Appeal No. UKEAT/0345/16/BA

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 24 May 2017
Judgment handed down on 29 June 2017

Before

THE HONOURABLE MRS JUSTICE ELISABETH LAING DBE

(SITTING ALONE)

BRIGHTON & SUSSEX UNIVERSITY HOSPITALS NHS TRUST — APPELLANT

(1) MR J AKINWUNMI
(2) MR J NORRIS & 4 OTHERS — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS ELIZABETH MELVILLE (of Counsel) Instructed by: Cater Leydon Millard Solicitors 68 Milton Park Abingdon Oxfordshire OX14 4RX
For the First Respondent	MR BRUCE FREW (of Counsel) Instructed by: Consilia Legal LLP 4 Park Place Leeds LS1 2RU
For the Second Respondents	No appearance or representation by or on behalf of the Second Respondents

SUMMARY

PRACTICE AND PROCEDURE - Perversity

PRACTICE AND PROCEDURE - Contribution

UNFAIR DISMISSAL

The Employment Appeal Tribunal ("the EAT") dismissed an appeal from a Decision of the Employment Tribunal ("the ET") upholding the Claimant's claim of unfair dismissal, but dismissing his claims of whistleblowing detriment and victimisation. The EAT held that the ET had been entitled, having regard to the complex background of the case, to hold that the Claimant's dismissal for being absent without authority for 20 months was unfair. Neither that decision, nor the decision that the Claimant had not caused or contributed to his dismissal, was perverse.

THE HONOURABLE MRS JUSTICE ELISABETH LAING DBE

Introduction

1. This is an appeal from a Decision of the Employment Tribunal ("the ET") sitting at London (South). The ET consisted of Employment Judge Hyde, Ms Leverton and Miss Brown. The ET decided unanimously that Claimant had been unfairly dismissed. The ET also held that he did not contribute to his dismissal. The ET dismissed his claims of automatically unfair dismissal, victimisation and whistleblowing. The Decision sent to the parties on 16 September 2016. The hearing occupied 4 reading days, 10 hearing days and 7 days in chambers. The Decision is 713 paragraphs long (137 pages).

2. I refer to the parties as they were below. Paragraph references are to the ET's Decision unless I say otherwise. The First Respondent ("the Respondent") was represented on its appeal by Ms Melville, and the Claimant by Mr Frew, both of counsel. I thank them for their written and oral submissions. Despite the length of the ET's Decision, the issues on the appeal turned out to be relatively narrow and I commend both counsel for their precise and focussed submissions.

3. The Respondent's case, in sum, is that the ET could not see the wood for the trees, and, as a result, lost its way. The core of the Respondent's case before the ET was that it was entitled to dismiss the Claimant because he had taken 20 months of unauthorised absence. The Claimant's case is that this formulation of the argument is artificially limited and that it fails to engage with the ET's assessment of the reasonableness of the behaviour of the Claimant and the Respondent.

The Background

4. The Claimant was a consultant neurosurgeon. There were six permanent neurosurgeons in his department. The numbers of locums varied. The Claimant's relationships with Mr Norris ("the Second Respondent") and Mr Hardwidge ("the Third Respondent") had got worse over time. They made complaints about one another. The Claimant was due to start an unpaid employment break between 5 November 2012 and 4 February 2013.

5. Those relationships got even worse just before that break. There were many complaints, mostly against the Claimant (paragraph 42). The Claimant did not return when he was supposed to, and did not return at any time before his dismissal. He was dismissed for unauthorised absence on 6 October 2014.

6. The ET accepted that the Respondent had a genuine belief that the Claimant's 20-month unauthorised absence was misconduct and that the Respondent had reasonable grounds for that belief (paragraphs 692 to 693). The question was whether it was within the band of reasonable responses for the Respondent to dismiss the Claimant for that reason.

The Employment Tribunal's Decision

7. Two general points emerge from the ET's Decision. First, there are many references in the ET's Decision to the fact that many of the Respondent's important documents were not shared with the Claimant at the time when they were generated, and, indeed, some did not emerge until they were produced in the course of the hearing, in some cases after the relevant witness had given evidence (see, for example, paragraph 226). The ET also said that there were relevant documents which neither side had disclosed (paragraph 606). Second, some of the Respondent's witnesses did not make a good impression on the ET. The ET used the word

"disingenuous" and its cognates several times when describing their evidence (see, for example, paragraph 484).

8. The ET said in paragraph 21 that it accepted Ms Melville's statement of the law, but did not "agree with the application of the principles stated" in every case.

9. In paragraph 30, the ET summarised the parties' positions. The Respondent dismissed the Claimant for gross misconduct after disciplinary proceedings alleging unauthorised absence from 4 February 2013. The Respondent's case was that the Claimant had failed to engage with the Respondent in order to bring about a return to work. The Claimant argued that the dismissal was unfair and did not take account of the reason why he had not returned to work, that is, that his health and safety and that potentially of patients would be endangered if he returned without the Respondent addressing the allegations made against him by his former colleagues, clearing him in relation to the alleged threats and generally facilitating his return to work.

10. In the next several paragraphs, the ET summarised the facts in outline. In 2008 the Second Respondent was made principal lead clinician for neurosurgery. In 2009 he discussed the Claimant's performance with him. He did not deal with this formally. At the time, the Claimant did not accept that the Second Respondent's concerns were valid.

11. The ET said that the Claimant had made an earlier claim in the ET, in 2011, alleging discrimination on grounds of race by the Respondent and by the Second Respondent. That was investigated internally by Mr Twyning. There were three main allegations about events in January 2011. Mr Twyning did not uphold the allegations of discrimination but he reported that the working relationships between the Claimant and his colleagues, in particular the Second

Respondent, had got worse. He said that there seemed to be "a culture of poor working relationships, ineffective communication and low levels of trust". He feared it would affect patient care, safety, and the effective running of the department. The department would benefit from changes, including a "more formal and professional management style". The Second Respondent had by then been managing the department for "some years". Mr Twyning recommended that the Claimant's allegations of historic bullying and discrimination be investigated separately. The report strongly supported formal management training for the Second Respondent and equality and diversity training for all medical staff in the department. This was despite the fact that the Second Respondent had already had some management training. Thought should be given to enabling the Claimant and the Second Respondent to draw a line under the incidents and to foster a "more professional and closer working relationship". Mediation should be considered. The ET said (paragraph 37) that with the benefit of hindsight, Mr Twyning's recommendations were "extremely well made".

12. The Claimant's discrimination claim went to the ET. When the claim was part-heard, and before the Second Respondent had given evidence, the parties settled it. The ET set out the terms of the settlement in paragraphs 39 and 40. It was signed both by the Claimant and by the Second Respondent. "Understandings" were recorded which were not formally part of the agreement. The Understandings included that material about the Claimant's proposed application for a sabbatical. If his application met the necessary formal requirements, the Respondent would grant "the requested sabbatical". Any such sabbatical would be on the terms of the Respondent's employment breaks policy ("the policy"). The ET observed, later in the Decision, that the agreement benefitted both the Claimant and the Second Respondent. The settlement was agreed on 20 September 2012.

13. Towards the end of October 2012, the Claimant was given a three-month employment break, to start on 5 November 2012. In paragraph 42, the ET listed five things which then happened soon afterwards. The Claimant sent a "whistleblowing" letter about the Second Respondent to Dr Holmberg; Mrs Wilkinson, the Third Respondent's PA, alleged that the Claimant had threatened to assault the Second Respondent ("the Wilkinson allegations"); the Respondent Surgeons (the Claimant's departmental colleagues) sent a letter dated 19 November 2012 ("the five consultants' letter") raising serious issues about the Claimant's competence and practice; on 30 November 2012 the Police told the Respondent who told the Second Respondent (but not the Claimant) that they would take no further action on the Wilkinson allegations; and in early December 2012, the Second Respondent referred the Wilkinson allegations to the GMC (but did not tell the GMC that the police had decided to take no further action on them).

14. During that period, the Respondent commissioned Mr Todd to investigate (by reviewing the relevant papers only) the treatment of various patients about whom the Claimant and the Second Respondent had raised issues. The Claimant and the other consultants did not know about that investigation at the time. The functioning of the Pituitary Department was also reviewed by the Respondent. Mr Todd was distinguished and apparently independent. Some of Mr Todd's reports were shared with the consultants (but not with the Claimant) at a meeting at the end of January 2013, just before the end of the Claimant's employment break.

15. The Claimant appealed against the decision to limit his employment break to three months. The appeal was heard on 4 January 2013. It was dismissed. On 1 February 2013 the Claimant complained in writing about the handling of his employment break. He said that it was discriminatory. He indicated that he could not return to work in all the circumstances. The

break ended on 4 February and the Claimant was treated as absent without leave after that. The Claimant disagreed with the Respondent's position that he was not entitled to take paid employment elsewhere during the break (paragraph 50). The Second Respondent's report to the GMC occupied the Claimant from February 2013 until 19 June 2014. In January 2014, the GMC Interim Orders Panel put conditions on the Claimant's practice. He successfully challenged those in the High Court on 19 June 2014.

16. The Respondent commissioned various investigations of the allegations and cross-allegations made by the Claimant and by his consultant colleagues. I have already referred to Mr Todd's desktop review of patients treated by the Claimant and by the Second Respondent (paragraphs 43 to 46). The ET described other investigations in paragraph 52. There were issues about three patients: GL (the vascular surgeons), SR (mostly the Second Respondent) and SH (mostly the Claimant). In April 2013 Mr Altman for the Respondent investigated allegations made by the Claimant against the Second Respondent (paragraph 53). Those concerned patient SR, and treatment of a private patient on the Respondent's time. The Respondent told the Claimant that there was no case to answer. Also in April 2013, the Respondent asked Professor Singh to investigate the Claimant's allegations of race discrimination against Dr Holmberg and Mr Adcock. Professor Singh did not uphold those allegations (his report was finished in April 2014; the Claimant was sent a copy in June 2014). The Respondent also investigated the "Wilkinson assault" allegation against the Claimant. Mr Haleja did that investigation. His report was dated June 2013. His conclusion was that there was not enough evidence to support the any allegation that the Claimant had threatened physically to assault the Second Respondent. Dr Holmberg decided that no further action was appropriate. The Respondent also commissioned a report into an allegation made in the five consultants' letter about the Claimant's treatment of patient SH.

17. On 8 October 2013 the Respondent wrote to the Claimant to say that it had commissioned an investigation of the Claimant's unauthorised absence. Ms Hollywood's report on that was dated January 2014. She said that it was untenable for the Claimant to stay on unauthorised leave, notwithstanding his grievances about aspects of his colleagues' and employer's conduct. She did not specify what sanction should be applied. The Claimant was not aware that the report was finished until 3 March 2014, when he was told this in an email. The ET found that the Claimant was sent the report just before 24 May 2014. No disciplinary action was taken until Professor Singh's report was available. In the meantime, the Respondent sent Mr Todd's report about the Claimant's treatment of patient SH to the GMC, since the Second Respondent had already referred the Claimant to the GMC.

18. The Respondent gave no indication to the Claimant that it would implement Professor Singh's suggestions about a return to work. A disciplinary hearing was originally scheduled for 22 August 2014. The Claimant asked for an adjournment. The hearing was postponed until 26 September 2014. He did not attend. He began the early conciliation process then, although he was not dismissed until 6 October 2014. He appealed against his dismissal and presented his ET1 on 30 October 2014. The appeal was heard on 12 January 2015. It failed.

19. On 17 February 2015 the GMC announced that it would take no further action on the Second Respondent's referral of the Claimant.

20. The ET considered the Claimant's detriment allegations and victimisation allegations from paragraph 85. They rejected them on various grounds, such as time limits and causation. They considered the allegations very fully, and in the course of that consideration, made many findings which were critical of the Respondent and of the five consultants.

21. The first allegation was that the Claimant had been ostracised in his department between 20 September 2012 to January 2015. The ET said there was a very difficult atmosphere. They recorded that the Respondent accepted that the department the Claimant worked in was "in crisis". The ET noted that the Second Respondent had a marked tendency to wrongly to portray the outcome of the first ET, by saying the Claimant had unconditionally withdrawn his claims and as a vindication for the Second Respondent (paragraphs 91 to 98). The Respondent and the Second Respondent were not sensitive to the need to communicate the outcome accurately (paragraphs 99 and 100).

22. Between paragraphs 101 and 132 the ET considered the Claimant's employment break. The Claimant discussed it in 2012 and applied for it in August 2012. There was no clinical director formally in post then. The issue was discussed by the Claimant and Dr Holmberg between August and the day before he went on his break (paragraph 106). It was clear in September 2012 that the Claimant was asking for a break of six months. Dr Holmberg who considered the application thought it did not make a good or valid case for a break and that the grant of three months was exceptional under the policy (paragraph 108). The ET did not agree with Dr Holmberg's interpretation of the policy.

23. Ms Melville took issue with this but in my judgment the ET were right to say that, properly construed, the policy does not say that an employment break is exceptional. Ms Melville is right to submit, however, that it simply does not follow from wide discretion which the policy confers that the Respondent is bound in every case to grant whatever break an employee may seek. How the Respondent exercises its discretion and balances the wishes of an employee with the needs of the service is a matter for the Respondent, not for the ET, to decide (absent **Wednesbury** unreasonableness).

24. The ET observed that they were concerned that Dr Holmberg appeared to believe that it was appropriate for him to "effectively disregard the express terms of the … policy and apply his own view of entitlement" (paragraph 110). He later emailed all staff to ensure that all requests would be decided by him in accordance with his criteria, so that he could apply his own criteria to applications for a break. The ET noted that in the past, two people, including a consultant, Mr Redfern, had been given breaks on a basis that was consistent with a wide reading of the policy.

25. The ET quoted the policy at paragraphs 111, 113 and 116. Dr Holmberg considered that it was an old policy and unfit for purpose. The ET commented that there was "no evidence… this view of policy… had been communicated to the people that it applied to" (paragraph 112). The policy did not say that a break should tend towards the shorter period or that five years was the maximum. The ET were concerned that senior doctors did not the check wording of policy (paragraph 114). At paragraph 117, the ET commented that the potential reasons for an employment break were "extremely wide and no one was able to suggest an example of a situation which could not fall within the policy and thus not provide a valid reason for an employment break" (paragraph 117). My own comment is that while that is true, as a matter of construction, the discretion conferred by the policy is such that the Respondent is entitled to take into account the reasons given by an employee for wanting a break in deciding how to exercise the discretions conferred by the policy.

26. The Claimant applied in writing on 14 August 2012 for a break of six months starting from 1 December 2012. He gave not less than 12 weeks' notice in accordance with the policy. In the event, he did not give 12 weeks' notice to his line manager. The ET said that a start date can be agreed (paragraph 120). The policy says that an employee is not normally be allowed to

take up paid employment (paragraph 123) except where that would broaden his experience, and authority from the Respondent would be necessary. The ET said that paid employment elsewhere was therefore permissible. Again, that is strictly true; but the fact that the policy permits something does not mean that the Respondent is obliged to grant it. The ET observed that the policy provided that channels of communication should be kept open during an employment break (paragraph 127). The ET considered that these factors undermined Dr Holmberg's view that breaks under the policy should only be for short periods (paragraph 28). Again, this is true as a matter of construction, but that does not decide how the Respondent should exercise its discretion in a particular case.

27. The ET made a misplaced general criticism that there was no attempt to keep in touch with the Claimant about the day-to-day running of the department, but were entitled to criticise the Respondent for not telling the Claimant about, or inviting him to, the late January 2013 meeting at which the Todd reports were discussed with the five consultants, when the Claimant was due back at work on 4 February.

28. The ET said that Dr Holmberg could not explain satisfactorily why he did not tell the Claimant about the meeting and especially the report about patient SR either "at the time and/or shortly thereafter". Dr Holmberg knew that the Claimant wanted to know the outcome about patient SR. At the very least no thought had been given to the Claimant when that important meeting was organised (paragraph 131). That failure to keep him updated did not assist his return to work into what, the Respondent was fully aware, was a very difficult situation for him (paragraph 132).

29. In the next section of the Decision, from paragraph 133, the ET described some background issues in the department up to November 2012. The Claimant's relationships with the Second Respondent (primarily) and the Third Respondent were strained. There was no evidence of ostracism between 20 September and at the start of November 2012 (paragraph 134). The next matters which could be evidence of ostracism were the five consultants' letter and Wilkinson allegations (paragraph 135). The Claimant first became aware of these on 19 December 2012 (when he received a letter from the GMC). Before these occurred, there were issues in the department which the ET then referred to.

30. The ET described the Claimant's concerns about patient GL, and the history of that patient. Mr Todd's concerns mirrored the Claimant's. GL was in a terrifying situation and had to wait five months to be offered an out-patient appointment. GL's experience was in Mr Todd's view "unacceptable" (paragraph 145). The patient had a fatal brain haemorrhage at the end of August 2012. His problems were first noted in January 2012. He was re-referred by his GP in mid-March. This should have prompted a more urgent review than in fact happened. The ET was concerned by lack of empathy of the surgeons who gave evidence and by reliance on statistics suggesting that there was a low probability of GL dying. They were hostile to the Claimant's point that a lack of systems contributed to the outcome (paragraph 48). GL was sent an appointment for October 2012, but that was too late. His family complained (paragraph 150). This painted a picture of service delivery issues and of personality issues (paragraph 155).

31. The ET said that the Claimant was acting properly as a doctor in raising his concern about GL (paragraph 156). The ET were critical of the surgeons "pouring scorn" on the Claimant's concerns about GL and explained why (paragraph 157). The Claimant also raised

his concerns about casual attitudes to the on-call rota (paragraph 159). The ET referred in paragraph 162 to evidence that the Second Respondent and Mr Critchley had described the Claimant as "paranoid".

32. The next topic the ET considered was the way in which the Claimant's colleagues were told about his employment break. This created quite a stir, on 31 October 2013. The Claimant's colleagues complained about the short notice (paragraph 164). Mr Critchley did not know the terms of the policy. In an email he described the decision as "incredible" given the pressures on the department. The ET said it was highly inappropriate to send such an email to such a large audience. The ET gave other examples of the "stir" caused by the grant of the break. In paragraph 169, the ET made the point that these were understandable criticisms of the Respondent's managers, but not of the Claimant. In paragraphs 170 and 172 the ET referred to allegations by Mr Critchley that the Claimant was developing his private practice at home and in the Caribbean. He had not provided any evidence of this when Dr Holmberg asked him for it, as far as the ET knew. This, the ET said was "yet another example of the consultants failing to deal with … the Claimant in a rational and professional way".

33. The ET were particularly critical of the Third Respondent's reaction. He made accusations which the ET did not see any evidence to support (paragraph 175 et seq). The Third Respondent had not done any planning for the Claimant's break. He had simply failed to engage with that in a way which was inconsistent with his role as prospective clinical director. His later complaints "sounded rather hollow" (paragraph 181). Dr Holmberg told the consultants that the Third Respondent had known about the break for some time and that his decision was informed by an assurance that a locum would cover the Claimant's work

(paragraph 182). The consultants "bombarded" Dr Holmberg with asserted concerns about the safety of the Claimant's patients, but gave him nothing specific (paragraph 184).

34. All the witnesses agreed that the five consultants' letter carried more weight than specific complaints from individuals would have done. The ET clearly found that Dr Holmberg had not intended to elicit a petition about the Claimant (paragraph 185). A senior member of the HR team described it as a "vote of no confidence letter". The ET considered that letter in detail later on in the Decision.

35. The ET then dealt with allegation that the Second Respondent had failed to mediate with the Claimant, and belittled him in relation to the first ET claim. The ET rejected the first allegation in paragraph 193. The ET also rejected the second allegation, although it accepted that the Second Respondent misrepresented the outcome of the first ET.

36. The ET next considered a complaint that the Wilkinson allegations amounted to victimisation. The ET examined at some length the background to these allegations, that is, the Claimant's complaint about N's treatment of patient SR. SR was a prisoner who had put something up his own nose. It was thought that this was a pencil and that it had been removed, but that turned out not to be so. The Second Respondent later operated on him and he got better. There were two reports about this. The first was by Mr Todd. The second, an internal report by Mr Altman, criticised the Second Respondent in a more muted way than the first. The Claimant was not told at time that Mr Todd was preparing a report, or about its conclusions. He was told about the outcome of the Altman investigation on 7 October 2013 (paragraphs 209 and 210).

37. Mrs Wilkinson was the Third Respondent's PA. She took no steps to report an incident with the Claimant immediately (paragraph 223). Her account was that the Claimant had made an apparent threat to "take down" the Second Respondent in last week of ET hearing in September 2012. He had laughed it off when she approached him the next day. She reported it to Margaret, the Second Respondent's secretary. Margaret "wondered if he really meant it". Mrs Wilknson reported this incident on 2 November to Mr Critchley and on 5 November to the Respondent's Safety Ombudsman. The ET got the impression from this and other evidence that there was a "definitely something of a camp or clique" involving the Second Respondent, the Third Respondent, Mr Critchley and possibly their secretaries, but not Mr Butler, Mrs Wilkinson's line manager, who was identified with the Claimant (paragraph 227). Mrs Wilkinson did not report the incident to Mr Butler as her communication with him had broken down. The ET noted that Mr Critchley's witness statement appeared to understate his involvement with the reporting of this incident, which only became clear from his note which was disclosed very late. The ET expressed their concerns about this in paragraph 230 (see also paragraph 231). The five consultants did not raise the Wilkinson allegations in their letter. This suggested that they did not take them seriously (paragraphs 235 to 237). When Mr Haleja eventually investigated and reported on this incident in June 2013, he did not uphold an allegation of verbal threats of a physical nature by the Claimant against the Second Respondent (paragraph 238). The Claimant was told about this in July 2013. By the end of November 2012, the police told the Respondent, which told the Second Respondent, that they had decided to take no further action. The Claimant was not kept properly informed of the criminal or civil investigations (paragraph 240). Nonetheless the ET held that this complaint was not well founded (paragraph 242).

38. The next allegation was that various spurious complaints were made against the Claimant (paragraph 243 onwards). This was based on the letter from the five consultants. They made six specific complaints about the Claimant. The ET considered each in turn. The ET said that it was "extremely disingenuous" to refer to first incident, in 2009, as no formal action was taken at the time (see above). Some of the complaints were about matters of which the five consultants had no direct knowledge. The sixth allegation was of incompetence by the Claimant in an operation on patient SH on 17 October 2012. The five consultants had no direct knowledge about this except that the Claimant had admitted the error shortly after making it. That was a very unfair and misleading criticism, designed to create an impression that the Claimant was disconnected from the checks and balances in the department (paragraph 257). On the balance of probabilities, the ET held, there was no proper basis for the picture painted by the Claimant's colleagues in the letter (paragraph 258).

39. The ET went on to consider allegations in more detail (paragraphs 259 onwards). The consultants tended to "shoot from the hip" (paragraph 272). They accused the Claimant of making "vexatious and malicious allegations which were unfounded". That was a reference to first ET claim. The Claimant had withdrawn that claim, but on terms. The ET found that this allegation was not justified (paragraph 277), and the allegation that the Claimant was shown in the first ET claim to be "an unreliable witness" (paragraph 275). The approach to the Claimant's handing of patient SH showed that the Claimant did not get same consideration by colleagues did the Second Respondent (paragraph 280).

40. The Claimant's excision of healthy tissue from patient SH was one example (and, it seems, the only one) of an error since 2002, and not evidence of general technical incompetence (paragraph 283). The five consultants did not say in their letter that the Claimant had been open

about having made a mistake and followed correct procedures in reporting his error (paragraph 284).

41. The five consultants said in their letter that their overriding concern was patient safety. The only thing which was relevant to patient safety was that a difficult working relationship would not contribute to patient safety, and the portrayal by his colleagues that the Claimant should never have brought the ET claim would contribute to poor working relationships and harm patient safety. There was no necessary connection between the Claimant and prejudicing patient safety (paragraphs 288 and 289). The letter came, it had been clear from the evidence, from many "corridor conversations". The main drivers of the letter were the Second Respondent and the Third Respondent. They had a very negative reaction to the unexpected news of the Claimant's employment break and to the Claimant's letter of 1 November 2012 (paragraph 290). It seemed that Mrs Wilkinson's allegations might also have been indirectly prompted by that letter (paragraph 291).

42. The ET rejected the consultants' evidence that they had not discussed the Claimant's 1 November letter before writing their letter (paragraph 292). The ET explained why.

43. The consultants were "incandescent" that the Claimant had been given three months' leave to go to the Cayman Islands (paragraph 293). The allegations in the consultants' letter that the Claimant was undermining patient safety were not justified (paragraph 294). The allegation that the Claimant was distancing himself from the normal rigour of clinical discussions with colleagues in a way that undermined patient safety was "mischievous" (paragraph 295).

44. The ET therefore accepted the Claimant's claim that the five consultants had made spurious allegations with no factual foundation (paragraph 296). But that part of the Claimant's claim was out of time (paragraph 300).

45. The ET dealt next with allegation that the Claimant was reported to the police. The ET said that it was appropriate for the Respondent to contact the police, even if the Respondent was not following its procedure. It was unfortunate that the Claimant only found out when he was informed about the GMC allegations on 19 December 2012. The issue was mishandled by the Respondent, but was not *prima facie* evidence of victimisation (paragraph 320).

46. The ET referred to the Crockard report which in December 2012 described the poor relationship between the Claimant and the Second Respondent as "obvious". This meant that there was the potential for clinical problems and HR needed to take an active management role to try and resolve the issue. The ET agreed with that assessment.

47. The next allegation was that the Second Respondent reported the Claimant to the GMC on 4 December 2012, two days after the Second Respondent received a letter from the police saying that they would take no further action on the Wilkinson allegations. The Second Respondent said that he had spoken to the Claimant about not fulfilling his NHS obligations "to the benefit of his UK and overseas private practice". He referred to the Respondent's 2011 internal investigation which, he suggested, had cleared the Second Respondent on all counts. He said that the Claimant had unexpectedly withdrawn all his allegations in the ET "unconditionally" at the last minute.

48. As the ET said, "A number of points arise from that paragraph". The ET dealt with those in paragraphs 324 onwards. The Second Respondent's account of the background was "rather misleading". The ET only heard evidence of one occasion, in 2009, when the Second Respondent had spoken to the Claimant about his private practice. The evidence tended to show the Claimant had fully disclosed his interests abroad to the Respondent. The ET said it perfectly normal for consultants to have private practices.

49. The Second Respondent had glossed over in his letter to the GMC the conclusions of Twyning report about his own failings. The ET explained why. The said that they "struggled to see how" the Second Respondent could say to the GMC that the Twyning report "cleared him on all counts". The ET said that it appeared that there was no appropriate management of the issues in the neuroscience department (paragraph 330). The Second Respondent gave a misleading account of the way the ET claim had been resolved. The Second Respondent's account was "disingenuous". He had tried to say in his evidence to the ET that he was confused about how the first ET had ended (paragraph 331). He had tried to make it seem that the Claimant's allegations were baseless and purely vindictive (paragraph 332).

50. The Second Respondent failed to tell the GMC that the police had, two days earlier, told him that they were taking no further action. It was "extremely misleading" of the Second Respondent to give the GMC the impression that he had been completely cleared of the SR allegation; it was still being investigated (paragraph 339). Mr Todd made some "quite strident criticisms" of the Second Respondent's management of SR. Dr Holmberg did not later correct these misrepresentations which had been made to the GMC.

51. The ET noted other misleading aspects of the letter to the GMC. For example, the Second Respondent had personally signed the agreement settling the first ET claim. He had given a partial account of his dealings with police; crucially, he did not say that he had been told why they were taking no further action. He gave the impression that the police were still pursuing the Wilkinson allegations. The referral to the GMC was not balanced or fair. But, the ET held, this allegation was out of time.

52. The next allegation concerned the Respondent's contacts with the GMC. The GMC wrote to Dr Holmberg on 8 January. The GMC asked for further information. Dr Holmberg sent a brief letter. He did not say that the police had decided to take no further action, even though the Claimant had raised this. He added no further detail of any substance. He said that the Claimant was away from the Respondent and these matters would be investigated on his return. The GMC asked for further information, including the five consultants' letter, in an email on 13 February 2013. Dr Holmberg did not send much back, but did send that letter (paragraph 354). He did not provide an accurate and balanced account to the GMC despite the Claimant's request that he should do so (paragraph 355). For example, he did not refer to the Todd January 2013 findings about SR which he knew about, but which the Claimant did not know about, and he did not say the police were taking no further action. The Claimant had made those points on the phone to Dr Holmberg. Dr Holmberg did not give any context to the five consultants' letter, for example, that the Claimant had been forthcoming about his treatment of patient SH at the time. Nor did he refer to the Twyning and Crockard reports, which showed that there had been a poor relationship between the Claimant and the Second Respondent for some time. Dr Holmberg also knew that in his second report Mr Todd had expressed concerns about the Second Respondent's treatment of SR. That would show that it was unfair to suggest that the Claimant's allegation about SR was pure retaliation.

53. The ET then described the Claimant's letters to the GMC which gave his account of the issues and of the Second Respondent's motives for referring the Claimant to the GMC. The Claimant then referred his concerns to the GMC. The ET criticised the Claimant's organisation of his defence of the GMC proceedings.

54. At paragraph 380, the ET made further observations about the toxicity of the working environment, "it was obvious to any neutral observer".

55. The ET dismissed this victimisation complaint, because while Dr Holmberg did not show due consideration to the Claimant, he did take an independent line with the surgeons in emails in late 2012. The ET was satisfied that Dr Holmberg did not give information to the GMC because he considered it "not appropriate" to do so. But, the ET made clear, by finding there was no discrimination, they were "most certainly not endorsing" Dr Holmberg's conduct.

56. The next allegation was that the Claimant was not told of any investigation into the Second Respondent or of its outcome until later. The Claimant was convinced that the Second Respondent was not telling the truth when he said to the GMC that he had been exonerated in relation to patient SR on two occasions.

57. In paragraph 399, the ET said that Dr Holmberg and the Claimant had had a conversation about the Claimant's return to work on 20 December 2012. Dr Holmberg, according to the Claimant's note, had said that the working environment would have changed. The ET commented that in view of events in November, it was "indeed likely" that it would have changed, but by way of "a distinct deterioration". In paragraph 400 the ET recorded that the December 2012 Crockard report about pituitary surgery said that the interpersonal problems

between the Claimant and the Second Respondent were "obvious" and that they must be resolved; it was presumed that HR would have an important role in this. That was not shared with the Claimant, although he was on an authorised employment break at time and the Respondent was in contact with him. It was likely on the evidence that that report was shared, however, with the other consultants at the meeting in late January 2013.

58. The Claimant raised, on the phone, in his employment break appeal, that the Second Respondent had said in his letter to the GMC that contact between the Claimant and the Second Respondent was forbidden and that the Claimant should not attend the shared workplace. Dr Holmberg said he would talk to the Claimant separately about that. In a follow-up conversation, Dr Holmberg said that he not aware of any injunction. He said the Claimant should ask Ms Weatherill. In the ET's view, this was not a satisfactory response. It seemed that Dr Holmberg had not seen a copy of the Second Respondent's letter to the GMC. Transcripts of calls between the Claimant and Dr Holmberg showed that the Claimant was trying to maintain a professional relationship (paragraph 406). The ET noted, however, that three to four months later, the Claimant was sarcastic with Mr Altman.

59. Dr Holmberg told the Claimant on the phone that the Claimant's concerns expressed in his letter of 1 November were entirely appropriate. Another theme was that the Claimant was saying he could not see how he could come back to work in the light of the five consultants' letter. He was more stressed than when left at end of November. He had gone to see Occupational Health. He told Dr Holmberg he had had to abandon his private practice (paragraphs 409 and 410).

60. The ET then considered the handling of the Claimant's complaint about dignity at work. He also alleged that he was treated differently from a consultant called Mr Redfern when he tried to remove himself from workplace until his health recovered and the environment was able to change. He alleged that the environment he worked in was entirely ignored by the Respondent, and that his concerns were not investigated.

61. In a letter dated 1 February 2013, the Claimant declined to come back to work on 4 February because of increasing difficulties in working with colleagues and because his environment was unsafe. The Respondent said he should appeal, and he did. The appeal was conducted by conference call. The ET said that Dr Holmberg misstated the position by saying employment breaks were an "exceptional privilege". The Claimant had not explained fully what the break was for, but Dr Holmberg accepted that he had had a difficult time and needed to re-focus. Three months was a reasonable time for that.

62. At paragraph 418, the ET recorded the Claimant's reasons for wanting a break. The unsafe environment was causing him stress which would affect patient care and his reputation. The ET considered that this was a reasonable view for the Claimant to have in the light of the history. I, for my part, consider that, in the light of the ET's extremely thorough review of the history, that was a view which the ET was fully entitled to reach. In paragraph 420 the ET summarised why it reached that conclusion. Viewed objectively, the five consultants' letter showed a lack of trust in the Claimant's competence which illustrated the difficulty of the working relationship. I would add, that the ET has already found, and was entitled to, that those concerns expressed by the five consultants were either, not justified at all, or, in the case of patient SH, expressed in an unfair way. The ET returned to this topic in paragraph 441, and made further findings. The ET referred to "trauma issues" and patients who "fell through the

cracks", to the need for rota for the vascular surgeons, and to the negative response when the Claimant raised this. There was a negative effect on patient care.

63. The Claimant said he wanted to work on his private practice as he needed to support his family. Dr Holmberg referred to the policy. The ET considered that Dr Holmberg was wrong to say that the policy prevented any paid work. That is correct, as a matter of construction. The ET said paid work was not the expectation, but was possible (paragraph 421). If the Claimant was working overseas that could broaden his experience.

64. The Claimant was asked to clarify what he meant by "unsafe" and how the situation could improve. The Claimant felt there was a breakdown in teamwork. In terms of safety, various issues had not been addressed over the years. He did not know if change could happen. He said he wanted a break before returning to 10 years work in NHS before retirement. The ET said (and this is an important finding) that the Respondent should have taken responsibility for improving the working environment: see the recommendations of the Twyning and Singh reports. The Claimant mentioned possible roles in the Cayman Islands and in West Africa. They were the sort of roles he would have envisaged doing for the Respondent, but had not. The ET said these were opportunities to do work during a break which the Claimant had not the opportunity to do pursue with the Respondent (paragraph 426).

65. The Respondent explained it had to balance its interests against the Claimant's. The Respondent had a duty to provide a service, and staff. In paragraph 430, the ET said the Respondent had completely underestimated the past and potential future disruption to the service from difficult relationships and cross-allegations. The Claimant had raised these repeatedly with managers. The only thing that the Respondent had done was to propose a

mediation between the Claimant and the Second Respondent. When that fell through in October 2012 the idea was not resurrected. Any remedy would have had to include the other consultants too. The ET accepted the Claimant's argument that the physical layout of the service restricted its scope and that there was a locum willing to do the Claimant's slots (paragraph 434).

66. The ET said that the concern about the Claimant being de-skilled was without substance (paragraph 436). The Respondent aware from one of the many reports it had commissioned that the surgeons were not helping each other to develop skills. The ET commented that "sadly, an unduly negative and restrictive approach was taken to the Claimant's request for further leave" (paragraph 437).

67. The Respondent knew, the ET found, that the Claimant's colleagues had a negative view of working with him again (paragraph 437). There was inconsistency in the Respondent's view that the Claimant was a key member of staff while at the same time being aware that his colleagues had very serious concerns about his competence and commitment and had also reported him to the GMC (paragraph 438). The ET endorsed the Claimant's description of the working environment as "unsafe" (paragraph 441). The ET noted that Mr Butler described the Claimant at a meeting as a "skilled surgeon" and was not contradicted by Dr Holmberg or Mr Adcock (paragraph 442).

68. The ET found that the Claimant had explained his position fully enough. The Respondent's repeated criticism that he had not done so was not justified (paragraph 445). He was happy to go back after a break (paragraph 444). The ET recorded in paragraph 446 that the Claimant's appeal was dismissed. Mr Adcock thought that the Claimant's main concerns were

about working relationships. This, he felt, was not a reason for a longer break and, it would not solve the issue. He acknowledged, importantly, that the Respondent had a duty to make a safe working environment. He asked the Claimant to meet Dr Holmberg to discuss a return to work plan and whether a reference to Occupational Health would be appropriate. Those suggestions, the ET noted, were never implemented.

69. A psychiatrist from Grand Cayman sent a report to the Respondent about the Claimant. The Claimant was suffering from stress, which was having a detrimental effect on his physical and emotional health (paragraph 449). He recommended a treatment plan and 8-12 weeks away from the NHS. Internally, the Respondent discussed a phased return to work with no clinical duties, but did not tell the Claimant about this (paragraph 450).

70. The Claimant replied to the decision on the appeal. He said that this was part of a continued line of unfairness due to race. The Respondent wanted him to return so the allegations against him could be investigated, but there was no investigation of the Second Respondent. He said that Mr Redfern had been treated more favourably. He had been allowed 12 months' break to work in a private hospital as a medical director. The Claimant said that he had raised this in October 2012 and the Respondent had not explained this difference in treatment. He was unable to return to work on 4 February and had been advised that it would be bad for his health. The issues raised in this letter were investigated by Professor Singh.

71. The National Clinical Assessment Service ("NCAS") gave advice to the Respondent. It said that the Respondent had to put patient safety first and that this could be compromised if colleagues in a department "are unable to work together" (paragraph 463). The ET said this was "extremely obvious". It tended to corroborate the Claimant's view that it was untenable for

him to return to work. Indeed, the ET added, the Second Respondent and the police seemed to share that view.

72. The ET said the fact that matters had got to this stage reflected extremely poorly on the Respondent's management. The ET gave as an example the absence of any agreed script about the outcome of the first ET claim. An instruction to "tell the truth" was plainly not adequate given degree of antipathy between doctors (paragraph 464). NCAS said it was a department with difficulties (paragraph 466). The ET said the relevant doctors could not explain properly why they had written the five consultants' letter in the procedural context they had chosen. There had been no formal managerial action against the Claimant which suggested there were no issues of substance and/or that the letter was an overreaction. NCAS suggested the Respondent consider getting the Claimant to return in a different area as it would be likely to be difficult to work in the department until the issues were resolved (paragraph 469). NCAS was happy for its advice to be shared with the Claimant, but the Respondent did not do so.

73. The Claimant had communications with the Respondent's Director of HR, Mr White. As the ET pointed out, Mr White had not been properly briefed on the outcome of the first Tribunal claim (paragraph 472). He assumed that the Claimant's points were not valid instead of listening to them. The HR Director's letter of 21 February told the Claimant that the clinical matter he had raised had been investigated by Mr Todd. The Claimant was not told Mr Todd's conclusions. Mr White said that Mr Altman had been appointed to investigate the Claimant's concerns about the Second Respondent (paragraph 474). Mr White said he could not reveal details of Mr Redfern's case without breaching confidentiality, but assured the Claimant those circumstances were entirely different. Mr White did not give evidence to the ET.

74. The ET was very surprised that Mr White had dealt with the Claimant's letter of complaint in this summary way without meeting the Claimant, or investigating. Mr White said the Claimant's absence was unauthorised and that if the Claimant did not explain it satisfactorily by 28 February, Mr White would have to go down the disciplinary route. The ET considered that this was surprising, given the advice from NCAS that it was contrary to patient safety to have bad relationships between consultants (paragraph 480). This letter was not consistent with what Mr Adcock had said at end of the appeal outcome letter. There was no contact from Dr Holmberg about a return to work meeting. Against that background, an assurance that the Respondent would investigate the Claimant's complaints did not go far enough. The ET did not agree that the Claimant need to be at work for his complaints to be addressed (paragraph 483).

75. The Claimant contributed to Mr Altman's investigation of SR by email; and substantial investigations had already been done when the Claimant was not there. There was a "degree of disingenuity" in this statement. The Respondent was still keeping the Claimant in the dark. Mr White did not address the Claimant's point that the GMC had not been told that the police were taking no further action. Mr White told the Claimant his letter of 1 February 2013 would be treated as a grievance.

76. The Claimant sent the Respondent a letter from his GP about the stress he was suffering (paragraph 487). The GP's view was that a return to work in the NHS trust would be "detrimental to his health". Mr White did not offer the Claimant an Occupational Health assessment. The Claimant said on 28 February that he would not return work until his doctor told him he was fit. The ET described this letter as rather angry, discourteous and unprofessional (paragraph 489). Its tone was not excusable, but not surprising. The fact that

Mr White thought the Claimant's explanation for his absence inadequate said more about Mr White than he realised. Mr White replied politely. He said the Claimant had not explained what medical condition stopped him working and had not provided any evidence in line with the Respondent's policies. As the ET said, this did not appear to be a fair comment, given the medical evidence the Claimant had sent to the Respondent (paragraph 491).

77. The ET then described the commissioning of the Singh report in April 2013 by Mr White into the Claimant's allegations of race discrimination by Dr Holmberg and Mr Adcock. That report was not finished until April 2014. Mr Todd was asked to investigate the Claimant's treatment of patient SH in April 2013, and the Claimant was told by Dr Holmberg that Mr Haleja was to investigate the Wilkinson allegations. The Second Respondent and Mr Critchley stressed to Mr Haleja that it was untenable to work with the Claimant if patient safety was not to be endangered (paragraph 500). They mentioned that the Claimant had a temper, was paranoid, and had a shotgun. This was done to suggest menacing connotations though Mr Critchley only knew that the Claimant had a shotgun because he had been on a clay pigeon shoot with the Claimant. The Second Respondent said in answer to a question that he had not ever been threatened by the Claimant, but said the Claimant was a karate black belt. He referred in a sinister way to the Claimant's connections with Cayman Islands. The Second Respondent did not suggest in evidence to the ET that he actually felt threatened by the Claimant. When interviewed, the Second Respondent did not refer to the Understandings, but to "unconditional withdrawal" (paragraph 503). The ET indicated its view that the Understandings showed that both the Claimant and the Second Respondent benefited from an amicable resolution of the first Tribunal claim (paragraph 504).

78. The Second Respondent told Mr Haleja that the police had recommended that he and the Claimant should not work together and has said that the Respondent should "get rid of him". This showed that even in May 2013, the Second Respondent was concerned about working with the Claimant (paragraph 508). In the end, Mr Haleja found that there was not enough evidence to substantiate the complaint that the Claimant had made verbal threats about the Second Respondent (paragraphs 515 and 521). The Claimant told Mr Haleja he could not come back to the Respondent unless this was cleared up (paragraph 519).

79. The Claimant was not sent Mr Haleja's report, but he was told the outcome and that the matter would not be referred to a conduct panel. Dr Holmberg acknowledged that this was a source of stress for the Claimant. There was no clear or reliable evidence that the Claimant had an intention to threaten physical harm to the Second Respondent. He also wrote to the Second Respondent about that outcome.

80. The ET then considered Dr Holmberg's and Mr Adcock's statements to Professor Singh. The ET said that the Claimant did not know about the progress of Professor Singh's inquiry at the time. Dr Holmberg told Professor Singh that the neuroscience department was failing in spring 2012. There were uncontrolled waiting lists. Dr Holmberg did not give this background information to the GMC when they asked for information. The ET wondered why. It did not occur to him then to tell the GMC. The Respondent decided to close its neurosurgery service to all new patients for six months about the time of the Claimant's letter of complaint that this appeal had failed. Dr Holmberg told Professor Singh that the service could not easily do without the Claimant at that time. The ET considered that this was not consistent with the allegations of incompetence made against the Claimant by his colleagues. Further, the Claimant's slots were being filled by a locum.

81. The ET had several criticisms of Dr Holmberg's statements to the Singh inquiry. At paragraph 532, the ET said, in relation to patient SR, "this does not appear to be an accurate account". The ET explained why. Fairly, the ET said, however that as Dr Holmberg had not been asked about this in the hearing they attached no weight to it.

82. Dr Holmberg conceded that his experience in dealing with sabbatical requests was "limited". Mr Adcock said that the Claimant was a key member of the team and should be party to any changes to resolve the problems. He believed the service was under considerable pressure. He also told Professor Singh something which Dr Holmberg did not say, which was that the vascular service had been suspended. Mr Adcock did not give evidence to the ET. He indicated in a document that he had not previously been involved in a similar situation about an employment break. He referred to investigations of the service and "HR processes", some of which, he believed, were still going on.

83. The ET then described a meeting between the Claimant and Professor Singh on 7 August 2013. Professor Singh referred to the Crockard and Todd reports. He asked if they had been shared with the Claimant and the Claimant said no. He had asked the Respondent to disclose them and the Respondent had refused because they were confidential. The ET reminded themselves that all the other consultants were told of those outcomes at the meeting at the end of January 2013 meeting. The Claimant also complained that Mr Haleja's report was not sent to the GMC. He mentioned his difficulties with the Third Respondent. The ET commented that in evidence, the Third Respondent appeared "somewhat dismissive" of the Claimant. He picked up on an irrelevant grammatical error in an email by the Claimant and gave a robust defence of what had happened to patient GL (the patient who had died of an aneurysm). He dismissed the Claimant's stated concerns in his evidence even though he was

not directly involved in the case. The Claimant's concerns were, however, supported in ET's view by a letter from another consultant, Mr Bucur (paragraph 550). The Third Respondent showed no sensitivity at all to the Claimant's position, despite being a senior colleague. The Claimant set out his position very fully to Professor Singh, as the ET recorded.

84. On 12 September 2013 the Claimant asked Dr Holmberg for an extended employment break with no restrictions on working. He raised several other issues, and chased them up in emails later in September. Mr Altman's report was dated 23 September 2013. Dr Holmberg summarised it to the Claimant in a letter dated 7 October 2013. He decided that the Second Respondent had no case to answer about patient SR. He also addressed other points made by the Claimant. A further break would give the Claimant time away from the workplace but would not address the underlying issues or the serious allegations which had been made about the Claimant while he was away.

85. He was going to deal with the Claimant's absence and had appointed a case manager, Dr Kalidasan. The Claimant should return to work while his complaints were progressed. Dr Kalidasan wrote to the Claimant about his investigation on 8 October 2013. It was about a potential conduct issue under the Respondent's disciplinary procedure. The aim was to see if disciplinary action was appropriate. Ms Hollywood, an external investigator, was in due course appointed.

86. The ET quoted from Mr Todd's report on the Claimant's treatment of patient SH in paragraph 568. It appeared that the Claimant was at fault. Mr Todd found it a troubling case. Mr Todd's report seemed to the ET to have been a desktop report. The Claimant's case was that Mr Todd had not discussed the case with him. At the end of the process, the ET thought, as

far as it could see, that the main criticism of the Claimant had been failures to record things properly and to communicate properly (paragraph 569). The ET described the difference in the Respondent's response to the criticisms of the treatment of patients SH and SR by the Claimant and the Second Respondent respectively (paragraph 570). In essence, the Claimant was not given a chance to defend himself but the Second Respondent was.

87. The ET then dealt with the interim restrictions on the Claimant's practice (paragraphs 572 to 579). They were imposed pending the full hearing because the GMC panel considered that the evidence it had suggested that those failures to keep records and communicate by the Claimant in SH's case were a potential risk to patients.

88. The Claimant met Ms Hollywood on 14 January 2014. The ET summarised what was discussed. There was a transcript. Ms Hollywood did not give evidence, but the ET had her report. She told the Claimant she knew what was going on with the neurosurgeons as she had been asked to look at them the year before. She had interviewed them all and Mr Butler. She had a reasonable overview of the problems and some of the personality issues. The Claimant described the situation as a "complete and utter breakdown". He expressed his anxieties about the way that the Wilkinson allegations had, in effect, been left hanging in the air, so as to affect his working relationship with the Second Respondent. The ET summarised the various points the Claimant made in the interview. The transcript showed how little the Claimant trusted the Respondent (paragraph 589). The ET said that the Claimant had made "somewhat hyperbolic" references to Hitler and to the Nuremberg trials. Ms Hollywood said he had now been away for more than a year, the period the Claimant had originally asked to be away for. He said that things had got worse since he had made that request (paragraph 595).

89. He returned more than once to the fact that the Respondent had rung the police about him. Ms Hollywood's response (paragraph 596) was to say that he could consider that there had been a fundamental breach of his contract of employment and treat it "as a resignation issue". She said that perhaps *de facto* that was what he had done by not coming back to work. The ET summarised Ms Hollywood's interview with Mr Butler in paragraphs 597 to 604. The ET observed, in that context, that it did not consider that the policy required the specificity of plans for an employment break that the Respondent appeared to think it did (paragraph 600). When asked what he knew about the first ET claim, Mr Butler said he did not know the details but had been told by the Second Respondent that the Claimant had lost (paragraph 604).

90. Ms Hollywood said in her report that the case looked like a straightforward case of an employee failing to comply with the terms of an agreed employment break but that there were complicating factors, including the Claimant's reasons for not coming back. She listed them, and considered each. She mentioned the Claimant's fear that he would be arrested if he returned to work and was found near the Second Respondent. That would have to be addressed if the Claimant were to return to work. The conflicts between him and his colleagues would have to be addressed. It was hard to see how if the Claimant was not at work. She said in her report that it was arguable that the conduct of the Respondent which the Claimant described might have given him grounds to resign because of a breakdown of trust and confidence. Her conclusion was that it was untenable for the Claimant to stay on unauthorised leave, his grievances notwithstanding. In her view the Claimant's conduct put him at risk of disciplinary action. The evidence suggested continuing misconduct by the Claimant.

91. The Claimant asked for disclosure of the appendices to Ms Hollywoods' report. Dr Kalidasan made clear that he would take into account her report and that of Professor Singh.

Mr Altman took it into account. The ET summarised Professor Singh's conclusions in paragraph 621. It was clear the Respondent had known about the breakdown of working relationships for a long time and there was no evidence of any efforts to improve them. Dr Holmberg had correctly applied the policy to the Claimant's application for an employment break. He dismissed the Claimant's complaints of breaches of the dignity at work policy, and of harassment, victimisation and race discrimination. He said it was easy to see why the Claimant thought that the decision on his application for an employment break was racially motivated. He made nine recommendations. The Respondent should recognise the stress caused to the Claimant by working in an environment where working relationships had broken down. The Respondent should develop a clear plan for the Claimant to return to work with support, mediation and an active management plan to improve relationships in the department, and measures to build confidence. The Respondent should have a review in 12 months after his six recommendations had been implemented to see progress and the credibility of its commitment to equality issues. He made six more general recommendations about race equality in the Respondent's organisation (these are referred to in the third recommendation).

92. The ET observed that at that stage, the five consultants' letter had not been investigated and nothing had been done about the obviously difficult relationships in the department (paragraph 625). The Respondent failed to take the opportunity presented by Professor Singh's recommendations. The other consultants were still at work and had concerns about working with the Claimant which the Respondent had not addressed. The Respondent should have invited the Claimant to have a discussion about returning to work outside the disciplinary proceedings. Nothing like that happened.

93. The ET took into account (paragraph 626) in assessing the Claimant's absence from work that poor working relationships affected not just him, but could threaten the safety of the patients being treated by him and by others. The Respondent did not take up the opportunity of following through on Professor Singh's first two recommendations when the Claimant emailed the Respondent on 11 June asking to meet the Chief Executive and others. He said he needed "closure". The Respondent decided that the meeting should be with Dr Holmberg among others. The Singh report was not mentioned at the meeting which the Claimant attended with his wife. Dr Holmberg questioned the purpose of the meeting. It went ahead, but the Respondent did not encourage it. The ET concluded from the consultants' evidence at the hearing that they had not been approached about the Claimant's reintegration into the workplace (paragraph 629). In the ET's view, this was not the active management which Professor Singh, the Todd Panel, or the Crockard report had recommended (paragraph 630). The Respondent had never had the meeting with the Claimant to discuss his return which Mr Adcock had promised in January 2013. The fact that the reports had still not been disclosed to the Claimant did not reduce the Respondent's responsibility to act on them, which "in the Tribunal's view was the only reasonable response to the situation" (paragraph 631).

94. The ET then considered and dismissed various allegations of victimisation and whistleblowing. In paragraph 644 the ET found that although it disagreed with Dr Holmberg's interpretation of the policy, he acted in good faith and in an attempt to balance the needs of the service with the Claimant's. He was not "ill-intentioned" and did not victimise the Claimant. In paragraph 658, the ET dealt with some derogatory observations made by the Respondent about the Claimant in closing submissions. In paragraph 659 the ET said they were unable to make the findings against the Claimant which the Respondent invited them to make. The ET noted the evidence of the Second Respondent and the Third Respondent that the Claimant had

shown that he did not feel part of the team. "It was, the Tribunal found, a poor reflection of their management of him that they did not demonstrate that they had proposed any way of addressing this" (paragraph 667).

95. The ET considered that the Claimant was treated unfavourably in various ways up to 4 February 2013 but that that did not amount to victimisation (paragraphs 668 and 669). Any such allegations were probably out of time. It was not just and equitable to extend time.

96. On 14 July 2014 the Claimant was invited to a disciplinary hearing. That was postponed at the Claimant's request, for a reasonable amount of time. The Claimant did not give any good reasons for a further postponement. He had over 10 weeks' notice of the hearing. He did not respond to offers to attend by Skype or Webex. He did not send any written representations.

97. The appeal was by review, not rehearing. The ET concluded that the disciplinary proceedings did not amount to victimisation and were not a response to whistleblowing.

98. With that considerable background, the ET then dealt with the unfair dismissal claim, starting at paragraph 687. The ET said that in deciding the unfair dismissal claim they had considered all their findings about the events leading to the dismissal, including the Claimant's victimisation and whistleblowing claims. In paragraph 688, they listed the points the Claimant argued were relevant to fairness. These are uncontroversial. There is no arguable misdirection in that paragraph, nor did Ms Melville suggest that there was.

99. In paragraph 689, the ET addressed in some detail under seven sub-paragraphs the Respondent's argument that the Claimant did not engage seriously with the Respondent at any stage in relation to return to work or addressing issues in department. The essential point was that the ball was firmly in the Respondent's court to take active steps to manage the relationships in the department and to make arrangements for the Claimant to return to work. The Respondent did not do so.

100. The ET said that there was something in the Respondent's complaint that the Claimant constantly asked the Respondent to investigate complaints when he had been told that they were being investigated. On the other hand, the Respondent did not give the Claimant much information about the progress and outcome of investigations as it did to the other surgeons. They were given Mr Todd's report about patient GL in January 2013. The Claimant did not get it until June 2014. There were other examples (paragraph 690). The Claimant's constant references to the police report "cried out for [the Respondent] to address this outstanding issue between its senior employees in a way which only it could and which lay outside the Claimant's power" (paragraph 691).

101. The ET had found reason for dismissal was not race victimisation and that it was not automatically unfair because of whistleblowing. The ET accepted that the reason for the Claimant's dismissal was the Respondent believed that the Claimant had been absent from work without authority for some 20 months and that this was gross misconduct entitling them to terminate his employment. That was a potentially fair reason. The Respondent genuinely believed this, and that belief was based on reasonable grounds. The ET referred to **Burchell**.

102. The ET reminded themselves of the test in section 98(4) of the **Employment Rights Act 1996** (paragraph 694). They took care to remind themselves that they must not substitute their own view for that of employer, but assess, instead, whether dismissal was within the band of responses of a reasonable employer. The ET considered whether or not the Respondent acted reasonably by not providing the necessary assurances to the Claimant in a timely fashion about the outstanding matter of the police complaint. The Claimant referred to his anxiety about this many times and during his appeal. The longer this anxiety was not addressed, the greater it would become. The Second Respondent's concerns were not addressed, either. The Claimant was justified in his belief that a return to work without some prior discussions about what that would entail would be contrary to his health and to his ability to practise safely. The ET took into account the five consultants' letter, which the Respondent's head of HR had described as a "vote of no confidence". Just before initiating disciplinary proceedings, the Respondent got Professor Singh's recommendations which supported the provision of assurances to the Claimant before he went back to work (paragraph 695).

103. The Respondent had not acted on Mr Adcock's indication in his 18 January 2013 letter that Dr Holmberg would contact the Claimant to discuss a plan for his return to work. When the Claimant met Dr Holmberg in June 2014, the Respondent did not take up the opportunity to discuss Professor Singh's recommendations as a way forward. The Claimant raised the five consultants' letter at that meeting and asked what the outcome was. It should have been clear to the Respondent that while this issue was unresolved, the Claimant's return to work would be extremely problematic. All Dr Holmberg said in his letter after the meeting was that when the Claimant returned to work, he would consider what further action needed to be taken about the first five complaints and that complaint 6 was being investigated by the GMC.

104. When Mr Altman was dealing with the disciplinary hearing against the Claimant for unauthorised absence he did not have Mr Haleja's report. He did not know of the concerns expressed by the Second Respondent, as late as May 2013, about his personal safety in the Claimant's presence. Nor did Mr Altman see the evidence that Mr Critchley had described the Claimant as paranoid in May 2013 (paragraph 697).

105. Ms Hollywood had identified the history of problems as had Professor Singh. It was striking that she speculated that the treatment of the Claimant by the Respondent could have supported a complaint of constructive dismissal had he chosen to resign (paragraph 698). In a crucial passage, the ET said that the Respondent simply decided not to go through normal management processes but to move to a disciplinary process on "a narrow basis of unauthorised absence" (paragraph 699). In this way, the ET said, the Respondent "tried in effect to exclude and avoid the complexities of the case of which they were well aware". The Respondent was fully aware of difficulties, from before when the Claimant brought the first ET claim. There was very little evidence of any appropriate management response to the Twyning report. It was clear that the situation had deteriorated after the settlement of that claim. Finally, the Respondent failed to act on Professor Singh's recommendations which repeated or developed points made by many others before.

106. The ET observed that the Respondent had said before the Singh report that the Respondent was waiting for it as it could have a bearing on the case manager's view of the Claimant's absence; it was then striking that a narrow view was taken of the report and its recommendations ignored (paragraph 700).

A 107. The dismissal was substantively unfair. The ET considered whether the Respondent should have looked to reach out and resume the Adcock plan. It was not now feasible because of the long delay and intervening difficulties between the Claimant and the Respondent.

B 108. The ET said it had carefully considered the case law to which the Respondent had referred. The ET then mentioned **Macari v Celtic Football amd Athletic Company Ltd** [1999] IRLR 787 (Court of Session) and **Rochford v WNS Global Services (UK) Ltd** C UKEAT/0336/14. The ET distinguished those on the facts. Those authorities did not sit well with an employee whose work could endanger the lives and wellbeing of others so directly. Importantly, however, the ET said it rejected the argument that the Respondent had tried to D engage with the Claimant in any real sense about his return to work after the employment break appeal. The Respondent did not put to the Claimant any way of addressing his real concerns about resuming work in a team in which he was now totally isolated (paragraph 702). That is in my judgment an accurate summary of the position, as is clear from the long history set out so E carefully by the ET.

109. In the ET's view, the situation of the Claimant was more akin to that of an employee F who is disciplined for failing to obey a reasonable management instruction (paragraph 703). His position, held on reasonable grounds, was that a return to work, without more, was unsafe both for him and for others. The ET referred to **UCATT v Brain** [1981] ICR 542. The G Claimant acted reasonably in refusing to return to work without some appropriate advance preparation by the Respondent. This was the position which the Respondent itself had taken in January 2013.

H

110. The ET said that many of Mr Frew's submissions about the actions of Mr Kalidasan and Mr Altman in dealing with the disciplinary process were well made (paragraph 704). The ET noted that Mr Altman and the key managers lacked experience in dealing with equality issues. To the limited extent that the Claimant was asked in appeal what he wanted in order to be able to return to work, that was meaningless. The Claimant had already laid out his concerns about returning to work with the Second Respondent several times. The Respondent took no action to address those concerns. The responsibility and power to ensure a safe and effective return to work lay with the Respondent (paragraph 705).

111. The ET considered **Polkey v A E Dayton Services Ltd** [1988] 1 AC 344 in paragraph 706. The dismissal was substantively unfair. The scope of the enquiry was artificially narrowed and did not examine the material issues. The ET did not uphold the Claimant's procedural point (that the Respondent had not postponed the hearing). A **Polkey** adjustment therefore did not apply.

112. Then the ET considered contributory conduct. They referred to the Respondent's written argument on this issue. The ET said that they had already dealt with this question. In essence, the Respondent did not implement the Adcock plan, and given what had happened between the surgeons even since October 2012 it should have been obvious to the Respondent that it was not just a matter of what the Claimant wanted. The other surgeons needed to be part of what was likely to be quite a complex mediation and assurances needed to be brokered between the Claimant and the Second Respondent, in particular, given the strength of his feelings about the Wilkinson allegations.

113. The Respondent's response at every stage, apart from the formulation of the Adcock plan, was inadequate, as far as the Claimant was aware. Even Ms Hollywood's recommendation about the Second Respondent and the Claimant working together, that this would need to be addressed by appropriate assurances and directions on both sides, was ignored by the Respondent. The Respondent could not rely in this context on internal exchanges which were not communicated to the Claimant, or which had come to his attention indirectly. The ET gave an example. The Respondent did not follow up Ms Hollywood's suggestion that the Claimant could work elsewhere. The Claimant did not attend the disciplinary hearing, but made sufficient representations in the appeal. There were no grounds for holding that he caused or contributed to his dismissal.

114. The ET concluded by paying a generous tribute to the hard work and skill of both counsel in a challenging case. I should pay an equivalent tribute to the ET for marshalling a complex set of facts and allegations in the way that they did.

Submissions

115. Ms Melville argued that, while the ET do not spell this out, the effect of their decision is that the Claimant was entitled to withhold his services for 20 months, in breach of contract, because of alleged misconduct by his employer. She contends, first, that that approach is wrong in law. She did not submit that the ET overtly misdirected themselves (indeed, they expressly said that they adopted her submissions about the law).

116. In oral argument she contended that the man on the Clapham omnibus would find it surprising that the Respondent was not "fully entitled to dismiss" the Claimant. She submitted that the Respondent was entitled to take a narrow view of the Claimant's gross misconduct.

A The ET became "bogged down" in the detail. The length of time it took the ET to produce their decision supported that view, although she accepted that the ET had to consider all the Claimant's whistleblowing and victimisation claims.

B

117. She notes that the Claimant did not plead that any part of the Respondent's conduct was a breach of the implied term of trust and confidence, but that, even if it had been, that would not have entitled the Claimant to withhold his services. The options when there is such a breach are C to affirm the contract, or to accept the employer's repudiation and resign: see **Macari**. If the employee does not elect to treat the contract as at an end, he remains bound by its terms, and bound to obey his employer's lawful and reasonable instructions, and the other terms of the D contract. She also referred to **Rochford**. She submitted that the first sentence of paragraph 703 amounts to a finding by the ET that the Respondent's instruction to the Claimant that he return to work was a reasonable instruction. She submitted that the ET did not "engage sufficiently" E with those two authorities.

118. She distinguished **UCATT**. She submitted that the reasoning of the Court of Appeal in that case was based on the premise that the employer's instruction was not a lawful and F reasonable instruction. **UCATT** was "simply not instructive". A Court should be cautious, 40-50 years later, in applying a statement made by only one member of the Court made in a very different context.

G

119. She also contends that the ET's Decision was perverse, and that the ET erred by substituting for the Respondent's its view about the appropriate exercise of a discretion H conferred on the Respondent by the policy (set out at paragraphs 111, 116 and 123). She submitted also that the ET substituted their view about the merits of the employment break for

A the Respondent's and that that was a misdirection which infected their approach to the unfair dismissal claim. She accepted, as she was bound to, that the ET did not expressly take this into account in their analysis of the unfair dismissal claim.

B

120. She referred to various passages in the Decision, which I have mentioned in my summary of the Decision, which showed that the ET was critical of Dr Holmberg's interpretation of the relevant policy. She relied, in particular, on paragraph 437 of the Decision in that regard. It was within the range of reasonable responses for an NHS employer to take the view that extending the employment break was not the right way to deal with the problems in the department. If the ET's decision was right, it would open the doors to other employees in the NHS, who could assert, "You need to sort this out before I come back to work". The argument based on patient safety would open "a door to chaos" as, if the ET are right, any employee who works in difficult conditions, such as a fireman or policeman, could refuse to go to work on a similar basis.

C

D

E

121. She accepted that the policy is widely drafted but contends that the fact that a policy confers a wide discretion does not require an employer to be as generous as the policy permits in any given case. She also contends that the ET's conclusion about the exercise of this discretion was contrary to the conclusions of Professor Singh, an external expert who investigated the Claimant's allegations of race discrimination (paragraph 621), Dr Holmberg's and Mr Butler's views (paragraphs 227, 598 to 599), and the evidence that the service was "beleaguered" (paragraph 537).

F

G

122. Finally, she argued that the ET's findings that the Claimant was unfairly dismissed and that the Claimant did not contribute to his dismissal were perverse (paragraph 711).

H

123. Mr Frew argued that the ET's conclusions were open to them. The ET reminded themselves of the fundamental question and directed themselves correctly about the burden of proof. The ET recounted the history in detail. The ET were entitled to find that "the situation the Claimant was in [was in] our opinion more akin to that of an employee who is disciplined for failing to obey a reasonable management instruction" (paragraph 703). The ET were entitled to distinguish the cases the Respondent relied on because those cases did not consider an employee "whose work could endanger the lives of and physical wellbeing of others so directly". Most importantly, the ET were entitled to find that the Respondent did not try to engage with the Claimant in any real sense after the employment break about the Claimant's concerns that he would return to work in a team where he was totally isolated.

124. The ET were also entitled to find, argued Mr Frew, that "his position, held on reasonable grounds, was that a return to work, without more, was unsafe both for himself and others … The Claimant acted reasonably in refusing to return to work without some appropriate advance preparation by [the Respondent]" (paragraph 703).

125. He contended that the ET addressed the policy in other parts of the Decision, not in its reasoning on unfair dismissal. The ET did not substitute its view for that of the Respondent. A necessary ingredient was missing from the appeal: the ET had found that the instruction to return to work was not reasonable, and the Claimant's refusal to return was reasonable. Mr Frew did not accept that the ET were holding that the instruction to return to work was reasonable. That meant that the ET were entitled to distinguish **Macari** because the Court in that case found that the instruction given to the employee was lawful, legitimate, and not given in bad faith (perhaps because good faith is a feature of Scots contract law: he did not know).

There was no open floodgate, he submitted, because the employee's conduct had to pass the test of reasonableness.

126. He contended that the decision was not perverse. The ET had considered all the circumstances with great care. The ET had reminded themselves that they must not substitute their view for the Respondent's. Their reasoning about the employment break was distinct from, and did not taint, their analysis of the unfair dismissal claim. They were bound to consider the Claimant's case about the employment break, as it was part of his pleaded claim.

Discussion

127. Having summarised the ET's Decision and the parties' submissions in some detail, I can give my reasons for dismissing this appeal briefly.

128. The key question, on Ms Melville's analysis, is whether the ET were entitled to take into account their view that the Claimant's refusal to go back to work was reasonable. For reasons which I shall explain I do not consider that that question is the key to the ET's approach.

129. Ms Melville's question turns on what is decided by **UCATT**. In **UCATT**, the employee was dismissed for disobeying, on the advice of the union's legal officer, an instruction to sign a settlement agreement which he had not been consulted about, and which, he considered, could make him liable for the acts of others over whom he had no control. He was summarily dismissed. An Industrial Tribunal upheld his claim for unfair dismissal on the ground that though the employer's instruction was lawful, his refusal to comply was not unreasonable. The Court of Appeal held that the Industrial Tribunal had misdirected themselves in holding that the

instruction was lawful and reasonable, but that even if the instruction had been lawful and reasonable, the employer had acted unreasonably in requiring him to sign the undertaking and in treating that as a sufficient reason for his dismissal.

130. Donaldson LJ, with whom Oliver LJ agreed, dealing with the submission that the Industrial Tribunal had erred in law in focussing on the reasonableness of the employee's conduct, said (at p550G) that where the conduct complained of is a refusal to obey an instruction, "the primary factor which falls to be considered by the reasonable employer deciding whether or not to dismiss his recalcitrant employee is … "Is the employee acting reasonably or could he be acting reasonably in refusing to obey my instruction?"". The Industrial Tribunal had put itself notionally in the position of the reasonable employer. It was musing aloud about whether the employee was, or could have been acting reasonably and "reached a wholly clear conclusion about it". Donaldson LJ could see no error in that approach, as long as the Industrial Tribunal did not fall into the error of asking "Would we dismiss?".

131. Oliver LJ added that even if the Industrial Tribunal was wrong to attribute weight to the employee's reasonableness in not signing the undertaking, he did not think the result was or should have been any different. He agreed that, even if the instruction had been treated as a reasonable and proper instruction, "it was wholly unreasonable to dismiss the employee for failing to comply with it" (p553D-E). The Industrial Tribunal's decision was essentially one of fact. Lawton LJ's analysis was different; but he did not decide the appeal on the basis that the Industrial Tribunal had erred in law in looking at the reasonableness of the employee's conduct: see the equivocation at p549C-D "Even if …".

A

132. Strictly speaking, the statements about the legal relevance of the reasonableness of the employee's refusal to comply with an instruction are *obiter*, since two members of the Court clearly held that the instruction was one the employer was not entitled to give (Lawton and Oliver LJJ). Nonetheless, **UCATT** is a very old authority, and I was not told that this aspect of its reasoning has been doubted: nor were the ET. I consider that, for my purposes, the reasoning of the majority of the Court of Appeal is highly persuasive.

B

C

133. **Rochford** is a case in which the EAT held that the ET had been entitled to hold that the Claimant's dismissal for refusing to obey a management instruction was not unfair. In that situation, I do not get much help from it. I do not consider that HHJ Peter Clark formulated a legal principle to that effect which I am bound to follow. **UCATT** is not referred to in the judgment.

D

E

134. Just as the Court of Appeal in **UCATT** was not persuaded that the Industrial Tribunal had misdirected itself, I am not persuaded that the ET in this case adopted the wrong approach when it considered **UCATT** (in paragraph 703). In distinguishing **Macari** and **Rochford**, they referred not to the Claimant's conduct, but to the Respondent's (paragraph 702). They only focussed on the reasonableness of the Claimant's conduct in paragraph 703, where they made an analogy between the facts of this case and those of **UCATT**. I do not consider that they erred in that respect, in the light of the reasoning in **UCATT**.

F

G

135. But the real point is that the ET had already expressly directed themselves that they must not substitute their view for that of the employer and understood that there is a band of responses to misconduct. The ET considered the reasonableness of the Respondent's conduct in paragraphs 695 to 700 and concluded that the dismissal was substantively unfair. I do not

H

consider that, at that stage, they focussed unduly, or unlawfully, on the reasonableness of the Claimant's conduct.

136. I reject Ms Melville's submission that the ET erred in its approach to the policy. The most important points are first, that the ET was required to consider the application for the break, and the Respondent's handling of that application in the context of the Claimant's other claims, and second, that there is simply no clue, in their reasoning about the unfair dismissal claim, that they took this into account at all. I note, finally, that they dismissed those aspects of the Claimant's claim which relied on the Respondent's application of the policy.

137. The ET's reasoning on contribution is a logical consequence of view it expressed in paragraph 703, that the Claimant's position was a reasonable one. If his stance was reasonable, it could not be "culpable or blameworthy", which is a necessary condition for a finding of contributory fault (**Nelson v BBC (No 2)** [1980] ICR 110 CA.

138. I do not consider that the decision of the ET on the merits of the claim, or on contribution, was perverse. Ms Melville invoked the response of the man on the Clapham omnibus. Once he appreciated, from the vantage point of his historic mode of transport, that there was more (considerably more) to the history than the bald fact of a dismissal for 20 months' unauthorised absence, and once he appreciated what that "more" was, any sense of amazement or outrage at the ET's decision would vanish.

Conclusion

139. For those reasons, I dismiss this appeal.