Case Number: 2302841/2015

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant: **Mr D Kumar**

Respondent: **Guy's and St Thomas' NHS Foundation Trust**

HELD AT: **London South**

ON: **24, 25, 26, 27, 28 April 2017**
In chambers on 7 June 2017

Before: **Employment Judge Morton**
Members: **Ms NA Christofi**
Mrs C Upshall

Appearances
For the Claimant: **In person**
For the Respondent: **Ms C Musgrave, Counsel**

RESERVED JUDGMENT

1. The Claimant's claims of direct age and race discrimination and harassment because of age and race fail on their facts or because they are brought out of time. In relation to claims brought out of time it is not just and equitable for time to be extended.

2. The Claimant's claim of breach of contract fails and is dismissed.

3. The tribunal having made no award in favour of the employee in these proceedings the claim under s38 Employment Act 2002 also fails and is dismissed.

REASONS

1. The Tribunal apologies to the parties for the delay in producing this judgment which is due to factors beyond our control.

2. By a claim presented on 13 October 2015. The Claimant bought to the tribunal claims of age and race discrimination and breach of contract. The claims were resisted by the Respondent. Case Management Orders were made on 18 December 2015 and the case was originally listed for hearing for 5 days in July 2016 but was postponed.

The issues

3. At the start of the hearing the Tribunal was presented with two lists of issues, one prepared by the Respondent and the other by the Claimant. The Tribunal decided to use the list of issues used by the Respondent and take the additional points made by the Claimant into account insofar that seemed just and proportionate. The Respondent's list of issues is attached to this judgment.

The evidence

4. The Claimant Mr Kumar represented himself at the hearing although he had previously been advised by solicitors. He brought no witnesses.

5. The Respondent's witnesses were Marcus Bankes, consultant in the hip team in the Respondent's orthopaedic surgery department and the leader of that team, Mark George, consultant surgeon in the same team, David Brierley, an HR consultant with the Respondent who assisted with the respect to the Claimant's grievance in September 2015 and Lisa Town who was the deputy service delivery manager for the Respondent's surgery directorate until May 2015, but who no longer works for the Respondent.

6. There was a bundle of documents of 478 pages including some documents that were handed to the Tribunal at the start of the hearing. References to page numbers in this judgment are in references to page numbers in that bundle.

Preliminary Matters

7. The first one and a half days of the hearing were taken up with preliminary matters. Firstly the Claimant appeared to make an application to amend his claim by adding matters to his list of issues (paragraphs A3 and B3) that had not previously been pleaded. The Claimant wished to say that his appointment to a shorter fellowship than he had wished was an act of direct age and race discrimination, but this was the first time that he had made this specific allegation. The Respondent objected to the amendment and the Tribunal considered the application during an adjournment. We decided to refuse the amendment. The original claim form had not made it clear that this was the basis of the Claimant's claim and in our view the amendment was substantive.

The question in relation to an amendment application is where the balance of injustice and hardship lies and in addition to the substantive nature of the amendment sought we noted that the claim now brought, that the issuing of the contract for a shorter fellowship was an act of discrimination, was made in 2017 when the contract itself was issued almost 3 years earlier. The new claim was therefore substantially out of time. The Claimant had not explained why it was just and equitable to extend time despite the fact that he was represented by solicitors until the early part of 2017. We also noted that the Claimant had left it extremely late to make the application to amend. By his own admission (in an email dated 12 April to the Respondent's solicitors and copied to the Tribunal) he started looking at the bundle and other documents from the second week of January 2017. It is not disputed that he had the witness statements and most of the documents at that time although there had been some late disclosures. However the Claimant was fully aware of the content of the late disclosed documents and the principal facts of the case long before that date. He could therefore have made an application for an amendment earlier than he did. We also took into account the difficulties in his personal circumstances and we considered how the hardship and injustice of agreeing or refusing the amendment affected both parties. The Claimant would be deprived of the opportunity to advance a particular argument in support of his claim of discrimination. However we returned to the fact that the claim was made substantially out of time and without a compelling explanation. The Respondent on the other hand would be faced with having to defend a new allegation when the hearing had already begun. The overriding objective requires us to do justice between the parties, to consider what is proportionate and likely to save expense. We considered that the balance fell in favour of refusing amendment in this case.

8. We adopted the same reasoning in relation to a new claim in the Claimant's supplementary witness statement that some of the Respondent's conduct was retaliatory and amounted to unlawful victimisation. The Claimant had been in possession of all the documents on which he was relying since July 2016, in particular the document at page 242 j. Again we accept that for personal reasons the Claimant did not fully focus on this issue until 7 April 2017, but even then he waited a further 2 weeks to raise the issue by which time the Respondent had not had time to prepare a response. On these facts the balance of hardship and injustice favours refusing the amendment to include a claim of victimisation.

9. The Claimant also made an application on 7 April 2017 to add three of the Respondent's witnesses in their personal capacity as Respondents to the claim. The Respondent again objected to this. The Tribunal considered that the same considerations applied to this application as to the application to amend. The hardship to the Claimant was difficult to perceive. The Respondent is vicariously liable for any wrongdoing by its employees and if this amendment were allowed the remainder of the scheduled hearing would be in jeopardy because the Respondent would have to consider how to conduct its defence and whether separate representation for the individual Respondents was appropriate. The case would be unlikely to be relisted for many months. There would be significant costs to both parties but in particular to the Respondent. In

our view the balance of hardship and the overriding objective militated against granting this amendment. Any advantage to the Claimant would be marginal compared to the disadvantage to the Respondent and the additional cost and delay entailed in having to postpone the hearing.

10. The claimant also made a late application for reconsideration of a case management decision by Judge Freer in June 2016 that there should be a split hearing in this case. The test in relation to an application to reconsider on the parties' agreed position as endorsed by Judge Freer is whether it is in the interests of justice to do so. The Claimant had not in the Tribunal's view provided a satisfactory explanation as to why the interests of justice would be served by reconsidering this decision. The Tribunal considered that the interests of justice would be better served by leaving the decision undisturbed. The Respondents submitted and we agreed that a loss of opportunity claim which is the basis on which the Claimant puts forward his claim for loss, is a complex remedy issue better dealt with at a separate hearing with appropriate evidence to hand. The Respondent had not prepared to deal with the matter during the course of the hearing and it would not in our have been just to the Respondent in accordance with the overriding objective to require it to do so at such a late stage.

11. The Tribunal gave its decision on the three amendment applications orally at the hearing. Time was then taken out dealing with a complaint of late disclosure and once that was resolved there was no time to hear any evidence and a timetable was established for dealing with the evidence over the remaining days allocated to the case.

12. At the beginning of the second day of the hearing the Claimant made an application for an adjournment and stated that he had lost confidence in the system. He complained that the panel composed of three white women was not ethnically diverse. He also complained that the Respondent had made late disclosures in response to his request for documents made in February and March and that in his view disclosure was still not complete. He made an application for disclosure of all correspondence between Ms Town and himself and suggested that the case was not ready for trial. In response the Respondent took instructions on the disclosure of the documents that were the subject of the Claimant's concerns. They confirmed that documents pages 71b and 169f had been sent on 12 April, the document at page 466 on the 19 April. On 21 April the attachment to the document at page 466 was confirmed and the documents at pages 204 to 208 were supplied.

13. The Claimant then went on to refer to a document created in 2006 on the advisability of having an ethnically diverse panel in employment tribunals. Ms Musgrave observed that the Claimant appeared to be asking the panel to recuse itself and submitted that that application should be refused. The Tribunal therefore adjourned to consider whether there were any grounds on which a new panel ought to be convened and to enable the Respondent to take instructions on a matter concerning what had or had not been known to Ms Town at the time of the Claimant's appointment.

14. We then gave an oral decision that there were no grounds for the panel to recuse itself in this case. The panel had been properly constituted in accordance with statutory and extra statutory guidelines. There was also no basis for an adjournment of the case. The Respondent did not agree to the adjournment and the tribunal accepted the Respondent's submission that an adjournment had not been necessitated by its own actions during disclosure. It is the nature of Tribunal litigation that some documents relevant to the issues will come to light at a late stage. We accepted that the Respondent had conducted searches for documents requested by Claimant at each stage and had responded appropriately. It seemed clear from the application that the Claimant had made that he was fully aware of the implications of the documents that were disclosed late and would be able to address his concerns in both cross examination and submissions. In our view he had not been prejudiced by any of the late disclosures.

15. An application for postponement of a hearing must be considered under rule 30a. The balance of prejudice pointed very firmly away from agreeing to a postponement of the case at that stage of the proceedings. It would involve very considerable further delay in relation to allegations that already go back to 2014 and it is not clear that any further documents would be likely to come to light that would assist the Tribunal in resolving the issues. It would not be in the interests of justice or in accordance with the overriding objective to postpone the case and incur the delay, costs and disruption that that would entail. The Claimant's application for an adjournment was therefore refused.

16. The Tribunal delivered this decision orally at 12:45 and the Claimant was not content with the decision and asked us to reconsider it. After a fairly short adjournment the Tribunal considered the reconsideration application and whilst the Claimant had referred us to a number of documents none of them in our view showed grounds for a reconsideration of the decision not to adjourn the hearing. We had had detailed submissions from Ms Musgrave on the Respondent's position as regards disclosure and we were content that the Respondent had complied with his duty and there was no prejudice to the Claimant in allowing the claim to continue.

17. The evidence commenced at 1:30pm on the second day. However before turning to our findings of fact we will deal with a number of applications made in writing by the Claimant after the end of the hearing. The Claimant had sent a lengthy email to the Tribunal on 28 May seeking reconsideration of three case management decisions that were reached by the Tribunal during the course of the hearing. The first concerned the Tribunal's indication to the Claimant that he did not need to make written submissions. He sought reconsideration of that direction asking that we consider a written submission sent to the Tribunal after the hearing. The Respondent objected on the basis that the Claimant had been given the opportunity at the hearing to read out submissions that he had already prepared but had been unable to print out and that what he was now trying to do was to supplement those submissions. The Respondent also raised points about the procedure that the Claimant was adopting. The Tribunal took the view that it had made it clear to the Claimant at the hearing that it had noted in full submissions that he had made at that stage and we did not consider it to

be just to the Respondent or in accordance with the overriding objective to allow him to make additional written submissions after the end of the hearing.

18. Secondly the Claimant made an application in connection with the document at 365-374 (the "medi-rota") but the Tribunal was unable to understand the significance of the point the Claimant was trying to make. There had been discussion of the "medi-rota" document already at the hearing and as the Tribunal had made a decision as to which documents to rely on, we did not consider it was appropriate to hear further submissions on essentially the same point after the hearing was over.

19. Thirdly the Claimant sought a reconsideration of the Tribunal's decision not to rely on certain statistical data that was bought to its attention during the course of the hearing. The Tribunal had expressed the view that it was concerned about relying about sets of data that could be subject to a variety of interpretations and in respect of which it did not have the full context. The documents the Claimant had would have wished us to rely on were at pages 462 – 464 and consisted of an extract from the Respondent's Workforce Sub-Committee's statutory annual workforce diversity monitoring report for 2014/2015. The Claimant sent the full document after the hearing and sought to argue that the Respondent had failed in its duty of disclosure by not including the document in the bundle. He then made various points in support of his contention that there was racial inequality at the Trust and submitted that the inequality evidenced by the documents shifted the burden of proof to the Respondent in relation to his discrimination claims. He also submitted that excluding the documents would preclude him shifting the burden of proof. The Respondent objected to the application on the basis that it is not clear how the workforce diversity report shed light on how the Claimant was treated. It repeated a point that it made in submissions at the end of the hearing, which is that the document deals with recruitment data and as the Claimant was in fact appointed it is difficult to see how the document assists his case. It also repeated its earlier submission that generic statistics are of less relevance in a case of this nature than those related to the specific department in which the Claimant worked.

20. The Claimant had also sought to introduce as a new document, a 2016 WREF report for the Respondent. The Respondent again objected to the introduction of this document as it was not before the Tribunal during the hearing and it was inappropriate and contrary to the interests of justice for it to be introduced subsequently. The Respondent also queried why a 2016 report is relevant to the facts of this case when the Claimant complained of matters occurring in 2015.

21. The Tribunal weighed all these matters and came to the view that was not in the interests of justice for new documents to be introduced after the hearing or for these new points to be considered when it was not clear how they would assist the Tribunal in resolving the issues. We considered both parties' representations as to whether the Respondent had complied with its duty of disclosure and formed the view that there was no evidence of any failure of disclosure by the Respondent particularly as the relevance of the document to

the issues in the case is doubtful. We therefore refused the Claimant's application for a reconsideration of our case management decisions. However we decided that we would consider, when we reached our conclusions, whether it would have made any difference to the outcome of the case if the Claimant had succeeded in shifting the burden of proof to the Respondent on the basis of these documents.

The law

22. **Direct discrimination:** S 13 Equality Act prohibits direct discrimination. Under s 13(1) a person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others. The circumstances of the claimant and the chosen comparator must be the same or not materially different. S 4 Equality Act sets out the protected characteristics. These include age and race.

23. **Harassment** S 26 Equality Act prohibits harassment related to a protected characteristic, including age or race.

    (1) A person (A) harasses another (B) if—

    (a) A engages in unwanted conduct related to a relevant protected characteristic, and

    (b) the conduct has the purpose or effect of—

    (i) violating B's dignity, or

    (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.…

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

    (a) the perception of B;

    (b) the other circumstances of the case;

    (c) whether it is reasonable for the conduct to have that effect.

24. **Burden of proof**. It is also relevant to consider the law on the burden of proof which is set out in section 136 of the Equality Act. In summary, if there are facts from which the tribunal could decide in the absence of any other explanation that the Claimant has been discriminated against, then the tribunal must find that discrimination has occurred unless the Respondent shows the contrary. It is generally recognised that it is unusual for there to be clear evidence of discrimination and that the tribunal should expect to consider matters in accordance with the relevant provisions in respect of the burden of proof and the guidance in respect thereof set out in Igen v Wong and others [2005] IRLR 258 confirmed by the Court of Appeal in Madarassy v Nomura International plc [2007] IRLR 246. In the latter case it was also confirmed, albeit applying the pre-Equality Act wording, that a simple difference in status (related to a

protected characteristic) and a difference in treatment is not enough in itself to shift the burden of proof to the Respondent; something more is needed.

25. **Written particulars**: Section 38 Employment Rights Act 2002 provides that if an Employment Tribunal find in favour of an employee or makes an award to an employee in respect of the employee's claim and when the proceedings were begun the employer was in breach of its duty to the employee to give written particulars of employment or amended particulars of employment under s.1 of the Employment Rights Act, then the Tribunal must increase the award to the employee by a minimum amount of two week's pay and a higher amount of four week's pay unless there are exceptional circumstances.

26. **Breach of contract:** Claims of breach of contract may be brought under the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994/1623 Article 3 of which provides:

> **Proceedings may be brought before an [employment tribunal] 1 in respect of a claim of an employee for the recovery of damages or any other sum (other than a claim for damages, or for a sum due, in respect of personal injuries) if-**
>
> **(a) the claim is one to which section 131(2) of the 1978 Act applies and which a court in England and Wales would under the law for the time being in force have jurisdiction to hear and determine;**
>
> **(b) the claim is not one to which article 5 applies; and**
>
> **(c) the claim arises or is outstanding on the termination of the employee's employment.**

Findings of Fact

27. The Respondent is a publicly funded NHS organisation providing acute health services to the local community. The Claimant was employed as a clinical fellow in orthopaedic surgery specialising in "young adult hip" surgery. His employment with the Respondent began on 18 August 2014 with an interview which took place 3 July and a job offer made on 4 July. He remained employed by the Respondent until his resignation with effect from 15 May 2015.

28. The background to the Claimant's appointment is as follows. The Claimant's appointment was as a hip fellow within the Respondent's orthopaedics team of which Mr Bankes and Mr George were the principal consultants. Fellowships of fixed term training posts are offered to junior doctors looking to specialise prior to seeking a consultant's post. The orthopaedic surgery department carries out procedures in a range of orthopaedic specialisms and Mr Bankes is leading practitioner in hip procedures and in particular surgical treatment of young adult hip disorders. His team is one of the leading units in the country dealing with that speciality. Mr Bankes heads the team with Mr George the next most senior consultant. There are two other consultants, Mr Shah and Mr Khan. Ordinarily the hip fellow changes each year and a range of registrars and other junior doctors rotate through the department during their training. Others within the

orthopaedic department specialise in other aspects of orthopaedic medicine such as knee, spine etc.

29. Mr Bankes explained the career structure within NHS hospital medicine and the fact that carrying out one or more fellowships is a common route to gaining the necessary experience to apply for a consultant post. Fellowships are issued to the most senior trainee surgeons and are generally focused on the specialities in which the individual wishes to work. Hospitals regard fellowships as a good way of obtaining high quality skilled doctors just below consultant level who are already experienced in their field. Fellowships are not necessarily a route to consultancy at any particular hospital although that may happen from time to time. Mr Bankes has had hip fellows in post for the last 10 years. Fellowships ordinarily last one year but shorter or longer periods are not unprecedented. Fellows are generally recruited at least a year in advance. Interviews for fellowships in the team are generally carried out by Mr Bankes and Mr George.

Recruitment of Jonathan Hutt

30. Mr Bankes and Mr George carried out interviews for the 2014 hip fellowship in September 2012 (pages 62-63) Jonathan Hutt applied for the fellowship having trained in Mr Bankes team some years earlier and having strong references from subsequent employment he was offered the post as the best candidate for the role. Mr Hutt then wrote to Mr Bankes to say that while he was very interested in taking up the post he was also considering taking a post in Canada in 2014 and asked if he could defer the fellowship and start instead in 2015. Mr Bankes agreed to this proposal (page 68). Meanwhile the fellowship was offered to Wael Dandachli who became the hip fellow for 2014. Mr Hutt's precise start date for 2015 was left for further discussions and Mr Bankes confirmed in December 2013 that he would start in start in January 2015 (page 73).

31. It became necessary at a later stage (July 2014) for Mr Bankes to re-interview Mr Hutt as it had become apparent that paperwork associated with his appointment in 2012 was not confirmed. It was therefore necessary to go through the process of re-advertising the role which Mr Bankes did with some reluctance. However the Tribunal accepted his evidence that he always had the intention of appointing Mr Hutt and honouring his earlier commitment to him and he went through a new recruitment process to comply with the Respondent's requirements rather than because there was any real possibility that someone else would be appointed to the role.

Appointment of the Claimant

32. When Mr Dandachli had completed his year as a fellow in March 2014 he was succeeded by Madhu Sudan Tao Tiruveedhula who was engaged from 3 April to 31 December 2014, the period immediately preceding Mr Hutt taking up his post. However, Mr Tiruveedhula was then offered the opportunity to take up a consultant post at the Evelina Children's Hospital, which is part of the Respondent. It therefore became necessary to advertise for a short term replacement fellow to cover the remaining 5 or 6 months of the year before Mr

Hutt was due to join to take up his fellowship in January 2015. Ms Town, who was the Respondent's new deputy service manager was asked by Mr Bankes to advertise the post in May 2014. Ms Town's email to medical recruitment is at page 161. The advertisement, at page 162, made no mention of the period of time for which a fellow would be required. At page 164 there is a screenshot of the advertisement with further details indicating that the post was fixed term but not for what period.

33. The Claimant applied for the position and was interviewed on 3 July. In his witness statement the Claimant state "Mr Bankes said that the fellowship was until the end of January 2015 as another fellow would be starting at some point in January 2015 but they were not sure when. They did not mention any name of the other fellow. But I was of course disappointed to hear this as it would give me at most 4 months… on the fellowship and this was not long enough for me to learn both hip arthroscopy and peri-acetabular osteotomy to the level I would need to practice as a consultant". The Tribunal noted this as a clear concession by the Claimant that he had reason to think at the time of the interview that his fellowship would only last until January and he was disappointed to learn that this would limit his opportunity to learn the skills that he was keen to obtain. The Claimant explained in his evidence in chief that his interest in his particular post resulted from his early exposure to work on young adult hip surgery. The two procedures which he was particularly keen to learn - hip arthroscopy and peri-acetabular osteotomy – were procedures he had not learned in his career to date. He had had difficulty obtaining a fellowship in which he could learn these procedures and the post in Mr Bankes' team was therefore ideally suited to his career aspirations.

34. There was a dispute of fact about what happened in the interview after it became clear that the advertised post was for a limited period. The Claimant said he explained that he wanted to learn both procedures "Mr Bankes looked toward Mr George and then looked towards Ms Town and said we are going to have two hip fellows in any event so this fellowship could easily be extended to one year" and then turned to me and said "your services would still be needed after January 2015 regardless". I asked him back "What if it is not extended?" Ms Town then promptly responded by asking me, "So would you like to do a full 12 months of fellowship?" I confirmed "yes I would".

35. Mr Bankes has a different recollection and said it was explained to the Claimant that the fellowship was only a short term post as another fellow would be starting in early 2015. When the Claimant expressed some dissatisfaction with the fact the fellowship would end in January Mr Bankes asked Lisa Town to look into whether there was anything the business could do to extend or fund a second fellowship. Mr Bankes denies assuring the Claimant that it would have been possible to have two hip fellows as that would have required additional budget, which was not a matter over which Mr Bankes had control. Ms Town's evidence was that the Claimant had expressed disappointment and had said that a 4-6 month fellowship would not be long enough and she and Mr Bankes had agreed that she would speak to Kayley Taggart, the general manager, about the situation. Ms Town was relatively new to the department and was not fully familiar with what might be possible but in her view the question of an

extension of the fellowship was left open ended and no firm promise was made. Mr George said that he and Mr Bankes had assumed the job had been advertised as a 5-6 month post and was surprised to learn that the Claimant had been unaware of this. Whilst in theory they would have liked to have been able to offer him a one year post, this was subject to funding and therefore could not be guaranteed. He confirmed that Mr Bankes had asked Lisa Town to explore the possibility of an extension with Kayley Taggart and that the matter was left inconclusive.

36. At page 239 there is a letter written by Mr George written to Kayley Taggart on 11 December 2014 in which he reiterates that “We stated that ideally posts would be for a year and Lisa was asked whether an extension was possible – the answer was left somewhat open ended during the interview”. He goes on in the letter to deal with a matter which we return to later in this judgment, namely that the Claimant was subsequently issued with a fixed term contract for 12 months. But on the basis of the witnesses' accounts of what occurred in the interview we find as a fact that the Claimant was told at the interview that the job was for 4-6 months' duration. He was also told that the department would look into the possibility of extending the contract and Lisa Town was charged with the task of discussing this possibility with Kelly Taggart. There was no evidence that that discussion ever in fact took place.

37. We were surprised at the lack of notes of the Claimant's job interview but in fact both parties were more or less in agreement as to what was actually said. The problem was that Mr Kumar left the interview with higher expectations of an extension than the Respondent intended or was in a position to offer. Mr Kumar's very strong wish to gain experience in the unit's speciality coincided with the unit's urgent need to recruit an individual to cover the role for a limited period and the result was in our view a collision of wishful thinking on Mr Kumar's part with the Respondent's anxiety not to put off the only candidate able to fill the role at short notice (the only other potential candidate had withdrawn his application).

38. Mr Kumar was offered the position the same night by telephone. He was very pleased. The Respondent wrote to him the next day (page 204) making a conditional offer of appointment. The letter clearly described the post as full time for one year, which the Respondent maintained was an error. We find that neither Mr Bankes nor Mr George was aware at the time that the job was being offered on that basis.

39. Ms Town had completed the "job offer details" form at page 209 and sent it to Medical Recruitment, thus starting the process of generating the letter at page 204. In her witness statement she said that she had left both the start and end dates of the appointment blank and had told Medical Recruitment to ensure that it was contract to last until the end of the calendar year. On the basis of her evidence in cross examination we find that she completed the start date of the contract but left then end date blank and that the end date was wrongly assumed by Medical Recruitment to be one year after the start. When the offer letter was sent to Mr Kumar, it was copied to Ms Town, but she did not pick up the error at the time or before it was sent to Mr Kumar. Mr Kumar told the

Tribunal that the receipt of the letter offering him a 12 month contract was in keeping with his understanding of how things had been left at the interview – namely that the Respondent would look into the possibility of offering him a contract for a longer period than 4-6 months. We do not accept his suggestion that the offer of a 12 month contract was a conscious decision by the Respondent as opposed to an error. We consider that had that been Ms Town's intention she would, on a balance of probabilities, completed both the start and end dates on the job offer details form.

40. On 3 September Mr Kumar received the letter at page 218 confirming that pre-employment checks had been completed and his file had been sent to Medical HR who would issue a contract of employment. The contract was sent on 22 October (page 223) under cover of a letter that clearly states that the contract was for one year's duration, subject to earlier termination in accordance with the contract's terms.

41. On 17 November Mr Kumar wrote to the Respondent querying the Respondent's entitlement to terminate the contract early (page 234). He did not in fact sign the written contract as a result of this concern although he had started work for the Respondent on 18 August. On 18 November (page 235A) the Respondent confirmed that these were its standard employment terms.

42. On 2 December Kayley Taggart wrote to the Claimant as follows:

> **"Dear Deepak,**
>
> **Can you please let me know when you are free to meet?**
>
> **I understand that you were recruited into a 6 month position and contract end date should be the 31/12/2014 but unfortunately medical HR made an error with your contract and issued a 12 month contract.**
>
> **We've double checked the position with the hip team and they confirmed it was a six month post ad that a new hip fellow will be starting in January.**
>
> **I want to meet and ensure this is what you are expecting and to ensure there was no confusion."**

43. The Claimant's response is at page 237. He said:

> **"I am sure I was offered a 12 month fellowship and I accepted this post only on the understanding that this was a 12 month post. There is no confusion in my mind and in the interview itself I was clear that I wanted a 12 month position as I knew for learning hip arthroscopy and PAO 6 months is too short.**
>
> **Mr Bankes and Lisa both told me interview that there will be need for additional hand and my services will be required even after the new fellow joined the team.**
>
> **I have mentioned to Mr George this discrepancy in understanding and I will clarify this to Mr Bankes tomorrow that I would not have left my BOA fellowship for a 5 month fellowship which certainly does not fulfil my training needs.**
>
> **I am very upset with all this and I will request you kindly look into this matter carefully as my career is at stake."**

44. The Tribunal finds that this email somewhat misrepresents the position, but that the receipt of the 12 month contract shortly after the interview led the Claimant to believe that he had in fact been offered a 12 month contract and that the instruction to Lisa Town to discuss the possibility of an extension with Kayley Taggart had in fact led to a longer contract being offered. We find no evidence that the conversation between Ms Town and Ms Taggart took place however and therefore conclude that the 12 month contract was issued erroneously. Mr George's letter at page 239 is supportive of the Claimant but he describes the situation as a "cock-up with Deepak's contract" and says

> **"We stated that ideally posts would be for a year and Lisa was asked whether an extension was possible – the answer was left somewhat open-ended during the interview. It is therefore unsurprising that when Deepak received both an offer letter and a contract for 12 months that he felt that his wish for the post had been approved. I was unaware of this misunderstanding until a couple of weeks ago. Deepak left a lost that he would not have left had he been offered only a four and a half month post which is now what he is being told by you.**
>
> **He has taken a post based on a job offer and contract which you are now saying will not be fulfilled. This is morally wrong and I suspect illegal. Could you please clarify to Deepak, Marcus and me what your intention is with regard to Deepak's employment?"**

45. In effect and in our view somewhat disingenuously, Mr George treats the situation as a problem created entirely by management and is sympathetic towards the Claimant's predicament. He wrote to the Claimant privately on 12 December (page 240) to confirm his support and to confirm that there would be no negative repercussions if the Claimant were to challenge the legality of the Respondent's actions.

46. At this point the Respondent's HR department had taken the view that Claimant's contract should be terminated on a month's notice. Kayley Taggart however tried to resolve the issue before leaving the Respondent's employment on 24 December (email exchanges with Mr George on 11 and 12 December at page 240a). She wrote:

> **“Hi Marc I have spoken to Lisa who said she has spoken to both you and Marcus… and that you both confirmed that it was 6 months.**
>
> **Medical HR have sent incorrect contract and the person who sent it has now left the trust.**
>
> **Unfortunately we don’t have another hip fellow post to offer, and HR advised us to give a month's notice – which I have done by email.**
>
> **We do have a vacant SpR [specialist registrar] post – if Deepak is happy to do a fellow post to support other sub-specialities as well hip, I can convert that into a fellow post for 6 months – it would involve some fracture clinics and trauma.**
>
> **Please let me know if that's an option you want me to explore.”**

47. Mr George replied “I will leave to Deepak to do whatever he feels his needs to do, he has I believe already taken advice from the BMA. My concern here is really that a negative message will go out about how we treat our fellows. Clearly within a few days not your problem”.

48. The Claimant then met with Kayley Taggart on 22nd December. Again there are no notes of that meeting. The meeting is described by the Claimant in paragraph 65-66 of his witness statement. He followed it up on 23 December with an email at page 241 asking "May I request you to kindly send me confirmation in writing that my post is now until 17 August 2015 and my timetable will be exactly the same as the new hip fellow joining in January".

49. Ms Taggart confirmed their discussion by email at page 242 on 24th December which was copied to Mr Bankes, Mr George and Ms Town. She writes:

> **"Hi I am just making final adjustments on medi-rota this afternoon, but effectively you will be doing something close to the following:-**
>
> **Monday - Trauma list (or half day off)/ Bankes GMT 12.**
>
> **Tuesday – Fracture Clinic/George GMT.**
>
> **Wednesday – Fracture Clinic/George OPD**
>
> **Thursday – FMT 12 – FMT 12**
>
> **Friday – Bankes / Bankes (or half day off).**
>
> **I know you are on leave in January so it might be worth you and the rest of the hip team meeting and seeing if Jonathan Hutt wants to do some trauma too – but I'll leave that for you guys to decide in the new year.**
>
> **Marcus/Marc just to confirm there is no budget for another hip fellow we have only been able to keep Deepak on as there was an SpR vacancy that we have been covering with agency. This is why trauma and fracture clinics are in this job plan".**

50. The Claimant replied (page 242):

> **"Hi Kayley**
>
> **This is slightly different to what we agreed yesterday but many thanks. Trauma is good for CV and job hunting and I am more than happy to do a bit of Trauma but I would appreciate if Mr Hutt and I had the same amount of elective and trauma sessions.**
>
> **That would make it more balanced and fair.**
>
> **I would request Mr Bankes and Mr George can look into this so I can achieve what I came here for as soon as I can".**

51. We find as a fact that the details of the allocation of work to the Claimant were left unresolved when Kayley Taggart left her employment that day. Although she said "Agreement – yeah" at page 242b, the crucial question of whether Mr Hutt would agree to share trauma work so that the Claimant would have sufficient exposure to the more advanced work he wanted to practise, was left to be resolved by the team itself. We conclude that once again the Claimant formed a somewhat over-optimistic view of what he had been offered, influenced by his very clear wish to obtain a particular type of experience in Mr Bankes' team. Once the rotas for the New Year were published however the

Claimant found that the arrangement that he had asked for, namely an equal sharing of trauma and elective sessions with Mr Hutt, had not been put into effect. He wrote to Mr George on Christmas Day 2014 (page 242c), pointing out his disappointment with the rota. He asked Mr George, whom he perceived as his ally at that point, to resolve matters.

52. The Claimant was then out of the country due to family illness until 18 January 2015. On 21 January he had a conversation with Mr George about his change of duties. Mr George's response was that there had been no agreement for an equal sharing of duties between the Claimant and Mr Hutt. He confirmed this in an email exchanged with the Claimant on 9 February (page 243). Mr George wrote "We had a long discussion in clinic when you first got back [from the Claimant's leave in January]. I made it very clear that the young adult fellow work was not going to be shared out between you and Jon".

53. The Claimant complained again on 10th February "I am sure you understand what a deleterious impact you will have on my future prospect of pursuing a career in young adult hip. In the long discussion that we had I could not clearly understand the reason behind this decision." The Tribunal notes however despite his dissatisfaction with the nature of the duties he was being offered, the Claimant continued to work for the Respondent. He was also looking for other employment elsewhere.

54. We also find that the exchange with Mr George supports our earlier conclusion that the Claimant had left his discussion with Kayley Taggart in December in a somewhat over-optimistic frame of mind about the likelihood that he would be doing specialist young adult hip work during his period as a specialist registrar. The Claimant continued to raise his concerns about the rostering arrangements throughout February and March but he did nonetheless continue to work for the Respondent undertaking the duties that were assigned to him and also looking for employment opportunities outside the Respondent. He eventually identified an opportunity and was offered a post as a locum consultant at another trust. He resigned from his employment with his last date being 15 May 2015. The Claimant then raised a grievance about his treatment in August 2015, almost 3 months after termination of his employment. Despite the fact the Claimant had left his employment, the Respondent dealt with the grievance and an investigation report was produced in January 2016 (page 264). The grievance was not upheld.

55. In relation to the specific allegations of age and race discrimination identified at paragraphs 1 and 2 of the list of issues we make the following findings of fact. The Claimant's first allegation is that in or around November 2014 Mr Bankes said to the Claimant that he was looking for a successor but that the Claimant did not meet his criteria. The Claimant said in his further and better particulars of claim (page 18) that in or around November 2014 Mr Bankes said he was "looking for a successor" during a discussion in the outpatients department of the Respondent after the Claimant had requested a day off to attend an interview. Mr Bankes informed the Claimant that the workload of the unit had increased significantly and the hospital needed more permanent staff. He implied that there was an issue with fellows taking time off for interview leave or

study leave. The Claimant responded by asking Mr Bankes if the Respondent required a consultant and Mr Bankes replied in the affirmative. The Claimant then responded by saying “I am here. You can keep me after I finish the fellowship” at which Mr Bankes facial expression and head movement suggested according to the Claimant, that he was saying “no” but he then said “I am looking for a successor”. The Claimant asserts that this amounted to an indication that he himself could not be a successor to Mr Bankes. He asserts that this amounted to direct discrimination because of age and/or race.

56. Mr Bankes denied any recollection of making the specific comment about a successor or indeed the conversation itself which he said he had difficulty recalling 20 months after the event. Mr Bankes also points out that the Claimant did not make any complaint about this conversation until almost a year after it had taken place. He did not mention it in his grievance. We note that at page 257-258, which are notes of a telephone conference call between Mr Bankes and Marcus Adams, who investigated the Claimant's grievance that there was no mention of this comment because it was not a matter about which the Claimant had complained at the time. The Tribunal finds that the first time the comment was mentioned was in the Claimant's ET1. Mr Bankes does not deny that the unit would have liked to have appointed another consultant had funding been available, which it was not. Nor does he deny that he did not see the Claimant as generally suitable to be a consultant in the unit. He explained this at paragraph 46 of his witness statement in which he states that on account of both his surgery skills and his leadership skills the Claimant's performance was not in his judgment at the level required to take on a consultant's position. The Tribunal accepted that evidence as true. Mr Bankes concedes that had the Claimant made a suggestion that he could be a consultant in the team he might well have indicated that was not likely to happen. But that, he says, was a consequence of the Claimant's skill set and performance and not his age or his race.

57. The Tribunal finds as a fact that there was a discussion about the future of the department in or around November 2014 but on a balance of probabilities Mr Bankes did not use the word “successor”. The Claimant however understood the conversation to be one about the future of the department including the possibility of an additional consultant's post. In light of Mr Bankes concession in his evidence we also find that he did not see the Claimant as a suitable person to take up the consultant’s position in the unit but we find that he based this assessment on the Claimants surgical and leadership skills and not on his age or race. Mr Bankes also referred to in his evidence to a potential additional consultant post that was under discussion in December 2014 (page 240c). However financial constraints meant that that proposal was not taken forward and again Mr Bankes asserts that he considers it unlikely that the Claimant would have been successful in securing the role as his skills and performance were not at the required level.

58. The Claimant also asserts that in or around November or December 2014 Mr George referred to him as an “old dog learning new tricks”. Mr George denied making such a comment both in his witness statement and in cross examination. Again the Claimant did not mention this comment in his grievance

in August 2015 and the account he gives in his further and better particulars is not detailed. At paragraph 43 of his witness statement however he was quite specific and says “Mr George used the term “old dog” for me when he passed the remark “an old dog learning new tricks” during a hip arthroscopy procedure in which I had to make more than one attempt to pass the second needle into the joint.” The Tribunal concluded that on the balance of probabilities Mr George did make a remark during a hip arthroscopy procedure which was at least in part related to the Claimant's age. The Claimants recollection is specific and reasonably detailed. We return to this point in our conclusions.

Submissions

59. In reaching our conclusions we took account of the Respondents oral and written submissions and the oral submissions made by the Claimant on the final day of the hearing. In that regard the fact that the Claimant says that he was unaware of the details of Mr Hutt's appointment has made no difference to our conclusions on the issues in the case, which are set out below. What is important is the Respondent's reasons for acting as it did. We do not accept as a matter of fact that Mr Hutt was actually appointed after the Claimant. Although technically Mr Hutt had had to go through a second appointment process in 2014 in order to ensure that the proper paperwork was in place it is necessary to look at the process as a whole and in that regard it is clear that Mr Hutt was in actually appointed in 2012 and always had a prior claim to the specialist work in the unit from January 2015 onwards. Plainly the Claimant was the sitting incumbent and thought of himself as having been displaced but in our view that is not correct reading of what actually happened in this case.

60. We have dealt earlier in this judgment with the Claimant's concern that he was not able to provide written submissions. To recap, the Tribunal understood the position to be that the Claimant had prepared submissions but had been unable to print them out. We therefore listened to the Claimant's detailed oral submissions and made a careful note of them. We did not regard it as appropriate or just to the Respondent to consider further written submissions that the Claimant produced after the hearing. The claim was heard over five days and the Claimant had had ample time to print off written submissions if he wished to do so.

61. The Respondent produced written submissions which were supplemented by oral submissions at the hearing. We were grateful to both parties for their assistance in summing up their respective cases at the end of the hearing.

Conclusions on the issues

Age and Race Discrimination

62. The Claimant relies on remarks made by Mr Bankes and Mr George as acts of direct age discrimination and harassment. We conclude that if Mr Bankes did make a comment about the future of the unit in November 2014 this was not a comment that was related to the Claimant's age but to the unit's need for

specific skills and aptitudes that Mr Bankes did not consider that the Claimant possessed.

63. In any event the claim in relation to this allegation was made out of time and the Claimant has not shown why it would be just and equitable to extend the time, save to say that he was concerned during the course of his employment about the impact of any complaint on references for new employment. However that concern would have disappeared once the Claimant did secure a new post and yet he still waited several months before raising a grievance and then several more weeks before submitting a claim to the Tribunal. He has offered no explanation for these further delays. Furthermore the Tribunal notes that the Claimant did not even raise this allegation as part of his internal grievance thereby not availing himself of a clear opportunity to raise a complaint at an earlier stage. In the absence of a satisfactory explanation from the Claimant as to why time should have been extended in relation to this allegation there were no grounds to extend time and the Tribunal therefore had no jurisdiction to determine this part of the claim.

64. In relation to the comments which we find on the balance of probability to have been made in relation to the Claimants age by Mr George again the Claimant did not mention this allegation in his grievance and only raised it as part of these proceedings. The issue arose in December 2014 and the claim form was presented on 13th October 2015. The Claimant has not explained why he did not raise the matter earlier, including at the stage of raising a grievance with the Respondent, or why it would be just and equitable to extend time. As in relation to the first complaint in the absence of that explanation there are no discernible grounds to extend time and the Tribunal therefore has no jurisdiction to determine this part of the Claimant's claim. The Claimants claim of age discrimination therefore fails on both counts.

65. In reaching this conclusion we have taken into account the Respondent's submissions and the fact that the Respondent's ability to give evidence in relation to the comments has been affected by the delay. The Claimant had never mentioned the comments prior to submitting his claim and it was not until the 31 March 2016 that the Claimant particularised this part of his claim sufficiently that it could be responded to. This was almost 17 months after the alleged comments were made. We note also that the Claimant contacted the BMA when he was told his contract would be terminated on 31 December 2014 and was advised to submit an internal grievance but chose not to do so. He was therefore not without access to legal advice at the time the claims arose.

66. The Claimant also relies on a difference of treatment between himself and Jonathon Hutt when his contract was changed to that of a Specialist Registrar, as an act of direct age and race discrimination. The Tribunal concludes the Claimant was not less favourably treated than Jonathan Hutt when his role was changed from that of a clinical fellow within the elective orthopaedic hip surgery specialising in young adult hip to a specialist registrar role. We do not consider that Mr Hutt was in comparable circumstances to the Claimant for the purposes of a claim under s13 Equality Act. Mr Hutt had been interviewed in 2012 and for reasons specific to himself had decided to defer his appointment. It was always

intended by the Respondent and Mr Hutt that he would occupy the role for 12 months. The Claimant on the other hand was employed to fill an unexpected vacancy at short notice because of the early departure of the previous incumbent. The clear intention of the department was that the Claimant would be appointed for a 4-5 month period and the discussion about the possibility of an extension was left incomplete. The circumstances of the two candidates are therefore not comparable.

67. Even if they had been comparable, the reason that the Claimant was given different treatment from Mr Hutt from January 2015 onwards was that he was in effect supernumerary in the unit. Mr Hutt had had since 2012 the expectation that he would be taking up the role as hip fellow in 2015 but the Respondent took the view that it would wrong and detrimental to Mr Hutt to postpone his appointment or dilute his training when there was only enough specialist work for one fellow. Even if we had accepted that the Claimant had presented us with sufficient evidence indicative of age or race discrimination to shift the burden of proof to the Respondent, including statistical evidence about the age or ethnic background of the Respondent's employees (which we do not), we would have accepted Respondent's explanation that the reason it treated the Claimant as it did was nothing to do with his age or race but was caused by the fact that Mr Hutt was coming to take up his post as previously agreed. This is an explanation untainted by any discriminatory considerations. The fact that errors had been made when the Claimant was offered his contract and that he was wrongly led to believe that he had been appointed for a period of 12 months, was an administrative error in which the Claimant's age and race played no part. The Respondent was not prepared to visit the consequences of that error on Mr Hutt by diluting his period of training or postponing it in order to meet the Claimant's expectations. That was not an act of direct discrimination towards the Claimant, however aggrieved the Claimant may have felt about it. It follows therefore that the Claimant did not resign in circumstances where he was entitled to do so because of discriminatory conduct on the part of the Respondent as there was no such conduct.

68. Even if we had decided this point in the Claimants favour there is a further question as to whether the claim was bought inside the statutory time limit and we would have determined that the Claimant had not done so and had not provided any explanation as to why time should be extended in this case. We therefore would have declined jurisdiction even if we had determined that the Claimant had been discriminated against in the manner he alleged. We also note for completeness that it is not necessary for us to deal with paragraph 3.2 of the List of Issues because we have rejected the Claimant's claim that there was less favourable treatment under s13 Equality Act.

Breach of Contract

69. At its highest the Claimants case was that there was a breach of contract in January 2015 when his duties changed, on the basis that he was contractually entitled to a 12 month hip fellowship in Mr Bankes' team and that as a term of that contract he was entitled to be given the opportunity throughout the 12 month period to carry out the advanced procedures in which he was so anxious

to gain experience. It was the Respondent's case that the 12 month contract was issued by mistake. It does not dispute that it offered him a 12 month contract, or that it changed the Claimant's duties in January 2015 as the Claimant was not given much, if any, exposure to the advanced procedures after that date. The tribunal has found as a fact that the exact nature of the duties that the Claimant was to carry out after January was left to the team to decide and the team decided in practice to give the bulk of those to Mr Hutt. We find therefore that the Claimant's contract was breached in January 2015 by the failure after that date to allocate to him the more advanced procedures, when he had been issued with a contract that stated clearly that his role as the hip fellow in the team would last for 12 months. We do not consider that the Respondent had a right to vary that contract either by virtue of its terms, or by reason of the doctrine of mistake. It was the Respondent's intention, but not that of the Claimant, that the contract should have been issued for a shorter period. This was more than an obvious drafting error.

70. The next question however is whether the Claimant effectively waived the breach by continuing to work for the Respondent for a further five months after the breach occurred. The Claimant resigned in April 2015, the effective date of termination being 15 May 2015, almost 5 months after the alleged breach of contract occurred. He therefore did not resign promptly in response to the breach. Instead he remained in employment and although he expressed concerns about the nature of his work on several occasions he did not formally protest against the introduction of new terms or do or say anything to reserve his position, despite the fact that he had contacted the BMA during this period and therefore had access to legal advice. He says that he was concerned about the potential impact of a complaint on his need for references. In our view if there was a breach of contract in January 2015 the Claimant waived it by continuing in employment without expressly reserving his position. It follows from that he would not be entitled on that ground alone to any remedy for breach of contract. It also follows from this analysis that the breach was not outstanding on termination of employment because that Claimant had by that stage waived the breach. The Tribunal therefore has no jurisdiction to determine the breach of contract claim or award any remedy.

71. For completeness we will address the remaining points concerning the breach of contract in the List of Issues. We do not accept that the Claimant agreed to the variation (point 5.2), which is a different question from the question of whether he waived the breach. His agreement to the variation was clearly conditional on an agreement that specialist work would be shared between him and Mr Hutt, a condition that was never met. On 23 January 2015 and subsequently it was made clear to him by Mr George that it never would be met. However by his subsequent conduct in continuing to work despite his dissatisfaction with the work he was being given, he waived the breach of contract as we have already concluded.

72. Even if the Respondent did have the right to terminate the contract with one month's notice (point 5.5) the Respondent has not shown that that is what it in fact did. The documents we were shown were not consistent with a scenario in

which the contract was terminated and the Claimant agreed to be hired on new terms.

73. It follows from the points made above that the Claimant is not entitled to any remedy for breach of contract. But even if we are wrong in our conclusion that the Claimant waived the breach of his contract, or that the Tribunal has no jurisdiction to determine a breach of contract claim where the breach has been waived before termination, we would have accepted the Respondent's submission that the principles in **Edwards v Chesterfield Royal Hospital NHS Foundation Trust** [2012] ICR 201 preclude the Claimant from bringing a claim for damages for a period beyond the one month's notice period to which he was entitled under the contract of employment that was issued to him. Any claim for the loss of an opportunity to pursue a career in young adult hip surgery would therefore fail on that principle.

74. The remaining issues, concerning the Claimant's section 1 statement and the manner in which he pursued his grievance, are matters related to remedy and therefore do not concern us in this liability judgment.

75. Regardless of the conclusions that we have reached on the issues and our judgment that the Claimant's claims must fail, we observe that in our view the Claimant was not always well or respectfully treated by the Respondent. In its anxiety to ensure that someone was appointed to the post on a short term basis we find that Mr Bankes and Mr George allowed the Claimant to leave the interview in July 2014 with the impression that there was a good chance that his contract would be extended for a longer period. The fact that this impression was compounded by the erroneous issuing of the 12 month contract to the Claimant cannot be laid at the door of either Mr Bankes or Mr George and was attributable to management failures at the Respondent, but once the problem came to light we consider that the Claimant was in effect fobbed off with a solution that was not properly thought through, discussed or communicated so that he was in fact misled into thinking that he was going to continue receiving the sort of work he was so keen to learn. Thus the Respondent raised his expectations and then dashed them. It also missed at least one opportunity to put his misapprehension about the contract right when he queried the term that enabled the contract to be terminated before end of the fixed period of 12 months. The Respondent's systems seem to have made it inevitable that this error would not be picked up and the Claimant was ill served by that state of affairs leading to a justifiable sense of grievance and of having been cheated of a valuable opportunity. Ms Taggart, although we did not hear evidence from her, was plainly anxious to arrive at some sort of solution before she left the Respondents employment and did in effect fudge the decision leaving to the unit itself to resolve how duties would be allocated. However there is no evidence that either Mr George or Mr Bankes ever gave any thought to the suggestion made that Mr Hutt and the Claimant would share some of the more specialised work.

76. We find that although the Claimant was treated disrespectfully in some of the correspondence concerning his performance, his performance was not the reason his fellowship was terminated or his contract varied. Hence the

comments made, though hurtful, are not relevant to the issues in this case and entitle the Claimant to no remedy.

_____

Employment Judge Morton
Date: 16 August 2017