RESERVED REASONS

EMPLOYMENT TRIBUNALS

Claimant	**AND**	**Respondent**
Dr A Nabili		Norfolk Community Health and Care NHS Trust

Heard at: London Central **On**: 7 November 2017

Before: Employment Judge D A Pearl (sitting alone)

Representation
For the Claimant: Mr B Gardiner (Counsel)
For the Respondent: Mr S Cramsie (Counsel)

JUDGMENT AS TO REMEDY

The judgment of the Tribunal is that:

1 No Order is made for reengagement or reinstatement.
2 The compensatory award is for 7 weeks' loss of net pay and benefits.
3 The appropriate uplift pursuant to section 207A of the 1992 Act is 25%.
4 The amounts of the basic and compensatory awards are adjourned to a further hearing if they cannot be agreed.

REASONS

1. This was the reconvened hearing to deal with remedy and the Claimant was now represented by Counsel. The hearing was completed within a day and both counsel agreed thereafter to exchange written submissions, for which I am most grateful. Because of the way in which the arguments have been deployed in their submissions, I need to set out a summary of what occurred at this hearing.

2. For an outline of the essential chronology, I refer to my Judgment on liability of 28 September 2017. Ms Cooke, Head of HR, now gave evidence opposing the Claimant's reinstatement or re-engagement. She briefly noted in her witness statement the reasons why the Claimant was unable to work after October 2009, save for three weeks in March 2010. There were multiple complaints received about her performance from ancillary organisations, personnel who worked with

her, schools, social workers and paediatricians from other Trusts. The Claimant had been suspended from practise by the GMC since 3 August 2011. Currently her registration was suspended for a period of 12 months (to January 2018.) Further, the Respondent lacks the resources to retrain the Claimant. She cited findings from the GMC and the Medical Practitioners Tribunal ('MPT') that I will refer to in my conclusions. The Respondent does not employ junior doctors in its Paediatric Department. A second reason for resisting re-engagement was her behaviour and conduct which Ms Cooke states has led to a loss of trust and confidence in her. She also noted that the disciplinary process and litigation had been running for over six years.

3. She was cross-examined and confirmed that she had spoken to her Medical Director who has no connection with the facts of the case. That Director regularly speaks to the GMC. She described the Respondent as a community-based trust which has a small body of specialist consultants who cover a wide geographical area. There is no junior doctor programme and there is only one in the whole organisation and that doctor is not a paediatrician. She believed there were no resources available for retraining and no capacity in the Respondent to "get her [the Claimant] to a place where she could function." I accept Ms Cooke's evidence as being factually accurate.

4. Dr Nabili gave evidence. Her statement deals rather sketchily with a GMC assessment in 2015 over two days. On the first day she says that she was unwell and that she collapsed. She said that the second day's assessment was cancelled because of her health. She seems to state that at some point, possibly in 2015, there was no concern for patient safety and her suspension was lifted. She was considered to be a very high performer and she was performing well and not a danger to patients. Some of this statement is not easy to understand. She states that in August 2016 another performance assessment was offered by the GMC but did not take place because of an MPT hearing. This took place in January 2017 without her attendance or representation and she decided not to appeal the decision. She also asserts that she should not have been dismissed on the allegations that were put against her and she believes that these were not proven.

5. In paragraph 27 she says that if not dismissed by the Respondent, the further assessment of her would have taken place while she was in employment, she would have maintained high standards and continued as a consultant. She then appears to say that her current suspension is because she has not been in employment for over six years. She does not believe that she should be re-engaged merely as a junior doctor.

6. In paragraph 30 she seems to state that if she had not been suspended by the Respondent and then dismissed, she would have continued working for over five years as a consultant "and later as a junior doctor or never as a junior." (I am not sure that I follow this last point.) In any event, the result would have been that she would not have been subjected to the MPT proceedings. She further alleges breaches of a Department of Health framework document of 2003, in respect of her dismissal, and states that she would still have been employed if matters had been correctly handled. She also alleges that the Respondent, by informing the GMC of the termination of employment, gave that body other "extraneous reasons"

for her dismissal. In paragraph 49 she summarises her case by saying she would have remained in employment to date but for the dismissal "… as I was always able to find high-quality employment in my area of specialism-paediatrics. Had the Respondent adopted a fair disciplinary procedure, I believe that I would not have been dismissed if the Respondent did not terminate my employment when it did but that any future dismissal if any, would have been unfair as there would not have been any valid or legal reason to dismiss me."

7. In cross-examination she was taken to Schedule 6 to her contract, page 490, which is a requirement that she must first consult with her clinical manager before taking other remunerated clinical work. She said she had never received this and maintained the position (on both sides of the short adjournment) that she has previously adopted, that there was no need to inform or seek permission if the work was in her own time. However, she then seemed to give a different answer. The questioning moved on to the West Kent position and she denied that Dr Kinnaird was ignorant of her work there, maintaining that he knew about it. When Dr Kinnaird's letter of 9 July 2009 at page 399 was put to her, she said that he was covering up. The purpose of the cover-up was so that the work pattern would not be revealed and the cause of her stress could then be attributed to her personal circumstances, rather than overwork. The investigatory notes at page 383 were put to her. In this passage she was asked why she wanted two days off? She said "I wanted to work for the West Kent." She was asked if she should have discussed that with Dr Kinnaird and she said: "in hindsight, yes."

8. Taken to page 178, a letter dated 18 December 2009, the Claimant agreed that she was told by Dr Crayford, Clinical Director, not to work. She did start working again in March 2010 and on 7 April 2010 the letter at page 255 excluded her from work with immediate effect. This was for two weeks in the first instance. It was extended on 21 April: page 259. This letter told her that the reason for exclusion from work was a serious allegation that had been made about her conduct and performance and she was not permitted to attend any work premises. It is the letter that has been given much attention elsewhere and I refer to it again below. The Claimant told me that this letter permitted her to work and she was free to go to another Trust to seek work; and, in doing so, she was not obliged to tell that Trust that she had been suspended "because the Respondent said they would inform." I understand this to be a reference to the penultimate sentence of the letter, that if she had any other part-time work with another NHS organisation, the Respondent would also notify them of her exclusion from work. She contrasted it with the letter of 28 October 2009 at page 165 which told her to stop clinical work and not to engage with any further clinical work without prior agreement. As I understood her evidence, the Claimant was saying that the letter under consideration at page 259 to 260 told her to go to work. The passage on page 260 "means I can go to work for another Trust and not tell the Respondent." She only had to tell them in the case of voluntary work, study leave or annual leave. She told me that as a senior doctor she was doing exactly what the letter said.

9. Accordingly, she did not tell her employer about work at the Royal Berkshire because she did not need to. It was not because she feared they would stop her. This led her to repeat her stance that Locumlinx, the agency, knew that she had been excluded from work. When taken to page 493, the letter dated 27 January

2011 from that company that stated that they did not have any suspension letter and were not made aware of suspension by the Claimant, she said that she had spoken to another person than the author of this letter. That other person, Mr Compton, had moved on. She was then taken to the CV that Locumlinx had sent to Royal Berkshire which omits any employment after September 2008. This was an old CV and her evidence to me was that she is 100% certain that she sent Mr Compton her up-to-date CV. The error, therefore, was his.

10. Finally, she was taken briefly to the report of Ms Kenyon, Associate Director Executive Nurse, of July 2010 and the conclusions at page 516. This is in very strong terms and will be referred to again in the conclusions. It led to the notice of a disciplinary hearing 8 October 2010 at pages 323 to 324.

To what extent am I bound by previous findings of EJ Postle?

11. The parties take very different views. Mr Gardiner submits as follows, as to the EAT direction that "all other findings of fact and conclusions reached in the Reasons … are to stand."

" 60. This overlooks the context in which that statement was made. It follows and explains the scope of the rehearing, namely a rehearing of the claim for unfair dismissal ie whether or not the decision to proceed in C's absence rendered the dismissal an unfair one. On such a rehearing, the Postle tribunal facts and conclusions are to stand. The facts had been found as part of the Reasons for deciding the liability issue.

61. The agenda of issues to be considered by the Postle final hearing is set out at paragraphs 2 and 3 of the same judge's earlier case management order at a Preliminary Hearing held on 2 October 2014 [112-113]. This noted that the hearing would first adjudicate on liability (the paragraph 2 issues) and only adjudicate on remedy (the paragraph 3 issues) if the Claimant was successful on liability. Because EJ Postle dismissed C's claim on liability, he had never reached any conclusions on remedy. Nor had he made any findings of fact in order to address the specific remedy issues. In *London Ambulance Service NHS Trust v Small* [2009] IRLR 563, Lord Justice Mummery observed, without laying down any fixed rule, that it would often be helpful for a tribunal when looking at questions of fairness, contributory fault, *Polkey* and so forth to set out their relevant findings of fact separately with respect to each element (see *Roldan* at para 71). It is open to this Tribunal to make its own findings of fact relevant to each of the remedy issues.

62. The most fundamental point is this – the points made above on *Polkey* are the points that would have been argued by C if she had appeared at a disciplinary hearing with proper representation. R cannot put the blinkers on that analysis by constraining the Tribunal with findings of fact restricted to *Burchill* issues."

12. Mr Cramsie submits as follows.

"This argument is flawed. The order by Slade J does not qualify the binding effect of EJ Postle's findings and conclusions in any way. Further, it would be absurd to read the order as having this effect. A Tribunal's findings on liability and remedies in the same claim should be consistent. It would be wrong in principle for a Tribunal to determine the issues of liability and remedies on different and inconsistent bases."

13. My first observation is that one has to read the entirety of the judgement by Slade J on 21 June 2016, in order to appreciate what is the correct approach. In that judgement, between paragraphs 6 and 14, she quotes various passages from

the factual findings of the Employment Judge. In dealing with the central ground of appeal the essence of her decision is in paragraph 27, that the Judge "… erred in law in his approach to the issue of whether the Respondent adopted a fair procedure in conducting the disciplinary hearing in the absence of the Claimant. Ground of appeal (iv) succeeds." She then went on to consider two other grounds in which the Appellant took issue with certain factual findings. In paragraph 31 she again referred to what the Employment Judge had stated in one respect and she went on to conclude that: "the Claimant has advanced no basis on which the finding of the EJ that he was satisfied that the transcript of the investigatory meeting is a fair and accurate reflection of that meeting may be challenged." Those grounds of appeal were dismissed. In paragraph 36 she set out the remittal to a new tribunal for rehearing "of the reason for and reasonableness of the decision to proceed with the disciplinary hearing in the absence of the Claimant *in the circumstances* [my emphasis] and their effect on the fairness of the dismissal ... " She then says that the other findings of fact and conclusions reached in the Reasons are to stand.

14. It is my view that Mr Cramsie is correct to say that the order of the EAT does not qualify the findings of fact in any way. Given that specific challenges made to some factual findings were rejected, the circumstances referred to in the above paragraph are those that include all the relevant factual findings made by the Employment Judge. While I have to ask on the issue of Polkey what would or may have happened had the Claimant been present at the disciplinary hearing, I have to do so, in my view, within the context of the relevant factual findings. Slade J did not only restrict herself to the earlier findings because she added the words "and conclusions". Therefore, for clarity, I shall set out what I consider to be relevant findings or conclusions, which are to stand.

14.1 That the initial days of work by the Claimant at West Kent were not known to Dr Kinnaird.

14.2 The implication from the letter dated 21 April 2010 is that a person who is on suspension should not be working for any organisation.

14.3 The various findings set out in paragraph 4.11 concerning the taking of notes at the investigatory meeting; and the finding that no amended minutes were ever seen from the Claimant or her representative.

14.4 That from her answers (see paragraph 4.14) it was suggested that she knew she should have informed the Trust and in effect should not be working for another Trust while she was excluded.

15. There is at paragraph 6.11 of those findings a conclusion that, taking all factors into account as well as "the surrounding circumstances", the sanction of dismissal was a reasonable one that a reasonable employer could impose. That was the Judge's conclusion based on his view that there was no procedural defect in the disciplinary hearing. What he seems to be saying here is that it would be reasonable for the employer, once it had determined that the disciplinary offences were made out, to dismiss. It does not mean that, had the Claimant been heard at this hearing, the offences would necessarily have been made out. Nor does it

mean that, if this remained the view of the panel having listened to the Claimant, it would necessarily have dismissed her. I consider that I must reach conclusions on these issues.

Conclusions

16 I will deal here with Polkey questions first, even though I must consider reinstatement/reengagement as the primary remedy. I will also refer to principles of law as they arise, as well as the submissions made by counsel. I ought here to say that I am extremely grateful to both of them for their industry.

Polkey

16 I have to ask what is likely to have happened had the Claimant been heard (and represented) at a disciplinary hearing. The Polkey principle arises from section 123(1) ERA. "The amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances, having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer". Mr Gardiner refers me to the guidance of Elias J Software 2000 v Andrews [2007] IRLR 568 at paragraphs 30 to 53, summarised at paragraph 54. It is for the employer to adduce any relevant evidence on which he wishes to rely, although the Court will consider all the circumstances. He also refers me to the judgment of Langstaff J in Contract Bottling Limited v Cave [2015] ICR 146 at paragraphs 13 to 21. "The aim of the assessment is to product a figure that as accurately as possible represents the point of balance between the chance of employment continuing and the risks it will not, expressed in terms of weeks, months or years or as an overall percentage".

17 The Respondent's case is that at any reconvened disciplinary hearing the Claimant would have been dismissed for gross misconduct and that this hearing would probably have taken place about seven weeks later. Mr Cramsie invites me to conclude that there was no realistic possibility that the Claimant would not have been dismissed in such circumstances. The evidence that I have received includes that of Ms Weeks on the liability hearing. She put in two witness statements and in paragraph 33 of the first statement she set out the major factors that led the panel to the view that the Claimant should be dismissed with immediate effect. In her second statement she says that she is "certain" the panel was still have concluded that the Claimant had acted dishonestly. Even in the absence of such a finding, the "extraordinary lack of professional judgement" would have produced a dismissal.

18. In support of this submission, Mr Cramsie draws particular attention to the terms of the original claim form that was received on 18 July 2011. The relevance of this date is that it approximates to the date when the Respondent says any reconvened disciplinary hearing would have been heard. Therefore, I am invited to conclude that the case that the Claimant would have asserted at such a hearing would have been along the lines of what she set out in the ET1. She said there that she understood that the letter of 21 April 2010 meant that she only needed to obtain the consent of the Trust for volunteer work, study leave or annual leave.

The Trust did not make clear to her, she says, that she could not work for another NHS organisation or that she should first inform the Respondent. Mr Cramsie is correct to submit that her case on this issue has never varied. His supplemental submission is that it is an incredible case, was not believed at the hearing conducted in her absence and would not have been believed had she ever attended. For example, at the investigatory interview she had said she had told the agency that she had been excluded. Thereafter, Locumlinx supplied a letter to contrary effect. At a hearing, he submits, the panel would not have accepted her account when placed against the documentary evidence. In addition, the suggestion that the agency placed her at the Royal Berkshire when they knew she had been excluded is improbable. Additionally, there were other concerns about the Claimant's credibility. This informs his overall contention that there is no realistic prospect that she would not have been dismissed at any rearranged hearing.

19. Mr Gardiner comes to a precisely opposite conclusion and submits that the Claimant would "inevitably" have kept her job after such a hearing. He then begins to advance a sophisticated submission that the Claimant either would not or ought not to have been dismissed. This starts with an analysis of the charge that was brought against her and a comparison with predecessor wording; and it leads him to submit that the panel was not entitled, in law, to consider questions related to the Claimant's dishonesty. In my view this is a contentious reading of the letter setting out the charges at page 343, where gross misconduct is spelled out. In any event, this would amount to opening up the findings by which I am bound and re-running the unfair dismissal claim. For good measure, I do not regard this as a good argument in any event, since the Claimant had asserted points in her defence that were clearly designed to deal with the allegation that she was behaving dishonestly. One consequence of Mr Gardiner's submission is that he argues that the evidence before the disciplinary panel ought to have been limited and this, in turn, helps him with the submission that the Claimant would not have been dismissed. I reject this argument as the proposed limitation of evidence seems to me to be based on a false premise.

20. His further submission that both disciplinary charges ought to have been dismissed strikes me as being unrealistic. The contention is based upon the arguments outlined in paragraphs 29 to 33 in which he, inter alia, relies upon a definition of private practice. The argument is that a lay person such as the Claimant could be forgiven for thinking that she did not need to inform anybody or seek permission before working for Royal Berkshire. When set against the other facts of the case that I have referred to above, as well as the findings of the earlier Employment Judge, the submission also strikes me as being unrealistic. In my view, Mr Gardner is inserting here a level of refined legal argument that would never have been raised at a further disciplinary hearing and which has emerged at the conclusion of some years of litigation.

21 He presses on me the conclusion that there was no misconduct at all, but I regard this as unsustainable. Equally, the interpretation that he advances for the letter of 21 April ignores the wider significance of the charges of gross misconduct. The previous Judge found that the implication from the letter is that a doctor who is suspended should not be working for any other organisation. Even were I not

bound by that conclusion or finding, I would have made it in my own right. Exclusion from clinical practice is a matter of considerable gravity for a doctor and, taking an overall view of matters, what led to the charges of gross misconduct was the discovery that, while excluded from practices, the Claimant had sought and taken work elsewhere. She asserted that she had told the agency about her exclusion, but that had been denied. The evidence about the CV was also damaging and the Claimant has had to argue that it was sent in error by the agency. There are other indications in the investigatory interview that she recognised that what she had done was wrong. Mr Gardiner's occasionally legalistic arguments are impressive for their detail but I consider them to be unsound when placed against the central facts of the case, which are to be found in the findings of the Employment Judge and also throughout the documentation.

22. I reject the argument made by Mr Gardiner that there is any prospect that a reconvened disciplinary panel would have found the Claimant's actions "entirely forgivable" or that there is any likelihood that she would have been convicted, at worst, of a "most technical breach of her contract."

23. I further agree with Mr Cramsie that there is no evidence that these allegations of unfairness contained in the Claimant's closing submissions here would have been raised at a re-arranged disciplinary hearing. He points out that they were not raised in the ET1, the agreed list of issues, correspondence, or by counsel at the EJ Postle hearing, even though the Judge entertained new grounds of unfairness. He submits, and I agree, that it is unrealistic to expect that the allegations raised for the first time in these closing submissions would have been raised at the re-arranged hearing. I consider the probability that the case would have been put in this way to be close to zero.

24. In his response submissions, Mr Cramsie draws attention to Hill v Governing Body of Great Tey Primary School [2013] IRLR 274, EAT, para 24: "First, the assessment of it is predictive: could the employer fairly have dismissed and, if so, what were the chances that the employer ***would*** have done so? The chances may be at the extreme (certainty that it would have dismissed, or certainty it would not) though more usually will fall somewhere on a spectrum between these two extremes. This is to recognise the uncertainties. A tribunal is not called upon to decide the question on balance. It is not answering the question what it would have done if it were the employer: it is assessing the chances of what another person (the actual employer) would have done. Although Ms Darwin at one point in her submissions submitted the question was what a hypothetical fair employer would have done, she accepted on reflection that this was not the test: the tribunal has to consider not a hypothetical fair employer, but has to assess the actions of the employer who is before the tribunal, on the assumption that the employer would this time have acted fairly though it did not do so beforehand."

25. Of Mr Cramsie's other submissions I find myself in general agreement with his observation as follows. "By keeping some of the allegations of unfairness in reserve, C prevents the Polkey question from being properly identified. C can then, as she had done in the present case, argue that even if the procedural flaws raised in the liability hearing had been remedied other procedural flaws would have made a fair dismissal impossible. This approach undermines the Polkey exercise."

26. Without descending to detail, I find that Mr Cramsie has dealt conclusively with the suggestions of conflict of interest, the role of Dr Crayford, the relevance of performance issues and the various points about documents including the job plan and the contract. As far as I can tell Mr Cramsie is right in submitting that these points are now raised for the first time and, in any event, I consider that there is no possibility that they would have been raised at the time. He also deals at paragraphs 47 to 51 of this written submission with a bundle of other points made for the Claimant. I agree that arguments based upon section 491 of the National Health Service Act 1997 are new and would not have been raised by the Claimant. I consider that the arguments he raises in paragraphs 51.1 to 51.4 appear correct. I would further add that the Claimant has not adduced evidence that supports a number of her closing submissions, although I regard this as a relatively minor issue. For the purposes of an adjudication under the Polkey principle I need to ask what this employer would have done if it had conducted a fair hearing which, in the context of this case, means a hearing at which the Claimant was in attendance and able to make her representations.

27. Looking at all these matters overall, and having taken account of all the various submissions made by Mr Gardiner, I have come to the conclusion that this employer would have dismissed the Claimant at a reconvened disciplinary hearing. The evidence that I have for this finding is, in my view, compelling and I see no realistic prospect that the Claimant could have avoided a finding of gross misconduct. She would have asserted those matters that have emerged during the litigation, at least up to the point of her counsel's closing submissions. Her honesty and integrity would have been as much in question as it was at the hearing conducted in her absence. The surrounding evidence did not assist her. Assuming that she gave evidence along the lines of what she told me, I see little prospect that the conclusion of gross misconduct could or would have been avoided. She would, for example, have been likely to have accused Dr Kinnaird of a cover-up and I refer to paragraph 7 above. I found her evidence to be in parts unclear and also contradictory. It was self-justifying and, on key points, unreliable, in my view. I have no reason to think that a disciplinary panel would have been more impressed by her.

28. On the basis that the panel would have rejected her evidence at a hearing and concluded she had committed gross misconduct, I conclude that there is a high degree of probability that the Claimant would have been dismissed. Dismissal has already been found to be a reasonable sanction, the procedural unfairness being put aside. I see no real prospect of mitigation having been advanced. This is particularly the case had the Claimant given similar evidence to the panel as I received.

29. This is, perhaps, one of those unusual cases where the assessment of a percentage chance is not appropriate, because it would not reflect my assessment of the evidence. This is that the probability of dismissal is so high that the only consequence of the unfair dismissal is that it advanced the point in time at which the Claimant's employment would have terminated. I see no reason to adopt the longer period contended for by Mr Gardiner and I agree with the Respondent that

seven weeks appears to be the likely period that would have elapsed before any reconvened hearing at which the Claimant could attend.

Contributory conduct

30. The Respondent accepts that, having made the above finding as to Polkey, no further reduction is sought on the basis of contributory conduct. I am content to adopt this, but I ought to make clear that the Claimant has been shown to have acted in a blameworthy manner and her evidence before me confirms that to be the case.

Reinstatement/re-engagement

31. It is agreed that under section 116 I must consider whether it is practicable for the employer to comply with an order for reinstatement; and where the complainant caused or contributed to some extent to the dismissal, whether it would be just to order her reinstatement. The Respondent has two grounds for resisting such an order. The first is that the Claimant's registration to practice remain suspended and the second is that there is no longer any trust and confidence between the parties.

32. Dealing with the Claimant's performace and exclusion from practice, I first note Ms Kenyon's findings in July 2010. She recorded (page 279) that there had been 11 formal complaints from patients and other professionals and also 4 whistleblowing letters. Ignoring one complaint made outside the 12 month period, this brought the number of complaints to 10, whereas no other doctor within the organisation within the last two years had received more than one complaint. She said there were no serious failings in terms of clinical decision-making but there was a constant theme of inappropriate attitude and failures in communication with children, carers and staff. In interview, she appeared to give no indication that she understood or appreciated concerns raised by others. Without exception, clinical and administrative staff highlighted fundamental problems in terms of her interaction with others. She was disorganised and chaotic in certain aspects of her work.

33. Next, for the purposes of considering reinstatement/re-engagement I can move directly to the determination of the MPT dated 20 January 2017. This sets out the history which I need not repeat, including the allegations concerning the Claimant's professional performance that were found proven by the GMC in 2013; and again in 2015. The question of an adjournment on the application of the Claimant was then dealt with. It was refused: see page 765. It concluded after a detailed review of the evidence that the Claimant's professional performance had been deficient at the time of the assessments referred to. Further, those deficiencies were serious and had a direct impact on patient safety: page 791. The tribunal accepted the evidence that she was not able to formulate diagnoses or treatment plans and did not communicate effectively with patients, their parents or with colleagues. It received evidence that her knowledge base is "alarmingly low." It accepted evidence that she was unable to conduct the basic assessments. These referred to such matters as how to deal with non-accidental injuries, or support for an adolescent with a history of self-harm wishing to leave hospital. It

saw no evidence that the Claimant had completed any remediation or retraining to address deficiencies identified in clinical performance. There was no evidence that she had developed any insight into the extent of her failings. The likelihood was that her medical knowledge and skills would have deteriorated since those assessments. As she continued to present a risk to patients, in the view of the tribunal, her fitness to practice was impaired by reason of her deficient professional performance. It referred to "serious failings" and concluded that it would be neither sufficient, proportionate nor in the public interest to take no action. The decision was to impose conditions on her registration. The identifiable areas of practice that needed to be addressed were "numerous." They repeated that there was a serious risk to vulnerable patients as the deficiencies were long-standing: see page 795. Partly because the Claimant had not taken part in the regulatory process, no workable conditions could be formulated. A period of suspension of 12 months was imposed for the protection of the public and also to demonstrate to the Claimant, the profession and the public that "doctors exhibiting such basic deficiencies should not be permitted to practice until they had demonstrated a willingness to remediate and taken steps to do so." As part of these conclusions, at page 795, the tribunal found that her failings were "wide-ranging, encompassing fundamental areas of clinical competency, with evidence that her medical knowledge base is alarmingly low."

34. Notwithstanding these very considerable difficulties for the Claimant, Mr Gardiner submits that " on the evidence before the ET, it is practicable to reinstate C to her original role, or alternatively to re-engage her in an appropriate alternative role." Mr Cramsie disagrees.

35. The submission on behalf of the Claimant is unsustainable. Dealing briefly with some of the points that are made on her behalf, the beliefs she holds about the assessment of 2013 and 2015 are not relevant to my decision as it would not be proper to question those assessments or call into question the determination of the 2017 MPT. That there may be, or recently has been, a reconsideration of the suspension is not a relevant factor and I have no further information. The possibility of a phased return to work does not in any realistic sense hold any weight when viewed against the Respondent's objections. It will be recalled that an earlier assessment was that the Claimant was currently safe to work only at FY 2 level, which is very junior indeed. I see no possible conclusion other than that it is not practicable to comply with an order for re-engagement. I agree with Mr Cramsie's assessment in his closing submission that by reference to paragraph 33 of the MPT determination in 2017, the Claimant could only in due course return to work to junior level. He further submits, correctly in my view, that as there is no evidence that she has taken any of the necessary steps, the prospects of her return to a junior posts are remote. When one adds Ms Cooke's evidence that there are no junior doctors in the paediatric department and the Respondent has no resources to train her up to consultant level, an order for reinstatement or re-engagement has to be out of the question. On the relatively unusual facts of this case, it is not a practicable option to re-engage her at a junior level; and reinstatement to the position of a consultant is impossible.

36. The Respondent's second objection is based on trust and confidence and the evidence that this no longer exists cannot be sensibly contradicted. Mr

Gardiner seeks to dismiss this concern by arguing, in part, that the misconduct has been exaggerated and that the Claimant was not guilty of the same. This is not the finding that was made by the previous tribunal and it is not a finding that I would make in any event. The Claimant is believed to have fundamentally breached her contract of employment on the basis of going to work for another Trust without informing her employer and without seeking consent and in circumstances that connote dishonesty on her part.

37. The Respondent also relies on contributory conduct, but by this point in the analysis the argument is academic. There are no possible grounds upon which it could be said that it was practicable to reinstate or re-engage.

Quantum

38. The parties have disagreed about the correct net figures and no evidence or consideration was given to the topic at the hearing. Therefore, assuming that the basic award is agreed, at this point I record my two relevant conclusions. I accept that the measure of financial loss is 7 weeks. Although the point is not clear, I am inclined to award loss of statutory rights because the rights were in fact lost.

39. Acas uplift. I do not need to adjudicate on the appeal issue as I have come to the view that for the procedural defect I identified, no less that 25% uplift would be just. To reverse its stance on the adjournment in the case of a doctor whose employment could end after a disciplinary hearing, when there was known to be no prospect of the doctor coming to the hearing, alone warrants the maximum uplift.

40 I would ask the parties to inform the tribunal within 14 days of receiving this judgment of the position with regard to the final figures.

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Employment Judge Pearl on 12 February 2018