EMPLOYMENT TRIBUNALS

Claimant: Dr Corrado D'Arrigo

Respondent: Dorset County Hospital NHS Foundation Trust

Heard at: Southampton Employment Tribunal

On: 5, 8, 9, 10, 11, 15, 16, 17, 18, 22 and 23 January 2018

RJD: 25 - 26 January, 14 February and 9 March 2018

Before: **Employment Judge Craft**

Members: **Mr K Sleeth**
Mr N Knight

Representation

Claimant: Mr G Probert, Counsel

Respondent: Mr S Gorton, QC

UNANIMOUS RESERVED JUDGMENT

1. The Claimant's claim of automatic unfair dismissal contrary to s.103A Employment Rights Act 1996 fails and is dismissed.

2. The Claimant's claim of detriment for making protected disclosures contrary to ss.47B and 48 Employment Rights Act 1996 fails and is dismissed.

3. The Claimant was unfairly dismissed by the Respondent.

   The case will now be listed for a remedy hearing.

REASONS

The Claim, the Documents and the Issues

1. The Claimant who had been employed by the Respondent ("the Trust") as a Consultant Histopathologist was dismissed with effect from 27 January 2016. He claims automatic unfair dismissal because of making a protected disclosure / disclosures contrary to s.103A Employment Rights Act 1996 ("the

ERA"); detriment for making a protected disclosure / disclosures contrary to ss.47B and 48 of the Act; and unfair dismissal contrary to s.98 of the Act submitting that the Trust failed to follow a fair procedure and that its decision to dismiss him fell outside the band of reasonable responses in the circumstances of his case. The Trust denies these claiMs It states in its Grounds of Resistance that the Claimant's dismissal was not automatically unfair contrary to s.103A of the Act and that the Claimant's employment was terminated because of an irretrievable breakdown in the functioning of the Histopathology Team, specifically working relationships within that team and with the Trust's management. Those grounds also state that the Claimant's dismissal was not unfair pursuant to s.98 of the Act and that the Trust followed a fair procedure in dealing with the Claimant.

2. This case was heard over 11 days. It received evidence from the Claimant (**Exhibit C1**) and five witnesses on his behalf who all gave their evidence-in-chief by written statement as follows: Dr John Mikel, Consultant Histopathologist (retired) **(Exhibit C2)**; Dr Saleem Taibjee, Consultant Dermatologist & Dermatopathologist **(Exhibit C3)**; Dr Alina-Eleanor Chefani, Consultant Histopathologist **(Exhibit C4)**; Dr Teresa Thomas Consultant Histopathologist & Clinical Lead for the Histopathology Service **(Exhibit C5)**; Mr Alan David Williams, Medical Laboratory Assistant **(Exhibit C6)**.

3. The evidence received on behalf of the Trust was as follows: Mrs Julie Pearce, Chief Operating Officer **(Exhibit R6)**; Mrs Christine Blanchard, Medical Director, Salisbury District Hospital & External Panel Member **(Exhibit R7)**; Mr Richard Jones, External Independent HR Investigator **(Exhibit R8)**; Dr Paul Lear, Medical Director **(Exhibit R9)**; Ms Catherine Youers, Divisional Workforce Manager **(Exhibit R10)**; Mrs Patricia Miller, Chief Executive, former Director of Operations **(Exhibit R11)**.

4. The Tribunal was also referred to extensive documentation as follows:

   Exhibit R1: Agreed Bundle of Documents. This consisted of 193 documents and 904 pages to which, by agreement, a further six documents were added during the course of the hearing giving a total of 967 pages.

   Exhibit R2: Agreed Chronology

   Exhibit R3: Schedule of Protected Disclosures

   Exhibit R4: Schedule of Protected Disclosures not pursued at trial

   Exhibit R5: Agreed List of Issues

   Exhibit R12: Mr Gorton's closing submissions

   Exhibit R13: Trust's Chronology

   Exhibit C6: Mr Probert's Skeleton Argument

   The Tribunal was also provided with a cast list of individuals who would be

referred to in the course of the proceedings.

5. The Tribunal was provided with the following authorities:

    Perkin v St George's Healthcare NHS Trust [2005] EWCA Civ 1174

    Ezsias v North Glamorgan NHS Trust [2011] IRLR 550

    Royal Mail Ltd v Kamaljeet Jhuti [2017] EWCA Civ 1632

6. The Claimant's Schedule of Protected Disclosures set out seven alleged disclosures dating from 10 October 2013 to 28 July 2015. At the commencement of closing submissions the Tribunal was informed that the Trust accepted that the first five alleged disclosures in the Claimant's Schedule had been protected disclosures of information in respect of patient safety within the terms of the Act and that the Trust was not raising any questions as to the integrity of the Claimant in pursuing such matters at the relevant time. It was also confirmed that the Claimant had abandoned his claim in respect of the seventh disclosure in that Schedule and was no longer seeking to argue that this was a protected disclosure within the terms of the Act. This left the alleged sixth protected disclosure in the Schedule for adjudication by the Tribunal. This concerns a complaint which the Claimant made to the General Medical Council ("GMC") in February 2015.

7. The Tribunal summarises the list of issues agreed by the parties to take account of the Trust's admissions and the Claimant's withdrawal referred to above, as follows:

    (a) Did the Claimant make the alleged protected disclosure numbered 6 in his Schedule of Protected Disclosures?

    (b) Did the Claimant's disclosure of information in February 2015 tend to show either that a person has failed, is failing or is likely to fail to comply with any legal obligations to which he is subject; or that the health or safety of any individual has been, is being or is likely to be endangered?

    (c) Did the Claimant have a reasonable belief that these disclosures were in the public interest?

    (d) Has the Claimant established a prime facie case that he was dismissed because of his proven protected disclosures and, if so, which proven protected disclosures?

    (e) If so, has the Trust discharged the burden of proof that the reason or principal reason for the Claimant's dismissal was not the Claimant's protected disclosures?

    (f) In the event that the Trust does not satisfy the Tribunal of this burden, what, in the Tribunal's finding, was the reason and / or principal reason for the Claimant's dismissal?

(g) Has the Trust proven that the reason for the Claimant's dismissal was because of the Trust's view that there was a breakdown in the relationship between the Claimant and the Trust's management?

(h) Did the reason for dismissal fall within s.98(1)(b) ERA, namely some other substantial reason?

(i) If the reason for dismissal was related to the Claimant's conduct did the Trust have a genuine belief in this reason and was this belief reasonably held? Furthermore, was this belief obtained through a reasonable investigation?

(j) Was the dismissal fair or unfair (having regard to the reason for dismissal), having regard to s.98(4)?

(k) Did the Trust follow a fair procedure when considering the Claimant's dismissal?

(l) Was the decision to dismiss within the range of reasonable responses of an employer in these circumstances?

(m) Has the Claimant proven he was subjected to the detriments he has particularised as a result of making protected disclosures? If so, were the Claimant's protected disclosures a material reason for this treatment by the Trust?

The Tribunal was only concerned with the issue of liability. The issues as to remedy agreed by the parties are omitted for that reason.

The Law

8. The Trust has conceded that the Claimant made the protected disclosures numbered 1 to 5 in the Schedule (**Exhibit R3**) on 10 October 2013, 9 October 2014, 7 November 2014, 2 February and 9 February 2015. The Tribunal has to determine whether the Claimant made a protected disclosure to the GMC in February 2015. It is agreed that the GMC is a prescribed person under s.43F of the Act.

9. Since 25 June 2013 a qualifying disclosure is a disclosure of information which in the reasonable belief of an employee or worker making it tends to show one or more of the six specified types of malpractice (s.43B(1)(a-f) ERA 1996) has taken place or is likely to take place. These include breaches of legal obligation, danger to health and safety of an individual and criminal offences. The wrongdoing can be in the past, present or prospective, or merely alleged. It may concern the conduct of an employer, employee or a third party. The disclosure made by the Claimant is alleged to fall within s.43B(1):

(b) *"That a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject"* and

(c) *"The health or safety of any individual has been, is being or is*

likely to be endangered".

A disclosure made after 25 June 2013 will only be a qualifying disclosure if the employee reasonably believes it is in the public interest. There is no statutory definition of public interest. A disclosure made before 25 June 2013 will only be a qualifying disclosure if made in good faith.

10. A disclosure may concern new information, in the sense that it involves telling a person something of which they were previously unaware, or it can involve bringing a person's attention to a matter of which they are already aware. A disclosure must be more than merely a communication, and the information must be more than merely allegation or statement of position. The employee making a disclosure must convey facts, even if those facts are already known to the recipient. Disclosure is not defined in the legislation. It has been given a wide application. It can be made verbally, or in writing. Legislation encourages disclosure to the employee's employer, that is, internal disclosure as the primary method of whistleblowing.

11. There are two levels of protection: the dismissal of an employee will be automatically unfair if the reason, or principal reason, is that he / she has made a protected disclosure. The legislation also protects employers from being subject to any detriment on the ground that they have made a protected disclosure, that is broadly, they have been subject to disadvantage in the circumstances in which they are required to work as a result of making such a disclosure.

12. The legislation also provides for a disclosure to any person who the employee believes to be responsible for the relevant failure (a responsible person) and for a disclosure to be made to a prescribed person or body charged with the overseeing an investigation of malpractice within certain types of organisation or in particular sectors. An employee who makes the qualifying disclosure to a prescribed person will be protected if he or she reasonably believes that the information of any allegation within it is substantially true.

13. Under s.48(2) ERA on a complaint of detriment, it is for the employer to show the ground on which any act, or deliberate failure to act, was done. For a claimant to succeed in this claim he / she has to show that he / she has suffered some detriment, that the detriment was caused by some act or deliberate failure to act by the Trust and that the Trust's act or omission was done on the ground that the claimant had made a qualifying disclosure or qualifying disclosures within the relevant terms of the ERA 1996.

14. The law on public interest disclosure, subsequent to the case of **Parkins v Sodexho** and the amendment of s.43B is clearly and recently explained in **Chesterton Global Ltd and another v Nurmohamed and another [2017 IRLR 837]**.

15. In this case the Court of Appeal provided guidance which included a four step test as to nature of the exercise required by s.43B(1). Firstly, the tribunal has to ask *"(a) whether the worker believed, at the time he was making it, that the disclosure was in the public interest and (b) whether, if so, that belief was*

reasonable". Secondly the exercise requires *"the tribunal to recognise, as in the case of any other reasonableness review, that there may be more than one reasonable view as to whether a particular disclosure was in the public interest; and that is perhaps particularly so given that that question is of its nature so broad-textured."*

16. The Court of Appeal further states: *"That does not mean that it is illegitimate for the tribunal to form its own view on that question, as part of its thinking – that is indeed often difficult to avoid – but only that that view is not as such determinative"* The Court of Appeal then states that, thirdly, "*the necessary belief is simply that the disclosure is in the public interest. The particular reasons why the worker believes that to be so are not of the essence. That means that a disclosure does not cease to qualify simply because the worker seeks, as not uncommonly happens, to justify after the event by reference to specific matters which the tribunal finds were not in his head at the time he made it"*. The judgment also states "*all that matters is that his (subjective) belief was (subjectively) reasonable"*.

17. Fourthly, the Court of Appeal states: *"while the worker must have a genuine (and reasonable) belief that the disclosure is in the public interest, that does not have to be his or her predominant motive in making it …"*. The Court of Appeal also states as follows: *"I do not think there is much value in trying to provide a new general gloss on the phrase "in the public interest". Parliament has chosen not to define it, and the intention must have been to leave it to employment tribunals to apply it as a matter of educated impression …"*.

18. Public interest claims must, by s.48 ERA, be made within three months:

> *"(3) An employment tribunal shall not consider a complaint under this section unless it is presented –*
>
> *(a) before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them, or*
>
> *(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months."*

19. As already stated above the Claimant's primary claim is that he was automatically unfairly dismissed for making protected disclosures but he also submits that the Trust did not properly address allegations about his conduct and that its senior managers pursued an unfair procedure and acted in bad faith towards him. The Trust denies such claiMs It said it pursued a fair procedure and the Claimant was dismissed for some other substantial reason which was the breakdown in relationships within the Histopathology Team and with senior management (as its Grounds for Resistance state).

20. The Tribunal has been provided with helpful representations as to the well-established principles and guidelines available to it in considering claims of unfair dismissal. It considers that the three authorities specifically referred to the Tribunal set out the key legal areas that the Tribunal has been invited to consider and that in all other respects there is broad agreement between Counsel as to the principles the Tribunal have been invited to apply.

21. It is helpful to provide a brief overview as a starting point. The Claimant is a qualifying employee and his dismissal will be unfair unless the Trust can show, firstly, that the reason (or principal reason) for his dismissal was one of the five potentially fair reasons set out in s.98(1) and (2) of the ERA. And, secondly, finds that in all the circumstances (including the Trust's size and administrative resources) it acted reasonably in treating that reason as sufficient reason for his dismissal within (s.98(4)) which include conduct and some other substantial reason (SOSR). The reason for a dismissal may also fall into more than one of the five potentially fair categories, as there is a certain degree of overlap between them.

22. S.98(1)(b) of the ERA states that in an SOSR case dismissal must be found to be for "*some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held*". There is no further statutory guidance on what is meant by SOSR but it is designed to catch potentially fair dismissals that would not fall into any of the other categories. Furthermore in order to show SOSR, it is only necessary to establish a reason for the dismissal which is of a kind that could justify the dismissal of an employee holding the job in question. It is not necessary that it actually did justify the dismissal. This distinction is important as, once the employer shows it had a potentially fair reason, a tribunal is expected to look at whether the employer followed a fair procedure and whether the decision to dismiss for that reason was within the range of reasonable responses of a reasonable employer because deciding whether the dismissal was "justified" is not part of the test which a tribunal should apply.

23. In the case of **Ezsias** the EAT held as follows:

> *"The contractual disciplinary procedures only apply to issues of conduct or competence, not allegations of a breakdown in working relationships. Those procedures do not apply to cases where, even though the employee's conduct caused the breakdown of their relationship, the employee's role in the events which led up to that breakdown was not the reason why action was taken against him. Employment tribunals will, however, be on the look-out, in cases of this kind, to see whether an employer is using the rubric of "some other substantial reason" as a pretext to conceal the real reason for the employee's dismissal.*
>
> *In the present case, the employment tribunal have been alive to the refined but important distinction between dismissing the claimant for his conduct in causing the breakdown of relationships, and dismissing him for the fact that those relationships had broken down. The only fair reading of the tribunal's decision was that although as a matter of*

history it was the claimant's conduct which had in the main been responsible for the breakdown of the relationships, it was the fact of the breakdown which was the reason for his dismissal, with his responsibility being incidental."

24. In the case of **Perkin**, the Court of Appeal held:

> *"Although "personality" of itself cannot be a ground for dismissal, an employee's personality may manifest itself in such a way as to bring the actions of the employee within s.98. Whether, on the facts of a particular case, the manifestations of an individual's personality result in conduct which can fairly give rise to the employee's dismissal, or whether they give rise to some other substantial reason of a kind to justify the dismissal of an employee holding the position which the employee held, the employer has to establish the facts which justify the reason or principal reason for the dismissal.*
>
> *A breakdown in confidence between an employer and a senior executive for which the latter is responsible and which actually or potentially damaged the operation of the employer's organisation, or which rendered it impossible for senior executives to work together as a team, can amount to some other substantial reason for dismissal. Provided the terms of s.98(4) are satisfied, it must be possible for an employer fairly to dismiss an employee in such circumstances. The essential and determinative facts are for the employment tribunal to find.*
>
> *In the present case, there was material on which the Tribunal could find that the Claimant could not work harmoniously with his colleagues and, therefore, whilst it would have been preferable if the Tribunal had analysed the case as falling within some other substantial reason rather than conduct, the Tribunal was entitled to conclude that the employers had a potentially fair reason to dismiss him.*
>
> *The Employment Tribunal had also not erred in determining the fairness of the claimant's dismissal on the basis of the test set out in **British Home Stores Ltd v Burchell**.*
>
> *Whilst **Burchell** itself was a "conduct" case, there is no reason why the principles it sets out should be limited to cases arising under s.98(2)(b). Accordingly, whilst the dismissal in the present case was more properly categorised as being for some other substantial reason, the Tribunal had not directed itself erroneously on the fairness issue by following **Burchell** approach."*

25. In the **Juhti** case the Court of Appeal held that an employee was not automatically unfairly dismissed for making protected disclosures to her line manager because the person who took the decision to dismiss her was unaware of those disclosures. It found that a decision made by one person in ignorance of the true facts, which is manipulated by someone else who is responsible for the employee and does know the true facts, cannot be

attributed to their employer. In reversing the decision of the EAT in this case, the Court of Appeal held that the statutory right not to be unfairly dismissed depends on there being unfairness on the part of the employer; unfair or even unlawful conduct on the part of individual colleagues or managers is immaterial unless it can properly be attributed to the employer. This judgment upheld the principle identified in an earlier Court of Appeal decision in **Orr v Milton Keynes Council**.

26. **Juhti** establishes that what the employer reasonably believes when dismissing an employee has to be determined by reference to what the decision-maker actually knew, not what knowledge ought to be attributed to the decision-maker. The Court could not see any reason to depart from the **Orr** decision just because this case concerned automatic unfair dismissal rather than ordinary unfair dismissal. It confirms that s.103A ERA falls under Part X of ERA and must be interpreted consistently with other provisions governing liability for unfair dismissal. There was no justification for taking a different approach to identifying the reason for dismissal.

27. Underhill L J who gave the approved judgment did provide some analysis of what is termed a "manipulation" case. In summary he indicated that it might be that in some circumstances, depending on the status of the manipulator, the fairness of the dismissal might be affected. Four possible scenarios were identified. These were as follows. In cases referred to as peer manipulation, where a colleague with no management responsibilities for the victim procures his or her dismissal by giving false evidence, thereby misleading the decision-maker, the dismissal is plainly not unfair. The employee has no doubt suffered injustice at the hands of an "Iago" figure but the employer has not acted unfairly. In cases (such as **Juhti**) where the manipulation is done by a line manager who does not have responsibility for the dismissal, there is also no scope for attributing that to the employer for the reasons set out in **Orr**.

28. The third scenario is manipulation by a manager with some responsibility for the investigation which was not the situation considered in **Orr**. There may be some elaborate forms of disciplinary procedure, where manager A is given some responsibility for investigating disciplinary allegations and presenting them to the decision-maker, manager B. If manager A distorts the investigation there would be a strong case for attributing the motivation and knowledge of A to B even if they were not shared by B. The fourth scenario was a manipulator near the top of the employer's hierarchy. In some extreme cases a CEO (or someone similar) might procure an employee's dismissal by deliberately manipulating, for a proscribed reason, the evidence before the decision-maker. Underhill L J's judgment considers that there may well be a case for attributing the manipulator's motivation to the employer for the purposes of s.98(1) in this situation, but also notes this would depart from the rule in **Orr** and he would not express a definitive view on such facts.

Findings of Fact

29. The Tribunal made the following findings of fact on the balance of probabilities after considering all the oral and documentary evidence which the parties presented to it and their Counsels' written and oral submissions. The Tribunal

did not make findings of fact upon all the evidence presented to it because it made material findings of fact upon those matters which it considered to be relevant to the issues before it. The Tribunal will not record all the submissions made to it. They were considered carefully and the issues addressed in them have formed part of the fact finding exercise and the determination of the Tribunal's Judgment.

30. The Trust runs Dorset County Hospital. This is an NHS District General Hospital in Dorchester, Dorset. The hospital is the hub of the district's inpatient facilities. The Trust is also responsible for managing community hospitals which are situated in the surrounding major towns. Following employment as a locum in August 2006 the Claimant was appointed for an initial period of two years to be the Lead Consultant of the Trust's Histopathology Department ("HP Department") from 1 December 2006 under contractual terms set out in a letter of appointment. This included a term setting out General Mutual Obligations expected of the Claimant and the Trust. The appointment letter also recognised the requirement of an agreed Job Plan to enable the Claimant to accommodate direct clinical care duties, supporting professional activities, additional NHS responsibilities and other external duties, with this plan to be reviewed annually.

31. By 2014 the Claimant was leading an HP Department that comprised three consultants who were Dr Thomas, Dr Mikel and Dr Bostanci who had commenced working in the HP Department in 2007 and 2010 respectively. There were also two middle grade doctors in the HP Department: Dr Miller who had commenced employment in October 2010 and Dr Chefani who had commenced employment with the Trust on 7 August 2011 (who had previously worked in the Department as an unpaid volunteer). Dr Taibjee, a Consultant Dermatologist and Dermatopathologist also worked part-time in the HP Department after joining the Trust in April 2013. The support of the laboratory and its staff is also critical to the Department's work. This was managed by Dr Jagjivan, Head of Pathology.

32. The upgrading of the Trust's server in 2013 resulted in a loss of previous email correspondence. This meant that no email correspondence on the Trust's server was available prior to 17 March 2011. The position of Dr Bostanci and the HP Department's concerns about her work and other issues is a recurrent theme in this case. It is the Claimant's case that a number of incidents involving Dr Bostanci occurred over a period of approximately four years which had been reported to senior management following what the Claimant describes as "normal escalation routes" and that eventually, having exhausted all internal routes, he escalated these concerns to the General Medical Council ("GMC") on 9 February 2015.

33. Early in 2011 Dr Bostanci started to develop severe backlogs in the reporting of her diagnostic cases. These were usually discovered during her periods of leave from work. By the summer of 2011 there was an increasing volume and frequency of such backlog. The Claimant estimates that between 2011 and May 2012 he raised more than 20 risk incidents concerning delayed reporting by Dr Bostanci relating to approximately 100 cases.

34. In March 2012 Dr Chefani wrote to the Trust's CEO, Mrs O'Callaghan, to raise her concerns about the behaviour of Dr Moosa, then Clinical Director of Pathology, towards the Claimant at a meeting that he had held with the HP Consultants on 16 March 2012. Dr Chefani subsequently resigned from the Trust's employment in April 2012 because of the problems she encountered dealing with Dr Bostanci's abrasive behaviour towards her and her perception of the negative impact that Dr Bostanci was having on the HP Department. Subsequently, Dr Chefani returned to the HP Team after being assured that she would no longer be supervised by Dr Bostanci.

35. Mrs O'Callaghan held a meeting with the HP Consultants on 23 April 2012. The purpose of this meeting was to inform the Consultants that she had instructed, Mr Rob Pitcher, the Pathology Director from Bristol, to conduct an external review of the HP service in the Trust in respect of its capacity and potential resourcing issues. The Claimant wrote to Mrs O'Callaghan on 4 May questioning the selection of Mr Pitcher and the need for such a review. His letter stated, inter alia as follows:

> *"Although I have not seen the brief, you indicated that the main purpose of this review is the discrepancy between the capacity plan produced by our General Manager which shows that the service is under-resourced and the belief by the senior members of the Trust management that the Service has adequate capacity.*
>
> *I have not seen the evidence on which the senior management has based its assessment however I note that this is at odds with six previous reviews, not including the latest review by the General Manager. In fact, from 2008 to 2010, I have produced two capacity plans, all indicating similar shortfalls in staffing levels. This was confirmed by an independent review commissioned by the Interim Director of Finance, Terry Tonks. In addition, three external independent reviews conducted as part of site inspections for the Colorectal Screening, Breast Screening and Cervical Screening programmes, all indicated similar shortfall in capacity.*
>
> *In light of such overwhelming body of internal and external reviews, all concurring in their conclusions and in the absence of any evidence produced to the contrary, I question the necessity to commission yet another review".*

Mrs O'Callaghan replied to the Claimant on 14 May to say that Dr Pitcher had already agreed to review services for the Trust and that she would let him know the process that would be followed as soon as she had more details.

36. In 2010 the HP Department had secured a contract with Roche for assessment and development work. This contract was managed by Mrs Cooper, the Cervical Programme Co-ordinator. On 21 May the Claimant wrote to Mrs Miller, the Trust's Director of Operations, and Mrs Cooper to express concern about the impact of Dr Chefani's resignation on this programme. In his letter the Claimant attributed Dr Chefani's resignation to the consequences of "actions of senior Histopathology managers". This was a

reference to Dr Chefani's criticism of Dr Moosa and Dr Bostanci, but his letter also expressed his concerns about the HP Department's resourcing issues and the increasing demands being made on the HP Team. He copied his letter to his consultant colleagues, a divisional manager of the programme, the divisional director of the programme and the divisional director of the Family Services Programme.

37. The Trust's position throughout the matters which the Tribunal have had to consider, and throughout these proceedings is that senior managers never had any doubts about the Claimant's clinical skills as a Histopathologist. This was particularly emphasised by Mr Lear who confirmed that his concerns as to the Claimant's position related solely to interpersonal relationships. Mr Lear also explained that the Claimant had a reputation for expressing very strong views against management actions decisions. He qualified that potential criticism by saying that such a reputation is not unusual for consultants within the NHS (a view which was confirmed by Mrs Blanchard in the course of her evidence). However, he considered the Claimant to be more outspoken and critical than most.

38. The Tribunal received no evidence as to whether Mr Pitcher proceeded to undertake a review on behalf of the Trust. It appears that Mrs O'Callaghan's instruction to him was overtaken when Mrs O'Callaghan sought advice from Mr Lear, the Trust's Medical Director, who having been informed of Mrs O'Callaghan's frustration with the Claimant as clinical lead of the HP Department, his opposition to the Trust's management team and turnaround times for histological specimens which was described as awful, recommended commissioning the Royal College of Pathologists ("RCP") to review the Department's performance. This review was undertaken by Professor Peter Furness and Mr Nick Kirk. Their biographies were included as an appendix to the RCP Report presented to the Trust and confirmed they had qualifications and experience which made them well suited to undertake this review.

39. The reviewers held a telephone conference with Mrs O'Callaghan and Mr Lear on 2 August 2012. Having been supplied with documentation for examination before their site visit they attended the HP Department on 18 and 19 September 2012, when they interviewed available members of staff. They also interviewed users of the cellular pathology service and at the end of the site visit feedback was provided to all available departmental and managerial staff at which those present were given the opportunity to contest the facts and accuracy of the presentation but not to discuss the conclusions. One further document and some additional workflow information was made available to the reviewers following that meeting.

40. In the "Introduction and Background" section of the RCP Report it states as follows:

> *"The cellular pathology department has had serious problems for several years, including an investigation of the probity of a pathologist by the GMC. Staffing of the department subsequently fell precipitously but has been rebuilt in recent years. The cellular pathology department*

currently has four substantive NHS consultants and two non-consultant doctors (who are in many respects treated as trainees). Specialist Registrars are occasionally seconded to the unit but none was present when we attended …

In 2009 a review of the financial status of the Foundation Trust by Monitor led to replacement of the Trust's senior management team.

The cellular pathology department largely supports the secondary care services provided by the Trust, though a proportion of work comes from primary care (approximately 20%). The volume of work has been measured in several different ways and is discussed below …

Complaints about the cellular pathology service have been received by the Trust management, largely relating to a proportion of the specimens taking too long to be reported. This included occasional delays in the diagnosis of unexpected malignancy.

The medical staff in the department believe that their workload was excessive. This is currently being mitigated by sending away a proportion of the workload (small biopsies only, not major resections) for external reporting.

Senior management, lacking personal expertise in cellular pathology, found themselves unable to assess whether the workload was indeed excessive or whether the problems arose from inefficiency within the department; and if the latter, what steps might be taken to improve efficiency. RC Path Consulting was asked principally to address these issues.

The advisers were informed that a fifth Consultant Histopathologist has recently been appointed but has not yet started work and that a recently appointed Dermatologist has dual accreditation (dermatology and dermatopathology) so will be able to assist with the reporting of skin biopsies …

The RC Path advisers were not asked to be involved in assisting the current options appraisal for reconfiguration of the pathology services; this was described as a separate process.

41. In its findings the Report stated, inter alia, as follows:

"The RC Path advisers were received openly and with courtesy by all the members of staff with whom they came into contact …

This Report inevitably concentrates on the problems with the service, so it is appropriate to emphasise at the outset that we found no evidence whatsoever of problems with the accuracy or completeness of the reports generated by the cellular pathology laboratory, nor with technical quality of the output of the laboratory, nor with the department's contributions to other aspects of the hospital such as

multidisciplinary team (MDT) meetings. Indeed, as far as we could ascertain without close inspection, those aspects of the service provided appear to be exemplary".

42. In its "Executive Summary" the Report states, inter alia, as follows:

> *"RC Path Consulting has confirmed that there are significant Cellular Pathology diagnostic delays at Dorset County Hospital NHS Foundation Trust and these are due to a variety of reasons. Mainly the delays relate to management problems and backlogs of slides in Consultants' offices. The management problems require a system-wide approach and a review of departmental priorities. Specific recommendations are made in this report to address these …*
>
> *The backlogs of cases in Consultant offices should be addressed by the expected commencement of a new Consultant. RC Path Consulting strongly recommends that new ways of working, including a more flexible workload allocation system, start at the same time as the new Consultant …*
>
> *The RC Path Consulting advisers recommend that reliance on the external locum should reduce in a planned an gradual way over the first year of this appointment with a consequent reciprocal phased increase in in-house reporting by all consultants. This increase should be possible if new ways of working and changes in prioritisation are adopted."*

43. The Report confirmed that turnarounds times should be a major concern for the Trust which needed to be addressed. The current data shown to the reviewers for the quarter ending June 2012 indicated that 12% of reports were taking more than 18 days to prepare. Following their examination of turnaround times the reviewers commented as follows:

> *"Examination of turnaround times broken down by reporting pathologist data did not consistently identify any one pathologist as being related to the problem. All pathologists have numerous specimens with prolonged turnaround times, but for each pathologist the problem appeared to develop intermittently".*

The Report made seven recommendations to improve laboratory procedures and also recommended a significant change to workload allocation. They had found that the RC Path workload points system was being used to allocate work rather than as a tool to monitor the reasonable and equitable distribution of workload retrospectively. It recommended that such a method of allocation should be abandoned and replaced by a more flexible approach to work distribution while accepting that the details of this more flexible approach would have to be the subject of discussion within the HP Department.

44. The reviewers stated that RC Path Staffing Workload Guidance did not advocate the use of its workload points system in the way in was being used in the HP Department. It is a system intended to identify a reasonable overall

staffing level and to facilitate equitable distribution of work between different members of staff but they state that its use as a tool for day-to-day control of workflow to individual pathologists in the way it had been described to them was time-consuming and excessively rigid. They state as follows:

> *"The system was not intended to underpin a system where work is deliberately held back in the laboratory rather than being allocated to a pathologist."*

They did accept that with current staffing levels it was likely to be appropriate to continue to use some form of workload measurement to determine a reasonable level of external assistance but also recommended that steps should be taken to remove the Department's reliance on ad-hoc external reporting. A further recommendation was that the medical staff acknowledge that they needed to work better as a team and that a system should be established so that they can share problems such as backlogs of work, rather than working in isolation.

45. The reviewers consideration of overall workload concluded that an additional consultant member of staff was justified but were not convinced that this level of under-staffing would have resulted in the problems identified in the Report if other measures could be taken to improve the working of the Department. They also concluded that the Department currently had very low morale and had been told that this had declined "in the last couple of years". The Report identified that this period correlated loosely with a number of changes in management at the Trust and identified that there were now three separate lines of management for this area of work – medical staff, laboratory / biomedical staff and clerical / administrative staff. The Report found that this split management structure left several key members of staff having to deal with two lines of accountability, while the most senior members of each line of management did not have personal experience of working in cellular pathology.

46. The Report recommends that management and administrative staff who are wholly employed within the Cellular Pathology Department should be assigned and managed by the HP Department to enable available resources to be prioritised appropriately. However, it recognised that the problem it had identified was harder to resolve in respect of the medical and laboratory staff. In examining this it credits the Claimant as having shown himself to be an effective manager in the past but also refers to a perception of many members of staff in the Department that he is "somewhat autocratic, and unwilling to reach decisions by consensus and unwilling to consider challenges to his decision or to accept criticism". However, they go on to state that "to his credit he places great emphasis on diagnostic accuracy and the completeness of reports, but he seems much less concerned about other aspects of laboratory quality, including the need to maximise the efficient use of resources and the timeliness of reports". They also note that no other Consultant Pathologist in the Department would wish to take on the management role. They state that the alternative to a single management structure for medical and laboratory staff would be to demand (and to monitor) better relations between the Claimant and the Head Biomedical Scientist, Ms Jagjivan.

47. The Report then states as follows:

> "*There must be a route to well-informed senior management for the swift, authoritative and credible arbitration of any disputes. It will be necessary to insist on, and closely monitor, compliance with protocols that define the division of authority, duties and responsibility. It should be clear to all concerned that disciplinary action would result from persistent breaches of these arrangements. Mentoring of both parties might help support these changes. It may also be necessary to engage external facilitation or team-building to ensure an effective professional relationship is maintained".*

Therefore, the Report proposed changes in the management structure to be discussed by senior management with all members of staff in the Department but did not make a specific recommendation but expressed the expectation that with the current members of staff, the best available solution would be for the Claimant to lead the medical staff and Ms Jagjivan to lead the laboratory and administrative staff within a clearly defined structure and close monitoring of such arrangements by senior management. Finally, in their "Summary and recommendations" the reviewers state as follows:

> *"However, we believe that the most important change that is needed is a change in the attitude of the medical staff".*

48. The Claimant's position in respect of the RCP Report and its recommendations as he explained it to the Tribunal was that the RCP reviewers had not been given correct data and that the backlog had been generated by only one consultant – Dr Bostanci. It was because other consultants had helped Dr Bostanci in clearing her backlog that they had had her jobs assigned to them and that this showed up as delays attributed to them which was unfair and incorrect. He accepted that there had been a decline in morale in the HP Department in the previous two years as the Report had concluded. He attributed this decline in morale to the new management structure introduced in 2009 / 2010 and the changes made to the senior management team. However, during the course of his evidence he had to accept that the backlog in Dr Bostanci's work, which related to potentially 50 to 120 cases every six weeks or so, was far smaller than the overall backlog which had been identified by the RCP Report as to turnaround times and which needed to be addressed by the HP Department and the senior management team. It was accepted by all parties that because the fifth consultant who was expected to join the team at the time of the Report did not do so the Department was required to continue to operate without the full complement of Consultants it required with all the work pressures this caused, which also required continuing ad hoc external assistance to support its work.

49. The Tribunal received substantial evidence in the course of the hearing as to the implementation of the RCP recommendations. The starting point for this implementation appears to have been a meeting called by Mrs O'Callaghan for all staff of the HP Department. At this meeting she explained the recommendations which had been made and told the staff that the HP Department was expected to take account of those recommendations but that

it was for the Department to determine whether and how such recommendations were to be implemented.

50. A protracted period of discussion then followed with at least monthly meetings which were attended by the Claimant and his fellow Consultants. Those discussions were continuing up until the Claimant's suspension in June 2015. The Claimant had expressed reservations both about the need for a review and the appointment of RCP to conduct it. The Claimant and Drs Mikel and Thomas and their colleagues then opposed a number of its recommendations. The Tribunal will refer later in these Reasons to one of the meetings held to discuss implementation of the recommendations but, leaving that meeting to one side at present, there were two significant consequences from the Tribunal's point of view from this failure to agree implementation of the recommendations.

51. The first was the appointment of Dr Olufadi to the position of Clinical Director of the HP Department. Mr Lear interpreted the RCP Report as a recommendation that the Trust should look for new leadership in the HP Department. This was because the senior management team needed someone to run with the recommendations of the Report rather than substantially oppose them. Therefore, some months after receipt of the Report, it was decided to appoint Dr Olufadi to the position of Clinical Director of the HP Department rather than the Claimant who Mr Lear was not prepared to appoint. He had found no enthusiasm from the other two Consultants to undertake this job. Dr Olufadi was prepared to take it on although he had no substantial clinical knowledge of this area which on the evidence before the Tribunal was a considerable barrier to his effective management of the HP Department. The intention of the appointment was to bring better leadership to the HP Department. However the Claimant remained Head of Service in the HP Department and remained in that position until his dismissal, but Dr Olufadi had overall responsibility for implementation of the RCP recommendations.

52. The other significant consequence was that the RCP recommendations had still not been implemented in a number of key areas by June 2015. The Claimant's evidence was that substantial progress had been made and that a substantial number of the recommendations had been implemented. However, he agreed that by June 2015 there was no mechanism for appropriate reporting of delays within the HP Department, no system to allow consultants to share work and problems, and that, with the exception of Dr Olufadi's appointment there had been no change in management structure and, in his view, no improved communication from senior management. The evidence before the Tribunal also confirmed that no workload allocation arrangement had been implemented and that no new KPI's had been introduced that could be measured, monitored and routinely reported as the RCP Report had recommended. However, the Trust's senior management team had also not implemented the recommendations as to overall management of the HP Department or engaged external facilitators to implement team building.

53. Mrs Pearce gave helpful evidence in respect of the situation in June 2015. She had joined the Trust shortly before the Claimant was suspended and in the period leading up to the Panel hearing, which she chaired, was involved in her position, in reviewing the situation as it then was in the HP Department. She told the Tribunal that while some of the RCP's recommendations as to KPI's were in place they had not been sufficiently implemented to encompass all the recommendations made by the RCP Report. However, Mrs Pearce also confirmed that she and Dr Thomas had been able to complete this work in the period between June and December 2015 which was nearly three years after the presentation of RCP's Report. Mrs Pearce also found that the recommendations as to the management of the laboratory had been insufficiently implemented and that the use of the RC Path workload points system had not been implemented at all. The only change in management structure which had been made was that Dr Olufadi had been instructed to oversee the Department which she was told had been because of ongoing difficulties caused by the Claimant's continuing and robust objections to implementing the RCP recommendations.

54. A review of the Claimant's employment with the Trust confirms that he had a significant commitment to the management of the Trust in addition to his clinical work. Indeed, in representations he made to the Panel which considered the case for his dismissal he listed no less than 24 separate areas of involvement in management which included the following. He had been the Trust's designated individual for the Human Tissue Body from 2007 to 2012 in which position he was involved in developing and overseeing the implementation of a framework for the Human Tissue Act. He also participated in the Trust's Clinical Governance Board and was a member of its IT Board for two years. He was chair of the Trust's Breast Cancer MDT from 2011 to 2013 which was a task he had undertaken at the request of the Trust's senior management. He had also been deputy chair of the Trust's Medical Staff Committee from 2008 to 2011 and became chair of that committee from 2011 to 2013 at the request of Mrs O'Callaghan. He had also been a member of the senior executive team that advised the CEO when the hospital was in special measures and was a member of the Dorset Cancer Locality Meeting which gave strategic input to the organisation of cancer treatment in the locality. He had been instrumental in securing external work with Roche, and with it additional income for the Trust, although that complicated resourcing demands, with the continuing failure to recruit a further HP Consultant.

55. In November 2012 the Claimant was involved in email correspondence with Mark Power and others in respect of junior doctors' accommodation in which he was critical of management and complained about lack of accountability and other failings. This resulted in the Claimant apologising to Mr Power for the tone of his email which he emphasised was not intended as personal criticism of him. This exchange resulted in a meeting with Mr Lear on 5 December in which he accepted that he had offended Mark Power and expressed his sincere regret for doing so. In an email to Mr Lear following that meeting he also states that he takes on board Mr Lear's and others' comments regarding the tone and modality he used and that he will learn from this.

56. At the beginning of April 2013 the Claimant reported to Dr Olufadi that there was a backlog of work in Dr Bostanci's office who was then on two weeks leave to which Dr Olufadi responded by indicating that the matter could be discussed on Dr Bostanci's return and asked the Claimant to report only on the case which had revealed the backlog. The Claimant did not consider this was satisfactory and sought further guidance from Dr Olufadi to which he received no reply. Then, on 10 April, during Dr Bostanci's continuing holiday absence, Mr Lear sent an email to the Claimant and Dr Mikel in respect of a rectal biopsy in Dr Bostanci's office which required progression and indicated he would be forced to take action if there was a refusal to process and report on the specimen by the end of the week, which contradicted Dr Olufadi's instruction to the Claimant.

57. On 5 June 2013 the Claimant wrote to Mr Lear to report an incident that had occurred in the HP Department on 24 May during which Dr Miller had been verbally abused by Dr Bostanci, who had ignored the Claimant's intervention to attempt to end the incident. His letter stated, inter alia, as follows:

> *"I'm very concerned by these events. This is not the first time that I or others have witnessed such behaviour by Dr Bostanci towards middle grade doctors (one of which resulted in a junior doctor leaving work in tears and resigning on the following day). On a number of occasions I have indicated to Dr Bostanci that this type of behaviour is inappropriate and have received reassurances from her that it would not happen again. Unfortunately this pattern of behaviour continues to be repeated. I have raised this as an important issue for the past several months with my General Manager and Clinical Director who have reassured me that action would be taken but I have seen no evidence of this. Therefore I have discussed these matters with HR and was advised to report this incident directly to you."*

The reference to HR is to the Claimant's contact with Ms Hallett (Head of Operational Human Resources).

58. Mr Lear replied to the Claimant on 2 July. His letter stated, inter alia, as follows:

> *"I have spoken with Dr Olufadi (Clinical Director) and Ms Hallett (Head of Operational Human Resources) and am assured that appropriate actions have already been taken to support Dr Miller and to resolve the inter-personal difficulties between her and Dr Bostanci.*
>
> *In the meantime I have suggested that Dr Miller is supervised by the other Consultants in the department and that her interaction with Dr Bostanci is limited. I have asked to be kept abreast of the situation moving forward.*
>
> *Thank you for bringing this to my attention."*

59. On 13 September 2013 Dr Olufadi wrote to the Claimant accusing him of unauthorised absence from work on 12 September, and subsequently

escalated that matter to Mr Lear on 27 September 2013. The Claimant was able to explain the reasons for his absence and the arrangements he had made to cover for it to Mr Lear but accepted that he had not followed appropriate procedures in doing so.

60. In October 2013 the Claimant, Dr Mikel and Dr Thomas requested a meeting with Mr Lear and Dr Olufadi. This was held on 10 October. The purpose of this meeting was to discuss their concerns as to Dr Bostanci. They indicated that reports had been issued with no clear diagnosis, that there had been seriously delayed reports and supplementary reports, that slides kept in her room had not been made available for review and that she was exhibiting highly stressed and unpredictable behaviour. Mr Lear sent an email to the Consultants later that day which indicated that he and Ms Hallett had agreed to refer Dr Bostanci to Occupation Health and that he agreed that she would need to be managed in terms of workload when she returned to work. The Consultants recall that it was also agreed that Dr Thomas would monitor the backlog until early 2014 and that Mr Lear would undertake a formal review at that time. It is agreed between the parties that no such review took place. Dr Bostanci had to take a substantial amount of sick leave over the following six to eight months with intervening periods of phased returns to work. This meant she had very limited reporting duties which would have made a review impracticable until her return to full-time work.

61. On 22 October 2013 the Claimant received an email from a Consultant Surgeon (which was copied to Mr Lear) which raised serious concerns over Dr Bostanci's performance and unsatisfactory reports prepared by her, to which the Claimant sent an appropriate response providing reassurance that the concerns would be addressed.

62. On 4 November 2013 the Claimant sent an email to all members of the Trust's Consultant body to inform them that the HP service had regained full accreditation with CPA UK, giving a brief history of how that accreditation had been lost and then stating: *"I do not wish my views to be known to those who manipulated the efficiency of the service"* and requesting the recipients of the email to keep its content confidential. This was referred to Mr Lear who on the 4 November sent an email to Mark Power. This stated:

> *"This confidential email will amount to mutiny in my book. I think just the two of us should discuss the content. I do not want our mole exposed".*

A meeting was held between Mr Lear, Mr Power (Director of Workforce and HR) and the Claimant on 14 November in respect of the Claimant's email. The Claimant's position was that the email was confidential but he accepted that the remark he had made was inappropriate but was not prepared to accept that it was either offensive or malicious. Mr Lear and Mr Power wrote to the Claimant after this meeting. This letter stated, inter alia, as follows:

> *"Firstly, it is important that you recognise the content of your email we discussed was both highly critical, and offensive to the senior management of the Trust. Whatever tone or spirit you consider was*

> *used in the text, it came across as being an individual who was seeking support from almost the entire consultant body (with the exception of those in leadership positions) to raise a "vote of no confidence" in the senior management team. We accept that we were not expected to have sight of your correspondence, but clearly some of your colleagues felt differently.*
>
> *To be absolutely clear with you, we have found establishing a constructive working relationship with you to be extremely difficult. The working environment within your department continues to give concern and we can see no way forward in allowing you to take on even a minor managerial role while your attitude towards senior management (the executive team in particular) and your lack of support for colleagues in difficulty continues. We believe Dr Rasaq Olufadi is making good progress in difficult circumstances and you are expected to support him, rather than raising challenges at every opportunity.*
>
> *We are considering seeking a further external behavioural assessment to help us draw matters to a conclusion. You will be notified of our intentions in due course.*
>
> *Finally, we wish to place on record any further correspondence from you, of a similar nature, will be subject to an investigative process, which may well result in a formal sanction. Given your seniority and experience as a clinician, the nature of your behaviour, which is at complete odds with the Trust's core values, would not be tolerated by any employer either within the NHS or outside – the time has come when that will no longer be tolerated here."*

The reference to the identity of the mole on the Consultant body, or the purpose of such an arrangement, was not explained.

63. During this period Mr Lear had written to the Claimant and Dr Olufadi seeking the opportunity to meet with them to discuss how the Trust should support Dr Bostanci when she returned to work. The Claimant in his reply to Mr Lear which he copied to Drs Thomas and Mikel submitted that Dr Olufadi's failure to deal with their concerns about Dr Bostanci's health and performance over a substantial period of time made his attendance at such a meeting counterproductive. Mr Lear in his reply indicated that over the previous two years there had been very little concern indicated to him with regard to the quality of Dr Bostanci's work, but rather her slowness. He indicated that he had concluded that Dr Bostanci was not well and needed support to get her through this difficult time and it was as a result of that that her professional work had deteriorated. He also indicated that he proposed to await the review from Occupational Health and that he was happy that the Claimant and his consultant colleagues attended the meeting which would also be attended by Dr Olufadi.

64. In late November 2013 the Trust was notified that a complaint had been made to the GMC about the Claimant. This was in respect of a matter on which no internal complaint had been made either to Mr Lear or the Trust's complaints

office. He wrote to the GMC's investigations officer assigned to this case on 28 November 2013 in which he confirmed the Claimant's employment with the Trust and briefly described the commissioning of the RCP to review the HP service. His letter then states as follows:

> *"We removed Dr D'Arrigo from a full management role within the department a year ago and appointed a chemical pathologist to oversee the changes suggested by RC path review. Since that time, Dr D'Arrigo has raised objections to every element of management within the department of histopathology. He has been particularly critical of one of his consultant colleagues over the last year and this has resulted in her needing time away from work, in order to cope with a combination of physical and stress related illness. We hope to welcome her back to the department in mid-December with assigned support from another colleague. During the absence of this colleague, Dr D'Arrigo has taken every opportunity to undermine her clinical work,*
>
> *More latterly, Dr D'Arrigo wrote a confidential email to the consultant body, which we interpreted as seeking a vote of "No Confidence" in the Trust's senior management. His colleagues felt it appropriate to share that email with the executive team, and we have since spoken to Dr D'Arrigo to advise him that formal action will be taken, in the event this type of behaviour is repeated.*
>
> *You will understand the nature of the complaint made to the GMC is of no surprise to me, particularly regarding the nature of the allegations. I will enclose a few of the emails which are on record, which will support what I have mentioned.*
>
> *If I can be of any further assistance, please let me know".*

65. The relevant documentation before the Tribunal confirms that the Claimant kept the Trust advised of his response to the complaint which had been made against him. On 26 August 2014 the investigation officer wrote to Mr Lear and confirmed that the case examiners at the GMC had decided to conclude the case with advice and providing a copy of the reasons given for that decision. The GMC concluded that the case did not raise fitness to practise concerns about the Claimant, that none of the allegations met the realistic prospect tests and that there was no evidence to support a finding of impaired fitness to practise and nor was the threshold for a warning approached.

66. In March 2014 the Claimant submitted a grievance seeking additional payment for annual leave. This was because Dr Olufadi had refused to pay him for 11 days annual leave because although there had been 16 days untaken at the end of the previous financial year, the Trust's procedures only allowed five days to be carried over. Dr Illes (Divisional Director – Clinical & Scientific) upheld that decision. The Claimant pursued an appeal to Mr Lear, who allowed the appeal to the extent that the Claimant was able to carry forward six more days but had to forfeit the remaining four days. This meant that the Claimant's claim which had been limited to 11 days was successful and holiday pay was paid to him for those days.

67. Shortly before Mrs O'Callaghan, the Trust's CEO, left her employment the Claimant wrote to the Trust's Chairman on 14 May 2014 criticising her tenure as CEO. The Claimant did not expect this letter to be copied to Mrs O'Callaghan and the Tribunal did not see the letter. However from other correspondence available to the Tribunal, which followed this letter the Claimant was clearly expressing strong criticism as to a number of matters which included the decision to investigate a proposed outsourcing of pathology services by the Trust. On 19 May Mrs O'Callaghan sent an email to the Claimant, copied to Mr Lear that was critical of the Claimant's approach. This email described him as domineering and intolerant and expressed the view that the Claimant had never taken on board advice to work in a more constructive manner and should stop trying to undermine senior management with unpleasant comments. The Claimant replied to this email, and amongst other comments, expressed his view that during Mrs O'Callaghan's tenure as CEO the Trust had become a very poor work environment.

68. Mrs O'Callaghan replied to the Claimant on 17 July. Her brief letter stated, inter alia as follows:

> *"You have been a rude and difficult man to deal with and this can be confirmed by many others. Your reputation is widely known and you appear to have no insight. The Royal College of Pathologists Report confirm that your style is not conducive to positive working. You perceive performance management as personal. You have not shown any leadership in histopathology and perhaps might reflect that, if you had worked differently and were not so antagonistic, the stress in histopathology may be reduced and the morale may be better.*
>
> *I accept that I make errors but they would be compounded if I followed advice from you".*

69. The Claimant maintains that he was entitled to raise the concerns which he did with the Trust's Chairman and that he was not disparaging in doing so and is also critical of the content and tone of Mrs O'Callaghan's correspondence with him at this time.

70. Dr Bostanci eventually returned to full-time duties early in September 2014 but soon developed a backlog of cases again. She also continued to exhibit worrying behaviour. On 9 October 2014 Dr Thomas sent an email to Dr Bostanci about cases left in her office. The email indicated that during Dr Bostanci's absence on study leave her colleagues had had to deal with a number of unsigned out overdue cases. Dr Thomas describes how all of these were old cases (sometimes a month or more) that she had been emailed about as being required because they were long overdue, it also described the pressure this put on her colleagues. It concludes as follows:

> *"This has been a recurrent pattern in the past which I had hoped would now change. It is not only stressful for us but must also be for you. I gather from Corrado that you were in both days at the weekend (I know how important it is to take the weekends free). Yet the seriously overdue cases were still not dealt with. It really does concern me that*

> *you have reached this point again when you have not only been on full time duty for about a month. I think you need to tell us honestly if you cannot deal with the work assigned to you and tell us what you can manage. It is important for all of us that we find a way to work this – you can suggest alternatives".*

Dr Thomas sent a copy of this email to Mr Lear. On the same day Ms Christine Collins-Gilchrist (General Manager) and Mr Lear were called to the HP laboratory by Ms Jagjivan and the Claimant because of Dr Bostanci's unprofessional and abusive behaviour in the cut up room. Laboratory staff had been required to prevent her mixing up colon specimens and she had been abusive to them. Dr Bostanci was subsequently sent home and another pathologist assigned to cover her cut up duties. She was then given the following week off all duties to enable her to catch up on her work backlog.

71. Then, on 10 October the Claimant emailed Mr Lear and Dr Collins-Gilchrist about complaints he had received from a secretary and a junior member of staff in the laboratory about Dr Bostanci's behaviour towards them. The Claimant proposed that Dr Thomas should write to Dr Bostanci about her behaviour unless Mr Lear informed them otherwise. Mr Lear replied on 12 October to the Claimant and others to say that he and Ms Hallett were going to closely monitor the situation over the next few weeks.

72. Dr Collins-Gilchrist emailed Ms Hallett and Mr Lear on 10 October. Her email confirms that heated discussions had occurred in the laboratory in front of the laboratory staff and that Dr Bostanci needed to apologise to the laboratory staff who needed to be treated with courtesy and respect. It also confirms that slides were muddled and that an assurance had been given to Dr Collins-Gilchrist that the laboratory staff had managed to sort them out correctly. It further confirmed that Dr Collins-Gilchrist was going to see Dr Bostanci during the morning and also meet with the laboratory staff. The email goes on to note that work distribution needs to be more robust and that in the short-term this is going to be problematical. Dr Collins-Gilchrist submits that she and Dr Olufadi do not have sufficient knowledge and skills to check this. It also indicates that now that the Trust's pathology services are staying in-house and not being outsourced by tender the management of the laboratory is going to be restructured and that the Trust is getting head hunters to find a "Consultant Clinical Lead" which is described as "*a key post which will bring much needed leadership*". This email was not copied to either the Claimant or Dr Thomas.

73. Mr Lear had sent an email to Dr Collins-Gilchrist and others on 9 October. This confirmed that he and Ms Hallett had attended on Dr Bostanci on that day. It also noted "her office does have stacks of half-finished work". Mr Lear made a decision to take cut up work away from her on that day and noted that he and Ms Hallett did not consider that she cope with pressure. Dr Bostanci made representation that she was being given too much work and Ms Hallett in her email to Mr Lear and Dr Collins-Gilchrist states that until the issues of work distribution are resolved, it would be difficult for the Trust to gather sufficient evidence relating to her pace of work to proceed down "a capability route". The Claimant was not sent a copy of this email.

74. On 13 October 2014 Dr Collins-Gilchrist had written to the Claimant with reference to a meeting which she had held with him and Dr Thomas. This letter records that during the meeting the Claimant had stated that Dr Illes, Divisional Director, was a "fraudster and criminal". She informed the Claimant that he should either substantiate that claim to Mr Lear or provide a written apology to Dr Illes. The Claimant replied by email on the same day. He copied this email to Dr Lear and Ms Hallett. He did not retract the allegation, expressed strong criticism of Dr Illes and made clear that he did not consider he was suitable for his job. There is no evidence before the Tribunal that this matter was taken any further at that time. At the Tribunal the Claimant accepted that his remarks were disrespectful. He also said it was stupid and unnecessary of him to have made the comments and that Dr Illes did not deserve to be referred to in this way.

75. On 24 October 2014 the Claimant sent an email to Dr Olufadi reporting that Dr Miller had been bullied by Dr Bostanci at a Consultants' meeting held on that morning. His email also refers to the previous incident he had reported in the previous year following which he had been given no indication of what steps had been taken to deal with it. In his reply on the same day Dr Olufadi states, inter alia, as follows:

> *"You will not be aware that an investigation has been initiated to this meeting, as several complaints have been received. You will be interviewed as part of this investigation and informed of the outcome.*
>
> *In relation to the complaint you raised last year, Ms Hallett and I discussed this matter directly with Karolina at the time".*

76. The Claimant pursued the point of the previous complaint because he was particularly concerned as to why he had not been interviewed as to what had happened. The email correspondence between the Claimant and Ms Hallett sets out his concerns very clearly.

77. It was the Claimant's view those concerned had, in the face of an number of complaints about Dr Bostanci's bullying and harassment of other staff failed to deal with his complaint appropriately in 2013. His email to Ms Hallett of 28 November states, inter alia as follows:

> *"In this case I view the Clinical Director, the Divisional Director and a Medical Director to be the responsible officers. In my opinion they have underperformed in this matter over a long period of time and their failure has caused a vulnerable member of staff to suffer ill health".*

In Ms Hallett's reply she makes it clear she does not agree with all that the Claimant has stated and also confirms that the investigation of the incident of 24 October is ongoing.

78. On 7 November the Claimant sent a detailed email to Dr Olufadi and Dr Thomas. This was copied to Mr Lear. It concerned a delay by Dr Bostanci in reporting on a lymphoma case which required same day response and which in his view called into question her handling of lymphoma cases.

79. On 11 November 2014 the Claimant had attended a meeting with Dr Miller and Dr Olufadi which followed a period of sickness leave for Dr Miller. He wrote to Dr Lear and Ms Hallett on the same day stating that he considered Dr Olufadi had behaved inappropriately towards Dr Miller during this meeting. The email was also very critical of Dr Olufadi's communication skills and near the end of the email he described Dr Olufadi as pompous, vain, vacant and confrontational. He also suggests that Dr Olufadi could attend a course to improve matters and that someone else should be assigned to deal with Dr Miller. At the Tribunal hearing the Claimant accepted that his use of words in this letter was unfortunate and confirmed that he had a difficult working relationship with Dr Olufadi and that Dr Olufadi's management had created real difficulties for the HP Team.

80. At a meeting of the HP Service held on 24 November 2014 chaired by Dr Christina Collins-Gilchrist and attended by the Claimant, Drs Thomas and Mikel and others, including Ms Jagjivan, there were heated exchanges between the Claimant and Dr Christina Collins-Gilchrist who each accused the other of failing to display courtesy and respect to the other. The catalyst for this heated dispute related to figures in respect of a KPI performance index for Salisbury Hospital's Pathology Service which the Claimant asserted did not support the information which had been previously given to him and his colleagues and demonstrated that the Trust's current KPIs imposed tougher standards than those recommended by the RCP report.

81. This meeting demonstrates that there had been a failure to agree KPIs and that the Claimant was not prepared to accept the RCP recommendations and was continuing to robustly oppose their implementation for what he considered were valid reasons which were supported by his colleagues. This situation had reached such an impasse that Dr Thomas had become concerned at the lack of progress in this area and at the Claimant's unwillingness to compromise with Dr Collins-Gilchrist's position. The history of what were obviously protracted and frustrating discussions for the Trust's managers is not available to the Employment Tribunal. It concludes that as tempers became frayed at this meeting the discussions that had been ongoing for so long effectively ground to a halt. There were allegations and counter allegations on which the Tribunal cannot, and does not have to, reach any view. The critical finding of fact is that the position remained unresolved. The Claimant had consistently opposed the Trust's efforts to implement KPIs and the issue of turnaround times remained unsatisfactory. The meeting ended with Dr Collins-Gilchrist accusing the Claimant of being discourteous and disrespectful and the Claimant asserting that he and his colleagues had been given inaccurate information in previous meetings. There appears to have been little common ground. This suggests that a point had been reached when senior management had to impose the required KPIs and enforce their implementation.

82. The investigation into the events at the team meeting on 24 October was undertaken by Mr Hugh Bellis, Consultant Orthodonist and Clinical Director for Head & Neck. Those is attendance at the meeting were the Claimant, Drs Mikel, Thomas, Bostanci and Miller. The Report prepared by Dr Bellis was

not within the agreed bundle of documents and was only obtained from the Trust by direction of the Tribunal during the course of the hearing. Dr Bellis preferred the statements of the Claimant and Drs Mikel, Thomas and Miller to the recollection of Dr Bostanci. Mr Bellis concluded that the behaviour of Dr Bostanci was disruptive and that her behaviour towards Dr Miller was intimidating. He also concluded that this contravened both the Dignity and Respect at Work Policy and the Good Medical Practice Guidance. He also stated that there were obvious working relationship problems within the HP Team that would need to be resolved for the HP Department to function effectively. He specifically mentioned the relationships between Dr Bostanci and Dr Miller and Dr Bostanci and the Claimant.

83. Ms Hallett wrote to the Claimant and Drs Miller and Bostanci on 23 January 2015. She copied her letter to Drs Lear, Mrs Collins-Gilchrist and Dr Olufadi together with the Interim Director of Operations and Divisional Manager. It informed the recipients of the finding against Dr Bostanci and stated that Mr Lear and Ms Hallett would take appropriate action in line with the Trust's Policy for Maintaining High Professional Standards for Medical and Dental Staff. The letter also referred to the other finding as to relationships within the team as to which Ms Hallett stated:

> *"I suggest that we involve an external mediator who will support you to resolve these problems I will be in touch with you all separately to arrange this".*

At this time there were still two grievances which were being pursued by Dr Chefani and Ms Jagjivan in respect of Dr Bostanci's behaviour towards them that had not been investigated by the Trust.

84. The Claimant wrote to Ms Hallett on 30 January asking a number of questions. He wanted to know whether the mediation meeting was compulsory. His observation was that mediation would be necessary not only with him but with the whole department because Dr Bostanci's behaviour had been disruptive at all levels with all staff. He also referred to the two separate unresolved grievances for bullying and harassment that had been taken out against Dr Bostanci by other members of staff. He suggested that it might be advisable to await the outcome of those investigations before moving forward with a mediation. He also makes clear that he would not be happy to go into mediation as arrangements currently stand. He also states that the letter did not indicate whether any disciplinary action had been taken and if so what this action was. He sought reassurance that the Trust had taken necessary actions to ensure there would be no repeat of Dr Bostanci's behaviour. In her reply of 2 February Ms Hallett agreed that mediation might be needed on a wider scale than just between the three individuals she had named and also confirmed that mediation was a voluntary procedure. The Claimant in his reply to that email repeated his questions as to whether any action had been taken against Dr Bostanci. Ms Hallett was not prepared to comment in respect of that but noted that the Claimant was considering pursuing a grievance against Dr Bostanci.

85. On 9 February the Claimant wrote to Ms Hallett again setting out a number of measured and reasonable points as to the overall position and explaining the concerns which caused him to reject the proposed mediation at that time but making clear that he was willing to reconsider his position if Ms Hallett provided more information to him on the points he had raised. Ms Hallett acknowledged receipt of this email and expressed her disappointment, but said she would discuss matters further with Mr Lear and get back to the Claimant. She also wrote that she did not see how the situation in the Department could improve without some form of external support. On 9 February Ms Jagjivan had contacted Drs Collins-Gilchrist and Olufadi to enquire as to the position in respect of her grievance against Dr Bostanci which had been issued nearly seven months previously. Dr Olufadi's reply was that he would find out the reason for the delay and report back to her promptly.

86. The Employment Tribunal accepts the evidence of Dr Thomas which supports the evidence given by the Claimant, as to how matters escalated further. At the beginning of February 2015 Dr Olufadi requested Dr Thomas to reinstate Dr Bostanci to check the work of Dr Chefani. Dr Thomas refused to do so because of Dr Bostanci's long history of bullying behaviour towards Dr Chefani and because Dr Bostanci still had a significant backlog of her own unreported cases. Dr Olufadi insisted that Dr Thomas should take this step. It was at this stage that she discussed the issue with the Claimant and Dr Mikel. They jointly drafted a letter to Dr Olufadi which was sent to him on 2 February 2015. This expressed their concerns over his management of Dr Bostanci and stated that if those concerns were not addressed they were prepared to report the matter to the GMC and CQC. On 10 February 2015 Dr Olufadi replied to Dr Thomas requesting a meeting with Mr Lear. At this meeting the Claimant reiterated the consultants' concerns at the lack of any action taken over delayed patient reports and the stressed behaviour of Dr Bostanci.

87. On 9 February the Claimant also wrote to Mr Lear to inform him that at a meeting that day the HP team had discovered that they held a number of unreported specimens, some from as far back as November 2014 and the pathologist responsible for these cases (Dr Bostanci) was on leave for a week. The Claimant reported that Dr Olufadi had instructed the team that since Dr Bostanci was away on leave for a week they did not need to take action and the backlog could wait until her return. The Claimant's email made clear that he thought this was unacceptable. He asked Mr Lear whether he considered Dr Olufadi's position was justified and, if not, what he was going to do about it. Mr Lear remembers receiving this email but could not recall whether he responded to the Claimant. He confirmed that he would not have supported Dr Olufadi's decision. He considered it was a shame that this had been referred to him as it was a departmental issue. He considered it illustrated the difficulties in the HP Department with which he did not think he should have been involved. He did not know how the matter had been resolved. Although it was not known to the Claimant and others at the time Mr Lear confirmed to the Tribunal that by then he knew that Dr Bostanci had been prepared to accept a written warning following the report by Mr Bellis.

88. In view of the Claimant's concerns about the many unreported specimens and what he considered was an inadequate response by Dr Olufadi and the clinical risks of delay, the Claimant reported Mr Lear and Dr Olufadi to the GMC. He did so by a telephone call using the confidential route later on that day. The Claimant identified himself and was the told GMC aimed to keep his identity confidential. However he was also told that it might be very difficult to protect his identity in view of the details that would be required from him as to the matters on which he was making his report. He informed his colleagues, Drs Thomas and Mikel that he had made that complaint.

89. On 23 February 2015 an Investigation Assistant at GMC sent an email to summarise the matters reported to the GMC by the Claimant in the telephone conversation on 9 February. The Claimant was asked to provide confirmation that the GMC had satisfactorily summarised those matters reported to it in writing by 2 March 2015. The GMC wrote to the Claimant again on 15 April to inform him that a decision had been made to open an investigation into Dr Olufadi and Mr Lear. The email noted that the Claimant had stated he would like to remain as a whistle-blower but he was asked for his consent to disclose the complaint which would mean disclosing the notes of his call on 9 February and the notes he had provided to the GMC on 2 March to those subject to the complaint. He was also asked if he was prepared to release other supporting documents which he held which he was told would be disclosable to those facing the complaint during the investigation.

90. The GMC's letter confirms that the Claimant had referred to difficulties experienced with Dr Bostanci and her behaviour and delayed reporting on tissue samples. It indicates that the Claimant had complained that these issues had been raised with the Medical Director and the Clinical Director over a number of years and that no satisfactory action had been taken. There are eight bullet points summarising the complaint made to the GMC. The fifth bullet point states as follows:

> *"Roughly a year and a half ago you and several colleagues went to speak to the Medical Director and Clinical Director, taking examples of the poor performance and informing them of the issues and asking them to intervene. The Medical Director was already aware but this was the first official act to raise these issues. The Medical Director found this was a significant problem and asked a colleague to function as a mentor / observer reporting information to the Medical Director. You feel the Medical Director should have considered whether Dr Bostanci should be removed from clinical duties. In addition, the monitoring should have lasted two or three months, but a year and a half later the monitoring colleague has still not been asked for any reports or information".*

91. In February 2015 the Trust commissioned Edgecumbe Consulting Group Limited ("Edgecumbe"), a business based in Bristol offering psychology practice in the HR field to undertake a review of the HP Department. The Trust was introduced to Edgecumbe by Mr Lear. The circumstances in which he did so was subject to considerable challenge by the Claimant. In considering the Trust's appointment of Edgecumbe the Tribunal has

substantially accepted the evidence of Mr Lear and the Trust's then CEO, Mrs Miller. Their evidence was consistent and accorded with the Trust's management structures and procedures for incurring such expenditure and was supported by correspondence from Edgecumbe.

92. Mr Lear had been subject to an assessment by Edgecumbe when he worked in Bristol. This had been carried out by Mrs King, a director of Edgecumbe. Mr Lear had not seen Mrs King for some years when he met her at a training event for medical directors in January 2015. Mrs King was not a personal friend of Mr Lear as the Claimant has alleged. Mrs King gave a lecture at the training event about dealing with dysfunctional departments. At the end of this event Mr Lear spoke to her about whether Edgecumbe could provide assistance to the Trust and told her the Trust had a difficulty in one of its departments, which he did not identify. Mrs King gave an indication of how Edgecumbe could assist in dealing with this.

93. Mr Lear could not commission work from Edgecumbe without authorisation from his CEO. He discussed doing so with Mrs Miller following which he and Mrs Miller took part in a telephone call with Mrs King to discuss the extent of the commission and what the Trust required from Edgecumbe. Mrs Miller explained to the Tribunal that when she and Mr Lear decided to commission a report from Edgecumbe they had already agreed that the HP Department was dysfunctional and that this potentially affected patient safety and that the Claimant's influence in the Department was a major factor in causing its dysfunction. Mrs Miller's view of the Department and the Claimant came from information provided by Mr Lear, but also from her meetings with executive directors, divisional directors, divisional managers and the Trust's HR director. These conversations included conversations with Dr Olufadi and Dr Collins-Gilchrist. Mr Lear was then responsible for drawing up the terms of reference for Edgecumbe's work. Mrs Miller explained that they were seeking recommendations from Edgecumbe to enable them to address these problems.

94. On 11 February Mrs King wrote to Mr Lear to set out her proposed approach following which Edgecumbe awaited the Trust's formal terms of reference. This letter followed the telephone conversation between Jenny King, Mr Lear and Mrs Miller. Its first paragraph states, inter alia, as follows:

> *"Thank you for contacting Edgecumbe Group about supporting the Trust to resolve some serious difficulties within the consultant team in Histopathology. You have indicated that this situation has become so serious that the Trust is seeking immediate external help to try to address it. You described the problems as longstanding and centred largely on the behaviour of one consultant, Dr D'Arrigo, whose behaviour has apparently become increasingly destructive. You are seeking our advice as to how to manage his impact on the team and to provide an external view about how to enable the team to function effectively".*

The proposed approach suggested that Edgecumbe conducted a full behavioural assessment of the Claimant, which would require his co-operation.

95. Mrs King's letter also thanked Mr Lear for the briefing and the details he had given of the individuals who would be involved in the review, that is, the HP Consultants including Dr Bostanci; Dr Olufadi and Dr Collins-Gilchrist and, potentially, Drs Miller and Chefani. Mr Lear responded to Mrs King's letter of 11 February by a letter of 12 February which formally confirmed the Terms of Reference and that the Trust supported a full behavioural assessment of the Claimant followed by further feedback with him and then a discussion with Mr Lear and Mrs Miller. The Terms of Reference were finalised on 19 February after which Terms of Engagement were also agreed.

96. It is common ground between the parties that a meeting was convened by Mr Lear in February 2015 to inform those concerned of the Edgecumbe review. Those who attended the meeting were the Claimant, Dr Olufadi, Ms Hallett, Drs Mikel and Thomas. Mr Lear did not provide evidence in chief in respect of this meeting. Dr Thomas told the Tribunal that Mr Lear asked those present to participate in an external assessment conducted by Edgecumbe on the basis that it would provide more robust evidence against Dr Bostanci. The context is that at the meeting Dr D'Arrigo repeated concerns about the lack of action being taken about delayed patient reports and the stressed behaviour of Dr Bostanci. Dr Mikel recalled that Mr Lear explained that he felt more substantial evidence would be needed to bolster the Consultants' concerns about Dr Bostanci and stated that he had appointed Edgecumbe to help sort out difficult relationships within the team. The Claimant said that Mr Lear told them that he needed more evidence that would stand up to a legal challenge from Dr Bostanci and that he insisted that the Claimant should take part in an interview with Edgecumbe after the Claimant had expressed concern about taking part in another investigation before any action in respect of outstanding complaints against Dr Bostanci had been dealt with.

97. Mr Lear told the Claimant that it was a reasonable management instruction for him to participate in the investigation. The Claimant agreed to do so but refused to undergo a psychological assessment. The Consultants' evidence to the Tribunal is that Mr Lear told them that he accepted Dr Bostanci was causing difficulties and that the Edgecumbe report was needed to deal with her. When Mr Lear was cross-examined about this meeting he denied that he had said what the consultants alleged against him. He says that the name of Dr Bostanci was not raised by him but was raised by one of the consultants and that he had said that he wanted more evidence about the dysfunction in the Team not just Dr Bostanci.

98. The Tribunal asked questions about this meeting because it was concerned at how, with the people he had to deal with and the outstanding complaints against Dr Bostanci, Mr Lear had explained to the Consultants what the Edgecumbe report was for, particularly bearing in mind what he had agreed with Edgecumbe which was that the focus should be on the Claimant. Mr Lear conceded that he had been deliberately vague in what he had said. He tried to keep the discussion broad. He accepted that it had been disingenuous of him to do so. He did not want a prolonged to and fro and did not want to frighten people off because he wanted the investigation to proceed. He did not inform the Claimant what he had said about him to Edgecumbe. He conceded that he

should have been more open with the Consultants at this meeting. Taking all this evidence into account the Tribunal prefers the evidence of the Consultants to that of Mr Lear as to what was said at this meeting. He has accepted that he was not frank with those who attended this meeting and it is agreed that he did not give the Claimant full information as to his position or as to the purpose of the Report as it could potentially affect him. The Tribunal are satisfied that he referred to Dr Bostanci because it provided a reason for commissioning the report which would be accepted by the Consultants and avoided what he knew would have been a difficult but necessary conversation with the Consultants as to the purpose and focus of the report, which should have been fully discussed with them. This was disingenuous behaviour by the Trust's Medical Director in which he deliberately failed to explain the purpose of the Report and what the Trust was attempting to address.

99. The Edgecumbe Report entitled: "*Review of the working relationships within the Histopathology Service"* is dated April 2015. It was received by Mr Lear in May 2015. In the Introduction to the Report Edgecumbe summarises the understanding that they gained from the briefing given by the Trust's commissioning team. This introduction states, inter alia, as follows:

> *"The problems are longstanding and centre largely, but not exclusively, on the behaviour of Dr Corrado D'Arrigo who was recruited in 2008 to rebuild the Histopathology Service"…..*
>
> *These events together with others have contributed to a severe breakdown in the working relationship between Dr D'Arrigo and the Trust's senior management.*

The Report presents informed analysis and opinion on all those interviewed and then addresses the position in the HP Department as a whole. The Tribunal can only summarise the conclusions briefly and stresses that this summary is not comprehensive. The Report presented an alarming picture of the HP Department. It describes the situation as among the most actively dysfunctional Edgecumbe has seen. Edgecumbe conclude that there is an absence of clinical leadership in the Department and also states that it appears to Edgecumbe that the consultants and laboratory manager are disproportionately influenced and controlled by the Claimant. Edgecumbe also raised a number of matters of concern about the Claimant's attitude and impact on others. Edgecumbe believed that Dr Bostanci had the ability and willingness to reflect and learn from her mistakes but also concluded that she and the Claimant would not be able to establish a trusting relationship going forward. The Report also made a number of recommendations which the Tribunal summarise briefly.

100. One-to-one feedback for those interviewed was recommended. Edgecumbe also recommended a clinical and managerial structure for the whole of the HP service should be put in place with the authority of the Trust together with a transparent process for selecting a new Clinical Lead. Edgecumbe further recommended the establishment of rules of conduct setting out the consequences for those who failed to meet those rules and that all members should be required to sign a behavioural contract. It also recommended the

implementation of good operational processes that are measurable and can be monitored.

101. Edgecumbe also made individual recommendations as to the Claimant, Dr Bostanci and Ms Jagjivan. Edgecumbe referred to a dismal picture and stressed that outcomes are likely to be poor in such a situation unless all staff are committed to rebuilding and sustaining working relationships together with active monitoring. It gives a timeline for its recommendations suggesting that within one month there should be attendance by Edgecumbe on Dr Miller and laboratory staff, one to one feedback for all those mentioned in the Report. Its recommendation is that the wider management issues, with the addition of recruitment, should be addressed within a period of three months. They also recommended that over the medium to long term the Trust should consider securing the services of a suitably qualified team coach to support the HP Team and the Trust's senior leadership to implement the recommendations. Its recommendations for individuals encompassed Dr Bostanci who it stated would need a great deal of mentoring and support; Ms Jagjivan who it considered should be given extensive training while making clear to her that her current leadership style was not appropriate to team working in the modern NHS. Furthermore, Dr Bostanci and the Claimant should be expected to manage their behaviour according to the behavioural rules and expectations of the Trust and to work with all other team members in a respectful and professional manner.

102. The Report states that Edgecumbe did not look in detail at the operational elements of the service but in its opinion the climate was becoming one of almost unbearable tension for several individuals and the tensions and resentment would continue if both the Claimant and Dr Bostanci remained in the Team. On the likelihood of the Team being able to work and function safely and effectively within the current structure or one that is amended the Report indicates that Edgecumbe had the impression that there was a genuine lack of clarity about the shape and future of histopathology in the Trust and Edgecumbe were left uncertain about the Trust's strategic intentions with regard to pathology services. They refer to the decision already taken to rationalise biomedical services and change the management structure of the laboratory which was further demoralising Ms Jagjivan and had been unable to determine the impact of this on the laboratory staff because they had been outside the group nominated for interview.

103. Edgecumbe concluded that the team would not function effectively and might not function safely if the current structure continued. Edgecumbe accepted that the HP Team might argue that they continued to deliver the service to a high standard (which is common ground between the parties), but were concerned how little they had demonstrated their appreciation of the risks posed by some of their behaviours and the impact this could have on the culture and climate in the Team.

104. Mr Lear and Mrs Miller considered that the Report indicated that patient safety was being compromised. Mr Lear and Mrs Miller were not satisfied with its recommendations. Mrs Miller told the Tribunal that their concern was whether the Trust could implement the recommendations made by Edgecumbe quickly

enough to address the issues of patient safety raised by the Report. Mr Lear put it slightly differently. He explained that the question was whether the recommendations met the concerns which the Report had described. Mr Lear's position was that the Trust had already tried the recommendations which had been made. He was concerned that if the HP Team followed the Claimant in resisting the recommendations, as he anticipated, there would be a risk to patient safety because management would then let the situation continue as it was.

105. Mr Lear raised these matters in a letter to Mrs King on 14 May 2015. The result of this correspondence was that Mrs King provided an Addendum to the Report. This confirms that Edgecumbe had been informed that the majority of recommendations made by them had already been tried by the Trust at least once without success and that, having been informed of this Edgecumbe did not suggest that the Trust should attempt to implement their recommendations again. Edgecumbe endorsed the view which Mr Lear had expressed to them that to do so would be a grave risk to the HP Department as it would prolong a situation that "*represents serious risks to professional and clinical governance*". The Addendum concludes that the Trust "*now needs to take whatever action you deem fit in the light of this situation, to fulfil your duties and responsibilities as Medical Director and Responsible Officer for the Trust*".

106. Mrs Miller said that she and Mr Lear were shocked by the findings of the Edgecumbe Report and in particular its finding that patient safety in the Trust was compromised by the behaviours in the Department. They were not surprised by what had been said about the Claimant and were also aware of problems with Dr Bostanci. However, although they agreed they could not ignore the Report, neither of them considered it was appropriate for them to make a decision on their own, or even jointly, about what to do next. Mrs Miller decided to convene a meeting of the Board of Directors to consider the Report and concluded that the Board would need to receive legal advice about the options available to them so that they could decide what the Trust should to do next.

107. On 8 May 2015 the Claimant submitted a grievance in relation to leave arrangements as applied to the HP Consultants. He pursued this grievance against Dr Olufadi, Dr Illes and Mr Lear. He asserted that Dr Olufadi had changed the agreed departmental process for leave with no consultation, that Dr Illes had failed to respond to a letter from him in respect of this, that Dr Olufadi had failed to forward his request for leave to Mr Lear and that Mr Lear was allowing the HP Consultants to be treated differently than other Consultants in the Trust and, finally, that Dr Olufadi had failed to provide the necessary cover to enable the Claimant to take leave. The grievance was considered by Ms Walters, the Trust's Director of Finance and Resources at a meeting with the Claimant on 28 May following which she confirmed in a letter of 1 June 2015 to the Claimant that she was not upholding his grievance and also notified him of his right to pursue an appeal against that decision.

108. Mrs Miller convened a special meeting of the directors on 26 May. All the directors were given a copy of the Edgecumbe Report in advance. The Trust's Board of Directors is a unitary Board and non-executive directors play a part

in its decision making process. Mrs Miller told the Tribunal that how to take this matter forward was not her responsibility, but the responsibility of the Board because it involved patient safety, staff wellbeing and potential reputational issues. Furthermore both Mrs Miller and Mr Lear were not prepared to accept that they had made recommendations to the Board as to what steps the Trust should follow at the Board meeting. Mrs Pearce had attended the Board meeting in May 2015. This was a week or so after she joined the Trust. She recalled Ms Hallett giving a high level presentation about the Edgecumbe Report. She also recalled that the Board had a recommendation before it based on legal advice which was adopted by the Board. The Report and recommendations were tabled by Mrs Miller and supported by Mr Lear (contrary to their evidence). Mr Lear also provided background information to the Board. It was proposed that the next best step was to look at the Claimant's behaviour in more specific detail and to examine what part he had played in the dysfunctionality of the team, his behaviour towards the senior management team and clinical managers and whether this was repairable. This recommendation was adopted by the Board.

109. Mrs Pearce explained that the Board did not exclude Dr Bostanci at this time because the matters highlighted in the Edgecumbe Report concerned the Claimant. It was concluded that sorting out issues with the Claimant would resolve Dr Bostanci's position. Mr Lear's evidence was that at this meeting the Board discussed the removal of Dr Bostanci instead of the removal of Dr D'Arrigo. The Board's decision on this issue was that, because Dr Bostanci had co-operated with Edgecumbe, and they indicated she had shown some insight into her position, the Trust should continue with her employment. The Board were then updated by an agenda item at their following meetings in closed session. The Board was not shown a copy of the Mr Jones's Report. It was informed about it and decided that a Panel should be assembled to consider the Report which would be chaired by Mrs Pearce.

110. The minute of the Board Meeting sets out the procedure that was agreed by the Board. This was that there should be an investigation into the findings of the Edgecumbe Report and that the Claimant should be excluded (that is, suspended) from his employment while the investigation was ongoing. It was also agreed that an external body should be appointed to undertake the investigation which should be carried out as quickly as possible and that HR resource required to support the investigation internally should be backfilled while the procedure was ongoing. Finally, the Board agreed that the potential implications of these steps in respect of the Claimant's wife, who was also employed as a consultant by the Trust should be considered and addressed as appropriate. The Board authorised Mrs Miller to proceed with the above actions as soon as possible and to incur such costs as required. Following this meeting Mrs Miller and Mr Lear requested Mr Warner, the Director of Workforce & Organisational Development, to search for a suitable HR Consultant to undertake the investigation required by the Board. This resulted in the appointment of Mr Richard Jones as the external independent HR investigator.

111. On 2 June 2015 Mr Lear wrote to the Claimant. The purpose of this letter was to explain to the Claimant the commissioning of the Edgecumbe Report, the content of the report (with a redacted copy provided to him), how the Trust intended to deal with it and the procedure it would follow. It also advised the Claimant that he was to be excluded from the Trust from the date of the letter. The reason given to the Claimant for this decision by the Trust was that it was necessary because of the details of the Report and the fact that the Trust did not believe that his presence during the investigation would assist matters and was likely to hinder the investigation. He was also told that the exclusion would be reviewed every four weeks. The Tribunal has found it instructive to consider what Mr Lear told the Claimant as to the commissioning of the Edgecumbe Report. His letter stated as follows:

> *"The focus of Edgecumbe Health's remit was the team functioning of the consultant histopathologists. Instructing Edgecumbe Health was an unprecedented and highly unusual step. I, as Medical Director felt compelled to do this because in the Trust's view there was a serious longstanding dysfunction within the consultant histopathology team, serious dysfunction between the consultants and their clinical lead and serious dysfunction between the Trust and the team.*
>
> *The Trust could not leave this situation as it was as such dysfunctionality (actual or perceived) would risk the safety of the service as it could potentially compromise the clinical standards offered by the histopathology team. The Trust owes a duty of care to all its employees. Allowing such a situation to endure could also be contrary to that duty of care".*

112. As to the Trust's response, Mr Lear's letter states as follows:

> *"Accordingly, the Trust is now considering how to address the breakdown in the functioning of the team and specifically working relationships within the team and with the Trust's management. As a result of the report, the Trust is now considering whether these issues are capable of being remedied and whether it should consider terminating your employment as a means of addressing this most serious of situations. I appreciate that this letter may come as a shock to you. However, the Trust feels compelled to act in the light of the report".*

113. As to the process and procedure Mr Lear explains that the Trust did not believe that the Trust Policy on Maintaining High Professional Standards for Medical and Dental Staff (MHPS) was applicable. This was because the concerns raised did not relate to the Claimant's conduct or capability. Mr Lear states as follows:

> *"The report pays testimony to your clinical skills; and the matters raised in the report do not give rise to any conduct issues".*

The letter then states as follows:

> *"The Trust intends to adopt the following process:*

An independent HR professional will be instructed by the Trust to report in a short period of time on:

(1) The issue of the breakdown in the functioning of the team and specifically working relationships within the team and with the Trust's management.

(2) Whether there are any feasible steps that can be taken short of recommending the termination of your employment that would address the serious state of matters in the team.

(3) If no such steps can be identified, to consider making a recommendation of termination of your employment with the Trust.

The Trust may then convene a panel to consider the possibility of terminating your employment. The procedure for such a panel will be explained to you if that stage is reached. The Trust wishes to make clear here that it has not decided to terminate your employment. We are however investigating whether matters have reached such a point that it may become necessary to consider such a step, given the seriousness of the issues raised by Edgecumbe in their report".

114. Mr Lear also informs the Claimant that notwithstanding that MHPS did not apply the Trust thought it fair and reasonable to follow the procedure prescribed by MHPS relating to his exclusion. On the same day Mr Lear reported to the Medical Staffing Committee that a Consultant in the HP Department had been excluded and that this act was without prejudice whilst a full external investigation was undertaken.

115. The National Clinical Assessment Service (NCAS) wrote to Mr Warner on 8 June following a telephone conversation on 1 June about the Claimant's circumstances and the steps the Trust was taking. This letter stated, inter alia, as follows:

"I advised you that a formal investigation and exclusion should be managed in accordance with "maintaining high professional standards" (MHPS) Part 1 and that the Medical Director would normally assume the role of case manager. You have already identified a "third party" trained and experienced Human Resources Manager to undertake the investigation. Any conclusions from an investigation that is not MHPS compliant may be open to challenge".

116. On 2 June 2015 the Claimant wrote to the GMC apologising for not replying to the request made in April. He wrote as follows:

"I'm afraid when facing the potential consequences of reporting my Medical Director, I buckled"

He also informed the GMC that he had been suspended from work that day and enquired as to whether the GMC had proceeded with the investigation

and also indicated that he would be happy to assist in a more open and active way. The GMC replied to confirm that a decision had been made to proceed with their investigation but that Mr Lear and Dr Olufadi had not yet been informed of the complaint and asking the Claimant to complete a consent form by 9 June. This email of 2 June was followed by a further email on 10 June enquiring whether or not he was prepared to provide consent to enable the GMC to provide full copies of documents submitted to it rather than heavily redacted documents. The Claimant did not provide his consent.

117. A further development was that on 15 June 2015 Dr Miller submitted a grievance to the Trust's Director of Workforce and Human Resources complaining about Dr Bostanci's behaviour towards her. This grievance encompassed complaints about Dr Bostanci from September 2011 to 9 June 2015 and also made allegations in respect of the conduct of Dr Olufadi. Dr Miller's letter also indicated that it covered just some of the examples of the constant harassment and bullying at work carried out by Dr Bostanci.

118. Mr Jones is a chartered fellow of the CIPD. He has an MsC in Management and has worked at HR director level in eight NHS organisations as well as carrying out many investigations within NHS Trusts under MHPS. He agreed to undertake an investigation following discussions with Mr Warner on 3 June 2015. His main contact at the Trust throughout the investigation was Ms Youers, the Divisional Workforce Manager. He received very few documents from the Trust before commencing his investigation. He was provided with a copy of the Edgecumbe Report and one or two other documents but in his own words, "nothing of any substance". He was also provided with a copy of Mr Lear's letter to the Claimant of 2 June and was asked by the Trust to use that as his terms of reference for the investigation and to provide his conclusions on the issues set out in that letter. The documentation appended to his Report was obtained during the course of the interviews he conducted during his investigation. He did not have a briefing meeting at the Trust before he started his investigation which is his preference in situations of this sort.

119. Mr Jones's "Report of independent HR investigation into problems concerning Dr C D'Arrigo, Consultant Histopathologist" was completed on 8 July 2015. The Report confirms that it was undertaken as a standard HR type investigation and was not conducted in line with the framework for managing performance and conduct of doctors within MHPS. The report also confirms that Mr Jones had been given a list of witnesses to interview and that he was given the flexibility to extend this list if he wished. Mr Jones prepared some standardised generic questions to ask all of the initially identified key witnesses and some additional questions for senior management. He did so after reading the Edgecumbe Report. He then prepared a shorter version of generic questions for the three witnesses who were interviewed following a specific request to do so from the Claimant. Notes of the interviews are included as appendices to the Report. As to findings of fact, Mr Jones confirmed that his investigation was not required to reinvestigate, or review Edgecumbe's findings. The Trust provided Mr Jones with an extract from a GMC document about working collaboratively in addition to the Edgecumbe

Report and Mr Lear's exclusion letter to the Claimant.

120. Mr Jones's Report consists of 178 pages. It contains notes of interviews with seventeen employees of the Trust including the Claimant, the four other consultants working in the HP Department, Mr Lear, Ms Hallett, Drs Miller and Chefani, Dr Olufadi, Dr Collins-Gilchrist and Mrs O'Callaghan. It is as a result of these interviews that Mr Jones obtained further documents. These were the Claimant's letter to Mr Lear of 11 November 2014 (paragraph 79 above); emails between the Claimant and Mr Lear as to the GMC complaint about the Claimant; the letter from Mrs O'Callaghan to the Claimant of 17 July 2014 (paragraph 68 above); the minutes of the meeting held on 24 November 2014 (paragraph 80 above); the emails between the Claimant and Ms Hallett as to mediation (paragraphs 83 – 85 above); and the Claimant's email to the HR Department of 8 May 2015 (paragraph 107 above).

121. Ms Youers had written to the Claimant to inform him of those who had been selected for interview by the Trust. In their correspondence the Claimant had made clear his concerns to the content of the Edgecumbe Report and his concern that he had been singled out and the impartiality of Mr Lear. He also provided a list of nineteen other potential interviewees setting out reasons why he considered they could be of assistance to Mr Jones. The Claimant was also supported by an industrial relations officer of the British Medical Association ("BMA") as the procedure continued. In her response by email of 17 June to the Claimant's list of additional staff to interview, Ms Youers informed the Claimant that as the investigation predominately focused on the last two years a decision had been made not to interview those staff who left the employment of the Trust prior to that time as they would be unable to contribute to the current and most recent situations.

122. Mr Jones explained his remit to the Tribunal as follows. The findings had already been made by Edgecumbe and the Tribunal wanted him to provide an independent view of those findings. He investigated what was said to him in the interviews which is how he obtained the emails in the appendices. Furthermore, he attached some weight to the content of those emails referring to what he considered were inappropriate remarks made by the Claimant against others and the fact that he saw no correspondence from others criticising the Claimant. In any event, his view was that his task was to consider whether there had been a breakdown in working relationships regardless of who was to blame. He was not asked to reinvestigate or test Edgecumbe's findings and did not do so. He was required to take a view as to the Claimant's position. He confirmed that the name of Dr Bostanci kept coming up from other doctors in the HP Department but his terms of reference were not to deal with Dr Bostanci. However he considered it was impossible to ignore how often her name was mentioned. His conclusions as to the Claimant can be summarised as follows. He did not think on balance that the Claimant's relationship with his colleagues had broken down but concluded that his working relationship with senior management had broken down and could not be repaired.

123. He told the Tribunal that he could not think of any other options as to how the situation could be dealt with apart from those already referred to in the

Edgecumbe Report except, perhaps, a negotiated termination of the Claimant's employment although there are significant restraints as to the discretion available to an NHS employer in that area. His four options were as follows: do nothing; consider further interventions that he understood had already been considered and explored; and then ruled out by the Trust, or consider specific interventions aimed at changing the Claimant's attitude to the Trust's management, although he concluded there was no evidence to suggest this would work; or to terminate the Claimant's employment.

124. He was adamant that he was not required to make any recommendation to the Trust as to what option should be followed. His report ends as follows:

> *"However on the basis of all this evidence gathered the investigator has to conclude that the bond of trust between Dr D'Arrigo and his employer seems broken and is not repairable. In this situation it would be better for both parties if this bond was formally cut and it would sadly appear that the way the Trust can achieve this is by terminating the contract of Dr D'Arrigo.*
>
> *The Trust will want to consider this report very carefully and decide its next steps".*

125. It is appropriate for the Tribunal to summarise the view of those of the Claimant's colleagues who were interviewed by Mr Jones, and who worked with the Claimant in the HP Department and which, in the case of Drs Mikel, Thomas, Taibjee and Chefani also included evidence which they gave to the Tribunal at the hearing. His colleagues strongly supported the Claimant. There was great respect for his clinical skills and an appreciation of what he had done for the Department over a number of years. There was also recognition of his weaknesses and a concern that he had damaged his relationship with senior management as a result of representing their views and interests on their behalf. Dr Thomas also represented the Claimant before the Panel which must be seen as a substantial demonstration of her support for the Claimant. The impression of this evidence was of a group of dedicated professionals who considered that their colleague had not been treated fairly when weighing up his strengths and weaknesses.

126. When Mr Lear had received and considered Mr Jones's report it was his view that the only option was to terminate the Claimant's employment. However, this was not a decision that he could make. The decision as to whether or not to terminate the Claimant's employment was to be referred to a Panel for appropriate consideration.

127. On 13 July 2015 he received a letter from the GMC which informed him that a whistle-blower had made three allegations against him. It is not disputed that he went to see Dr Thomas, then acting Clinical Lead in the HP Department after he had received this letter. There is also no dispute between Mr Lear and Dr Thomas that he told her he had received a letter from the GMC which had accused him of failing to fulfil his responsibilities as a Medical Director. Mr Lear also accepts that he thought it was either the Claimant or Dr Thomas who had made the complaint to the GMC. There is then a substantial dispute

between them as to what Mr Lear said to Dr Thomas. He says that he told her that if such a broad sweeping allegation like that is made against someone then anyone would be likely to say that the working relationship between accuser and accused has broken down. Dr Thomas says that it was clear when Mr Lear came to see her that he believed the Claimant had made the complaint to the GMC and says that Mr Lear told her that he could have nothing more to do with the Claimant because he had reported him to the GMC and there could be no further relationship between them because of that.

128. Mr Lear accepts that he reacted badly to the third allegation made to the GMC which had been referred to him. He took the initiative to speak to Dr Thomas and to enter into a discussion with her about the letter he had just received from the GMC. After considering all the evidence available to it as to Mr Lear's view of the Claimant up to this point both before and after the Edgecumbe Report, and the fact that by this time he had concluded that the Claimant should be dismissed by the Trust, the Tribunal prefers the evidence of Dr Thomas as to what was stated at this meeting by Mr Lear. The Tribunal finds that Mr Lear went to Dr Thomas to seek her confirmation that the Claimant had made the complaint to the GMC and to demonstrate to her that in those circumstances the Claimant had made his working relationship with Mr Lear untenable. A potentially relevant issue for the Tribunal in respect of this conversation and the reasons for it was whether at that stage Mr Lear should have recognised that his position as the Case Manager was compromised by the view he now held as to the impossibility of a future working relationship with either the Claimant or Dr Thomas, if she had made the complaint to the GMC or supported it.

129. Dr Thomas considers that Dr Bostanci's appointment added a different and considerably higher level of stress to the Department both because she was not coping with work and had many delayed cases in her office. It is her recollection that from 2012 all risks concerning Dr Bostanci were handled by the general manager (then Ms C Aitken) and Dr Olufadi. In addition she recalls junior pathologists attending on the Claimant with anxieties about Dr Bostanci's delayed reporting and bullying behaviour which in turn escalated to more senior managers. It was this which led to the meeting with Mr Lear and Dr Olufadi on 10 October which was followed by Dr Bostanci's lengthy absence from work but Dr Thomas' monitoring noted continuing backlogs despite a limited workload on her return to work in September 2014.

130. In her Edgecumbe interview, Dr Thomas set out her view that the major factors contributing to dysfunction in the Department were a combination of new management actions and one dysfunctional pathologist. She also spoke of considerable stress as a result of cases being allowed to mount up in Dr Bostanci's office and criticised management's attitude to those concerns. She also considers that what Edgecumbe wrote about what she had said did not represent her views. She says that after the Claimant's suspension the HP Department was left in disarray and she was having to work around the clock to cover urgent cases. She says that she expressed concerns as to this situation when she spoke to Mr Lear who told her he did not know how she

had coped. Dr Thomas also suggested that instead of dismissal a working relationship could be established with the Claimant and suggested one option was that he could work outside the hospital so that it could retain his valuable diagnostic skills.

131. On 22 July the consultants and doctors in the HP Department sent a letter to Mr Lear supporting the Claimant and requesting his return to work. They also expressed the view that his exclusion was detrimental to the service, to the care of patients and the morale of staff.

132. On 20 July Ms Youers asked Mr Jones to give further details as to the breakdown of relationships between Dr Bostanci and members of the HP Team and also his view on the relationship between Dr Bostanci and senior management and whether these relationships were irretrievably broken down. He replied as follows:

> *"You will appreciate that within the terms of reference ie the exclusion letter, I was not asked specifically to review the issues around Dr Bostanci. However given the emphasis placed on her by the various members of Histopathology during our interviews, it would have been remiss of me and I think the report would have been less authentic had I not made some reference to them. In terms of a breakdown between her and colleagues this will be particularly true of Dr D'Arrigo, the middle grade doctors Miller and Chefani (for whom this relationship is quite critical to their development) and I think Dr Thomas also. In terms of Mikel and Dr Taibjee the situation would differ slightly, albeit in my opinion they too have also lost trust in her abilities? It was also very noticeable within the three interviews we had with laboratory staff they too intimated real concern over her in terms of diagnostic skills and specifically turnaround times".*

He also comments on her relationship with the senior management and his email also states as follows:

> *"In respect of irretrievable I do believe that for her colleagues it can no longer be repaired and so is broken. Again in terms of senior management I have to speculate a bit but on the balance of probability, I suspect it is probably broken with them too?"*

133. On 27 July Mr Lear wrote to the Claimant to provide him with a copy of Mr Jones's Report. He also informed the Claimant as follows:

> *"My conclusion is that the report shows there is a potential case and that is therefore necessary to convene a panel who will consider the findings of the independent investigator and reach a conclusion whether the breakdown in the function of the team and specifically working relationships in the team and with the Trust's management mean that a recommendation should be made for termination of your employment with the Trust".*

He then gives brief details of the evidence that will be presented to the Panel,

confirms that the Claimant will be advised of the composition of the Panel in due course and that the period of exclusion has been further extended.

134. On 3 August Mr Lear wrote to Dr Bostanci excluding her from her employment. This was to enable the ongoing investigation into the potentially serious allegations made against her in the grievance issued by Dr Miller on 15 June 2015 and to commence an investigation into a grievance against her from Dr Chefani which had been submitted in March 2014. The letter also refers to Mr Jones'ss Report which refers to his provisional view that the relationship between Dr Bostanci and the majority of her colleagues had broken down and was not retrievable. On the same day, Ms Youers wrote to the Claimant informing him that the Trust had commissioned an investigation to be undertaken following the submission of complaints against Dr Bostanci and Dr Olufadi, advising him of the consultant who would be investigating the matter. Ms Youers also wanted to arrange a meeting between the Claimant and the investigating consultant and asked the Claimant to supply copies of documents which she referred to in her email.

135. The journey to the Panel hearing was protracted for which in the course of the hearing each side made various criticisms of the other. For this reason it was helpful for the Tribunal to provide the parties with a factual matrix of their findings in this area at the beginning of the fourth day of the hearing. In February 2015 the Claimant and others had established Poundbury Cancer Institute (PCI) to provide services for cancer patients. He had invested a significant sum into this business which is still operating and in which he has been working with local GPs since his dismissal. The Claimant was working with local GPs and colleagues' support in the Poundbury business from late June and had obtained consent from the Trust to do so.

136. He was also represented by the BMA in the ongoing procedures. There was extensive correspondence in which the Trust requested the Claimant to provide details of witnesses and documentation on which he relied and of the implications if he did not do so within time limits set out in the correspondence. The Claimant was given substantial access to the Trust's network from 3 November 2015 and three applications for postponement of the hearing to assist him in his preparation for it were granted by the Trust which also granted extensions of time for him to contact witnesses and provide documents.

137. During this period he had been signed off by his GP. The last medical certificate which ran to 26 January 2016 was not received by the Trust until 12 January. This meant that the Trust's HR Department was unaware that his absence continued to be certified up to the date of the hearing. He eventually produced a medical certificate which had been signed on 5 January 2016 but backdated by his GP to take account of his previous absence. The Claimant and his representative made no application to postpone the hearing on 4 January either before that hearing or when it commenced. He was prepared to continue with Dr Thomas as his representative rather than his BMA representative who had attended to undertake that task. The Claimant had not produced documents by that date and did not bring copy documents with him to the Panel hearing. These had to be sent to the Panel after the hearing

together with other additional documents which the Panel then considered as part of their deliberations on outcome.

138. The Panel which comprised the Trust's Chief Operating Officer, Mrs Pearce, its Divisional Director for Surgery, Mr Tweedie and Mrs Blanchard, Medical Director for Salisbury District Hospital, its external Panel member, convened on 4 January 2016. The Panel had been provided in advance of the hearing with a copy of Mr Jones'ss investigation report. Mr Lear appeared to present the Trust's case. He was accompanied by Mr Jones and Ms Youers. Ms Crane, a Divisional Workforce Manager, provided HR support for the Panel. On the day of the Panel hearing it was unclear whether the Claimant intended to attend. The Panel were advised by Ms Chamberlain, the Claimant's BMA representative that she did not know whether he would attend. He had not provided the Panel with any documents for the hearing and had given no indication that he intended to call witnesses despite a number of opportunities to do so.

139. He arrived thirty minutes late. He did not provide the Panel with any documents during the course of the hearing. He was accompanied by Dr Thomas and others from the HP Department. He objected to Mr Lear's presence at the hearing. After taking advice the Panel informed the Claimant that he had to decide whether he wanted Dr Thomas or Ms Chamberlain to present his case. His BMA representative and two other colleagues who had accompanied him to the hearing then departed. The Panel also decided that Mr Lear should remain to present the Trust's case and he duly did so and was then followed by Mr Jones who summarised the key findings of his investigation. Dr Thomas then presented the Claimant's response to the management case on his behalf which allowed the Panel to ask questions about the statements that were read out by Dr Thomas.

140. The Panel Meeting was minuted. The minutes are comprehensive and demonstrate that the hearing was lengthy and arduous. They are accepted as accurate by the Claimant. The fact that Mrs Thomas was reading from documents which were not made available to the Panel, and that no arrangements were made to copy documents for the Panel at the hearing made progress difficult. Nevertheless the Panel made arrangements for the Claimant to provide them with a copy of his statement / statements of case and the other documents he wished to refer to them on the day after the panel hearing and were able to consider those documents when considering their decision.

141. The Tribunal are satisfied that in these circumstances, particularly taking into account the Claimant's failure to co-operate with the Trust leading up to the hearing, and giving credit to Dr Thomas for her presentation of his case to the Panel, he was given full opportunity to respond to the case against him orally during the hearing and afterwards by presenting documents. The Panel had not been provided with a copy of the RCP Report before the hearing but this was provided to them so that it could also be considered in their discussions.

142. The Tribunal notes Mrs Pearce's evidence that the Panel found it very difficult to follow the Claimant's case as presented by Dr Thomas. This is not a

criticism of Dr Thomas but a result of how she had to present the case as a result of the Claimant's failure to provide documents in advance. However notwithstanding these difficulties the Panel were, in view of the steps they took to assist the Claimant, able to extract the issues he wanted to put before them, which included the allegation that his employment was being terminated because he was a whistle-blower and because he had raised patient safety issues. It was made clear to the Panel that the Claimant was strongly supported by his colleagues in the HP team. The Panel also gave careful consideration to the allegation that Mr Lear had initiated the Edgecumbe Report after he found out that the Claimant had reported him to the GMC and the comments he was alleged to have made about this to Dr Thomas in a meeting with her.

143. Mrs Pearce explained that the Panel's task was to look at the behaviour of the Claimant not Dr Bostanci, who was considered to be red herring because the Panel were looking at the Claimant's leadership of the Team and whether it could be retrieved. Dr Bostanci was part of a much broader picture. They were not aware of the Bellis Report. The fact that there had been and unsatisfactory grievance pursued by the Claimant was a factor in their decision. They also had no reason to doubt his willingness to return to the HP Department. The question was whether relationships had mended sufficiently for such a return and whether it would be effective and the Panel were not confident that it would be. They also took into account the terms of reference agreed with Edgecumbe as set out in their Report but reached no conclusion as to whether Mr Lear had been disingenuous in his conversation with the Consultants. Mr Jones's Report made clear the position of the senior and clinical managers interviewed by him.

144. The Panel were also able to consider a letter from Ros Keys, a trained psychotherapist, which set out a series of criticisms of the Edgecumbe Report. Mrs Pearce also asked questions of the Claimant as to whether he had been reporting the safety incidents involving Dr Bostanci using the Trust's incident reporting system and it became obvious that he had not. After the hearing, the Claimant provided a list of examples relating to Dr Bostanci and Mrs Pearce instructed the Trust's Head of Risk Management to look at the cases referred to. She also asked the Head of Risk Management to provide her with a list of clinical incidents regarding patient safety reported directly by the Claimant between July 2010 and 12 December 2014. He could only find one reported incident during this time on 24 October 2014 which related to a delay in pathology reporting by Dr Bostanci.

145. Mrs Blanchard was able to ask the Claimant about his view that the relationship had not irretrievably broken down and could be restored. It was the view of the Panel that he had been prompted by Dr Thomas to inform the Panel that he accepted he bore some responsibility for the breakdown of working relationships because in answer to Mrs Blanchard's previous questions he had not accepted responsibility but had only criticised senior managers in the Trust.

146. Mrs Blanchard and Mr Tweedie were asked to set out their initial thoughts to Mrs Pearce in writing and the Tribunal have had the benefit of considering

their comments in emails of 7 and 14 January 2016 respectively. The content of those emails, the minutes of the panel hearing and the evidence provided to the Tribunal about the panel hearing by Mrs Pearce and Mrs Blanchard confirm that careful consideration was given to the matter before the Panel and that all recognised that it was unusual to dismiss a doctor due to a irretrievable breakdown of working relationships and that the Panel needed to be sure that there was no alternative and that no other action could be taken to repair relations. Mrs Blanchard's note ended as follows:

> *"The question which remains for me is whether the management has demonstrated that working relationships between Dr D'Arrigo and Drs Bostanci, Olufadi and Lear have irretrievably broken down; one email exchange refusing mediation seems slightly thin evidence, although some of Dr D'Arrigo's expressed opinions on his colleagues does provide some support. Should we therefore attempt to test this by getting him back to work in an exclusively clinical capacity with mediation and coaching? I would give it less than 50% chance of success".*

147. The Panel's decision was explained to him in a comprehensive letter sent to him by Mrs Pearce on behalf of the Panel on 28 January 2016. This letter summarises the evidence the Panel received and the additional points raised by the Claimant that were considered by the Panel. The Panel concluded that the evidence in the management case demonstrated a clear breakdown in the Claimant's relationship with management. Furthermore the Panel were not persuaded that if the Claimant returned to work he could simply focus on clinical work and avoid management interactions or that the situation was retrievable by such an arrangement. The Panel concluded the Claimant's relationship within the Team and Trust management had broken down and that there was no evidence from him to show how this could be rebuilt to be workable going forward.

148. The letter also records that the Panel did not consider that the Claimant's working relationship with management, in particular his Clinical Director, Divisional Director, Divisional Manager and Medical Director could be repaired and had concluded that a consultant position would not be tenable without a working relationship with senior team.

149. The Panel also decided the appropriate sanction was the Claimant's dismissal from the Trust. He was informed that he would be paid in lieu of his contractual three months' notice, including any outstanding leave and that his last date of service was 27 January 2016. The letter also informed the Claimant of his right of appeal against this decision.

150. The Claimant submitted an appeal against this decision by letter of 4 February addressed to Mr Warner. The letter of appeal was extensive and comprehensive. There were six grounds of appeal. These were that: unfair action had been taken against the Claimant for whistle-blowing; that the investigation had been superficial and biased and a decision had already been made to dismiss him in December 2014; the Trust had failed in its duty of care towards him in not recognising the stress under which he had worked and failing to offer him support; that no concerns had been raised during his

appraisals and no disciplinary actions had been taken against him prior to his suspension; that his response to matters raised against him had been hampered by lack of access to his records; and that he had suggested an alternative workable solution and confirmed that he was open to working with the Trust to rebuild relationships.

151. The Claimant's appeal was heard on 6 April 2016 before a Panel comprising Mrs Miller, Mrs Doherty, Consultant / Divisional Director and Mrs Baird Assistant Medical Director, North Bristol NHS Trust, the external member. The minutes taken at this meeting were available to the Employment Tribunal. The Claimant was accompanied by Dr Thomas at the appeal hearing.

152. The Appeal Panel reserved its decision at the end of the hearing. Mrs Miller wrote to the Claimant on 12 April to inform him that his appeal had been unsuccessful. In that letter she summarises the decision which the Panel reached on the six grounds of appeal submitted by the Claimant. The Appeal Panel did not accept that there was any evidence to support the Claimant's view that detrimental action was taken against him as a result of him raising concerns as to patient safety or that a decision was made to dismiss him in December 2014. They also concluded that it was unreasonable to submit that management should attribute his behaviour to health concerns when he had raised no health concerns during the period under consideration.

153. It was also concluded that there was considerable evidence to suggest that the Claimant was fully aware of concerns about his behaviour and attitude over a number of years and had contributed to dysfunction in the Department and this conclusion was supported by what the Trust has explained to Edgecumbe when commissioning the Edgecumbe Report. They did not accept that the Claimant had been seriously hampered in his attempts to defend himself due to lack of access to his records. Finally they concluded that the Claimant lacked insight into the changes that would be required in order to rectify the situation and also concluded that his suggestion of avoiding any contact with management reinforced their view of his lack of person awareness and considered that it was extremely unlikely that his relationship with the Trust management could be rebuilt. These are the facts which the Tribunal has found.

Submissions

154. As already indicated the Tribunal received extensive and helpful written (Exhibits C.6 and R.12) and oral submissions from Counsel. It summarises those submissions below. In doing so the Tribunal confirms that it has referred to and considered all the submissions made to it in its deliberations as to its findings of fact and its final determination.

155. Mr Probert submits that the Claimant and his Consultant colleagues began to raise concerns in relation to Dr Bostanci around 2011. As to the protected disclosures Mr Probert notes that the Respondent now accepts that the Claimant made protected disclosures to it on 10 October 2013, 9 October 2014, 7 November 2014, 2 February 2015 and 9 February 2015. He submits that it is clear from each of the disclosures on which the Claimant now relies

that he was concerned with patient safety, staff well-being and safeguarding the services provided by the Trust and that they speak for themselves. This includes the disputed disclosure which the Claimant made to the GMC on 9 February 2015 as to which Mr Probert submits the Respondent did not seriously challenge the Claimant as to that disclosure other than to suggest that he did not genuinely believe the allegations which he was making against Mr Lear.

156. The Claimant's primary case is that the process to dismiss him was instigated and manipulated by Mr Lear. In short, it is alleged that Mr Lear a senior member of the Trust's management took advantage of his position to manipulate the Respondent's procedures to affect his desired outcome to remove the Claimant from his job and did so because of a proscribed reason. Furthermore Mr Probert argues that this conduct is sufficient in this case to challenge the orthodox position that the Tribunal must only consider the set of facts operating on the mind of the decision maker when considering the reason for dismissal.

157. The hinge of Mr Probert's argument is the Claimant's and his colleagues' letter of 2 February 2015 to Dr Olufadi, copied to Mr Lear, complaining about Dr Bostanci and the Trust's failure to act on the concerns about Dr Bostanci's communicated by him and his colleagues; and the Claimant's subsequent letter of 9 February 2015 to Mr Lear in respect of Dr Olufadi's instruction creating further delay. He submits this resulted in Mr Lear contacting Edgecumbe on that day and then commissioning a report from them in which Edgecumbe were instructed to focus solely on the Claimant, to provide Mr Lear with grounds for his dismissal.

158. Mr Probert further made the following points to support the Claimant's case. Mr Lear stated that the Claimant's behaviour "has apparently become increasingly destructive" between 24 October 2014 and 10 February 2015. There is no evidence before the Tribunal that the Respondent had any new concerns about the Claimant's behaviour towards senior management in that period. Mr Lear's letter to Edgecumbe of 11 February was not disclosed by the Respondent in the disclosure process. Mr Probert submits this was because of its damaging content. Mr Lear did not instruct Edgecumbe to investigate Dr Bostanci. He also persuaded the Claimant and his Consultant colleagues to co-operate with Edgecumbe by disingenuous means and failed to give them full and proper information as to the basis on which Edgecumbe had been instructed to conduct their review.

159. Mr Probert also submits that Mr Lear then ignored Edgecumbe's recommendation and misleads Edgecumbe in his reasons for doing so, limits the scope of Mr Jones's investigation to disadvantage the Claimant and ensures that there is no appropriate consideration of Dr Bostanci's behaviour and its contribution to the difficulties in the HP Team when this matter is considered by the Panel. As to the procedure followed by the Respondent he argues that by refusing to recognise the matter as one of conduct Mr Lear ensured that the Claimant had no opportunity to address allegations made about his behaviour. Mr Probert relies upon the same submission to support the Claimant's detriment claim.

160. As to the Claimant's dismissal Mr Probert submits that the Respondent either did not properly characterise the reason for dismissal or failed to properly consider the actual reason which was the Claimant's conduct. It also failed to follow a fair procedure in circumstances in which the Claimant's employment and reputation was at risk. The Claimant has never faced any formal disciplinary procedures in respect of his behaviour or performance during his employment by the Trust. He was fully supported by the colleagues he worked with in the HP Department. The Panel failed to investigate the purpose of the Edgecumbe Report or the reasons Mr Lear and Mrs Miller had for rejecting its recommendations. The hearing was rushed. The Claimant was not allowed to call witnesses and the Panel did not give due weight to the Claimant's admissions of responsibility and the admitted difficulties in his working relationships with senior management.

161. Mr Probert submits that the integrity of the appeal was undermined by Mrs Miller chairing the appeal hearing. A reasonable employer should, and would, have accepted that her position was conflicted, firstly, by her previous involvement in bringing these matters to the Panel and, secondly, her predetermined adverse view of the Claimant's position. Mr Probert repeated his submission as to protected disclosure in respect of the detriment claiMs In doing so he referred to the Claimant's Amended Particulars of Claim and relies on Mr Lear's alleged bad faith and prohibited motivation.

162. In the factual summary with which he commenced his written closing submission Mr Gorton describes this as a very simple case. He submits that it is the conclusion of Mr Bellis' report into the incident on 24 October 2014, which was circulated on or around 23 January 2015, and the consultants' letter of 2 February 2015 threatening to escalate matters to the GMC, that demonstrated that the Respondent had to do something to deal with the position in the HP Team and which resulted in the instruction of Edgecumbe.

163. Mr Gorton submits that the terms of reference to Edgecumbe were entirely team focused and also focused on achieving a positive result for all involved. Edgecumbe was an independent and high quality agency. The conclusions of its Report demonstrated a substantial and serious state of dysfunction in the HP Team, which threatened to compromise the safety of the service, although he accepts the disconnect in their Report as to their recommendations and the potential timeline for their implementation of them, does not support a conclusion that the safe operation of the HP Service was under immediate threat.

164. He also submits that the Claimant's grievance in respect of annual leave entitlement in May 2015 demonstrated an expression of no confidence in the medical line management team by the Claimant. Furthermore the Board ensured that another pair of eyes (Mr Jones) investigated the position. This resulted in a conclusion that relationships between the Claimant and senior management had irretrievably broken down. There were attempts made to resolve matters by negotiation. When those were unsuccessful the matter was referred to a Panel which included an experienced independent member (Mrs Blanchard) and no case has been advanced by the Claimant that members of the Panel were motivated to punish him for having raised patient

safety issues. The Panel considered representations made by the Claimant and reached a conclusion that was within a range of reasonable options for a reasonable employer in these circumstances. Furthermore, the Claimant pursued the same arguments he had presented to the Panel at his appeal and was not able to put forward any realistic solution to address his admitted difficulties with the senior management team.

165. Mr Gorton addressed the Claimant's whistleblowing claim with submissions that assumed the Claimant had made valid protected disclosures which the Respondent had conceded was the case in five of the six alleged protected disclosures on which the Claimant relied. He submitted the Claimant's case is misconceived. He did so for the following reasons. The decision to dismiss the Claimant was taken by the Panel and upheld by the appeal panel. He argues that the manipulation type of case relied upon by Mr Probert involves the true aim of the manipulator not being revealed to the decision maker. Mr Gorton submits that in this case the manipulation case was expressly and explicitly argued before the Panel. It was considered by the Panel and rejected. There is no basis on which it can be argued that the Panel was misled or duped.

166. Edgecumbe had prepared an independent report. It is not alleged that Mr Lear manipulated that Report. Edgecumbe were not the decision maker. It was the Board who decided how to take matters forward then the Panel made the decision to dismiss. Mr Jones was also independent. His integrity and professionalism have not been challenged. He concluded the relationship was irretrievably broken down after interviewing 17 people. It is not alleged that Mr Lear manipulated Mr Jones's decision.

167. Mr Lear was motivated by concerns for the service operated by the HP Department. He received complaints from others as to Dr Bostanci. He took no action against those who made those complaints. Finally, there was no case advanced by the Claimant that the Panel had the Claimant's protected disclosures in their mind when they took their decision to dismiss. Their decision was based on Mr Jones's report and their own assessment of matters before them.

168. Mr Gorton's argument as to the status of the Claimant's disclosure to the GMC is that the Claimant had no reason to believe that Mr Lear could be at fault because the matters he referred to were the responsibility of Dr Thomas. Therefore, the Claimant cannot prove that he reasonably believed that the information he disclosed to the GMC was substantially true and the reason he took that step was to retaliate against Mr Lear for commissioning a report from Edgecumbe and because he considered he had been bullied into co-operating with Edgecumbe. As to the detriment claims Mr Gorton reminded the Tribunal that all the claims had been submitted out of time and that the Claimant had given no evidence as to reasonable practicability (and no submissions had been made to the Tribunal on these points) and that, in any event, the claims had no merit and should be dismissed.

169. Mr Gorton further submits that an irretrievable breakdown in relations between an employer and employee can and does amount to SOSR. It is a potentially fair reason within the meaning of s98(1) of the ERA. The **Ezsias** case

demonstrates that a claimant's behaviours did not need to be treated as conduct issues. Furthermore the procedure adopted by the Trust in the **Ezsias** case is in stark contrast to the Respondent's procedure in this case. As to the procedural standard on which the SOSR procedure should be analysed Mr Gorton submits that the test is one of reasonableness referring to the case of **Perkins**. The Respondent's case is that it followed a reasonable procedure that provided all reasonable safeguards as set out in its disciplinary policy. The range of reasonable responses test applies equally to the conduct of investigations, and the procedure used, as it does to dismissal. The Employment Tribunal must be careful not to substitute its view of what the Respondent should have done. The proper function of the Tribunal is to determine whether the decision to dismiss the Claimant fell within the band of reasonable responses a reasonable employer might have adopted. Furthermore an Employment Tribunal is obliged to consider the fairness of the entire disciplinary process when assessing whether a dismissal is fair or unfair.

170. The Claimant had made an admission very late at the Panel hearing that he was responsible significantly for the breakdown in relations with management. Dr Bostanci was dealt with under an entirely separate process by which her employment was eventually terminated. Her position was not relevant to the Claimant's situation as considered by the Panel.

171. Mr Gorton submits this is an SOSR dismissal and that the Tribunal is concerned with what the Respondent reasonably believed to be dysfunction in the HP Department that manifested itself in the Claimant's avowed resistance and hostility to senior management. The Panel had to consider whether there was an irretrievable breakdown in the Claimant's relationship with the Trust's senior management. They formed the view that there was such a breakdown and that view is supported by the investigations carried out by Edgecumbe and Mr Jones. The Claimant had the opportunity to explain his case and the Panel considered what had been said by him and on his behalf. Mrs Pearce had the benefit of direct knowledge of the HP Team following her recent arrival to work at the Trust and on the basis of the matters placed before them the Panel's decision was a reasonable response within a band of reasonable decisions open to the Respondent.

172. Mr Gorton further submits that there are numerous instances where the Claimant has sought to challenge the Respondent's management in a way that resulted in an irretrievable breakdown in relations with management against the critical backdrop of real and significant dysfunction in the HP Team. It is submitted that this dysfunction applied to his colleagues and his relationship with management. Furthermore his colleagues accepted this and he himself eventually accepted some responsibility for this situation.

173. The context of the internal procedures is a breakdown in relations generally within the HP Department and specifically between the Claimant and his managers. It was this that caused his dismissal. The Tribunal was also reminded that as a matter of law a breakdown in relations (or trust and confidence) does not require a finding of fault by the Claimant. He also commended the dismissal letter to the Tribunal as demonstrating thorough

and rigorous analysis, including the option of mediation. The Panel's decision was balanced and proportionate. Finally when considering his appeal the Respondent's appeal Panel dealt objectively with the grounds submitted by the Claimant and their rejection of those grounds was a decision open to a reasonable employer in such circumstances.

Conclusions

174. After reviewing all the evidence before it the Tribunal's starting point is threefold. Firstly, it finds that all those involved in the matters under consideration, were motivated by the safety and best interests of the Trust's patients. Neither party has sought to argue otherwise. Secondly, all those involved had to cope with substantial pressures arising from the responsibilities and demands of their own jobs, the Trust's services and general pressures in the National Health Service and this is the context in which their actions should be considered. Thirdly, the Tribunal has not found this to be a simple matter.

175. The parties are agreed the Claimant made five protected disclosures. All of these disclosures related to the performance and / or behaviour of Dr Bostanci. The managers to whom these disclosures were made responded to the matters the Claimant raised with them on 10 October 2013, 9 October and 14 November 2014. There is no evidence to support a claim that the Claimant suffered detriment or detriments by making those disclosures at those times. A sequence of events in early February 2014 resulted in two further agreed disclosures being made on 2 and 9 February. These are linked to the extent that it was the Claimant, Dr Thomas and Dr Mikel who wrote to Dr Olufadi (copied to Mr Lear) on 2 February concerning Dr Bostanci, and the Claimant, who on receipt of further information as to backlogs of work and Dr Olufadi's response to that problem, who wrote to Mr Lear on 9 February. Dr Olufadi replied on 10 February proposing a meeting with Mr Lear, but by then the Claimant had taken forward a course of action indicated in the Consultants' letter of 2 February by contacting the GMC to complain about Dr Olufadi and Mr Lear.

176. The first question for the Tribunal is whether the complaint to the GMC is a protected disclosure. It was an oral complaint but the content of it is confirmed in the letter to the Claimant from the GMC of 23 February 2014. The questions (and the Trust's challenge to its status) to be addressed by the Tribunal are whether the Claimant could reasonably believe that the allegations he makes are in the public interest, and substantially true. In considering this question, as with many others before it in this case, it is the knowledge of the background of the matters under consideration, in this case the complaint, that is vital in assessing what was done, and why, not only by the Claimant, but also by the Trust's managers.

177. The Tribunal has already indicated that all the parties, notwithstanding their differences of opinion, were motivated by their concerns for the effective and efficient operation of the service and, more particularly, patient safety. The Tribunal's findings of fact about the Claimant's and his colleagues' concerns about Dr Bostanci are set out above, as are his frustrations with the

responses made by Dr Olufadi, Mr Lear and others. The Tribunal is satisfied that the Claimant considered that the complaints he made to the GMC were in the public interest and substantially true because its findings of fact make that clear. This means that his complaint to the GMC was a protected disclosure, as the GMC assumed it was. His concerns about delays and, in some cases, competence were shared by his colleagues all of whom were experienced and expert in their field. The submission that these matters were the responsibility of Dr Thomas, taking into her account her unchallenged evidence, is unsustainable. It ignores the representations she made to those above her who included the Claimant, the Clinical Director and the Medical Director.

178. The same considerations of background and context must also then be applied to the actions of Mr Lear when he recommended the commission of Edgecumbe to review the management and operation of the HP Department to Mrs Miller. By February 2014 Mr Lear and Mrs Miller, and others in the senior management team, including Dr Gilchrist-Collins and Dr Olufadi had encountered difficulties with the Claimant. These included continuing opposition from the Claimant to the implementation of recommendations made in the RCP Report, ongoing problems with the performance of the HP Department particularly in terms of turnaround times; and, more recently, the Claimant's disparaging comments about two colleagues in October and November 2014, and the outcome of Mr Bellis' investigation and his recommendations.

179. In this context the further complaints by the Claimant were a further indication of continuing problems within the HP Department, which confirmed views which Mr Lear and Mrs Miller already held about the Claimant and the HP Department. Indeed Ms Hallett's email in October 2014 (paragraph 72 above) indicates that the Trust were already headhunting a Consultant Clinical Lead for the Department (whether to replace the Claimant or Dr Olufadi is unknown) which had not been discussed or shared with him.

180. This further correspondence was a catalyst to take the step of instructing Edgecumbe (which followed Mr Lear's chance meeting with Mrs King in the previous month) but these disclosures were not (and nor were the accumulation of complaints against Dr Bostanci) the sole, or principal, reason for instructing Edgecumbe. This would be to isolate, and disregard the history of difficulties in the working relationship between the Claimant and senior and clinical managers over recent years which had led to considerable frustration for the senior management team over a considerable period of time as a result of which their patience was running out. Furthermore, the Claimant, in his evidence to the Tribunal, agreed that it was a reasonable option for the Trust to review the position in the HP Department at this time to investigate how it could be resolved. In this context the allegation that Edgecumbe were commissioned as a result of these protected disclosures as alleged by the Claimant is unsustainable.

181. The Claimant also alleges that Mr Lear was influenced in his actions by the knowledge that the Claimant had made a complaint to the GMC. There is no evidence before the Tribunal to support that allegation. The Tribunal will comment below as to the actions taken by Mr Lear after he received

notification of this complaint from the GMC. However, this was not until 13 July 2018, and his actions before that date cannot be attributed to any earlier knowledge of the complaint, for that reason. The Panel were also given the opportunity of investigating this allegation and reached the same conclusion.

182. The case as put to the Tribunal by the Trust is that the Claimant's working relationships had broken down not only with senior management but also with colleagues in the HP Department; that external reviews by the RCP and Edgecumbe had found the HP Department was dysfunctional, with low morale and lack of leadership contributing to that; and that the Claimant was substantially, if not wholly, responsible for that position. The Trust in setting out its case has been at pains to make no criticism of the Claimant's clinical judgement and work within the HP Department but the core of its case blames the Claimant for the HP Department's problems.

183. The picture of the Claimant that emerged is of someone who is extremely good at his job and very committed to the Trust and its services but who is known to have a volatile personality, and an unwillingness to compromise, accept criticism or modify his views, which he can express in forthright and disparaging terms. This had inevitably led to disagreement with those he reported to and contributed to his continuing resistance to change on a number of occasions. This is shown by the extended and difficult discussions as to implementation of the key recommendations made by the RCP Report, and he had to accept during the hearing that he had been mistaken to attribute those difficulties in turnaround times entirely to Dr Bostanci, as to which see paragraphs 47-48 above.

184. The context of this is that the Tribunal has been informed that this type of behaviour is not unusual with consultants who, the Tribunal observes, are at the apex of a hierarchical structure of clinical management. Mrs Blanchard, in general remarks to the Tribunal in her evidence, helpfully explained that there are many situations where differences of opinion arise between senior managers and consultants and that in those circumstances both parties will genuinely cite patient care and safety as the critical factor supporting their point of view which can lead to an impasse in which compromise can be difficult to achieve. Such are the pressures of management which the Tribunal referred to in general terms above but such difficulties are not unusual and a part of the landscape which managers have to deal in the NHS, and for which they receive training as the lecture given by Mrs King and attended by Mr Lear in January 2015 demonstrates.

185. The Tribunal has found a more nuanced picture of the difficulties in the HP Department than the Trust submitted to it. It is the case that with the exception of Dr Bostanci the Claimant had maintained good working relationships with his peers in the HP Team, and others. He and his colleagues had been dealing with difficulties with Dr Bostanci for some considerable time. Dr Thomas' evidence was particularly relevant in considering this situation as an independent third party actively involved in the work of the HP Department, and its management. This demonstrated a range of difficulties caused by Dr Bostanci as well as her efforts to deal with those

difficulties. It confirms that concerns raised by the Claimant, both for himself and on behalf of others, were justified. The Trust had also been considering whether it could commence formal procedures as to Dr Bostanci's capability, as to which see Ms Hallett's email to Mr Lear referred to in paragraph 73 above.

186. Dr Thomas herself made representations to Dr Olufadi as to the proposed arrangements for supervision of Dr Chefani and was a co-signatory of the letter of 2 February that was sent to him. By this time Ms Jagjivan's grievance against Dr Bostanci had remained uninvestigated for several months. Dr Chefani's grievance against Dr Bostanci was also still outstanding and, in June, Dr Miller was to issue a grievance against Dr Olufadi. Furthermore the result of the investigation conducted by Mr Bellis was that Dr Bostanci faced disciplinary proceedings for which she was prepared to accept a written warning and then further ongoing issues resulted in Mr Jones being asked to give his opinion of Dr Bostanci's position and whether her relationships with senior management had irretrievably broken down. Ultimately, these ongoing matters led to her departure from the Trust although the Tribunal received no direct evidence as to the precise circumstances of that parting. The Tribunal concludes that these issues were a significant contribution to the difficulties in the HP Department and confirm that Dr Bostanci had encountered difficulties in dealing with a number of colleagues at various levels in the HP Department and that her difficulties were not restricted to her working relationship with the Claimant.

187. There is a stark contrast to be drawn in these circumstances between the Claimant and Dr Bostanci. He was recognised as very competent in his job and all parties accept the passion he held for it. He had not been subject to any internal complaints from his peers or those who worked under him in the HP Department about his performance in the job or his behaviour towards them. He had faced no grievances or disciplinary proceedings in the 11 years in which he had been working for the Trust. Furthermore he had been asked to take on a substantial number of additional responsibilities to support the Trust and there had been no complaint about his involvement in those activities. His employment record demonstrates that others must have been able to work with him successfully in a variety of capacities over a number of years, notwithstanding the difficulties that had arisen with senior managers from time to time.

188. As to overall management Dr Olufadi faced difficulties in management of the HP Department. This was because of his lack of clinical knowledge and experience of its work. The Trust had also failed to define the status and responsibilities of the Head of Service position which the Claimant continued to hold after Dr Olufadi's appointment, notwithstanding that Mr Lear had appointed Dr Olufadi to remove the Claimant from managing the implementation of the RCP Report.

189. The RCP Report had recommended reorganisation of the Department's management structure. This had not been actioned by the Trust. Going forward, the Edgecumbe Report was critical of Ms Jagjivan's management of the laboratory (as their recommendations made clear) and also referred to the

difficulty they had encountered because of the lack of strategic direction from the Trust towards the HP Department's services. The HP Department as with other Departments in the Trust had also had to come to terms with the Trust being placed in special measures, and thereafter the introduction of a new senior management team.

190. A unique pressure on the HP Department had been that the senior management team had proposed outsourcing its services. Although very few details were available to the Tribunal this was a matter on which there had been considerable disagreement between the Trust and the HP Department and the Claimant had led opposition to that proposal which was eventually not taken forward. There had been no direct engagement with the Claimant as to his own actions since November 2013, that is face to face meetings at which concerns and criticisms could be raised with him. For example, Mrs O'Callaghan wrote what she did to the Claimant but there was no evidence before the Tribunal to indicate that she had taken any action to address the difficulties to which she refers; and no communication with the Claimant about the headhunting exercise already referred to above. This apparent failure of management continues as the Trust's interaction with the Claimant demonstrates in what was said to him about the commissioning of the Edgecumbe Report and then the actions taken after its publication.

191. Mrs Miller's and Mr Lear's view of his behaviour is confirmed by the instructions which Mr Lear gave to Edgecumbe which focused so substantially on the Claimant, and which had not been discussed with him. Furthermore, Mr Lear's comment that the Claimant's behaviour had become increasingly destructive is difficult to square with the evidence before the Tribunal. Although the Tribunal finds that the Claimant's behaviour had continued to be obstructive, the use of the word destructive is highly charged. It confirms, as did their evidence, that Mr Lear and Mrs Miller had already formed a view about the effect of the Claimant on the HP Department before receiving the Edgecumbe Report. However, neither of them had discussed this with the Claimant and when he had the opportunity to do so Mr Lear admits that he was disingenuous, when speaking to the Claimant, Dr Thomas and Dr Mikel, as to the purposes of the Report. Mr Lear's conduct of the interview secured his objective of gaining co-operation from the Consultants but his conduct of the interview risked irretrievable damage to the trust and confidence which the Consultants were entitled to expect from him.

192. The Edgecumbe Report was also not discussed with the other parties who were referred to in it. This is because Mr Lear and Mrs Miller rejected the proposals which Edgecumbe had made, although for different reasons. The Tribunal cannot accept their apparent position which was that accepting, and implementing, the recommendations would have meant that the situation in the HP Department would continue as it was. It was open to the Trust, acting as a reasonable employer, to implement those recommendations immediately by management instruction. For example, one to one interviews would have enabled the Trust to inform all those concerned of their position, what was expected of them, how matters were to be addressed with them and the

consequences if they did not co-operate with the Trust in doing so. The RCP Report had traversed the same territory.

193. It is not correct to assert, as Mr Probert has done, that Mr Lear gave a narrow brief to Edgecumbe to concentrate only on the Claimant. He did, however, set out very clearly the view which he and Mrs Miller held as to the Claimant's position and behaviour. This is not surprising. Mr Lear had held a negative view of the Claimant for a substantial period of time. His letter to the GMC in November 2013 demonstrates this very clearly. His evidence also made it clear that his frustrations with the Claimant, in his view, went beyond what might be termed the usual frustrations that can arise from a difference of views between a medical director and consultants working under him. The letter is instructive in other ways. It indicates that Mr Lear had concluded then that the Claimant was to blame for Dr Bostanci's illnesses. It also informed the GMC that he had removed the Claimant from a full management role in the HP Department in the previous year (paragraph 62). In doing so, he had not dealt with the Claimant's position as Head of Service which in itself confused the lines of authority between the Claimant and Dr Olufadi, who as Clinical Director, was the clinical manager responsible for the overall performance of the HP Department.

194. Edgecumbe had found a dysfunctional HP Department. They had taken a team focused approach and while they make clear their concerns about the Claimant they set out holistic recommendations to address those concerns, as they had been asked to do. The HP Department was under considerable strain for a number of reasons, operational, and otherwise, for example, in the operational sphere there had been the strain imposed by the failure to recruit a fifth consultant. This had been the case for a number of years and had been within the knowledge of the senior management team for a considerable period of time. There was no doubt the Claimant had, by his approach and actions contributed to this situation. The most obvious example is the ongoing issue of turnaround times and his opposition to the implementation of the RCP recommendations to deal with that problem. However, the HP Department had continued to maintain service levels as the RCP had found in its review in 2012 (paragraph 41), and there was no evidence before the Tribunal that this did not continue.

195. The timeline of Edgecumbe's recommendations did not conclude that patient safety (in a service that did not involve interaction with patients personally) was under immediate threat. It confirmed a position that had existed for some time and of which the Trust was already aware. It also stressed the need to address the strain on relationships within the HP Department as an immediate priority and made recommendations that if successfully implemented would have substantially mitigated, if not resolved, those problems and provided a framework for defining a culture in which sanctions would have been applied to anyone who did not co-operate with the relevant code and required procedures. Those recommendations also included direct engagement with all the team, including the Claimant and consideration of a new structure for its management.

196. The evidence before the Tribunal does not support Mr Lear's representations to Edgecumbe that what they were recommending had already been tried by the Trust and failed. The only exception to this was the proposal for mediation made by Mr Bellis. However, the Claimant had not rejected the mediation suggested by Ms Hallett. He had given a measured, logical, explanation of why he considered it should not commence until the other outstanding issues affecting Dr Bostanci had been resolved. The Tribunal also notes that within the Edgecumbe Report they expressed some doubt as to whether the conditions for success for a potential mediation between the Claimant and Dr Bostanci were present.

197. This unsatisfactory position informed the recommendation made to the Board, and the terms of reference provided to Mr Jones. Furthermore, at some point in its May meeting the Board considered whether it was preferable for the Claimant, or Dr Bostanci, to be removed from the HP Team. Furthermore, after completion of Mr Jones' Report Mrs Youers asked Mr Jones to give his view as to Dr Bostanci's relationship with senior management.

198. Mr Jones was given very narrow terms of reference. These were to address the breakdown in the functioning of the Team and specifically working relationships within the Team and with the Trust management. He was also asked to consider whether there were any feasible steps that could be taken short of recommending the termination of the Claimant's employment that would address the serious state of matters in the Team. The first point to make is that feasible steps had been recommended by Edgecumbe but were removed from consideration by Mr Lear. Furthermore, the extent of the terms of reference determined that he did not examine the operational functioning of the team and was not asked to express any view about a more holistic approach to the position. This was because that had already been rejected by the Board and Mr Jones' Report was directed to forming a view as to whether or not the Claimant's employment should be terminated, and could not, and did not address whether or not that step, by itself, could deal with, and resolve, the difficulties faced by the HP Department.

199. When Mr Lear wrote to the Claimant with a copy of the Jones Report he informed the Claimant that he was convening a panel to consider Mr Jones's findings to "reach a conclusion whether the breakdown in the function of the team and specifically working relationships in the team and with the Trust management mean that a recommendation should be made for termination of your employment with the Trust". This confirms that the Trust had already concluded that there had been a breakdown in the functioning of the HP Department and in working relationships in the HP Department and with the Trust's senior and clinical management. There was substantial evidence to support the conclusion as to working relationships with senior and clinical management. The second and third conclusions confirmed views of Mr Lear and Mrs Miller but the Tribunal finds that those matters had not been fully investigated by that date and if they had been then the evidence before the Tribunal does not support such sweeping findings.

200. The evidence given by Mrs Pearce and Mrs Blanchard was candid and helpful. It confirmed that the Panel had shown care and diligence in their

consideration of matters placed before them. There were obvious time constraints, particularly for Mrs Blanchard, as an external member, but the hearing was not rushed. Such difficulties as the Claimant faced were entirely of his own making as the findings above make clear. The Panel were also able to give full consideration to all matters which the Claimant placed before them including his allegations against Mr Lear.

201. The Tribunal adopts Mr Gorton's submissions as to the allegation that Mr Lear manipulated this procedure and the Panel. These are summarised at paragraph 163 above and also contained within his written submissions. The matters on which Mr Probert relies were all, substantially due to the efforts of Dr Thomas, disclosed to the Panel and considered by them when making their decision. The Panel was the decision maker. There are also no grounds on which the Claimant can argue that the Panel were motivated to punish him by reason of the disclosures he had made.

202. Such merit as there is in the submission that Mr Lear was conflicted as a result of the GMC investigation and that in some way this influenced the decision is entirely mitigated by two factors. Firstly, the Panel was made aware that he had been reported to the GMC and gave consideration to that, and the allegations which the Claimant made in respect of that. Secondly, Mr Lear would have been required to attend the hearing in any event even if he had not been presenting the case. The minutes clearly show Mr Lear's involvement in the hearing but do not support any suggestion that the Claimant was prejudiced by his attendance or that he unduly influenced the Panel who were clearly in control of the procedure as it progressed.

203. The Tribunal were also satisfied that Mr Lear did not manipulate Edgecumbe or Mr Jones as has been alleged. They were independent and their professionalism and integrity has not been challenged and could not be.

204. This finding means that the Tribunal does not have to address the wider legal arguments for which it was referred to the cases of **Juhti** and **Orr**. The Tribunal is entirely satisfied that Mr Lear was not the Iago figure which Mr Probert has argued before it. As to the argument advanced by Mr Probert that this should have been treated as a case of misconduct the Tribunal has found the case of **Perkin** and **Ezsias** to be most helpful.

205. The source of the problem that the Respondent was seeking to address was the Claimant's working relationship with senior management, which included his clinical managers. Although the evidence before it referred to a relatively small number of incidents over a period of four years or so the Tribunal have found that the Claimant's approach and conduct to those who had to manage him was challenging. It does not doubt the genuine frustration this caused and its substantial contribution to an unsatisfactory situation in the HP Department between the Claimant and his managers. However there needs to be a sense of perspective which those closest to the problem may not have had. The Claimant was entitled to be frustrated, as were his Consultant colleagues, as to the management of Dr Bostanci. He had also to lead opposition to outsourcing the service which must have been an unsettling and difficult period of time for all concerned. However it is clear that the manifestations of

his personality (as referred to in **Perkin**) resulted at times in conduct which he would later recognise and accept had been unacceptable and regrettable.

206. Therefore, the Tribunal is satisfied that, in these circumstances, it was preferable for the Respondent to consider this matter as a case of some other substantial reason rather than conduct. Furthermore, in doing so, the Respondent attempted, and substantially succeeded in following a procedure which with a few minor exceptions, for example, the procedure for suspension met the requirements of MHPS and did not prejudice the Claimant.

207. The Tribunal finds that the Claimant's claims of automatic unfair dismissal and detriment fail and those claims will be dismissed. The Tribunal finds that the Claimant was dismissed for some other substantial reason. This is a potentially fair reason for dismissal. The Tribunal has to decide whether taking account of all the circumstances, this was a fair dismissal.

208. The Tribunal found the Claimant was dismissed by the Panel because they considered that his working relationships with senior management and his clinical managers had broken down and could not be repaired. The senior managers considered the Claimant was to blame for that breakdown in working relationships and leaves no doubt that members of the Panel formed a view about that but the Tribunal is satisfied from evidence given by Mrs Pearce and Mrs Blanchard that their focus was on whether or not the relationship with senior management had broken down to such an extent that the Claimant should be dismissed because the relationships could not be repaired.

209. All are agreed that the **Burchell** test is relevant to the Tribunal's deliberations on whether the Claimant was fairly dismissed. In undertaking that task the Tribunal must ask itself whether what occurred fell within a range of reasonable responses for a reasonable employer. It has been held that this can apply both to the decision to dismiss and the procedure by which that decision was reached. In this case the first remaining question for the Tribunal is whether the investigation undertaken by the Respondent fell within the range of reasonable options that a reasonable employer might have adopted. In considering this question the Tribunal reminded itself that it must not substitute its own view as to whether or not the investigation was reasonable but consider whether the Respondent had conducted the investigation in a way that fell within the range of reasonable options available to a reasonable employer in these circumstances.

210. Furthermore, if the Tribunal is satisfied that the investigation was reasonable the next question is whether it was reasonable to treat that reason as sufficient reason to dismiss the Claimant and whether that reasons fell within a range of reasonable options available to the Respondent at that time. Once again the Tribunal must not substitute its view as to whether or not the dismissal was fair and reasonable. The Tribunal finds that they acted unfairly towards the Claimant in doing so.

211. Mr Lear's and Mrs Miller's rejection of the Edgecumbe recommendations was a result of their predetermined view that the Claimant's position was

untenable. This was a decision that would have a substantial impact on the recommendation given to the Board and the terms of reference provided to Mr Jones. The Tribunal concludes that, in reality, it was their expectation of the Claimant's opposition to the implementation of the Edgecumbe proposals and the difficulties this would cause that led them to reject the recommendations. However this was not articulated to Edgecumbe (even though it was supported by previous circumstances). They also ignored the fact the Edgecumbe proposals had been made following their assessment of the Claimant and his position in the HP Department, and its difficulties, and had provided a route to manage such a situation effectively.

212. Mr Jones did not investigate operational issues or the extent of operational disruption caused by the Claimant. He also did not investigate other options to manage this situation. The terms of reference did not allow him to explore such matters. He also did not consider whether the Claimant's removal would address all the operational and relationship issues within the HP Department and resolve them. Unsurprisingly, his investigation confirmed a division of views between senior management and clinical managers and those who worked in the HP Department and, (although outside his terms of reference) the impact of Dr Bostanci on the latter and her unsatisfactory relationship with senior management.

213. The options that could have been investigated to deal with the Claimant's position short of dismissal were closed to him. Each case must be decided on its own facts but the Tribunal notes that in **Ezsias** it was, in effect, a full scale revolt by those he worked with (by petition to senior management) that resulted in his dismissal.

214. Mrs Pearce's evidence is clear. The task of the Panel was to concentrate on the Claimant's relationship with senior management and as far as the Panel was concerned Dr Bostanci was a red herring. This approach did not recognise that there were three elements to the situation which the Panel had to address. These were the Claimant's working relationships with senior management (including his clinical managers) his working relationships with those in the HP Team and the extent of dysfunction in personal and working relationships and its effect on the service provided by the HP Department and the part the Claimant had played in contributing to that.

215. The Trust did not set out what it meant by breakdown in function when Mr Lear wrote to the Claimant on 27 July setting out the Trust's three areas of concern to be addressed by the Panel. The Trust makes no criticism of the work of Edgecumbe or Mr Jones. They carried out their work in accordance with the instructions they were given by the Trust. Edgecumbe considered working relationships in the HP Department and how they could be addressed. They did not consider operational issues in any detail. Mr Jones was asked to look only at the Claimant's working relationships with his colleagues in the HP Department and senior management. There is nothing before the Tribunal to suggest that the HP Department had not maintained service standards satisfactorily to its internal clients, as the RCP review had found a number of years before, although as found above work practices still needed to be improved and recommendations implemented.

216. Mr Jones' Report confirmed that the Claimant had good working relationships with his colleagues but poor and broken working relationships with senior managers. His investigation could not avoid the problems others had with Dr Bostanci, although he did not consider that reviewing this was within his terms of reference. However, after completion of his Report, he was asked to comment on her position by Ms Youers. His written reply to her of 20 July confirms that concerns about Dr Bostanci extended to all parts of the HP Department. The Bellis Report also made serious findings against Dr Bostanci. Mr Jones' letter and the Report were not provided to the Panel in a situation where the Claimant was alleged to have poor working relations with both colleagues and senior management impacting on the HP Department. The limited extent of Mr Jones' terms of reference were unreasonable because they did not enable him to fully address the issues which the Panel were required to consider.

217. Ms Youers' enquiry of Mr Jones, the Board discussion as to whether Dr Bostanci or the Claimant should department from the HP Team, together with the three areas of concern to be considered by the Panel set out in Mr Lear's letter to the Claimant of 27 July made the Trust's and the Panel's view that Dr Bostanci's situation was a "red herring" or an irrelevance to these procedures untenable. The Tribunal find that it was not within a range of reasonable options for consideration of Dr Bostanci's impact on work relationships and the performance of the HP Department to be excluded from investigation by the Trust, whether before referral to the Panel or by the Panel itself.

218. The Panel's commendable yardstick was that it was unusual to dismiss a doctor for irretrievable breakdown in working relationships and that it needed to be sure there were no alternatives and no other action could be taken to repair relationships before making that decision. However, the critical and substantial focus was on the Claimant's working relationship with senior management. This is confirmed by Mrs Blanchard's note to Mrs Pearce sent when the Panel's decision was under consideration. This note also confirms the limited evidence made available to the Panel. Mrs Blanchard describes this as one email exchange refusing mediation.

219. Mrs Blanchard also puts forward a potential alternative. This was for the Claimant to undertake only clinical work and to be provided with mediation and coaching. She considered that this had some chance of success although estimates it at less than 50%. The Claimant still held a management role in the HP Department as Head of Service when he was suspended. He had admitted a responsibility for the breakdown in relationships with his senior managers and put forward a proposal that he could continue his employment and avoid contact with the senior management team. The Tribunal note that this could apparently have been substantially achieved by the removal of his formal management position as Head of Service in the HP Department.

220. The Tribunal gave careful consideration to the argument that Mr Jones' investigation confirmed that the Claimant's working relationships with his managers had broken down and that there was nothing further required to support his dismissal. This was because the Respondent did not need to

establish that the Claimant was to blame, and does not need to justify a dismissal. However it is still necessary for the Tribunal to consider whether the investigation was reasonable and whether the Respondent's decision fell within a range of reasonable options available to a reasonable employer.

221. The Panel were required to consider not only whether the Claimant's relationship with his managers had broken down. Mr Lear had informed the Claimant that the Panel would: "*Reach a conclusion whether the breakdown in the function of the team and specifically working relationships in the team and with the Trust's management mean that a recommendation should be made for termination of your employment with the Trust".* The Tribunal has found that the investigation was too limited to enable the Panel to fully and reasonably consider those matters and their potential complex interaction. The investigation clearly indicated that the Claimant's working relationships with his colleagues in the HP Department had not broken down. Furthermore the Panel was not in a position to consider other options that had previously been available to the Trust, and had been rejected. A reasonable employer in such circumstances would have ensured that such options were still available. The Tribunal considers this particularly significant when Mrs Blanchard had raised the possibility of continuing employment with ongoing support.

222. Therefore for the reasons set out above the Tribunal has concluded that the Respondent's investigation did not fall within a range of reasonable options available to the Respondent in this case and that the Claimant's dismissal was not within a range of reasonable options available to the Respondent and that the Claimant was unfairly dismissed.

223. The case will now be set down for remedy hearing. The Tribunal had not required submissions as to remedy at the conclusion of the liability hearing. The Tribunal considers it is helpful to indicate to the parties that in view of its findings above the Tribunal will expect the parties to have given consideration to the potential issue of the Claimant's contributory fault in advance of the remedy hearing.

Employment Judge Craft

17 August 2018