Case Number:

EMPLOYMENT TRIBUNALS

Claimant:	**A**
Respondent:	**B**
Heard at:	**Sheffield**
	On: 5, 6, 7, 8 and 9 June 2017
	16 August 2017 (in chambers)
Before:	**Employment Judge Brain**
Members:	**Dr P C Langman**
	Mrs S Robinson
Representation	
Claimant:	**Ms M Murphy of Counsel**
Respondent:	**Mr G Powell of Counsel**

RESERVED JUDGMENT

The Judgment of the Employment Tribunal is that:-

1. It was not practicable for the Respondent to comply with the terms of paragraph 2 of the Reserved Judgment promulgated on 14 July 2016.
2. The Respondent shall pay to the Claimant a basic award calculated in accordance with the provisions of section 119 of the Employment Rights Act 1996. The basic award is subject to a reduction in accordance with paragraph 3 of the Reserved Judgment promulgated on 9 April 2015.
3. The Respondent shall pay to the Claimant a compensatory award in the sum of £74,200.
4. No order is made upon the Claimant's application that the Respondent be ordered to reimburse him for the fees he paid in pursuit of his claims before the Employment Tribunal pending HM Courts and Tribunal Service announcing its position following the decision of the Supreme Court in ***R (on the application of UNISON) v Lord Chancellor [2017 UKSC 57].*** The Claimant has liberty to re-apply to the Tribunal in respect of this matter.

REASONS

1. After having heard evidence and submissions from each counsel, the Tribunal reserved judgment. We set out here the reasons for the judgment that we have reached.

2. The Claimant commenced employment with the Respondent on 1 May 1995. He was employed as an orthopaedic surgeon and consultant in trauma and orthopaedics. He was summarily dismissed for gross misconduct on 10 February 2014.

3. On 27 June 2014 the Claimant presented his claim to the Employment Tribunal. The Tribunal determined that the Claimant had been wrongfully and unfairly dismissed. His complaint that he had been automatically unfairly dismissed for having made a protected disclosure failed. The Tribunal also determined that the Claimant had contributed to his dismissal to the extent of 15% and that any basic and compensatory awards made in his favour shall be reduced by that amount. The Reserved Judgment was promulgated on 9 April 2015.

4. The matter returned to the Tribunal to deal with the issue of remedy. The Claimant's principal case was that he should be re-employed. His application for an order for reinstatement was refused by the Tribunal. However, we determined that his alternative application for an order for re-engagement should be granted. The Reserved Judgment following the remedy hearing was promulgated on 14 July 2016. We shall refer to the Reserved Judgment of 9 April 2015 as 'RJ1' and that of 14 July 2016 as 'RJ2'.

5. The Respondent was ordered to comply with the re-engagement order contained at paragraph 2 of RJ2 by 11 August 2016. The Respondent has totally failed to comply with it. Hence, a second remedy hearing (which took place between 5 and 9 June 2017) was required.

6. At the first remedy hearing, the Respondent only called C to give live evidence on its behalf. As summarised in paragraph 19 of the reasons that accompanied RJ2, the Respondent advanced three reasons why it contended it not to be practicable to re-employ the Claimant. (Only the third of these was an issue before us at the second remedy hearing). These were that:-

    6.1. There were no available vacancies.

    6.2. Criminal proceedings were pending against the Claimant arising out of the incident which lies at the heart of this matter (that being the Claimant's alleged sexual assault of J).

    6.3. There were issues of mutual trust and confidence. The latter issue was the subject of C's evidence cited at paragraph 20 of RJ2's reasons.

7. In the reasons for RJ2 the Tribunal outlined the statutory provisions pertaining to re-employment following a successful unfair dismissal complaint. We refer to paragraphs 71 to 88 of RJ2's reasons in particular. We shall not set them out again here. Where the employer totally fails to comply with a reinstatement or re-engagement order the

Tribunal has no power of compulsion. However, the Tribunal does have the power to make an additional award under section 117(3)(b) of the 1996 Act where there has been total failure to comply. By that provision, where there has been total non-compliance with a re-employment order the Tribunal must, subject to the defence available to the employer of non-practicability, make an additional award on top of the basic and compensatory awards. The statutory provisions governing basic and compensatory awards are to be found at sections 118 to 126 of the 1996 Act. We shall not set those provisions out here. They are familiar to the parties. It is mandatory for the Tribunal to make an additional award on top of the normal basic and compensatory awards unless the employer satisfies the Tribunal that it was not practicable to comply with the re-employment order.

8. The statutory scheme therefore creates two stages at which a Tribunal may have to assess the question of practicability. The first stage arises when the Tribunal considers at the first remedy hearing whether to make an Order for re-employment at all having found the employer liable for unfair dismissal. The second stage arises later but only if the employer refuses to comply with a re-employment order made at the first remedy hearing. At the second hearing the onus is on the employer to show on the balance of probabilities that it was not practicable for it to comply with the Order. If it fails to do so it will have to pay an additional award of between 26 and 52 weeks' pay in addition to the basic and compensatory awards.

9. Effectively, therefore, at the first stage the Tribunal needs only make a provisional determination or assessment on the evidence before it as to whether it is practicable for the employee to be reinstated or re-engaged. It is only at the second stage where the employer has not complied with the re-employment order and seeks to show that it was not practicable to do so that a Tribunal must make a final determination on practicability.

10. The date at which the practicability of an Order for re-engagement is to be considered is when such re-engagement would take effect. It is common ground in this case that the re-engagement Order was to have taken effect on or before 11 August 2016. As Ms Murphy put it at paragraph 2.2 of her opening submissions, *"the relevant date of assessment of practicability should the 'backstop' date of 11 August 2016".*

11. In his closing submissions, Mr Powell candidly and fairly accepted that the evidence that had been presented to the Tribunal at the first remedy hearing on the question of practicability the subject of RJ2 was inadequate. It is not in dispute that it is open to an employer to rely on arguments which were in existence prior to or when the re-employment Order was made as well as matters which have come to light since the Order was made. In the light of the evidence which the Tribunal received during the course of week commencing 5 June 2017, Mr Powell submitted that it was not practical for the Respondent to comply with the re-engagement Order by 11 August 2016.

12. The Respondent's position now was that it was not practicable so to do for two reasons:-

12.1. That staff at the Respondent have expressed concern about working with the Claimant following the re-employment Order and were refusing to work with him. It is well established that the personal relationship between the employee in question and his or her colleagues is clearly a relevant factor that will affect the question of practicability and/or the Tribunal's exercise of its discretion.

12.2. That the Claimant required training and updating for the upper limb surgery role (which position was available at the time of the remedy hearing in June 2016 and being one of the roles into which the Tribunal ordered the Claimant be re-employed). Further, that training would incur a significant cost to the Respondent.

13. Mr Powell clarified (at the opening of the afternoon session upon the first day upon which live evidence was received) that the practicability point did not concern the issue of whether there in fact was a vacancy for the upper limb surgery role at the material time. That role was in fact being filled by a locum employed upon a six month contract commencing on 1 June 2016. As a matter of fact that remains the case.

14. Ms Murphy accepted (at paragraph 3.6 of her opening written submissions and orally in closing) that if the Respondent succeeds in proving that it was not practicable to comply with the re-engagement Order then the basic and compensatory awards are assessed in the normal way subject to the normal statutory maxima. The statutory cap upon the compensatory award as at 10 February 2014 was £74,200. The correct approach is to apply the statutory cap after deductions and adjustments (including any percentage reduction for the employee's contributory fault). It is not in issue that should the Respondent establish the statutory defence of impracticability then the Claimant is entitled to a compensatory award in the maximum sum applicable as at the date of his dismissal.

15. Should the Respondent fail to discharge the burden of proof upon the issue of practicability then the statutory cap upon the normal compensatory award may be exceeded to the extent necessary to enable the aggregate of the compensatory and additional awards fully to reflect the amount specified payable under section 115(2)(d) of the 1996 Act. That subsection provides that on making an Order for re-engagement the Tribunal shall specify the terms on which re-engagement is to take place including any amount payable by the employer in respect of any benefit which the employee might reasonably be expected to have had but for the dismissal (including arrears of pay) for the period between the date of termination of employment and the date of re-engagement. This was reflected in paragraph 2(4) of RJ2.

16. On the facts of this case the back pay will comfortably exceed the statutory cap of £74,200. Mr Powell accepted, on behalf of the Respondent, that should the practicability defence fail then the Claimant is entitled to the sums that would have been paid by the Respondent in respect of benefit between 14 February 2014 (the date of the summary dismissal) and 11 August 2016 (the last date for compliance with the re-

employment Order). It is common ground that the additional award is subsumed into that maximum award. Thus, the correct approach, were the Tribunal to consider that it was practical for the Respondent to re-engage the Claimant, is to apportion the amount awarded between the back pay and the additional award. (We should observe the amount of a week's pay for the purposes of the additional award is itself subject to a statutory cap and there was an issue upon the question of what is meant by 'pay' for the purposes of section 115(2((d)).

17. In her opening submissions, Ms Murphy advanced the proposition that the relevant period for the assessment of the loss for the purposes of section 115(2)(d) should not be to 11 August 2016 but to the date of the second remedy hearing. Mr Powell submitted that there was no mandate to construe section 117 of the 1996 Act as extending the Claimant's statutory rights beyond the final date for compliance of 11 August 2016. Although otiose in the light of our findings, we agree with Mr Powell that the Claimant's approach is simply wrong. There is no provision in section 117 or elsewhere in the 1996 Act to extend the date referred to for re-engagement in section 115(2)(d) (and thus in paragraph 2(4) when read with (7) of RJ2) for computation of loss beyond 11 August 2016. Mr Powell's submission that ***Parry v National Westminster Bank Plc [2005] IRLR 193*** is not authority for the Claimant's proposition upon a proper analysis of that case (particularly by reference to paragraphs 15 to 19) is correct. Ms Murphy did not address the Tribunal as to how ***Parry*** supported her proposition which we understood to be abandoned.

18. Therefore in summary the statutory scheme is straightforward. The compensatory award may be relaxed in circumstances in which the employer fails to show that it was not practical to re-employ the employee. In such a case, the statutory cap is relaxed to the extent necessary to enable the aggregate of the compensatory and additional awards fully to reflect the amount specified as payable up to the final date for compliance under section 115(2)(d). The latter refers to any amount payable by the employer in respect of any benefit which the employee might reasonably be expected to have had between the date of termination and the date of re-engagement. Where the arrears of pay under section 115(2)(d) themselves exceed the normal statutory cap upon the compensatory award then the additional award is subsumed within that relaxed or new maximum but not beyond it.

19. On behalf of the Respondent, the following witnesses were called to give evidence:-

    19.1. D. She is employed by the Respondent as service manager – head and neck, vascular surgery and trauma and orthopaedics.

    19.2. E. She is employed by the Respondent as a clinical governance facilitator.

    19.3. F. She is employed by the Respondent as a staff nurse.

    19.4. G. She worked for the Respondent for 10 years commencing on 5 December 2006. From 20 April 2009 she held the position of senior theatre practitioner in charge of emergency theatre.

19.5. H. She is employed by the Respondent as human resources business partner.

19.6. J. She worked for the Respondent in a variety of roles. She no longer works for the Respondent.

19.7. K. He is employed by the Respondent as acting director of finance.

20. In addition to the live witnesses, the Tribunal was presented with written statements from the following:-

20.1. L. He is employed by the Respondent as an operating department assistant technical officer.

20.2. M. She has worked in main theatres at the hospital run by the Respondent for a period of 22 years.

20.3. N. She is employed by the Respondent as an operating department practitioner.

20.4. O. She is employed by the Respondent as an operating department assistant technical officer.

20.5. P. She is employed by the Respondent as a staff nurse.

21. None of the witness statements of those who were not called to give live evidence were signed by the witnesses. That said, the Tribunal accepts the statements as the evidence of those witnesses. It would be a serious matter indeed were statements to be presented to the Tribunal other than those that genuinely representative of what those witnesses had to say about matters. The weight to be given to that evidence, not having been subject to the rigours of cross-examination, is inevitably diminished.

22. In addition to his own evidence, the Claimant called witness evidence from the following:-

22.1. Q. He is currently working as a middle grade in orthopaedics at the hospital ran by the Respondent.

22.2. R. He no longer works for the Respondent. He was previously employed by the Respondent as a registrar in orthopaedics.

22.3. S. He is an orthopaedic registrar employed by the Respondent.

22.4. T. T is an orthopaedic consultant employed by the Respondent.

23. In addition to these live witnesses, the Tribunal was presented with witness statements from the following (none of whom were called to give live evidence but which evidence is accepted upon the same basis as set out in paragraph 21):-

23.1. U. He is a consultant orthopaedic surgeon employed by the Respondent.

23.2. V. He is a consultant orthopaedic surgeon.

23.3. W. She is a physiotherapist in private practice.

23.4. X. She is employed by the Respondent as a healthcare assistant.

23.5. Y. She is employed by the Respondent as the Claimant's PA.

24. Y says at paragraph 1 of her witness statement that she was a legal secretary for 24 years before she was appointed as the Claimant's PA in March 2002. Y worked at the same solicitors' practice as did the Employment Judge, paths thus having crossed between October 1990 and March 2002. This was declared to the parties neither of whom had any application to make in consequence. The Tribunal were satisfied that a fair minded observer would not consider such a situation to give rise to any appearance of bias.

25. It is convenient to take the two central issues now relied upon by the Respondent as pertaining to the issue of practicability (and referred to in paragraph 12) in turn. We shall start with that which we have, for convenience, referred to as the Claimant's relationship with colleagues. More fully, it is described as follows by Mr Powell at paragraph 9.1.1 of his closing submissions:-

"The staff at the Respondent have expressed concern about working with [the Claimant] and were refusing to work with him, Statement H Tab 6 Paras 1 to 5 – whose evidence is unchallenged in that regard. There is a wealth of evidence to support that reasons for the staff not wanting to work with the Claimant. He sexually assaulted and acted wholly inappropriately towards F, [J], G, P, N, O and M. The witnesses corroborate one another as their evidence of similar patterns of behaviour by the Claimant and is similar fact".

26. E's evidence is that at a meeting held on 30 June 2013 G informed her of an incident which had occurred involving her and the Claimant. E says that G did not say when the incident occurred. It had arisen when she was attempting to discuss a theatre list with the Claimant. The pertinent parts of E's witness statement are as follows (using the same paragraph numbering):-

"(10). ……During this conversation she [G] stated to me that he [the Claimant] had invited her to accompany him into the male changing rooms so they could continue to discuss the matter further. [The matter was the issue of the theatre lists]. She confirmed that she didn't think anything of following him so she could finish discussing the matter with him.

(11). [The Claimant] was dressed in theatre scrubs and once inside the changing pulled the trouser waistband down to show her his penis, commenting that, "it was a pity you're gay, just look what your missing". G told me she said to [the Claimant] "fuck off", she laughed at him and left the male changing room. She didn't say he followed her or said anything further to her".

27. E goes on to say in her witness statement that G did not wish to take the matter further. Despite appeals to G's professional responsibility and the risk to others G was unmoved. E says that at the first opportunity she sought guidance from the chief nurse Z *"who confirmed it would be very difficult if G wouldn't come forward herself as this allegation would be hard to prove".* E goes on to say at paragraph 15 of her witness statement that, *"in the months following this revelation no other person from theatre came forward to volunteer any information about [the Claimant]. All staff in the department were aware of the allegations*

made by [the Claimant] by another member of staff". We presume this to be a reference to the allegations made against him by J.

28. It will be recalled that in September 2013, an anonymous letter was received by the Respondent raising allegations against the Claimant. We refer in particular to paragraphs 133 to 142 of the RJ1 reasons. The anonymous letter (hitherto unseen by the Tribunal) is at pages 306 to 308 of the bundle before us at this remedy hearing. It is not in dispute that this was written by G (albeit that she refers to herself in the third person). E was involved in the investigation commissioned upon receipt of the anonymous letter. It was within the terms of reference of the case investigator to interview E. We refer to pages 317 and 318. E told us that she was interviewed by the case investigator but did not give a signed statement (or, indeed, any statement) to her.

29. What emerged from E's cross-examination was:-

    29.1. That she was unable to give an accurate summary to the case investigator about what she had been told by G. This was because of the lapse of time and because G was very distressed when she discussed the matter with E on 30 June 2013.

    29.2. E felt that G ought to have come forward to raise a complaint against the Claimant.

    29.3. She was able to pinpoint the precise date of the conversation with G by reference to her electronic diary. A copy of the relevant entry was not produced for the benefit of the Tribunal.

    29.4. E would have little contact with the Claimant were he to have been re-engaged by the Respondent. The contact would be limited to investigations carried out by her in the event of an untoward clinical incident.

    29.5. E did not say in her witness statement that she would have a problem working with the Claimant were he to have been re-employed by the Respondent.

30. G gave evidence in paragraph 7 of her witness statement that shortly after she commenced employment with the Respondent she was standing at the scrub sink in theatre 2. The Claimant approached her from behind and pressed his genitals up against her bottom and whispered in her ear *"this is what you are missing".* G's account is that she turned around to face the Claimant and said *"you're the exact reason I am gay"* and then turned back and carried on scrubbing. She did not tell anyone as she considered that no action would be taken and she had heard this was normal behaviour for the Claimant.

31. She then gives evidence about a second incident which occurred *"a few years later".* The Claimant was standing by the door frame of the coffee room. He said there was a case in A&E to be prepared. G says that she walked sideways past him in the door frame and he put his hand *"in my private part as I walked past".* She says, *"I looked at him and simply said "move it" as again I didn't want him to see that I was upset".*

32. The third incident (being the one which G told E about) is referred to in paragraphs 10 and 11 of her (G's) witness statement. She gives an

account of the Claimant walking her towards the male locker room. She says:-

(11). "Once we were in the locker room, the Claimant went to his locker to get the details from his suit and I crouched down by the small bin so I could lean on it to write down the details. [We interpose her to say that these were details about the theatre lists]. The Claimant then walked towards me and his genitals were very close to my face. I was so scared that I said "if you don't get that thing out of my fucking face, I will bite the fucker off". These are words that I would not normally say which adds to the upset. Despite this, the Claimant replied "don't bite it, blow it".

33. G says that at that stage AA walked in. The Claimant stepped back. She walked out without saying anything.

34. The following emerged from the cross-examination of G:-

    34.1. There was no mention in her witness statement of her making an allegation against the Claimant of indecent exposure.

    34.2. G accepted this to be the case. She said that the Claimant had not pulled the trouser waistband of his theatre scrubs down in order to show her his penis. She said in evidence before us that, *"his penis was on my cheek. He was in his scrubs".*

    34.3. She accepted that she had not made it clear to E what had happened when she spoke to her about the incident in their discussion of 30 June 2013.

    34.4. She said that E was incorrect when she said that G told her that she had told the Claimant to "fuck off" in relation to the locker room incident. She reiterated the version of events in paragraph 11 of her witness statement cited in paragraph 32 above.

35. Similarly, the reference to G's sexual orientation made by the Claimant was not upon the occasion in the locker room recounted to E by G (being the third incident recounted by G) but upon the occasion of the first alleged assault set out in paragraph 7 of G's witness statement cited in paragraph 30 above.

36. G defended E when it was suggested to G by Ms Murphy that E had thus made significant mistakes in her account of what G had said to her. G said, *"I wouldn't necessarily say that. I didn't go into specifics. I was in a state. She couldn't write anything down because I was just telling her. We never got together again. I said I wouldn't take it further".*

37. G did speak to the police about her experiences after J made her complaint in 2013. It is clear that she regrets not acting as a witness for the prosecution.

38. The Claimant sought to discredit G upon several grounds. The first of these was that G was *"highly strung, was very easily stressed and threw "hissy fits" at the least provocation. She was said to be very temperamental"* and *"well known for her profanity and vulgar language".* We refer to paragraphs 107 and 108 of the Claimant's witness statement. G denied using coarse language in the course of her duties. She said that had she done so she would have faced disciplinary action.

39. The second ground was upon the basis of a complaint made by T against her on 30 October 2015. The letter of complaint is at exhibit 3 of T's witness statement. This allegation was purportedly investigated by E who offered T an apology for G's unprofessional behaviour. The letter is at page [T]4 and is dated 3 December 2015. The allegation centred upon G becoming "very rude and raged" and having thrown "papers onto the floor". When taken to this correspondence, G was surprised. She was afforded some time to read through the correspondence. She said that she knew nothing about it. The outcome letter post-dated the day upon which G joined her current employer. When asked about this, E said that she *"would have"* interviewed G about T's allegations. There was no record of any note of interview between G and E about this (or at any rate the Tribunal was not taken to any).

40. The third ground was that G was an attention seeker. The Claimant produced a Facebook photograph (exhibit [T]24). G accepted that she was the person depicted in the photograph. It appears that she is engaged in some sort of sexual badinage with a colleague named BB. G denied that she had written the caption that appears upon the photograph.

41. The fourth ground was that G had not sought to move away by requesting an internal transfer thus undermining her case. She said that this was not an easy thing to arrange given that she had a specialist job in charge of emergency theatres. In any event, she said that she had done nothing wrong and did not see why she should be the one who had to move. She did not involve AA. As a general point, G felt that she would not be believed by anybody *"as the gay girl over the consultant in charge"* (as G put it).

42. The fifth ground was that it was unusual for a female member of staff to go into the male locker room and that she could simply have refused so to do. G said that it was not unusual for female members of staff to go into the locker room in order to clean it and that she did not refuse to accompany the Claimant as she "*did not want to look stupid or intimidated".* She refuted Ms Murphy's suggestion that it was a disciplinary matter for female members of staff to go into the male lockers.

43. In our judgment, there was little merit in the Claimant's attempts to discredit G. The episode around T's complaint is indeed curious. We accept that G knew nothing about this complaint before she saw it for the first time when giving evidence before the Tribunal. There was no evidence emanating from the Respondent of any investigation carried out by E. She gave a conditional answer when asked whether she had investigated T's allegations. This leads to the inescapable conclusion that E reached a conclusion about T's allegations without speaking to G, taking advantage, it seems, of the fact that G was about to leave the Respondent's employment anyway.

44. There is no or no satisfactory evidence that G was "highly strung" or prone to foul mouthed outbursts. There is much merit, we think, in her point that had she behaved like this she would have faced disciplinary action. There is no evidence that she was subject to such.

45. There was no evidence that it was a disciplinary matter for a female member of staff to enter the male locker room. As a subordinate employee, it is unsurprising that G allowed herself to be led by the Claimant into the locker room. Our conclusion was reinforced by the fact that AA did not raise any complaint about G's presence in the locker room when he saw her there.

46. There is much merit in G's point about not wishing to move away from her post. It is a specialist post. It is what she has chosen to do and we can see no reason why she should have sought to transfer away from it. It would have been difficult for her to move away from a specialist post anyway.

47. The Facebook photograph is evidence of G participating in sexual banter or badinage within the department. It does not follow from that that she has a propensity to invent stories about others.

48. The final ground upon which the Claimant seeks to discredit G centres upon a serious allegation of behaviour upon discriminatory grounds. The Claimant says at paragraph 109 of his witness statement that *"One of the registrars* [in fact, Q] *informed me that G asked him, "where do you come from, Muslim?" in a derogatory tone as if Muslim was a place. He found this upsetting. He also said that there was no point in making a complaint as nothing would be done about it."* This allegation was not put to G by Ms Murphy. She therefore did not have an opportunity to respond to it.

49. F says that she worked alongside the Claimant for a period of around six years. She said that, *"At times I found the theatre environment with [the Claimant] stifling as he could be very controlling. Incidents in which I found him controlling were for example when he requested that I scrub in with him for most of the cases, as he seemed to prefer some staff more than others, if I failed to do as he asked, I would be ignored by him until I appeased him".* She says that she was told on one occasion that she was no longer allowed to work in his list *with "a certain close colleague of mine who I had worked with successfully for many years."* (This colleague was P). F alleges that in 2012 the Claimant struck her hands repeatedly with instrumentation *"because I was talking to another colleague".* F gave as an example of controlling behaviour the Claimant seeking to dictate what topping she may have on a pizza.

50. F also accused the Claimant of proselytising. She found such discussion uncomfortable.

51. She alleges that the Claimant touched her without her consent. She says at paragraph 10 of her witness statement:-

    "I can't recollect the exact date or the first time [the Claimant] touched me without my consent, as I feel it happened so much it felt like as if it had always been that way. The behaviour began with him coming up close to me and whispering in my ear, he would say something about my physical appearance and how he was attracted to me, this would make me feel embarrassed but he seemed to enjoy that. Over the years he became increasingly both verbally and physically more inappropriate, he

would touch and slap my bottom but would always turn this into a laugh and a joke, as though a bit of fun. I did not find this funny".

52. F went on to say in paragraph 12 of her witness statement:-

"During the later stages of our working relationship I found his behaviour made me feel more and more uncomfortable and more inappropriate. He would come up behind me and push his groin into my lower back. At the time I chose to ignore these interactions as I felt I was in someway to blame for them, as though I was allowing him to take advantage of me. I did protest about this behaviour but [the Claimant] didn't take any notice and did not take it seriously".

53. In paragraph 13 of her witness statement she speaks of an incident which allegedly took place in autumn 2012. She says that she was scrubbing at the sinks in theatre 2 and had her elbows bent and her hands up (being the correct position for hand scrubbing). She turned to speak to the Claimant in this position when *"he reached forward and quickly groped my right breast. I was shocked by what he had just done but he carried on with the conversation as though nothing had happened".*

54. F says that she did not complain to anyone at the time about any of these incidents. However, she did approach DD, her line manager, to request a team change. This was approved. The reason that F gave was the Claimant's *"controlling behaviour".* Although she spoke to the police F did not act as a witness for the prosecution in the criminal proceedings brought against the Claimant. Her explanation is at paragraph 16 of her witness statement where she says, *"I had seen a close family member going through the same ordeal, having to go to court and then losing their case, as it was one person's word against the other, I saw the trauma of the aftermath and did not wish to go through the same".*

55. She expressed herself *"very angry"* when she was informed about the re-employment order. She says that, *"the prospect of his return is affecting me emotionally and I have requested sessions with a counsellor as I have now realised I have been a victim of unwanted physical assault. I am being supported by my partner and family".*

56. The following emerged from the cross-examination of F:-

    56.1. She fairly accepted that consultants other than the Claimant could also engage in what may be viewed as controlling behaviour.

    56.2. She was in no position to refute the suggestion that the Claimant had not specifically requested F to scrub in with him. However, her perception was that the Claimant had a bearing on her being assigned so to do and being kept apart from P.

    56.3. Ms Murphy then said to F that the Claimant accepted that he did ask DD to separate her and P. This was because the Claimant perceived them to be talking too much. F said that she had never been approached by DD about this although she had noticed that she and P were being kept apart. F had raised no grievance about this. She denied there to be too much talking within the

Claimant's theatre and said that it was relaxed and the Claimant would often play music during theatre sessions.

57. It was suggested to F that the Claimant could not recall striking her hands with instrumentation or discussing religious issues with her. F accepted that she had not raised the proselytising with DD.

58. She accepted that she had not raised any complaint about what appears, from her prospective, to have been a deteriorating situation as the Claimant's behaviour towards her became more serious. She said that she felt that she had nowhere to go particularly, she said, as DD was having an affair with the Claimant. She said that it was her word against his. She said that it was *"easier to get out of his way"* and that she *"took the coward's way out".*

59. It was suggested to F that the suggestion in paragraph 11 of her witness statement about the Claimant getting up to "antics" suggested an element of light heartedness. This she denied. She said that the Claimant would *"push his penis into you. It'd be like innuendo and a joke and led to touching you".*

60. H's evidence is that on 26 July 2006 EE, lead nurse, telephoned her. H's evidence is that EE told her that there was *"a lot of upset in the theatres department at the news of the Claimant returning to work".* By way of reminder RJ2 was promulgated on 14 July 2016. EE said that she had heard this from T. H said, *"EE told me that a couple of people had been to her to say they are concerned about working with him again and said they are refusing to work with him and EE did not know what to tell them and asked if they could refuse to work with him".* H told EE that if the Claimant were to return then members of staff were expected to act professionally and work with him. H said that she would try to find out what she could. She said that she discussed the matter with somebody within the Respondent's human resources department. She spoke to EE the following day to inform her that no decision had been made in respect of the Claimant returning to the department.

61. J incorporates into her witness statement the account about the central incident of May 2013 that she gave in June 2013 (at pages 417A and 417B) and in the minutes of the meeting held on 27 June 2013 with FF who, it will be recalled, was the investigating officer commissioned by the Respondent. Those minutes are at pages 469A to 469D.

62. Her evidence is that she has been profoundly affected by the incident. She has received assistance from the organisations to which she refers at paragraph 7 of her witness statement. The impact upon her is described at paragraphs 8 to 11. We need not set them out here.

63. At the merits hearing, the Tribunal had found as a fact that the Claimant had not sexually assaulted J. It was upon that basis that the Claimant succeeded with his wrongful dismissal complaint. It was also upon the basis of those findings that the Tribunal determined it to be just and equitable to make a reduction of 15% from any basic and compensatory award made in his favour in his unfair dismissal complaint. Ms Murphy sought to suggest that an issue estoppel arose given the Tribunal's determination given at the merits hearing. Mr Powell submitted that this

was not the case. The Tribunal had indeed found in favour of the Claimant upon the wrongful dismissal complaint and had made findings of fact pertaining to the issues of wrongful dismissal and contributory conduct relevant to the unfair dismissal complaint. There was nothing to prevent the Respondent from now adducing further evidence about the incident going to the discreet legal issue of the practicability of compliance with the re-engagement Order. The estoppel point was not one pursued by Ms Murphy. We presume it was abandoned.

64. Ms Murphy cross-examined J about the incident. Likewise, much of the cross-examination of the Claimant by Mr Powell was taken up with putting the Respondent's case to him. For reasons that we will come to in due course, the Tribunal does not consider it necessary upon this occasion when determining the issues before us at this remedy hearing to decide whether or not the Claimant did, in fact, sexually assault J.

65. M's evidence was that the Claimant would *"often talk to her in a suggestive manner and make smutty comments regarding my appearance".* She said that the Claimant would stand too close to her invading her personal space and would make suggestive remarks.

66. N gives an account of the Claimant approaching her from behind whilst she was making a drink. She says that he pushed his hips against her. His genitals were thrust against her hips and buttocks. She told him to "stop it". She says that the Claimant made her feel very uncomfortable and her view was *"he was quite sleazy with female staff".* There were no further incidents of the Claimant touching her following the one to which she refers (which had occurred about 10 years ago). Nonetheless, she did complain that the Claimant would invade her personal space.

67. O said that the Claimant was *"very touchy feely".* Like N and M, she complains of him standing *"too close for comfort".* She complains that the Claimant spoke to her in a *"smutty, dirty tone".* On one occasion, she said she was cleaning the base of the operating table. The Claimant was standing behind her. As she made to stand up she says that the Claimant said to her, "*ooh get back down where you were, I could see down your top then".*

68. P describes the Claimant as a *"friendly character, however he did have a reputation for making inappropriate comments to female members of staff".* She says that she had a good working relationship with him over the 10 to 15 years that they worked together. She says that there was physical contact but this was always in a *"friendly, acceptable way".* That said, she gives an account that around 10 years ago she was on her own in the scrub room of the operating theatre when the Claimant came up behind her unexpectedly and slapped her on the bottom. She says, *"I looked [the Claimant] in the eye and said "don't you ever dare do that again, or I will report you"".* The incident was never mentioned again. It appears from her statement that P never had any further problems with the Claimant.

69. L says that he never personally had a problem with the Claimant. He says that the Claimant had a reputation for being *"a bit 'touchy feely' with the female theatre staff".* His evidence is that*, "the operating theatre is a very female environment. Some of the girls have told me that [the*

Claimant] groped them, slapped them on the bottom and placed his nether regions against their bottom". He has never witnessed any such incidents. He does give an account of seeing J after the incident of May 2013 who had told her that *"A had grabbed her boobs".*

70. The following emerged from the cross-examination of the Claimant:-

70.1. He suspected that members of staff engaged in a conspiracy with J. As the Claimant put it in evidence, *"that's their game".* The Claimant considered that others were seeking to encourage her to make a complaint.

70.2. That the Respondent went on a *"fishing exercise".* The Claimant said he was informed of this by T. (T in fact gives evidence that on 21 September 2016 he found the door of the main sitting area of the nursing staff to be closed. He was told not to go in as there was a meeting involving GG, the medical director, and the nursing director together with theatre staff. The purpose of the meeting according to T was to see if any other nursing staff *"would be prepared to give a statement regarding [the Claimant's] alleged behaviour in theatres".* T goes on to say that he was informed by the clinic sister HH that a request had been made of her to make a statement about the Claimant and that she had refused to do so having experienced no untoward behaviour from him).

70.3. That he thought that G had been *"put up"* to write the anonymous letter. The Claimant suspected E of involvement in this.

70.4. That all of the witnesses who had given accounts to the Tribunal were, according to the Claimant, *"making it up"*. However, the Claimant could give no credible reason as to why they should do so.

71. The Claimant refuted that he had sought to denigrate G or J. He accused the Respondent of seeking to denigrate him.

72. The Claimant refuted that the junior staff live in fear of the consultant surgeons. The Claimant said the reverse was the case. He said that the consultants most live in fear of the nurses and that *"everyone gangs up".*

73. He said that after August 2016, when the staff learned of the re-employment Order that the Tribunal had made, the Respondent embarked upon what the Claimant described as a *"witch hunt"*. He said that the Respondent had decided not to comply with the re-engagement Order even before the witness statements that were presented to the Tribunal had been obtained.

74. It was suggested to the Claimant that staff had expressed misgivings about his re-employment within a matter of days of the promulgation of R2. The Claimant said that staff had been pressured into giving witness statements against him.

75. He said that he had had a good relationship with P. Mr Powell suggested if that was the case then it was surprising that she would give evidence in support of the Respondent's case. The Claimant repeated his assertion that witnesses had been pressured.

76. He could advance no explanation or no convincing reason as to why O would give the statement that she had. The Claimant candidly accepted that he had *"no idea why she would".* Mr Powell asked the Claimant whether it was the case that she too had been put under pressure. The Claimant replied that *"it seems so".*

77. Under cross-examination, T was unable to advance any explanation or any convincing explanation as to why the Respondent's witnesses would tender such evidence. When asked why they would make up such allegations against the Claimant, T said, *"I cannot say why".*

78. On behalf of the Claimant, Q said that he had never witnessed any inappropriate or unprofessional behaviour or language from the Claimant. It was he who had alleged that G had enquired *"which country do you come from, Muslim? as if Muslim is a name of a country."* He says that G *"made it obvious that she hated Muslims".* He did not raise a complaint about this taking the view that from his experience the Respondent would *"sweep it under the carpet".* He said that he was too busy to make such a complaint. It was suggested to him that the medical director of the Respondent would take such an issue very seriously had it been brought to his or her attention. Q said that he was *"not sure"* that he could agree with that proposition.

79. R said that he found the Claimant to be *"a man of high moral character and someone whose excellent leadership skills all of us in the department came to admire".* He said, *"staff at all levels and grades always felt comfortable in his presence".* He never witnessed any inappropriate behaviour.

80. S gave similar evidence. He spoke highly of the Claimant's professionalism and high standards. He said that he had never seen the Claimant make any inappropriate comments or gestures.

81. In his signed and dated witness statement U speaks of the Claimant's reputation as *"very good and respectable".* He too says that he has never witnessed anything inappropriate from the Claimant.

82. V speaks highly of the Claimant based upon the Claimant's work at the hospitals where V works between November 2014 and March 2015. He says, *"I've never known or heard of any staff or patient issues or concerns relating to [the Claimant] arising from his time working [here]".*

83. W became acquainted with the Claimant during her time working for the NHS in Rotherham. More recently, she opened some medical consulting rooms. The Claimant rented a room from her along with other consultants following the sale of and move of premises. She speaks highly of the Claimant professionally and personally.

84. X gives evidence about the esteem in which the Claimant is held by his patients. She has witnessed no issues between the Claimant and his colleagues.

85. Y gives similar evidence. In particular she speaks as to the Claimant's support of her following the passing of Y's mother. She says that the Claimant has never made her or any of the administrative staff feel uncomfortable at any time.

86. We now turn to the second limb of the Respondent's practicability defence. This was put in these terms by Mr Powell in his written closing submissions (at paragraph 9.1.2):-

"The Claimant required training and updating for that role, which was available the upper limb role, which is likely to require 12 months of training. On the Claimant's own case it will require 3 to 6 months. As above it was accepted at the remedy hearing that there was a need for such training. The training would have been at a different trust, not at the Respondent, and would have required it to incur significant sums of money, paying the Claimant and probably reimbursing the host trust for its lost revenue, as accepted by Professor Wallace".

87. Professor Wallace is one of the two expert witnesses from whom the Tribunal received expert evidence. Professor Wallace was instructed by the Claimant. The Respondent instructed Professor Giddins. The expert evidence is contained in section D of the remedy hearing bundles (at pages 818 to 1413).

88. Professor Wallace is an Emeritus Professor of Orthopaedic and Accident Surgery, Academic Orthopaedics, Trauma & Sports Medicine at the University of Nottingham. Professor Giddins is a Consultant Orthopaedic and Hand Surgeon. He is based in Bath.

89. The Tribunal derived particular assistance from the joint statement of agreed and not agreed issues at pages 1409 to 1413.

90. At page 1411 we see it recorded that Professor Wallace, having considered all of the information available to him, estimated that the Claimant would require approximately three months of shoulder and elbow fellowship training and three months of wrist and hand fellowship training to make him sufficiently competent to carry out the duties of an upper limb consultant at the Respondent's hospital.

91. A wealth of information was made available to both experts. Professor Wallace made specific mention of an assessment of the Claimant's practical skills and knowledge carried out by a colleague of his named Paul Manning.

92. Professor Giddins observed that Mr Manning recommended six months of fellowship training in shoulder and elbow surgery. This is what Professor Giddins himself anticipated. In addition, Professor Giddins' opinion was that the Claimant would require around six months of wrist and hand surgery training upon the basis that the Claimant would need to be trained and assessed to an adequate standard in a large range of conditions including those listed at the bottom of page 1411 and the top of page 1412. We shall not set those out here.

93. There was disagreement between the experts as to the conditions that the Claimant would reasonably be expected to treat surgically at the Respondent's hospital rather than referring the case to the Northern General Hospital in Sheffield for a specialist opinion. Those are set out at page 1410 and again we need not repeat them here. One of the conditions which Professor Wallace felt would be better managed in a tertiary centre such as at the Northern General was thumb based (CMC joint) arthritis. In cross-examination Professor Wallace said that on

reflection he agreed with Professor Giddins that it would be reasonable for a consultant working as an upper limb surgery in a general hospital to treat such a condition. Professor Wallace said that he felt that the Claimant would so able to do given his past experience. Professor Wallace accepted that *"to a certain extent"* that he should defer to Professor Giddins in relation to hand surgery given that Professor Wallace is not a hand specialist (albeit that he has done minor operations in the hand and wrist).

94. By reference to the specialist training in trauma and orthopaedics curriculum of August 2013 (in particular at page 1215) we see that the vast majority of surgeons have a specialist elective interest in orthopaedic conditions often based on an anatomical region of the body. We note that upper limb is divided into shoulder and elbow on the one part or hands and wrists on the other part. Upon the basis of Professor Wallace's concession that he should properly defer (at least to an extent) to Professor Giddins upon issues around hand and wrist surgery and Professor Wallace's departure from what was said about thumb based (CMC joint) arthritis in the joint statement, we prefer Professor Giddins' expert evidence generally and find in particular that the Claimant would be expected to deal with those conditions set out at page 1410 in bold type (including those that are underlined to distinguish those conditions that Professor Wallace feels to be better managed in a specialist tertiary centre). Thus we find that the Claimant would require six months fellowship training in hand and wrist surgery before being able to safely practice as an upper limb surgeon in the Respondent's general hospital. In addition to this he will require a period of training in shoulder and elbow surgery.

95. In cross-examination, Professor Giddins fairly accepted there to be a reasonable range of opinion as to how much training an individual with the Claimant's undoubted experience would require to undertake upper limb surgery work in a general hospital. On any view, Mr Powell must be correct to say in his submissions (at paragraph 9.1.2) that upon the Claimant's case it will require three to six months of training for the Claimant to safely perform the upper limb role. In fact, we consider this to be generous on Mr Powell's part towards the Claimant given that the Claimant's own expert postulated three months training for shoulder and elbow work followed by three months for wrist and hand work. Given that we prefer Professor Giddins' evidence, we consider that a period of up to 12 months of training in total is more realistic (particularly given the specialist training required to carry out hand and wrist surgery).

96. K's evidence is that the Respondent is not a teaching trust. The Respondent could therefore not deliver the training to the Claimant. Training would therefore have to be undertaken outside of the Respondent's organisation. K says about this (in paragraph 17 of his witness statement) that, *"During the period of such a retraining, my understanding is that the Respondent would be required to continue to pay the Claimant and would inevitably need to obtain the services of a locum to provide the services that would ordinarily be provided by the Claimant (had he not been required to undertake the re-training)".* He goes on to say in paragraph 18 that, *"the Respondent would be put*

under the financial pressure of both paying the salary of the Claimant (which at his basic salary and CAA level 7, amounts to approximately £125,000 per annum) and that of a locum to cover the Claimant's work during the period of training". Some figures are then set out in paragraphs 20 to 22 of the potential costs to the Respondent.

97. Professor Wallace told us that he has had personal experience of training an orthopaedic surgeon seconded to two of the Nottingham hospitals. The seconding hospital (based in Norfolk) continued to pay the salary during the period of training. Professor Wallace did say, however, that this arrangement may vary according to the circumstances. Professor Giddins was unsure of such financial arrangements. However, he said that he would expect the *"home hospital to pay"* the salary.

98. There being no evidence to the contrary, and such evidence as there was emanating from distinguished experts, the Tribunal accepts as a fact that the Respondent would have to fund the Claimant's salary during the period of his training. During his absence from the Respondent, the upper limb surgery work would have to be covered and the Respondent would engage a locum for this purpose. Professor Giddins confirmed that during the period of training the up-skilling orthopaedic surgeon would be expected to do perhaps two days of shoulder training and three days of wrist and hand training which may be adjusted depending on progress. The implication of this is that the Claimant would be out of action as far as the Respondent is concerned for however long the training took to undertake.

99. The Respondent would, of course, have had to engage a consultant surgeon or a locum surgeon in any event. That said, had the Respondent complied with the re-engagement Order we are satisfied that it would have incurred significant additional cost temporarily during the period of the Claimant's training. Based upon K's evidence, this could be in the region of around £180,000. K's evidence was that such a financial burden would come at a very unfortunate time for the Respondent given that it is running at a substantial deficit. K in fact alluded to a further cost (not referred to by the experts) arising out of the possibility of the training organisation charging the Respondent by reason of the reduction in the training organisation's orthopaedic activity occasioned by the need to train the Claimant. K did accept in cross-examination that it was only a possibility that the training hospital would seek to make such a charge to the seconding body. K also accepted the potential in the long term for consultants to generate significant amounts of income as alluded to by T in paragraph 50 of his witness statement. Under re-examination, K said that there was no budget for the Claimant's training.

100. We now turn to our conclusions. We shall start with the first of the two bases upon which the Respondent runs its practicability defence: that staff at the Respondent have expressed concerns about working with him and were refusing to work with him. It is our judgment that the Respondent has a meritorious defence of practicability upon this basis.

101. We find as a fact that at the end of July 2016 H was the recipient of expressions of concern from members of staff related to her by the lead nurse. There was no challenge to this aspect of H's evidence.

102. It is credible that EE was relaying genuine concern to H. We find this to be the case as F, a current employee of the Respondent gave live evidence of an alleged sexual assault upon her perpetuated by the Claimant. E, another current employee of the Respondent, gave live evidence of what she had been told by G. We also heard from G who corroborated E's account of there having been a discussion about what G says the Claimant did.

103. We also attach some weight to the fact that four other female members of staff gave written witness statements in which they raised concerns about the Claimant's behaviour. Although that evidence inevitably carries less weight than does that of the live witnesses from whom we heard it is corroborative of H's account that the lead nurse was relaying genuinely held concerns to her.

104. Against that, the Claimant presented evidence from three female witnesses. None of those three were called to give live evidence before the Tribunal. All of them spoke in favour of the Claimant and to the effect that they had witnessed or experienced nothing untoward during their time of working with him. That evidence only takes the Claimant so far. That some female members of staff who worked alongside the Claimant experienced nothing untoward does not mean that others did not. The Respondent is bound to have to take seriously a situation where a cohort of some but not all of the female clinical members of staff have expressed concerns.

105. The Claimant is plainly held in high esteem by his orthopaedic consultant and surgeon colleagues some of whom attended to give supportive evidence. The Respondent adduced no evidence to the contrary. The difficulty for the Claimant however is that the Respondent was faced with a situation where other members of staff were relaying concerns to the lead nurse about the prospect of the Claimant's return to work.

106. It is not necessary for us to make findings of fact as to whether the Claimant perpetuated the acts alleged against him by the Respondent's witnesses. It is also not necessary for us to make findings of fact upon this occasion as to whether or not the Claimant sexually assaulted J. It was necessary to make a determination upon the latter issue at the merits hearing that we heard in March 2015 (in order to decide the Claimant's wrongful dismissal claim and the issue of contributory conduct). The Tribunal therefore wishes to make it clear in these reasons that we make no findings one way or the other about the incidents relayed to us by the Respondent's witnesses.

107. It is sufficient, in our judgment, for us to find that there was a sufficient groundswell of genuinely held concerns upon the part of female junior staff as to present a practical bar from the Respondent's perspective to the employment of the Claimant. H's unchallenged account was of the possibility of disruption within the department by reason of a refusal of some members of staff to work with the Claimant.

108. In our judgment, the Respondent entertained genuine concerns about the re-employment of the Claimant given the evidence presented upon this occasion to the Tribunal. It was in our judgment correct for the Respondent to take the view that re-employment was not practicable without the need for the Respondent to conduct an investigation and determine whether or not the Claimant had in fact perpetuated the acts alleged against him and that it was not practical to re-employ him given the real prospect divisiveness which his return foreshadowed.

109. There were some inconsistencies particularly between what E believed she had been told by G on one hand and what G said she had told E on the other. The Tribunal has sympathy with E upon this issue. Before the Tribunal, G did give us the impression that the Claimant had in fact committed acts of indecent exposure. G made clear to us later in her evidence that this was not in fact what she had meant to portray and that the Claimant had not so acted. In the circumstances it is understandable as to why E misunderstood what G was trying to say to her.

110. A difficulty that would have faced the Respondent had it sought to determine whether or not the Claimant had so acted would inevitably arise out of the failure of the witnesses to make contemporaneous reports about the Claimant's alleged behaviour. All felt that they would not be believed as it was effectively their word against that of a very senior and very influential figure within the Respondent's organisation. In our judgment, that is a good explanation and the failure to report matters contemporaneously does not diminish the credibility of the Respondent's case that there were genuinely held concerns. It is plain that some of the witnesses (particularly F and G) greatly regretted not being more supportive of J.

111. At the merits hearing the Tribunal determined as a fact that there was a conspiracy against the Claimant. At the first remedy hearing we agreed with the Claimant's then counsel's submission that the Claimant was not a deluded conspiracy theorist but had raised specific, identifiable and focused allegations. We refer in particular to paragraphs 107 to 110 of the reasons to RJ2. At this remedy hearing, the Claimant, regrettably, gave a somewhat different impression. He made unfocused conspiracy allegations to the effect that the nursing staff was out to get him and that the surgeons lived in fear of them.

112. At the first remedy hearing, C conceded that the Claimant's belief in conspiracy was not a reason that he should not be employed. The Respondent did not advance that argument at the second remedy hearing. We do not find it not to have been practicable by reason of the Claimant's belief in a conspiracy against him. That said, however, the Claimant was clearly expressing jaundiced views about some of the Respondent's staff with whom he was expecting to work. Plainly, J and G have moved on but the other witnesses remain employed by the Respondent. In the circumstances, it is difficult to see how the Respondent may practically have sought to manage the difficult if not impossible personal relationship issues that would have faced them were the Claimant to be re-employed. We find pertinent the dicta cited at paragraph 13 of Mr Powell's closing submissions. He was citing from ***Port of London Authority v Payne [1994] ICR 555***, where it was said

that, *"the standards must not be set too high. The employer cannot be expected to explore every possible avenue which ingenuity might suggest. The employer does not have to show that reinstatement or re-engagement was impossible. It is a matter of what is practicable in the circumstances of the employer's business at the relevant time".*

113. The situation that presented itself at the relevant time (that is to say in the 28 day period up to 11 August 2016) was one in which, upon the evidence that we now have, there was a practical difficulty for the Respondent in complying with the terms of the Tribunal's Order made at the first remedy hearing. The personal relationship between the Claimant and some female colleagues was such that it was frankly impossible for them to work together or for the Respondent to have contemplated allowing them to work together. Whatever the rights and wrongs of the situation (and it bears repeating that we make no findings of fact as to whether or not the Claimant acted as alleged by any of the Respondent's witnesses including J) it is plain that there is such mutual antagonism that working relationships have irreparably broken down.

114. It is difficult to see how any practical arrangements could be arrived at by the Respondent to overcome these difficulties. The Claimant is unable to work in any department other than the orthopaedic department. It formed no part of the Claimant's case that the female witnesses who remain in the employer of the Respondent should be moved out of the orthopaedic department. If such a contention had been raised then it seems to us to go beyond the requisite standard by which practicability is to be judged in accordance with ***Port of London Authority.*** Given the highly skilled and important nature of the work undertaken by the Respondent's staff within the orthopaedic department it is essential for there to be healthy relationships between colleagues. It is plain that that essential ingredient would be missing in this case were the Claimant to have been re-employed. In the circumstances therefore we hold that it was not practicable for him to have been re-engaged by the Respondent.

115. We now turn to the second limb of the Respondent's practicability defence: that the Claimant required training and updating for the role. As we have said, there is a range of opinion as to how long it will take to train the Claimant to the requisite standard to enable him to carry out upper limb surgery within a general hospital. Even on the Claimant's account, this will take at least six months or so. There is no suggestion by anyone that the Claimant does not have the requisite skill-set to enable him to be trained for an upper limb surgery role. He has taken steps of his own volition to obtain those skills. For example, he attended the course in the United States to which we referred in RJ2 and voluntarily shadowed Professor Manning.

116. The fact of the matter, however, is that at the material time the Claimant did not have the requisite skills to enable him to do the upper limb surgery role. The only evidence that we had about the Claimant's attributes upon the last occasion was that emanating from the Claimant himself. The Tribunal received no evidence about the issue of re-training and what that entailed (both in terms of the practicality of making training arrangements and the cost). Had the Tribunal been aware that the Claimant was not in fact possessed of the requisite skill-set the Tribunal

has little doubt that it would not have made a re-employment Order. It is difficult to see how it can be said to be practicable to re-engage an individual into a role for which additional expensive training is required and where that individual is not able to "hit the ground running".

117. We also agreed with the Respondent's submission that the cost issues are significant. The Respondent had not budgeted for the funding of the Claimant's training during the relevant financial year. Re-employment of the Claimant would effectively be to double the Respondent's cost of covering the upper limb surgery vacancy until such a time as the Claimant had been trained. The Respondent is running at a deficit. The Respondent needed an orthopaedic surgeon with an interest in upper limb surgery who could commence work straightaway. The Claimant was not able to fill that vacancy without a period of expensive training.

118. For these reasons, therefore, we find that it was not practicable for the Respondent to re-employ the Claimant during the period up to 11 August 2016. That being the case, and by application of the principles set out above, the Claimant's entitlement is to a basic award in the agreed sum of £9,180 (net of the deduction for contributory conduct) and the compensatory award capped at the prescribed maximum as at the effective date of termination of the Claimant's contract of employment.

119. These findings render it unnecessary to consider in detail the Claimant's updated schedule of loss. That said, several issues do arise which we shall now consider.

120. The first of these was around the issue of mitigation of loss. It is well established that when calculating the compensatory award, the calculation should initially be based on the assumption that the employee has taken all reasonable steps to reduce his or her loss. If the employee in fact failed to take such steps then the compensatory award should be reduced so as to cover only those losses that would have been incurred even if the employee had taken the appropriate steps. The dismissed employee's duty to mitigate his or her loss will be fulfilled if he or she can be said to have acted as a reasonable person would do if he or she had no hope of seeking compensation from his or her previous employer. However, the onus of showing a failure to mitigate lies on the employer as the party who is alleging that the employee has failed to mitigate his or her loss.

121. In the context of re-employment orders, sums awarded under sections 114(2) or 115(2) cannot be reduced on the grounds that the employee has failed to mitigate his or her loss. However, we consider there to be merit in Mr Powell's point that before an employee succeeds before a Tribunal in obtaining a re-employment order the obligation to mitigate pertains. The Respondent therefore maintained that the Claimant had failed to mitigate his loss for the period prior to 14 July 2016. The difficulty for the Respondent is that it produced no evidence in support of its contention that the Claimant failed to mitigate his loss.

122. The Tribunal reminded itself of our findings of fact at paragraphs 59 to 70 of the RJ2 reasons. It is our judgment that the Claimant did act reasonably in an attempt to mitigate his loss following his dismissal. The absence of any evidence from the Respondent to the contrary is fatal to

its submission that the Claimant failed to mitigate. (It bears repeating that this finding is otiose in the light of our determination upon the issue of practicability in any event).

123. We accept the Claimant's submission that, as a matter of law, what is colloquially termed "back pay" the subject of an Order under section 115(2)(d) includes loss of the employer's contribution into the NHS pension scheme. In our judgment, the reference in section 115(2)(e) to *"any rights and privileges (including seniority and pension rights)"* is a reference to an entitlement to membership of the scheme and the benefits that come with it. It would produce a harsh judgment were a re-employed employee to suffer the loss of the benefit of employer contributions into the pension scheme between the date of dismissal and the date of re-employment. It is our determination that reference to *"pay"* in section 115(2)(d) is to be construed widely to avoid such injustice and to encompass not just a loss of salary but also loss of pension contributions. After all, pension is deferred pay. Again, this finding is otiose in any event in the light of our determination upon the issue of practicability.

124. Had we been deciding this matter in chambers before 26 July 2017 we would have held that the Claimant is entitled to be reimbursed his expenditure for the Employment Tribunal fees. He succeeded with his wrongful dismissal and ordinary unfair dismissal complaints. The Tribunal has discretion to make a costs order where a party has paid the Tribunal fee in respect of a claim and where that claim is decided in whole or in part in favour of that party. The Claimant having vindicated his position with his successful complaints we would have seen no reason why the Respondent should escape liability to reimburse the Claimant for the fees which he incurred. However, on that day the Supreme Court held (in ***R (on the application of UNISON) v Lord Chancellor [2017 UKSC 57]***) that it was unlawful for the government to have levied fees such as those paid by the Claimant. He is thus entitled to be refunded by the government. We see no reason to order the Respondent to indemnify the Claimant for his Employment Tribunal fees as he will be able to recover them. We give him liberty to apply in respect of this aspect of the matter.

Employment Judge Brain

Dated: 29 November 2017