Appeal No. UKEAT/0164/17/BA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 22 & 23 February 2018
Judgment handed down on 26 April 2018

Before

HIS HONOUR JUDGE SHANKS

(SITTING ALONE)

CITY HOSPITALS SUNDERLAND NHS FOUNDATION TRUST — APPELLANT

(1) MR O IWUCHUKWU
(2) MR I MARTIN — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR SEAMUS SWEENEY (of Counsel) Instructed by: DAC Beachcroft LLP Wellbar Central 36 Gallowgate Newcastle-upon-Tyne Tyne and Wear NE1 4TD
For the First Respondent	MR C ECHENDU (Represenative)
For the Second Respondent	No appearance or representation by or on behalf of the Second Respondent

SUMMARY

RACE DISCRIMINATION - Inferring discrimination

JURISDICTIONAL POINTS - Extension of time: just and equitable

UNFAIR DISMISSAL - Reasonableness of dismissal

The Claimant was employed by the Trust as a consultant surgeon. He was the only black African consultant employed by the Trust.

After concerns were raised about his practice, he was restricted to non-clinical duties in September 2013 and the Royal College of Surgeons was invited to conduct a review of his practice; the reviewers reported in April 2014, making various adverse findings about his practice and a series of recommendations. After some delays, the Trust's Medical Director took the view that a capability panel should be appointed; after further delays, a hearing took place in March 2015 and on 7 May 2015 the panel dismissed the Claimant for capability reasons.

Meanwhile in May/June and October 2014 the Claimant had raised grievances alleging that he was being discriminated against in relation to the capability concerns because of his race. The Trust considered that these grievances were brought as a way of delaying or derailing the capability procedure and said that they were "out of time" and failed to deal with them under the Trust's formal grievance procedure, although they were considered and rejected by the "case investigator" appointed under the capability procedure.

The Claimant appealed against the dismissal but the Trust failed to arrange a hearing to take place within 25 days of the appeal as required by the capability procedure and the Claimant said he would not participate in the appeal.

The ET:

(1) found that the Claimant was discriminated against because of his race in relation to the failure to deal with his grievances under the formal grievance procedure;

(2) extended his time for bringing a claim for discrimination based on (1) under section 123(1)(b) of the **Equality Act** on the basis that it was "just and equitable" to do so;

(3) found that the Claimant was unfairly dismissed because:

   (a) in its conduct in the period from September 2013 to the panel's decision (in particular its restriction of the Claimant to non-clinical duties in September 2013) the Trust had acted as no reasonable employer would have acted;

   (b) that conduct was sufficient to taint the decision to dismiss and render it unfair;

   (c) (although the panel had reached the view that the Claimant's capability was impaired on reasonable grounds and there was no criticism of its procedure) the panel had given insufficient consideration to possible remediation or redeployment of the Claimant;

   (d) the Trust's failure to comply with the procedural timetable for the hearing of an appeal involved acting as no reasonable employer would have acted and denied the Claimant the opportunity to appeal against the dismissal decision.

The EAT allowed the Trust's appeals against the findings of discrimination and unfair dismissal.

(1) The inference that the failure to deal with the grievances in accordance with the grievance procedure was race discrimination was based solely on the fact that the reason given at the time, i.e. that they were "out of time", was not a sustainable reason; but the ET found that the Trust considered that the grievances were presented as an attempt by the Claimant to delay or derail the capability proceedings: this provided a complete explanation for the Trust's conduct unrelated to the Claimant's race and the inference of race discrimination was unsupportable and the claim should have been dismissed.

(2) It followed that the decision to extend the time for bringing the claim for race discrimination was no longer a relevant issue. On the point which was argued (namely whether it was ever open to the ET to extend time when the Claimant had presented no evidence as to why he had failed to present a claim in time) the apparent conflict in the EAT jurisprudence had now been resolved by the Court of Appeal in **Abertawe Bro Morgannwg University Local Health Board v Morgan** [2018] EWCA Civ 640, which makes it clear that, if a Claimant gives no evidence on that issue, the ET is not obliged to infer that there was no acceptable reason for the delay and that, even if there is no acceptable reason for the delay, that does not necessarily mean that time should not be extended.

(3) The finding of unfair dismissal involved errors of law in that:

(a) the conclusion that the Trust's conduct between September 2013 and the panel's decision was sufficient to render the dismissal unfair without reference to the reasonableness of the decision or the circumstances applying when it was made focussed on the wrong question and involved an error of approach (see: **McAdie v Royal Bank of Scotland** [2007] EWCA Civ 806);

(b) when considering the decision to dismiss itself the ET did not focus properly on its reasonableness because they failed to engage with the reasons set out in the dismissal letter for rejecting the various possible alternatives to dismissal;

(c) the conclusion that the Trust's failure to comply with the timetable for the hearing of the Claimant's appeal was unfair and deprived the Claimant of the opportunity to appeal was perverse.

HIS HONOUR JUDGE SHANKS

Introduction

1. The Claimant, Mr Iwuchukwu, qualified as a doctor in Nigeria in 1987. From 1995 he held a variety of posts in hospitals in the UK. In February 2007 he took a post as a consultant general surgeon with a special interest in breast surgery at the Sunderland Royal Hospital, which is part of the Appellant NHS Trust. At all material times he was the only black African consultant employed by the Trust. By 2010 he had left the general surgery rota to concentrate on providing breast surgery and by 2012 he was the only consultant breast surgeon employed by the Trust. The ET found that breast reconstruction accounted for about 20% of his work as a breast surgeon.

2. After concerns had been raised about his practice, the Claimant was restricted to non-clinical duties from September 2013 and he was dismissed by the Trust following a capability hearing by letter dated 7 May 2015.

3. On 15 August 2015 the Claimant brought proceedings in the Employment Tribunal against the Trust and Ian Martin, its Medical Director, raising numerous allegations of race discrimination/harassment and victimisation going back to 2010 and claiming that his dismissal was unfair, on the grounds that it was by reason of a "**TUPE**" transfer, that it was by reason of a "protected disclosure" and on general "section 98" grounds. At the hearing before the ET he also asserted that his dismissal was itself an act of race discrimination and that he had been the victim of a criminal conspiracy.

4. Following a 12-day hearing in June and July 2016, the Employment Tribunal sitting in North Shields (Employment Judge Buchanan, Mrs Tarn and Mrs Mee) in a Judgment sent out on 2 November 2016: (a) upheld one claim of race discrimination and victimisation against the Trust arising from the way they dealt with grievances raised by the Claimant in May/June and October 2014, and (b) found that the Claimant's dismissal was for capability reasons but was unfair under section 98(4) of the **Employment Rights Act 199**6. All his other claims, including all those against Mr Martin, were dismissed.

5. The Trust appeals against the ET's findings which went in the Claimant's favour, saying that the ET was wrong in law: (a) to extend time for bringing the successful race discrimination/ victimisation claim, (b) to find that the way the grievances were dealt with was because of his race and by way of victimisation, and (c) to find that the dismissal was unfair under section 98(4).

Relevant Facts

6. The ET made detailed and comprehensive findings of fact covering nearly 40 closely typed pages of their Judgment. What follows is a briefer summary of the facts most relevant to the appeal.

7. At paragraphs 7.14 to 7.18 the ET set out a detailed description of MHPS (Maintaining High Professional Standards in the Modern NHS), which was the relevant capability policy applying to the Claimant's employment. They rightly recorded that the policy required that, before invoking formal capability procedures, an employer should consider the scope for resolving the issue through counselling or retraining and should take advice from NCAS

(National Clinical Advisory Service) (see paragraph 9 of section IV of MHPS at page 329 of the EAT bundle). They went on to say in paragraph 7.17:

> **"7.17. … The whole tenor of MHPS is that capability matters will be addressed by an agreed action plan unless the practitioner's performance *is so fundamentally flawed that no educational and/or organisational plan has a realistic chance of success* in which circumstances a capability panel may be necessary. …" (My italics)**

I think Mr Sweeney for the Trust was justified in his criticism of that characterisation of the process. The words I have italicised come from paragraph 15 of MHPS (see page 331 of the EAT bundle), which is dealing with the advice that NCAS might give in response to a request from an employer. They are not intended in my view to place an additional restriction on the ability of an employer to proceed to the appointment of a capability panel, the decision on which may involve other considerations.

8. At paragraphs 7.37 to 7.40 the ET set out relevant background relating to the Trust's breast service in general. The ET recorded that there was a history of co-operation between the Trust and its two neighbouring NHS Trusts, Gateshead and South Tyneside. Gateshead had a strong reputation in breast care and was the only one of the three to provide a breast screening service. In 2011/12 there was a proposal to centralise much of the breast service work (including reconstruction) of all three Trusts at Gateshead, which would have involved all staff involved transferring to Gateshead and a single breast MDT (multi-disciplinary team) at that site. However, the process stalled and when concerns were raised about the Claimant's performance in 2013, Gateshead indicated they wanted to hold off from any proposed transfer until those concerns had been resolved. From December 2014, after the departure of a locum, the Trust closed the breast service to new referrals (although existing patients continued to be cared for). The ET recorded that, as at 2016, the future of the breast service remained a

difficult issue and that, although a **TUPE** transfer to Gateshead had been in contemplation, it had not happened.

9. Meanwhile, after concerns had been raised about the Claimant's practice (in particular, an apparently high post-surgical complication rate, a lack of adherence to treatment plans agreed by the MDT, and a disengagement from and lack of interest in the MDT), Mr Martin initiated an investigation into his practice in May 2013. Following an initial investigation report from Stephen Holtham, the Trust's Clinical Director of General Surgery, Mr Martin sought advice from NCAS in August 2013. They advised him to commence a formal investigation under MHPS by a suitably qualified or experienced individual and agreed that, given the concerns raised, it would be appropriate to restrict the Claimant to non-clinical duties rather than to exclude him, although Mr Martin was advised to keep the restriction under continuous review as he would a formal exclusion. On 2 September 2013 Mr Martin advised the Claimant that he was restricted to non-clinical duties involving no contact with patients and it was agreed that the RCS (Royal College of Surgeons) would be commissioned to conduct an "*invited review*" of the Claimant's practice. On 5 September 2013 the RCS agreed to carry out such a review. It seems that this type of review did not strictly satisfy the requirement for a report from a "case investigator" under the MHPS policy.

10. The RCS reviewers visited on 12 and 13 December 2013. On 23 December 2013 Mr Martin was advised that the reviewers believed there were sufficient concerns about the Claimant's practice that the restrictions on his practice should continue. The concerns were mainly about breast reconstruction work but the reviewers also identified issues about his receptiveness to the views of colleagues and his ability to engage productively with the MDT. There was a further visit on 25 January 2014 and a draft of part of the report was sent to the

Trust and the Claimant on 28 February 2014. However, the final version was not received until 7 April 2014.

11. The report concluded that there were sufficient concerns about the Claimant's practice for the restrictions to continue; in particular, (a) the outcome complication rate in some areas (mainly breast reconstruction) was below expected standards, as was his attention to patient selection and his recording and analysis of complications; (b) it was unclear from some notes that the treatment offered faithfully reflected the views of the MDT and in some cases it clearly did not; (c) there were sufficient concerns being expressed by colleagues to indicate that the Claimant's conduct did not meet expected standards, with the Claimant unable to engage in non-confrontational debate and an effective breakdown in trust between him and many members of the MDT. The recommendations were: (a) that the restriction should remain in place until other recommendations had been addressed; (b) that the Trust should urgently finalise their plans for the future of breast surgery which should not include allowing a sole site breast surgeon to continue; (c) that the Trust consider what surgical practice would be appropriate for the Claimant to continue to ensure that any return to practice preserved patient safety and high quality care; (d) that the Claimant should not carry out any breast reconstruction work; (e) that he should not be allowed to relay MDT decisions to patients nor be sole arbiter of the outcome of discussions with patients where legitimate treatment choices existed; (f) that he should have an experienced mentor; (g) that he should not resume independent surgical practice without a period of direct clinical oversight and (h) if he were to do so, there should be at least one other consultant breast surgeon with a significant presence on site. There was an appendix to the report containing a summary of the notes on 20 of the Claimant's patients which had been reviewed; it contained frequent references to the very poor nature of the record keeping

and in one case the reviewer commented that there had been poor decision-making at all stages and a failure to take advice from colleagues which was "*incomprehensible*".

12. Having read the report, Mr Martin sought advice from NCAS and the GMC (General Medical Council) and discussed the matter with the Chief Executive of the Trust and Kathleen Griffin, Head of HR. NCAS declined to carry out an assessment on the Claimant as it said it would add nothing to the RCS review already undertaken, a decision they confirmed on 11 June 2014 after taking account of the Claimant's comments. The GMC advised that the matter be referred to their Fitness to Practice Directorate; by letter dated 13 June 2014 they issued an interim order which restricted the Claimant to performing breast surgery on NHS patients at the Trust subject to supervision effectively at the level of a foundation level 1 trainee; I was told that this in effect prevented him practising at all since there was no other doctor at the Trust who could provide such supervision.

13. Having received confirmation that NCAS would not carry out an assessment of the Claimant, Mr Martin met Ms Griffin and put forward his view that the way to proceed was to a capability hearing. She advised that they should explore whether a remediation programme for the Claimant could be found at another NHS organisation. Mr Martin followed that advice and sought assistance from various organisations. He met the Claimant and Robert Quick, an HCSA officer, and it was agreed that he would contact NHS Trusts in Glasgow, Manchester, Gateshead, Newcastle and Northumbria to see if they would be prepared to help with remediation. Letters were sent to all of them and they all responded to the effect they were not prepared to help. Mr Martin informed the Claimant of this; the Claimant said that there were other colleagues who could help but he never provided any details of these. The ET concluded at paragraph 7.108 that the steps taken to consider remediation at this stage were "*late,*

perfunctory and little more than a tick box exercise" but, as far as I can see, the ET did not give any further reason for that conclusion.

14. Mr Martin then concluded that the only way to proceed was by convening a capability panel, and having discussed the matter with relevant colleagues, this course of action was agreed. He wrote to the Claimant confirming this on 10 September 2014 and in due course a hearing was set for 23 December 2014.

15. Meanwhile on 3 June 2014 the Claimant had sent the Chief Executive of the Trust a long grievance about the way he had been treated. It was dated 31 May 2014 and headed "*Formal Grievance*". It complained of the fact that he had been unsupported over the years and complained about the references to NCAS and RCS and that he had been "*suspended for over 8 months without any review of the situation*". Most of the complaints related specifically to Mr Martin and it was stated that his treatment amounted to bullying and harassment and race discrimination. The ET found that the grievance was a "protected act" for the purposes of section 27 of the **Equality Act 2010**.

16. Mr Martin did not deal with the grievance but he did obtain advice from NCAS to the effect that the grievance should be dealt with separately but in parallel with the on-going capability process but should not "*... be allowed to stall or derail that course of action*". On 8 July 2014 the Claimant and Mr Quick met Andrew Loughney, the Surgical Medical Director, and Bill Holliday, the Divisional HR Manager, to discuss the grievance. The Claimant said that he was the victim of race discrimination and that he did not believe he would receive fair treatment from anyone within the Trust and that it should be investigated by someone from outside. On 4 August 2014 Mr Loughney wrote the Claimant a letter which recorded that the

Claimant had been unwilling to discuss specifics but suggested a further meeting or that he provide written evidence in support of his grievance. I was told there was no reply to that letter.

17. The Claimant had agreed to explore remediation with Mr Martin and that process, as I record above, had occupied August and part of September 2014. Once notified that nobody was prepared to assist with remediation, Mr Quick on behalf of the Claimant sought to revive the grievance procedure. Mr Holliday from HR wrote to him on 30 September 2014 to the effect that the grievance could not be taken forward because it was outside the one-month time limit for raising grievances set by the formal grievance policy. This position was clearly unsustainable and the ET found that it was a blatant attempt to close down the grievance procedure which had started but stalled in August and September 2014 while discussions on remediation took place.

18. On 7 October 2014 the Claimant wrote to the Chief Executive of the Trust raising the same complaints again and also complaining about certain comments Mr Martin had made at a meeting on 7 August 2014 and about his failure to contact breast surgeon colleagues at other Trusts (rather than the Medical Directors) in relation to remediation, and accusing him again of race discrimination. That grievance was also a protected act.

19. The view was taken in the HR Department that the October grievance was also out of time but Ms Griffin, having taken legal advice, decided to take a pragmatic approach and suspend the capability panel hearing set for 23 December 2014 while the Trust formally appointed Shaun Fenwick (the Deputy Medical Director) as "case investigator" under the MHPS procedure; his terms of reference included consideration of whether the Trust had deviated from its procedures in dealing with the case and, if so, whether the reason related to

A the Claimant's race and whether there was other evidence of race discrimination against him; he was told that if he found evidence of vindictive or discriminatory treatment by Mr Martin he was to report directly to Ms Griffin rather than Mr Martin who was the "case manager" for the purposes of MHPS. Notwithstanding this arrangement, which the ET found to be an attempt to look at the issues raised by the October grievance, the ET found that the Claimant's grievances of May/June and October 2014 were never formally investigated under the grievance procedure and that this amounted to "less favourable treatment" for the purposes of section 13 of the **Equality Act 2010**.

20. As part of his investigation Mr Fenwick met the Claimant for over three hours on 26 November 2014. His report was completed on 9 January 2015. He concluded that the data on which the RCS report was based were accurate and appropriate. He found that there was sufficient conflicting evidence as to the nature, seriousness and reasons for the Claimant's complication rates and sufficient evidence of concern that he did not adhere to agreed treatment plans and was disengaged during MDT meetings to warrant further consideration. He rejected the Claimant's allegations of race discrimination. In his conclusions he set out four options: the recruitment by the Trust of an additional consultant to remediate the Claimant; remediation at an alternative location; support to the Claimant to find alternative employment; and putting his case before a capability panel.

21. Having received the Fenwick report and taken advice as to whether it was appropriate to continue as case manager, Mr Martin determined to press ahead with the appointment of a capability panel. A panel was appointed comprising Julia Pattison, the Trust's Director of Finance and Deputy Chief Executive, Professor Nanita Kumar, Post Graduate Dean at Health Education England, and Michael McKirdy, a consultant surgeon at a hospital in Scotland, and a

hearing was arranged for 24 March 2015. The panel was provided in advance with the Fenwick report (which included the RCS report) and a witness statement from the Claimant with supporting documents which challenged the findings of the RCS report. At the hearing, which lasted six hours, the Claimant was represented by a lawyer and accompanied by Mr Quick.

22. The panel deliberated on 24 April 2015 and an 11-page letter of dismissal was issued on 7 May 2015. The panel concluded they could rely on the RCS report to find that the Claimant had a high post-surgical complication rate, did not adhere to treatment plans agreed by the MDT and appeared disengaged during MDT meetings. They rejected the challenges the Claimant had raised to the RCS report. The ET record at paragraph 7.142 that the panel "*... accepted that there was no evidence to suggest that the claimant's non implant work was technically deficient but stopped short of finding that the only clinical performance concerns related to reconstructive surgery given the findings in respect of the claimant's poor patient selection, recording of complications and receptiveness and ability to engage productively with the MDT and wider circle of colleagues*". The panel set out their consideration of various options instead of dismissal (including redeployment to a general surgical role at the Trust) and gave detailed reasons for rejecting each of them. They concluded that the only option was dismissal and dismissed the Claimant with notice.

23. The Claimant appealed against the decision of the panel. His grounds of appeal dated 3 June 2015 referred to the fact that his non-reconstructive work accounted for 80% of his breast surgical work and that he should have been allowed to continue with this while concerns about reconstructive surgery were looked into. He complained that the panel had disregarded his grievance of race discrimination and victimisation against Mr Martin, who, he said, was the person who instigated every attack on him. He accused the panel of having a pre-conceived

intention to dismiss and said that their decision was "*vindictive, disproportionate and victimising*".

24. Although the MHPS policy required an appeal hearing to take place within 25 working days of the appeal being lodged, it took time to secure a suitable panel and it was not until 14 August 2015 that Ms Griffin advised the Claimant of the panel members and that the appeal hearing would take place on 13 October 2015. On 17 September 2015, Mr Echendu, who was now acting for the Claimant, said that the appeal was organised only after the Claimant had brought his claim (actually the claim was brought on 15 August 2015) and that the Claimant would not participate in the appeal. It was also said that the delay in organising the appeal was an act of "*intimidation, bullying and harassment*".

25. The ET recorded that since his dismissal the Claimant had worked under close supervision in Cornwall in "*... on call general surgery and elective breast surgery activity including new and follow up clinics and non reconstructive breast surgery*". Apart from his technical skills being a little "*rusty*" there has been no difficulty with this work and the ET stated that there was every reason to think the he would be successfully remediated to his previous level in due course.

The Failure to Investigate the Grievances

26. The ET found that the failure to investigate the Claimant's grievances raised in May/June and October 2014 under the Trust's formal grievance policy was race discrimination and victimisation by the Trust, but that it did not involve Mr Martin personally. Their reasoning is set out at paragraphs 11.36 to 11.40 and 11.46 to 11.52 of the Judgment. In summary, they found that the way the Trust dealt with the grievances was a blatant attempt to

close them down without having to deal with them further and the reason given for failing to follow the grievance policy, namely that the grievances were "out of time", was not sustainable, and that it followed from that that the claims of race discrimination and victimisation were made out.

27. I agree with the submission of Mr Sweeney for the Trust that on the face of it this was an unjustified leap of reasoning. Further, in the light of their finding that the Trust through Ms Griffin (see paragraph 11.48) and indeed Mr Martin personally (see paragraph 7.121) saw the grievances as a method of attempting to delay, if not derail, the capability proceedings which were then on-going, it seems to me that it is unsupportable: the view of the Trust about what the Claimant was trying to do clearly provided a complete (albeit perhaps unsatisfactory) explanation for the Trust's behaviour which was unrelated to his race. The ET also reasoned that race discrimination was established by reference to a hypothetical comparator of a different race referred to at paragraphs 11.37 and 11.40, who they said would not have been treated in the same way and would have had his grievance properly investigated under the grievance policy; the problem with the hypothetical comparator which the ET constructed was that they forgot to include when considering the characteristics of the comparator that the Trust would also have formed the view that his grievance was an attempt to derail a capability procedure.

28. When specifically considering the victimisation claim the ET said that they concluded that the decision not to allow the grievances to be investigated under the policy was "... *materially influenced by the content of the grievances*" (see paragraph 11.48). It is not clear on what basis the ET decided that the *content* of the grievances was relevant and, again, in the light of their finding that the Trust saw the grievances as an attempt by the Claimant to derail the capability proceedings, I do not think this reasoning can stand.

29. Mr Echendu for the Claimant maintained that the ET were entitled to conclude as a matter of fact that the way the Trust dealt with the grievances was because of the Claimant's race and/or his complaints of race discrimination. He referred to paragraph 11.11 in the ET's Decision under the heading "*The substantive allegations of direct race discrimination - general comments*" where the ET refer to the many allegations raised against the Claimant during the period 2012 to 2015, to the fact the Claimant was excluded from clinical duties for a long time without proper review, to the elision of capability and conduct issues, and to the deteriorating relationship between the Claimant and Mr Martin. He said that the existence of these other factors meant that it was open to the ET to draw the inference of race discrimination and victimisation in this case. However, given that the ET rejected all the other complaints of race discrimination raised by the Claimant as well as all the claims against Mr Martin personally, I do not see how any of these factors can provide any support for the inference of race discrimination or victimisation in relation to the way the grievances were treated.

30. Mr Echendu also asserted in this context at paragraphs 10 and 11 of his skeleton argument that Mr Martin and Ms Griffin conspired in some way to appoint Mr Fenwick and (it is implicit) that his report was some kind of sham. There is really no basis for this assertion, which seems to be another of the "*wilder accusations*" against Mr Martin and the Trust to which the ET refer at paragraph 12.1 of the Judgment, and it should not have been made by Mr Echendu.

31. I am of the clear view that the ET made an error of law in drawing the inference of race discrimination and victimisation and I therefore allow the appeal in relation to those findings against the Trust. Since I have concluded that the inferences were simply unsupportable on the basis of the ET's other findings of fact I consider that it is open to me to substitute my own

decision for that of the ET and to dismiss the claims of race discrimination and victimisation which were upheld by the ET.

ET's Decision to Extend Time

32. Having found that the Trust's failure to investigate the Claimant's grievances under its formal grievance policy amounted to race discrimination and victimisation, the ET stated that those claims were *prima facie* out of time under section 123 of the **Equality Act 2010** but, in paragraphs 11.41 and 11.51, they extended time on the basis that it was "just and equitable" to do so. The Trust appeals against the decision to extend time. Since I have allowed its appeal on the race discrimination and victimisation claims and decided that those claims cannot succeed on the merits, the question of whether time should have been extended does not arise in practice.

33. However, I would note that the main issue between the parties on this part of the appeal arose from an apparent conflict in the EAT jurisprudence as to whether it is ever open to the ET to extend time when no evidence is advanced as to why a Claimant had failed to present a claim in time. It seems to me that that conflict, such as it was, has been authoritatively resolved by the Court of Appeal in a case, decided after this appeal was argued, called **Abertawe Bro Morgannwg University Local Health Board v Morgan** [2018] EWCA Civ 640, where the Court of Appeal indicate at paragraph 25 that it is ***not*** the case that "*... if a claimant gives no direct evidence about why she did not bring her claims sooner a tribunal is obliged to infer that there was no acceptable reason for the delay, or even that if there was no acceptable reason that would inevitably mean that time should not be extended*".

The Reasons for the Finding of Unfair Dismissal

34. The ET's reasons for finding that the Claimant was unfairly dismissed are set out at paragraphs 11.77 to 11.90 of the Judgment. At paragraphs 11.78 to 11.80 the ET found that the reason for the dismissal was that the panel genuinely believed that the Claimant's capability was impaired and that the panel had reasonable grounds, based on the RCS report and other evidence they received, for that belief. The ET note that the RCS report was thorough and related to several aspects of the Claimant's practice, including complication rates, behaviour in MDT meetings, note taking, and patient selection.

35. At paragraph 11.81 the ET then turned to consider whether the Trust followed a "*reasonable procedure*". They record that the MHPS policy, which they accept governed the Trust in this matter, envisages capability issues being dealt with quickly and efficiently, and in particular the appointment of a "case investigator" and a process of remediation through an agreed action plan.

36. At paragraph 11.82 the ET criticise the Trust for excluding the Claimant from all clinical duties in September 2013 without considering whether to allow him to work in general surgery under supervision, thereby retaining his basic surgical skills while matters were investigated. In acting this way, the ET found that the Trust failed to act as any reasonable employer would have acted. This failure, they say, "*taints all which follows*".

37. At paragraph 11.83 the ET say that having excluded the Claimant from clinical duties in September 2013, any reasonable employer would have kept the exclusion under "*regular and genuine review*" but that the Trust did not do this. The consequence of this was that the period of exclusion went on for 20 months, which was an unreasonable period which "*inexorably [led]*

to consideration of dismissal which MHPS is designed to prevent", while, if a process of remediation had been put in place, it might have had a successful outcome.

38. At paragraphs 11.84 to 11.87 the ET go on to criticise the Trust for (a) allowing conduct concerns to interfere with the investigation into capability concerns, (b) failing to appoint a "case investigator" speedily as required by the MHPS procedure, (c) failing to genuinely consider remediation through an action plan, and (d) allowing the whole process to be unreasonably delayed so that it took 20 months during which the Claimant could not practise as a surgeon, and (e) the poor working relationship between the Claimant and Mr Martin which led to unreasonable decisions being taken and the failure to consider the process of remediation properly. All these, the ET said, were not the actions of any reasonable employer.

39. At paragraph 11.88 the ET state that the MHPS was "*... one procedure and the matters which occur prior to a capability panel being convened cannot be divorced from the decision of [the] panel*". They go on:

> **"11.88. … The unreasonable actions of [the Trust], which we identify before the panel decided to dismiss, are sufficient in our judgment to taint the decision of that panel and render the decision to dismiss itself unfair. …"**

40. In the balance of paragraph 11.88 the ET say that the unreasonable actions already identified were or should have been known to the panel and they should therefore have given particularly detailed and careful consideration to remediation or redeployment of the Claimant, but that their consideration was not at the level or detail which any reasonable employer would have applied in the circumstances of this case. In the first paragraph 11.89 the ET criticise the knowledge of and material considered by the panel in their discussion on 24 April 2015 and the fact that the Claimant was not involved and conclude that, in view of the background and the fact that the Claimant was an experienced surgeon whose practice had been described as "*below*

par" but not "*fundamentally flawed*", any reasonable employer would have given more detailed thought and consideration to remediation than was given to them by the panel.

41. Finally, in the second paragraph 11.89 the ET record that the Trust failed to comply with the MHPS policy's requirement that the hearing of any appeal should take place within 25 days of notification of the appeal (see EAT bundle page 339) and say that the Trust did not appreciate the importance of a timely appeal process or give the matter the priority it deserved. In this respect the Trust acted as no reasonable employer would act and effectively denied the Claimant the opportunity to appeal as required by any reasonable procedure.

The Appeal on Unfair Dismissal

42. The Trust say that the ET's finding of unfair dismissal was based on a number of errors of law which can be fairly summarised as follows:

(1) The ET's findings that the Trust acted as no reasonable employer would have acted between September 2013 and the panel's decision to dismiss involved substituting the ET's judgment for that of the Trust's Medical Director and/or were perverse;

(2) Their conclusion that those actions "*... are sufficient ... to taint the decision of [the] panel and render the decision to dismiss itself unfair*" involved an error of law and approach similar to that made by the ET in the case of **McAdie v Royal Bank of Scotland** [2007] EWCA Civ 806;

(3) The ET failed to focus (as they should have) on the panel's decision to dismiss and its reasonableness in the circumstances applying at the time;

(4) The conclusion that the failure to arrange an appeal within the MHPS timetable deprived the Claimant of the opportunity to have a review of the dismissal decision and rendered it unfair was also perverse.

43. On (1), it seems to me that, given the history I have set out and in particular the positions taken by the NCAS, RCS and GMC, the ET's findings about the Trust's actions between September 2013 and the panel's decision are somewhat surprising. However, in the light of my own conclusions on the other points raised by the Trust, I prefer not to reach a final view as to whether they are "perverse" or involve a "substitution mind-set" by the ET, as the Trust would say.

44. On (2), I was referred by Mr Sweeney to the **McAdie** case. In that case the ET found that the claimant had been dismissed because she was no longer capable of doing her job for health reasons which had been caused entirely by the employer's failure to properly address a grievance she had raised over a year before her dismissal; since the employer had behaved in relation to the grievance as no reasonable employer would have behaved, it followed that the dismissal was unfair notwithstanding that the claimant was incapable of doing the job and a proper procedure had been followed in making the decision to dismiss. The EAT allowed an appeal by the employer and substituted a finding that the dismissal was fair and the Court of Appeal upheld the EAT's position. The fact that the employer was entirely responsible for the employee's incapacity by its unfair treatment of her before the decision to dismiss did not by itself make the dismissal unfair. As the EAT said (see the quotation by Court of Appeal at paragraph 38):

> **"… it is important to focus not, as such, on the question of [the employer's culpable] responsibility but on the statutory question of whether it was reasonable for the [employer], "in the circumstances" (which of course include the [employer's] responsibility for [the incapacity]), to dismiss her for that reason. On ordinary principles, that question falls to be answered by reference to the situation as it was at the date that the decision was taken. …"**

45. It seems to me that the ET in this case have made the same error in their conclusion in the first part of paragraph 11.88 as the ET in the **McAdie** case did. The relevant statutory question was whether the decision to dismiss was reasonable in all the circumstances applying

A at the time of the decision. The ET's conclusion that the decision was rendered unfair solely by the unreasonable conduct of the Trust before the decision was made, without any reference to the decision itself and the circumstances applying at the time it was made, clearly focussed on the wrong question. The fact that the MHPS is, as the ET put it, "*one procedure*" for dealing with capability issues relating to doctors in the NHS cannot change the statutory question relating to unfair dismissal into another different question, namely whether the employer complied with that procedure in the run up to the decision to dismiss.

46. On (3), it is fair to say that in the second half of paragraph 11.88 (starting with the words "*In any event ...*") and the first paragraph 11.89 the ET do appear to address their minds to the reasonableness of the decision itself and reach the view that the capability panel should have given more detailed thought and consideration to "remediation" than they did and that their decision was therefore unfair. However, the ET entirely failed in these paragraphs to engage with the panel's detailed reasons for rejecting the alternatives to dismissal ("*Remediation in Trust*", "*Third Party Remediation*" and "*Redeployment*" to general surgery) which are set out in the dismissal letter of 24 April 2015 (see pages 352 to 354 of the EAT bundle). In my view that failure makes it clear that the ET did not properly focus on the reasonableness of the decision: that is an error of law by the ET which means that the conclusion on unfair dismissal cannot stand. It does not, however, mean that the ET's conclusion that the panel's decision was unfair was a perverse one and I therefore refuse the Trust's application for leave to amend the Notice of Appeal to raise a perversity challenge in this context.

47. On (4), the ET decided in the second paragraph 11.89 that in failing to comply with the timetable for an appeal laid down by MHPS, the Trust acted as no reasonable employer would

A have acted and denied the Claimant the opportunity to have the matter reviewed on appeal. I unhesitatingly agree with Mr Sweeney's submission that this conclusion was perverse. It failed to take account of the very short timetable envisaged by the MHPS and the obvious complications involved in assembling an appeal panel and failed to take account of the perfectly B plausible explanation for the delay which was put forward by Ms Griffin (in her statement at page 373 of the EAT bundle), which the ET had expressly accepted in the context of a discrimination claim at paragraph 11.57 of the Judgment. Further, it was not right to say that C the Claimant was denied the opportunity to appeal; it would have been perfectly open to him to pursue the appeal already set for 13 October 2015 while pursuing his claims in the Employment Tribunal. Mr Echendu in his submissions suggested that the fact that the Trust had failed to D comply with the time limit for the hearing of the appeal in the MHPS policy was really the end of the question and meant that unfairness was established: that is simply not correct.

E 48. As to his other submissions on this part of the case, Mr Echendu submitted in general that the Trust's appeal in relation to the unfair dismissal decision was an "*abuse of the appeal structure [sic]*"; I am not sure what that is intended to mean. He said the ET directed themselves correctly about the law; that was not in dispute: the question was whether they had F applied the law properly. He was at pains to stress the detailed requirements of the various policies which the Trust had not followed, in particular MHPS. However, he did not really engage with the fundamental points raised or seem to appreciate that the mere fact that an G employer has breached the express terms of a relevant policy or procedure does not of itself render a dismissal unfair for the purposes of section 98(4) of the **Employment Rights Act 1996**. Finally, he stated in his skeleton argument at paragraph 54:

> **"54. The [Trust's] treatment of the [Claimant] in this case clearly met the threshold of torture and degrading treatment under Article 3 of ECHR but unfortunately the ET liked them [sic]."**

H

That, I am afraid, can only be described as hyperbole and yet another of the "*wilder accusations*" made against the Trust and, again, Mr Echendu simply should not have allowed it to go into a document he prepared for a court hearing.

Conclusions on Unfair Dismissal

49. For the reasons set out above, particularly in paragraph 46, I have concluded that the ET's decision on unfair dismissal involved errors of law and cannot stand and I allow the appeal against the finding of unfair dismissal. However, it is clearly not appropriate for me to reach my own conclusion on the matter since it may involve further factual inquiry and, in any event, will involve a fresh judgment as to the reasonableness of the panel's decision and the matter will therefore have to be remitted.

50. Inconvenient as it may be, at the moment I do not think it would be right to remit the case back to the same ET (though in case anyone wishes to make further representations on the point I will include a liberty to apply in the EAT's Order). However, I see no reason why any findings of primary fact in section 7 of the ET's Judgment should be disturbed and I would hope that the new ET would be able to make its decision on the basis of the ET's Judgment read in the light of this Judgment and any documents in the case, without the need for further evidence.

Disposal

51. I will therefore order as follows:

(1) The appeal is allowed;

(2) The claims for race discrimination and victimisation which succeeded before the ET are dismissed by the EAT;

(3) The claim of ordinary unfair dismissal is remitted to be decided by a new ET (but there is liberty to apply within 14 days of handing down for a reconsideration of whether it should be a new ET);

(4) A preliminary hearing will be held by the ET to consider what further evidence (if any) should be presented at the final hearing.