EMPLOYMENT TRIBUNALS

Claimant: **Mr R Girgis**

Respondent: **University Hospitals Bristol NHS Foundation Trust**

Heard at: **Bristol** **On:** **3-7 and 10 December 2018 (10 December in chambers)**

Before: **Employment Judge Livesey**

Representation:
Claimant: Miss Clarke, counsel
Respondent: Mr Panesar, counsel

JUDGMENT

1. The Claimant's complaints of constructive unfair dismissal and breach of contract relating to notice are dismissed.

2. The date which had been reserved for a telephone Case Management Conference is cancelled.

REASONS

1. The claim

1.1 By a Claim Form dated 22 March 2018, the Claimant brought complaints of constructive unfair dismissal and breach of contract relating to notice.

2. The evidence

2.1 The Claimant gave evidence in support of his claim and the Respondent called its witnesses in the following order;

- Mr Haynes, Consultant Ophthalmic Surgeon and joint Clinical Director of the Bristol Eye Hospital;
- Mr Day, Consultant Orthodontist;
- Professor Callaway, Consultant Radiologist and Deputy Medical Director;
- Mrs Sleight (née Bishop), Head of Medical HR;
- Ms Bailey, Consultant Ophthalmic Surgeon and joint Clinical Director of the Bristol Eye Hospital;
- Dr Luker, Deputy Medical Director, formerly Senior Community Dental Officer.

2.2 The following documents were produced;

- C1; Claimant's Chronology (not agreed);
- C2; Claimant's Closing Submissions;
- R1; Hearing bundle, including a small supplemental bundle;
- R2; Cast List (agreed);
- R3; Respondent's Opening/Glossary;
- R4; Respondent's Closing Submissions.

3. The issues

3.1 The issues had been discussed and recorded at a Case Management Preliminary Hearing which had taken place on 22 June 2018 before Employment Judge Oliver.

3.2 In relation to the complaint of unfair dismissal, the Claimant relied upon the implied term of mutual trust and confidence and alleged that there had been 21 breaches which were set out in paragraph 34 (a)-(u) of his Claim Form (pages 32-4 of R1), sub- paragraph (q) having effectively formed the last straw as that concept was recognised at law.

3.3 During the course of closing submissions, it became clear that the Claimant was also seeking to assert that the Respondent's policies had been expressly incorporated into his contract of employment and that the Respondent's alleged breaches of them had therefore constituted breaches of those express terms. Paragraph 34 of the Claim Form and paragraph 3.1 of the Case Management Summary of 22 June 2018 appeared to have left those arguments open although it was surprising that such arguments had not been ventilated orally until that point of the hearing.

3.4 The Respondent did not seek to rely upon s. 98 (4) of the Act nor did it seek to run a positive case on affirmation, but it did seek to argue that its conduct had not been the cause of the Claimant's resignation and that he had contributed to it under ss. 122 (2) and 123 (6).

3.5 The Claimant also alleged that the Respondent's fundamental breach had effectively prevented him from working his notice, hence his complaint of wrongful dismissal.

3.6 The hearing was listed to determine issues relating to liability only.

3.7 Those issues were confirmed as agreed at the start of the hearing, save with regards to paragraph 3.3 above.

4. The facts

4.1 The following factual findings were reached on the balance of probabilities. An attempt was made to restrict the findings to matters which were relevant to a determination of the issues in the case. Any page numbers provided within these Reasons are to pages within the hearing bundle R1 unless otherwise stated and have been cited in square brackets.

The evidence

4.2 At the start of the hearing, Mr Panesar applied to call two additional witnesses on half of the Respondent, Mr Saad and Professor Sparrow, and statements were submitted from them. It was intended for them to have dealt with points which had been raised by the Claimant in paragraphs 9 (v) and (iii) of his witness statement respectively which were points of detail regarding two of the misconduct allegations which he had faced. Mr Panesar accepted that he had not raised those points during the disciplinary process and I therefore questioned the relevance of the evidence given that the relevant test required me to consider whether the Respondent had had reasonable or proper cause for the decisions that it took on the evidence that had been gathered at the time. Miss Clarke agreed that that was the correct approach.

4.3 The statements had been served on 30 November and 1 December, the Saturday before the hearing started. All statements were supposed to have been exchanged on 5 November. If the evidence was adduced, not only did Miss Clarke consider that the agreed timetable might have been jeopardised, but she also stated that the Claimant would then have wanted to have produced further medical literature in relation to the opinion provided by Professor Sparrow.

4.4 Having considered the possibility of the case going part heard if the further evidence was adduced, the prejudice caused by the Claimant but, in particular, the limited relevance of the evidence, the Respondent's application was dismissed. I was, however, prepared to review that decision if, as the evidence developed, it became apparent that shutting the Respondent out would have caused it a significant injustice. Having had to rule on the application, the statements had been read and they were taken into account in any event to that limited extent. Mr Panesar did not renew his application during the course of the hearing and the evidence was not mentioned again.

4.5 In respect to those witnesses who did give evidence, I formed the following broad impressions.

4.6 The Claimant was not a good witness. He had to be asked to answer questions directly on more than one occasion. Importantly, he stated that he was not able to remember any conversation which he had had with any patient. He was only able to say what he *would* have said in certain circumstances because it would have been his routine.

4.7 Although the Respondent's witnesses were not uniformly of better quality, I was particularly impressed by the evidence given by Mr Haynes and Ms Bailey, the joint Clinical Directors of the Hospital. Professor Callaway readily gave ground in relation to some parts of his evidence (the quality of his decision letter, for example) but was resolute in other respects, particularly relating to the decision which his panel made. He did, however, seem confused in relation to some of the issues that were put to him in respect of the application of the Respondent's policies.

Background

4.8 The Respondent is an NHS organisation which provides acute health care services in Bristol and the surrounding area. It employs over 8,000 people across 10 sites.

4.9 Amongst the Respondent's sites is the Bristol Eye Hospital ('BEH'), a large specialist eye hospital with a national reputation, which is managed by Ms Holly. There are 29 ophthalmic consultants employed at the Hospital, many of whom have sub-specialisms in specific aspects of eye surgery. The Hospital offers a daytime, walk-in Accident and Emergency ('A&E') service 7 days a week. There are approximately 25,000 attendances to A&E per year and the Trust's target is to treat 99% of those patients within 4 hours of their arrival.

4.10 The following policies were referred to in evidence;

(i) The Respondent's Cataract Policy (Referral for Assessment of Surgical Treatment) which was provided by the local Clinical Commissioning Group [99];
(ii) The Respondent's Policy for Managing Capability Concerns of Medical and Dental Staff [102-128];
(iii) The Respondent's Staff Conduct Policy [129-142];
(iv) The Respondent's Disciplinary Policy [143-169];
(v) The Department of Health's Code of Conduct for Private Practice [69-70];
(vi) Maintaining High Professional Standards in the Modern NHS, also produced by the Department of Health [547-605].

4.11 The Claimant was employed as a Consultant Ophthalmologist from 1 April 2011. He was based at the BEH where he was the Lead A&E Consultant. He was the only consultant in that department. He also held cataract clinics at the BEH and the Weston General Hospital on two days each month. His Job Description suggested that his job plan could have involved up to 10 sessions in A&E per week, a 'session' being ½ a day or 4 hours [71-80]. His Statement of Terms and Conditions of Employment contained a provision for him to have given 3 months' notice of his resignation [81-98]. It also contained the following provision in relation to disciplinary procedures (clause 21 (a) [22]);

> "*However should we consider that your conduct or behaviour may be in breach of our code of conduct and/or Disciplinary Procedures, or that your professional competence has been called into question, the matter will be resolved through our Disciplinary or Capability procedures which are consistent with the Maintaining High Professional Standards in the Modern NHS framework, subject to the appeal arrangements set out in those procedures.*"

4.12 Not unlike many consultants within the NHS, the Claimant also undertook private work at the Nuffield Hospital, Bristol. It was accepted that the Consultant Contract Terms and Conditions of Service for Consultants (2003) [100] and the General Medical Council ('GMC') Good Medical Practice Guidance [101] applied to the Claimant's employment. Paragraphs 20-23 of Schedule 9 of the Contract contained guidance which governed a consultant's handling of issues relating to the possible provision of private services in a situation where a patient might have

wanted the same treatment through the NHS. Paragraph 20 specified that a consultant was only able to provide standard advice which had been agreed with his employer. During the course of his work, he was prevented from 'making arrangements' to, or 'initiating discussions about', providing private services, but discussions about private treatment were not entirely prohibited; there may have been situations in which patients needed to have been told about all treating options, some of which may not have been available on the NHS, but such discussions were carefully regulated (see the Code of Conduct for Private Practice [69-70]);

> "*Except where immediate care is justified on clinical grounds, consultants should not, in the course of their NHS duties and responsibilities, make arrangements to provide private services, nor should they ask any other NHS staff to make such arrangements on their behalf unless the patient is to be treated as a private patient of the NHS facility concerned.*"

4.13 It was clear that the Claimant found his work challenging. Leading an A&E Department in times of increasing demand and reducing budgets cannot have been easy and he indicated that he was going to step down in September 2016 [200]. He wanted to meet Mr Haynes and Ms Bailey before announcing his decision formally. Ms Bailey's evidence in that respect was not challenged (paragraph 27 of her witness statement). He did not, in fact, resign his post before subsequent events intervened.

Complaint regarding Miss V

4.14 Prior to the matters in issue in the case, the Claimant accepted that he had been previously told by Ms Holly not to tell patients about the price of private surgery (see paragraph 8 of his witness statement, an incident referred to elsewhere as the 'YAG capsule' issue or incident). He did not receive any formal warning at the time. The relevance of the matter to the later events, according to the Respondent, was simply the fact that it had provoked a discussion about the BMA guidelines in respect of private treatment.

4.15 In or around April 2015, the Claimant became aware that a patient's mother had made a complaint about the treatment of her daughter, 'Miss V', in June 2014. It was alleged that he had diagnosed cataracts after a quick examination which he then offered to cure privately. A second opinion had been obtained which indicated that surgery was unlikely to have been required for many years. The complaint was investigated by the Respondent and a detailed letter of response was provided on 14 May 2015 [177-9]. The patient's mother received an apology and was told that the service provided by the Claimant was not at the level which "*we want our patients to receive*". The letter went on to state that the Claimant had been shown the complaint letter and was made aware "*that it is inappropriate for him to be promoting his private practice when undertaking NHS work*" [178].

4.16 As far as the Claimant was aware, that was the end of the matter. He did not receive any form of warning on that occasion. He subsequently alleged that he had been 'fully exonerated' in respect of that allegation. The Respondent, on the other hand, claimed he had been verbally advised by the then Clinical Director, Mr Markham, not to mention private practice to

NHS patients again and the letter appeared to have reflected that advice [178].

2016 complaints

4.17 In 2016, three further matters were brought to the Respondent's attention. A meeting was convened on 1 December between Ms Holly, Dr Luker, Mr Haynes, Ms Bailey and others at which the allegations were considered initially. It was decided to commence a formal investigation.

4.18 On 5 December 2016, Dr Luker, the Deputy Medical Director, then advised the Claimant of the concerns in relation to the treatment of four patients as follows [216-8];

(i) Dr Spry, an Optometrist, had alleged that the Claimant had incorrectly advised a patient, 'Mr B', that he had not been eligible for a cataract operation on a second eye on the NHS, following the correction of a cataract in the other one. It was alleged that the Claimant had then advised Mr B that the work could have been undertaken by him privately instead [210];

(ii) Mr Fernandes, another experienced Optometrist, urgently referred 'Mr S', an architect, to the BEH due to the '*severe affects'* of a deteriorating eye condition upon his work [529A]. It was alleged that he had been told by the Claimant in July 2016 that he needed cataract operations and "*special lenses to correct his astigmatism as well, Toric IOLs"* (see the notes [531]). The Claimant was recorded as having told him that his case would have required exceptional funding under the NHS, which he then confirmed to the patient's GP [530]. Crucially, it was alleged the Claimant had said that he was able to assess the work privately instead [211-3];

(iii) Mr Johnson, another Optometrist, alleged that the Claimant had recommended clear lens surgery to a patient on a private basis, 'Ms H', having attended A&E complaining of sudden and transient visual field loss in March 2016. Ms H had alleged that the Claimant had 'inappropriately touted for business' and had been 'maverick in suggesting an operation to correct a perceived problem that did not exist' [207]. In essence, the allegation was that the patient had attended with a sudden problem which was diagnosed as having been caused by a migraine, but the Claimant had used the opportunity to try to resolve a long-lasting sight problem for which she had used glasses effectively for some time;

(iv) The complaint about Miss V which dated from 2014 was also raised in the letter (see paragraphs 4.15-16 above) but Dr Luker stated in evidence that she had told the Claimant that it had only been included by way of background when she discussed it with him on 5 December. The Claimant said that he could not remember and I considered it more likely to have been said in light of the Respondent's positive evidence in that respect.

4.19 The Respondent's initial letter warned the Claimant that the alleged conduct could have potentially contravened schedule 9 of the Consultant Agreement which prohibited consultants from initiating discussions about

private treatment. Paragraphs 77-80 of the Good Medical Practice Guide 2013 were also referred to, which provided that a consultant should not allow any private interests to interfere with the service provided to a patient within the NHS.

Restriction in practice

4.20 A temporary restriction was placed upon the Claimant's practice; he was prohibited from conducting his usual duties in the cataract clinic at the BEH and from holding his clinic at the Weston General Hospital. This, the Respondent argued, was not for any clinical reason, but in order to have reduced the possibility of him promoting his private practice further in circumstances where he would have been in a one to one situation with patients. Instead, he was required to carry out work within the open clinic within the BEH's A&E Department.

4.21 Other alternatives were considered by the Respondent. It was thought that a total exclusion or the use of a chaperone during consultations would not have maintained the confidentiality of the investigation and would have been to the Claimant's significant disadvantage. The Respondent did not consider that any attention would have been drawn to him working additional hours in A&E in light of his Job Description and the demand within the department.

4.22 The Claimant alleged that it was widely accepted within his profession that working within an A&E Department was stressful with the result that, generally, doctors were only allocated 2 to 4 such sessions a week (paragraph 33 of his witness statement). He alleged that he undertook between 5 and 6 such sessions from December 2016 until November 2017 as a result of delays which occurred during the investigation process.

4.23 It was noteworthy that the Claimant appeared to have worked up to 5 sessions per week in A&E for at least a year in 2013/4 years (4 single sessions and 2 half sessions [522]) and, after the restrictions were in place, the figure rose to 5 or 6 per week. He still carried out his cataract operating list (1 session each week) and his private work. He also continued with his administration and mentoring functions (1½ sessions). Meanwhile, the Claimant's Fellow, Mr Ahmad, undertook at least 8 sessions in A&E [521].

4.24 The Claimant had been referred to Occupational Health ('OH') on Dr Luker's initiative in December when the investigation had commenced. He was seen by Dr Williams who wrote to Dr Luker on the 9th [224-5] and Ms Holly on the 14th [226]; he did not think that the Claimant was suffering "*a high level of initial distress*" and he was "*happy for him to continue working*". His anxieties at that time centred around his ability to deal with the paperwork associated with the investigation process. The Claimant had informed Dr Williams that Ms Holly had provided some flexibility in his workload to free up some time in order to deal with the paperwork. Dr Williams supported that approach. He did not, however, state that the Claimant's work in A&E had been causing him stress.

4.25 The Claimant alleged that the OH advice was ignored. He alleged that Ms Bailey, the Clinical Director, stated that additional time would only have

been provided to him if he had agreed to cease his private sessions. He alleged that both she and Mr Haynes adopted that position with the intention of preventing him from pursuing his private practice.

4.26 From the documents, it was clear that Ms Holly wrote to him upon receipt of the OH advice and offered flexibility in his workload to enable time to undertake the administration created by the investigation [227]. She was not prepared to allow him to do so without him also making adjustments to his own work;

> "*..should you need more time for the administration created by the ongoing investigation, I would be happy to amend your timetable to facilitate this, but only if you had first ceased your private session on a Tuesday morning.*"

4.27 A subsequent offer of another OH referral was not taken up by the Claimant [278-9]. At the meeting which had taken place in March 2017, the Claimant had expressed concern about stress which was said to have been occasioned by the investigation process, not his work in A&E. At around that time, his restrictions were modified such that he was allowed the use of his private room in A&E.

The investigation

4.28 Mr Day, a Consultant Orthodontist, was appointed as the investigating officer in mid or late December by Dr Luker, the Case Manager with overall responsibility for the process. Mr Day was supported by Mrs Sleight, Head of Medical HR. He was given detailed terms of reference [222-3]. Although he was of a different discipline to the Claimant, he was chosen because, according to Dr Luker, the Respondent normally appointed investigating officers in that manner. The choice of Mr Day was not explored with her in cross-examination.

4.29 The Respondent, in consultation with the unions, had agreed to use its Managing Capability Concerns Policy for the investigation of issues of potential professional misconduct in the case of a dentist or doctor [102-128]. That was therefore the Policy which was adopted in the Claimant's case. The benefits of doing so were that it provided more safeguards and protection and required the Respondent to maintain contact with the NCAS, part of the NHS's Litigation Authority which oversaw the use of such procedures whenever that type of investigation took place. As Mrs Sleight pointed out, however, because the Policy required a number of different people and decision-makers to have been involved at certain stages, investigations tended to take longer. By way of example, it stipulated that there should have been three meetings with the person under investigation (part of the Policy not within R1); an initial outline meeting, one at which his primary account was taken before the other witnesses were interviewed and, finally, one at which all of the evidence which was gathered was then put to him.

4.30 Mr Day started by interviewing Ms Holly in December [228]. An attempt was made to see the Claimant in December too for an initial meeting to explain the "*process and next steps*" only [619], but he chose to ask for it to take place in January instead [620-1]. There were also problems

caused by the availability of his BMA representative, Ms Harding, according to Mrs Sleight and the Christmas period intervened.

4.31 Mr Day first met with the Claimant on 10 January 2017 [234-242]. Although the intention was simply to have set out the framework for the investigation, the Claimant came armed to talk about the cases in detail and he did so. He was supported by his BMA representative, Ms Harding.

4.32 In relation to the first allegation, he denied that he had ever treated a *Mr* B. It subsequently transpired that the patient was female, a *Mrs* B [249]. In respect of the second allegation, he relied upon the Respondent's Cataract Policy which indicated that, where visual acuity was better than 6/12, exceptional funding would have been required in order for an operation to have been undertaken on the NHS. He therefore asserted that he had correctly advised the patient, although he denied having initiated any conversation about private treatment. In respect of the third allegation, he denied that he had given the advice.

4.33 Finally, he complained that the fourth allegation had been raised at all; it had previously been dealt with, was closed and was old. The Respondent alleged that it had been made clear to the Claimant that it was not pursued *as* an allegation at that first meeting but had been included by way of background information only (paragraph 12 of Mr Day's statement). The notes of the first interview, however, appeared to suggest that the Claimant provided a detailed account in respect of the fourth allegation [239].

4.34 Mrs Sleight indicated that they had already spoken to Mr Markham, the previous Clinical Director of the BEH. She also stated that Mr Haynes and Ms Bailey would have been approached for their input. Ms Harding did not raise any objection but the Claimant objected to the possibility of them being used as 'judges' [240-1]. Ms Harding did raise the possibility of the instruction of an independent person for a professional opinion and Mr Markham's name was mentioned again [241]. Mr Day subsequently attempted to make contact with him [622] but ultimately concluded with Mrs Sleight that, with Ms Bailey, Mr Haynes and the expert who was subsequently instructed from another trust, they had not needed to go back to him.

4.35 Mr Day interviewed Mr Spry on 26 January 2017 [248]. On 3 February 2017, he met with Ms Bailey and Mr Haynes together who provided their professional and clinical opinions in respect of the allegations [257-9]. He had previously seen them in January at the very start of his investigation when he had asked some basic questions about the processes and terminologies involved.

4.36 The second meeting with the Claimant took place on 7 February 2017 [263-4]. He gave a much more detailed account, particularly regarding his treatment of Mr S.

4.37 Mr Day spoke to Mrs B, Mr S and Ms H over the telephone on 7 and 10 February ([262], [307-8] and [305-6]). He did not meet any of them face-to-face nor did they provide written accounts of the events. He had not

contacted them before because he had wanted to be sure that the correct patients had been identified. In Mrs B's case, that had not been clear until late January. He also needed to gain permission from each Optometrist in order to contact them and he then sent each letters to explain the call and to set it up.

4.38 The Claimant raised his concerns about the length of the investigation in an email to Mrs Sleight on 28 February [271]. He was informed that the delay was then being caused by the difficulty in obtaining an independent clinical opinion and support was offered [271].

4.39 As previously stated, the Respondent did also obtain an opinion from an independent Opthamologist. The decision to obtain it was taken in early February and the Medical Director, Mr O'Kelly, was approached for that purpose. Approval was granted in late February and a suitable expert then had to be identified. Dr Luker emailed her opposite number at a local trust in late February [274], a request that she had to chase in March [273]. Mr Hakin, who was based in Taunton, was identified that day [273] and the Claimant was notified [280]. There were then difficulties in getting the patients' notes to him [280-299] and they ultimately had to be couriered in April [297].

4.40 Mr Hakin expressed his views on 25 April 2017 [283-4]. The Respondent did not consider the evidence to have been particularly satisfactory and Mr Day raised questions of him the same day. In Mr Hakin's follow up letter of 2 May, however, he said that he could not "*see that there is any case to answer in any of these cases*" [295].

4.41 Having considered both parties' positions in relation to Mr Hakin's evidence, whilst it was difficult to ignore the superficial strength of the opinion expressed on 2 May, there were obvious flaws in the views which he expressed;

(i) Mrs B; Mr Hakin had initially said that the patient had not wanted to "*pursue the contact lens option*" in respect of her right eye, yet there was nothing within the medical records which supported that. When Mr Day had asked him for the source of that information, he simply repeated it on 2 May [295]. Further, on one of the crucial issues, he stated that it was "*not entirely clear whether surgery to the right eye would have been appropriate on the NHS*". As was made clear in respect of the case concerning Mr S, Mr Hakin's Trust's Cataract Policy which the local CCG in Taunton had applied, was different from the Respondent's. A key element of the allegation against the Claimant was that the further operation that Mrs B had required *would* have been covered by its policy. Mr Hakin never grappled with that point. A further element concerned whether Mrs B's informed consent had been taken prior to her left eye surgery including, in particular, the possible consequential surgery that may have been necessary upon her right eye. Again, that issue appeared to have been sidestepped as '*irrelevant*' [295];

(ii) Mr S; Mr Hakin's view here was fundamentally flawed as a result of the difference between the two Trusts' Cataract Policies. The

Respondent's covered the use of Toric lenses, which were needed in Mr S's case because of astigmatisms which the Claimant had accepted, but Mr Hakin's views were expressed from an entirely different standpoint. The consequence was that he considered that the care that the patient needed could only have been obtained via a request for exceptional funding on the NHS or privately. He was asked to address that point on 2 May and simply restated his earlier opinion without reference to the Respondent's particular Policy [295];

(iii) Ms H; here, the only real question was whether or not there ought to have been any discussion about private treatment for a long-standing problem when the patient had attended the NHS as a result of a different, acute issue. Mr Hakin's view did not address that question head on and, although he suggested that the procedure that *was* recommended would have reduced the patient's risk of glaucoma (a condition caused by intraocular pressure), even the Claimant accepted that that risk was minimal following an earlier laser peripheral iridotomy, a procedure performed to relieve intraocular pressure [284].

4.42 A further meeting was then required with the Claimant but he was on leave at the beginning of April and then undertook Jury Service over two weeks in the middle part of that month. It was hoped that they would meet on 26 April [285], but the meeting was postponed because the investigators had not heard back from Mr Hakin in respect of the questions which they had raised (paragraphs 18 and 19 of Mrs Sleight's witness statement).

4.43 The meeting with the Claimant eventually took place on 9 May 2017, at which he provided yet further detail of his treatment and interactions with the patients [300-4]. The tape from that meeting then went into the HR typing pool but was delayed. Mrs Sleight had to ask for an agency typist to type them up and the notes were not produced for a month. Mr Day accepted in evidence that that delay was "*frustrating for everyone*".

4.44 Mr Day then completed his investigation report on 13 June which contained a detailed consideration of each allegation and the evidence which had been gathered in respect of them [313-330].

4.45 The Claimant was then asked to and did provide a detailed response to the investigation report on 29 June [333-6].

4.46 In July, the Dr Luker, the Case Manager, then met with Mr Day and others to consider his report and the Claimant's response to it. The Claimant was then invited to a meeting on 24 July at which the outcome of the investigation was to have been shared with him [344]. The delay, she said, was caused by the inability to co-ordinate dairies. They were all busy and the holiday period had started.

4.47 At the meeting, the Claimant was informed that the case was going forward to a disciplinary hearing [347-370]. He raised issues relating to his restricted work and stress. He wanted to reduce his exposure to A&E work which Dr Luker was prepared to consider [348 & 361]. She did not,

however, consider that any reduction should have enabled him to increase his private work, which she made clear to him (paragraph 42 of Dr Luker's statement and [355-6]). Another OH referral was offered but was not taken up by the Claimant [375-6].

Hearing

4.48 On 1 August 2017, the Claimant was invited to a hearing to face the same four allegations which she had been informed about on 5 December [372-4].

4.49 It was the Respondent's case that the hearing was to have been conducted under the Trust's Disciplinary Policy [387-8], but the invitation letter was somewhat ambiguous as to whether the process was then continuing under the Managing Capability Concerns of Medical and Dental Staff Policy [373]; whilst the hearing was going to have been 'in line' with the former, the sanctions of the latter were to have been available to the panel. A subsequent email stressed that the hearing was to have been held under the Disciplinary Policy [387] and the matter did not appear to have been issue at the hearing itself when that was clarified [442].

4.50 Dr Luker clarified the position when she gave evidence; she said that the hearing was conducted under the Disciplinary Policy but that the panel was constituted in line with the Capability Policy; that was what the Claimant had been told at their meeting in July [349 & 359].

4.51 Between 1 August and early October, the Respondent struggled to convene a panel. It was the summer and external professionals were required. A hearing was to have taken place in September, but Mr Walker, a panel member and Medical Director from the Taunton and Somerset NHS Foundation Trust, was unavailable.

4.52 On 3 October, the Claimant was invited to the hearing on the 31st of that month [382-4]. He was invited to call any witnesses or produce further documentation if he wished.

4.53 Professor Callaway, a Radiologist and Interim Medical Director, had been appointed to chair the hearing. On 17 October, the Claimant wrote to 'strenuously dispute' the suggestion that the panel was not going to have included an ophthalmologist [389-391]. Professor Callaway responded, stating that he considered that its constitution was satisfactory "*given the major issue is concerning professional conduct*". If an issue arose which required the panel to understand technical issues regarding ophthalmic surgery, an expert might have been consulted for further clarification [394].

4.54 Prior to the hearing, the Claimant produced a lengthy and detailed statement of 19 pages on 26 October [409-427]. Although it contained a detailed analysis of the allegations against him, it did not include one allegation which was made in his witness statement for the first time; that a potential witness, Mr Markham, was warned off attending the hearing on his behalf by Ms Bailey and Mr Haynes just days before it was to have commenced (paragraph 58 of his statement). The allegation was not raised by him or his BMA representative at the hearing itself, nor in the Claim Form. It was cast into further doubt by the evidence which both Mr

Haynes and Ms Bailey gave which I accepted; Mr Markham came to see Mr Haynes about the case and said that he '*had advised Rafik to put his hands up*', indicating that he thought that the Claimant faced a strong case. Whilst Mr Haynes expressed his own views to Mr Markham, he did not dissuade him from attending. That may have been, he said, a decision which Mr Markham had made for himself. Similarly, Ms Bailey said that Mr Markham had expressed the view to her that the Claimant's case was '*a shame*'. He further said; '*if only he* [the Claimant] *had reflected on his behaviour'*.

4.55 In addition to Professor Callaway and Mr Walker, the Respondent's Deputy Director of People, Mr Nestor, was present on the panel. Dr Luker attended and presented the case. The Claimant was supported by his BMA representative, Ms Harding [441-498]. Dr Spry, Mr Fernandes, Mr Johnson, Mr Haynes, Mrs Bailey and Mr Day all gave evidence in person. The Claimant did not ask any witnesses of his own to attend.

4.56 At the start of the hearing, Dr Luker made it clear again that the fourth allegation had been raised as background and had not been part of the investigation [442-3]. She then called each witness to give evidence and the Claimant cross-examined them [443-488]. Ms Harding asked very few questions herself. The Claimant then gave a lengthy and detailed account of his treatment and conversations with each patient [448-494]. Dr Luker and Ms Harding summed up their cases and the panel adjourned to consider its decision.

4.57 The panel then informed the Claimant of its decision; he was found guilty of the three allegations. The panel considered that a pattern of conduct had been demonstrated and that he had failed to take on board issues relating to the promotion of his private practice, which had impacted upon the patients' rights of access to NHS treatment and the reputation of the BEH. Professor Callaway indicated that the fourth allegation had not been considered even as background (paragraph 7 of his statement). The Claimant was issued with a first written warning which was to have remained on his record for one year. Neither he nor his representative asked for an explanation of the decision or its basis.

4.58 Professor Callaway also identified areas of potential concern in relation to the Claimant's decision-making, record-keeping and the documentation of the risks and benefits associated with procedures. He said that he wanted to work with the Claimant to support him going forward and, although such a supportive plan would normally have been put in place by Dr Luker, he offered to meet with the Claimant himself to do so in a week, after a period of leave that he had booked. The Claimant accepted that offer. In the meantime, the restrictions on his practice remained in place. The Claimant appeared accepting of the approach [497].

4.59 Professor Callaway's outcome letter was dated 2 November 2017 [501-4]. He concluded that the Claimant had been in breach of Consultant's Terms and Conditions, paragraphs 20-23 and the GMC Good Medical Practice Guidance, paragraphs 77-80, although it was accepted that paragraph 80 had been included by mistake. He was provided with a right of appeal, which he did not exercise. Rather confusingly, the outcome letter

confirmed that the hearing had been conducted under the Respondent's Capability Policy in apparent contradiction of earlier statements.

4.60 The Claimant complained that Professor Callaway did not make detailed findings in relation to each allegation and/or deal with the arguments set out in the 19 page statement which he had prepared before hearing. He therefore alleged that Dr Callaway had either not understood the allegations or had considered that the Claimant had done nothing wrong, but had been unable to find in his favour.

4.61 The Claimant considered that the letter of 2 November was the final straw and he resigned on 7 November in an email which his solicitor helped him to write in which he complained, in particular, that an informal capability process was being invoked [505].

4.62 It was the Claimant's case that '*the intention behind the proceedings was to engineer his dismissal*' (paragraph 31 of the Claim Form). He asserted that the Respondent had designed the whole process in order to force his resignation or to have dismissed him. This, he said, was because of Ms Bailey's resentment of him and his work (paragraph 32 of the Claim Form [31]). He accepted that Ms Bailey was a consultant with a national reputation and standing. He was not aware of the extent to which she undertook private work or whether it might have been in potential competition with his own.

4.63 Ms Bailey vehemently denied those allegations in her witness statement (paragraphs 6 and 7); her private practice did not overlap with the Claimant's and the Trust's requirement for his services made such an accusation difficult to accept.

4.64 Ultimately, she was not cross-examined on that part of her evidence at all, despite me asking Miss Clarke whether that had been an oversight or a deliberate decision and having given her the opportunity to do so. There was no reasonable evidence from which it was appropriate to have concluded that she had borne the resentment towards the Claimant which he alleged. Further, there was no evidence from which it was appropriate to conclude that pressure had been brought to bear on Professor Callaway and his panel by Ms Bailey.

4.65 At the conclusion of the process, the Respondent reimbursed Mrs B for the cost of the private treatment that she had incurred.

5. Conclusions

Constructive unfair dismissal; legal principles

5.1 The implied term of trust and confidence was breached if an employer participated in conduct which was calculated or likely to have caused serious damage to, or destroyed, their relationship (what has been referred to as the 'unvarnished *Malik* test' from the case of *BCCI-v-Malik* [1998] I AC 20). It was not breached, however, if an employer simply behaved unreasonably, although such conduct could point to a breach evidentially. The danger of equating a breach of the implied term with the issue of reasonableness or the 'range or reasonable responses' test was

highlighted in the case of *Bournemouth University-v-Buckland* [2010] ICR 908, CA. Breaches ought to have been serious. Parties were expected to withstand 'lesser blows' than those anticipated in *Malik* (*Croft-v-Consignia* [2002] IRLR 851). In *Tullett Prebon-v-BGC* [2011] EWCA Civ 131, the Court of Appeal suggested that a tribunal should have considered whether, looked at in the light of all of the circumstances objectively, the party's conduct indicated an intention to have refused further performance of the contract (paragraph 27, per Kay LJ), although intention was not an essential ingredient; an objective analysis of the likely effect was required (*Leeds Dental Team Ltd-v-Rose* [2014] IRLR 8).

5.2 It was also important to remember that there was a second consideration; there needed to have been no reasonable or proper cause for the conduct to have been regarded as a fundamental breach of the implied term.

5.3 The operation of a disciplinary procedure in an oppressive manner may have been regarded as a breach of the implied term, as in *Alexander Russell plc-v-Holness* UKEAT/677/93.

5.4 The Claimant considered that the last act (the hearing outcome letter of 2 November 2017) was the last straw in a series of breaches, as in *Lewis-v-Motorworld* [1986] ICR 157. In such circumstances, the last straw itself needed to have contributed to the breach of trust and confidence in at least some material way. It needed to have been something more than trivial (*Omilaju-v-Waltham Forrest LBC* [2004] EWCA Civ 1493). In *Kaur-v-Leeds Teaching Hospitals NHS Trust* [2018] EWCA Civ 978, the Court of Appeal reviewed cases on the 'last straw' doctrine and Underhill LJ formulated the following approach in relation to the *Malik* test;

> *"In the normal case where an employee claims to have been constructively dismissed it is sufficient for a tribunal to ask itself the following questions;*
> *(1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?*
> *(2) Has he or she affirmed the contract since that act?*
> *(3) If not, was that act (or omission) by itself a repudiatory breach of contract?*
> *(4) If not, was it nevertheless a part (applying the approach explained in Omilaju) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the Malik term?....*
> *(5) Did the employee resign in response (or partly in response) to that breach?"*

5.5 The breach relied upon does not need to have been the only cause of the employee's resignation in order for a claim to have succeeded; *Wright-v-North Ayrshire Council [2013] UKEAT/0017/13/2706.* It was sufficient for it to have been *an* effective cause of his resignation.

Constructive unfair dismissal; conclusions

5.6 Paragraph 34 of the Claim Form contained the allegations that were relied upon which were considered in turn;

5.6.1 Inordinate delay in the investigation;

It was accepted that the investigation "*process took longer than the Respondent had anticipated*" (paragraph 20 of the Response). The Capability Policy stated that it should ordinarily have been completed within 28 days (paragraph 6.1 [110]), although it was acknowledged that, "*Due to clinical commitments and leave this timescale is not always possible.*" Clearly, at 6 months between the date of the initial letter of 5 December 2016 and the date of Mr Day's report in June, there was a significant delay, although the Claimant received a number of written updates about it ([243], [277], [286] and [309] for example).

It was clear from the evidence that the delay arose for a number of reasons. Between December and the Claimant's first interview on 10 January 2017, there were problems caused by his BMA representative's availability and Christmas. The Claimant had also asked for the meeting to have been held in January.

Most of the interview work was then undertaken in January and February 2017, those with the patients having been delayed as a result of their Optometrists' permissions having been sought and the telephone calls having to be set up.

The Respondent claimed that the engagement of the independent ophthalmologist, Mr Hakin, had proved difficult. Mr O'Kelly's approval had to be chased in February and early March and an expert was then identified a few weeks later. There were then problems getting the notes to Mr Hakin and he did not provide his opinion until April [283-4]. Further delays were then caused as a result of the Claimant's leave and Jury Service and a scheduled meeting with him had to be postponed because the Respondent was still waiting on answers to questions which had been raised of Mr Hakin, which were not received until 2 May [295].

The Claimant was then re-interviewed on 9 May. The notes of that meeting were not typed up for a month and Mr Day could not therefore produce his report until June. That delay was exasperating and was caused by a simple lack of administrative resource within the BEH.

After the investigation had concluded, the delay in establishing and convening a panel hearing between August and October was due to the fact that it was the summer and a number of professionals were involved, including an external panel member, Mr Walker whose diary had prevented an earlier hearing.

Looked at in totality, the whole process appeared to have moved slowly. The reality, however, was that a number of factors caused individual sticking points; the number of allegations emanating from separate patients and separate optometrists, the availability of the Claimant's representative, Christmas, leave, Jury Service, the diaries and clinical commitments of those involved and a lack

of typing resource. The agreed use of the Capability Policy, rather than the Disciplinary Policy, also slowed the process down.

The Claimant relied upon the case of *Hussain-v-Surrey and Sussex Healthcare NHS Trust* [2011] EWHC 1670 in which a delay of 6 months was said to have been '*unthinkable'*. The difference here, however, was that the Claimant was not excluded from work as Mrs Hussain had been and confidentiality around the allegations was maintained whilst he continued at work. The issue of delay had arisen in very different circumstances in *Hussain* since the case concerned an application for injunctive relief.

Overall, the delay could probably have been regarded as unreasonable, but there had been reasonable or proper causes for it, many of which had been out of the Respondent's control (those associated with the Claimant's representative, his own leave Jury Service and the external expert and panel member). The Respondent had not simply rested on its oars and the Claimant was kept informed. It could not be said that the delay was of such a character as to have amounted to a breach of the implied term of trust and confidence. The process and/or Policy had not been used oppressively as in *Alexander Russell* (see paragraph 5.3 above). It could not be said that, looked at objectively, the conduct was such as to have been likely to have destroyed the relationship between the parties in *Malik* terms.

The Claimant's further argument's in relation to the express incorporation of the Policies have been dealt with below.

5.6.2 Ignoring recommendations from OH; and

5.6.3 Indicating that adjustments would only be made if the Claimant's timetable to allow him to prepare his response to the investigation if he dropped his weekly private session;

The Claimant's case had been that OH advice had been ignored in a manner which prejudiced his defence to the allegations and/or which was designed to inhibit his private practice (paragraph 8 of the Claim Form).

It was clear that Ms Holly had written to the Claimant after the OH Report had been received and had offered the flexibility which had been suggested but only if his NHS work had not suffered at the expense of his private practice [227]. The Claimant did not reduce his private Tuesday sessions and no adjustment to his timetable was therefore made. In my judgment, it was not unreasonable for the Respondent to have offered to have adjusted his timetable on that basis. The Claimant was contracted as the Lead Consultant in A&E on a full time basis and his primary duty was to the NHS.

Further, and in any event, he had sufficient time to prepare for the investigatory interviews and the panel hearing and participated fully and in detail. He had come armed to deal with each allegation

at the first investigatory meeting in January, which had been set up as an outline meeting only, and had sufficient time in advance of the panel hearing to put together an extremely detailed documentary case [409-427]. He also cross-examined the witnesses thoroughly and at length at the hearing. There was no merit in that complaint.

5.6.4 Failure to appoint investigating and disciplining officers who were adequately qualified to understand the allegations against the Claimant regarding incorrect treatment advice, or at the very least to ensure that at least one member of the disciplinary panel was an Ophthalmologist;

The Claimant complained that Mr Day's appointment as the investigator breached the Respondent's Policy for Managing Capability Concerns, paragraph 4.3, which suggested that he ought to have been "*appropriately experienced*" [108]. He also alleged that that the appointment of Professor Callaway to chair the Disciplinary Hearing was in breach of the Policy since it provided that the Respondent would have taken "*reasonable measures to ensure that the membership of the panel is acceptable to the practitioner*" [114]. He contended that the Respondent's failure to acknowledge his concern on 17 October demonstrated that it had made a predetermined decision and was going to uphold the allegations because the involvement of an ophthalmologist would have led to his exoneration (paragraph 21 of the Claim Form). It was also alleged that the breach of the Policy was a breach of an express term or at least capable of amounting to a breach of the implied term; *Blackburn-v-Aldi Stores* [2013] IRLR 846.

As to the express incorporation of the Policy, the Claimant relied upon paragraph 21 (a) of his Principal Terms and Conditions of Employment [90]. It was alleged that the same term had been considered in *Hussain* to have brought about the express incorporation the Trust's policies in that case (see the Judgment of Smith J at paragraph 166). Mr Panesar could see the strength of that argument and, in my judgment, he was right to have done so. For the same reasons as in paragraph 166 of *Hussain*, the Respondent's policies were expressly incorporated here.

In relation to the choice of Mr Day as the investigating officer, Miss Clarke did not cross-examine Dr Luker on her appointment of him. The Respondent argued that he had been chosen because he had appropriate experience of dealing with the type of matters which the Claimant faced. The Policy did not stipulate that the investigator had to be the same discipline as the person under investigation [108-110]. Mr Panesar's interpretation of it was correct; it simply required the appointment of an investigator of appropriate experience (paragraph 4.3 [108]).

In any event, since the primary allegations were in relation to the Claimant's alleged subversion of NHS treatment options against

those which he could have offered in private practice, no particular ophthalmic expertise was required. Mr Day, as a Consultant Orthodontist, undertook private work too.

Bearing in mind the nature of the allegations and the wording of the Policy, it was not unreasonable for Mr Day to have been appointed. He impressed me as someone who fully understood his brief and the nature of the allegations. The Policy did say, however, that the investigator could have considered the instruction of an independent practitioner in cases which involved complex clinical issues, which is what Mr Day did.

With regards to the choice of the panel, neither the Respondent's Capability Policy (paragraph 9.4 [114]), nor the Department of Health's Policy on the Maintaining High Professional Standards in the Modern NHS, upon which the Trust's Policy was based (paragraphs 18 to 20 [584]), specified that any particular discipline ought to have been represented on the panel.

Both Policies did, however, say that, if a practitioner raised an objection to the choice of a panel member within 5 days of notification, the Respondent should "*take reasonable measures to ensure that the membership of the panel is acceptable to the practitioner*" [114]. The letter of 24 October did not allay the Claimant's concerns about the fact that the panel lacked an ophthalmologist, but Professor Callaway did at least indicate that one could have been co-opted if the panel felt that it was required during the hearing [394]. The panel heard from the Claimant, Mr Haynes and Ms Bailey who were all experienced and senior ophthalmologists. It also heard from three Optometrists and Mr Hakin's evidence was considered. Professor Callaway did take reasonable steps to review the panel's composition, but ultimately concluded that there was sufficient expertise and independence for it to have proceeded as it did. In particular, he was given no reason to believe that the views expressed by Ms Bailey and/or Mr Haynes would not have been independent. Ms Bailey said in evidence that she would have expressed exactly the same opinion in a case involving an external or internal consultant. Her evidence was compelling and clear.

But the Claimant's arguments went further. Miss Clarke argued that the Capability Policy had expressly drawn on the Department of Health's Policy [107], which was also expressly incorporated into the Claimant's contract [90]. She was right. That latter Policy, she argued, was more prescriptive in relation to the composition of a panel [584]; it was required "*to be advised by*" a senior member of staff from HR (in this case, Mr Nestor) and a senior clinician from another Trust (Mr Hakin). In my judgment, as a result of their involvement and the evidence of the Claimant himself, Ms Bailey, Mr Haynes and the three Optometrists, the panel was "*aware of the typical standard required of the grade of doctor in question*" [584]. It was properly '*advised*' by the appropriate personnel.

Neither the wording nor the spirit of the Respondent's Capability Policy was contravened in my judgment.

5.6.5 Ignoring the opinion of the independent Ophthalmologist;

The Claimant alleged that the Respondent's decision to ignore the Opthamologist's advice had been illogical and perverse. The Respondent, on the other hand, stated that it had not ignored the advice but simply considered that it had failed to deal with the key issues in some respects and, in others, had failed to reflect local policies in terms of what treatment was available within the Trust compared with that which was available his own CCG's Policy (see paragraph 4.41 above).

The opinion was not ignored. It was considered to hold little validity for reasons which were rational and well explained. The Respondent's rejection of the thrust of Mr Hakin said was not perverse because it ran against the Trust's Cataract Policy and the views expressed by many others.

5.6.6 Placing the Claimant on A&E duties for over a year;

This allegation was closely linked to that which was dealt with within paragraph 5.6.1 above.

The Respondent's Capability Policy specifically allowed for the possibility of an employee being restricted in his work "*in serious cases of unsatisfactory performance*" (paragraph 6.3 [111]).

As the Claimant was the Lead consultant in A&E, he was expected to have spent a large part of his working time in that department (his Job Description suggested up to 10 sessions per week [71] and his work plan had shown that he had undertaken four sessions per week for at least a year in 2013/4 [522]). Five or six sessions were not, therefore, excessive. He was allowed to retain his operating list and it was noteworthy that his trainee Fellow, Mr Ahmad, undertook up to 10 sessions per week during the same period [521]. The Claimant alleged that it was not usual for a doctor to work for more than 2-4 sessions per week in A&E (paragraph 33 of his witness statement). That was clearly not the case for Mr Ahmad.

It was not clear whether the Claimant alleged that it was the additional work in A&E which had caused him stress. That did not appear to have been his complaint at the outset. He never raised such a complaint with OH or when a meeting had been convened in March 2017 to discuss falling productivity in A&E. He blamed the stress on the investigation, not his work within the Department (paragraph 39 of Mr Haynes's statement and [278-9]). He did, however, raise stress in a different context in the July meeting [348], but what then could the Respondent reasonably have done? The restrictions in his clinics were not contended to have been unreasonable in light of the nature of the allegations and, given the nature of his Job Description, the need for practitioners to have

been working in A&E and the need to have maintained confidentiality around the investigation, the Respondent had a reasonable and proper cause for imposing the solution that applied here. Importantly, the Claimant avoided a suspension or exclusion from practice, which had been a possibility.

5.6.7 Failure to properly interview the patients and/or to ascertain their position as to the contents of the discussion/s they had with the Claimant regarding treatment options;

Mr Day undertook telephone interviews with each of the patients in February with Mrs Sleight present. They were all sent a note of their interviews in May, which was acknowledged to have been an oversight, but none of them retracted any comments that had been recorded, albeit that Mr S could not remember what had been discussed during the earlier call.

Whilst that was not a perfect process, it seemed to have been a sensible, time efficient and proportionate way to have gathered the evidence from the patients themselves. Both Mr Day and Mrs Sleight were witness to what they had been said in February.

5.6.8 Despite the fact that both Mrs B and Mr S confirmed that they were not raising a complaint about the Claimant, and that Ms H did not seek to pursue any concerns, the Respondent nonetheless continued with the investigation;

The Respondent considered that it ought to have addressed an unacceptable pattern of behaviour if it had evidence of such. That evidence had come, primarily, from the three Optometrists. Whether individual patients had wished to pursue complaints personally was not determinative, particularly given the fact that they would not ordinarily have been aware of their entitlement to NHS treatment under the Trust's policy [99].

Those views were not capricious or unreasonable in light of the Optometrists' evidence.

5.6.9 Taking into account an historic allegation, of which the Claimant had been fully exonerated;

The Respondent denied that the Claimant had been 'fully exonerated' in respect of the 2015 incident and the apology letter that had been written to Miss V's mother appeared to bear that out.

In any event, it was made clear to him that the allegation was not pursued *as* a separate allegation at the first meeting with Dr Luker in December 2016. Mr Day made the same point at his first meeting with him in January 2017. It was background evidence which was considered to have indicated a possible pattern of conduct, as set out in Mr Day's ultimate report (paragraph 4.4

[319]) and the position was reiterated at the start of the hearing by Dr Luker [442-3].

What seemed strange was that the allegation reappeared in the letter inviting him to the panel hearing as an allegation and then again in the outcome letter. The suggestion that it had been weighed as further evidence of wrongdoing in the balance against him was tempting.

The Respondent's case, however, was that the allegation was not relied upon as another incident of misconduct, but simply to highlight the fact that there had been occasions when he had been reminded of the boundaries between NHS and private work, both in respect of Miss V's complaint and the YAG capsule issue. It was worthy of note that, in the former case, the Claimant was recorded as having acknowledged receipt of the advice [178]. The outcome letter referred to those issues in precisely that way [504] and, in view of the repeated manner in which the allegation was caveated at meetings with the Claimant, he ought not have been in any doubt as to its limited relevance.

5.6.10 Failure to engage with the detailed explanations put forward by the Claimant in the statement he prepared for the disciplinary hearing; and

5.6.11 Failure to make any findings of fact as to the content of the discussion/s between the Claimant and the patients as regards their treatment options; and

5.6.12 Failure to make any findings as to why the advice given by the Claimant was considered to be incorrect; and

5.6.13 Failure to consider and explain whether or not the reason for any incorrect advice given was due to an error/difference in professional judgment as opposed to an attempt to bolster private practice; and

5.6.14 Failure to explain in any way how it was concluded that allegations 1 to 3 were substantiated; and

5.6.15 Failure to explain in any way how it was concluded that the Consultant Contract Terms & Conditions all the GMC Good Medical Practice Guidance were breached by the Claimant, the outcome letter simply saying '*you breached the following*' and listing various sections of the aforementioned policies without any commentary, findings or explanations being provided; and

5.6.16 Failing to explain to the Claimant what he had done wrong such that he would be in a position to know how his behaviour/advice would have to be adjusted/modified going forward;

These allegations were considered together because of the degree of overlap between them.

It was not helpful that the Respondent's outcome letter failed to deal with many of the detailed arguments which the Claimant had put forward [501-4]. Professor Callaway accepted in evidence that it had been "*sparse*" and a "*poor letter*". Did that mean that such

findings had not been made? Did that mean that there had been no reasonable or proper basis for the panel upholding the allegations?

In my judgment, it ought to have been clear to the Claimant what the nature of the allegations which were found against him had been. They had been set out in the letter of 5 December 2016 [216], the investigation report [313-327] and the invitation letter [372]. He had never said that he had not understood them at any of the investigatory meetings or the panel hearing and it would have been difficult for him to have engaged in such a detailed manner if he had not.

No questions were raised about the basis or reasons for the decision at the disciplinary hearing or following receipt of the outcome letter, either by the Claimant or his representative, and the assertion in his resignation letter that "*no attempt* [had] *been made to explain*…*what it is* [he had] *actually done wrong*" was disingenuous [507].

Whether here or under the 17th allegation below, it was necessary to address the Claimant's main concern in the case as a whole; that the allegations had been found against him. Whilst not explicitly identified within his 21 complaints, it was inherently part of his case that adverse findings had been made on the basis of what he considered to have been little or no evidence. Although it was not part of my determination to decide whether the Respondent's findings had been correct, it was necessary to review the nature of the allegations and the asserted reasonable and proper causes for the conclusions that were reached;

<u>Allegation 1 (Mrs B)</u>
Mrs B had been short sighted in both eyes. She had suffered a retinal detachment in her left eye which was corrected at the BEH (not by the Claimant). That operation resulted in the development of a cataract in that eye and the refractive properties of the lens were altered which caused a visual imbalance between the two eyes.

The Claimant then operated on the left eye in August 2016, also at the BEH; a new lens was inserted and the vision in that eye was restored to near normal. There was then a significant difference between the vision in her eyes; she had a measurement of 0 in her corrected left eye, whilst her right measured -5.

The Respondent's case was that further surgery ought to have been avoided in her right eye because it carried with it a significantly increased risk of retinal detachment. A number of options might have been explored, one of which could have been the use of a -5 lens in her left eye when her cataract was repaired. That would have balanced her eyes and obviated the need for any surgery in her right eye.

Insufficient time was then given after the cataract operation in her left eye before it was determined that she may not have coped with the imbalance by using contact lenses or glasses. Instead, the Claimant operated privately on her right eye within a few weeks.

Before that procedure had been undertaken, the Claimant stated that a number of different options had been discussed with Mrs B in relation to the likely future imbalance between the vision in each eye. The notes included no reference to the risks and benefits of her surgery having been discussed and, more importantly, the specific, significant risk of retinal detachment in her right eye was not recorded as having been discussed [526] (the broad reference 'risks and benefits' in the GP letter was a self-generating entry that was produced by a consultant ticking a box when the letter was generated [524]).

After the Claimant's private surgery, the patient went on to develop retinal detachment in her right eye. The cost of that procedure was ultimately reimbursed by the Respondent.

The patient had specifically alleged that she had been told that any corrective surgery on her right eye would not have been covered by the NHS [262], notes of the conversation which she confirmed to have been correct [310-1]. Her evidence was also confirmed in a subsequent email in which she expressed concern about having been potentially misinformed [265]. The Respondent's Policy, however, dealt with her position within paragraph 3 (d); a patient with "*significant optical imbalance (anisometropia or anisekonia) following cataract surgery on the first eye*" would have been entitled to further surgery on the NHS [99]. The Claimant had suggested that the imbalance was asymptomatic, but the evidence suggested otherwise (i.e. the patient's report that she had been off work because of it [262]). The Policy dealt with cases of simple optical imbalance in any event which the patient indisputably had on the basis of her prescription irrespective of whether she had symptoms as well.

<u>Allegation 2 (Mr S)</u>

Mr S was an architect whose rapidly developing left cataract was said to have been "*severely affecting* [his] *balance and* [the] *quality of* [his] *life at work*" [529A].

The Claimant accepted that he had not read the referral letter in full and had assumed that, at the age of 63, the patient had retired. The Claimant identified that cataract operations were required and that he would need special (Toric) lenses to correct his astigmatism. The patient was advised that he would have needed exceptional funding to have had such procedures undertaken and he alleged that the Claimant stated that he had never known such an application to have been successful in his sort of case. The conversation then turned towards private treatment and the Claimant then produced his business card [307].

Again, the Respondent alleged that the procedure that was required in Mr S' case *was* covered by its Cataract Policy due to its effect upon his employment (paragraph 3 (b) [99]) and, although funding could never have been guaranteed, the Claimant effectively closed the door to that possibility. Further, unlike other CCGs, the Respondent's Policy covered the use of Toric lenses.

Finally, it was alleged that the patient's notes indicated that he was having trouble with glare (hence the reference to his problems with computer work [531]), which was a well-known problem which would also have potentially qualified him under paragraph 3 (a) [99].

It was telling that, during cross-examination, the Claimant admitted that he would have 'listed him' (i.e. for a NHS procedure) if he had known about his employment. Instead, he was discharged, the Claimant having accepted that he had nevertheless needed cataract operations [530].

Allegation 3 (Ms H)

This patient had attended A&E on 12 March 2016 with a headache following the sudden onset of visual field loss in her left eye. The notes showed that she had good vision with glasses and that she had previously undergone bilateral peripheral iridotomies ('PIs'), minor laser procedures which enabled intra ocular fluid to drain properly [535]. One of the potential problems caused by a large lens in later life is the possibility of the iris's drainage membrane (the 'angle') becoming closed. Intraocular pressure can lead to glaucoma and optic nerve damage. Having had bilateral PIs, however, the Claimant's eye pressure was seen to have been normal when it was measured with a ton-o pen on 12 March (readings of '18/17' [536]) and again by the Claimant using applination tonometry (a reading of '17' [538]). Her optic nerve was seen to have been normal ('N' [539]) and she was not under review by the glaucoma team.

Having excluded the possibility of a stroke or angle closure (iris membrane blockage), the patient's problem was diagnosed as having been caused by a migraine. Nevertheless, the Claimant recommended lens replacement "*as she was really very longsighted and was surprised that no one picked this up*" and she was told that the procedure would have cured her glaucoma and cataracts, which led to a discussion about the potential for him to have provided that service privately [305-6].

The Respondent's concern here was that, in the absence of any evidence of glaucoma (her eye pressure and optic nerve were normal), the Claimant had effectively offered her treatment for a problem, angle closure, which had been discounted. The fact that she was poor sighted had not been the reason for her attendance at A&E and she was recorded as having been "*very happy in spectacles*" [207]. It was theoretically possible that she might have gone on to develop increased intraocular pressure in later life, but even the Claimant accepted in cross-examination that there was a

minimal risk (5% or less) of such an occurrence in a patient who had already undergone bilateral PIs, as she had.

Mr Haynes' views were much stronger; he considered that there was no literature which could be found which might have justified the procedure that was offered on the basis of a such a small glaucoma risk in a patient who had undergone PIs. Mr Hakin's views on that issue were simply wrong, he said [284].

Overall and taking the cases of the three patients together, the fact that three Optometrists had raised separate issues within a short period of time was considered to have been '*unusual*" (Professor Callaway's statement, paragraph 19). That evidence was echoed by Dr Luker who said in evidence that she considered it to have been so unusual that she was not able to recall any other occasion when it had occurred in respect of another clinician.

Based upon the matters set out above, there was a reasonable or proper cause for the Claimant to have been investigated and charged as he was. Further, the allegations were sufficiently clear so as to have been readily understood in order for a defence to have been prepared and proffered. As to the panel's decision, I need not have said whether I would have reached the same conclusion as the panel but what could be said, however, was that the evidence appeared strong. The Respondent could not have been criticised for having mounted an unnecessary process on the basis of little or no evidence. It was cogent and plausible and, to cite the test, reasonable and proper. The letter of outcome was insubstantial but was probably proportionate given the detailed nature of the allegations and the report and the fact that the Claimant had only received a first warning.

5.6.17 Imposing a first written warning when it was entirely inappropriate to do so;

At the start of the Claimant's witness statement, he acknowledged that the allegations were "*very serious*" and "*could have had a long-lasting impact on* [his] *career… as it* [called] *into question* [his] *professionalism and integrity*" (paragraph 2). He subsequently referred to the allegation as "*extremely serious*" (paragraph 55). During cross-examination, in relation to the allegation which concerned Mr S, he accepted that, if it had been found that he had effectively turned somebody away from the NHS, his actions would have been serious enough to have warranted a warning.

Professor Callaway stated that a warning was the *least* sanction available to the panel (paragraph 27 of his statement); it marked the seriousness of the conduct but provided the Claimant with an opportunity to change and to continue working. Dr Luker expressed similar views, but for different reasons (paragraph 18-19).

Having concluded that the allegations were made out, there was a reasonable and proper cause for the Respondent's choice of a first warning, it having found evidence in support of allegations which were considered to have been serious. It's assertion that the sanction was lenient was compelling. That said, it was not for me to determine what sanction ought to have been imposed. The only question was whether or not the sanction that *was* imposed had caused or contributed to a breach of the implied term of mutual trust and confidence. In my view, such an argument could not have been maintained.

5.6.18 Instigating capability procedures in November 2017, despite expressly stating previously that there were no concerns regarding capability;

During the course of the investigation, several concerns came to light regarding the Claimant's practice; he admitted to having not documented discussions about the risks associated with surgery with Mrs B [463-4], to having not documented negative findings associated with certain conditions [469-470] and to having not read Mr S's referral letter [492], the latter admission he repeated in cross-examination. The significance of the last matter was that he had not appreciated that Mr S's employment had been so severely affected, which may have brought paragraph 3 (b) of the Cataract Policy into play. He had assumed that Mr S had retired at the age of 63. He accepted that he did not find out whether the patient had been aware of the Policy.

The Claimant rejected the notion that Professor Callaway's offer of a supportive work plan had been moderate [497]. Given the nature of the concerns which had arisen, the discussion which had taken place at the end of the disciplinary hearing appeared to have been relatively soft and constructive. The Claimant did not complain about it at the time. Nothing formal was instigated. It was an informal process for which the Respondent had reasonable and proper cause [497-8].

5.6.19 Failing to allow the Claimant to return to his substantive role following the end of the proceedings, and continuation of his restricted duties;

The Claimant appeared to have accepted the rationale for the extension to the restrictions at the end of the hearing [497]. In the short term, it might have only been for another week until Professor Callaway had been able to meet him after his week's leave. Mr Nestor had made it clear that the position was to have been revisited once a supportive plan had been put in place with objectives [498].

The reason for those discussions was, of course, the Respondent's concerns about patient safety which had been revealed during the investigation and panel hearing. A further

short extension to the restrictions of the Claimant's practice was not capricious, illogical or unreasonable in the circumstances until the Respondent's concerns had been allayed.

5.6.20 Instigating an investigation and disciplinary procedure with the intention of either dismissing the Claimant or forcing his resignation;

The Claimant was of the belief that the entire procedure had been instigated for the purpose of dismissing him or forcing his resignation (see paragraph 58 of his witness statement). He was not, of course, dismissed. He only received a first warning.

His suggestion that Ms Bailey's resentment and jealously of his practice had led to the Respondent's approach was not demonstrated and lacked credibility.

5.6.21 Pre-determining the outcome of the investigation;

It was difficult to accept such an allegation, having heard from the Respondent's witnesses; Mr Day had not been under any pressure to reach a particular conclusion and the panel's decision was based upon the evidence of three patients, their Optometrists and other senior professionals. There was no guiding hand. Further, Professor Callaway certainly came across as a man who knew his own mind.

The allegation of pre-determination could not be accepted.

5.7 Although there were 21 separate allegations, it was obvious during the hearing that the real essence of the Claimant's case was that he had found been guilty of the misconduct alleged. It was not the Tribunal's task to take the decision which the panel took again but, judging by the nature of Miss Clarke's cross-examination, the Claimant appeared to believe that the hearing was a means to secure an acquittal.

5.8 His best point in that regard was the Respondent's treatment of the independent expert's opinion. The rejection of Mr Hakin's views was superficially surprising but, when the issues were properly understood and when it was remembered what evidence the other Optometrists and Ophthalmologists had fed into the case, the conclusion was rational, justifiable and cogent.

5.9 At the heart of the case from the Respondent's perspective, was the evidence of Ms Bailey and Mr Haynes. Ultimately, there was nothing which they were shown to have got wrong. Their clarity and independence of thought was impressive. The only surprise having been, perhaps, the leniency o the sanction.

5.10 In procedural terms, what happened here was definitely not perfect. A number of procedural issues had been raised with good justification, particularly relating to the delay and Professor Callaway's letter of outcome, but the Respondent had possessed reasonable and proper

cause for the decisions that it took in its pursuit of the allegations and, ultimately, its findings. Had the claim been brought following the Claimant's dismissal, rather than his resignation, it might have been possible for him to have proved its unfairness under s. 98 (4), but it was critical to remember that the test was here very different. The procedural breaches were not fundamental, either individually or when taken together.

5.11 Accordingly, either individually or cumulatively, it could not be said that the conduct complained of here was calculated or likely to have caused the relationship between the parties to have been destroyed or significantly damaged.

5.12 In terms of causation, the Respondent pointed to the Claimant's email of 19 September 2016 [200]. Serious doubts remained as to the precise reason for the Claimant's resignation, but they were not explored in detail in cross-examination and no other potential cause was demonstrated save the matters which concerned him.

5.13 Nevertheless, for the reasons set out above, the Claimant was not constructively dismissed.

5.14 Accordingly, no findings under ss. 122 (2) and/or 123 (6) were necessary. Had they been, it is entirely possible that they would have been made in these circumstances, despite the case of *Frith Accountants Ltd-v-Law* [2014] IRLR 510, which was a decision based upon very different facts.

Breach of contract relating to notice

5.15 The Respondent was not in fundamental breach of contract and the Claimant's claim of breach of contract relating to notice also failed and was dismissed.

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Employment Judge Livesey

Date: 10 December 2018