarded him as very different to the Claimant who was a locum, not on the specialist register who had been recently involved in a never event and then the subject of concern about his treatment of three patients within a matter of days of each other.

63 The Claimant appealed against his dismissal. The appeal hearing, chaired by Ms Riddell, was a careful and detailed hearing, with witnesses were called and subject to questions from the Claimant, with a full opportunity for the Claimant to challenge his non-selection at interview and to raise his concerns about the earlier capability investigation and his belief that he had been ill-treated by Mr Symons and others. The Claimant was provided with the management case and all relevant information in advance of the appeal hearing. Despite this, the Claimant did not at any point explicitly allege in his appeal that he was being treated less favourably because of race. The Claimant did once refer to differences in background. Read fairly we do not consider that such an opaque comment can reasonably be said to be an allegation of race discrimination, far less that Ms Riddell should have considered or found race discrimination on the strength of it.

64 In a well-reasoned and comprehensive outcome letter, Ms Riddell informed the Claimant that his appeal was not upheld. In evidence, the Claimant considered in great detail comments made in the appeal hearing (a full transcript of which was in the bundle before us, extending to some 101 pages) and sought to persuade us that there were material inconsistencies with the witness evidence given in this hearing. We have considered some points to the extent relevant as set out above, for example the October 2014 mentoring document and the extent to which notes were taken at the interview on 25 August 2015. Insofar as not considered explicitly above, we considered the matters relied upon by the Claimant to be minor and explained by the frailty of memory. We are not persuaded that there is any material inconsistency sufficient to doubt the credibility and reliability of the evidence given to us by Mr Shah, Dr Skinner or Mr Symons.

The Law

Discrimination

65 Section 13 Equality Act 2010 provides that a person discriminates against another if, because of a protected characteristic, he treats that other less favourably than he treats or would treat others. Race is a protected characteristic. Conscious motivation is not a requirement for direct discrimination, it being enough that race had a significant influence on the outcome. The crucial question is why the complainant was treated in the way in which they were, particularly in cases where there are no actual comparators identified, **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] IRLR 285.

66 In considering the burden of proof, we referred to s.136 Equality Act 2010 and the guidance set out in the case of **Igen Ltd v Wong** [2005] IRLR 258, CA as approved in **Madarassy v Nomura International Plc** [2007] IRLR 246, CA. This guidance reminds us that it is for the Claimant to prove facts from which the Tribunal could conclude, in the absence of adequate explanation, that the employer has committed an act of unlawful discrimination. The outcome at this stage of the analysis will usually depend upon what inferences it is proper to draw from the primary facts found by the Tribunal. Where the Claimant has proved such facts, the burden of proof moves and it is necessary for the employer to prove on the balance of probabilities that the treatment was in no sense whatsoever on the prohibited ground. If the Respondent cannot provide such an explanation, the Tribunal must infer discrimination.

67 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 we

could conclude that there had been discrimination, **Madarassy** at paragraphs 54-57. The protected characteristic must be an effective cause of any less favourable treatment. We must take care to distinguish between unfair or unreasonable treatment and discriminatory treatment as the two are not the same.

68 Where a discrimination claim is based upon multiple allegations, it is necessary for the Tribunal to consider each allegation individually and also to adopt a holistic approach to consider the explanations given by the Respondent. We should avoid a fragmented approach which risks diminishing the eloquence of the cumulative effect of primary facts and the inferences which may be drawn, for example see **X v Y** [2013] UKEAT/0322/12. We must consider the totality of the evidence and decide the reason why the Claimant received any less favourable treatment.

Protected Disclosure

69 A qualifying disclosure requires a 'disclosure of information' which in the reasonable belief of the worker tends to show a prescribed failure, s.43B(1)(b) Employment Rights Act 1996. The Respondent concedes that the Claimant made a protected disclosure in his email to the Chief Executive on 9 September 2015.

70 There is no requirement that the protected disclosure be the sole or principal cause for the detriment in a section 47B claim. It is sufficient that it is a material influence, in the sense of being more than a trivial influence, **Fecitt v NHS Manchester** [2012] ICR 372, CA. By contrast for a s.103A unfair dismissal, the protected disclosure does have to be the reason or principal reason for dismissal.

71 If a claimant positively asserts that there was an inadmissible reason for dismissal, he will be expected to produce some evidence supporting that positive case. The claimant does not bear the legal burden of proving that dismissal was for that reason and the Tribunal must decide the reason based upon direct evidence and any permissible inferences which may be drawn, **Kuzel v Roche Products Ltd** [2008] ICR 799.

Unfair Dismissal

72 Section 98 of the **Employment Rights Act 1996** ("the 1996 Act") provides the Respondent bears the burden of proving a potentially fair reason for dismissal or "some other substantial reasons of a kind such as to justify the dismissal of an employee holding the position the employee held".

73 The expiry and non-renewal of a fixed term contract may amount to some other substantial reason where purpose for the contract has ceased to be applicable, **Fay v North Yorkshire County Council** [1986] ICR 133.

74 Once a potentially fair reason is proved, s.98(4) provides that the Tribunal must consider whether dismissal is fair or unfair, depending on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and shall be determined in accordance with equity and the substantial merits of the case.

75 In many cases there is a range of reasonable responses where one employer

might reasonably decide to dismiss, yet another employer equally reasonably decide not to dismiss. Neither can be challenged as unfair. As long as dismissal falls within this range, the Tribunal must not substitute its own views for that of the employer, **London Ambulance Service NHS Trust v Small** [2009] IRLR 563. However, the band of reasonable responses is not infinitely wide and it is important not to overlook s.98(4)(b) the provisions of which indicate that Parliament did not intend the Tribunal's consideration to be a matter of procedural box ticking, **Newbound –v- Thames Water Utilities Ltd** [2015] IRLR 734, CA.

Conclusion

Race Discrimination

76 The Claimant's case on race discrimination is in relation to the restrictions on his surgical practice, formal capability investigation, failure to investigate his complaints about Mr Symons' motives and the email sent by Mr Symons on 5 January 2015. The agreed list of issues do not include complaints about his non-selection for interview or dismissal. The Claimant relies upon Mr Symons as an actual comparator to demonstrate less favourable treatment for all except the email, where he relies upon Mr Peckham as an actual comparator.

77 It is clear that the Claimant was treated less favourably than Mr Symons insofar as he was subject to a formal capability investigation and subject to formal restrictions on his surgical practice whereas Mr Symons was not. We are not persuaded, however, that Mr Symons is a proper comparator for the purposes of the Equality Act as we have found his circumstances to be materially different to those of the Claimant. Mr Symons is a substantive consultant on the specialist register. The Claimant is a locum consultant not on the specialist register. The concerns about the Claimant's practice involved only his hip practice, with three patients within a matter of days. The concerns about Mr Symons' practice involved approximately 11 patients, over a number of years and related to a range of different operations with other consultants also involved. The Claimant had been involved in a never event only three months before. Mr Symons had not. The Claimant was subject to informal mentoring (and the Respondent had believed that more formal mentoring was required). Mr Symons was not. For these reasons, we find that the two men were not truly comparable.

78 Even if not a statutory comparator, we considered whether or not Mr Symons was an evidential comparator and whether a hypothetical comparator would have been treated differently. For the reasons set out above, we found Dr Skinner to be an impressive witness and have no hesitation in finding that the treatment of the Claimant was in no sense whatsoever to do with race. Dr Skinner worked hard to improve the Respondent's safety record and did so by much greater scrutiny and willingness to undertake formal capability procedures. Dr Skinner was genuinely concerned about the Claimant's decision making, as were Mr Symons and Mr Shah. The Respondent took the Claimant's allegations very seriously, with an internal scrutiny panel, a case conference at senior level and, as with the Claimant, involvement of Professor Briggs as an independent external expert. It was Professor Briggs who suggested involving the Royal College of Surgeons. Their comprehensive review and our findings about Dr Skinner's commitment to patient safety and improvement of incident reporting at the Respondent are entirely inconsistent with the Claimant's case that Dr Skinner handled the investigation of Mr Symons' in a manner which seemed like a cover up. We are satisfied that Dr Skinner

would have treated a hypothetical surgeon in the Claimant's position in exactly the same way, irrespective of their race.

79 On our findings of fact, we do not accept that the Respondent avoided or failed to investigate Mr Symons' motives as the wording of the agreed Issues state. The Claimant's grievance was acknowledged upon receipt and initial attempts were made to arrange a meeting to start such an investigation. The Claimant wanted it to be considered as part of the formal investigation into his own capability being conducted by Mr Ojotiku. Other employers, and indeed the NCAS, might have considered it appropriate to have done so. However, we have found that Dr Skinner reached her decision to exclude the issue of Mr Symons' motivation on the advice of HR and to focus instead on the clinical issues. There were sound and genuine reasons for first determining whether there were capability concerns before then considering the motive of Mr Symons in raising the same. Shortly after conclusion of the capability investigation, the Claimant agreed to withdraw his grievance as he and the Respondent wished to move on. This withdrawal removed the need for further investigation.

80 The Claimant has not adduced any evidence from which we could make the necessary findings of fact that he has been treated less favourably than Mr Symons was or would have been (again Mr Symons is relied upon as an actual comparator for these Issues). Even if we could have reached such a conclusion, we have made no primary findings of fact from which we could conclude that this was because of race.

81 The final act of race discrimination is the 5 January 2015 email sent by Mr Symons. Mr Peckham was a surgeon who was unable to operate and for whom trauma cover was required. So was the Claimant. Although the underlying cause of the inability to operate was different, health as against concerns, we do not consider it material in the circumstances of this case and we accept that Mr Peckham is an appropriate comparator. The Claimant was treated less favourably than Mr Peckham as the email sent in respect of cover for the latter did not explicitly disclose confidential matters, irrespective of whether or not colleagues knew informally.

82 In determining whether this less favourable treatment was because of race, we considered the burden of proof provisions and whether there was "something more" than a difference in treatment and a difference in race. We considered the similarity of the need for trauma cover and the close time period within which each email was sent to be sufficient to pass the burden of proof to the Respondent, requiring it to provide an explanation which was in no way whatsoever on grounds of race.

83 As set out in findings of fact, we have accepted Mr Symons' evidence that both emails were sent to ensure adequate trauma cover. Mr Symons believed that the reasons for Mr Peckham's absence were well-known within the department and so that email did not require disclosure of why colleagues were being asked to provide cover. Mr Symons' reason for disclosing the Claimant's situation was that the same colleagues would not have known why they were being asked to provide cover in his case. Unreasonable treatment is not the same as discrimination. However ill-judged the email sent on 5 January 2015 was, Mr Symons' desire to provide an explanation for a request for cover and his belief that such explanation was required for the Claimant but not for Mr Peckham. We conclude that this was the only reason for the difference in the level of disclosure in the emails and that the Claimant's race played no part in it whatsoever.

84 Looking at the race case holistically, prior to 9 December 2014, the Claimant and Mr Symons enjoyed a positive working relationship and personal friendship. This changed after 9 December 2014 in a heated professional disagreement in a team meeting and has deteriorated further to such an extent that the Claimant now believes that Mr Symons has colluded in a conspiracy to secure his dismissal and discriminate against him. As Ms Criddle submitted, the Claimant could proffer no explanation why Mr Symons, his friend until 9 December 2014, should suddenly have taken against him because of he is of North African origin. The claim of direct discrimination because of race fails and is dismissed.

Unfair Dismissal and Protected Disclosure

85 The Claimant's case is that he was given notice because he had made a protected disclosure and that there was a backlog of hip and knee work arising from the appointment of short term locum during the summer period, the effect of which would have been to avoid dismissal at all. The Respondent's case is that the backlog had been resolved and that there was no need for the Claimant to provide additional work, given that he would be working a longer notice period which would provide adequate cover until the new consultant started.

86 We do not accept that the protected disclosure was the sole or principal reason for dismissal or that it was a material or effective cause for notice being given. In preferring the Respondent's case, we did not consider it necessary to undertake the detailed analysis of statistical information about hip and knee work urged upon us by the Claimant. As with Mr Waheed, who had not made a protected disclosure, it was always the case that the Claimant would be given notice of termination of employment if not appointed to the substantive post. This is consistent with the NCAS letter dated 30 December 2014 setting out the Respondent's position long before any protected disclosure. It is also consistent with the contents of the NCAS record of the conversation with the Claimant on 1 September 2015. Both NCAS letters pre-date the protected disclosure.

87 The discussion on 9 September 2015 made clear that the only issue was when notice would be given. Notice was not given on 9 September 2015 because Mr Shah erroneously believed that only a short period of notice would apply. When this was corrected by HR, the degree of uncertainty and the risk of being left without consultant cover had been removed by the lengthier period of notice. We are satisfied that the timing of the notice to terminate was not in any way connected to the protected disclosure but was entirely due to the realisation that the Claimant was due a three month notice period which would of itself provide an adequate period of cover pending the arrival of the new appointee.

88 As part of his unfair dismissal case, the Claimant also relies upon the decision to change the advertisement to include foot and ankle work and procedural failings in the interview process as material from which we could infer that this was a sham. His case is that the Respondent deliberately set out to disadvantage him and to reduce his prospects of successful appointment to a substantive post as it wished to secure his dismissal. The Respondent, by contrast submits that this was a genuine decision to meet an operational need identified by Mr Symons and agreed at Board level.

89 Insofar as the Claimant argues that the Respondent had already decided that it wanted to secure his dismissal by June 2015 when it changed the job advertisement, we note that it is at odds with his claim that the principal reason for dismissal was a protected

disclosure which would not happen for a further three months.

90 In considering the competing cases as to the reason for including foot and ankle work in the advertisement, we accept that in the running of any business (or as here a hospital) there will be differences of opinion as to the wisdom of different recruitment choices. Whether or not the Respondent's decision was a wise choice or the right choice is not for us to say, so long as we conclude that it was a genuine reason and a sufficient reason, it will pass the requirement of section 98(1) ERA.

91 Based upon our findings of fact, we have concluded that the Respondent wished to recruit the best lower limb surgeon to the job. If that were a hip and knee specialist so be it. If, however, the successful candidate was a foot and ankle surgeon, the Trust could rearrange its offering and retain that work in-house with the Claimant's hip work being reallocated amongst the other surgeons. This latter scenario has in fact occurred with Mr Shoaib and Mr Ranjith absorbing the Claimant's work. The change to the advertisement to include foot and ankle was not a decision taken on a whim by Mr Symons but one that was thought through and approved by the Trust Board. It is not for this Tribunal to decide, as the Claimant asks us to do, whether the decision to dismiss him adversely affected the quality of hip and knee replacement work for the local population.

92 It is fanciful to suggest that the role was changed simply to disadvantage the Claimant or to ensure that he would not be successful. The Claimant had made clear to Mr Symons that he intended to apply for the substantive post and this was expected given the length of his locum employment. The same also applied to the other two locum consultants who had also applied for substantive posts when advertised, one of whom was also not successful. He passed the threshold for appointment, performed well at interview and was a strong candidate. Were it not for the fact that another candidate performed better still, the Claimant would have been appointed despite his speciality being hip and knee. We conclude that the decision to included foot and ankle work was for genuine, operational reasons and we reject the Claimant's case that the decision was a sham.

93 We do not accept that this case should be considered as termination of a fixed-term contract in the sense contemplated in **Fay**. The Claimant's employment had continued without specified time limit after the expiry of the initial fixed term. However, having appointed the substantive lower limb consultant and as the Claimant's work could be and was absorbed by other surgeons, the purpose of his role as a locum had ceased. For these reasons, we accept that the Respondent has established that there was some other substantial reason which was sufficient to justify dismissal in the circumstances of the Claimant's employment.

94 In considering fairness under section 98(4) ERA, we reminded ourselves that we should not require a counsel of perfection but consider whether overall the procedure falls within the range of reasonable procedures open to an employer. The Claimant raises a number of challenges to the procedure, some of which we considered above in the context of the job which was in fact advertised. The Claimant also complains that the presence of Mr Symons on the interview panel was unfair in light of the previous capability investigation and grievance. We consider that this is a complaint raised with the benefit of hindsight when the Claimant realised that he had not been successful. The Claimant did not object to Mr Symons' presence at the time, Mr Symons had been supportive of the Claimant's application and offered to help him prepare. Both men had agreed to move

forward from the previous problems.

95 We have not made any finding that Mr Symons was anything other than fair and impartial in his approach to the Claimant, as there was no reliable evidence to justify the same. Mr Symons took detailed contemporaneous notes of the Claimant's interview, as he did with other candidates. The areas of weakness identified in the Claimant's performance were consistent with those identified by other interviewers and consistent with his demeanour giving evidence to this Tribunal.

96 The Respondent operated an interview process which fell within the range of what is reasonable. There was fair scoring, fair record keeping and a fair conclusion reached following discussion between the interviewers. It would be better practice to put in place a process to give formal feedback from a single source rather than providing ad hoc informal feedback from a range of the interviewers. This would avoid the risk of feedback which appears contradictory where different individuals attach different weight to different parts of a candidate's performance rather than a constructive, consensus explanation of what that person was not successful and how they may improve for the future. However, we do not consider that the fact that the Respondent could have handled feedback in a better way is sufficient to render the dismissal unfair for the purposes of section 98(4) ERA.

Remedy Hearing

97 By consent it is agreed that the Claimant is entitled to payment due for mileage calculated in accordance with the 2003 Consultant contract and programmed activities during the period April 2012 to June 2015. As yet, these sums have not been agreed between the parties. Insofar as it has not already been done, within 14 days of the date of this Judgment, the Claimant should provide a schedule setting out the mileage to which he claims to be entitled and the Respondent should provide a schedule of the number of programmed activities for which the Claimant has been paid. Each party should then comment on each other's schedule, clearly identifying where there is disagreement and the basis for the same, within 14 days thereafter.

98 If no agreement can be reached, the case will be listed for a two day remedy hearing to determine the money claims.

Employment Judge Russell

30 June 2017