EMPLOYMENT TRIBUNALS

Claimant: **Mr Anthony Owa**

Respondent: **Barking, Havering and Redbridge University NHS Trust**

Heard at: **East London Employment Tribunal**

On: **10, 11, 12, 13, 17, 18, 20, 24, 25, 26 September 2019**

Before: **Employment Judge Burgher**

Members: **Ms L Conwell–Tillotson**
Mrs A Berry

Representation

For the Claimant: **Mr A Elesinnla, Counsel**

For the Respondent: **Mr S Cheetham, QC**

JUDGMENT

The unanimous judgment of the Employment Tribunal is that:-

1 The Claimant's race discrimination claims fail and are dismissed.

2 The Claimant's claims for unlawful victimisation fail and are dismissed.

3 The Claimant's claims for detriment for making protected disclosures are dismissed on withdrawal.

4 The Claimant's claims for unlawful deduction of wages fail and are dismissed.

REASONS

Issues

1. There have been several iterations and refinements of the list of issues. The initial lists of issues were drafted on 2 January 2019, they were updated on 5 August 2019, refined at the outset of the hearing on 10 September and clarified again before evidence commenced on 11 September 2019. Mr Cheetham expressed concern about the refined issues insofar as they referred to individuals who the Respondent was not calling to give evidence. A pragmatic approach was agreed upon by reference to the contents of the Claimant's 31 page witness statement. The Tribunal permitted the Claimant's application to amend, made on 13 September 2019, to add new allegations, in respect of a further 4 new allegations. The Claimant's written submissions, that were sent on 24 September 2019, abandoned a number of the allegations being made including some of the amended allegations. Given the changing scope of the issues we set out below the full list of allegations. Whilst the paragraph numbers of the issues are ungainly we adopt them for the purposes of our judgment. We proceed on the basis that the issues that appear with strikethrough have been withdrawn or 'abandoned' by the Claimant. The issues that are underlined were for clarification or amendments permitted by the Tribunal.

Jurisdiction

2. The Claimant contacted ACAS on 4 December 2017 and the ACAS certificate was issued on 6 December 2017. The Claimant lodged his claim on 17 January 2018. The Respondent submitted a provisional ET3 and Grounds of Resistance on 2 March 2018 and then filed a full Response on 23 March 2018. The Tribunal is required to consider whether any of the acts complained of took place outside the time limits set out at section 123(a) of the Equality Act 2010?

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

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

5. Are any claims out of time pursuant to section 23 Employment Rights Act 1996?

6. If any of the Claimant's claims are out of time, was it reasonably practicable for the claim to have been presented before the end of the period of three months and if not, was the claim submitted within a further reasonable period?

Direct Race Discrimination

7. Did the Respondent treat the Claimant less favorably because of his race contrary to s13 of the Equality Act 2010? The Claimant claims that:

(a) Mr Gabriel Sayer and Professor Bhik Kotecha failed to pay the Claimant agreed contractual remuneration, namely:

(i) Clinical Lead
(ii) Skull Base Sessions
(iii) Twilight Sessions
(iv) Failure to Job Plan
~~(v) Master's~~
~~(vi) Restrictions~~
(vii) Travel Time

(b) Mr Sean Masterton, Professor Kotecha, Mr Stephen Burgess and Mr Hepworth failed to pay the Claimant for extra hours worked between June 2009 and November 2016 that had been agreed with Mr. Christian Adams. Consideration of whether the Respondent failed to pay the Claimant for the neurosurgical skull base work from 2004 to 2015 despite them being additional duties and Mr Anwuah agreeing in writing to pay the Claimant 2 sessions for this work in 2008; and whether the Respondent failed to pay the Claimant the additional session agreed by Mr Stephen Burgess, Medical Director in 2012;

(c) On or around 25 January 2012, Mr. Gabriel Sayer tried to punish the Claimant for refusing to see an additional unscheduled patient in an overbooked clinic by checking the Respondent's car park data to check on the Claimant's movements;

~~(d) Mr Drabu failed to pay the Claimant the agreed 1 programmed activity additional remuneration for the Claimant's work as Clinical Lead for Day Surgery between 14 February 2007 and 2010 and Clinical Lead between February 2012 and 24 September 2012;~~

~~(e) On or around 23 August 2012, and also between October 2016 and December 2016. Mr. Sayer tried to prevent the Claimant from taking study leave that he was contractually entitled to;~~

~~(f) The Respondent and Gabriel Sayer refused to pay the Claimant's contractual travelling allowance which he is entitled to from 2003 until the present day and made him work during the contractual travel time;~~

(g) Mr Sayer has refused to facilitate the Claimant's transition from the old consultant contract to the new consultant contract from May 2015 onwards;

~~(h) The Respondent failed to fund, assist or cooperate with the Claimant in his endeavor to obtain an MSc in Otology and Audiology in 2015 and 2017~~

(i) Ms Val Davis refused to take any action or any reasonable action in response to a bullying and harassment complaint lodged by the Claimant against Mr. Sayer and Professor Bhik Kotecha in

October 2016. Ms Davis failed to deal with the Claimant's complaint against Ms Helen Burnham alleging racial discrimination in or around October 2016 and failed to follow its procedures.

(j) Dr. Nadeem Moghal falsely complained to the National Clinical Assessment Service ("NCAS") that the Claimant may have lost patience during an operation on 22 December 2017 and walked away leaving the patient, that he made no arrangements to cover the situation, he was not contactable, he may have left the hospital;

(k) On 23 December 2016, Dr Moghal restricted the Claimant's practice without justification;

(l) Ms Davis and Dr Magda Smith failed to deal with the Claimant's appeal against his restriction properly or at all;

(m) Dr Moghal falsely alleged to NCAS that the Claimant was aware of the referral;

(n) Ms Davis and Dr Magda Smith failed to provide correspondence between NCAS and the Respondent to the Claimant despite several requests by the Claimant;

(o) Dr Magda Smith told NCAS that a number of allegations were upheld on 14 March 2017 when the disciplinary hearing did not take place until 13 October 2017;

(p) Dr Moghal insisted on siting on the disciplinary panel on 13 October 2017 despite the clear conflict-of-interest in that he had initiated the investigation, ~~fed false information to NCAS and restricted the Claimant's practice on the basis of false allegations~~ and had been keeping a file on the Claimant with a view to subjecting him to some detriment for a considerable period of time;

~~(q) The first written warning given to the Claimant on 13 October 2017 and additional sanctions which were beyond the remit of the disciplinary panel convened under the MHPS;~~

(r) Ms Davis delayed in convening the disciplinary hearing and the appeal;

(s) The Claimant informed Dr Moghal of serious incidents relating to patient safety on or around 4 December 2017 involving consultants of Asian origin to which he received no or no meaningful response.

~~(t) The Respondent instructed a practising barrister to chair the appeal panel when he was not an appropriate person to do so in accordance with the provisions of the MHPS and he was not on the national list held by NHS employers, despite this, the Respondent continued to insist that he was an appropriate person when the MHPS does not provide for this.~~

(u) ~~The Respondent failed to agree or take any steps to agree the composition of the appeal panel with the Claimant in accordance with its own disciplinary procedure or the provisions of the MHPS procedure~~.

(v) The Claimant's grievances and complaints relating to serious untoward incidents which were conveyed to the Respondents Chief Executive, Mr Matthew Hopkin, on or around 1 February 2018, were not investigated properly or at all by Mr Hepworth through the proper clinical governance processes.

(w) Ms Davis appointed, Mr. Chapman, to deal with some of the Claimant's complaints and falsely represented him as an independent investigator when he was in fact an ex-employee of the Respondent's previous solicitors.

~~(x) Mr. Chapman's report is of poor quality, has perverse conclusions, and was a sham designed to damage the Claimant's Tribunal case and bolster the Respondent's defence of the claim.~~

(y) Ms Davis failed to investigate properly or at all the part of the Claimant's grievance relating to failure to pay contractually agreed remuneration despite Ms. Val Davis assuring the Claimant that this would be investigated as part of the grievance.

(z) Mr Kumar and Mr Hepworth unilaterally reduced the Claimant's working hours from 52.5 hours per week to 42 hours per week and agreed to the basis of calculation of the Claimant's working week and said remuneration that the Claimant has been contending for since latest 2004 without explanation or payment of the outstanding sums of money due to the Claimant.

(aa) ~~The Claimant signed a job plan on 17th November 2018 agreeing to work 12 sessions for the Respondent and has worked the 12 sessions but has only been paid for 11 sessions by the Respondent~~.

~~(bb) The Respondent required the Claimant to work a substantial number of hours over and above his contractual obligation without additional remuneration that he was contractually entitled to (see 7 b, d and f above for further details.~~

~~(cc) The Respondent has failed to address the Claimant's claims for outstanding wages and have not paid any of the alleged outstanding sums.~~

(dd) Ms Davis, Dr Moghal and Professor Kotecha failed to properly or at all investigate the Claimant's complaints about serious patient safety issues against other consultants in the department especially Mr. Kumar.

(ee) Professor Bhik Kotecha and Mr Sean Masterton conducted sham investigations into the Claimant's complaints against Mr. Kumar in order to discredit the Claimant. Dr. Moghal wanted to, '*shut the Claimant down,'* and made allegations that the Claimant was targeting Mr. Kumar.

(ff) Ms Davis and Mr Bown failed to investigate properly or at all the Claimant's complaints relating to the lack of probity issues concerning Dr. Moghal, Professor Kotecha, Mr. Sayer, and Mr. Kumar and failed to compare his treatment to that meted out by the Respondent to his comparators.

~~(gg) Mr. Sayer and Mr. Kumar deliberately misled Mr. Chapman, who was investigating the Claimant's grievance, into believing that Mr. Kumar had only undertaken one post graduate degree when he had in fact undertaken two.~~

~~(hh) Mr. Chapman dismissed all of the Claimant's grievance allegations of racial discrimination and victimisation without comparing the alleged treatment to the way in which the Respondent had treated comparators or those that had not done protected acts.~~

~~(ii) Mr. Chapman did not attempt to ascertain whether white or Asian consultants were subjected to the same restrictions as the Claimant in respect of his sabbatical nor did he compare the Claimant's treatment to the treatment received by Professor Kotecha who was carrying out his private work on NHS time which amounted to fraud.~~

(jj) Ms Davis, Dr Moghul and Dr Smith refused to investigate serious acts of misconduct, (fraud, lack of probity and candour, and retrospective entries into patients notes), as alleged by the Claimant as part of its investigation and gave no reasonable reason for its decision.

(kk) Ms Davis convened a grievance panel which contravened the Respondent's Grievance Procedure and ACAS guidance as to how grievances should be dealt with and also ignored the Claimant's complaints as to the composition of the grievance panel.

(ll) Ms Davis sought to mislead the Claimant by stating that the grievance panel was properly constituted in accordance with its and ACAS procedures.

(mm) Ms Sandra Malone, refused to let the Claimant present his additional written submissions to the grievance appeal panel on the basis that they had not been presented in time however, the Respondent allowed its Chief Executive to, '*ambush*,' the Claimant with his written submissions produced for the first time at the grievance appeal hearing.

(nn) The grievance appeal panel, failed to properly address or answer the Claimant's written or oral submissions as to why Mr. Chapman's report was a sham.

(oo) The grievance appeal panel's decision to reject the Claimant's appeal without addressing his arguments or setting out why they were rejected. The grievance appeal panel was led by Ms Malone.

(pp) Ms Malone treated the Claimant's objections to the appeal process with disdain and contempt.

(qq) Ms Malone and Ms Davis failed to provide the Claimant with the handwritten notes of the appeal hearing despite several requests for them.

~~(rr) Ms Davis and Dr Smith has not informed the Claimant about the progress of its investigation into the Claimant's allegations of probity, fraud, and general misconduct despite stating at the appeal hearing that they would do so.~~

~~(ss) Dr Smith tried to force the Claimant to agree to attend a disciplinary hearing appeal which was in breach of the MHPS procedure and threatened the Claimant that if he failed to attend a hearing would go on without him.~~

(tt) Mr Hepworth and Dr Smith has failed to properly or at all investigate the concerns raised by the Claimant in February 2019 about Mr. Kumar operating beyond his competence and encouraging others to do so.

(uu) Mr Hepworth was subjected to a number of written questionnaires by the Respondent when he complained about Mr. Kumar's poor practices but did not subject Mr. Kumar to the same. Despite several requests by the Claimant about the progress of the investigation into his concerns he has yet to receive any or any reasonable response.

(vv) Mr Masterton, Dr Moghal, Dr Smith and Ms Davis failed to investigate the Claimant's concerns about Mr. Kumar which the Claimant claims is part of a culture of, *'cover-up.'*

~~(ww) The Respondent has failed to hear the Claimant's appeal against the outcome of the disciplinary hearing and thus, its sanctions still remain in place on the Claimant's personnel record.~~

(xx) Despite several requests from the Claimant the Respondent has still not allowed him to move to the new consultants' contract.

(yy) Dr Moghal has failed to respond to incidents relating to patient safety involving amongst others, consultants of Asian origin, to Dr Moghal and to date the Claimant has received no response.

By amendment to the claim, the following allegations are also made:

~~(aaa) the terms of reference of the Mordi investigation were false and inaccurate;~~

~~(bbb) Dr Smith excluded the Claimant from the list of witnesses for the Mordi investigation;~~

(ccc) Dr Smith failed to follow procedures and failed to refer the allegations against Professor Kotecha to counter-fraud;

(ddd) Dr Smith failed to inform the Claimant as to the progress of the investigation into his complaint.

8. If so, has the Respondent shown that any treatment was done because of the Claimant's race in accordance with s136 of the Equality Act 2010?

9. The Claimant relies on Mr. Kumar and Bhik Kotecha as actual comparators in relation to all claims and/or a hypothetical comparator.

Victimisation

10. The Respondent accepts that the matters outlined below are capable of amounting to protected acts pursuant to section 27 of the Equality Act 2010. The Claimant relies on the following as protected acts:

a) On or around 17 October 2016, the Claimant lodged a complaint alleging racial discrimination against Ms. Burnham;

b) On 4 December 2017, the Claimant lodged a Serious Untoward Incident complaint against Mr Kumar for not consenting a patient for the operation that he performed which led to complications and a cover up;

c) The Claimant lodged a racial discrimination, victimisation, and a bullying and harassment complaint against Dr. Moghal on the 15 January 2018.

11. Was the Claimant subjected to detriment(s) on the grounds of having done a protected act contrary to section 27(1) of the Equality Act 2010? The Claimant claims the following alleged detriments:

a) The claims set out at 7 (j), (k), (m), (p), (s), (dd), (ee), (jj), (vv), (yy) (against Dr Moghal);

.

b) Dr Moghal informing NCAS on 22 December 2016 that the Claimant had raised a bullying and harassment complaint and that he had complained of race discrimination;

c) Ms Anna Clough who was tasked with investigating the Claimant's race discrimination complaint against Ms Burnham denied the Claimant study leave which he had pre-booked on the basis that the course was not pre- approved;

d) Ms Clough failed to respond to the Claimant's request for a job plan;

e) Dr Moghal failed to deal with the Claimant's allegations in relation to patient safety between June 2015 and 28 November 2016, and 4 December 2017.

f) The Respondent failed to convene an appeal panel in accordance with the provisions and timescales of the MHPS and did not agree an extension with the Claimant.

g) The Chief Executive's decision in respect of the grievance appeal panel was an act of victimisation and a detriment.

Whistleblowing

12. Did the Claimant make a protected disclosure in accordance with s.43A of the Employment Rights Act 1996? The Claimant relies on the following disclosures:

a) In or around 2012, the Claimant complained to Mr Kotecha, Clinical Lead and Gabriel Sayer, Clinical Director that the practice of allowing junior doctors to work unsupervised was unsafe and a potential risk to patients;

b) In or around September 2015, an incident arose where a child was mismanaged by an unsupervised junior doctor and the Claimant relies on the statement given a Serious Untoward Incident investigation;

c) On or around 17 October 2016, the Claimant lodged a complaint alleging racial discrimination against Ms. Burnham;

d) On 15 January 2018, the Claimant lodged a Serious Untoward Incident complaint against Mr Kumar for not consenting a patient for the operation that he performed which led to complications and a cover up;

(e) The Claimant lodged a racial discrimination, victimisation, and a bullying and harassment complaint against Dr. Moghal on the 15 January 2018.

~~13. Was the Claimant subjected to detriment(s) on the grounds of having made a protected disclosure contrary to section 47B of the Employment Rights Act 1996? The Claimant claims that:~~

~~a. The claims made at 5(g)-(r) above;~~

~~b. On 5 October 2015, the Claimant was subject to a false allegation by Professor Kotecha alleging that the Claimant had been absent without leave when he had been informed that the Claimant was unwell;~~

~~c. Dr Moghal falsely accused the Claimant of doing private work while he was on sick leave despite being aware that Bhik Kotecha, another member of the department had been consistently doing private in the private hospitals when he should have been attending to NHS patients. Additionally, Bhik Kotecha was recording NHS activity whilst not being on the premises including when he was engaged in private practice;~~

~~d. Professor Kotecha denied the Claimant's request for compassionate or special leave in or around April 2016 when his wife required hospital treatment. However, he granted Mr. Kumar leave to look after his wife after she was admitted for surgery in August 2016.~~

14. Allegations 7(a) (iii), (iv), (vii) above are also brought as claims for unauthorised deduction of wages.

15. Whilst the number of issues and allegations are extensive, Mr Elesinnla sought to explain that the Claimant's claim could be simply put in that race discrimination and victimisation could be concluded from the following:

15.1 The Claimant had not been paid his contractual entitlements since 2003 without adequate explanation;

15.2 The Respondent's application of its policies towards him was so unreasonable, atypical and unexplained; and

15.3 The Respondent's failure to deal with his complaints against others, including allegations of fraud, was so unreasonable, atypical and unexplained.

Evidence

16. The Claimant gave evidence on his own behalf. He was questioned for over two days.

17. The Respondent called the following witnesses to give evidence on its behalf.

17.1 Ms Valerie Davis, Head of Employee Relations;

17.2 Professor Bhik Kotecha, Clinical Lead in ENT, 2012 – 2017;

17.3 Dr Nadeem Moghal, Respondent's Medical Director 2015 – August 2018;

17.4 Mr Gabriel Sayer, Clinical/ Divisional Director ENT, 2011 – 2017;

17.5 Ms Sandra Malone, Non Executive Director, grievance appeal officer; and

17.6 Dr Magda Smith, Acting Medical Director August 2018 -2019, Medical Director from 2019.

18. All witnesses had prepared written statements and were subject to cross examination and separate questions from the Tribunal.

19. The Respondent also relied on the written witness statements of Ms Anna Clough, Divisional Manager and Mr Alan Wishart, Deputy Director of workforce. They were not called to give oral evidence and their evidence was taken as read. However, their evidence was not accepted in respect matters that were specifically challenged with other relevant witnesses and to that extent those matters challenged remained live for our determination.

20. The Tribunal was referred to relevant pages in a bundle of documents. Numerous additional documents were permitted to be added to the bundle throughout the hearing. No objections were raised. The bundle eventually had nearly 4000 pages and extended to 5 volumes. The Tribunal was not assisted with how the bundle was arranged and had to navigate the many documents that were not placed in a logical order and many of which were duplicated.

21. The Tribunal spent the first day reading statements and relevant documents and the following six days hearing oral evidence. The Tribunal deliberated the case for the following two days before giving judgment to the parties on the tenth day.

Procedural matters

22. On the fourth day of the hearing the Tribunal considered the Claimant's application to amend to add 4 new allegations as specified in paragraph 11 (aaa) – (ddd) above. The Tribunal considered the overriding objective and balance of prejudice and in view of the fact that the Respondent was calling relevant witnesses on other matters, instructions could be taken and a response provided without any detrimental effect on the Tribunal timetable. The Tribunal refused the Claimant's application to amend to add a further 2 allegations which were not directly relevant to the witnesses whom the Respondent had planned to call.

23. The Respondent was permitted to submit supplementary witness statements from Mr Sayer and Dr Smith to address the new allegations.

Overview and assessment of witnesses

24. This case involves a number of highly educated and qualified individuals including the Claimant.

25. The Tribunal found the Claimant's evidence to have significant incredibility and irrationality in respect of a number or the allegations he made.

26. The incredibility stemmed from the Claimant maintaining that numerous matters of contractual disagreement that occurred a very, very long time ago against different people were acts of direct race discrimination or unlawful victimisation. The Claimant had advice from expert employment lawyers and BMA representative from, at least 2013, and he did not suggest race as a potential factor for any of his concerns until 2016. Even then no claim of race discrimination was advanced against Professor Kotecha or Mr Sayer who were two of the main alleged proponents of race discrimination against him. This was some 13 years after he commenced employment and the Claimant was assertive in pursing areas of disagreement during this time.

27. The Claimant demonstrated to the Tribunal elements of self-importance and a significant lack of reflection or acceptance of any other pressures apart from his own. The Claimant's self-absorption was best evidenced by his firmly held belief expressed to us that anybody who disagrees with him did so on grounds of his race.

28. The Claimant's irrationality was demonstrated to the Tribunal by the uncompromising allegations he maintained and the failure to reflect and consider the implications of alleging that Professor Kotecha, Dr Smith, Dr Kumar, Dr Moghul, Ms Davis, Ms Clough, Mr Wishart, Ms Malone were dishonest, liars, lacking in integrity and all acting in conspiracy against him, without any tangible evidential basis. His allegations in this regard were based on rigid thinking, unreasonable suspicion and an irrational perception that any disagreements he faced or contrary treatment towards him must have been, latterly at least, because of his race.

29. Having said that, the Tribunal was not impressed with the evidence of Professor Kotecha. His credibility was found to be wanting in a number of respects. First, in relation to his knowledge of changing of the notes made by Dr Kumar on 4 December 2017 and second in respect of the statements he made to Dr Smith about changing Dr Kumar's email on 23 December 2016. Professor Kotecha's evidence was incredible given that this had been discussed with him in the Chapman investigation in 2018 and the Mordi investigation in 2019. However, he denied outright to Dr Smith that he had changed the Kotecha email during her subsequent questioning of him in July 2019. Further, the evidence he gave to the Tribunal of what he told Dr Smith during her investigation was not consistent with Dr Smith's recollection. This underlined the concern that we had in relation to the veracity of his evidence.

30. Ms Val Davis' evidence indicated that she lacked full understanding of the detail of the Respondent's procedures. We find that she demonstrated a lack of ownership and engagement with the trusts relevant policies, especially when there was an acute need for them to be followed. There were serious shortcomings in the communication and the advice that she gave to management in respect of the relevant policies. This became clear in relation to the content of the disciplinary procedures and the operation of the MHPS policy when the Claimant was being restricted from practice. However, Ms Davis was not assisted by the evident high

turnover of HR staff within the Respondent and the paucity of its case management filing and recording systems.

31. Dr Moghal was Medical Director and was tasked with dealing with over 350 consultants and up to 650 doctors. His primary concern was to deal with patient safety. We find that he was drawn into becoming the unwilling arbiter of an increasingly dysfunctional ENT department resulting from disagreements between Professor Kotecha and Dr Kumar on the one hand the Claimant on the other. It is evident that Mr Dr Moghal, in dealing with issues and allegations raised, was concerned by the nature of the dysfunctionality in the department. In seeking to ensure that the ENT Department was run as effectively as possible he viewed the Claimant as more problematic than his work colleagues in the running of the department especially given the Claimant's reported failures to engage constructively with his line managers in matters such as job planning, approach to absences such as study leave and sickness absences, timekeeping as well as the underlying interpersonal issues. However, Dr Moghul also sought to delegate matters wherever possible to the appropriate management line in accordance with the Respondent's operational structures and Professor Kotecha as Clinical Lead at the time was part of the management structure.

32. We find that Mr Sayer's evidence was sourced from a font of frustration. He had reached the end of his tether regarding the Claimant who he stated had taken a disproportionate amount of management time to deal with. We find that this impacted on his approach and attitude towards the Claimant.

33. We found Dr Smith to be a straightforward witness who was catapulted into the frame by the unexpected illness of Dr Moghul. She assumed his responsibilities as Medical Director in what she stated was a very busy Trust in the middle of winter. We accept that her primary focus was patient safety and she needed to rely on other members of her team and HR to get up to speed on the matters she inherited. The Claimant was one of very many matters she had to take at the time and she acknowledged her mistakes in failing to follow the letter of the relevant policies at the time.

34. Ms Malone presented as a balanced witness who had undertook the grievance appeal process in a basic but neutral way. Whilst we accept that she had read all 3000 pages of the bundle of appeal documents that were before her it was evident from her cross examination that she did not pay as much attention to detail as was necessary.

35. Our overview and assessment of witnesses forms part of our findings and determination of the factual allegations made.

Facts

36. The Tribunal has found the following facts from the evidence.

37. The Respondent is a NHS Trust with Queens Hospital and King Georges Hospital. The Respondent has over 350 consultants and up to 650 doctors at any one time. The applicable reporting structure is Chief Executive, Medical Director,

there are then 6 Clinical Directors (or Divisional Directors) and then 30 Clinical Leads to whom consultants or doctors must report to.

38. The Claimant identifies as black for the purposes of the claim. He was appointed to the Respondent on 1 May 2003 as a consultant in the Trust's ENT department. Professor Kotecha, who had been in the Trust for eight years at the time of the Claimant's employment, was instrumental in selecting and recruiting the Claimant to employment within the Respondent.

Contract terms

39. The Claimant was sent an offer letter of employment on 4 August 2003, over 3 months after he had commenced employment. The inefficiency of the Respondent's HR service provision was evident from this early stage.

40. The Claimant's offer letter set out the key terms of employment which applied to him. It was stated that the terms and conditions of employment that were offered were set out in the terms and conditions of service of Hospital Medical and Dental which are amended from time to time. This was the 2002 contract or 'Old contract terms'. New contract terms were issued to others under a 2003 agreement but the Claimant did not wish to transfer onto those terms until expressing an interest to do so in 2015.

41. The Claimant's contract offer letter states that he was employed on a full time basis and that:

41.1 He will agree his job plan each year and undergo an appraisal on behalf of the Chief Executive in accordance with Trust policy.

41.2 The arrangement of his duties will be initially a matter for discussion between himself and the relevant Clinical Director.

41.3 It is agreed that any private practice that he may undertake will in no way diminish the level of service that may be expected from him by the Trust in carrying out the duties.

41.4 The duties specified are regarded as requiring substantially the whole of his Professional time; and

41.5 This would involve a minimum commitment equivalent of 10 notional half days (NHD's) a week.

42. We were referred to paragraphs 61 and 62 the relevant terms and conditions of Service of the 2002 contract [Bundle pages 85 and 86]

PART-TIME APPOINTMENTS

Assessment of Duties

61 For part-time practitioners in the grades of consultant, AS, SHMO, SHDO, hospital practitioner and part-time medical or dental officers (paragraph 94 or paragraph 105appointments), the Authority shall make a general assessment, in terms of notional half-days and fractions thereof, of the average time per week required by an average practitioner in the grade and specialty to perform

the duties of the post. A notional half-day is regarded as the equivalent of a period of 3.5 hours flexibly worked. In making this assessment, the Authority shall take into account such duties as are set out at paragraph 30.c above. They should also take into account time necessarily required in travelling between home or private consulting room, whichever is the nearer, and the hospital(s) or other place(s) of work served (unless the journey is one which the practitioner would undertake irrespective of his work with the Authority), subject, unless the circumstances warrant exceptional treatment, to a maximum of half an hour each wav in respect of journeys to the practitioner's main hospital or principal place of work. There should be excluded from the computation any element of time for committee work other than on behalf of the Authority, and care of private patients under Section 65(2) of the National Health Service Act 1977. There shall also be excluded time required for domiciliary consultations (for which special fees are payable), and any time contracted for, and remunerated separately, under the provisions of paragraph 14. This paragraph shall also be used as the basis for assessing the minimum work commitment of maximum part-time practitioners - see sub-paragraph 13.b.

Rounding Up

62 Where a practitioner's appointment is with a single employing authority and in one grade only, any fraction of a notional half-day resulting from the assessment made in accordance with paragraph 61 above shall count as a notional half-day, so that the notional half-days resulting from the general assessment of duties of the practitioner's appointment shall always be in terms of whole numbers of notional half-days.

43. Clause 30 c referred to in clause 61 in the relation to the definition of the assessment of NHD and clause 30 d of the old contract Terms state:

30 c A hospital consultant has continuing clinical responsibility for any patient admitted under his or her care. A consultant and the general manager responsible for the management of the consultants' contract shall agree a job plan for the performance of duties under the contract of employment. For the purposes of drawing up a job plan, the authority shall take the following duties into account; outpatient clinics, ward rounds, operating procedures, investigative work, administration, teaching, participation in medical audit, management commitments (for example as clinical director), emergency visits, on-call rota commitments, and so on, including occasional visits to outlying hospitals or other institutions for consultation, diagnosis or operative work. The authority shall take into account time given, for example, as consultant adviser to the authority on special branches of the service or by way of "pastoral visits" to outlying hospitals.

30 d The job plan will identify the nature and timing of the consultants fixed commitments. Fixed commitments are to be assessed and worked in notional half days or fractions thereof, and far a whole time for maximum part-time consultant shall normally account for between five and seven and hates bees, depending on speciality. The consultants on other part-time contracts including honorary contracts, at least half of the NHD specified in the contract shall normally be accounted for by fixed commitments. The number of fixed

> *commitments may be varied with the agreement of the consultant and the general manager, taking account of the other components of the job plan. Except in an emergency, the consultant shall fulfil fixed commitments unless the local general manager has agreed otherwise; and that such agreement is not to be unreasonably withheld. The job will be subject to review each year and revisions may be proposed by either the general manager or the consultant, who shall use their best endeavours to reach agreement on any device job plan. If agreement is not reached and the health authority notifies the consultant of its intention to amend the job plan, the consultant may appeal against the proposed amendment. When appeal is made in relation to matters governed by this paragraph or paragraph 30 c, the employing authority shall establish an appeal panel. The appeal panel will be chaired by the director of public health or senior medical or dental office of the authority, and will include a lay member of the authority and the senior officer of the authority. If either party judges that it would be helpful a medical or dental advise acceptable to each party will be co-opted to the panel. The panel will submit his advice to the authority, which shall then determine the appeal.*

44. We observe that the contractual document says that there is a minimum work commitment equivalent to 10 NHD's a week. A week is stated to be the reference period.

45. A notional half day is regarded as equivalent to a period of 3.5 hours flexibly worked. We had to consider the relevance, if any, of the words the 'week' the time reference period in the contract, as well as the words notional and flexibly. In construing this we also considered the 2013 guidance on the difference between the Old contract terms and New Contract terms. This stated:

> *A MEHT is defined as a period of 3 1/2 hours flexibly worked at professional activity has a nominal timetable value four hours it is important to remember however that direct clinical care PCC professional activities include an element for administrative administration activities directly related to the CC work for example multidisciplinary meetings about direct patient care referrals and notes under the old contract these elements accounted for under the heading of flexible commitments therefore it would be misleading to equate in MEHT fixed commitment with a DC CPA in terms of activity as the to do not correspond exactly similarly supporting professional activities as PA PAs do not encompass all the activities accounted for within the definition of a flexible commitment* ***neither the old nor the 2003 contract are hours based contracts rather they both reflect an expectation that contractual duties will be undertaken in a spirit of professional flexibility with regard to time, location, content and duration of agreed activities.*** *in practice the contractual distinctions between PAs and NHC's or sessions should not have the effect of introducing restrictions and limitations on the flexibility that did not previously exist so that was the guidance that was given on consultant job plans as [page 2781/ 2782].*

46. Mr Sayer stated that the Claimant was on the old contract and he was employed as a maximum part-time which is up to 10 NHD's.

47. Mr Wishart's statement stated that the Old Contract is made up three types of contract. First, a whole-time contract where the total salary equated to 11 NHDs. These individuals had to undertake between five and seven NHD's of clinical work, but were unable to undertake private practice above 10% of the NHS earnings. Second was a maximum part-time contract. These individuals had to do between five and seven NHDs of clinical work, however they could undertake more than 10% of their earnings in private practice. The trade-off for this was that they would lose 1/11 of their salary compared to those that were on a whole-time contract. Third was a part-time contract where the reduction in clinical work was normally between 9/11 or less. These individuals could do as much private practice as they wish.

48. The Claimant gave evidence that from 2006 his status changed from a whole-time contract as his private earnings exceeded 10% of his NHS income. Therefore, from that time he was on a at maximum part-time contract. This meant that he would lose 1/11 of his pay as set out in paragraphs 13(a) and 13(b) of the Old Contract terms [63].

MHPS

49. The Respondent adheres to the policy entitles Maintaining High Professional Standards in the Modern NHS [1030].

50. This policy provides the process to be followed when concerns are raised about a clinician involving, amongst other things, clinical malpractice. The policy is a nationally agreed framework setting out procedures that are designed to protect both a NHS Trust and a clinical practitioner. This policy requires the appointment of a case investigator, ensuring a written record is kept of the investigation, appointing a Designated Non Executive Board Member (NED). There is a defined process to be followed in relation to exclusion of a clinician [1045], the process to be followed for reviewing exclusions, contact with the National Clinical Assessment Service (NCAS) and an appeal process. It is evident that the detailed and necessary clauses of the MHPS outlined above were not followed in respect of the Claimants restriction from practice that occurred on 28 December 2016.

Fraud policy

51. The Respondent has a fraud policy that requires, in specified circumstances, a local counter fraud specialist to be responsible for taking forward all antifraud work locally in accordance with NHS counter fraud authority standards [3466]. This policy states that the line managers have responsibility to ensure that adequate system of internal control exists within their responsibility and that the responsibility for prevention and detection of fraud and bribery primarily rests with managers and requires the cooperation of all staff.

52. The fraud policy requires the HR department to liaise closely with managers and the local counter fraud from the outset where a member of staff is suspected of being involved in fraud.

53. Clause 4.1.12 of the fraud policy states that in cases of potential fraud or corruption the counter fraud and security management service will be contacted for

advice before any investigations are instigated. It states that an employee should be informed of the allegations once the investigation is complete and if any the allegations or findings against them the employee will be required to attend a formal disciplinary hearing if there is a case to answer. Appendix D of the antifraud and antibribery policy provides examples of NHS fraud and among them are undertaking private work during NHS time. Fraud is, not surprisingly, defined as an act of gross misconduct under the Respondent's disciplinary process.

Grievance procedure

54. The Respondent's grievance procedure provides for resolution of grievances at an informal stage or formal stage. The formal stage ordinarily requires the grievance outcome to be provided within 10 working days of the hearing, it also states that the grievance hearing will usually be within 10 working days of the grievance form. In relation to the appeal hearing of the grievance it is stated that the member of staff may wish to submit any further information for hearing at least 7 days before hand.

55. The Tribunal find that the Respondent's organisational inefficiency was such that compliance with the timescales in the grievance procedure would have been exceptional, if they were complied with at all.

56. In respect of grievance appeals the procedure states that documents must be submitted at least 7 days before the date of the appeal hearing. It also states that the manager who heard the formal grievance will be required to submit any supporting evidence including the reasons for their decision at the formal stage of the grievance procedure including any action taken to resolve the grievance at the informal stage within seven working days of the hearing to the appeal hearing manager.

Job plan

57. The Tribunal is unable to ascertain from the evidence whether the Claimant had agreed or sought to agree a job plan for the period 2003 through to 2008. There was no job plan that would have provided the certainty, predictability and consistent understanding for to both the Respondent and the Claimant. It is unclear why such a job plan was not able to be agreed at this time in accordance with the terms of the offer letter. There was no suggestion that an appeal panel was required to resolve this dispute as provided for in clause 30 d of the Old Contract and no evidence that such an appeal panel was requested throughout the years of dispute. We find that the Claimant worked a timetable that he was content with and the Respondent did not seek to impose upon him any change in terms and conditions or working arrangements that would have been more compatible with its needs. There were no defined duties that recorded the expectations between the parties about the work and responsibilities that the Claimant would be required to do and be paid for.

Skull based work

58. The Claimant stated that he was doing lateral skull-based and neurosurgical procedures from 2004 (Skull based work). The Claimant stated that he was undertaking skull based work on Thursday every 6 to 8 weeks instead of his ENT

work. He stated that he would normally operate until 30 minutes past midnight which he says amounted to at least another 2 NHD sessions that he was not paid for. The Claimant maintains that other members of the team were being paid to do this work.

59. The Claimant was not paid for this work and he approached Christian Adams, General Manager of speciality surgery at King Georges for payment and was advised to approach the neurosurgical team. As the Claimant still had not been paid for such work by November 2008 that he stated he undertaken extra sessions without pay for four years. He stated that he met with Mr Awuah the Respondent's General Manager for neurosurgical neurosciences who agreed to pay two NHD for the neurosurgical skill based work, one NHD for the clinics and surgical sessions as well as one flexible session for ward rounds and administration. The Claimant stated that this was reflected in the letter sent to him on 1 December 2008 from Mr Awuah which states [1103]

> *'I am writing to confirm that we will be paying for the extra duties you have been doing for the joint neurosurgical care cases out of the neurosurgical neurosciences budget. If you have any further queries please do not hesitate to contact me'*

60. There is no mention in that letter of two extra NHD sessions being added. This is conspicuous given that the Claimant stated that had been working for this lengthy period of time, and after, without being paid for them.

61. The Claimant stated that despite this letter he was not paid for the work he did from December 2008 onwards. Consequently, he claims 433 weeks for unpaid skull based work for sessions between November 2004 until April 2013 and from May 2015 to July 2015.

62. Given the lack of contemporaneous documentation in this regard, the Claimant has not established to us that he was entitled to claim an extra 2 NHDs per week as alleged. We considered that if these sums were really due the Claimant would have sought to recover them at a much earlier time than this claim presented in 2018. There was at most a misunderstanding but not a crystallised contractual entitlement upon which the Claimant could rely. We therefore do not accept that such sums were unlawfully withheld from him in respect of skull based work.

<u>Clinical Lead</u>

63. The Claimant was appointed as Clinical Lead for day surgery in 2007. The appointment letter 14 February 2007 states:

> "*You will need to identify one Programmed Activity session in your job plan to do this work the start date the post is first of March 2007*"

64. No evidence of the Claimant identifying a Programmed Activity in his job plan was put forward and there was no evidence of an agreed job plan that was provided to us. Whilst the Claimant may have undertaken additional duties the underlying issue in this regard was the failure to agree a job plan. The Claimant ceased to be a Clinical Lead for this period in 2010.

65. The Claimant was appointed to the position of Clinical Lead again in April 2012. In this instance he was paid one NHD and his pay increased from 10 to 11 sessions to reflect this. The additional one NHD for undertaking the Clinical Lead was signed off on 2 May 2012. However, in September 2012, the Claimant resigned from the Clinical Lead role due to difficulties in his working relationship with Mr Sayer, the then Clinical Director, and therefore the extra one NHD would not been due from that time.

66. Mr Sayer questioned the Respondent's car park data to check on the Claimant's movements in relation to his late arrival time at work in January 2013. The Claimant's timekeeping was having an impact on patient appointments.

67. Due to ongoing relationship issues the Claimant and Mr Sayer engaged in an ACAS led mediation which led to a mediation agreement between them. The terms of the mediation agreement indicated that there should be clarity in all forms of communication between themselves, that there should be fair and open consultation on all issues and that there should be early resolution of misunderstandings. It was stated that a review of the agreement should take place in six months to consider progress. There was no evidence before the Tribunal as to whether there was a review of the mediation agreement. However, the Tribunal note that there was no indication of race discrimination levelled against Mr Sayer at this time.

68. The Claimant continued to raise concerns about the number of NHD's he was entitled to against his operational but not agreed job plan. This led to a mediation session with the then Deputy Medical Director Stephen Burgess on 17 May 2013. The discussion addressed differences between the Old Contract and the 2003 New Contract. The Claimant was still on the Old Contract and did not wish to change to the New Contract. Mr Burgess stated that the Old Contract was not as easy to define as the New Contract as it was not a time-based contract. It was a professional contract which covered 24/7, 365 days a year. It was stated that there was no prescribed agreement as to exactly how many fixed NHD's there should be in a job plan for a consultant working under an Old Contract. It was stated that usually there are between five and seven fixed sessions, an on-call commitment of one in every five weekdays, and approximately one weekend in every 10.

69. The letter dated 29 May 2013 confirming the meeting refers to the Claimant's assertion, made in previous discussions, about increasing his NHDs to 11 (whole-time) but he was unsure whether the change form signed had been processed to effect that change. We have found that the change form signed in 2012 was to reflect the change to him being Clinical Lead for the period April 2012 through to September 2012 when the Claimant resigned from that post. There was no evidence before us that the Claimant wished to transfer to a whole time contract and we heard no evidence that he was going to reduce his private practice to effectively move onto a whole-time contract to benefit from 11 NHDs following his discussion with Mr Burgess.

70. If it was accepted that the Claimant should have been entitled to one additional NHD for the forthcoming year that would have brought him up from 10 to 11. However, whilst he was on a maximum part-time contract he would have

automatically had a reduction of 1/11th which would have meant being paid for 10 NHDs. If the Tribunal's assessment is correct it is possible that the Claimant may have been overpaid in the period from September 2012 if the maximum NHD reduction of 1/11 of salary was not being applied.

Travel time/job plan

71. The Claimant's job plan had not been agreed by 2011. He was still querying travel time and how this should feature in the NHDs. The Claimant sought advice from the British Medical Association employment adviser on 22 November 2011 who provided their advice in March 2012. The Claimant referred to seeking advice, including specialist employment law advice during this time [1167, 1225, 2023cc, 2948] but allegation of race discrimination was made.

72. During 2013 Mr Sayer and the Claimant continued to be unable to agree a job plan. The Claimant stated the job plan did not reflect duties. The key issues of disagreement related to the assessment and approach to travel time.

73. The Claimant's starting point in relation to travel time was that he was entitled to one hour for each NHD meaning 2.5 hours work and 1 hour travel. The Respondent asserted that this would have had the absurd effect of the Claimant being given two hours travel time for 2 NHDs worked on one day at the same site. The Claimant revised his view and eventually accepted that if he worked in the same place on the same day he would only be entitled to 1 hour travel time regardless of the number of NHDs he worked on that day. That seemed to the Tribunal to be a sensible and correct interpretation of the contract terms.

74. We therefore looked at the times that the Claimant was required to attend under the job plan albeit, not agreed, and it was clear that he was only required to attend on three days. The Claimant was on call on Friday but sought to claim travel time for that day also.

75. By November 2015 discussions regarding agreeing a job plan were not successful. Mr Sayer was continuing to have discussions with the Claimant and considered that the Claimant's requests for work leave to be excessive.

Concerns raised against the Claimant

76. The Claimant took a sabbatical between 2014 to 2015 the terms of which no longer concern us. The Claimant signed a sabbatical agreement, the Respondent's standard terms in relation to sabbaticals provide that no work should be undertaken during sabbatical. However, it is evident that the Claimant had a side agreement that enabled him to do limited private work whilst he was in the UK as long as he had informed the relevant people.

77. Mr Sayer raised allegations that the Claimant acted in breach of sabbatical terms alleged undeclared conflict of interest in relation to in relation to clinical commissioning group healthcare business work in 2014. Ashley Patterson, the then HR Manager set up a case conference with counter fraud, which is seemingly in compliance with the Respondent's counter fraud policy.

78. Subsequently and separately, Professor Kotecha, Clinical Lead at the time wrote to Charlie Nicholson counter fraud complaining about the Claimant's conduct regarding allegedly undertaking private work whilst he was off sick.

79. Additionally, in November 2015, Professor Kotecha raised concerns relating to the Claimant's attendance at work and this led to an investigation in relation to Claimant's timekeeping and attendance at work, where on one occasion consultations for 12 patients on a list had to be cancelled.

80. Professor Kotecha made a complaint about the Claimant not attending work on 25 April 2016 which was eventually escalated to Dr Moghul. Dr Moghul stated that it was very disappointing and the Divisional team will support Professor Kotecha get this right. Dr Moghul observed that he was working with my HR colleagues to ensure we "*connect all the dots*" on the series of the Claimant's behaviours. Shortly after this report concerns were conveyed that the Claimant took nine days an unauthorised emergency leave.

Claimant's 2016 grievances

81. On 17 October 2016 the Claimant submitted three formal complaints. The first complaint was against Professor Kotecha bullying him. He stated that Professor Kotecha was at best spreading malicious rumours, condoning the disclosure confidential information and deliberately and systematically preventing him from keeping his skills up-to-date, deliberately undermining him over his line of work and denying him the same opportunities to care for family members who were unwell than other members of staff.

82. The Claimant made a complaint against Mr Sayer for bullying. He stated that Mr Sayer had systematically, deliberately maliciously prevented him from keeping his knowledge up-to-date made false accusations, refused to recognise that he had been working beyond his contractual hours and was bullying him into working new contractual hours.

83. The Claimant also made an allegation against Helen Burnham, a junior member of staff, in respect of race discrimination for verbal abuse he alleged that Miss Burnham during the course of discussion raised her voice and called him a cheeky monkey [2095 – 2100].

22 December 2016 incident and restriction from practice

84. On 22 December 2016 the Claimant left an operating theatre without completing the procedure on the patient. The anaesthetist and Divisional Director present, Dr Oluremi Odejimni contacted Ms Clough, the Divisional Director Surgery to relay the incident. Ms Anna Clough had a discussion with the Claimant and recorded her account in an email sent to Dr Moghal and Dr Smith sent at 17.00 on 22 December 2016 [1755 – 1756].

85. We accept that Ms Clough informed the Claimant that a formal investigation into the incident would be undertaken. Ms Clough told the Claimant that he would have the chance to explain the events during the investigation process and he could

justify then why he felt his actions were in the best interests of the patient. Ms Clough asked the Claimant whether there was anything that had contributed to the events that had to him feeling that he was unable to operate. This was discussed several times but the Claimant consistently stated that it was purely isolated event in the theatre and that there was no underlying reason or feeling that made him not fit to practice. The Claimant stated that he had done a major procedure that morning without incident. Ms Clough recorded that the patient in respect of the incident had been operated on by another member of staff the surgical team and was fine and this was arranged by the anaesthetist rather than the Claimant. Ms Clough expressed her concern to the Claimant that he did not try this as an option. The Claimant stated that he was clear that he told the theatres the best thing to do for the patient was to close them up and wake them up and the Claimant would come and apologise later. It is evident at this stage from Ms Clough's contemporaneous record of discussions with the Claimant that he felt that there was something to apologise for in respect of the incident. It was clear to all concern that this would be a matter for investigation.

86. Dr Odejimni also contacted Dr Moghal, the then Medical Director about the incident and stated that they had managed to get hold of Dr Kumar who had completed operation for the patient on 22 December 2016 procedure following the Claimant leaving the operating theatre. Dr Kumar was asked to provide his account of events.

87. Given the perceived seriousness of the incident Dr Moghal contacted the National Clinical Assessment Service (NCAS). NCAS is an advisory body to assist and provide advice and act as a sounding board when decisions are made about how to address medical concerns. It has an impartial role and has no regulatory role comparable to the GMC. Dr Moghal informed NCAS Adviser, Mr Neil Margerison, by telephone about the incident that had been relayed to him by Dr Odejimni and Ms Clough. Mr Margerison recorded the conversation and the advice that was given was in a letter dated and sent on 23 December 2016 at [1760/1761]. The Tribunal finds that this letter accurately records and reflects the nature of the comments made by Dr Moghal to NCAS and the advice that was given. Specifically, Dr Moghal informed NCAS of the information that were conveyed to him which was that the allegations were that the Claimant may have lost patience and walked away leaving the patient. It was alleged that the Claimant made no arrangements to cover the situation he was not contactable and he may have left the hospital. These were matters that were provisional depending on the investigation.

88. NCAS commented that if the actions were confirmed, then on the face of it this would seem to be unacceptable and unprofessional behaviour. Mr Margerison stated that should be possible to clarify this by speaking with Claimant and if necessary by some sort of investigation process.

89. Dr Moghal questioned in the short term he consider how best to ensure patient safety and informed NCAS that he was aware of the relevant provisions of the MHPS. He was informed that the necessary measures were dependent on what the Claimant has to say by way of explanation and perhaps by way of undertaking for the future.

90. Mr Margerison also advised Dr Moghal to take account the views of the relevant Clinical Director and Service Manager. He advised that from the information available at present the most likely measures would be some form of additional supervision and /or restriction of practice in accordance with the MHPS procedures.

91. Dr Moghal also informed Mr Margersion of additional background as he was unclear whether this may have a bearing on events. He stated that the Claimant has experienced some difficulties in his professional relationships including taking out a grievance alleging harassment and racial discrimination. It was also stated that the Claimant also has been somewhat less consistent in his attendance at work and indicated the problems with migraine have contributed to this. It was stated that these are obviously important issues that will need further clarification.

92. Dr Moghal asked Dr Kumar for a record of his account of events 22 December and Dr Kumar drafted an email on 23 December 2016 [1757]. This email was sent to Mr Professor Kotecha to review. We find that the email that Dr Kumar sent to Professor Kotecha was his accurate reflection of what he considered to be the circumstances of the incident on 22 December 2016.

93. This email was sent to Professor Kotecha who responded four hours later amending the email [1758]. Professor Kotecha changed the content of Dr Kumar's email in his document from the words ‘closing’ the case to ‘abandoning’ the case. Professor Kotecha added the following words to the email

> ‘*unfortunately after finishing the case I had to go to and complete my clinic and therefore the registrar was left to complete the theatre list unsupervised which is not satisfactory to say the least’*

94. Professor Kotecha deleted a paragraph referring to the surgery and the effect on the patient. Following review of the changes made by Professor Kotecha, Dr Kumar then sent the amended version to Dr Moghal [1759] later that day.

95. It is obvious that Professor Kotecha changed the content of the Dr Kumar’s email recording the incident of 22 December 2016 in the terms outlined above. His consistent denial of recollection that did so was incredible and the Tribunal is unable to accept his evidence in this regard.

96. Dr Moghal unexpectedly commenced a lengthy period of sickness absence due to serious illness on 23 December 2016. He handed all of his responsibilities as Medical Director over to Dr Magda Smith to deal with in his absence. Before going on sick leave Dr Moghal commenced the investigation and advised Dr Smith that a restriction of the Claimant's practice should be implemented. We accept that the decision was ultimately one for Dr Smith to take. However, we accept that the information that Dr Moghal had at the relevant time including advice from NCAS meant that restriction was a viable option that was open to the Respondent in the circumstances.

97. The Claimant suggested that it was open to the Respondent that he be supervised. However, having regard to the needs of patient safety and the resources

that were available time to the Respondent at the time supervising a senior consultant was not a viable option for the Respondent.

98. The Claimant was invited to a meeting on 28 December 2016 with Dr Smith. Contrary to the disciplinary procedure and the MHPS procedure, the Claimant was not informed what the purpose of the meeting was, he was not informed that he could have a representative at the meeting, he was not informed that he could appeal against the restriction, and he was not informed who the designated board member was, as the Respondent did not know the identity of the designated board member at the time and did not communicate with a designated board member until 9 February 2017.

99. The Claimant was informed that he would have his practice restricted and he was not allowed to make any representations for any less serious sanction such as supervision to be applied. No notes were taken of the meeting.

100. The Claimant sent an email on 26 December 2016 complaining about the lack of nursing personnel during the incident of 22 December 2016 [1762/1763]. He stated that that there was not an experienced nurse in the theatre to operate the laser and without the laser it was unsafe to continue the procedure.

101. The Claimant sent an email on 29 December 2016 stating that his restriction may be based on an inadequate amount of information given to the Medical Director and he would like to appeal against that decision [1766/1767]. The Claimant stated it was wrong to bluntly allege that he just walked out of the theatre without saying a word. He ended the procedure solely for patient safety not because he had a "*nervous breakdown*". The Claimant then gave his version of events which was contrary to that recorded by Ms Clough in the 22 December 2016 meeting in a number of relevant respects.

102. The Claimant's appeal was copied to Dr Smith and Ms Davis but was not acknowledged by Ms Davis until 12 January 2017.

103. On 9 January 2017 the Claimant's private hospitals and clinics that he undertook work for were informed of his restriction, including one hospital which the Claimant did not do any work. We accept that these restriction letters were sent out in Dr Moghal's name because they were the pro forma letters and not because Dr Moghal was actually involved in sending them.

<u>Investigation, disciplinary and appeal</u>

104. Dr Smith had appointed Ms Sheleigh Smith to undertake the investigation into the 22 December 2016 incident. Ms Davis informed the Claimant that there would be no appeal relating to whether an investigation would be carried out. It seemed to be the Claimant's case that he had a right to challenge the investigation being undertaken but we do not accept this was part of the Respondent's policies for him to be able to challenge the investigation itself.

105. Ms Sheleigh Smith completed her investigation on 24 January 2017. However, this was not sent to Dr Smith until the middle to end of February 2017, as is

evidenced by her statement made at the Claimant's disciplinary hearing held on 13 October 2017 [1856].

106. On 27 January 2017 Dr Smith reviewed and continued the Claimant's restriction. Contrary to the disciplinary policy she did not give the Claimant an opportunity to make representations about this before it the restriction was extended. On 21 February 2017, shortly after she received the Ms Sheleigh Smith's report, Dr Smith lifted the Claimant's restriction from practice.

107. On 16 March 2017, Dr Smith contacted NCAS to provide an update. She informed NCAS that the investigation had been concluded and that a number of the allegations were 'upheld'. The NCAS letter recording the conversation states that if matters were to be taken to a disciplinary hearing for conduct issues then the MHPS procedures should be followed with a medical member to be part of the panel.

108. The Claimant was sent a copy of the final investigation report on or around 29 March 2017. This identified that 3 of the 4 allegations would be pursued to a disciplinary hearing. The four allegations were:

108.1 the Claimant failed to attend the MDT briefing where planning of lists would have been discussed including the need for a trained laser nurse to be available throughout the procedure;

108.2 he failed in his duty of care by not communicating with theatre staff and providing reasons for unilaterally abandoning the procedure, demonstrating poor leadership and PRIDE behaviours;

108.3 he failed in his duty of care by inappropriately leaving the theatre because he was upset without communicating to the appropriate/designated responsible manager the reasons for this; and

108.4 he failed in his duty of care by not been available to continue planned lists leaving a registrar to continue unsupervised.

109. Ms Davis gave evidence that she had three assistants at various times throughout the disciplinary appeal process all of whom have left the Trust and that she had not been copied into all relevant emails. She stated that she had not been able to obtain all the correspondence relating to hearings. This demonstrates the absence of processes and proper management and communication within the Trust. The Tribunal is surprised that the Respondent seemingly does not have a central case management system to efficiently record and signpost its disciplinary and grievance requirements for matters raised.

110. The disciplinary hearing for the matters arising from the 22 December 2016 incident was not actually held until 13 October 2017. The hearing was chaired by Dr Moghal. The invite to the disciplinary hearing had all four allegations even though the investigation only recommended that the first three should proceed [1853A/

1853B]. However, at the start of the disciplinary hearing, the Claimant was informed that the fourth allegation was not going to be pursued by management [1856].

111. By letter dated 19 October 2019 Dr Moghal informed the Claimant of the outcome of the allegations against him were upheld. The Claimant was given a first warning and a number of recommendations of actions were requested of him to ensure his behaviour was not repeated [1867/ 1868]. The Claimant was offered a right of appeal against the disciplinary hearing which he exercised.

112. The Claimant appealed the disciplinary outcome and this appeal was eventually chaired on 22 January 2018 by Mr John Steinhart, a barrister instructed by the Respondent. The appeal hearing was adjourned due to the length of the Claimant's submissions.

Claimant's concerns against others and complaints against him

113. On 4 December 2017 the Claimant informed Dr Moghal and copied in Mr Masterson, Divisional Director and Professor Kotecha, Clinical Lead and Dr Kumar regarding patient safety concerns about Dr Kumar [1872/ 1873].

114. Dr Moghal responded to Professor Kotecha by email of 4 December 2017, directing Professor Kotecha to ask the Claimant to submit his concerns in the usual way through the appropriate governance process [1872]. Dr Moghal was concerned to ensure that Divisional Directors signed off on any patient safety concerns as valid before they actually got to him. This was obviously the case the year previously in respect of the Claimant where Dr Odejemni and Ms Clough as Divisional Directors notified him.

115. On 8 December 2017 Professor Kotecha replied to Dr Moghal stating that he had informed the Claimant of the process and had a call from Sean Masterton, Clinical Director to look at the case. Professor Kotecha stated that he had no concerns about the way in which Dr Kumar had managed the case but would do a formal detailed report on his return from holiday so that they could meet up to discuss [1872]. In respect of this incident the Claimant alleged that the patient incident notes relating to an incident were entered and dated retrospectively by Dr Kumar and Professor Kotecha in order to exonerate Dr Kumar from criticism. The Claimant alleges that Professor Kotecha and Dr Kumar were acting together to ensure this outcome.

116. On 14 December 2017 the Claimant wrote to Dr Moghal alleging that he is being victimised on the basis that he raised race discrimination within the Trust [3002].

117. From the end of December 2017 Professor Kotecha no longer undertook the Clinical Lead role.

118. On 15 January 2018 the Claimant made formal complaints against Dr Moghal, Mr Sayer and Professor Kotecha alleging race discrimination and bullying [1884 – 1889]. Due to the nature of the issues raised and the seniority of the individuals involved in the allegations the decision was subsequently made to appoint an independent investigator Mr John Chapman.

119. On 5 February 2018 Dr Kumar wrote a complaint to Ms Davis against the Claimant stating that he had been subject to an unprofessional attack and was pressured by the Claimant's intention to undermine his role. Dr Kumar stated he refuted the unfounded allegations which the Claimant was making against him which he considered to be a smear campaign against him causing stress and agony to him on both professional and personal fronts [3009 – 3010].

120. On 13 February 2018 the Claimant emailed Ms Davis raising concerns about Mr Steinhart being chair of the disciplinary appeal hearing. The Claimant was concerned about what policy was being followed and whether Mr Steinhart had a conflict of interest. The Claimant further communicated following Ms Davis' explanation about Mr Steinhart's involvement and the panel that he considered the Trust is getting away with a reprehensible arrangement which was neither appropriate nor reasonable [3033 - 3036] .

121. On 16 February 2018 Claimant wrote to Mr Masterston and Ms Davis and Mr Moghal alleging that the Professor Kotecha was doing private work in NHS time [3020 – 3022]. This would have been a breach of the anti-fraud policy.

122. On 19 February 2018 Mr Professor Kotecha wrote to Dr Moghal stating that he was distressed and distraught about what he felt was a very personal attack on his character, professional integrity by the Claimant [3012].

123. Ms Davis wrote to the Claimant on 20 February 2018 stating that the Trust takes his complaints seriously and the reason for the delay had been due to the fact that they are sourcing an external investigator to carry out an investigation into the matters raised [3017].

124. Ms Davis confirmed in this email that the complaints made against Mr Moghal Mr Sayer with Professor Kotecha (received in an email dated 16 January 2018) would be considered as well as complaints raised in his disciplinary appeal document in relation to Professor Dr Moghal Dr Smith and Alan Wishart. It was stated that the issue relating to alleged non-payment work undertaken would be considered. However, it was stated that the issue raised regarding patient safety was being investigated and will not form part of the process.

125. Mr John Chapman was appointed as a grievance investigator in March 2018. Mr Chapman identified his terms of reference as an amongst other things investigating whether it was discriminatory by Mr Sayer to refuse to honour previous agreements with the Claimant. However, on 29 August 2018 Mr Chapman wrote to the Claimant stating that the scope of the investigation was to investigate facts in relation to allegations of bullying, harassment and discrimination as set out in terms of reference and he would determine the Claimant's pay grievance or claims for compensation. Mr Chapman undertook his investigation and met the Claimant on 23 April 2018, 22nd of June 2018 and 6 August 2018. The final Chapman report was sent to the Claimant on 12 December 2018. It ran to 3000 pages.

126. On 16 January 2019 the Claimant met with Mr Chris Brown, the Interim CEO, to discuss to the grievance investigation outcome. Mr Bown accepted the findings of

the Chapman investigation and did not uphold the Claimant's grievances [3260 – 3261].

127. Mr Bown agreed that a further fact-finding investigation would be carried out to look into the Claimant's additional matters raised against Dr Kumar and Professor Kotecha. The outcome of these investigations would then be considered by Dr Smith and Mr Amos, Interim Executive Director of People.

128. The Claimant appealed against Mr Bown's grievance outcome and set out his grounds of appeal on 6 February 2019. The grievance appeal hearing chaired by Ms Sandra Malone, Non Executive Director and Special Advisor. This took place on 13 February 2019. The outcome of the Claimant's appeal was sent on 15 February 2019. His appeal was dismissed.

129. The Claimant was not happy with how the appeal was convened and he made his position known in an email to Ms Malone dated 13 February 2019 [1979 – 1981].

130. On 20 February 2019 the Claimant complained about Dr Kumar allegedly operating beyond his competence in arranging to operate in one the Claimant's patients without discussing them [2211H – I]. Mr Hepworth considered the Claimant's email by asking the Claimant a number of questions. The patient concerned was eventually assigned to a different hospital.

131. Ms Florence Mordi, Interim Medical HR Consultant was appointed to consider the additional allegations the Claimant was making against Professor Kotecha and Dr Kumar and her report was completed in April 2019 [2822 – 2889]. Ms Mordi specifically found that Professor Kotecha had changed Dr Kumar's email of 3 December 2016. Professor Kotecha's firm denial that he had not changed email this could not be sustained on the evidence.

132. Professor Kotecha had left the trust employment on 31 March 2019.

133. Dr Smith eventually followed up the allegations with Professor Kotecha by meeting him on 17 July 2019. She discussed the private practice allegations and the allegation that he amended Dr Kumar's email dated 23 December 2016. Her enquiry of Professor Kotecha was simplistic. Professor Kotecha misled Dr Smith about his involvement with the Dr Kumar email and, on the face of it Professor Kotecha's explanation about working during stated SPA time sessions should have warranted a referral to counter fraud for their consideration. This was not done.

134. The Tribunal had evidence that the Claimant, and other non-black consultants have been referred to Counter Fraud by Dr Moghal. However, Dr Moghal was not making the decision in this regard and there was no evidence that Dr Smith had referred anyone to counter fraud to demonstrate a basis for inference of discrimination. Professor Kotecha had left the trust and Dr Smith was not as assertive in her questions or enquiries relation to Professor Kotecha as she should have been. Dr Smith accepted what he said regarding the Claimant's allegations against him without proper analysis. Whilst there was legitimate area for discussion working in

private sessions during Trust time should ordinarily have led to a referral to the counter fraud department for them to resolve and this did not occur.

Move to new contract

135. On 18 May 2015 the Claimant requested to move to the New Contract, the 2003 terms [2050]. Mr Sayer responded on 21 May 2015 [2050] stating he believed the process is for the Claimant to agree a job plan with his manager and Clinical Lead which he would then approve and then he could agree the date at which he would like to commence the agreed job plan. Mr Sayer maintained that an agreed job plan was necessary to facilitate a move to the New Contract. A job plan had not been agreed.

136. The Claimant repeated his request to move to the New Contract. He stated this in an email dated 21 March 2016 which referred to him previously asking in May 2015 for this to be arranged when he returned from sabbatical [1372]. No job plan was agreed at this stage. The Claimant's request to change to the new contract therefore stalled.

137. On 17 November 2018, a job plan was finally agreed. Dr Kumar was now responsible for signing this off. It was stated that there was an agreed job plan on old contract as maximum part time with six fixed sessions and one on call with flexible SPA sessions. Three clinics of 9 patients each with travel time. Three session theatre with travel time included. Nuero ototoligical work to be discussed in next job planning meeting. Discussion to be started to reflect new contract job plan [2195A].

138. It should therefore have been possible to facilitate a change to the new contract. However, it is apparent that in March 2019 the Claimant sought to change the agreed job plan to go part time as he did not wish to have on call due to his health. The Claimant has raised objections to potentially lengthened hours on the new contract and the effect it will have on patient safety. A revised job plan for the purposes of a new contract is therefore not agreed [2221/2222].

Law and submissions

139. The Tribunal applied the following statutory provisions, appellate court authority and guidance when considering the issues of the case.

140. Section 13 Equality Act 2010 (EqA) defines direct discrimination.

> *'13(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.*
>
> *(2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.*
>
> *(3) If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B.*

(4) If the protected characteristic is marriage and civil partnership, this section applies to a contravention of Part 5 (work) only if the treatment is because it is B who is married or a civil partner.

(5) If the protected characteristic is race, less favourable treatment includes segregating B from others.

(6) If the protected characteristic is sex –

(a) less favourable treatment of a woman includes less favourable treatment of her because she is breast-feeding;

(b) in a case where B is a man, no account is to be taken of special treatment afforded to a woman in connection with pregnancy or childbirth.

(7) Subsection (6)(a) does not apply for the purposes of Part 5 (work)'.

141. Section 9 EqA defines race as a protected characteristic. The Claimant asserts that he is treated less favourably because he is black.

142. Section 27 EqA defines victimisation

'27(1) A person (A) victimises another person (B) if A subjects B to a detriment because –

(a) B does a protected act, or

(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act –

(a) bringing proceedings under this Act;

(b) giving evidence or information in connection with proceedings under this Act;

(c) doing any other thing for the purposes of or in connection with this Act;

(d) making an allegation (whether or not express) that A or another person has contravened this Act.

(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

(4) This section applies only where the person subjected to a detriment is an individual.

(5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule.'

143. Section 39 EqA provides imposes the relevant requirements on employers.

Employees and applicants

39(1) An employer (A) must not discriminate against a person (B) –

(a) in the arrangements A makes for deciding to whom to offer employment;

(b) as to the terms on which A offers B employment;

(c) by not offering B employment.

(2) An employer (A) must not discriminate against an employee of A's (B) –

(a) as to B's terms of employment;

(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;

(c) by dismissing B;

(d) by subjecting B to any other detriment.

(3) An employer (A) must not victimise a person (B) –

(a) in the arrangements A makes for deciding to whom to offer employment;

(b) as to the terms on which A offers B employment;

(c) by not offering B employment.

(4) An employer (A) must not victimise an employee of A's (B) –

(a) as to B's terms of employment;

(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for any other benefit, facility or service;

(c) by dismissing B;

(d) by subjecting B to any other detriment.

144. Section 123 EqA provides for the relevant time limits.

123Time limits

(1) Subject to sections 140A and 140B proceedings on a complaint within section 120 may not be brought after the end of –

(a) the period of 3 months starting with the date of the act to which the complaint relates, or

(b) such other period as the employment tribunal thinks just and equitable.

(2) Proceedings may not be brought in reliance on section 121(1) after the end of –

(a) the period of 6 months starting with the date of the act to which the proceedings relate, or

(b) such other period as the employment tribunal thinks just and equitable.

(3) For the purposes of this section –

(a) conduct extending over a period is to be treated as done at the end of the period;

(b) failure to do something is to be treated as occurring when the person in question decided on it.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something –

(a) when P does an act inconsistent with doing it, or

(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

145. Section 136 EqA sets out the burden of proof provisions.

(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

(4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.

(5) This section does not apply to proceedings for an offence under this Act.

(6) A reference to the court includes a reference to –

(a) an employment tribunal;

146. The Court of Appeal, in Madarassy v Nomura International Plc [2007] EWCA Civ. 33, stated at paragraph 56.

"The court in Igen v Wong expressly rejected the argument that it was sufficient for the complainant simply to prove facts from which the tribunal could conclude that the respondent 'could have' committed an unlawful act of discrimination. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal 'could conclude' that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination). It was confirmed that a Claimant must establish more than a difference in status (e.g. race) and a difference in treatment before a tribunal

will be in a position where it 'could conclude' that an act of discrimination had been committed."

147. The burden is therefore on the Claimant to prove, on a balance of probabilities, a prima facie case of discrimination.

148. The Tribunal considered the case of Ayode v City Link Ltd [2017] EWCA Civ. 1913, CA where Singh LJ 34 – 54 provides an extensive summary of the current law which we apply. At paragraph 62 Singh LJ observed that there are three relevant questions to consider, namely

148.1 Did the alleged act occur at all?

148.2 If it did occur, did it amount to less favourable treatment of the Claimant when compared with others?

148.3 If there was less favourable treatment, what was the reason for it? In particular, was that reason discriminatory.

149. In respect of comparators, the Tribunal referred to the case of Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11, HL. This requires that valid comparators be people where there are not material differences in circumstances. This is relevant when considering a hypothetical comparator when there is no actual comparator.

150. Mr Elesinnla, counsel for the Claimant, forcefully submitted that race discrimination allegations should be considered carefully in the context that evidence of direct race discrimination is rare. He submitted that atypical and wholly unreasonable treatment to the Claimant, as has occurred in this case, is sufficient for the burden to pass to the Respondent and that they have failed to provide an adequate non-discriminatory reason. Therefore, he submitted, findings of race discrimination and unlawful victimisation should be made.

151. Mr Elesinnla relied on the Tribunal to the following authorities in support of his submissions.

151.1 Chief Constable of West Yorkshire-v-Vento (No.1) [2001] IRLR 124, EAT, is authority for the proposition that the consideration of Comparators, whose situations are not identical but not wholly dissimilar, is a permissible way of constructing a picture of how a hypothetical comparator would have been treated;

151.2 Brown-v-London Borough of Croydon and anor UKEAT/067/053, authority for the proposition that in some hypothetical comparator cases it may be relatively plain that the burden has shifted to the employer, for example, where the employer acts in a way that would be quite atypical for other employers.

151.3 Bahl-v-Law Society [2004] IRLR 799 CA is authority for the proposition that an ET can infer discrimination from unexplained unreasonable behaviour.

152. Mr Cheetham QC, counsel for the Respondent reiterated the guidance given in the cases of Madarassy and Glasgow City Council v Zafar [1998] ICR 120 HL where Lord Browne – Wilkinson stated at page 1663F

> *'The requirement necessary to establish less favourable treatment which is laid down by section 1(1) of the Act of 1976 is not one of less favourable treatment than that which would have been accorded by a reasonable employer in the same circumstances, but of less favourable treatment than that which had been or would have been accorded by the same employer in the same circumstances. It cannot be inferred, let alone presumed, only from the fact that an employer has acted unreasonably towards one employee, that he would have acted reasonably if he had been dealing with another in the same circumstances'*

153. The Tribunal considered the relevant parts of section 13 and 23 of the Employment Rights Act 1996 ('ERA') in respect of the Claimant's unlawful deduction of wages claims.

154. Section 13 ERA states:

> *13 Right not to suffer unauthorised deductions.*
>
> *(1) An employer shall not make a deduction from wages of a worker employed by him unless -*
>
> > *(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or*
> >
> > *(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.*
>
> *(2) In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised –*
>
> > *(a)in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or*
> >
> > *(b)in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.*
>
> *(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.*

(4) Subsection (3) does not apply in so far as the deficiency is attributable to an error of any description on the part of the employer affecting the computation by him of the gross amount of the wages properly payable by him to the worker on that occasion.

(5) For the purposes of this section a relevant provision of a worker's contract having effect by virtue of a variation of the contract does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the variation took effect.

(6) For the purposes of this section an agreement or consent signified by a worker does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the agreement or consent was signified.

(7) This section does not affect any other statutory provision by virtue of which a sum payable to a worker by his employer but not constituting "wages" within the meaning of this Part is not to be subject to a deduction at the instance of the employer.

155. Section 23 ERA provides for the time limit. It states that:

23 Complaints to employment tribunals.

(1) A worker may present a complaint to an employment tribunal –

(a) that his employer has made a deduction from his wages in that section as it applies by virtue of section 18(2)),

(b) that his employer has received from him a payment in contravention of section 15 (including a payment received in contravention of that section as it applies by virtue of section 20(1)),

(c) that his employer has recovered from his wages by means of one or more deductions falling within section 18(1) an amount or aggregate amount exceeding the limit applying to the deduction or deductions under that provision, or

(d) that his employer has received from him in pursuance of one or more demands for payment made (in accordance with section 20) on a particular pay day, a payment or payments of an amount or aggregate amount exceeding the limit applying to the demand or demands under section 21(1).

(2) Subject to subsection (4), an employment tribunal shall not consider a complaint under this section unless it is presented before the end of the period of three months beginning with –

(a) in the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made, or

(b) in the case of a complaint relating to a payment received by the employer, the date when the payment was received.

(3) Where a complaint is brought under this section in respect of –

(a) a series of deductions or payments, or

(b) a number of payments falling within subsection (1)(d) and made in pursuance of demands for payment subject to the same limit under section 21(1) but received by the employer on different dates, the references in subsection (2) to the deduction or payment are to the last deduction or payment in the series or to the last of the payments so received.

(3A) Section 207A(3) (extension because of mediation in certain European cross-border disputes) and section 207B (extension of time limits to facilitate conciliation before institution of proceedings) apply for the purposes of subsection (2).

(4) Where the employment tribunal is satisfied that it was not reasonably practicable for a complaint under this section to be presented before the end of the relevant period of three months, the tribunal may consider the complaint if it is presented within such further period as the tribunal considers reasonable.

(4A) An employment tribunal is not (despite subsections (3) and (4)) to consider so much of a complaint brought under this section as relates to a deduction where the date of payment of the wages from which the deduction was made was before the period of two years ending with the date of presentation of the complaint.

(4B) Subsection (4A) does not apply so far as a complaint relates to a deduction from wages that are of a kind mentioned in section 27(1)(b) to (j)

Conclusions

156. In view of the above findings of fact and the law set out above the Tribunal's conclusions on the issues are as follows.

General

157. In a continuing attempt to understand the Claimant’s case, in particular why he maintained that his race was said to be a relevant feature for a number of the stated allegations, the Claimant and his Counsel, were asked to assist in identifying the evidential or inferential basis for race being in some way relevant to some of the claims made. The Claimant stated that it was his perception and belief that it was his race. Mr Elesinnla clarified that the treatment afforded to the Claimant was so

unreasonable and atypical that allowed an inference to be drawn for burden to pass to the Respondent to show that race played no part in the treatment. Mr Elesinnla stated that the Respondent was unable to provide such an explanation and therefore Tribunal could properly conclude race discrimination and unlawful victimisation

158. There was an absence of appropriate comparators given the context, nature of disagreements and the working relationships that was evident in this case. The circumstances were such that we were unable to conclude that any hypothetical comparator, in the same or similar characteristics, who was not black would have been treated any differently.

159. The Claimant made a number of historic claims for non-payments and underpayments. Given the content and timing of these claims, the Tribunal considered them to be contrived in being presented as race discrimination complaints when it is evident that the Claimant did not consider race as potentially relevant factor in any pay dispute at all at the relevant time. The Tribunal considered these payment claims to be unreasonably brought, they ought properly to have been litigated and resolved at a much, much earlier time than his claim presented to the Tribunal in 2018. In particular, the Tribunal concludes that in respect of matters pre-dating 2013, the Claimant's allegations of race discrimination against the different individuals were disingenuous, especially given that the generous 6 year limitation period provided by the Limitation Act 1980 had long since expired.

160. The Tribunal concluded that there was a slow and progressive deterioration in the working relationship between the Claimant and his colleagues in the ENT department and relevant line management following unresolved disagreements relating to responsibilities and contractual entitlements. It is evident that the leadership of the trust did not have the confidence, fortitude or professional HR support to properly address the serious relationship difficulties between the headstrong and uncompromising individuals in the ENT department. This allowed for feelings of resentment and discontent to fester between those concerned.

161. The Claimant has not been able to establish the cornerstone of his allegations that the treatment towards him was deliberate on the grounds of his race or that there was an underlying racially discriminatory or unlawful victimising conspiracy against him by senior officers of the Respondent against him.

162. In making a number of the allegations the Claimant has seemingly discounted the obvious contextual background, that he was working with other equally headstrong and uncompromising individuals who simply did not accept his behaviours or his view of things.

163. It is clear to the Tribunal that the working relationship between the Claimant and the senior key people he now is required to work with has broken down and if the Claimant's negative and irrational perceptions remain unchanged the breakdown in the relationship will be irreparable.

Clinical Lead payments

164. In relation to the Claimant's claim for Clinical Lead payments for the period 2007 to 2010 there is no evidence that the Claimant had agreed a NHD as part of his job plan. There is no actual comparator for the Tribunal to assess disparate treatment. The Tribunal conclude that been an agreed job plan that referred to the NHD, this could have been identified. We also conclude that there is an element of confusion in the Claimant's case in this regard as this coincided with him being converted to a maximum part-time contract where 1/ 11 of his salary would have been deducted to reflect the greater earnings he could receive from private work.

165. We do not conclude that the comparators that the Claimant seeks to rely on are in same or similar circumstances. The fact is that there was not an agreed job plan specifying the were the additional NHD would feature. There was no evidence to suggest that his comparators were paid NHDs for Clinical Lead work without agreeing a job plan.

166. In relation to the claim for Clinical Lead payments from April to 2012 to September 2012, we have found that the Claimant was issued with an addition NHD as was evident from the signed change form that increased his NHD's from 10 to 11. The Claimant was no longer Clinical Lead from September 2012 having resigned and therefore would have reverted back to 10 NHDs.

167. The Claimant has not established that he has been less favourably treated in relation to his Clinical Lead payment allegations. The Tribunal had serious difficulty in seeking to identify where the Claimant's race could be said to be a relevant fact in this alleged non payment, especially as the Claimant himself did not consider it to be such an issue until his grievance brought in 2018.

168. Therefore, we do not conclude that the Claimant has been less favourably treated in respect of his Clinical Lead allegations. There being no less favourable treatment the claims for race discrimination in this regard fail and are dismissed.

Skull based sessions

169. In relation to the Skull based sessions claim, there is evidence indicating that the neuroscience department would pay for the additional cost of the Claimant's undertaking skull based sessions during his ENT time. It was unclear to the Tribunal how the Claimant's ENT time and Skull based sessions would have been accounted for in a job plan. However, it is evident that the Claimant was not paid under hours based contract and any further time incurred would either have had to be agreed and confirmed under the job plan or by way of separate additional payment.

170. This was not apparent to the Tribunal, to be agreed by virtue of an extra number of NHD's additional payment there was no documentary evidence before us as to the amount of payment or indeed the amount of extra sessions that Claimant asserts. We conclude that the Claimant has not established to us that the specific amount of time he has claimed for skull based sessions was actually worked and in respect of sessions that were worked, what extra remuneration was agreed. We conclude that on the evidence before us any work would have had to be in a job plan and this would have been subject to the 1/11 deduction.

171. In these circumstances we are unable to conclude that the Claimant was less favourably treated by any purported failure to pay him skull based sessions. The Tribunal also had serious difficulty in seeking to identify where the Claimant's race could be said to be a relevant fact in this alleged non-payment.

172. Therefore, we do not conclude that the Claimant has been less favourably treated in respect of non-payment for skull based work. There being no less favourable treatment the claims for race discrimination in this regard fail and are dismissed.

Twilight session

173. The Claimant maintained a claim for twilight sessions. This was surprising given that he accepted in evidence that the twilight sessions he was doing was on a Friday were moved to Thursday and for which there was no further complaint. The Claimant was seemingly seeking to argue that despite the fact that this twilight session was moved from Friday to Thursday he still should have been paid for the Friday. We do not accept that the failure to accept the Claimant's analysis in this regard amounted to less favourable treatment. There being no less favourable treatment the claims for race discrimination in this regard fail and are dismissed.

Job plan

174. The Claimant's claim in relation to failure to job plan really amounts of failure to agree a job plan. This was a two-way process. The Respondent's witnesses simply did not accept the Claimant's approach to calculation of NHDs in particular the use of travel time and this permeated the disagreement. The job plan was not agreed.

175. There was no evidence that resolution of this disagreement was sought by reference to clause 30d of the Old Contract throughout this lengthy period. This was the process that could have been undertaken to resolve this but disagreement persisted until 2018. This was not subject to less favourable treatment. There was no suggestion that Mr Sayer would have agreed a job plan with an individual who held a contrary interpretation to the contractual entitlements as he did.

176. The Claimant refers to other consultants on agreed job plans who transferred to new contract. However, it was not evidenced that these consultants on the new contract did not agree their job plans. The Claimant refers to Professor Kotecha and Dr Kumar as statutory comparators in this regard. Both of these individuals were employed on the new 2003 contract terms. The Claimant initially sought to remain on the Old Contract with the benefits that conferred and as such neither Professor Kotecha nor Dr Kumar were in the same or similar circumstances for comparison purposes. It was logistically easier to map employees on New Contract terms to the Respondent's work requirements, however, the Claimant wrongly focused on the number of hours he actually worked, as opposed to also having regard to the necessary professional cooperation to enable service to be delivered. The Claimant was not employed on hourly based contract. A NHD required flexibility and was not strictly hourly based assessment. The Claimant maintained that it was. Mr Sayer disagreed.

177. The Claimant raised concerns about his NHD entitlement to Mr Burgess in 2013 as part of an escalation process. The Claimant was awarded an extra NHD. That meant that the Claimant was increased from 10 to 11 NHDs. Given the Claimant was employed on a maximum part-time contract 1/11th of his salary would have been reduced bring him back down effectively to 10 NHDs. It is therefore possible that using this contractual assessment the Claimant may have been overpaid. There was no suggestion that the Claimant believed there to be a racially discriminatory basis for this at the relevant time.

178. The Tribunal does not conclude that the disagreement on contractual interpretation regarding NHDs, and the effect this had on the agreement of the job plan, was less favourable treatment or that the Claimant's race played any part in the consideration. Mr Sayer was clearly concerned with operational and cost efficiency. We therefore conclude that the Claimant's claim relating to failure to agree a job plan did not amount to less favourable treatment or unlawful detriment. As such his claim for race discrimination and victimisation in this regard fail and are dismissed.

Travel time

179. In respect of travel time, each consultant or doctor was required to agree a job plan where the travel time is specified. The Tribunal observe that the agreed job plan that the Claimant eventually accepted in November 2018 was only three hours travel time in respect of all his NHDs. That is a matter which he was prepared to agree. Before this the Claimant was requesting more hours for travel time which the Respondent was not prepared to agree to. The Claimant was paid for his travel time for the time he was attending the hospital.

180. The comparisons the Claimant seeks to make with other consultants are not of evidential assistance as they depend on the number of days that the respective consultant travelled, where they travelled to and the sessions they were required to undertake.

181. We do not conclude that the Claimant's claim relating to non-payment of travel time amounted to less favourable treatment or unlawful detriment. As such his claim for race discrimination and victimisation in this regard fail and are dismissed

182. In relation to all of the matters in relation to non-payments the Claimant has failed to establish any facts from which the Tribunal could conclude that he was less favourably treated due to his race. It is evident that the Claimant's race played no part whatsoever in these matters.

Car park (Issue 7(c))

183. In 2013 Mr Sayer checked the Respondent's car parking facility to see the Claimant's arrival time. There was no evidence that Mr Sayer had done this towards any other consultant. Mr Sayer stated that he did so for operational reasons because the Claimant had a tendency to arrive late and this affected the operational delivery of patient client care. Mr Sayers steps in doing this without informing the Claimant of his suspicions was unreasonable in not following a fair investigation process with the Claimant we accept that Mr Sayer was concerned about patient service delivery and the reason was in the context of the Claimant's poor attendance and timekeeping.

We considered whether this behaviour was sufficient for the burden to pass. There is no evidence that Mr Sayer acted in such a manner to any other consultant and as such the Tribunal looked to Mr Sayer for an explanation and was satisfied that the Claimant's race played no part at all in this. The Claimant's conduct, approach to operational delivery and impact on patient services was the reason for Mr Sayer's action.

184. The Claimant's claim for race discrimination in this regard therefore fails and is dismissed.

New job contract (Issues 7(g) and (xx))

185. The Claimant has still not been able to transfer from the Old Contract to the New contract despite asking from May 2015. However, Mr Sayer required that a job plan be agreed before this could be done. We do not conclude that Mr Sayer refused to facilitate the Claimant's transition from the Old Contract to the New Contract from May 2015. He required that there was an agreed job plan before this was done. There was no agreement in relation to the hours, especially in relation to travel time and this not resolved until 2018.

186. Mr Sayer handed over responsibility for the Claimant's job planning and job contract to Dr Kumar and Mr Hepworth 2018. A job plan for the Claimant was eventually agreed in November 2018. Before discussions could be concluded about the transition to the new contract the Claimant sought to change the terms of his job plan. As at 7 March 2019, Dr Kumar was seeking to facilitate the Claimant's change to a new contract, however the Claimant sought changes to his job plan a new job plan was necessary as the Claimant expressed the wish to have a part-time contract with no on calls because of his health. An occupational health appointment was set up to look into this.

187. The Claimant refers to Professor Kotecha and as a comparator who he states simply moved onto the new contract without having to agree another job plan. We do not consider that Professor Kotecha is an appropriate comparator the Claimant sought to change his agreed job plan soon after agreeing it and this is the reason for the failure to simply transfer.

188. We therefore conclude that the Claimant's claim relating to failure offer a new contract did not amount to less favourable treatment or unlawful detriment. As such his claim for race discrimination in this regard fails and is dismissed.

The Claimant's grievances and concerns (Issues 7(i), (s), (v), (dd), (ee), (ff), (jj), (tt), (vv), (yy))

189. The Claimant's grievances relating to allegations of harassment and discrimination made in October 2016 were not effectively managed or dealt with by Mr Davis or the Respondent's HR. The Respondent clearly did not comply with the requirement to provide a resolution of this grievance within a reasonable time. We have considered whether, if the Claimant was not black and made similar allegations, the complaints would have been dealt with in any more efficient way than they actually were. We do not conclude that this would have been the case. There were endemic organisational failures in the Respondent caused by turnover of HR staff,

high pressure of work and the absence of case management and recording system. In respect of comparators there is no evidence of an efficient and quick resolution of any grievance that the Claimant can rely. It is evident that the concerns made by Professor Kotecha and Dr Kumar against the Claimant in 2018 were not dealt with in an efficient and expeditious manner, if they were dealt with at all.

190. In respect of the complaints the Claimant made against Dr Kumar on 4 December 2017, the Claimant was directed to the appropriate process to follow. Dr Moghal directed that the Claimant should follow the proper process. Dr Moghal expected Divisional Directors or Clinical Leads to raise matters with him before he considered them. He required sign off at the departmental level and he would not ordinarily deal with issues directly without having Divisional Director input. He handed the matter back down to ensure that the relevant organisational structure of the complaints dealt with. There was no less favourable treatment in this regard.

191. The Claimant's additional grievances that were conveyed in February 2018 were not initially dealt with because there was a Chapman investigation dealing with the Claimant's initial grievances. Following the grievance outcome of the Chapman investigation 2018 a meeting that was held with Mr Bown, the Chief Executive and it was agreed that there would be a further investigation, the Mordi investigation to deal with the other outstanding matters.

192. There was an obvious delay in addressing the additional allegations. However, the process that was in train regarding the Chapman investigation took priority and his terms of reference not extended to deal with the additional allegations.

193. The Claimant's concerns raised regarding these clinical governance issues were repeated on 1 February 2018. The Claimant raised how these were handled as background only. We do not conclude that how this was dealt with is supportive of the Claimant's allegations of race discrimination or unlawful victimisation.

194. Dr Moghal did not fail to deal with the Claimant's complaints against Professor Kotecha and Dr Kumar in respect of patient safety. They were not ignored but were dealt with in the context that there were complaints made by Professor Kotecha and the Dr Kumar against the Claimant.

195. The Claimant has not established that Professor Kotecha and Mr Masterton conducted sham investigations. The email that the Claimant refers to in this regard was misquoted by him in evidence. The wording was not "*shut the Claimant down*" but close the case down. The wording of the email from Professor Dr Moghal was unexceptional.

196. The Claimant's complaints about lack of probity and concerning Dr Moghal, Professor Kotecha and Mr Sayer were dealt with following the appointment of report Florence Mordi and subsequent consideration by Dr Smith.

197. In respect of grievances, the Tribunal conclude that default is that the Respondent is ineffective in following its grievance and complaints procedures. In respect of corporate governance there was a requirement for the appropriate

hierarchical structure to be followed. Finally, the Claimant has not established that his complaints have been covered up to protect Dr Kotecha.

198. We therefore do not find that the Respondent's failure to follow its grievance policy or corporate governance in respect of the Claimant's complaints amounted to less favourable treatment. As such his claim for race discrimination in these respects fail and are dismissed.

NCAS communication (Issues 7(j), (m), (n), (o))

199. We do not conclude that Dr Moghal made any false complaint NCAS. Dr Moghal relayed information, and did not make any complaint to NCAS. He conveyed the information to NCAS to seek advice. We have found that the information he relayed to them was appropriate and accurate and based on the information that had been referred to him by both Dr Odejinmi and Miss Clough. The Claimant has not established that he has been less favourably treated in this regard.

200. The Tribunal considered whether Dr Moghal's involvement in starting an investigation, the comments made to NCAS, and the subsequent involvement he had in restriction was caused by any protected act raised by the Claimant. The Tribunal concluded that given the information that was provided to Dr Moghal by Dr Odejimni Ms Clough and it was appropriate that he provide the full context to NCAS and did so in order to ensure that he would get the full proper advice the full context was being relayed to Mr Margersion. This was in the context of the need to ensure patient safety and whether was a potential health issue behind the Claimant's failure to complete the operation with the patient. We do not conclude that this amounted to less favourable treatment or detriment due to any protected act.

201. There were inaccuracies in the NCAS documentation [1754]. The NCAS form completed 22 December 2016, questioned whether the practitioner was aware of NCAS involvement. The box is ticked yes. It also asked whether suspension or exclusion status was at risk and it is answered '*unlikely*'. This form was incorrectly completed, the Claimant was not informed of NCAS involvement. There was clearly an incident that occurred on 22 December 2016 for which it was appropriate for the Respondent to seek NCAS advice. To the extent that inaccurate completion of the form which the Claimant did not see at the time could amount to less favourable treatment, we do not conclude that the Claimant's race played any part in it. It was a pressured situation for all concerned and mistakes were made.

202. The Claimant did not advance evidence that the Respondent failed to provide NCAS correspondence on request and therefore has not established this allegation.

203. In March 2017 Dr Smith told NCAS that a number of the allegations the Claimant faced were upheld. This was not technically correct. There was an investigation that had obviously found that there was a case to answer and not that the allegations were upheld. The representations Dr Smith made to NCAS at this time did however make it clear that there would need to be a disciplinary hearing in order to consider the allegations. Therefore, the representations were unclear about the allegations but not the process that that would have to be subsequently followed to establish them. We find this is a lack of understanding of the appropriate terminology

on Dr Smith's part indicating a lack of proper support that she was getting from HR at the time.

204. Given the above conclusions we conclude that the Claimant's allegations that he was subject to race discrimination and or unlawful victimisation arising from the Respondent's contact with NCAS fail and are dismissed.

Claimant's restriction from practice (Issues 7 (k), (l))

205. Dr Moghal had an impact and influence in the Claimant's practice being restricted. However the Claimant's practice was not restricted without justification. It was restricted following taking NCAS advice and the contemporaneous comments relayed by Ms Anna Clough in respect of her discussion with the Claimant at the time and the information provided by the Divisional Director anaesthetist. Dr Oluremi Odejinmi.

206. Dr Moghal subsequently received an email from Dr Kumar to support the decision to restrict. The restrictions were finally sanctioned by Dr Smith who had to assume the responsibility of Dr Moghal during his sickness absence. Dr Smith had significant pressure of work to manage and she was not effectively supported by HR at the relevant time. There were serious procedural shortcomings in the way in which the Claimant was invited to be restricted, in the information that was conveyed to him about the options open to him, as well as the subsequent processes in dealing with his appeal

207. Dr Smith and Ms Davis did not deal with the Claimant's appeal against his restriction in accordance with the MHPS timescales. The Claimant was not informed of the head NED until sometime in February 2017. The investigation continued and the Claimant was not given the opportunity to make representations before his restriction was renewed. These were all contrary to the policy. The failure to follow the policy placed the Claimant at a significant disadvantage both reputationally and financially. The MHPS process was in place to seek to ensure natural justice is followed in respect of such matters.

208. We accept that the significant failures to follow the MHPS process in respect of the Claimant's restriction from practice and his appeal is sufficient for the burden to pass for the Respondent to show that the Claimant's race played no part whatsoever in its failures. This is even more acute given that NCAS had advised Dr Moghal to have regard to the MHPS process.

209. We questioned whether the serious failures of Dr Smith and Ms Davis in this regard were on the grounds of the Claimant's race. We conclude that Dr Smith was catapulted into a level of responsibility. She was having to undergo an element of firefighting at that stage given all the pressures across the trust during the busy winter period and the Claimant's matter was one of a number of serious matters that she had to deal with at that time. She sought to rely on the operational support that HR could provide. However, HR support was inadequate during this time, to case management advise and guide in accordance with the processes.

210. Ms Davis and the HR team did not provide the support that would have been appropriate. We conclude that there were serious organisational and operational failings within the structure of HR at the Respondent that allowed for these serious shortcomings, and the number of other issues to go without being properly managed.

211. Ms Davis readily accepted her mistakes in failing to apply the procedures necessary to supporting Dr Smith and failing to ensure proper implementation of the policies. We considered whether serious shortcomings by Ms Davis and the HR department in this regard were genuine or whether as the Claimant suggests they were deliberate due to the Claimant's race. We do not conclude that this is the case on the evidence. In order to be deliberate this would have required a level of HR organisation and engagement with the relevant policies which was simply not present in this case.

212. We do not accept that the suggestion that Ms Davis would have been any more responsive in respect of the policies if the Claimant was not black. The failures to comply with policies and delays in investigation in respect of complaints against the Claimant by others is indicative of this. We are therefore satisfied that the Respondent has established that the Claimant's race formed no part whatsoever in his restriction and appeal process. The Claimant's claims in this regard fail and are dismissed.

Disciplinary process (Issue 7p)

213. Dr Moghal sat on the disciplinary panel on 13 October 2017. Dr Moghal had been involved in the Claimant's initial restriction from practice and initiated the investigation. The Tribunal accepts that this could be seen as a conflict of interest. Whilst Dr Moghal had initiated the investigation he did not play a part in the investigation itself.

214. The Claimant has not established that Dr Moghal kept a file on him with a view to subjecting him to some detriment over considerable period of time.

215. We find that Dr Moghal's decision to chair the appeal was a decision that the Respondent, acting reasonably, could have taken and the Claimant's race or protected acts were irrelevant to these decisions.

216. The Claimant's claims for race discrimination and unlawful victimisation in this regard therefore fail and are dismissed.

Disciplinary appeal process and Chapman report (Issues 7 (r), (u), (w), (y))

217. We do not conclude that the Claimant has established that Ms Davis made false representations that Mr Chapman was an independent investigator. To all intents and purposes Mr Chapman was an independent investigator even though he was an ex-employee of the Respondent's previous solicitors. The Claimant sensibly withdrew his allegation that Mr Chapman was racially discriminating against him in respect of the contents of his report.

218. Mr Chapman carried out his investigation in an appropriate manner concerning the terms of reference that were set. Ms Davis had clearly set out what the terms of reference were in an email and, if anything, it was Mr Chapman not Ms Davis who had misinterpreted the scope of enquiry and limited the analysis in respect of the investigation into the payment allegations payments that the Claimant made.

Reduction of working hours (Issue 7(z))

219. The Claimant's claim relating to a reduction in working hours is difficult to fathom. It was his agreement to a job plan in 2018 that led to a reduction of hours. This is not less favourable treatment or a detriment. The Claimant was not an hourly paid worker. His contract was based on notional half days that was said to be flexibly

worked according to a job plan. The failure to agree a job plan was the issue that remained between the parties until matters were agreed in 2018 and we do not conclude that the Claimant's subsequent agreement in 2018 to a job plan which had the effect of reducing the actual hours worked was less favourable treatment on grounds of his race or for making a protected act.

220. The Claimant's claims in this regard therefore fail and are dismissed.

Grievance appeal allegations (Issues 7 (kk) – (ss))

221. Ms Malone was a board member and, technically, the Chief Executive would report to the Board. As a delegate of the board, Ms Malone could be seen a senior to Mr Bown in order to deal with the grievance appeal outcome. The Tribunal conclude that there was no procedural issue with her appointment that could amount to race discrimination or unlawful victimisation.

222. We conclude that Ms Malone ought to have properly considered taking the Claimant's additional written submissions that he presented at the hearing. She wrongly assumed they were the same as the Claimant's appeal grounds without analysing them. This was a shortcoming on her behalf and the Claimant has legitimate reason to be aggrieved. The Claimant was able to fully put all aspects of his appeal during the appeal hearing despite being stressed and emotional, and he was given time with the case being adjourned for him to look at the additional documentation provided by the Chief Executive, Mr Bown.

223. We do not criticise Ms Malone for not postponing the hearing for some future date bearing in mind the time that had elapsed and the nature of the allegations concerned.

224. The Claimant's outcome dated 13 February 2019 [2818] was brief. However what the appeal panel was effectively asked to do was to engage in the scope and conclusions of the Chapman report. Mr Brown had accepted the contents of the Chapman report in his grievance outcome [3260/ 3261] and the appeal panel concluded that no reasons had been presented to persuade them that the Chapman report was a sham. This was the core focus of the Claimant's appeal. Whilst the detail of the Claimant's challenges to the Chapman report were not dealt in the grievance outcome letter, the Claimant was clearly informed that the appeal panel did not accept that the Chapman report should not be relied on.

225. The Claimant was unhappy with the conduct of the appeal hearing [1979] and threatened to name Ms Malone as an individual Respondent further round of race discrimination and victimisation in relation to her conduct of the appeal hearing.

226. The Claimant has not established that there were in fact handwritten notes of the grievance appeal hearing. His evidence in this regard was that he was unable to confirm that he actually saw anyone taking handwritten notes.

227. Whilst there were some procedural shortcomings in the appeal undertaken by Ms Malone, we do not conclude that they were sufficient to infer less favourable treatment or that the Claimant's race, or any protected act, played any part in this respect.

228. Therefore, the allegations for race discrimination and unlawful victimisation that the Claimant makes in relating to the grievance appeal panel process, conduct and outcome fail and are dismissed.

Questionnaires (Issues 7 (tt) and (uu))

229. The questionnaire sent by Mr Hepworth in respect of the Claimant's allegation that Dr Kumar was effectively stealing one of his patients and was not competent to work with the patient. Mr Hepworth tried to investigate the matter by sending email questions to the Claimant. We do not conclude that this amounts to less favourable treatment. It was not the way the Claimant would have liked the matter to be addressed but that does not indicate race discrimination or unlawful victimisation.

230. The Claimant's claims in this regard are therefore dismissed.

Dr Smith's handling of the Professor Kotecha fraud allegations (7 (ccc) =(ddd))

231. We have found that Dr Smith was not as assertive in her questions or enquiries relation to Professor Kotecha as she should have been. She accepted what Professor Kotecha said regarding the Claimant's allegations without proper analysis. Whilst there was legitimate area for discussion working in private sessions during Trust time, this should ordinarily have led to a referral to the counter fraud department for them to resolve. This did not occur in this case. We do not conclude that Dr Smith failed to refer Professor Kotecha due to the fact that the Claimant had reported him. We conclude that the failure was due to the fact that Professor Kotecha had left the Trust. We do not conclude that any failure by Dr Smith failed to keep the Claimant updated as to the progress the investigation was deliberate or due to the Claimant's race. Organisational and administrative inefficiencies were the reason for this in this instance.

232. The Claimant's claims in this regard fail are therefore dismissed.

233. In these circumstances all of the Claimant's race discrimination complaints fail and are dismissed.

Victimisation

234. Given our conclusions above, the Claimant has not established that the allegations he makes against Dr Moghal amount to unlawful victimisation. Whilst some of the matters outlined above were clearly detrimental to the Claimant he has not established that such matters occurred because of his protected acts. There were management decisions and actions which were taken to address the circumstances the Respondent faced at the time.

235. In these circumstances the Claimant's unlawful victimisation complaints fail and are dismissed.

Whistleblowing

236. The Claimant's complaints for whistleblowing are dismissed on withdrawal. Had we been required to adjudicate on them we would have concluded that the allegations he made were not because of any protected disclosures.

Unlawful deduction of wages

237. In view of our conclusions above any payments due to the Claimant must be based on job plan. Absent an agreed job plan his contractual entitlement is the entitlement for a maximum part time contract with the 1/11 reduction. The Claimant

was paid this sum. His claims for unlawful deduction of wages therefore fail and are dismissed.

Time limits

238. We have not had to consider time limits in view of our conclusions on the issues. However, there was no conspiracy established by the Claimant and we would not have concluded that any acts pre-dating 22 December 2016 were in time (the restriction and following processes) and in view of the evidenced access the Claimant had to specialist legal advice and BMA representatives from 2012 we would not have considered it just and equitable to extend time in respect of any acts pre dating 22 December 2016.

Employment Judge Burgher

10 October 2019