EMPLOYMENT TRIBUNALS

AND

Claimant	**Respondents**
Mr K Zayyan	1. George Eliot Hospital NHS Trust 2. University Hospitals Coventry & Warwickshire NHS Trust

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Heard at: Birmingham

On: **1, 2, 3, 7, 8, 9,** 10, 15, 16, 17, and 21 August 2017 (against both respondents on the dates in bold, and the 1st respondent only for the remainder)

Before: Employment Judge Dimbylow **Members:** Mr RW White
Mr TC Liburd

Appearances:
For the claimant: Mr J Neville, Counsel
For the 1st respondent: Mr R Powell, Counsel
For the 2nd respondent: Mr T Shepperd, Counsel

JUDGMENT having been sent to the parties on 6 September 2017 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. The claim. We do not propose to dwell on the history and background to the claim here. There have already been 5 hearings in this case on: (1) 27 September 2016 when there was a Closed Preliminary Hearing (CPH) before Employment Judge Harding, (2) 9 November 2016 there was a further CPH before Employment Judge Cocks, (3) 16 December 2016 there was an Open Preliminary Hearing (OPH) before Employment Judge Wynn-Evans, (4) 13 March 2017 a CPH before Judge Dimbylow and (5) 18 July 2017 a CPH before Acting Regional Employment Judge Findlay. All 5 hearings gave rise to orders or judgements; and much of the narrative of the case is set out in the preambles to the orders or in the reasons for the judgement on the OPH. There is no need for us to repeat it all here. We record the fact that on the sixth day of the substantive hearing, that is 9 August 2017, the claimant withdrew his claim against the second respondent and it was dismissed. By

that time, we had already read all of the witness statements. We had already taken the claimant's oral evidence and that of his only witness Dr Egbuji. Mr Neville considered making an application for witness orders against the second respondent's witnesses and some of those that the first respondent no longer intended to call. This arose because the claimant had further clarified his claim at the end of the tribunal's reading of the witness statements and documents. This included the claimant defining precisely who the alleged perpetrators of the discriminatory treatment were. The hearing was adjourned to enable Mr Neville to decide how to proceed. However, when we resumed, Mr Neville decided not to proceed with any such application.

2. The issues. These are set out in the order made on 13 March 2017 in relation to harassment and direct race discrimination; but were further clarified by the claimant in correspondence and as we proceeded in the hearing:

1. **Section 26 Equality Act 2010 (EqA): Harassment related to race**

1.1. Did the 1st and 2nd respondents engage in unwanted conduct as follows:

1.1.1. By Dr Wood subjecting the claimant to three unwarranted investigations (R1).

1.1.2. By Dr Wood encouraging junior doctors to covertly monitor the claimant (R1).

1.1.3. By Professor Meghana Pandit refusing to investigate the claimant's complaints of bullying and harassment against Mr Higman of 23 February 2015; whilst at the same time assisting the first respondent to investigate Mr Higman's complaint against the claimant (R2).

1.1.4. By Mr Higman instructing junior doctors (the claimant confirmed it applied only to Dr David Naumann) to carry out covert surveillance of the claimant (R2).

1.2. Was the conduct related to the claimant's race (described by the claimant as Black African)?

1.3. Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

1.4. If not, did the conduct have the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

1.5. In considering whether the conduct had that effect, the Tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

1.6. The 3rd and 4th issues fell away when the claimant withdrew against the second respondent.

2. **Section 13: Direct discrimination because of race**

2.1. Have the respondents subjected the claimant to the following treatment falling within section 39 of the EqA, namely:

2.1.1. By Dr Wood restricting the claimant's clinical practice (R1).

2.1.2. By Dr Wood subjecting the claimant to 3 unnecessary investigations (R1).

2.1.3. By Ms Meghana Pandit refusing to investigate the claimant's complaints of bullying and harassment against Mr Higman of 23 February 2015; whilst at the same time assisting the first respondent to investigate Mr Higman's complaints against the claimant (R2).

2.1.4. Any of the treatment not found to have been harassment.

2.2. Have the respondents treated the claimant as alleged less favourably than they treated or would have treated the comparators? The claimant relies on the following specific comparators: (1) Dr Al-Jabouri (of Middle Eastern origin), (2) Dr Nair (of Indian origin), (3) Mr Marimuthu (of Indian origin), and (4) Mr Higman (White). It was pointed out to the claimant's solicitor at the CPH in March 2017 that these were unlikely to be the correct comparator or comparators and it appeared that the hypothetical comparator was more appropriate. The claimant did not wish to alter his position.

2.3. If so, has the claimant proved primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic?

2.4. If so, what are the respondents' explanations? Do they prove non-discriminatory reasons for any proven treatment?

2.5. Again, the 3rd and 4th issues fell away as against the second respondent.

3. **Section 27: Victimisation** (and this was defined in a letter from the claimant's solicitors dated 20 March 2017).

3.1. Has the claimant carried out a protected act? The claimant relies upon a letter he wrote on 5 October 2015 to the 1st respondent.

3.2. If there was a protected act, has the 1st respondent carried out any of the treatment identified below because the claimant had done a protected act?

3.2.1. A failure by Dr Wood to progress the revalidation process to allow him to return to work.

3.2.2. A failure by Dr Wood to close the 3 investigations.

3. The evidence. We received oral evidence from the following witnesses:

The claimant
Dr James Tasie Egbuji

And on behalf of the 1st respondent:

Dr Gordon McKenzie Wood

We also received documents which we marked as exhibits as follows:

C1 claimant's skeleton argument
C2 claimant's draft timetable
C3 claimant's schedule of loss
R1 agreed bundle of documents (2,487 pages)
R2 bundle of witness statements
R3 cast list - agreed
R4 respondent's chronology-not agreed
R5 respondent's further chronology-not agreed
R6 1st respondent's skeleton argument
R7 2nd respondent's skeleton argument
R8 1st respondent's closing submissions

4. The law.

4.1 Section 26 EqA: Harassment related to race. Rather than set out the wording of the EqA, this is the test to be applied arising from it:

4.1.1 Did the 1st respondent engage in unwanted conduct?

4.1.2 Was the conduct related to the claimant's protected characteristic of race?

4.1.3 Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

4.1.4 If not, did the conduct have the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

4.1.5 In considering whether the conduct had that effect, the Tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

4.2 Section 13: Direct discrimination because of race. The test arising here is this:

4.2.1 Has the 1st respondent subjected the claimant to treatment falling within section 39 EqA?

4.2.2 Has the 1st respondent treated the claimant as alleged less favourably than it treated or would have treated the comparator(s)?

4.2.3 If so, has the claimant proved primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic?

4.2.4 If so, what are the 1st respondent's explanations? Does it prove non-discriminatory reasons for any proven treatment?

4.3 Section 27: Victimisation. Section 27 (1) states as follows:

4.3.1 "A person (A) victimises another person (B) if A subjects B to a detriment because B does a protected act, or A believes that B has done, or may do, a protected act."

4.3.2 Section 27(2) defines the following as constituting protected acts:

> "(a) bringing proceedings under the EqA;
>
> (b) giving evidence or information in connection with the proceedings under the EqA;
>
> (c) doing any other thing for the purposes of or in connection with the EqA; or
>
> (d) making an allegation (whether express or not) that the person alleged to have subjected the claimant to detriment or some other person has contravened the EqA."

4.3.3 Section 27(3) provides that giving false evidence or information, or making a false allegation is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

4.3.4 The starting point is that there must be a protected act. If the claimant cannot establish that he has in fact carried out a protected act as defined by subsection (2), his claim will not succeed unless the Employment Tribunal concludes that the person alleged to have victimised the claimant believed they had done so or may do so. It is necessary for that person to know of the protected act or suspect there has been a protected act.

4.3.5 Case law has established that a mere assertion of discrimination without reference to a protected characteristic will not, without more, (for example relevant background information known to an employer) constitute a protected act.

4.3.5 If there has been a protected act, the Employment Tribunal must then consider whether the claimant was subjected to detriment because of it. The provisions of the EqA essentially operate with a 3-stage approach. In summary, to determine whether an employee who has made a protected act has been subjected to detrimental treatment, the Employment Tribunal must first consider whether the claimant has established that the act or omission occurred. If not, the claim will fail on the facts. If so, the Tribunal must decide

whether the act or omission was detrimental. If so, the Tribunal must then determine whether the protected act influenced the detrimental treatment.

4.4 Section 136 of the EqA contains provisions regarding the burden of proof and, insofar as is material, states:

> "(1) This section applies to any proceedings relating to a contravention of this Act.
>
> (2) If there are facts from which the court could conclude, in the absence of any other explanation, that a person A contravened the provision concerned, the court must hold that the contravention occurred.
>
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision."

4.4.1 The latest interpretation of the EqA, concerning the burden of proof, is in the case of Efobi v Royal Mail Group Limited. Mr Neville drew this case to our attention, and as we describe later, he submitted the essence of the new guidance is in paragraph 78 of that judgment which states this:

"Section 136(2) does not put any burden on a Claimant. It requires the ET, instead, to consider all the evidence, from all sources, at the end of the hearing, so as to decide whether or not "there are facts etc" (cf paragraph 65 of **Madarassy**). Its effect is that if there are such facts, and no explanation from A, the ET must find the contravention proved. If, on the other hand, there are such facts, but A shows he did not contravene the provision, the ET cannot find the contravention proved. Long before section 136 was enacted, Industrial Tribunals were discouraged from acceding to submissions of no case to answer at the end of an Applicant's evidence in a discrimination claim. Section 136 prohibits a submission of no case to answer, because it requires the ET to consider all the evidence, not just the Claimant's, and because it is explicit in not placing any initial burden on a Claimant. The word "facts" in section 136(2) rather than "evidence" shows, in my judgment, that Parliament requires the ET to apply section 136 at the end of the hearing, when making its findings of fact. It may therefore be misleading to refer to a shifting of the burden of proof, as this implies, contrary to the language of section 136(2), that Parliament has required a Claimant to prove something. It does not appear to me that it has done."

4.4.2 It has long been recognized that in practice, few cases turn on the question of whether the burden has reversed. Either there is a prima facie case for the respondent to answer, or there is not. The previous approach in cases where there is a real issue as to whether the burden has reversed, the existing authorities were considered likely to be relevant. What we say now appears, on the face of it, and without us hearing any substantial argument from either side, outdated in view of Efobi. The Court of Appeal in Igen v Wong and others [2005] IRLR 258, considered the question of the burden of

proof in direct discrimination cases, and approved an amended version of the guidelines set out in Barton v Investec Henderson Crosthwaite Securities Ltd [2003] IRLR 332, which recommend a two-stage approach. The Court of Appeal clarified that although there is a two-stage process, this does not require tribunals to divide hearings into two parts, and that generally the tribunal would wish to hear all the evidence, including the respondent's explanation, before deciding whether the requirements at the first stage are satisfied and, if so, whether the respondent has discharged the onus shifted to it. At the first stage the complainant is required to prove facts from which, in the absence of an adequate explanation from the respondent, discrimination could be concluded. At this stage the tribunal must assume there is no adequate explanation. It is for the complainant to prove facts from which discrimination could be inferred but these facts could come from any evidence before the tribunal, including evidence from the respondent. At the second stage, the respondent is required to prove that it did not commit, or is not to be treated as having committed, the unlawful act, if the complaint is not to be upheld. To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of, in this case, race, since "no discrimination whatsoever" is compatible with the Burden of Proof Directive. That requires the tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that the claimant's protected status was not a ground for the treatment in question. The approach in Igen, as further clarified by the EAT, was confirmed by the Court of Appeal in Madarassay v Nomura International Plc [2007] IRLR 246 CA.

4.4.3 Subsequent EAT judgments such as Laing v Manchester City Council [2006] IRLR 748 EAT and Network Rail Infrastructure Ltd -v- Griffiths-Henry [2006] IRLR 865 have made it clear that as regards direct discrimination there is a distinction between the explanation for treatment (which must be disregarded at stage 1) and facts which establish the treatment could not have been less favourable and/or could not have been on the grounds of the person's protected status (which are relevant at stage 1, because they may demonstrate that the claimant has failed to reverse the burden). As regards direct discrimination, it is well established that unreasonable treatment plus a difference in protected characteristic does not, of itself, shift the burden to the employer to provide an explanation. Helpfully, the EAT has repeatedly made it clear that it will not be an error of law for the tribunal to assume the burden has shifted and to proceed to consider the stage 2 explanation, in line with the "reason why" approach suggested by Lord Nicholls in Shamoon v Chief Constable Royal Ulster Constabulary [2003] UKHL 11, although caution must be exercised as this could disadvantage the respondent. If the burden does shift and the respondent's explanation is not forthcoming, is inadequate, or suggests that possession of a protected characteristic was an operative cause of the treatment, the statutory wording requires that a conclusion that there has been unlawful discrimination must follow.

4.4.4 As will be apparent later, we decided to take the approach submitted by

Mr Neville, on the limited submissions of both parties. We appeared, according to Mr Neville, possibly, now to be in a new era following Efobi.

4.5 Section123 EqA has this about time limits:

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

(a) the period of 3 months starting with the date of the act to which the complaint relates, or

(b) such other period as the employment tribunal thinks just and equitable.

(2) Proceedings may not be brought in reliance on section 121(1) after the end of—

(a) the period of 6 months starting with the date of the act to which the proceedings relate, or

(b) such other period as the employment tribunal thinks just and equitable.

(3) For the purposes of this section—

(a) conduct extending over a period is to be treated as done at the end of the period;

(b) failure to do something is to be treated as occurring when the person in question decided on it.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—

(a) when P does an act inconsistent with doing it, or

(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

4.5.1 The 1st respondent took time points in defending the harassment and direct discrimination claims at paragraphs 1.1.2 and 2.1.4 above. In dealing with the issue of a continuing act, we had regard to the legacy case law which pre-dated the EqA, as it is still relevant. In the case of Calder –v- James Finlay Corporation Limited [1989] IRLR 55, which was approved by the House of Lords in Barclays Plc –v- Kapur and others [1991] IRLR 136, where it was held that an act extending over a period gave rise to continuing discrimination throughout employment when the claimant then was told that she was not "eligible" for a mortgage subsidy and alternatively this was subjecting her to a detriment whilst employment continued. A continuing act should be approached as being a rule or regulatory scheme which during its currency continues to have a discriminatory affect. The fact that a claimant continued to be paid less than a comparator was a consequence of the decision not to up-grade, not a continuing act of discrimination in the case of Sougrin -v- Haringey Health Authority [1991] IRLR 447. The matter was looked at again in the case of Cast -v- Croydon College [1998] IRLR 318. The Court of Appeal held, amongst other things, that the claimant's complaint was of several decisions by the employer which indicated the existence of a discriminatory policy in her post and its application to her and that this

constituted an "act extending over a period". Later, the Court of Appeal considered the case in Hendricks –v- Commissioner of Police for the Metropolis [2003] IRLR 96. The question is whether the acts complained of by the claimant amounted to an "act extending over a period" as distinct to a succession of unconnected or isolated specific acts, for which time would begin to run from a date when each specific act was committed. The claimant had the opportunity of showing at a full hearing that the incidents were linked to one another and that they were evidence of a "continuing state of affairs".

4.5.2 In considering the exercise of our discretion over the three-month time limit applying to the EqA, we have to consider whether it is "just and equitable" to let the case, or part of it, in after three months if the acts complained of are out of time and do not form part of an act extending over a period. The case of British Coal Corporation v Keeble [1997] IRLR 337 provides the guidance on how to exercise our discretion. This was considered later in the case of Chohan v Derby Law Centre [2004] IRLR 685 EAT. We also considered the matters mentioned in s.33 of the Limitation Act 1980. Although that refers to the broad discretion for the court to extend the limitation period of three years in cases of personal injury and death, it also requires the court to consider the prejudice which each party would suffer because of a decision to be made. We are required to have regard to all the circumstances of the case and amongst other things, to –

(a) The length of and the reasons for the delay.

(b) The extent to which the cogency of the evidence is likely to be affected by the delay.

(c) The extent to which the 1st respondent had co-operated with any request for information.

(d) The promptness with which the claimant acted once he knew of the facts giving rise to the cause of action.

(e) The steps taken by the claimant to obtain appropriate professional advice once he knew of the possibility of taking action.

4.5.3 In the case of Robertson v Bexley Community Centre [2003] IRLR 434 the Court of Appeal confirmed that the Employment Tribunal had a wide discretion in determining whether or not it was just and equitable to extend the time. The tribunal is entitled to consider anything that it takes to be relevant. Nevertheless, the case re-asserts that time limits are exercised strictly in Employment Tribunal cases. When considering the discretion over a claim that is out of time, and whether the time should be extended on just and equitable grounds, the Court of Appeal said that there was no presumption that the tribunal should do so. The tribunal cannot hear a complaint, unless the claimant convinces it that it is just and equitable to extend the time. Thus, the exercise of the tribunal's discretion is the exception rather than the rule.

5. Findings of fact. We make our findings of fact based on the material before us taking into account contemporaneous documents where they exist and the conduct of those concerned at the time. We have resolved such conflicts of evidence as arose on the balance of probabilities. We have considered our assessment of the credibility of witnesses and the consistency of their evidence with the surrounding facts. We have made our findings of primary fact having considered the whole of the evidence put before us. We have considered what inferences we should draw from them for the purpose of making further findings of fact.

6. Sometime around 1998 the Coventry and Warwickshire County Vascular Network (the Network) was established. The Network is made up of three NHS Trusts: South Warwickshire NHS Foundation Trust; and the first and second respondents. The Network provides a vascular care service across Coventry and Warwickshire. The claimant was employed by the first respondent as a Consultant Surgeon and has worked for it since 1 February 2003. He was the only vascular surgeon employed by the first respondent. At the same time the claimant also held an honorary contract with the second respondent. He predominantly undertook day cases at the first respondent, these being general and vascular surgery, but he also undertook vascular surgery at the second respondent, this being part of the on-call rota provided by six surgeons. The claimant undertook vascular elective work at the first respondent. All elective abdominal aortic aneurysms and complex arterial bypass cases were undertaken at the second respondent. The claimant's main place of work was in Nuneaton, and the main hospital of the second respondent was the Walsgrave in Coventry.

7. The claimant was born on 9 September 1960 and is now 56 years of age. He is still an employee of the first respondent but no longer carries out work at the second respondent. The claimant describes in his witness statement his ethnicity as being "Nigerian origin of Black African race", but for the purposes of the hearing he uses that set out in the issue agreed at the CPH on 13 March 2017. He has lived in the UK for over 30 years. The claimant is fully registered with the GMC and is on its Specialist Register. The claimant was one of six general surgeons at the first respondent but he was the only vascular surgeon. He has 32 years of practice, and is highly experienced in his field of work.

8. For our purposes, the relationship between the parties was largely uncontroversial until 2012. On 28 December 2012, the claimant sent a global email to all 86 consultants at the first respondent (414). The contents were misguided, critical and in breach of the subject's right to privacy. Ms Sasha Moran was the subject and she was a General Manager. This email followed an inappropriate telephone call from the claimant to Ms Moran. These events caused the then Medical Director Mr Andrew Arnold to appoint his then deputy Dr Gordon Wood as a Case Manager to look into the allegations that arose from the claimant's conduct. In a letter to the claimant on 1 March 2013 Dr Wood said this:

"I write to provide you with formal notification that a number of concerns have been raised regarding your conduct. These concerns have been discussed with the Chief Executive and I have been asked to act as Case Manager.

The allegations highlight concerns regarding your conduct towards Mrs Sasha Moran, General Manager, on or around 10 December 2012, during a telephone call, an email that you sent to consultant colleagues criticising Mrs Moran and unrelated matters relating to your alleged failure to engage in the legal claims process. In particular, the concerns are that:

- you raised your voice to Mrs Moran and used inappropriate and insulting language to her during a telephone conversation on or around the 10 December 2012;
- you sent an email to all consultants relating to Mrs Moran which might be considered to be inappropriate;
- you have failed to respond properly and in a timely fashion to requests made by the Trust's legal claims department.

In my role as Case Manager I have discussed these concerns with the National Clinical Assessment Service (NCAS) and would welcome an opportunity to discuss the matter with you to determine whether this matter can be dealt with without recourse to formal procedures. I shall arrange with your secretary a time for us to meet with Julie Liggins, human resources manager, such that we can discuss this matter in more detail.

I understand and appreciate that this is a sensitive matter and I give my assurance that it [will] be handled efficiently and with compassion.

In the meantime if you require any further guidance please contact me."

9. Stated shortly, although Dr Wood encouraged the claimant to take the matter forward informally, the claimant was very resistant to the idea. On the contrary, the claimant raised a formal grievance against Ms Moran.

10. Mr Arnold wrote to the claimant on 5 March 2013 (439/440), about a different matter, confirming that the claimant was being given a first written warning, level I, for 9 months. This was for a failure on the claimant's part to follow the correct practice when treating a nurse colleague in theatre. The claimant registered an appeal against the decision; and also, complained by way of a grievance about Mr Arnold's conduct in the proceedings (451). The claimant asserted that he had been subjected to discrimination and a breach of Article 6 of the Human Rights Act, in the failure to have a fair trial. The claimant's appeal against the disciplinary outcome was rejected in due course.

11. At a meeting on 19 July 2013 the claimant told Dr Wood (459) he recognised his actions in relation to Ms Moran were inappropriate and apologised to Dr Wood. Dr Wood tried to set up a personal meeting for the claimant to express an apology personally or arrange for the claimant to confirm it in an email. There followed much discussion about the way forward;

but the outcome was the claimant did neither of these things. The claimant dragged his heels and was plainly very reluctant to apologise. However, on 5 January 2014 he said that he would apologise for the email. Unfortunately, Ms Moran went off work sick and therefore Dr Wood reasonably suggested that it be done by email. The claimant expressed the view that he wanted to do it face-to-face, and refused to do it any other way. In the circumstances, the claimant was told on 24 March 2014 that the complaint by Ms Moran would now be made formal. The claimant treated the investigation process with contempt, failing to attend at meetings and failing to respond to correspondence. The investigation was completed by Dr Moghal in November 2014. He found that the facts warranted a disciplinary process against the claimant. This was heard by Kay Farmer, general manager, on 11 December 2014. Ms Farmer concluded that the email did not amount to bullying; but represented a severe lack of judgement. The claimant was issued with another first written warning lasting for 9 months. The claimant appealed against the outcome, but his appeal failed and he was notified of it on 2 July 2015.

12. The matters we have touched upon so far are background, but they are nevertheless important as they establish a pattern of behaviour.

13. Dr Wood was approached by Mr Bala Piramanayagan ("Mr Bala" as he was frequently called by the parties), the claimant's line manager, and Clinical Lead for General Surgery, on 21 August 2014, when he attended at Dr Wood's office. He put forward his two concerns about the claimant:

(1) frequently arriving late for his clinics, leaving junior doctor Mr Hagar alone and unsupported. This affected clinic waiting times and put pressure on Mr Hagar, and
(2) Mr Yahir, the claimant's Trust registrar, had complained that the claimant was arriving to do ward rounds at 4pm when he should have started much earlier. This meant that the team was frequently kept until 7pm, causing considerable inconvenience.

Dr Wood asked for the registrar to contact him to give more information. Dr Wood then spoke to Mr Hagar in the claimant's clinic on 16 September at 2:40pm as he was doing a clinic in an adjacent area. The claimant had not arrived at that time. Mr Hagar was concerned as he was on-call and had about 30 patients booked into the clinic. Mr Hagar revealed that he was keeping a log of when the claimant attended; and Dr Wood asked him to pass it on to him when it was completed. We find that this activity was entirely driven by Mr Bala and his approach to Dr Wood, who acted reasonably in response, carrying out his management function. It is no surprise that the 2 junior doctors did not want to raise the issues with the claimant directly given the way he responded to any criticism.

14. On 1 September 2014 Ms Linda Williams, Legal Services Manager, wrote to Dr Wood (632), and said this:

"There was a pre-trial conference last week and the outcome was that Browne Jacobson has recommended to the NHSLA that we still proceed to trial which commences next Monday (8th September 2014).

Whilst I would not like anything to happen before next Monday because Mr Zayyan is a key witness, I think you should be aware that although the case conference was arranged for 1.30, he did not arrive until 3.50 and when he did it was evident that he had done nothing to prepare for the conference. I was leaving messages on his mobile phone and I got Jan Mander to ring UHCW to try and contact him to try and find out where he was, at UHCW he was even bleeped twice. When he arrived he said he was in theatres at UHCW and it had overrun. Mr Zayyan was fully aware of this meeting and if he was doing a morning list he should have ensured it was of an appropriate size. In short the NHSLA paid for people to sit in a room for nearly 2½ hours doing nothing because the main person was late arriving."

She then went on to confirm that those waiting for the claimant were: counsel who had travelled from London, a consultant vascular surgeon who travelled from Oxfordshire, a consultant radiologist who had travelled from Newcastle, another doctor, together with a solicitor and her assistant.

15. Another issue troubling Dr Wood was the claimant's job plan and his appraisal. This issue had been an ongoing issue since January 2013. Gary Lawrence, Associate Medical Director, was responsible for the claimant's appraisal. We found that Dr Wood encouraged the claimant to get on with the process. All surgeons and doctors must be licensed every five years, and Dr Wood was the claimant's Responsible Medical Officer for revalidation. Dr Wood was responsible for some 150 clinicians and their licensing. In paragraph 50 of his witness statement Dr Wood described the requirements behind revalidation. He warned the claimant of the consequences of failing to engage in the process (620). The claimant was not co-operating with the process; nevertheless, Dr Wood arranged for the claimant's revalidation date to be put back later; and he went on to do this again on a number of occasions. This was a generous thing to do on the part of Dr Wood considering the claimant's conduct. He could have put the claimant's conduct over this issue to the GMC, putting the claimant in a worse light, but chose not to do so.

16. However, the various matters which were emerging could not be ignored entirely. There was a pattern of non-cooperation developing on the part of the claimant. Therefore, Dr Wood appointed Mr John Thompson, Deputy Director of Operations, to be a case manager looking into a number of concerns with the claimant. As Dr Wood was likely to be a witness he therefore decided not to involve himself. Mr Thompson appointed Ms Olivia "Dilley" Wilkinson (Deputy Director of Nursing at the first respondent) to investigate. Mr Thompson wrote to the claimant on 31 October 2014 (660) about a disciplinary investigation and said this:

"I have been appointed by the Medical Director to act as Case Manager in relation to the issues identified below. I have assessed the seriousness of the

concerns on the information available to me and have considered whether it is likely that the issues raised can be resolved informally without resort to formal disciplinary procedures. After discussing the issues with Dorothy Hogg, Director of Human Resources, and NCAS I have determined that a formal investigation needs to be undertaken into the following allegations:

- You have, on more than one occasion, failed to attend your clinics and as such have not fulfilled your contractual obligations to the Trust.

- You have failed to conduct ward rounds at a reasonable time, with no consideration as to the potential consequences on nursing staff, trust registrars and his patients.

- You have failed to comply with reasonable management instructions, in respect of completing job plan and appraisal documentation in a timely manner.

- You failed to adequately prepare and provide support to the Trust, in respect of legal action commenced against the Trust."

This was an entirely reasonable step to take based upon well documented events. Plainly, it was impossible for the first respondent and particularly Dr Wood to ignore so many complaints about the claimant's conduct, which looked at objectively by the tribunal was troubling to say the least.

17. On 22 December 2014 (837-840) Kay Farmer wrote to the claimant with the outcome of her disciplinary process. We note her conclusion after she posed the following question:

Did your actions amount to bullying in accordance with sections 4.2 and 5.4 of the Trust's Dignity at Work Policy?

"In consideration of the above, I determined that your email did not amount to bullying in accordance with the Trust's Dignity at Work Policy. I do, however, consider that given your position within the Trust, you should have known better than to send an email of this nature to the entire consultant body. Your actions represent a severe lack of judgement and insight. Further, you failed to remedy your actions by apologising to Ms Moran, despite being given a significant period of time in which to do so."

Ms Farmer recited that Ms Moran could not be interviewed and this had an impact on the assessment as to whether or not the claimant's behaviour was unwarranted and unwelcome to her as an individual.

18. It is worth noting the two provisions of the policy:

Section 4.2 states that: "…[ACAS] defines bullying as offensive, intimidating, malicious or insulting behaviour, and abuse or misuse of power through means intended to undermine, humiliate, denigrate or injures the recipient.

Section 5.4 confirms that there is a whole range of subtle, insidious behaviour which may constitute bullying. Some examples include persistent or recurrent behaviour which is offensive, abusive or demeaning… Disparaging comments or remarks, often in front of others…The key is that whatever form it takes, it is unwarranted and unwelcome to the individual."

In her letter, Ms Farmer went on to say this:

"I was unconvinced that you would even apologise to Ms Moran at this late stage. In conclusion therefore I consider that you should be issued with a first written warning, effective from the date of this letter and to last for a period of 9 months. I should make you aware that in the event that you commit any further acts of misconduct during this period, this warning may also be taken into account when determining an appropriate sanction."

19. In his appeal by email on 11 January 2015 (887) the claimant asserted that he was penalised with a formal warning which: "….is unfair and discriminatory: Mrs Moran is a white manager and I am a black consultant."

20. At pages 1396 to 1399, dated 2 July 2015 the outcome of the appeal is recorded. It followed an appeal hearing on 25 June 2015. The appeal panel questioned the veracity of the claimant's evidence on more than one occasion. As to the issue of the less favourable treatment, Julie Whitaker, the Director of Community Services, on behalf of the appeal panel, said this:

"Whether you were treated less favourably than Mrs Moran

This seems to be a significant theme in your defence. It is apparent that you admit the misconduct alleged and show some regret for sending the email on 28 December 2012. You also present other mitigation which from the appeal perspective we have dealt with separately.

The appeal panel have considered whether you were treated less favourably than Mrs Moran and have concluded that this was not a valid comparison for the following reasons:

- The concerns in respect of your conduct are a matter of record and all parties agree you should not have sent the email you did;
- You were provided with a generous opportunity to apologise unreservedly for your conduct. Whilst we accept there were other factors you would have liked to have discussed, these did not excuse your behaviour and an apology ought to have been forthcoming;
- In Mrs Moran's case, the complaint you raise is that she was seeking to establish your whereabouts, and you say that in doing so she was acting improperly;
- Whilst the appeal panel is not charged with making any determination in respect of Mrs Moran's conduct, it would seem that this is not out with the role of the general manager and in the circumstances, given this consideration, it is appropriate that your conduct was dealt with differently to that of Mrs Moran's.

We can only suggest that the difference in treatment relates to the difference in the substance of the concerns rather than the manner in which the concern has been raised."

21. We have dealt with the Mrs Moran issue in some detail because it was relevant background, and Mr Neville in his submissions asserted that it was necessary for us to consider these events, because they introduced Dr Wood, the sole alleged discriminator at the end, to the sequence of events which formed the issues before us. It is also perhaps illuminating about the way in which the claimant looks at comparative treatment, and we will touch upon that again later.

22. The Thompson investigation included a meeting between the claimant and Ms Wilkinson on 13 January 2015; and another took place on 14 April 2015. Whilst this investigation was ongoing in the background, further troubling matters were to arrive with Dr Wood concerning the claimant.

23. On 6 January 2015 there was a heated and challenging conversation between the claimant and Mr Higman of the second respondent concerning the treatment of a patient. In his witness statement, the claimant asserted that this was discrimination, although of course this has fallen away during the course of the hearing when the claimant withdrew his claim against the second respondent.

24. Mr Peter Blacklay, consultant vascular surgeon at SWFT, was due to retire, and this prompted Mr Higman to carry out a review of the Network. On 13 January 2015 Dr Wood met Mr Higman and Mr Bala to talk about Mr Higman's concerns about the first respondent's vascular service. Mr Higman stated that he had concerns about the standard of the vascular service, which he considered could not meet present national quality markers. He also raised concerns that patients were having difficulty securing appointments with the claimant. Mr Higman stated that the claimant had discussed with him his unwillingness to see ward referrals in the past when he was not on call for the Network. Mr Higman raised concerns about the claimant's engagement and said that he was aware of 12 patients with known aortic aneurysms from North Warwickshire who appeared to have no management plans and who had not been put forward for surgery by the claimant. He said that the claimant was not engaging in the management of patients with TIAs (transient ischaemic attack-a mini stroke) who required carotid artery surgery within two weeks of scanning. Mr Higman felt that scanning should be done at the first respondent and then operated on by the claimant at Coventry.

25. Mr Higman also raised concerns not only with the claimant but also about other elements of the first respondent's vascular service, such as the claudication service, the fact that there was no exercise clinic, vascular nurse input, non-invasive vascular investigations including duplex scanning or treadmill testing. Mr Higman also raised concerns about whether the claimant was complying with the NICE guidelines for the treatment of varicose veins, his availability and ability to be contacted and willingness to help in

emergency or urgent situations. Mr Higman did not criticise the claimant's operating abilities but was concerned that there were many facets of the vascular service at the first respondent that did not meet the required standards. The claimant's lack of engagement with those areas was contributing to a poor service for vascular patients. Mr Higman was keen for the first respondent to commission an independent review of the service. We were able to see notes of the meeting, and Dr Wood wrote to Mr Higman on 19 January 2015, confirming that he had discussed matters with the 1st respondent's CEO Kath Kelly; and with her agreement had approached Dr Rosser, Medical Director at the University Hospitals of Birmingham, to identify a suitable independent expert who could conduct a review of the vascular services at the first respondent and advise it about any improvements or changes that might be required (879). Dr Wood summarised the meeting on page 869 and Mr Higman corrected it on 876.

26. We noted that it was Dr Wood's practice, when so many comments were made to him orally, that he confirmed them back to the maker in writing seeking confirmation that that was their position. This is a good practice and it enables what might be said in the heat of the moment to be modified or to be "rowed back upon" (this was a term used in the hearing). We saw this pattern. The claimant used the expression that Dr Wood was "fault shopping" against him; but we disagree. Dr Wood was using a simple management tool and thereby creating an accurate record in his desire to get things right.

27. On 15 January 2015, the claimant met Mr Lawrence for his appraisal. However, Dr Wood could not carry out the revalidation process given what Mr Higman told him on 13 January 2015, and taking into account the ongoing investigation from October 2014. Dr Wood did however obtain extensions of time for revalidation from the GMC. This was obviously helpful to the claimant as it enabled him to continue practising. The claimant was notified of this by Dr Wood by email on 27 January 2015 (883).

28. On 3 February 2015 a further event involving the claimant took place and is recorded in an email from Mr Nigel Williams (colorectal on-call surgeon at Coventry). He sent it on 4 February 2015 to Chris Belcher, Head of Organisational Department. There is a lot of detail in it, but two themes emerge: firstly, the claimant was described as "rude and curt" in his behaviour, his tone and language were abusive, and secondly his clinical judgement was being questioned. It included this:

"There are several issues that concern me. The duty GEH surgeon seemed intent on washing his hands of any responsibility for this patient.
That Mr Z was rude and curt does not concern me, we have stressful jobs and I guess that he was stressed by this case.
What does concern me is that a very simple intervention (balloon tamponade) that requires no specialist skills could have been used several hours sooner and reduced the total blood loss from this gentleman. We very often see things in medicine that we have not come across before and in these situations are guided by advice from colleagues. That Mr Z was completely

unreceptive to any advice and to the detriment of this patient is of concern. Having stabilised the patient, the transfer would have been much safer.

I have copied this to Chris Belcher for transparency and completeness. (Chris, please could you forward to Dr Gordon Wood as I could not find his e-mail address. Thank you)."

This documented once again that Dr Wood was not fault shopping; on the contrary, it demonstrated that faults were being directed to him.

29. Mr Williams wrote to Dr Wood again on 13 February 2015 (934) when he said this (concerning patient AR):

"I have had time to reflect further on the incident. I have not, however, discussed it with any of my clinical colleagues other than for the e-mail sent on 4th Feb. The episode disturbs me in that Mr Z appeared to just want to abdicate any clinical responsibility for this patient. I was in the hospital (UHCW) until about 6.15-6:30pm that day and would have been easily available for advice on this gentleman's management. Post-banding haemorrhage is well documented and not unusual. Once again, I reiterate that had balloon tamponade been employed some hours sooner, haemorrhage control would have been secured and there would have been no need to resort to CT angiography. A lot rests on the responsible clinician not seeking advice sooner. I am a little surprised that no GEH colorectal surgeon was available to advise Mr Z on that day. Sadly, this is not the first time that I have interacted with Mr Z and found the exchange to be trying."

30. To make matters worse for the claimant, another notable event took place on 9 February 2015. On that day, Mr Higman received a telephone call from Mr Dr Egbuji, who is a consultant in the first respondent's medical team. He raised with Mr Higman the case of an elderly patient (KB) who had recently been admitted to the first respondent. KB had a shin ulcer and Dr Egbuji had requested a vascular opinion from the claimant. Dr Egbuji advised Mr Higman that the claimant had refused to provide an opinion; and had suggested that the patient was transferred to the second respondent's hospital. Mr Higman took the view that the claimant's approach was unacceptable, and to him, this was typical behaviour, representing the type of problem that the Network faced with the claimant. In his view, KB required an opinion and diagnosis from a vascular surgeon and a clear plan of management. This may or may not have involved the transfer to the second respondent, but in Mr Higman's view it was necessary for KB, being elderly and frail, to be reviewed locally ahead of determining whether a transfer by ambulance to the second respondent was necessary.

31. On 9 February 2015 Mr Higman emailed Dr Wood chasing up progress on the first respondent's review of its vascular service, explaining that he was anxious that the review took place as soon as possible because there were ongoing issues regarding inpatient referrals. He went on to describe the difficulties surrounding the care of KB (890). On the same day, Dr Egbuji also telephoned Dr Wood asking him to intervene to expedite a review by the

claimant as he did not want this frail patient to be transferred to the second respondent unless this would be of benefit. He expressed concern about the delay in getting the claimant's opinion. However, Dr Wood concluded, at this time, that this just was a difference of opinion between consultants; but he was concerned regarding the claimant's approach in requesting a transfer to the second respondent for a vascular review.

32. On 10 February 2015 Mr Higman raised a further issue with Dr Wood concerning patient IQ. This was a 38-year-old man with diabetes who had been admitted from the diabetic clinic with a necrotic area on the left great toe which had been present for several weeks. Both the medical team and the tissue viability nurse had advised an urgent vascular surgery review. On 10 February 2015, the claimant saw the patient and advised that he required: "regional amputation and should be transferred" to the second respondent. Mr Higman expressed concern that the claimant did not telephone to discuss the case with him as the on-call vascular surgeon. Instead, a medical student had telephoned Mr Higman's registrar to try and arrange the transfer without any further information. The registrar agreed to the transfer but asked that the claimant discuss the patient directly with Mr Higman. The second respondent had been given no information as to why there was a need for a transfer and/or why amputation was necessary (903). This is an interesting point. During the hearing the claimant complained about people not talking to him, an accusation put frequently to Dr Wood, but here we have an example of the claimant not talking.

33. Shortly thereafter, on 10 February, Mr Rajiv Nair (consultant in diabetes) emailed Dr Wood (906) expressing his concerns about this patient. He was concerned that the claimant had not discussed the matter with the vascular team in spite of Mr Nair going to the claimant's clinic to ask him to make a call to discuss the case and the transfer of the patient with Mr Higman. Dr Wood then went to the ward to see the patient himself that evening, whereupon he reviewed the claimant's opinion in the notes and spoke to Mr Higman. They agreed that given the urgency of the matter, the patient needed to be transferred to the second respondent and Dr Wood put in hand the transfer that evening. We find that this was a watershed moment for Dr Wood.

34. Now, Dr Wood was concerned about the claimant's practice, and in particular, that he did not appear to be liaising with the second respondent in respect of the transfer of patients with vascular problems, and was not reviewing patients in a timely fashion. Therefore, he emailed HR on 10 February to say that he needed urgent advice as he considered the claimant was putting patients at risk by his conduct (905). In two cases, he had had to intervene to ensure satisfactory management; and he saw a theme where the claimant took the view that, unless he was formally on-call, he should have no involvement with any patient with vascular problems not under his personal care.

35. Against this background Dr Wood together with Adam Race, Head of HR, met the claimant on 11 February 2015. Dr Wood raised his concerns over the two referrals and liaison with his surgical colleagues at the second

respondent. He reminded the claimant of his duty of care and the need to communicate. He said that they would meet again in two weeks' time to agree the claimant's job plan and ensure it fairly reflected his duties. Dr Wood gave an assurance to the claimant that they would clarify how the network operated and discuss any issues with Mr Higman to reach an agreed solution. At that point, the claimant was pleased when Dr Wood told him that he was arranging an external review of the vascular service. The claimant gave an undertaking that he would work collaboratively with clinical colleagues whilst trying to agree the job plan. Dr Wood left the meeting feeling that it had been constructive and he gave an assurance to the claimant that there was no issue with his surgery. At this point Dr Wood did not consider that any further action was necessary.

36. During that evening, Dr Wood updated Mr Higman by text message as to the conversation he had had with the claimant. He asked Mr Higman to let him know if there were any concerns over the weekend, because the claimant was on-call at the second respondent. He clarified that if there were any concerns as to patient safety he would need to stop the claimant working clinically; but he did not feel this was the case at the time (919-923). They agreed that Mr Higman's registrar (Dr Naumann) would be asked to keep an eye on the claimant but he would not be informed of the details. Mr Higman was the only person Dr Wood spoke to about his concerns with the claimant. Any concerns arising that weekend would be referred to Mr Higman as service lead.

37. On 13 February 2015 Dr Wood received a telephone call from Mr Higman reporting that the claimant had called for unnecessary support to theatre which had put pressure on the on-call surgical team at the second respondent. Mr Higman also explained that Mr Blacklay had raised concerns about the claimant's mental health, saying that he seemed very agitated and upset and had queried whether he was clinically safe to operate (917-918). Dr Wood tried to call Mr Blacklay on the same day but was unable to get hold of him.

38. On 16 February 2015, Dr Wood received another email from Mr Higman documenting concerns as to the inappropriate use of a crash call to the on-call surgical registrar by the claimant to gain his help with an elective patient in theatre. It appeared that the claimant had used crash call because he could not immediately contact a surgeon for assistance. The crash call system should only be used in an emergency, not to recruit help in theatre, as this took the registrar away from his on-call duties seeing emergency admissions (939). Dr Wood then spoke to Mr Higman at about 2:55pm and they discussed the conversation the latter had had with Mr Blacklay on 13 February. Mr Higman expanded upon what had been said, with Mr Blacklay having told Mr Higman that he would not be happy with the claimant operating on him. Dr Wood asked Mr Higman to look at putting in consultant cover for the on-call, should this prove necessary at short notice. Dr Wood was keen to speak to Mr Blacklay for his version of events directly, rather than rely on Mr Higman as an intermediary. This was entirely fair and reasonable, once again showing diligence on the part of Dr Wood.

39. Later the same day, Dr Wood spoke to Christine Hopton at NCAS about his concerns over the claimant. He explained to her that he was worried that the claimant's clinical decision-making may be impaired. She advised him that there was sufficient concern about the claimant's clinical performance to consider exclusion. Furthermore, she considered immediate exclusion for up to 2 weeks may be appropriate. Further down the line, any private work that the claimant had planned should be discussed and in accordance with good medical practice he should agree to cancel any private commitments. We saw a letter confirming the content of that conversation at page 951.

40. On 17 February 2015 Dr Wood requested an urgent meeting with the claimant to discuss his concerns (944-949). Also, he tried to call Mr Blacklay again; but without success. They did speak on 18 February at about 2:20pm and Mr Blacklay confirmed the text messages and telephone conversation that he had had with the claimant. He told Dr Wood that the claimant was "near the edge", he was worried about his fitness to perform surgical procedures, and also confirmed his comment that he would not want the claimant to operate on him (1080).

41. Dr Wood met the claimant on 19 February 2015. We saw the note of their meeting at 955 and heard the tape of it. Showing great fairness to the claimant Dr Wood decided that it was not necessary to exclude the claimant from work; but in the light of the concerns expressed as to the claimant's decision-making, he had decided to restrict him to non-clinical duties with immediate effect. In explaining to the claimant his reasoning, he told him that there were two elements to it: (1) the complaints about the claimant's willingness to engage with clinical colleagues and to accept and make referrals as expected, and (2) that the claimant had given undertakings that he would work collaboratively with his colleagues; but that in the meantime, a number of concerns had been raised regarding his practice. By this time, of course, Dr Wood had received concerns about the claimant from 6 senior consultants in a short space of time, which was unique in his experience. These were from: Mr Williams, Dr Egbuji, Mr Nair, Mr Blacklay, Mr Bala and Mr Higman. As a responsible officer, Dr Wood considered it his first duty to ensure patient safety at all times, it being a fundamental requirement of the GMC. He was very conscious of his responsibilities; and he was aware of a precedent involving another medical director who had failed to act in similar circumstances and had suffered the consequences of deregistration by the GMC. We heard the recording of the meeting and we will return to this topic and any effect it had on our decision-making process later. We would add that the claimant took his suspension from clinical duties as a suspension from work generally; and did not attend at all, even to carry out his non-clinical duties.

42. By letter dated 23 February 2015 the claimant made a complaint to the second respondent about Mr Higman (979-981) alleging "bullying and harassment". This formed part of the claimant's claim against the second respondent which was dismissed upon withdrawal. Nevertheless, it displays a

pattern of conduct: someone complains about the claimant and he responds with a grievance or complaint of his own.

43. In the background, both respondents were working to find a solution to keep the claimant involved in clinical work, for example at page 1013 dated 11 March 2015. Mr Allen Edwards was appointed to undertake the independent review of vascular. The claimant emailed Mr Edwards on 5 March 2015 (997) with his observations including reference to his job plan.

44. Dr Wood wrote to the claimant on 30 March 2015 concerning a further investigation (1062-3). He was to act as case manager and Dr Christine O'Brien, Associate Medical Director, was appointed to investigate, and terms of reference were attached to the letter. These concerned 2 patients, referred to as IQ and KB.

45. Dr Wood referred the claimant to occupational health (OH), and we saw the document at pages 1120-1. He was seeking advice and was concerned about: (1) work performance, fitness to work and (2) fitness to attend the capability/disciplinary meeting. The report appeared at 1118-9, is dated 15 April 2015, and it answered both questions posed by Dr Wood in the affirmative. Although the claimant was described as anxious he was assessed as: "not suffering from any medically significant stress". Dr Yusuf reporting, opined that ideally a disciplinary hearing should be resolved before the claimant returned to work. We could see other OH reports in the bundle at regular intervals.

46. Mr Edwards reported on vascular by a lengthy letter dated 11 May 2015 at pages 1174-6. He rounded it off in the following way:

"The recommendations for the provision of vascular surgical service have been defined by the Vascular Society and I include a link to their website. I would conclude that Mr Zayyan's practice is unique among surgeons in the Midlands area and I would recommend that it be examined.

My recommendations are:

1. Mr Zayyan should be provided with a job plan which reflects the expectations of a vascular surgeon who is a member of the Vascular Society.
2. Mr Zayyan and should be encouraged to drop his general surgical on-call commitments. His elective general surgical practice should be reviewed in line with national guidelines of the relevant professional societies.
3. The current arrangements between GEH and Walsgrave appear inequitable and I would encourage the CSL to develop pathways to deal with vascular problems arising at GEH during Mr Zayyan's duty week. I believe it is not unreasonable to expect Mr Zayyan to review non-urgent vascular problems at GEH during his off-call weeks.
4. Mr Zayyan needs to be provided with a dedicated listed at Walsgrave to deal with his elective arterial caseload.
5. Mr Zayyan needs to be provided with opportunities to gain the necessary skills to perform endovenous surgery.

6. GEH and the vascular CSL should explore mechanisms to establish a vascular laboratory at GEH. I appreciate this may have resource implications.
7. All vascular imaging at GEH should be shared with the MDT at Walsgrave.
8. Mr Zayyan should be encouraged to develop a diabetic foot service at GEH."

47. Dr Wood sent a copy of the report to the claimant on 12 May 2015 (1205). Rather surprisingly, given the recommendations, particularly supporting the claimant's vascular work and seeing the encouragement put forward for him to drop general surgical work, the claimant took exactly the opposite path, and on 15 June 2015 wrote (1296-7) to Dr Wood as follows:

"Re My Future Practice

It is now four months since you took the decision to suspend me from all clinical work, the issues that led you to do that remain unresolved. As you are aware my job plan review meeting is due on Wednesday 17th.

I was initially optimistic that by this time all the issues would have been addressed and resolved paving the way for a conclusive and productive meeting. Sadly this has not been the case. So I am now compelled to consider the option of practising as a General Surgeon only without Vascular, after 20 years in the field, and I have reluctantly decided that this is what I will do.

That means there will be no need for UHCW input into my job plan. I shall be grateful if you could communicate this officially to all the parties concerned."

48. This letter made no reference to race discrimination; but by the time of his witness statement the claimant asserted this in paragraph 74:

"The review found inequitability in the service and made 8 recommendations (including my cessation of general surgical on-call work) which I had hoped would be implemented to enable me to work on a level playing field with a fair job plan similar to my R2 colleagues. That has been exactly what I have been seeking since 2012 but GW refused to implement them, despite previously indicating that he would. I would consider his treatment of me leading to this decision to be racially motivated. That, combined with the bullying and hostility I had experienced at R2 which they failed to address, forced me to reluctantly relinquish vascular (p.1286-7)."

49. We concluded that there was a lack of evidence to support the assertion about Dr Wood's refusal to implement. It is significant that Dr Wood is accused of racism; but this is a continuation of the pattern of accusation, including: Moran, Arnold and Higman. The claim form stated: "I have been forced to reluctantly relinquish my vascular practice with loss of future NHS income from this with its adverse pension implications." We found this was an odd and surprising step for the claimant to take. He supported Mr Edwards' appointment. It was recommended he kept vascular, which he wanted, and yet he walked away from it when everything he desired was within his grasp.

It was a contrary decision to say the least. We find no force was exerted on the claimant to take this step. It was entirely his decision, and appeared not to have been talked through. There were imminent joint, planned, talks, as he recognised, on 17th June, and it would have been very apt for the claimant to have discussed it then. We find the claimant did not want to finalise his job plan until after the report from Mr Edwards. That had now been delivered and for the claimant to abandon vascular at this point was perverse behaviour.

50. Running in parallel was the start of the third investigation concerning patient "AR". Dr Wood wrote to the claimant on 18 May 2015 (1229-1232) enclosing terms of reference and we quote part of it:

"The allegations highlight concerns regarding your conduct in managing a patient who was subsequently transferred to University Hospital Coventry and seen by Nigel Williams, consultant surgeon. The detail of these concerns can be found in the attached terms of reference.

You will be aware that an additional concern regarding your conduct in theatre on 13 February 2015 had been raised. I have now concluded that this matter does not require formal investigation and no further action will be taken in respect of this incident."

The decision by Dr Wood in relation to the second item did not support the claimant's assertion that he was fault shopping. Dr Wood could have left it in; but chose not to do so.

51. Dr Wood was the case manager and Dr James Davidson (Consultant in Emergency Medicine at the second respondent) was appointed investigator. The claimant was represented by the MPS who maintained correspondence with the first respondent on the claimant's behalf. Various challenges were made by the MPS about the proceedings, including Dr Wood's involvement. There is no need for us to recite the detail, as they had no material impact on our fact-finding and conclusions.

52. Dilly Wilkinson produced a detailed investigation dated 30 June 2015 (1312-1329). Recommendations were made in it:

(1) the case manager should consider whether any matters should proceed to formal disciplinary, and

(2) an urgent review of the claimant's job place with a view to implementing a revised job plan.

Of course, this report had been overtaken by the event of the claimant ceasing vascular work.

53. On 5 October 2015 (1554) the claimant made a written complaint of race discrimination against Dr Wood. There was a considerable time gap to the further investigation meetings. On 7 October 2015, the claimant met with Dr Davidson for the third investigation. The claimant had with him Prof Carol

Seymour as his representative. Later the same day the claimant met Dr O'Brien in connection with the second investigation.

54. As a reminder in terms of the chronology, the claimant issued his claim form on 23 December 2015. On 24 December 2015 Dr O'Brien reported to Dr Wood, and at page 1620 set out the chronology of her investigation. There were 3 case investigator recommendations:

"1. I recommend that Mr Zayyan's job plan is reviewed and a system put in place to allow reliable review of patients with vascular problems at all times.

2. Additional support for vascular surgery would have to be put in place in Nuneaton if the on-call surgeon is not able to visit Nuneaton and review the patient.

3. The pathway for referral to the vascular surgeons should be reviewed and circulated to all consultants."

Of course, this too is out of date by then.

55. Dr Davidson reported on 30 December 2015 (1653). His recommendations were these:

"I do not feel that Mr Zayyan's inexperience with the treatment offered at UHCW represents a significant gap in skill or ability, nor was there any evidence of lack of engagement with the patient at GEH.

I **do** believe that Mr Zayyan's approach to the request for assistance might have been performed more effectively, and would represent a learning and development point for him.

There is no local agreement on how advice or transfer arrangements should be sought, nor a local service level agreement on providing surgical emergency care, with the exception of vascular work. There may be some benefit in creating a shared agreement in how requests for assistance are conducted in future."

56. We now step back in time in the chronology, and go back to the first investigation and Mr Thompson's actions in relation to it. In September or October 2015, he had a meeting with HR to discuss the Wilkinson report. Whilst he concluded that there were issues which needed to be addressed, they did not warrant formal disciplinary action and mediation would be the most appropriate course of action. He came to this conclusion because it considered the issues were behavioural; not turning up was a matter which he felt was connected to the claimant's job plan and he believed a joint resolution was required. He also took the view that the first respondent had a consultant who was away from work; it needed to get him back as soon as possible, and he considered mediation was the appropriate way. Mr Thompson then had a further meeting with HR, this time with Mr John Howden, interim head of HR, sometime in October or November 2015. Mr Howden concurred with Mr

Thompson's view that no formal hearing should take place and that mediation should be the first step to take. On the same day, they both went to see Mr Adam Race to discuss the detail as to how it should be taken forward. Mr Race indicated that there were other issues which needed to be addressed, and although he did not give the detail, we know that by 1 November 2015 the claimant had commenced early conciliation through ACAS and the claim was being mooted. At the same time, the job revalidation issue was still up in the air.

57. The claimant told us that on the suggestion of the second respondent he made an application to the Employment Tribunal to stay the tribunal claim. The tribunal granted the claimant's application with the consent of both respondents. This seemed a sensible thing to do, and the parties then embarked on mediation; and all the three investigations were put on hold pending the outcome of the mediation. The decision to leave matters in abeyance by the first respondent was taken by Messrs Howden, Thompson and Race. Stated shortly, an independent mediator, Mr Mark Smithers was chosen and it took place over two days on 27 and 28 June 2016. The claimant withdrew from the process and it was unsuccessful.

58. In December 2015, NCAS recommended that the claimant returned to do some work in the part of the job plan he had agreed to; but that did not happen because the claimant would not agree any part of the job plan and continued not attending at work. There was a serious lack of cooperation on the part of the claimant. The claimant had not been attending work although he had not been formally signed off work as sick; and it was plain that he was expected to attend at work for non-clinical duties.

59. In Dr Wood's letter to the claimant on 17 August 2016, he stated that the claimant was required to report to his office on 22 August 2016 to discuss the proposed job plan and activities. They met, and the claimant resumed work that day on non-clinical duties. The claimant was assisted in returning to clinical activities via a placement with another trust, where he was able to observe in theatre. There was also shadowing at the first respondent; and on 1 June 2017 the claimant commenced both elective and emergency clinical operative work. Revalidation has been deferred until 27 March 2018 to enable the claimant to provide a good body of supporting evidence for his appraisal to ensure success in the process.

60. We conclude that during the mediation process the claimant was told that the three investigations would lead to no further action and matters were closed. This was confirmed by letter dated 17 August 2016 from Dr Wood (1805-1807). The two had spoken on the telephone on 10 August 2016 when Dr Wood said the same thing. We found that this was a further conciliatory gesture on the part of the first respondent, inconsistent with the claimant's assertion that Dr Wood's motivation was that of a racist.

61. During the mediation process an offer was made to the claimant to resolve all matters. It was rejected by the claimant who decided to withdraw. We do not know the terms of the offer or the reasons for withdrawal.

However, we do know that after the mediation concluded, the claimant spoke to the mediator who sent an email to Dr Wood and Mr Race on 29 June 2016 (1790) which included this:

"I have spoken at length today with Mr Zayyan, and he has asked me to convey to you that if the Trust were willing to go with what was on the table yesterday both in terms he would be amenable to settling."

The offer was repeated by the first respondent. The claimant sought several extensions of time, which were granted, but eventually he rejected the offer on 12 August 2016. These are our main findings of fact in (largely) chronological order.

62. The submissions. We agreed with the parties that the submissions would be taken at 10am on 15 August 2017. We ordered that the parties arrived by 9:30am in order to mutually exchange their final written submissions and have the opportunity of reading them before they addressed us. Unfortunately, that did not go according to plan and Mr Neville arrived at 10am without any written submissions at all. He explained that he had had a problem with his computer and was unable to print it off. He could not access his computer remotely and other than returning to his home in Leicester to get copies he would have to address us orally. We canvassed with him whether he would like to apply for an adjournment; but he declined to do so. He did ask for a break so that he could read Mr Powell's submissions; and we agreed to do that. The parties agreed that they would reverse the normal order of submissions to enable Mr Neville to go first and they asked us to endorse that approach. We accepted that arrangement.

63. Mr Neville commenced his submissions by referring to the recent decision of the EAT, namely: Efobi v Royal Mail Group Limited UKEAT/2017/0203/16/1008. He submitted that this provided new thinking over how the tribunal should approach the burden of proof in discrimination cases. It emphasised that there was no burden of proof on the claimant. The tribunal have to decide whether there are facts to establish discrimination, and if there is no satisfactory explanation by the respondent the case will succeed. There has been mistaken thinking in the shifting burden of proof. When considering the issues which we identify in case management above, the test was slightly different in relation to direct discrimination and at 4.3 the question is now this: "If so, considering all the evidence, are there facts from which the tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic?" Mr Neville submitted that there was no change to the analysis set out for harassment and victimisation. He asked the tribunal not to get hung up on the burden of proof; but to look at all the evidence. He confirmed the dates of the three unwarranted investigations, and the identity of the case manager and investigator in each. The case of Ms Moran was relevant background because it showed how Dr Wood became involved with the claimant.

64. Mr Neville submitted that the tribunal should find that there was an underlying problem with Dr Wood and much of his conduct was unreasonable,

to the extent that his explanations cannot be accepted and should be regarded as exhibiting symptoms of an aversion to meeting with the claimant and he held a dogged determination to gather evidence over misconduct against the claimant. Dr Wood exhibited a lack of a welfare approach to the claimant. This should lead us to conclude that there was unconscious race discrimination. He accepted that there was nothing in the bundle to support this assertion and therefore the tribunal must draw inferences from the facts. In relation to the first investigation in 2014, Dr Wood was too eager to investigate the allegations and set about emailing people asking for information. He drew our attention to the documents at pages: 640, 641, 642 and 646. Dr Wood was gathering evidence and never established the truth. Mr Neville said it was rather a coincidence that records were being kept about the claimant. Dr Wood should have taken the claimant through an informal process, but Dr Wood was averse to doing so. Dr Wood instructed Mr Thompson to carry out the case management of this investigation, but in effect Mr Thompson was manipulated by Dr Wood into taking on his own views about the case. Mr Neville submitted that a theme emerged, matching the case of Ms Moran, where Dr Wood evinced an aversion to speak to the claimant betraying a racist animus.

65. Mr Neville submitted that we should have regard to the conversation at page 869 between Dr Wood and Mr Higman, and the tribunal should find Dr Wood had a record of showing greater focus on the claimant's shortcomings, whereas the reality involved an analysis of systemic failures. Dr Wood, by failing to forward Mr Higman's reply to his email to the CEO further revealed his animus. The fact of the claimant not being involved in the discussion once again illuminated Dr Wood's failure or aversion to communicate with the claimant. He drew our attention to page 899, which showed that there were general surgical issues, the system, but Dr Wood was focusing attention on the claimant's conduct and/or capability. When we considered the text messages at 917-925, there is no explanation as to why Dr Wood was not talking to the claimant.

66. As to the restrictions placed upon the claimant's practice, Dr Wood was proactive in what he did; but this indicated a greater approach than that which was proportionate or necessary. Dr Wood failed to have regard to the claimant's health and the outstanding job plan. There were systemic and communication issues. To have to wait for a concluded job plan was disproportionate. Dr Wood failed to get hold of other plans for the claimant to see, indicating a disinterest in the claimant, prompted by a racist attitude and aversion to him. Dr Wood uncritically adopted what he was told by Mr Higman. The restriction in the claimant's practice amounted to a detriment. The OH review at page 1118 demonstrated the job plan issue, and its disproportionate use, in ongoing restrictions. Dr Wood was not interested in getting the claimant back to work.

67. When the claimant resigned from his vascular practice by letter dated 15 June 2015, this was because of the delay in the investigations and the stress of them. The claimant felt that Dr Wood failed to sort out how the claimant undertook his vascular work. Nothing happened following the NCAS letter at

page 1612 in December 2015. The claimant's sickness and the investigations caused a vicious circle. The mediation ended the investigations, but Dr Wood thought the decision was wrong, signifying that there was a festering problem. Dr Wood's conduct was inexplicable, it gave rise to a racist animus, and we should draw an inference that that was the case. The test for harassment was met, both purpose and effect, the claimant having a reasonable perception.

68. As to the comparators, we should consider the claimant's nominated comparators as general background, as well as specific comparators. This would be commensurate with the adoption of the "reason why" approach referred to in Shamoon. As to the claim for victimisation, this was entirely wrapped up with the issues already advanced by the claimant, and we should consider it as part of the case as a whole.

69. In relation to remedy, this was a case at the top end of the top band of Vento, with the claimant being filled with stress for many months and the loss of his vascular practice. The claimant had established causation. This had an impact not only on injured feelings; but also, his loss of income and consequent loss of profit.

70. In relation to the out-of-time points, these matters were ongoing and continuing acts, and the outcome was told to the claimant on 31 March 2016 by Mr Howden (1746) and verbally by Dr Wood on 10 August 2016. The encouragement by Dr Wood of the two doctors to spy on the claimant was not a discrete issue. Mr Neville was unable to pinpoint when the claimant heard about it, but in any event, it was just and equitable to extend the time, if we did not adopt his argument on it being a continuous act. Mr Neville conceded that there was nothing about just and equitable reasons in the claimant's witness statement or in the evidence generally, and accepted the time point had been flagged up as an issue in the March 2017 CPH.

71. We then heard from Mr Powell. He submitted that the case of Efobi had been decided per incuriam, although he did not identify the cases not referred to in the EAT. The EAT decision did not have the authority to correct decisions of the House of Lords and the Court of Appeal. He then turned to his rebuttal of the claimant's submissions on the facts. In relation to the case of Ms Moran, he highlighted the fact that the claimant asserted Dr Wood failed to understand his case, but drew our attention to page 604, where the claimant said that he discussed the issue several times with Dr Wood, contradicting Mr Neville's submissions. The claimant's witness statement deals entirely with overt discrimination. The case of Brown v Dunn (no citation was given to us) was authority for the proposition that unconscious motivation is specific and should be put to a witness or pleaded, and in the case before us now this had not been done by the claimant and it was too late to raise it in submissions.

72. Mr Powell drew our attention to matters which appeared for the first time in the submissions of Mr Neville, which otherwise were not part of the pleaded case or even asserted in the claimant's witness statement, for example, Dr Wood telling Mr Thompson how to conduct the investigation and Dr Wood

effectively controlling that investigation. The only influence Dr Wood had on the investigation was his input as a witness, having been interviewed by Dilly Wilkinson. Having dealt with rebuttal, he then spoke to his written submissions, emphasising certain points, and there is no need to repeat here what is set out in writing. He underlined his submission that there were no inferences to be drawn that there was discrimination on the part of Dr Wood. There was no change in behaviour following the protected act of 5 October 2015, and Dr Wood became aware of this on 2 November 2015. He dwelt upon the time point and drew attention to the lack of evidence about this issue from the claimant. As to the allegation that Dr Wood encouraged the doctors to observe the claimant, the latter did not state when he knew that this was happening. If he did not know at the time, then it could not amount to harassment. If he did know, then it is plainly out of time. There was nothing in the claimant's witness statement to suggest that he was unaware of this action, therefore he was on notice and capable of bringing a claim. Mr Powell rounded off by concentrating on the claimant's unreliability as a witness. He drew attention to a number of inconsistencies in his case. Furthermore, he submitted that the claimant was prone to exaggeration. The claimant's case had ebbed and flowed, and been difficult to follow. The late use of the term "unconscious discrimination" was a further example of the claimant changing his position. The claimant's assertions that people are racist is a falsehood. To suggest that Mr Higman was racist, abandon the claim against him, and then use him to undermine Dr Wood demonstrated the weakness in the claimant's case. Mr Powell submitted that wherever there was a dispute on the facts, we should prefer the respondent's evidence to that of the claimant. The claimant has failed to make out his case applying Efobi or the previous jurisprudence.

73. In the event that the tribunal found in favour of the claimant, Mr Powell submitted that the claim for injured feelings was exaggerated and unsupported on the evidence. Furthermore, the claimant had failed to establish causation for any economic losses. This was particularly so in relation to those sums being claimed following his resignation from vascular work, such resignation being driven entirely by the claimant and not because of any conduct on the part of the respondent.

74. Our conclusions and reasons. Before turning to the issues in detail, we would say that we were not helped in our deliberations by the fact of there being no agreed chronology. The drafts were barely helpful and there were a number of incorrect dates. We also point out that there were a vast number of documents in the bundle which we did not have our attention drawn to; and the case was made over complex by the excessive inclusion of documents in the bundle which were irrelevant to the issues.

75. We deal with the issues in the order in which they appear in the issues section above. Subjecting the claimant to 3 unwarranted investigations. As to the time point, we conclude that these are not out of time as they were all in process at the point when the claim form was presented. They were a continuing act and therefore there is no need for us to deal with the just and equitable point. Applying the law as it now appears to stand, following the

case of Efobi we carry out our analysis. We find that the conduct was unwanted by the claimant, as he did not wish any of the investigations to take place. Were any of them related to the claimant's race? Our answer to that question is no, none of them were. The claimant expressed the view that the conduct of Dr Wood had both the purpose and effect of violating his dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him. The totality of the evidence before us demonstrated that the conduct did not have that purpose, with Dr Wood acting on information presented to him, which if he had not acted upon it, would have amounted to a dereliction of his duty. There was an overwhelming volume of concern, from several consultants, leading to this course of conduct by Dr Wood. As to having the effect, we have to take into account the claimant's perception and all the other circumstances of the case. When we look at the totality of the evidence again, it was not reasonable for the claimant to perceive that it had such an effect upon him. There is a considerable data trail showing how the three investigations came about, all of them stimulated by the claimant's own conduct. The claimant could have avoided any such feelings had he not behaved in such improper ways. Furthermore, the claimant, once again by his own conduct played a significant part in extending the time of the investigations, for example by he and his professional representative not being available, and being unfit to attend meetings. And, of course, had the claimant acted promptly by making the apology to Ms Moran he could have headed off a considerable amount of time spent on that issue. It would have been simple for him to have given the apology at an early stage, as he had promised to do, and which lamentably he failed to do. When we look at the totality of the facts before us, we conclude that the respondent did not harass the claimant for reasons related to race. Therefore, this part of the harassment claim is not well-founded, fails and is dismissed.

76. The second issue for us to determine, is whether the first respondent through Dr Wood, encouraged junior doctors (Hagar and Yahir) to covertly monitor the claimant? We know from our analysis above that these events occurred in August and September 2014. The earliest date any act could have been in time was 2 August 2015. Therefore, on the face of it, this claim is out of time. We apply the test set out above. We conclude that this is not part of a policy or a continuing act extending over a period. This is a discrete set of circumstances. At one stage, Mr Neville submitted that they were part and parcel of the unwarranted investigations; but he could not explain therefore why it appeared as a separate issue. We considered whether it would be just and equitable to extend the time. The length of the delay is from August/September 2014 to 23 December 2015, with the date of issue; but allowing for the effect of ACAS early conciliation the earliest date is 2 August 2015. We have not been told the reasons for the delay. It is unlikely that the cogency of the evidence will be adversely affected, as the complaints were well documented at the time. The respondent has co-operated with requests for information on many occasions, as evidenced by the huge bundle of documents. The claimant has not told us the date he knew of the facts giving rise to this cause of action. Mr Neville was asked for this information by us; but he was unable to provide it. As to advice, we know that the claimant was receiving professional advice from the MPS from an early stage. Because of

the lack of information before us the claimant has failed to convince us that it is just and equitable to extend the time and we do not do so. Thus, the tribunal has no jurisdiction to hear this part of the harassment claim and it is dismissed.

77. However, since we have heard all of the evidence, we go on to say what we would have found had this claim been in time. We would have found that upon considering all the evidence, both from the claimant and the first respondent, the claim would have failed. There is a very good data trail on this subject and it points away from Dr Wood encouraging the two junior doctors to covertly monitor the claimant. Dr Bala was the conduit for bringing the concerns to the attention of Dr Wood on behalf of the junior doctors. They were already monitoring the claimant and simply provided information to Dr Wood upon which he could act. For completeness, any course of conduct between Dr Wood and the junior doctors was not related to the claimant's race and did not have the purpose or effect proscribed in the legislation. The claimant's perception was entirely unreasonable, and any reasonable observer would see that there was no encouragement and no tainting by race.

78. We now deal with the claims for direct race discrimination. Firstly, the allegation that in restricting the claimant's clinical practice Dr Wood did so because of race. Has the respondent treated the claimant less favourably than it would have treated any comparators? Even until the end of the case the claimant maintained reliance on the four comparators that he proposed in the March 2017 CPH. We conclude that these are not the correct comparators as they do not have the same factual matrix. Of course, it is possible for the claimant to point to them as indicating there is a difference in treatment and use it as part of inference drawing, and we do that in our analysis. However, the relevant comparator would be a hypothetical one, in the same circumstances as the claimant, that is facing numerous concerns from several sources, including those surrounding his clinical practice. We conclude that the hypothetical comparator would have been treated in exactly the same way by Dr Wood. If we take the approach recommended in the case of Shamoon and ask ourselves the "why" question, the reason why the claimant was treated as he was, came about because of his own conduct as a consultant clinician. The multiple concerns advanced would have led to the same outcome against anyone subject to the same professional standards. Our analysis finds that the facts lead to a proper and fair conclusion that any difference in treatment would not have been because of the claimant's protected characteristic. The respondent's explanation establishes non-discriminatory reasons for the treatment complained of. Thus, the first claim for direct race discrimination is not well-founded, fails and is dismissed.

79. The second part of the direct discrimination claim relates to the three investigations, which the claimant described as "unnecessary". We conclude that this is part of a continuing act and is therefore in time; and we did not have to consider just and equitable reasons. We conclude that the four comparators advanced are not the correct ones and it would be the hypothetical comparator. When we apply the test to the hypothetical comparator faced with the same factual matrix we conclude that the

respondent would have treated the comparator in the same way. We base our conclusion on the same facts that we advanced for the harassment claim relating to the investigations. The claimant's assertion that these were unnecessary investigations is entirely without foundation. All three were demonstrably necessary given his course of conduct which led to them. Dr Wood would have failed in his duty as Medical Director if he had not taken action. Any perceived difference in treatment by the claimant had nothing whatsoever to do with his protected characteristic. The respondent's non-discriminatory explanations for the treatment have been established and were entirely justified. Therefore, this part of the claim is also not well-founded, fails and is dismissed.

80. There is a third claim for direct discrimination, and it arises out of paragraph 4.1.4, relating to any other treatment not found to have been harassment. As we read it, this is a reference to item 3.1.2, Dr Wood encouraging junior doctors to covertly monitor the claimant. We deal with this item in the same way as we did when it was a claim for harassment. For the reasons we gave earlier, it is out of time. Therefore, this claim is dismissed because the tribunal has no jurisdiction to hear it. Also, if we were wrong about it at that point, the claimant would have failed on the merits in any event. We would adopt the same reasons we advanced earlier in rejecting the harassment claim.

81. Finally, we turn to the claim for victimisation. We find and conclude that the claimant did carry out a protected act with his letter of 5 October 2015 to the first respondent. Then, did Dr Wood fail to progress the claimant's revalidation to allow him to return to work because the claimant had done the protected act? We apply the test set out above. Has the claimant established the detrimental action relied upon? We found it difficult to follow the claimant's case here because the process of revalidation did not prevent the claimant returning to work. Our factual analysis on revalidation is that any delay was entirely due to the claimant not agreeing his job plan over several years. We have already found that revalidation had been extended in time until 2018. The claimant had not been prevented from working and did return to work, both clinical and non-clinical. At no time was the claimant prevented from undertaking clinical work because of the delay in the outcome of the revalidation process; moreover, the restriction arose because of concerns over his clinical practice and patient safety. The totality of the evidence does not show the claimant was subject to a detriment. If we were wrong about that, we would have found that any failure to progress revalidation was not because the claimant had done a protected act, but by his own conduct in not co-operating in the process, and failing to agree his job plan. We conclude that this part of the claim is not well-founded, fails, and is dismissed

82. The second part of the victimisation claim relates to the alleged failure by Dr Wood to close the three investigations. The totality of the evidence leads us to conclude that the decision not to close the three investigations by the time of the issue of the claim form was not down to Dr Wood. It was Mr Howden in conjunction with Mr Thompson and Mr Race who agreed with the claimant, upon his application, to stay the litigation and the three

investigations. Of course, we know from our factual analysis that the three investigations were closed at the time of the mediation and Dr Wood confirmed that fact to the claimant in a subsequent telephone call and later by letter. The facts advanced by the claimant do not support his claim. The detrimental action he relied upon was not supported by the evidence. It was his own conduct which caused or contributed to the investigations not being closed by the time of the claim. The claimant was not subjected to a detriment by either Dr Wood or the first respondent, because the facts show that he consented and it was a joint decision, reasonably and fairly taken at the time and does not imply any subjugation of the claimant by the respondent. If we were wrong at that stage, we would go on to say that the decision not to close the three investigations at the time complained of was not influenced by the protected act whatsoever. Again, this part of the claim is not well-founded, fails and is dismissed.

83. We would state that had we approached our analysis of the claims in the way we described pre-Efobi, we would have come to the same conclusions in all of them. The claimant failed to establish a prima facie case of unlawful discrimination and victimisation, and would have failed to shift the burden to the respondent to prove a non-discriminatory explanation. Had he done so, then the first respondent would have discharged the burden of proof upon it, and demonstrated that in no sense whatsoever was its conduct tainted by race.

84. When coming to our decisions in this case we had regard to how the witnesses presented to us. We say something about Dr Wood first. We found that he was articulate and intelligent, open and honest. If there was a mistake in the process, he could see an alternative view of things and accepted that he may have made some errors. He presented as credible. We know, however, that that is not the end of the matter as credible witnesses can be mistaken. We considered this very carefully; but in our analysis, he was not mistaken. He was supported by a very good data trail. He presented to us as conscientious, always enquiring as to establishing the facts. He was diligent and took great responsibility in his role. Dr Wood was subject to a lengthy cross examination spanning the best part of two days. He dealt with it very professionally; and was able to answer nearly all of the questions succinctly and remain on point. We noted that it was not until 3:17pm on the second day of his cross examination that he was questioned about race being the driving force behind his decision making. His cross examination ended at 3:28pm. We found he was a good witness, and in many ways exemplary. We could see that he gave every opportunity to the claimant to remain as a clinician. He must see skills in the claimant which are highly valued by the first respondent, and which it wishes to retain. Dr Wood has maintained a balanced view notwithstanding the sustained, hostile and unfounded attack which has been made upon him.

85. Before we heard any oral evidence, we were asked by the claimant to listen to a recording of the meeting that he had with Dr Wood on Thursday, 19 February 2015 at 9:40am. The claimant invited the tribunal to note the tone adopted by Dr Wood in that meeting. The suggestion from the claimant

beforehand was that it would not be helpful to Dr Wood for us to hear it. However, having heard it we concluded that Dr Wood behaved quite reasonably and was not aggressive or oppressive. His tone was neutral; he adopted a business-like and informative approach to the meeting. There was nothing in the tone or the contents of the meeting which supported the claimant's case before us; in fact, it demonstrated the reasonableness of Dr Wood and accorded with our findings about him generally.

86. Then we say something about the claimant. He too was plainly articulate and intelligent, commensurate with his position as a Senior Consultant surgeon. However, he did not present to us as open and honest. His thinking and actions were not transparent. As the case unfolded, we were able to see that the claimant resented being managed at work. He did not grasp the concept of being part of a team, and being a team player when carrying out his function and wider duties as a consultant surgeon, including within the Network. He presented as selfish. He wanted people to treat him with respect, and yet he would not treat other people with respect. This was notable from the start of the time period that we were concerned with. In particular, in his dealings with Ms Moran. He had no insight into the upset that he caused other people. Whilst he accepted that now, on reflection, it was not an appropriate thing to do, to breach Ms Moran's privacy to over 80 consultants. Nevertheless, he did not see it as a breach of the GMC code to be polite and considerate to others. This may explain why he did not give the apology to Ms Moran that he had, at one stage, promised. He was pressed to do it, but repeatedly failed to do so; and this led to formal disciplinary proceedings against him, when it was entirely within his power to have avoided them by giving the promised apology. This also reflects a considerable element of stubbornness in his personality. He has a very fixed view of things, being blinkered, unable to see an alternative to his own view. This incident demonstrated that he became angry and was apt to make poor decisions when matters did not go the way that he wanted them to do. Very often, the claimant failed to answer simple direct questions when cross-examined, and would go off at a tangent and/or waffled. He had to be directed to come back to the question and answer it. He saw no difficulty in making other people wait for him to attend at meetings or clinics, legal and medical. Thereafter, he was outraged that somebody would complain, quite reasonably, about him. Simply stated, we found the claimant lacked credibility. He was not a witness of truth. Thus, wherever there was a conflict on the evidence we preferred the evidence of the respondent's witness.

87. Paranoid is a word the claimant introduced to us in the hearing, describing how he asked his wife if there was any mail from the respondents, not wanting to face up to it, and the appearance that may have created, possibly pointing towards him being paranoid. There were several issues raised by the claimant which may have pointed towards that being the case, and simply in laymen's terms the claimant did present as paranoid on occasion. For example, he complained about "secretive" meetings going on without his knowledge. They were not secretive at all, they were meetings which simply took place without him being present. He found it hard to accept that people might talk about him or watch him. Obviously, if patient care and care for an

employee were matters before an employer as concerns, it would be no surprise that these things happened. This would be reasonable and normal. The claimant, by his conduct presented to us as vindictive towards people who were carrying out their jobs; and sometimes trying to help the claimant, e.g. Dr Wood resolving the issue with Ms Moran, but the claimant spoiling the opportunity to move on without disciplinary proceedings being furthered. The claimant described himself as someone who could take criticism, learn, move on and apply the lesson. We disagree with his analysis. He could not take criticism, and reacted badly to it, lashing out at Mr Arnold, Ms Moran, Dr Wood and Mr Higman, demonstrating no ability to move on.

88. The only witness that the claimant called was Dr Egbuji. He is Nigerian by birth. He came to Great Britain in 1992 and is now a British citizen. He first met the claimant when he started to work for the first respondent in 2005. He is a work colleague of the claimant but they do not socialise out of work. He pointed out that the claimant was from northern Nigeria whilst he is from the south and there are language differences between them. He works as a consultant physician for the first respondent. He gave evidence in relation to KB and the events of 9 February 2015. His evidence was contained in a witness statement prepared on 10 July 2017, but signed on the day he gave his evidence to us, being 8 August 2017. He had previously given a statement in the form of agreed minutes taken by Dr O'Brien during the process of her investigation into the claimant over the KB incident. Unfortunately, there was a serious omission from the statement signed on 8 August. It failed to make any reference to the claimant advising that KB should be transferred to the second respondent on 9 February 2015. The words Dr Egbuji used in his statement to Dr O'Brien were these: "JE then spoke to KZ who stated that he was in theatre all day and could not see the patient today, hence the referral to UHCW." That statement was made on 16 June 2015, obviously much closer in time to the event under discussion. Dr Egbuji had spoken to Mr Higman about the subject shortly after he spoke to the claimant, and Mr Higman had sent an email on the same day at 15:58 (page 890) to Dr Wood confirming what he had been told by Dr Egbuji: "[the claimant's] response is that he is in theatre, and that the patient should be transferred to UHCW."

89. During cross-examination Dr Egbuji found it very difficult to explain this omission. He was given another opportunity by Mr Neville in re-examination. Counsel asked him: "Did the claimant suggest the transfer?" He replied: "It is true". Mr Neville then suggested to the witness that it was a direction to him to go to the on-call team about the transfer. There were objections from both representatives of the respondents, but the witness's clear answer had been recorded. There were other unsatisfactory aspects to Dr Egbuji's evidence. Like the claimant, he too was prone to waffle or go off at a tangent rather than answer a direct question. It was embarrassing to hear some of his answers, for example, over whether or not he had spoken to Dr Wood on the telephone. He started off by denying having done so. Eventually he conceded that he had done, having been taken to page 1629. He was then asked about the contents of the conversation, and denied that he had discussed KB. His memory was shown to be inaccurate and again once he was forced to admit

it, he conceded that he had discussed KB. He suggested that Dr Wood's witness statement was possibly wrong, and he himself had not been concerned at the delay by the claimant over the issue of transfer. The contemporaneous documents were quite revealing and supported Dr Wood in his evidence. Unfortunately, we concluded that Dr Egbuji's evidence was not open and honest, was inconsistent and unhelpful. He was not a credible witness, and at the least mistaken. This witness did not help us to understand the claimant's case and the issues he advanced before us.

90. Thus, when carrying out our analysis, where there was any conflict on a material fact we preferred the evidence of Dr Wood. If it is not apparent by now, we conclude by stating that having considered the matter at the end, and having taken into account all the information before us, there was not a shred of evidence to support the claimant's version of the events and enable us to find race discrimination in any of the forms complained of. Having stood back to make our findings of primary fact, any further facts or inferences to be gleaned, support the first respondent's version of the events.

Signed by Employment Judge Dimbylow

on 29 September 2017