Appeal No. UKEAT/0218/17/JOJ
UKEAT/0306/17/JOJ

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 22 & 23 February 2018
Judgment handed down on 18 May 2018

Before

THE HONOURABLE MR JUSTICE CHOUDHURY

(SITTING ALONE)

MR C MBUBAEGBU — APPELLANT

HOMERTON UNIVERSITY HOSPITAL NHS FOUNDATION TRUST — RESPONDENT

Transcript of Proceedings

JUDGMENT

Amended

APPEARANCES

For the Appellant	MR GERARD McDERMOTT (One of Her Majesty's Counsel) and MS NAOMI CUNNINGHAM (of Counsel) Instructed by: Bates Wells Braithwaite LLP 10 Queen Street Place London EC4R 1BE
For the Respondent	MR ROBERT MORETTO (of Counsel) Instructed by: Capsticks Solicitors LLP 1 St Georges Road Wimbledon London SW19 4DR

SUMMARY

PRACTICE AND PROCEDURE - Admissibility of evidence

PRACTICE AND PROCEDURE - Review

CONTRACT OF EMPLOYMENT - Wrongful dismissal

UNFAIR DISMISSAL - Reasonableness of dismissal

RACE DISCRIMINATION - Direct

RACE DISCRIMINATION - Inferring discrimination

RACE DISCRIMINATION - Burden of proof

The Tribunal did not err in determining that the dismissal of a Black African Consultant for a first offence was not unfair. The Respondent's reliance upon a pattern of conduct giving rise to concerns about patient safety as a sufficient reason to dismiss was within the range of reasonable responses notwithstanding the fact that there was no single act that could be said to amount to gross misconduct.

However, the Tribunal did err in concluding that the dismissal was not wrongful as it had failed to make the necessary findings of fact for itself to establish that the Claimant's conduct amounted to a repudiatory breach.

There was no error in concluding that the Claimant had not been discriminated against. The Tribunal's approach to the evidentiary matters relied upon as giving rise to an inference of discrimination was not 'fragmentary' as is apparent from a fair reading of the whole judgment.

The decision not to reconsider its judgment in the light of new evidence from the GMC that no action should be taken against the Claimant was not perverse. The Tribunal was required to consider different matters from those which concerned the GMC and the latter's conclusions were unlikely to have had a material influence on the outcome.

THE HONOURABLE MR JUSTICE CHOUDHURY

Introduction

1. The Claimant is a consultant orthopaedic surgeon. He was employed by the Respondent Hospital for over 15 years from 1999 until his dismissal for gross misconduct on 22 February 2016. Prior to the disciplinary proceedings that led to his dismissal, the Claimant had had an unblemished career with no question mark over his clinical judgment or abilities, and was highly regarded by colleagues. The matters giving rise to the finding of gross misconduct arose out of alleged failures to comply with rules and procedures introduced in 2013 to address dysfunctionality in the Claimant's department and various patient incidents, the last of which was on 28 July 2014. Although several in his department were subject to disciplinary proceedings, the Claimant was the only one dismissed for gross misconduct. He was the only black African consultant.

2. The Claimant's Claims of unfair dismissal, wrongful dismissal and discrimination on the grounds of race were all dismissed by the East London Employment Tribunal ("the Tribunal") after a 10-day hearing. The Reasons, which extended to 276 paragraphs over 62 pages, were sent to the parties on 13 April 2017. The finding that the dismissal was fair was by a majority, the dissenting member concluding that dismissal was outside the band of reasonable responses.

3. On 31 May 2017, the GMC, to which the Claimant's conduct had been referred, issued a determination that his case was closed with no action on the basis that the evidence did not support a conclusion that his conduct or practice was likely to result in a finding of impaired fitness to practice. The Claimant applied to the Tribunal for a reconsideration of its judgment

in the light of the GMC decision. By a decision dated 4 July 2017, the Tribunal refused to reconsider the matter ("the Reconsideration Decision").

4. It is in these circumstances that the Claimant appeals against both the Judgment and the Reconsideration Decision.

Factual Background

5. This may be summarised from the Tribunal's findings as follows:

6. The Respondent's Trauma and Orthopaedics department had for some years been dysfunctional. Interpersonal relations were particularly difficult between three surgeons, Mr Amer Khan, Mr Ziali Sivardeen and Mr Donal McCarthy, with frequent tit-for-tat concerns being raised. Matters came to a head by April 2013 when the then medical director, Dr Coakley, implemented the Department Rules and Responsibilities ("DRR"), which set out rules and reporting requirements in a number of areas. It was made clear in a letter sent to the surgeons by the Chief Executive that:

> **"… these expectations [in the DRR] will be pursued and significant evidence will be required that relevant clinical audits are in place. You must understand I would be negligent in my duty if this wasn't robustly followed up and in the event of no improvement being seen, that I do not act more formally on these matters."**

7. Compliance with the DRR by the surgeons was to be monitored. In early 2014, Dr Coakley wrote to the surgeons to notify them of an investigation into compliance with the DRR to be carried out by Bridget Prosser, an external HR consultant.

8. After the appointment of Ms Prosser, but before completion of her report, Dr Coakley retired on 9 June 2014, and was replaced by Dr Kuper, recruited from outside the Trust.

9. Ms Prosser's investigation was lengthy. She produced a detailed report on 29 August 2014 on the failures to comply with the DRR, drawing conclusions about the five surgeons whose compliance had been subject to monitoring during most of 2013: the Claimant, Mr Sivardeen, Mr Abdul Zurgani, Mr McCarthy and Mr Khan.

10. According to a summary of Ms Prosser's findings produced for the Respondent, she had made four findings against the Claimant and Mr McCarthy; five against Mr Zurgani; six against Mr Sivardeen; and seven against Mr Khan.

11. Dr Kuper reviewed the findings. Although there were fewer findings against the Claimant than some of the other surgeons, Dr Kuper deemed the findings against the Claimant to be the most serious because he was the audit lead, and that those in relation to Mr McCarthy were the least serious. Dr Kuper had meanwhile commenced an investigation into concerns about the Claimant's clinical practice by reviewing incident (Datix) reports (including one going back to September 2013) and emails.

12. Disciplinary hearings arising out of Ms Prosser's reports were convened for Mr Zurgani on 7 January 2015; for Mr Khan on 15 January 2015; and for Mr McCarthy on 9 March 2015. The outcomes of those disciplinary proceedings were that Mr McCarthy received a final written warning, Mr Zurgani received a first written warning, and Mr Khan resigned on the first day of his hearing.

13. Disciplinary proceedings in relation to two of the consultants, the Claimant and Mr Sivardeen, were postponed pending further investigations. In the Claimant's case, the further investigations were announced by a letter of 27 October 2014 setting out a total of 22 charges

arising out of the incident reports. That investigation was to be conducted by Katrina Erskine, the Respondent's Associate Medical Director for Surgery, Women & Sexual Health. The Claimant was not suspended and continued to practice. Ms Erskine produced her report on 8 July 2015, some eight months after she had been appointed as investigator.

14. On 6 August 2015, the Claimant was notified that there would be a disciplinary hearing to consider 17 separate allegations, the first four arising out of the Prosser report, and the remaining 13 from the Erskine report. By this stage, there had been no reported incidents in respect of the Claimant for some 16 months. The disciplinary hearing took place on 14 and 15 December 2015 and 12 February 2016. The Claimant was dismissed by a letter dated 22 February 2016, and his appeal against dismissal rejected by letter dated 5 August 2016.

The Claim

15. The Claimant lodged proceedings in the Tribunal on 15 July 2016, claiming that he had been unfairly dismissed, wrongfully dismissed and discriminated against on the grounds of his race. The Tribunal identified the issues to be determined as follows:

> **"Unfair Dismissal**
>
> **2.1. What was the reason for the claimant's dismissal and was it a potentially fair reason within the meaning of section 98(4) of the Employment Rights Act 1996?**
>
> **The respondent will say the claimant was dismissed because of his conduct, which is a potentially fair reason.**
>
> **2.2. Did the respondent have an honest belief in a set of facts amounting to misconduct?**
>
> **2.3. Was this belief based on reasonable grounds?**
>
> **2.4. Did the respondent carry out a reasonable investigation?**
>
> **2.5. Did dismissal [fall] within the range of reasonable responses?**
>
> **2.6. Was the dismissal procedurally fair?**
>
> **2.7. If the claimant's dismissal was procedurally unfair, should there be a "Polkey" reduction in the compensation awarded and if so, by how much?**

2.8. The claimant seeks compensation if the claim succeeds. If the claimant is awarded compensation, should the basic and compensatory awards be reduced in accordance with sections 122(2) and/or 123(6) of the Employment Rights Act 1996?

Wrongful Dismissal

2.9. Was the claimant guilty of gross misconduct? If not, what notice pay is he entitled to?

Protected Characteristics - The claimant brings claims of race discrimination. The claimant is black African British.

Direct Race Discrimination

2.10. Was the claimant subjected to the following treatment?

> **(a) Dr Kuper classified the claimant's behaviour as more serious than that of the other practitioners dealt with in the Prosser report;**
>
> **(c) The respondent reviewed incident reports and emails for the purpose of finding allegations against the claimant. This was done by Melanie Mavers, Helen Pardoe, Philip White, Alleyna Claxton, and Martin Kuper around July - October 2014.**
>
> **(l) The disciplinary panel dismissed the claimant rather than applying a lower penalty;**

2.11. If so did this treatment constitute less favourable treatment on the grounds of race?

2.12. The claimant relies on the following comparators:

> **(a) In relation to the allegation at 2.10(a) and (c) the claimant relies on Mr McCarthy (white), Mr Zurgani (Arab), Mr Khan (Asian) and Mr Sivardeen (Asian), who were also investigated in the Prosser report.**
>
> **(f) In relation to allegation 2.10(l) the claimant relies on Mr Baring and Mr Boarding as comparators. Mr Baring and Mr Boarding are white.**
>
> **(g) In relation to each allegation of direct race discrimination at paragraph 2.10 above the claimant relies on a hypothetical comparator.**

Time Limits - Race Discrimination

2.16. Did any of the acts complained of take place outside the time limits set out at section 123(a) of the Equality Act 2010?

2.17. If so, do these acts form part of conduct extending over a period so as to bring them within the time limits set out at section 123(a) of the Equality Act 2010?

2.18. If any of the claimant's claims are out of time, would it be just and equitable to extend time?"

16. It will be noted that the three issues identified as the less favourable treatment in paragraph 2.10 are numbered (a), (c) and (l). The reason for this is that the Claimant had initially relied upon some 13 acts amounting to less favourable treatment but withdrew all but these three in the course of closing submissions.

17. The Tribunal's Reasons, following the usual format, set out the relevant law in respect of each of the main heads of claim and then proceeded to make findings of fact. These findings were extensive and dealt with the various stages of the matter in a logical and thorough way. The Tribunal's conclusions on the claims commence at paragraph 259 and deal first with the claim of unfair dismissal. The Tribunal found unanimously that the procedure followed by the Respondent was fair. However, the panel was not unanimous as to the appropriateness of dismissal as a sanction. As to this they said as follows:

> **"266. It is the majority view that the disciplinary panel's decision was that the allegations that were upheld showed a pattern of conduct which cumulatively raised concerns over patient's [sic] safety. The majority are satisfied that the disciplinary decision makers carefully considered whether the claimant continued to pose a risk based on the fact that no further incidents had occurred, but reached the view that they could not be satisfied of this based on the claimant's continued inconsistency in his responses. The majority accept Ms Adam's and Mr Smith's evidence on this and accept that they reasonably believed that there would not be a change of behaviour which could be relied on in future. We accept, for example, that the concern over allegation 13, the wearing of gloves, was the claimant's focus on whether this posed a risk to him and not on any risk to the patient. It is the majority view that a belief that the claimant had not demonstrated sufficient change was a reasonable view that they were able to form following a reasonable investigation and fair process. On that basis, the sanction of dismissal falls within the range of reasonable responses in all the circumstances.**
>
> **267. It is the minority view, Mrs Alford dissenting, that a number of the allegations should not have been included in the disciplinary charges. In particular the issue of not waring sterile gloves and the failure to check the patient's hip, that is allegation 13 regarding case AR and allegations 17 regarding case DB, both of which the disciplinary panel drew particular attention to in reaching its conclusion, were in her view trivial. Further, she considered that the decision makers had not properly taken into account the fact that no further incidents had occurred from the date the claimant was told of the disciplinary matter to the date of dismissal. In her view this was evidence of improvement such as to make the sanction of dismissal inappropriate and outside the reasonable range of responses."**

18. It is evident that the minority view was that the dismissal was outside the range of reasonable responses on the basis that at least two of the allegations against the Claimant were trivial and that insufficient account had been taken of the fact that the Claimant had not been involved in any further incidents since being told about the disciplinary investigation.

19. The Tribunal then proceeded to deal with wrongful dismissal. It did so very briefly as follows:

> **"268. We find that the claimant was guilty of actions that breached his contractual obligations, in particular in relation to breaching hospital policy in prescribing aspirin and failures in relation to audit. The Claimant accepted that he did this. He also accepted that there were occasions when he did not document consent appropriately.**
>
> **269. Based on our findings as to the contractual obligations of a doctor we are satisfied that these were matters that did occur and that these amount to a breach of contract. The claimant was not therefore wrongfully dismissed. This is a unanimous view."**

20. It may be thought that it is somewhat odd that, having found by a majority that the dismissal was not unfair, the Tribunal was unanimous in concluding that there was a repudiatory breach of contract on the part of the Claimant warranting his summary dismissal.

21. Finally, the Tribunal dealt with direct race discrimination. It did so in two stages: in paragraph 271 it addressed a series of 18 matters which had been identified by the Claimant in submissions as amounting to facts from which the Tribunal could conclude that Mr Kuper discriminated against the Claimant on the grounds of his race. The Tribunal went through each of these matters and assessed whether in each case the facts could give rise to an inference of discrimination and/or a *prima facie* case of discrimination.

22. Then at paragraphs 272 to 275, the Tribunal expressed its conclusions in respect of the three specific claims of less favourable treatment as follows:

> **"272. In relation to 2.10(a), we have accepted that Dr Kuper did classify the claimant's behaviour as more serious than that of the other practitioners, but that that was an appropriate and reasonable finding. We find that because of his role in audit the claimant carried more responsibility than those he has identified as comparators and it is for this reason that he was treated differently (although of course 1 other consultant was also the subject of a second investigation). We find on this issue that there is sufficient for the burden of proof to shift to the respondent, but there is a non-discriminatory explanation and the respondent discharges this burden.**
>
> **273. Similarly in relation to 2.10(c) we have found that it was reasonable for the respondent to conduct further investigation into the claimant's conduct and to review the incident reports and emails. We do not find that any of these actions were based on the claimant's race and we do not find that the claimant has raised a prima facie case in these instances. If that is wrong we are nonetheless satisfied that the respondent has provided a non-discriminatory reason for its actions. The complaints were made and they were sufficiently serious to warrant investigation.**
>
> **274. The majority have found that the disciplinary panel's decision in upholding the allegations against the claimant was a reasonable one based on the evidence heard, including the claimant's admissions, and the respondent has satisfied the majority that,**

even if an inference can be drawn, there are non-discriminatory reasons for its actions. The minority view expressed by Mrs Alford and recorded above is that dismissal was outside the band of reasonable responses. She finds that the penalty raises an inference of discrimination but accepts that the panel issued the penalty it did because it had concluded this was a pattern of behaviour and is therefore satisfied that the respondent has met the burden of proof.

275. Accordingly in relation to all those issues raised at 2.10 the panel's unanimous decision is that the claimant did not receive less favourable treatment on the grounds of race. Based on this finding we do not need to go on to determine any issue of time limits."

23. The Claimant's claims were accordingly dismissed.

The Grounds of Appeal

24. Permission was granted to proceed with six grounds of appeal. These are as follows:

a. Ground 1 - Wrongful Dismissal: The Tribunal erred in concluding that dismissal was not wrongful on the basis of a finding that the Claimant had been in breach of his contract of employment, without making any finding as to whether he had committed a fundamental breach of contract.

b. Ground 2 - Unfair Dismissal: The Tribunal misapplied the test as to the range of reasonable responses so as to justify dismissal. It is said the Tribunal should have found that it was beyond the range of reasonable responses to dismiss after a first disciplinary hearing without taking any steps to improve the Claimant's conduct through disciplinary action short of dismissal.

c. Ground 3 - Evidential Issues:

i. Whether it was unfair to bring aggregated disciplinary proceedings instead of managing any perceived misconduct promptly;

ii. Whether the Respondent's assertion that the primary motivation for dismissal was that it was necessary to protect patient safety was credible in light of the fact that the Claimant had not been suspended and had

been permitted to practice without restriction or any additional training or supervision during the 16 months that the disciplinary process ran its course.

d. Ground 4 - Discrimination:

i. Misapplication of the burden of proof provisions: The Tribunal erred in taking a fragmented approach to the evidence relied on by the Claimant in support of his complaint of direct discrimination instead of dealing with the totality of that evidence in determining whether it was sufficient to pass the burden of proof to the Respondent;

ii. The Tribunal erred in failing properly to consider in each case whether the Respondent had discharged the burden of proof in relation to unconscious discrimination;

iii. (Not pursued).

e. Ground 5 - Comparator: The Tribunal erred in deciding that the postponement of the Claimant's disciplinary hearing pending further investigation could not be evidence of discrimination on the basis that a similar step was taken in respect of one of his colleagues, Mr Sivardeen, who was not of black African origin. Mr Sivardeen was not an appropriate comparator;

f. Ground 6 - Reconsideration: The Tribunal erred in treating the objective view of the GMC as irrelevant to the credibility of the assertions of the Respondent's witnesses that they believed him to present such a severe threat to patient safety that they had no reasonable choice but to dismiss him. If available at the original hearing, this evidence would necessarily have been treated as critically important evidence. The Tribunal's refusal to reassess the credibility of the Respondent's witnesses in the light of this crucial new evidence is irrational.

25. I shall deal with these matters in the order that the Tribunal dealt with them. Thus, I shall deal first with ground 2, unfair dismissal. In doing so, I shall also deal with the evidential challenge under ground 3(i). I shall then deal with ground 1, wrongful dismissal. This will be followed by the two grounds dealing with the discrimination claim, grounds 4 and 5. Finally, I shall deal with ground 6 and in so doing shall also deal with ground 3(ii), which also relates to the reconsideration ground.

Ground 2 - Unfair Dismissal

Submissions

26. Mr McDermott QC, leading Ms Cunningham, appeared on behalf of the Claimant. He submitted that the Tribunal had misapplied the test as to the range of reasonable responses. He noted that absent gross misconduct it would generally be unfair to dismiss for misconduct at the conclusion of a first disciplinary hearing. Reliance is placed upon the case of **Children's Aid Society v Day** [1978] ICR 437, 442C, where Lord Denning stated as follows after referring to the then Code of Practice:

> **"To that code there may be added the "guidance" which Sir John Donaldson gave in the useful judgment of *James v Waltham Holy Cross Urban District Council* [1973] ICR 398, 404. It is good sense and reasonable that in the ordinary way for a first offence you should not dismiss a man on the instant without any warning or giving him a further chance. You should warn him that, if it happens again, it would be an offence for which he should be dismissed. It is true that in this case that was not done. There was no initial warning given. He was dismissed on the instant. But nevertheless that is not a rule which has to be applied in every case. In some cases it may be proper and reasonable to dismiss at once, especially with a man who is determined to go on in his own way. …"**

27. I was also referred to paragraph 23 of the ACAS Code which provides:

> **"23. Some acts, termed gross misconduct, are so serious in themselves or have such serious consequences that they may call for dismissal without notice for a first offence. But a fair disciplinary process should always be followed, before dismissing for gross misconduct."**

28. It was said in the Notice of Appeal that the Tribunal should have made a finding as to whether there was gross misconduct first before considering whether the Respondent's response fell within the range of reasonable responses. Mr McDermott submits that there was nothing in this case which could be said to amount to an act of gross misconduct, and that it was impermissible for the Respondent to rely upon allegations against the Claimant that comprised an aggregation of a series of less serious matters ("a pattern of conduct") as amounting to such. Mr McDermott emphasises, in particular, the fact that the Claimant was not suspended at any stage despite being thought by Dr Kuper to present a risk to patient safety. Looked at properly, says Mr McDermott, the issues complained of against the Claimant were largely ones of performance which could readily have been managed in a manner that did not warrant summary dismissal bringing to an abrupt end an otherwise successful and blemish-free career.

29. Mr Moretto, on behalf of the Respondent, submits that the Tribunal did precisely what it was required to do, namely to consider whether the employer's actions were within the range of reasonable responses. He submits that it was not wrong in law for the Tribunal to refer to the pattern of the Claimant's conduct in assessing whether there was conduct overall which was, on reasonable grounds, believed by the Respondent to amount to gross misconduct. He reminds me that the assessment of whether misconduct is sufficiently serious to warrant summary dismissal is that it must be such as to undermine the relationship of trust and confidence between employer and employee. He relied upon the following passage in **Neary v Dean of Westminster** [1999] IRLR 288:

> **"22. What degree of misconduct justifies summary dismissal? I have already referred to the statement by Lord James of Hereford in *Clouston & Co Ltd v Corry* [[1906] AC 122]. That case was applied in *Laws v London Chronicle (Indicator Newspapers) Ltd* [1959] 1 WLR 698, where Lord Evershed MR, at p.700 said: 'It follows that the question must be - if summary dismissal is claimed to be justified - whether the conduct complained of is such as to show the servant to have disregarded the essential conditions of the contract of service'. In *Sinclair v Neighbour* [[1967] 2 QB 279], Sellers LJ, at p.287F, said: 'The whole question is whether that conduct was of such a type that it was inconsistent, in a grave way - incompatible - with the employment in which he had been engaged as a manager'. Sachs LJ referred to the 'well established law that a servant can be instantly**

> **dismissed when his conduct is such that it not only amounts to a wrongful act inconsistent with his duty towards his master but is also inconsistent with the continuance of confidence between them'. In *Lewis v Motorworld Garages Ltd* [1985] IRLR 465, Glidewell LJ, at 469, 38, stated the question as whether the conduct of the employer 'constituted a breach of the implied obligation of trust and confidence of sufficient gravity to justify the employee in leaving his employment … and claiming that he had been dismissed'. This test could equally be applied to a breach by an employee. There are no doubt many other cases which could be cited on the matter, but the above four cases demonstrate clearly that conduct amounting to gross misconduct justifying dismissal must so undermine the trust and confidence which is inherent in the particular contract of employment that the master should no longer be required to retain the servant in his employment."**

30. This shows, he submits, that any conduct sufficiently serious to undermine the relationship of trust and confidence can justify summary dismissal, and it is not necessary for there to be a single identifiable act of gross misconduct. In this case, the Respondent had lost trust and confidence in the Claimant. This was evidenced, says Mr Moretto, by the findings as to the Respondent's belief that Claimant was unlikely to change notwithstanding the absence of any incidents for the period since the disciplinary proceedings were instigated:

> **"216. In relation to sanction, Sheila Adam's evidence was that this was not an easy decision. The panel discussed whether it should be a final written warning or dismissal. Their conclusion was that some of the allegations, particularly 13, 17 and 18 and the pattern more widely, amounted to actions which were grossly careless and negligent and which were example of gross misconduct. They also felt that the claimant's actions in these respects threatened the health and safety of patients.**
>
> **217. Ms Adam's evidence was that she found the pattern of the whole very concerning. In the outcome letter she had picked on allegations 13, 17 and 18 as particular issues which might affect patients' safety and she used those as examples, however, she had not approached it by looking to see if any single instance amounted to gross misconduct. The key is that all could have been but as a pattern and repeated process of unsafe behaviour, this is what amounted to gross misconduct. She was not considering any of them as an individual point, they were there in total and what struck her most was a pattern of non-compliant behaviour which led to increased risks for the patient. She rejected the idea that there had been a strategy of not setting out, either in the October letter or the dismissal letter, which matters were gross misconduct and which were not. Her view was formed on the basis that she went to all the evidence and this was a pattern of behaviour, rather going to specific allegations, this is what made it gross misconduct. The professional adviser was also strongly of the same view.**
>
> **218. The panel did consider the mitigation provided by the claimant and noted the long period of service with the trust, together with supporting statements which the claimant had put forward. The also considered sanctions issued at disciplinary hearings to other consultants and an associate specialist in orthopaedics following the part A investigation in order to ensure consistency of approach. They concluded that these were not comparative given the severity and volume of the allegations in part B and C. The claimant, as lead for audit, had a greater responsibility for ensuring that documentation is recorded correctly.**
>
> **219. The panel had a real concern that a final written warning would not be sufficient because the claimant's actions showed that he was wilful in his approach. Although no patient had been harmed, this was simply good fortune. The concern was that the non-compliant approach to policies and safe practices could be repeated with a more serious**

outcome on the next occasion. This decision of the panel was that the allegations constituted gross misconduct.

220. Ms Adam confirmed that in deciding on the relevant sanction the panel took into account the character references the claimant had provided his long service and a range of testimonials from staff. They did balance out the risk of continuing the claimant as a surgeon against the loss of those skills. They were particularly influenced around the degree of likely change. Based on the claimant's responses this had been variable and inconsistent and sometimes he seemed to contradict himself. All panel members felt this; therefore it was difficult to feel confident that there would be a change in behaviour which could be relied upon in the future. In terms of why not a final warning instead, she felt the hearing heard 18 allegations of which some 13 had been upheld and they were simply not sure there would be a sufficient change in approach and that this represented a public risk.

221. She accepted that from 18 July 2015 no more concerns were raised about the claimant's behaviour. She considered that one could not attribute changed behaviour simply to having had conversations with his line manager or whether the investigation having started a month later then made the difference.

222. She was taken to various documents which suggested that the claimant had changed his behaviour and all it would have taken was for Mr Ball coming in and for things to be addressed for there to be change. Her evidence was that a lot of why the panel had concluded that the sanction of dismissal was appropriate was based on the claimant's inconsistency. Their feeling of inconsistency came partly from differences between his case statement and then what he said at the hearing and also inconsistencies in his responses to Dr Erskine during her investigation and again in the way which he then responded to the same points at the hearing."

Analysis and Conclusions - Grounds 2 and 3(i)

31. On the question of aggregation, the Tribunal said as follows:

> **"30. We accept Mr Moretto's submissions and consider that gross misconduct arises where there are sufficient matters to undermine the trust and confidence between the parties. We consider that the authorities support the view that the series of acts of misconduct may be aggregated together in the appropriate circumstances but this is a matter of fact."**

32. In my judgment, the Tribunal's approach to the acts of misconduct relied upon was not erroneous. Whether or not the label of gross misconduct is applied to such conduct is not determinative. It is quite possible for a series of acts demonstrating a pattern of conduct to be of sufficient seriousness to undermine the relationship of trust and confidence between employer and employee. That may be so even if the employer is unable to point to any particular act and identify that alone as amounting to gross misconduct. There is no authority to suggest that there must be a single act amounting to gross misconduct before summary dismissal would be justifiable or that it is impermissible to rely upon a series of acts, none of

which would, by themselves, justify summary dismissal. As stated in **Neary**, conduct amounting to gross misconduct is conduct such as to undermine the trust and confidence inherent in the relationship of employment. Such conduct could comprise a single act or several acts over a period of time. Where it is the latter, it is not a case of the employer "*collecting sufficient ammunition against [the employee] to dismiss*", as suggested in the Claimant's skeleton argument. Rather, it may be, as it was in this case, that upon examination of a series of acts, which the employer believes put patients at risk, the employer finds that it has lost confidence that the employee will not act in that way again. I see no reason why an employer would be acting outside the range of reasonable responses were it to dismiss an employee in whom it has lost trust and confidence in this way.

33. In the present case, the findings at paragraphs 216 to 222 of the Reasons (set out above) demonstrate quite clearly that the relationship of trust and confidence was undermined, not only by the pattern of conduct that was established, but also by the Claimant's "*continued inconsistency*" in his responses during the disciplinary hearing. These matters made it difficult for the Respondent to feel confident that there would be a change in behaviour which could be relied upon in the future. Moreover, as the majority of the Tribunal found, the disciplinary panel's decision was that the allegations that were upheld "*showed a pattern of conduct which cumulatively raise concerns over patient's [sic] safety*" (paragraph 266). These matters were all apt seriously to undermine the relationship of trust and confidence.

34. The Tribunal's further conclusion in this regard, namely that the belief held about the Claimant's inability to demonstrate sufficient change was based on reasonable grounds, is unassailable. It is clear that in coming to this view, the Tribunal took account of the evidence

A that the Respondent had expressly considered the fact that there had been no incidents since July 2015 (paragraph 221).

B 35. There is no challenge to the reasonableness of the investigation or the procedure. The sole challenge is as to the Tribunal's conclusion that the sanction of dismissal fell within the range of reasonable responses. That range is undoubtedly a broad one. Given the factors identified above as undermining the relationship of trust and confidence it is not possible to say

C that the Tribunal erred in law in concluding that dismissal fell within the range.

36. It is correct, as stated in the **Children's Aid** case, that summary dismissal will not

D ordinarily be the outcome of a first disciplinary hearing. However, that case also went on to say that, "*In some cases it may be proper and reasonable to dismiss at once, especially with a man who is determined to go on in his own way*". The employer's view of the Claimant's conduct in

E this case was essentially the same; it had lost confidence that the Claimant could change his behaviour so as to avoid the risk of recurrence of the conduct with which he was charged. As such, that authority does not advance the Claimant's case. That finding also deals with the Claimant's further contention under this ground which is that was unfair to dismiss after this

F first disciplinary without giving the Claimant an opportunity to improve. The Tribunal made express findings setting out the employer's belief that the Claimant was not considered capable of change and the reasons for having that belief. In other words, it was considered that

G improvement was unlikely. In the circumstances, the failure to provide an opportunity to improve was justified and does not render the dismissal unfair.

H

Ground 1 - Wrongful Dismissal

37. The contention here is that the Tribunal erred in finding that the dismissal was not wrongful on the basis of a finding that the Claimant had been in "*breach of his contract of employment*" without making a finding as to whether he had committed a fundamental breach of contract. As well as the aggregation point, dealt with above, Mr McDermott submitted that there was nothing catastrophic done by the Claimant in this case which justified instant dismissal. Furthermore, the Tribunal's conclusions at paragraphs 268 and 269 do not make the necessary findings to support a conclusion on the part of the Tribunal that there was conduct warranting summary termination.

38. Mr Moretto submits that the Tribunal was clearly aware that in determining whether the dismissal was wrongful it was carrying out a different exercise from that in determining whether the dismissal was unfair. Thus, whilst the Tribunal did not expressly mention repudiatory breach in paragraphs 268 and 269, it is clear that that was the standard of breach which the Tribunal must have had in mind. Moreover, having expressly made various findings as to the Claimant's contractual obligations (at paragraph 53 of the Reasons), the conclusion that the Claimant was in breach of those obligations was sufficient to support the finding that there was no wrongful dismissal.

Analysis and Conclusions - Ground 1

39. Whereas in determining whether dismissal was fair or unfair the Tribunal's task is to assess whether the employer's response fell within the range of reasonable responses, its task in determining whether the dismissal was wrongful is rather different. As stated by Maurice Kay LJ in **Boardman v Nugent Care Society** [2013] ICR 927 at paragraph 19:

> **"… On the issue of wrongful dismissal, it was appropriate, indeed necessary, for the employment tribunal to make its own findings of fact. The issue was whether the**

> **claimant had breached her contract of employment in such a way as to justify summary dismissal. …"**

40. The Tribunal must make its own findings of fact in relation to the breach in order to determine whether that breach was sufficiently serious to warrant immediate termination. In this regard I find that the Tribunal's findings at paragraphs 268 and 269 are inadequate to support conclusion that the dismissal was not wrongful. I say that for the following reasons.

41. The Tribunal refers only to contractual obligations being "breached" rather than there being any finding of repudiatory breach. That would not of itself amount to an error of law if it were clear from reading of the whole decision that the Tribunal did regard these breaches as repudiatory. The Tribunal did say at paragraph 32 of the Reasons that:

> **"32. There may be cases where a misconduct dismissal is fair, but a tribunal considers that the conduct in question was not sufficiently serious to amount to a repudiatory breach warranting summary dismissal."**

42. The conduct relied upon by the employer was not confined to specific breaches of contractual obligations, but comprised the "pattern of conduct" demonstrated by the Claimant and the belief that he was unable to change his behaviour. Those matters undermined their trust and confidence in the Claimant. In other words, the breach ultimately relied upon by the employer was a breach of the implied term of trust and confidence. There is nothing in paragraphs 268 and 269 to demonstrate that the Tribunal had in mind the breach of that implied term. There is no express reference in those paragraphs to anything other than certain specific breaches of policy and contract. Those breaches are identified in paragraph 268 as being "*in particular*" the breach of hospital policy in relation to prescribing aspirin, failures in relation to audit and failures to document consent appropriately. The Tribunal then says at paragraph 269 that, "*Based on our findings as to the contractual obligations of a doctor*" - this clearly being a

reference to the findings in paragraph 53 of the Reasons, which contained no reference to trust and confidence - that it was satisfied that "*these were matters that did occur*" (i.e. the matters in paragraph 268) and that "*these*" amount to a breach of contract. The Tribunal's finding was therefore particularly focused on the specific breaches identified in paragraph 268. The Tribunal concluded its analysis by simply stating that the Claimant was not therefore wrongfully dismissed. However, it failed to make any findings as to whether the specific breaches which it has identified in paragraph 268 were of sufficient seriousness to justify summary termination. There was nothing to indicate that the particular breaches were considered by the Tribunal to be repudiatory.

43. The Tribunal's failure to make the necessary findings to support a finding there was no wrongful dismissal is further underlined by the inconsistency between the unanimity in respect of wrongful dismissal and the minority view in respect of unfair dismissal. The minority member is recorded at paragraph 267 as being of the view that at least two of the specific allegations relied upon by the employer were trivial. This would tend to suggest that the minority member was not satisfied that the charges overall amounted to gross misconduct warranting summary termination. This further suggests that the Tribunal, in assessing whether or not the dismissal was wrongful, was wrongly focusing simply on whether there were breaches of express contractual obligations without going on to consider whether these breaches were sufficiently serious to merit summary dismissal.

44. Mr Moretto submitted that there was no inconsistency because the minority member was relying upon different allegations in paragraph 267 (relating to her view that dismissal was inappropriate and outside the reasonable range of responses) than in paragraph 268. I do not accept that this does explain the difference in conclusions. If the minority member considered

that dismissal was inappropriate for the purposes of unfair dismissal because the charges were trivial, it is difficult to see on what basis she could also conclude that, as a matter of fact, the conduct relied upon was serious enough to warrant summary dismissal.

45. For these reasons, the conclusion that the dismissal was not wrongful cannot stand. The matter must be remitted to the Tribunal to make the necessary findings of fact.

Ground 4 - Burden of Proof

Submissions

46. Ms Cunningham dealt with this ground of appeal on behalf of the Claimant. She submitted that the Tribunal had been asked to consider 14 evidential matters and to treat them as sufficient, *cumulatively*, to shift the burden to the Respondent to show a non-discriminatory reason for its treatment of the Claimant. Instead, the Tribunal dealt with each evidential matter individually and failed to consider their cumulative effect. It was said that this sort of fragmentary approach has been deprecated by the authorities and is of particular concern in cases where institutional discrimination is alleged. Heavy reliance was placed on the judgment of Mummery J (as he then was) in **Qureshi v Victoria University of Manchester** [2001] ICR 863 (pages 874C-H and 875C-H):

> **"*(3) The evidence***
>
> **As frequently observed in race discrimination cases, the applicant is often faced with the difficulty of discharging the burden of proof in the absence of direct evidence on the issue of racial grounds for the alleged discriminatory actions and decisions. The applicant faces special difficulties in a case of alleged institutional discrimination which, if it exists, may be inadvertent and unintentional. The tribunal must consider the direct oral and documentary evidence available, including the answers to the statutory questionnaire. It must also consider what inferences may be drawn from all the primary facts. Those primary facts may include not only the acts which form the subject matter of the complaint but also other acts alleged by the applicant to constitute evidence pointing to a racial ground for the alleged discriminatory act or decision. It is this aspect of the evidence in race relations cases that seems to cause the greatest difficulties. Circumstantial evidence presents a serious practical problem for the tribunal of fact. How can it be kept within reasonable limits?**
>
> **This case is an illustration of the problem. The complaint of racial discrimination is usually sparked by a core concern of the applicant: in this case his failure to obtain**

> **support and recommendations for his promotion to a senior lecturer in the Faculty of Law. Dr Qureshi relied extensively on circumstantial evidence that there was a racial ground for the acts and decisions he complained about. The circumstantial evidence included incidents ranging over a period of nearly six years, from 1988 to 1994. The incidents relied on by him antedate, accompany and postdate the alleged acts of racial discrimination and victimisation particularised in his 1993 and 1994 applications. It was necessary for the tribunal to find the facts relating to those incidents. They are facts (evidentiary facts) relied upon as evidence relevant to a crucial fact in issue, namely, whether the acts and decisions complained of in the proceedings were discriminatory "on racial grounds". The function of the tribunal in relation to that evidence was therefore twofold: first, to establish what the facts were on the various incidents alleged by Dr Qureshi and, secondly, whether the tribunal might legitimately infer from *all* those facts, as well as from all the other circumstances of the case, that there was a racial ground for the acts of discrimination complained of.**
>
> **…**
>
> ***(4) Inferences***
>
> **The process of making inferences or deductions from primary facts is itself a demanding task, often more difficult than deciding a conflict of direct oral evidence. In *Chapman v Simon* [1994] IRLR 124, 129, para 43 Peter Gibson LJ gave a timely reminder of the importance of having a factual basis for making inferences. He said:**
>
> > **"Racial discrimination may be established as a matter of direct primary fact. For example, if the allegation made by Ms Simon of racially abusive language by the headteacher had been accepted, there would have been such a fact. But that allegation was unanimously rejected by the tribunal. More often racial discrimination will have to be established, if at all, as a matter of inference. It is of the greatest importance that the primary facts from which such inference is drawn are set out with clarity by the tribunal in its fact-finding role, so that the validity of the inference can be examined. Either the facts justifying such inference exist or they do not, but only the tribunal can say what those facts are. A mere intuitive hunch, for example, that there has been unlawful discrimination is insufficient without facts being found to support that conclusion." (See also Balcombe LJ, at p 128, para 33(3).)**
>
> **In the present case, it was necessary for the tribunal to examine all the allegations made by Dr Qureshi of other incidents relied upon by him as evidentiary facts of race discrimination in the matters complained of. There is a tendency, however, where many evidentiary incidents or items are introduced, to be carried away by them and to treat each of the allegations, incidents or items as if they were themselves the subject of a complaint. In the present case it was necessary for the tribunal to find the primary facts about those allegations. It was not, however, necessary for the tribunal to ask itself, in relation to each such incident or item, whether it was itself explicable on "racial grounds" or on other grounds. That is a misapprehension about the nature and purpose of evidentiary facts. The function of the tribunal is to find the primary facts from which they will be asked to draw inferences and then for the tribunal to look at the totality of those facts (including the respondent's explanations) in order to see whether it is legitimate to infer that the acts or decisions complained of in the originating applications were on "racial grounds". The fragmented approach adopted by the tribunal in this case would inevitably have the effect of diminishing any eloquence that the cumulative effect of the primary facts might have on the issue of racial grounds."**

47. The submission is that the Tribunal fell precisely into this error of taking a fragmentary approach as demonstrated by paragraph 271 of the Reasons. As a result, says Ms Cunningham, insofar as the Tribunal found that the burden had shifted, it failed to recognise the strength of

A the case which had to be answered by the Respondent and had thereby disabled itself from properly considering whether the Respondent had discharged the burden.

B 48. Mr Moretto submits that there was no error in that the Tribunal correctly set out the law, addressed the evidential matters it was asked to consider and in doing so did consider their cumulative effect. In any case, says Mr Moretto, the Tribunal, having addressed each of the evidentiary matters relied upon, proceeded to consider the three specific allegations of C discrimination and found that, in respect of each, even if the Claimant had proven facts from which an inference of discrimination could be drawn, the Respondent had satisfied it that there was a cogent non-discriminatory explanation for the treatment complained of. Reliance was D placed on the Tribunal's extensive findings of primary fact, which must be treated as having been taken into account by the Tribunal in reaching its conclusions as to the burden of proof.

E *Analysis and Conclusions - Ground 4*

49. At first blush, the Claimant's argument appears to have some merit. The Tribunal does appear to have approached each of these evidentiary matters as if it were an allegation of race discrimination in itself and proceeded to determine whether it establishes a *prima facie* case F sufficient to shift the burden of proof. However, one needs to look at how the Tribunal dealt with the particular allegations of discrimination being relied upon, and the whole Judgment, in order to determine whether it erred. Viewed in that way, it is my judgment that the Tribunal did G not err.

50. In respect of each of the remaining allegations of discrimination, the Tribunal expressly H considered (at paragraphs 272 to 274) whether there was "*sufficient [sic] for the burden of proof to shift to the respondent*". Given that these paragraphs follow immediately from the

lengthy analysis of the evidentiary matters in paragraph 271, it seems to me that, on a fair reading of the Judgment, the Tribunal must have had in mind those evidentiary matters in determining whether there was sufficient material for the burden to shift. Paragraph 272, for example, records that the Tribunal found that there was sufficient for the burden to shift to the Respondent, but does not set out why. One can infer that it was all of those matters in the immediately preceding paragraph that led the Tribunal to that conclusion.

51. Furthermore, it is clear that, in respect of each of the allegations of discrimination, the Tribunal made extensive findings of primary fact. Thus:

a. In respect of the allegation at paragraph 2.10(a), namely that Dr Kuper discriminated against the Claimant in classifying his behaviour as more serious than that of his colleagues, the Tribunal's findings included the following:

> **"91. As we have previously found that the claimant could have provided data but did not and that, as he agreed, he simply stopped providing any information at a point in time, we find Dr Kuper's position to be a reasonable one. We accept that the Department was very hard to manage and that the lead role in audit was very difficult but nonetheless, as is accepted, this was a role the claimant had volunteered to take. The claimant had also agreed at the disciplinary hearing that the audit role was the most important element of the whole of the DRR (page 3542). We find that audit is very important and being the lead on that area does place extra responsibility on the individual who has this role. It is reasonable to view issues on audit failure with a greater degree of seriousness because of the consequences and the external spotlight on this issue at the respondent organisation."**

b. In respect of the allegation at 2.10(c) (reliance upon past incident or Datix reports) the Tribunal's findings included the following:

> **"154. Dr Kuper then instructed Ms Mavers and Sade Okutubo, a black consultant to review the incident reports. The respondent has an incident reporting policy and this is a [sic] page 353 of the bundle. That specifies the appropriate level of investigation and specifies the [sic] where there has been no harm or minor harm there should [sic] manager investigation locally. Where there has been moderate harm, severe harm or death, this should be managed with a serious incident and root cause analysis investigation. The policy does also specify, however, that some instances where there has been no harm or near miss, or the potential for harm may also be managed using the serious incident and root cause analysis investigation policy. We find that it was appropriate to use the incident reports in this way. The incidents may not have been regarded as serious in isolation at the time, but Dr Kuper's role is to look for patterns of behaviour. We also find that the trust were able to locate these reports because Dr Kuper was able to provide detail of these.**

Without that we accept that looking for Datix reports by name cannot be done as the reports are filed anonymously."

c. In respect of the allegation at 2.10(l) (dismissal), the Tribunal made a host of findings including those at paragraphs 216 to 222 of the Judgment (and which are set out above in paragraph 30).

52. Those findings of primary fact, which appear earlier in the Reasons, must be read with the conclusions at paragraphs 272 to 274. In respect of one of the allegations - 2.10(a) - the Tribunal found that there was sufficient for the burden of proof to shift. It can reasonably be inferred that its conclusion in this regard was based on the evidentiary matters set out in the preceding paragraph and on its findings as to the primary facts.

53. Ms Cunningham, submitted that the Tribunal's analysis was unduly perfunctory and that the Tribunal did not stand back and look at the overall picture created by the evidentiary matters. I do not accept that submission. There are indications, even in paragraph 271, that the Tribunal was alive to the need to consider matters in the round as opposed to taking a purely fragmentary approach. For example, certain of the evidentiary matters are grouped and taken together. Three evidentiary matters are grouped together at the top of page 59 of the Judgment, and are analysed by the Tribunal as follows:

"We heard Dr Kuper's evidence on why he did not further involve Dr Bhomik and accepted evidence that he was interested in his opinion but that he considered he had not have [sic] enough understanding of the detail, because of lack of experience of surgery operating theatres, to properly comment. It is possible that this matter, taken with the diversity statistics of the hospital, could together raise an inference in relation to discriminatory conduct, however, there is a reasonable non-discriminatory explanation and respondent [sic] therefore discharges the burden of proof."

This indicates that the Tribunal was considering whether Dr Kuper's evidence taken together with diversity statistics could raise an inference of discriminatory treatment. It was not a purely fragmentary analysis.

54. Having regard to the Tribunal's overall analysis, the findings of primary fact and the immediate juxtaposition between its analysis of the evidentiary factors and the conclusions as to the burden of proof at paragraphs 272 to 274, the Claimant's contention under this ground of appeal effectively boils down to this: that the Tribunal failed to include a sentence after paragraph 271 stating expressly that it had stepped back and looked at all these matters in the round. Whilst it might be ideal had it done so, my judgment, on a fair reading of the whole Judgment, is that it is tolerably clear that that is what the Tribunal did.

55. That deals with ground 4.1. Ground 4.2 contends that paragraphs 272 to 274 of the Reasons are perfunctory and failed to assess whether the explanations provided by the Respondent were adequate to discharge the burden of proof. That contention cannot succeed because it is based on looking at those paragraphs in isolation. As already stated, if one looks at the whole of the Judgment, it is clear that the Tribunal's briefly stated conclusions are built on the sound foundation of extensive primary facts set out earlier in the Reasons.

Ground 5 - Comparator

56. The complaint here arises out of paragraph 85 of the Reasons:

> **"85. The claimant and Mr Sivardeen had the Prosser report allegations outstanding and added to the allegations that formed a part of their eventual disciplinary meetings. This decision was taken by Dr Kuper on HR advice. It was suggested that this was intended by Dr Kuper to ensure the claimant's dismissal by waiting to gather sufficient evidence to ensure a dismissal. This is put as an act from which we can infer discrimination. We do not accept that, since the same treatment was afforded to Mr Sivardeen."**

57. It is said that the Tribunal erred in treating Mr Sivardeen as an appropriate comparator as there was more evidence of what appeared to be serious wrongdoing on his part than on the part of the Claimant. The main difficulty with this contention, which was not strongly pursued orally, is that it relates to a matter which was not pursued as an allegation of discrimination. I

accept Mr Moretto's submission that there was no extant allegation that the decision to await the outcome of the second investigation was an act of race discrimination. In any event, it seems to me that the comparability of Mr Sivardeen's position is not undermined by the fact that there were different allegations against him. The question considered at paragraph 85 was whether postponing the Claimant's disciplinary proceedings could give rise to an inference of less favourable treatment. Given that another person who was not of the Claimant's race and who could also have been subjected to immediate disciplinary proceedings, was treated the same, the inference does not arise.

Ground 6 - Reconsideration Decision

Submissions

58. Mr McDermott submits that it was irrational of the Tribunal to refuse to reassess the credibility of the Respondent's witnesses in light of the GMC decision to conclude its investigation into the complaints about the Claimant's conduct with no further action. It was a central plank of the Respondent's case that the Claimant posed an unacceptable risk to patients and it would have been highly relevant to the Tribunal's assessment of the Respondent's evidence in that respect to take account of the GMC's objective determination that he posed no risk to patient safety. The Claimant says that it is not enough to say, as did the Tribunal, that the GMC was applying a different legal test to that applied by the Tribunal, or that it was considering Fitness to Practice, since the issue of patient safety was relevant to both. In particular, the Tribunal's consideration of whether there were reasonable grounds for the Respondent's witnesses to believe that patient safety was at risk could have been influenced by the GMC's conclusion that there was no risk. Although there is an interest in the finality of litigation, it was submitted that the interests of justice in this case demand that the Tribunal should reconsider the matter and its refusal to do so was irrational.

59. Mr Moretto submits that far from being irrational, the Tribunal's decision was plainly correct. The Tribunal heard evidence that had been tested over the course of a 10-day hearing, which the GMC did not. Not only did the GMC not have the level of detail which the Tribunal had but it was considering the different issue of Fitness to Practice. The Claimant's approach would undermine finality of litigation to a serious extent. Reliance is placed on the judgment of HHJ Jeffrey Burke QC in **Bryant v Sage Care Homes Ltd** UKEAT/0453/11/LA. In that case, the Tribunal took into account the findings of the relevant regulatory body, the Nursing and Midwifery Council, in determining whether a dismissal was fair, but apparently gave it little weight, noting that its decision was very different from that which the NMC had to take. The EAT held that that there was nothing untoward about that conclusion and went on to say as follows:

> **"53. … The fact that an employee's professional body may subsequently have decided that the employee had no case to answer in respect of fitness to practice does not, in our judgment, support any argument that the employers were not acting within the range of reasonable responses in dismissing the employer for breaches of the NMC's guidelines. Were that not so, employers in cases such as the present might have felt obliged and might in the future feel obliged to await the outcome of the deliberation of such professional body; but in ordinary circumstances employers cannot be expected to do so; disciplinary processes are for the employer to conduct and to bring to a conclusion without delay. Although no reference was made to it during the course of the hearing we hope we can be forgiven for referring to the ACAS Code of Practice on Disciplinary and Grievance Procedures of 2004, which was applicable at the relevant time, which states as a core principle of reasonable behaviour in a disciplinary situation on the part of an employer that the employer should "deal with issues as thoroughly and promptly as possible"."**

60. In any event, submits Mr Moretto, had the matter been considered crucial, the Claimant could have sought a stay of the Tribunal's judgment pending the outcome of the GMC's investigation, but he did not do so. As such, the Tribunal should not be expected to consider it now.

Analysis and Conclusions - Ground 6

61. In my judgment, the Tribunal's refusal to reconsider does not cross the high threshold for it to be deemed perverse. Whilst the GMC's decision probably satisfies the first and third limbs of the test in **Ladd v Marshall** [1954] 1 WLR 1489 (material not previously available and credible), it does not, in my judgment, satisfy the requirement that the new material would be likely to have an important influence on the outcome. The Tribunal was correct to say that it was considering a different legal question from that being considered by the GMC in that the Tribunal was concerned with whether the Respondent had reasonable grounds for believing that the conduct complained of had occurred. That conduct comprised a series of failures which the Respondent considered could put patient safety at risk. The Claimant submits that any conclusion about patient safety cannot stand or be considered credible in the light of the GMC's conclusion. However, that is too simplistic an approach. In the first place, the Respondent's concerns were based not just on the few incidents relied upon but on the Claimant's pattern of conduct and his failure to satisfy the Respondent that his conduct would not reoccur. The GMC's determination did not consider that matter in any detail or at all. Of particular concern to the Respondent was his attitude to Trust policy and/or NICE guidelines and his failure to document matters when he departed from them in relation to the prescribing of aspirin. That was a serious issue for the Respondent and even the Claimant accepted that "*the road to chaos was to allow consultants to ignore NICE guidelines*". The GMC's expert noted that the Claimant did not follow Trust policy. However, the expert went on to say:

> **"[G]uidelines are guidelines and not legal requirements. There is evidence that the use of Aspirin is preferable in this clinical situation. Therefore, one could argue that [the Claimant] was correct and the Trust's Guidelines were incorrect … [A]lthough it would have been preferable had [the Claimant] provided a written explanation about why he was using Aspirin rather than following the Trusts' Guidelines, not to do so would not, in my opinion, be to fall below a reasonable standard of practice."**

62. This highlights the difference in approach between the Respondent (whose decision the Tribunal was required to consider for the unfair dismissal claim) and the GMC. Whilst the failure to follow guidelines might not be regarded by this particular expert such as to render the Claimant's conduct below a reasonable standard, it would clearly be a serious matter for any employer, and especially so where those guidelines are intended to protect patient safety. (That they were so intended is amply demonstrated by the fact that Dr Kuper considered the Claimant's prescription of Aspirin in four cases sufficiently unsafe as to warrant his intervention to change the prescription - it not being suggested that Dr Kuper did so deliberately because his alleged animus towards the Claimant outweighed Dr Kuper's concern for patient safety). The divergence of medical views as to what is best for patients is far from conclusive, does not undermine the credibility of opposing views (both of which might have a reasonable level of professional support), and does not in any way diminish the seriousness, as the Respondent saw it, of the Claimant's failure to follow established protocol. In these circumstances, the GMC's conclusion that what the Claimant did was not unsafe would be very unlikely to affect the Tribunal's decision.

63. The Claimant further says that the Respondent's conclusions about the risk to safety were obviously incorrect given that he was permitted to continue practising for some 16 months after the charges against him were laid. However, that ignores the evidence as to 'safety netting' given by Mr Kuper and which was accepted by the Tribunal (see paragraph 169).

64. In general terms, there is a considerable need for caution before reopening a case on the strength of a regulator's determination. There is a strong interest in the prompt determination of employment claims and in the finality of Tribunal judgments. Those interests would be undermined by too great a readiness to reopen in the light of a regulator's determination. Not

only are the regulator's concerns and approach unlikely to be the same as that of the Tribunal (as was the case here), they are unlikely to have a material influence on the outcome. That is not to say there will not be cases where it is appropriate to reconsider, but such cases are likely to be rare.

65. For these reasons, ground 6 is dismissed.

Ground 3(ii) - Credibility of reliance on patient safety

66. This has largely been addressed under ground 6. The Claimant submits that the Tribunal failed to address the key difficulty for the Respondent in relying upon patient safety which was the fact that the Claimant was permitted to continue practising. As set out above, this submission seems to disregard the Tribunal's consideration of the safety netting to which Dr Kuper referred.

Conclusions

67. For these reasons, the only ground of appeal which succeeds is ground 1 - Wrongful Dismissal. This matter will be remitted to the same Tribunal to consider that issue once again having made the necessary findings of fact. Upon remission, it appears to me that, given that the Tribunal will be required to reach its own conclusion as to whether there was a repudiatory breach (as opposed to considering whether the Respondent's actions fell within the range of reasonable responses), it would be permissible for the Claimant to adduce the findings of the GMC (which are now available) insofar as they are relevant to that issue.