Case No. 2410091/2019
Code V

EMPLOYMENT TRIBUNALS

Claimant: Mr O Iwuchukwu

Respondents: (1) General Medical Council
(2) Anna Rowland
(3) Paul Bridge

Heard at: Manchester (by CVP videolink) **On**: 30 September and 1 October 2020 (in chambers)

Before: Employment Judge McDonald (sitting alone)

Representatives
For the claimant: Mr C Echendu (Non-practising barrister)
For the respondents: Mr I Hare QC (Counsel)

JUDGMENT

The respondent's application that the claimant's complaints be struck out succeeds in relation to the allegations set out below.

1. The allegation that the first respondent "forced" the claimant to sign undertakings on 23 November 2016, 3 July 2017 and 24 July 2017 (allegation 3(e)) and that this was an act of direct race discrimination, race-related harassment or victimisation.

2. The allegation that the first respondent dictated and put undue pressure on his current employer (Lewisham and Greenwich NHS Trust) on 17 September 2019 by putting unnecessary requirements purporting to rely on the terms of his forced undertakings (allegation 3(h)) and that this and that this was an act of direct race discrimination, race-related harassment or victimisation.

3. The allegation that the first and second respondents made threats of sanctions for breach of undertakings on 11 January 2018, 17 September 2019 and 24 January 2020 (allegation (3)(j) and 4(c)) and that these were acts of direct race discrimination, race-related harassment or victimisation.

4. The allegation that cancellation of assurance/performance assessment reluctantly arranged following Pre-action letter from the Claimant's Legal Representative on

excuse of due to COVID-19 on 18 March 2020; without any further arrangement or alternative form of assessment such as telephone, skype or other form of objective assessment (allegation 3(k)) was an act of direct race discrimination, race-related harassment or victimisation.

5. All the claimant's complaints of indirect race discrimination (set out at paragraph 8 of the List of Issues).

REASONS

Introduction

1. I conducted a preliminary hearing in this case on 30 September and 1 October 2020. The first day was a CVP videolink hearing with the parties. I heard oral submissions from Mr Hare and Mr Echendu and brief evidence from the claimant about his ability to pay were I to make a deposit order. The second day was in chambers day without the parties.

2. The matters discussed at that preliminary hearing are set out in the document headed "Record of a Preliminary Hearing" dated the same day as this Judgment. This Judgment deals only with the respondent's application to strike out all or part of the claimant's claim and gives the reasons why I granted that application in part. It should be read alongside that "Record of a Preliminary Hearing" and the Deposit Order dated today's date.

3. The claimant is a black British consultant surgeon specialising in oncoplastic breast surgery. The first respondent ("the GMC") is the statutory regulator for the profession of doctor. It accepts that it is a qualifications body for the purposes of ss. 53 and 54 of the Equality Act 2010 ("the 2010 Act"). The Second Respondent ("Ms Rowland") is employed by the GMC as Assistant Director for Policy, Business Transformation and Safeguarding. The Third Respondent ("Mr Bridge") is employed by the GMC as an Investigation Manager in the Regional Investigation Team. The Second and Third Respondents are potentially liable under s.110 of the 2010 Act.

4. The claimant's claim arises from the GMC's decision to impose restrictions on his freedom to practice as a consultant surgeon. In broad terms, he says the decisions to impose and maintain those restrictions are acts of direct and indirect race discrimination, race-related harassment and victimisation. He also says that the GMC's repeated refusals to investigate his complaints against Mr Ian Martin ("Mr Martin") the Director of Medicine at City Hospitals Sunderland NHS Trust where he worked are acts of direct race discrimination and race-related harassment.

The documents in the case

5. There was a preliminary hearing bundle in electronic form consisting of 1624 pages. References to page numbers in this note are to pages in that bundle. The parties had also agreed a list of issues for the preliminary hearing which for convenience is annexed to this document.

6. Mr Hare and Mr Echcendu had each prepared written skeleton arguments. I reserved my decision at the end of the hearing. I gave Mr Echendu and Mr Hare the opportunity to make further written submissions which Mr Hare did on 30 September 2020. Mr Echendu's further written submissions were not sent until 2 October 2020 for perfectly understandable reasons which he explained in his covering email. Because Mr Echendu's further submissions were received after the chambers day I took further time after the chambers day to consider my decision. I apologise to the parties that that and other judicial commitments have led to a delay in finalising this judgment and the associated Orders.

Relevant Law

The Tribunal's power to strike out a complaint or make a deposit order

7. For convenience I have set out the relevant law on both striking out and deposit orders in these reasons. My decision on the respondent's Deposit Order application should be read with these reasons.

Strike out

8. Rule 37(1)(a) of the Employment Tribunal Rules of Procedure 2013 ("the ET Rules") gives the Tribunal the power to strike out all or part of a claim on the grounds it has no reasonable prospect of success.

9. Rule 37(2) says that a claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.

10. Caselaw provides guidance on the exercise of this power:

a. It will only be in an exceptional case that a complaint will be struck out as having no reasonable prospect of success when the central facts are in dispute. An example might be where the facts sought to be established by the applicant were totally and inexplicably inconsistent with the undisputed contemporaneous documentation (**Ezsias v North Glamorgan NHS Trust [2007] I.C.R. 1122, Court of Appeal**).

b. A Tribunal should not be deterred from striking out a claim where it is appropriate to do so but real caution should always be exercised, in particular where there is some confusion as to how a case is being put by a litigant in person (**Mbuisa v Cygnet Healthcare Ltd UKEAT/0119/18/BA EAT**).

c. The Tribunal should take the Claimant's case, as it is set out in the claim, at its highest, unless contradicted by plainly inconsistent documents (**Mbuisa**).

d. Discrimination issues should, as a general rule, be decided only after hearing the evidence. The tribunal can then base its decision on its findings of fact rather than on assumptions as to what the claimant may be able to establish if given an opportunity to lead evidence (**Anyanwu and anor v South Bank Student Union and anor 2001 ICR 391, HL**).

e. Whether the necessary test is met in a particular case depends on an exercise of judgment. It may not be assisted by attempting to gloss the language of the rule by reference to other phrases found in the authorities such as 'exceptional' and 'most exceptional'. However, it remains the case that the hurdle is high, and specifically that it is higher than the test for the making of a deposit order, which is that there should be 'little reasonable prospect of success'. (**Ahir v British Airways Plc [2017] EWCA Civ 1392)**

11. The correct approach for the Tribunal to adopt was summarised by Mitting J in **Mechkarov v Citibank NA [2016] ICR 1121** (quoted by Mr Hare at para 24 of his submissions):

> *(1) only in the clearest case should a discrimination claim be struck out; (2) where there are core issues of fact that turn to any extent on oral evidence, they should not be decided without hearing oral evidence; (3) the Claimant's case must ordinarily be taken at its highest; (4) if the Claimant's case is "conclusively disproved by" or is "totally and inexplicably inconsistent" with undisputed contemporaneous documents, it may be struck out; and (5) a Tribunal should not conduct an impromptu mini trial of oral evidence to resolve core disputed facts.*

12. Mr Echendu also referred me to authorities which stress that the Tribunal must have a proper basis for doubting the likelihood of the claimant establishing facts essential to the claims and to the exceptional nature of a decision to strike out a case where the central facts are in dispute (**Tree v South East Coastal Ambulance Service [2017] UKEAT 0043** and **Hasan v Tesco Stores (UKEAT/009/16)** respectively).

Deposit orders

13. Rule 39 of the ET Rules gives the Tribunal the power to make a deposit order:

> "(1) Where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party ("the paying party") to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument."

14. The EAT set out the approach to making a deposit order in **H v Ishmail and another [2017] I.C.R. 486**:

> "12. The test for ordering payment of a deposit order by a party is that the party has little reasonable prospect of success in relation to a specific allegation, argument or response, in contrast to the test for a strike out which requires a tribunal to be satisfied that there is no reasonable prospect of success. The test, therefore, is less rigorous in that sense, but nevertheless there must be a proper basis for doubting the likelihood of a party being able to establish facts essential to the claim or the defence. The fact that a tribunal is required to give reasons for

reaching such a conclusion serves to emphasise the fact that there must be such a proper basis.

13. The assessment of the likelihood of a party being able to establish facts essential to his or her case is a summary assessment intended to avoid cost and delay…..a mini-trial of the facts is to be avoided, just as it is to be avoided on a strike out application, because it defeats the object of the exercise.……If there is a core factual conflict it should properly be resolved at a Full Merits Hearing where evidence is heard and tested.

14. ….in evaluating the prospects of a particular allegation, tribunals should be alive to the possibility of communication difficulties that might affect or compromise understanding of the allegation or claim……

15. Once a tribunal concludes that a claim or allegation has little reasonable prospect of success, the making of a deposit order is a matter of discretion and does not follow automatically. It is a power to be exercised in accordance with the overriding objective, having regard to all of the circumstances of the particular case. That means that regard should be had, for example, to the need for case management and for parties to focus on the real issues in the case. The extent to which costs are likely to be saved and the case is likely to be allocated a fair share of limited tribunal resources are also relevant factors. It may also be relevant in a particular case to consider the importance of the case in the context of the wider public interest.

….16. If a tribunal decides that a deposit order should be made in exercise of the discretion pursuant to rule 39, paragraph (2) requires the tribunal to make reasonable inquiries into the paying party's ability to pay any deposit ordered and further requires the tribunal to have regard to that information when deciding the amount of the deposit order. Those, accordingly, are mandatory relevant considerations…..[Deposit] orders have the potential to restrict rights of access to a fair trial. Although a case is assessed as having little prospects of success, it may nevertheless succeed at trial, and the mere fact that a deposit order is considered appropriate or justified does not necessarily or inevitably mean that the party will fail at trial. Accordingly, it is essential that when such an order is deemed appropriate it does not operate to restrict disproportionately the fair trial rights of the paying party or to impair access to justice. That means that a deposit order must both pursue a legitimate aim and demonstrate a reasonable degree of proportionality between the means used and the aim pursued

17. An order to pay a deposit must accordingly be one that is capable of being complied with. A party without the means or ability to pay should not therefore be ordered to pay a sum he or she is unlikely to be able to raise. The proportionality exercise must be carried out in relation to a single deposit order or, where such is imposed, a series of deposit orders. If a deposit order is set at a level at which the paying party cannot afford to pay it, the order will operate to impair access to justice."

<u>The claims brought by the claimant</u>

Direct Race Discrimination

15. The definition of direct discrimination appears in section 13 of the 2010 Act and so far as material reads as follows:

> "(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".

16. Race is a protected characteristic under the 2010 Act.
17. The concept of treating someone "less favourably" inherently requires some form of comparison, and section 23(1) provides that:

> "On a comparison of cases for the purposes of section 13 … there must be no material differences between the circumstances relating to each case".

18. It is well established that where the treatment of which the claimant complains is not overtly because of race, the key question is the "reason why" the decision or action of the respondent was taken.

Indirect Discrimination

19. S.19(2) of the 2010 Act sets out the four elements of an indirect discrimination complaint:

> "(2) …a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if –
>
> (a) A applies, or would apply, it to persons with whom B does not share the characteristic,
>
> (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
>
> (c) it puts, or would put, B at that disadvantage, and
>
> (d) A cannot show it to be a proportionate means of achieving a legitimate aim."

Race-related Harassment

20. The definition of harassment appears in section 26 of the 2010 Act which so far as material reads as follows:

> "(1) A person (A) harasses another (B) if -
>
> (a) A engages in unwanted conduct related to a relevant protected characteristic, and
>
> (b) the conduct has the purpose or effect of

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B…

(4) In deciding whether conduct has the effect referred to sub-section (1)(b), each of the following must be taken into account -

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect."

21. The Equality and Human Rights Commission gives more detail on the factors relevant in deciding whether conduct has the effect referred to in s.26(1)(b) (the "harassing effect") at paragraph 7.18 of its Statutory Code of Practice on Employment ("the EHRC Code"):

"7.18 In deciding whether conduct had that effect, each of the following must be taken into account:

a) The perception of the worker; that is, did they regard it as violating their dignity or creating an intimidating (etc) environment for them. This part of the test is a subjective question and depends on how the worker regards the treatment.

b) The other circumstances of the case; circumstances that may be relevant and therefore need to be taken into account can include the personal circumstances of the worker experiencing the conduct; for example, the worker's health, including mental health; mental capacity; cultural norms; or previous experience of harassment; and also the environment in which the conduct takes place.

c) Whether it is reasonable for the conduct to have that effect; this is an objective test. A tribunal is unlikely to find unwanted conduct has the effect, for example, of offending a worker if the tribunal considers the worker to be hypersensitive and that another person subjected to the same conduct would not have been offended."

Victimisation

22. S.27 of the 2010 Act makes victimisation unlawful:

"(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."

23. This means that for a victimisation claim to succeed, the claimant has to show two things. First, that they did a protected and, second, that they were subjected to a detriment because of it.

24. S.27(1)(a) refers to detriment because of a protected act but does not refer to "less favourable treatment". There is therefore no absolute need for a tribunal to construct an appropriate comparator in victimisation claims. The EHRC Code at para 9.11 states: 'The worker need only show that they have experienced a detriment because they have done a protected act or because the employer believes (rightly or wrongly) that they have done or intend to do a protected act'.

Unlawful Acts under the 2010 Act by a qualifying body

25. The GMC accepts it is a qualifying body under s.53 and 54 of the 2010 Act. S.53 prohibits a qualifying body from discriminating against a person who holds a qualification (s.53(2)), harassing them (s.53(3)) or victimising them (s.53(5)).

26. The GMC accepts that in this case s.120(7) of the 2010 Act does not prevent the Tribunal having jurisdiction to hear this case.

Burden of proof

27. The 2010 Act provides for a shifting burden of proof. Section 136 so far as material provides as follows:

"(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."

28. This means that it is for a claimant to establish facts from which the Tribunal can reasonably conclude that there has been a contravention of the 2010 Act. If the claimant establishes those facts, the burden shifts to the respondent to show that there has been no contravention by, for example, identifying a different reason for the treatment.

29. 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 (**Madarassy v Nomura International Plc [2007] ICR 867, at para 56**).

30. It is not an error of law for an employment tribunal to draw an inference of discrimination from unexplained unreasonable conduct at the first stage of the two-stage burden of proof test. However, the Court of Appeal has cautioned against too readily inferring unlawful discrimination merely from unreasonable conduct (**Igen Ltd and ors v Wong and other cases [2005] ICR 931, CA**).

31. In his oral submissions, Mr Echendu referred me to three cases not referred to in his written submissions. The first was the case of **Amnesty International v Ahmed UKEAT/0447/08**. I accept Mr Hare's submission (in his Reply) that that case was different to the claimant's in that the conduct complained about in **Amnesty** was expressed to be based on the claimant's ethnic origins.

32. The other two cases Mr Echendu referred to were **Haile v Immigration Appeal Tribunal [2001] EWCA Civ 663** and **R v Criminal Injuries Compensation Board, Ex Parte A [1999] AllER 329.** Both of those cases involved applications for judicial review and I did not find them of assistance in deciding this case.

The evidence and overarching findings on the prospects of success

33. The authorities are clear that that where there is a central factual dispute, it will be exceptional to strike out a discrimination claim. Mr Hare, however, submitted the present case was unusual. There were two primary reasons for that, both arising from the fact that the respondent in this case is a qualifying body not an employer. The first reason was that all the interactions between the GMC and the claimant were at arms' length and so recorded in contemporaneous documentation. All that documentation was before me so, he submitted, I was as well placed as the Tribunal at the final hearing to reach conclusions about any factual disputes about the claimant's case. The second, related, reason was that there would only be limited oral evidence given at the final hearing. The GMC's oral evidence at the final hearing would be limited to giving an overview of the legislative framework, policies and practices adopted by the GMC. This was not a case where the final hearing will hear oral evidence from each decision maker about why they reached their decision. He submitted that those two reasons together meant I could be confident I was as well placed as the Tribunal at the final hearing to make decisions about the case and should not be inhibited from striking out the whole or part of the claim by concerns that there were disputes which only that final hearing could resolve.

34. Mr Hare also submitted that qualification bodies were in an entirely different position to those they regulate than are employers to employees, something recognised both by legislation (s.120(7) of the 2010 Act) and case-law (**BMA v Chaudhary [2003] EWCA Civ 645**). He did not suggest that the burden of proof or the principles set out in case law about inferring discrimination apply differently to cases involving qualification bodies.

35. For the claimant, Mr Echendu stressed the importance of the burden of proof provisions and submitted that the outcome of a claim under the 2010 Act will depend on what inferences a tribunal may draw from the primary facts. That exercise was one which

needed to be carried out at a final hearing by a Tribunal hearing all the evidence including oral evidence.

36. I accept Mr Hare's submission that the extent of contemporaneous documentation means that to a large extent I am as well placed as the final hearing to decide what happened in the case. By "what happened" I mean what, factually, the GMC did in response to the claimant's complaint about Mr Martin and in terms of investigating his fitness to practice. However, I do find that there is some evidence which the Tribunal and the final hearing will have before it which I do not. That will include the claimant's evidence on subjective matters such as his perception of the GMC's conduct (relevant to the harassment complaint (s.26(4)(a) of the 2010 Act); his evidence about why certain complaints were not brought sooner (relevant to whether it is just and equitable to extend time under s.123(1)(b) of the 2010 Act if the Tribunal find complaints are brought out of time) and his evidence about why he viewed certain actions by the GMC to be a detriment (in particular why the refusal to investigate Mr Martin was a detriment under s.53(2)(c)) of the 2010 Act).

37. The Tribunal at the final hearing will also hear evidence about the GMC's processes and decision-making which will enable it to put how the claimant's case was dealt with by the GMC in context. The documents before me set out the legislative, governing and policy framework within which the GMC's decision making operates. Within that, however, there is room for discretion. The final hearing will be able to decide, having heard oral evidence, whether the way the claimant's case was dealt with differed from the GMC's usual practice and approach. If it finds that was the case it will need to decide what inferences should be drawn about the reasons why there was that differential treatment. Was it because of race (for the direct race discrimination complaint), related to race (harassment) or because the claimant had done a protected act (victimisation)?

38. When it comes to that "reason why" question the Tribunla at the final hearing may also have more relevant evidence before it providing an overview of the outcomes of the GMC's fitness to practice process for doctors by ethnicity. There was some evidence about this in the bundle in the form of a report of a review of GMC decision-making in Fitness to Practice procedures by Plymouth University Peninsula (pp.1544-1624)("the Plymouth Report"). That report noted that BME doctors were more likely to progress through the GMC's procedures (p.1584) but concluded that on the evidence it considered there was no evidence of bias or discriminatory practices. That report, however, was published in December 2014 so was based largely (if not completely) on data from before the claimant's case was being dealt with by the GMC.

39. At the preliminary hearing Mr Echendu was not able to point to specific evidence before me which would lead to the burden of proof passing. He suggested that Mr Martin was an appropriate comparator. I think there is little reasonable prospect of the claimant establishing he was. I say that because the nature of the complaints being made against the claimant and against Mr Martin were fundamentally different. One involved direct concerns about patient safety arising from the claimant's practice. The other involved serious allegations (of dishonesty and discrimination) but in relation to the treatment of a colleague not a patient.

40. In the absence of Mr Martin being a valid comparator, in essence, Mr Echendu's argument was that the GMC's behaviour was so unreasonable that the only possible explanation (given the claimant's race) was that race was the reason for that treatment.

That seems to me to come very close to asserting that a difference in race and a difference in treatment is sufficient to pass the burden, which **Madarassy** explicitly says is not the case. However, I accept that **Igen v Wong** does allow that a Tribunal may, with caution, infer discrimination from unreasonable behaviour. Although I find I cannot say that there is "no reasonable prospect" of the claimant showing that he was treated differently or unfavourably and that the reason for that would breach the 2010 Act, I do think there is little reasonable prospect of the claimant doing so. That is particularly the case for those allegations where the GMC's actions and decision accord with its policies and the legislative framework which applies to it. Because of the weakness of this element of the claimant's case, where I have not struck out an allegation I have made a deposit order in relation to it.

41. In the case of some allegations, I have found some of the claimant's allegations to be "conclusively disproved by" or "totally and inexplicably inconsistent with" the undisputed contemporaneous documents. Where that is the case I have struck those allegations out. I have set out my reasons for doing so in relation to each of those allegations below.

The Allegations

Background facts

42. To place the allegations in context I first record my findings about the background facts. Restrictions were first imposed on the claimant by the GMC's Interim Orders Panel by an Interim Order made on 11 June 2014 (p.94). That followed a referral to the GMC on 15 April 2014 by Mr Martin.

43. The Interim Order was reviewed and extended on a number of occasions until 8 August 2017 when it was revoked (p.124). That decision took into account the claimant's acceptance on 24 July 2017 (pp.950-951) of an offer of undertakings made by the GMC (originally on 23 November 2016 (pp.126-161) and again on 3 July 2017 (pp.162-192). By those undertakings (pp.159-161) the claimant agreed, amongst other things, to inform the GMC of any new post he took up before he started in that post and to be subject to supervision in the work he carried out. His practice was restricted to basic breast surgery and he was only allowed to carry out reconstructive breast surgery in very limited circumstances.

The RCS Report and CHKS reports

44. The primary evidence provided by Mr Martin in support of his referral was a report from the Royal College of Surgeons ("the RCS Report"). That followed the RCS's review into the claimant carried out in December 2013 and January 2014 under the Invited Review Mechanism ("the IRM") at Mr Martin's request. In brief, the RCS Report found "a level of complications and implant loss which much exceeds that which would be expected" (p.323). It did so having examined what the RCS Report referred to as "the case records of a random sample" (p.323).

45. The claimant says that Mr Martin's referral to the GMC was deliberately misleading and involved "wholly erroneous information and fabricated documents" (Claimant's skeleton argument para 31). He says that Mr Martin skewed the evidence presented to

those who prepared the RCS Report in two specific ways. First, rather than a "random sample" of cases, Mr Martin arranged for the sample of cases provide to the RCS review to be "targeted" at those where complications had occurred (p.1493). The conclusions of the RCS Report do refer to "the case records of a random sample" and that supports the claimant's case that those undertaking the IRM thought he case records they were examining was a random sample rather than a selection of cases involving complications.

46. Second, the claimant says that misleading CHKS data was provided. The Caspe Healthcare Knowledge System ("CHKS") used benchmarking software to compare all aspects of the claimant's work with those of colleagues across the country. It used a number of metrics including complication rates. The claimant's complaint is that the RCS Report was based on a CHKS report from October 2013 which appeared to show he had markedly higher complication rates than his peers. He says that was because it included cases where he had removed ruptured PIP implants for externally referred patients, i.e. cases which were counted as complications but should not have been. When that data was corrected in a CHKS report for the claimant for December 2013 it showed that of the two complications metrics, one was lower than peer average and one was higher than peer average but "within the upper limit of the funnel plot" (pp.721-722). In contrast the October 2013 report led the RCS Report to conclude that the complication rates for these metrics were "very significantly worse than peer average" (p.318).

47. The contemporaneous documents support the claimant's case that the October CHKS 2013 report did distort his complication rate and that he had raised this issue with Mr Martin prior to the RCS review taking place in December 2013 (pp.1369-1371). For the GMC, Mr Hare's position was that while the RCS Report might be the trigger for the GMC's investigation, the GMC's decision to impose restrictions on the claimant was not based on the RCS Report and the CHKS data but on expert report(s) provided by Prof Andrew Baildam. I set out my decision about these issues under allegation 3(b) below,

48. Turning to the specific allegations. Where appropriate I have grouped allegations involving repetition of the same kind of decision or conduct together.

<u>Respondents' failure to investigate the claimant's complaints against Ian Martin (Medical Director of City Hospitals Sunderland NHS Trust) regarding false documents and false/misleading information supplied by him upon which the Respondents relied upon to carry out indefinite investigations against the claimant (3(a), 3(c), 4(a) and 4(b))</u>

49. On 11 February 2015 the claimant sent the GMC a formal complaint against Mr Martin. He stated that Mr Martin had discriminated against him (p.1341) in particular by providing false information when Mr Martin referred him to the GMC. By this the claimant meant basing the referral on the October 2013 CHKS data and the RCS Report based on that data. The GMC's enquiry team sent the claimant a letter on 23 February 2015 telling him the GMC would not be investigating the issue. That seems to have been on the basis it was an "employment dispute". The letter said that if a bullying and harassment investigation were to determine that Mr Martin had bullied the claimant or treated him unfairly then the GMC would be able to consider that information and whether it raised fitness to practise concerns at that time (pp.1355-56).

50. That letter does not suggest that the complaint was referred to the GMC's triage process to determine whether an investigation should take place. That was not done until 23 March 2017 (pp.1362-1365). That triage referral form suggests that the claimant raised

his complaint against Mr Martin in his representations in response to offer of undertakings. It does not refer to the claimant's complaint in February 2015 although the central issue in both is the allegation that Mr Martin based the referral on inaccurate CHKS data. It is not clear why to me on the documentation why what seems to be the same issue led to a triage referral when raised in 2017 but to a rejection by a letter from the enquiry team in 2015.

51. On 20 April 2017 the GMC wrote to the claimant to say that it had decided not to investigate the complaint against Mr Martin because it did not meet the threshold for a fitness to practice investigation (pp.1380-1381). The decision letter said that the issue raised was not a fitness to practice issue, as even if some of the data on the report was inaccurate, there was "no evidence to suggest that Mr Martin has deliberately set out to deceive, or that he has referred you maliciously without having any valid concerns about your claimant's practise himself".

52. The documentation supports the claimant's case that Mr Martin did not include the December CHKS data when he referred the claimant to the GMC (p.1362-5). It is not clear to me what steps were taken to examine the evidence prior to reaching the decision not to investigate the issue as a fitness to practice matter. It is also not clear to me what the parameters of "misconduct" are in s.35C(2)(a) of the Medical Act 1983. I can see that even if the allegation against Mr Martin was substantiated it does not involve something which directly impacts on patient safety. On the other hand, I am not clear how allegations of discrimination are treated by the GMC when it comes to deciding whether they raise fitness to practice issues. These are matters on which it seems to me the final hearing will need to hear evidence to put the decision not to investigate into context. Because of that I do not find I can say this allegation has no reasonable prospect of success.

53. That applies to the initial decision not to investigate and the subsequent refusals to review that decision between September 2017 and May 2019. The refusal to do so in September 2017 concluded that there was no dishonesty in Mr Martin failing to supply the December 2013 CHKS data or flagging up the claimant's concerns about the October 2013 CHKS data when Mr Martin referred the claimant to the GMC in April 2014 because "Mr Martin's referral was a reconstruction of how the RCS came to be invited to conduct the review" so there was "no prospect of proving dishonesty in him including in the referral the bundle that was submitted to the RCS ahead of the review" (pp.1400-1406) It seems to me strange that a referral to the GMC would not include all relevant evidence available at the point of referral rather than exclude some potentially relevant evidence (the December 2013 CHKS data) in order to reconstitute the evidence at an earlier date. It may be that is the GMC's standard approach but that would need to be clarified by evidence at the final hearing.

54. Mr Hare submitted that for these allegations there was a time limit issue which also meant that they had no reasonable prospect of success. He submitted that the last decision made by the GMC on this issue was in September 2017 so the complaint submitted to the Tribunal about it was out of time. Even if that is correct, the Tribunal at the final hearing would have to hear evidence from the claimant to understand whether it was just and equitable to extend time for hearing that complaint and I did not hear evidence from the claimant about the delay.

55. Taking all the elements above into account (together with my overarching conclusions about the "reason why" issue I do find that these allegations have little

reasonable prospects and make a deposit order in relation to them. I do not, however, find I can say that they had no reasonable prospects of success so do not strike them out.

Respondents' failure to investigate the Claimant's complaints of 11 & 23 February 2015 regarding the authenticity and the use of those false documents and misleading information against him which he has severally complained on 9 February 2017, 23 March 2017, 5 June 2017, 28 June 2017, 3 July 2017, including on 8 March 2018, 16 March 2018, 15 March 2019, 3 May 2019 until date (allegation 3(b), 5(a) and 5(b)).

56. There is an overlap in terms of relevant facts between this and the allegations considered in the previous section of this judgment. The claimant says his referral to the GMC was based on flawed evidence which, in a sense, infected the decisions to restrict his practice. Mr Hare submitted that view was wrong. He says the decisions to restrict the claimant's practice were based on the expert's review of primary patient records, not on the findings of the RCS Report or complication rates as evidenced by the October 2013 CHKS data. That cannot apply to the decisions made prior to the first expert report being received in February 2015, e.g. to make the Interim Order in June 2014 (pp.93-96) and to subsequently continue that order in force. The decision to impose the interim order necessarily took into account the RCS Report because the expert's report was not available by then (p.95).

57. I do accept that the evidence supports Mr Hare's view that once the expert's report was available the GMC decision was based primarily on that rather than directly on the CHKS data. The documentation is not wholly inconsistent with the data having been taken into account to some extent even at that point, however. Mr Hare submitted that references to that data in the decision to offer undertakings on 23 November 2016 (pp..126-161) were in the "background" section rather than the "decision" section of that decision. However, in July 2017 the GMC revised the decision document to state explicitly that its decision did not take into account the October CHKS 2013 data. There is at least some implication in that that it had been taken into account in the earlier decision. What is more, that July 2017 report (p.165) states that the October 2013 data was not taken into account because of a submission made by the claimant "at the closing stages of this investigation". That seems to me inconsistent with the documents, which show the claimant had raised this issue of the unreliability of the October 2017 data earlier in the investigation as well as by raising the complaint about Mr Martin which was specifically about this issue.

58. Taking all the elements above into account (together with my overarching conclusions about the "reason why" issue I do find that these allegations have little reasonable prospects and make a deposit order in relation to them. I do not, however, find I can say that they had no reasonable prospects of success so do not strike them out.

The allegations relating to refusal to lift restrictions on the claimant's practice (including to require him to undergo an assurance assessment (allegations 3(f), (g), 3(l), 3(m), 3(n), 4(d), 4(e)).

59. The claimant's case is that restrictions should not have been imposed on his practice because they were based on false evidence provided by Mr Martin. He also says that the GMC should have removed those restrictions from at least September 2017 (allegation 3(f)). He says there was sufficient evidence from experts in his field of practice

who supervised his work from October 2015 onwards to satisfy the GMC that there had been successful remediation of the concerns giving rise to the restrictions.

60. I find the contemporaneous documents support the GMC's case that the decisions to maintain the restrictions on the claimant's practice were reached having regard to the legislative framework within such decisions were made (including in particular the overarching objective in s.1 of the Medical Act 1983 which includes protecting the public).

61. It also seems to me the documentation supports the GMC's case that those decisions were reached in accordance with the GMC's Guidance for decision makers on agreeing, varying and revoking undertakings (pp.1521-1536) ("the Guidance"). That places an emphasis on documented and evidenced sustained improvement in the doctor's performance and (at para 58) states that "[when deciding whether to revoke undertakings] it is our policy to ask for an objective assessment of a doctor's performance to give an assurance that any identified failings or issues have been addressed. This may be a full performance assessment or a tailored assurance assessment" (p.1530).

62. I accept that the documents show that those who supervised the claimant at the hospitals where he worked from 2015 onwards were positive in their feedback about him and provided positive appraisals and supporting documents (e.g. pp.963-982). I do not accept that the documentation shows the kind of clear an unequivocal chorus for removal of the restrictions from a body of experts which the claimant suggests. The first unequivocal statement of that nature seems to me to have been by Mr Hamed in November 2018 (p.1202). When that was supported by Dr Steddon, the claimant's responsible officer at Guy's on 5 March 2019 (p.1202) the claimant's case was referred to the GMC's Senior Decision Makers a week later (p.1206).

63. The documents show the GMC did take into account the views of those experts but concluded that the evidence provided was not sufficient to meet the standards set by its guidance for revoking the undertakings. The characterisation of that evidence overall as "only piecemeal evidence of his remediation, rarely in a timely manner and despite clear advice on the rules and guidance governing his undertakings" in the GMC's decision dated 1 May 2019 (p.215) seems to me an accurate one. I also find that the decision to require an assurance assessment consistent with the GMC's policy of requiring objective evidence over a period of time that the concerns which gave rise to restrictions no longer pose a risk to the public.

64. Given that the GMC's decisions to maintain restrictions and to require him to undergo an assurance assessment seem to have been taken rationally and in accordance with its policies, I have considered carefully whether the claimant's complaints that they were acts of discrimination, harassment or victimisation have no reasonable prospects of success and should be struck out.

65. The test for each kind of breach of the 2010 Act is different but in broad terms the claimant would have to show that the decisions made in his case were different (and adverse) to those which would have been made for a doctor in materially the same circumstances and that the reason for that was his race (direct race discrimination), related to race (harassment) or because he did a protected act (victimisation). For the harassment complaint to succeed he would also have to show the decision was "unwanted conduct which had a harassing purpose or a harassing effect.

66. On the evidence I have before me, there is nothing to suggest that the GMC would have treated any case differently to the way it treated the claimant's when it comes to these decisions. However, I do not have evidence to put the claimant's treatment in context. I do not know, for example, how exceptional it is in practice to decide that an assurance assessment is not required. That sort of evidence, it seems to me would be given orally at the final hearing. While I think there is little reasonable prospect of these allegations succeeding, therefore, I find I cannot say there is no reasonable prospect. I have decided not to strike these allegations out but have made a deposit order in relation to them.

Delaying the investigation into the claimant (allegation 3(d), 5(c))

67. Allegation 3(d) is that the GMC "deliberately and inexplicably" delayed the investigation for 6 years without subjecting him to the Medical Practitioners Tribunal. It is the case that the restrictions on the claimant's practice have been in place for 6 years. However, this allegation is a distortion of events evidenced by the documents. I accept Mr Hare's submission that the proper characterisation of any delay in this case until a decision was reached was at most 3 years. Mr Martin's complaint was made on the 15 April 2014. The decision to offer undertakings was first made in November 2016 (pp.132-157) and repeated in July 2017 (pp.162-192).

68. I also accept Mr Hare's submission that the delay up to that point arose primarily because of delays in the independent expert, Professor Baildam, providing his final report. That was partly because it was agreed that he should review his report on the claimant (originally prepared by February 2015 (pp.422-476)). That was because both he and the claimant took the view that the medical records provided by City Hospitals Sunderland NHS Trust as the basis for that report were incomplete. Further records were requested on the 28 May 2015 (p.495).

69. They consisted of 16,000 pages which contributed to a delay in producing the revised expert's report. The report had not been received by 9 May 2016 when the GMC accepted in an email that the delay was "unacceptable" (p.522). It said the revised expert's report was expected in a few days. It was received by the GMC on the 16 May 2016 but the GMC then posed further questions to Professor Baildam which led to a final report being received from him on 6 September 2016. That was disclosed to the claimant as supporting documentation for the allegations sent to him on 8 September 2016 (pp.657-692). There was a further delay because the claimant asked that Professor Baildam respond to his representations. They were provided in January 2017 but the further supplementary report from Professor Baildam was not produced until 31 May 2017 (pp.838-861).

70. The documentation shows that there clearly was delay in the period 2015-2017 when Professor Baildam was producing his revised and supplementary reports. Some of that delay was due to delays in a third party producing patient records but it is also clear that there was "unacceptable" delay attributable linked to finalising the expert's reports.

71. Mr Hare submitted that the delays were outside the GMC's control and are a "regrettable, but inevitable aspect of complex GMC investigations". In this case, however, the GMC itself accepted in May 2016 that the delays in this case were "unacceptable" which suggests that by then they may have been outside the norm. There was then a further year before the expert's supplementary report was produced. On the face of it, the

delay up to 2017 was not in accordance with what the GMC itself thought of as acceptable standards. Given that, I find I cannot say that there is no reasonable prospect of the claimant satisfying the Tribunal at the final hearing that that delay amounted to less favourable or unfavourable compared to others. It may be that delay in the claimant's case is not unusual in GMC investigations but I have no evidence about that before me. Although I have decided not to strike out this allegation. I have decided to make a deposit order. That is because I think there is little reasonable prospect of the claimant establishing both that he was treated less favourably/unfavourably or subjected to unwanted conduct and that the reason for that conduct was his race, race-related or the fact he had done a protected act.

"Forcing" the claimant to sign undertakings on 23 November 2016, 3 July 2017 and 24 July 2017 (allegation 3(e))

72. I find that this allegation has no reasonable prospect of success. The evidence contradicts the claimant's case that he was "forced" to sign undertakings. The decision letter dated 23 November 2016 telling him of the decision to offer undertakings refers to "an invitation to agree undertakings", advises the claimant to consult with any legal advisers before doing so and provide details of source of support (p.126).

73. When the offer of undertakings was repeated in July 2017 it was in the same terms and there is nothing in the email correspondence between the claimant and the GMC when he returned the signed undertakings at the end of July 2017 to suggest he was "forced" to do so (pp.946-948). Had he wanted the matter to progress to a MPT he could have simply refused to sing the undertakings.

74. The evidence does not support the factual basis for the allegation and I strike it out as having no reasonable prospect of success.

Dictating and putting undue pressure on his current employer (Lewisham and Greenwich NHS Trust) on 17 September by putting unnecessary requirements purporting to rely on the terms of his forced undertakings (allegation 3(h)).

75. From 20 May 2019 (p.1250) the claimant began working for Lewisham and Greenwich NHS Trust ("Lewisham") on a bank basis pending confirmation of his fixed-term appointment at Lewisham. On 17 September 2019 the GMC did write to Lewisham to explain that under the terms of his undertakings there were limits on the kind of bank contracts or locum work which the claimant was allowed to do (p.1212). That email simply reflected and explained the contents of the undertakings entered into by the claimant (specifically undertakings 5 and 7). The GMC was simply informing the claimant's employer of the effect of the undertakings by which he had agreed to be bound. I cannot see how that could be "undue pressure" or "putting unnecessary requirements" on Lewisham. I find there is no reasonable prospect of this allegation succeeding and on that basis I strike it out.

Deliberate failure to arrange or communicate with him in relation to the assurance/performance assessment following the 10 April 2019 decision to carry out performance assessment thus perpetuating investigations (allegation 3(i))

76. On 10 April 2019 an Assistant Registrar (pp.198-200) wrote to the claimant to explain that it had been decided that he should undergo an assurance assessment before a decision could be made about lifting restrictions on him. The letter told the claimant he would need to complete an assessment portfolio by 10 May 2019. There is then a gap in the documentation when it comes to progressing the assurance assessment until 11 October 2019 when the claimant telephoned the GMC to confirm his willingness to undergo an assistance assessment (p.1215). It is then the claimant who chases the GMC about progressing this on 17 October 2019 (p.1219).

77. In a telephone call with the claimant on 18 October 2019 Jack Gibson of the GMC confirmed that the assessment would be carried out by independent assessors, that the claimant would need to submit a portfolio and that the assessment would not know the details of the assessors "for a few months" while the assessment team set everything up (p.1220). On the same day Mr Gibson sent the claimant the portfolio and other documents which he needed to complete, giving a deadline of 31 October for doing so (p.1222). He chased the claimant for the portfolio on 12 November 2019 (p.1224). On the 2 December 2019 the claimant telephoned the GMC and said he felt an assessment was unnecessary (p.1226-1227). However, on 16 December 2019 he submitted his portfolio.

78. Although there is arguably delay on the part of the claimant from October 2019 the documents before me do not contradict the claimant's allegation that there was no contact about the assessment form the GMC between April 2019 and October 2019. For example, the documentation did not include evidence of the GMC chasing the claimant for his assessment portfolio due in May 2019. I do not find that his allegation has no reasonable prospect of success. However, because of the weakness of the "reason why" evidence in the case I do think it has little reasonable prospect of success and make a deposit order in relation to it.

Continuing unnecessary threats with sanction for breach of his undertakings on 11 January 2018, 17 September 2019 and 24 January 2020 (allegation (3)(j) and 4(c))

79. This allegation refers to the GMC writing to the claimant to tell him that it was investigating potential beaches by him of the undertakings he had signed. As with 3(h) above, the allegations in each case related to his starting a new post without the GMC having been supplied with the necessary prior approvals.

80. In each case the GMC decided not to take action after investigating and after the failure to provide approvals had been rectified. I do not think that this can be characterised as "continuing unnecessary threats". The GMC was warning the claimant of the potential consequences of his breaches of the undertakings and giving him an opportunity to make representations. I find there is no reasonable prospect of this allegation succeeding and on that basis I strike it out against both the First and Second Respodnents.

Cancellation of assurance/performance assessment reluctantly arranged following Pre-action letter from the Claimant's Legal Representative on excuse of due to COVID-19 on 18 March 2020; without any further arrangement or alternative form of assessment such as telephone, skype or other form of objective assessment (allegation 3(k))

81. The documentation confirms that the GMC paused assessments because of the COID-19 pandemic (p.1292-1295). Given the nature of the assessment the claimant was required to undergo I do not think that there are any reasonable prospects of his being able to show that failing to carry out that assessment by telephone or Skype was les or unfavourable treatment. The documentation shows that the GMC did on 10 June 2020 provide information about acceptable alternatives to an objective assessment (pp.1301-1302). I find that this allegation has no reasonable prospect of success and strike it out.

The claims against the Second and Third Respondents

82. I have dealt with the complaints against Ms Rowland and Mr Bridge above. in addition to the limited nature of the specific allegations against them, Mr Hare submitted that the limited nature of each of their roles in the GMC process meant there was no reasonable prospect of any of the complaints against them succeeding. I find I do not have enough evidence about their roles in the process to reach that conclusion.

The Indirect Discrimination Complaints

83. The PCPs set out as the basis of the indirect race discrimination complaints each involve the claimant himself being treated less favourably. They are not, therefore, PCPs which the respondent "would apply to persons with whom the claimant does not share the [characteristic of being a black British doctor]" as required by s.19(2)(a) of the 2010 Act. I considered whether the appropriate course of action was to require the claimant to amend the PCPs. However, I am satisfied from what Mr Echendu told me at the preliminary hearing that these indirect discrimination complaints are really allegations of direct race discrimination. He suggested, for example, that assurance assessments are only carried out in relation to black and minatory ethnic doctors. I find that the indirect discrimination complaints have no reasonable prospects of success and strike them out.

Employment Judge McDonald

Date: 20 December 2020

JUDGMENT AND REASONS SENT TO THE PARTIES ON
21 December 2020

FOR THE TRIBUNAL OFFICE

Annex - Agreed List of Issues for the Preliminary hearing

IN THE EMPLOYMENT TRIBUNALS
MANCHESTER

CASE NO: 2410091/2019

BETWEEN:

MR O IWUCHUKWU

Claimant

--and—

(1) GENERAL MEDICAL COUNCIL
(2) ANNA ROWLAND
(3) PAUL BRIDGE

Respondents

AGREED LIST OF ISSUES

ISSUES

(1) Whether the claimant's complaints of race discrimination in Paragraphs 3 (a) and (c) and 4(a) below has been presented before the end of the period of three months starting with the date at the act complained of?

(2) If not, whether the Paragraphs 3 (a) and (c) and 4(a) allegation of race discrimination was of conduct extending over a period of time?

(3) If not, whether time should be extended for consideration of Paragraphs 3 (a) and (c) and 4(a) of the allegations of race discrimination pursuant to section 123(1)(B) of the 2010 Equality Act?

(4) Whether all or any of the claims should be struck out on the basis it/they have no reasonable prospects of success?

(5) If not, should a deposit order be made in relation to all or any of the claims on the basis it/they have little prospect of success?

1. The Claimant issued the Claim on 10 July 2019. The Respondents filed their ET3 and Response on 23 October 2019. On 21 October 2019, the Claimant applied to amend the Claim and made a further application to do so on 30 March 2020.

2. In the Claim, the Claimant alleges direct race discrimination, indirect race discrimination, harassment on the grounds of race and victimisation.

3. The factual matters relied upon as particulars of discrimination against the First Respondent are:

(Race discrimination)

(a) Respondents' failure to investigate his complaints against Ian Martin (Medical Director of City Hospitals Sunderland NHS Trust) regarding false documents and false/misleading information supplied by him upon which the Respondents relied upon to carry out indefinite investigations against the claimant.

(Race discrimination including Harassment)

(b) Respondents' failure to investigate the Claimant's complaints of 11 & 23 February 2015 regarding the authenticity and the use of those false documents and misleading information against him which he has severally complained on 9 February 2017, 23 March 2017, 5 June 2017, 28 June 2017, 3 July 2017, including on 8 March 2018, 16 March 2018, , 15 March 2019, 3 May 2019 until date.

(Race discrimination)

(c) failing to investigate and/or subject Ian Martin to the fitness to practise proceedings in relation to the allegations of probity, dishonesty and criminal acts the Claimant raised against Mr Martin (the Medical Director at City Hospitals Sunderland) in his email dated 11 and 23 February 2015, and continued on various dates as in 3(b) above until 3rd May 2019.

(Race discrimination, Harassment and Victimisation)

(d) deliberately and inexplicably delaying that investigation without subjecting the claimant to Medical Practitioners Tribunal for 6 years now or carrying out any performance assessment to close the investigation until date.

(Race and Victimisation and Harassment)

(e) "forcing" him to sign undertakings on 23 November 2016, 3 July 2017 and 24 July 2017 in form of a scheme to perpetuate investigations without putting the matters to MPT to determine his Fitness to Practice.
(Race discrimination, Victimisation and Harassment)

(f) refusing to remove the restrictions on his practice (Undertakings) on 7 September 2017 following the successful remediation and recommendation by the Medical Professionals in Cornwall Hospitals NHS FT to the Respondent to remove the restrictions.
(Race discrimination Harassment and Victimisation)

(g) Raising other criteria to perpetuate investigation in form of an assurance assessment on 10 April 2019 until date.
(Race discrimination, Harassment and Victimisation)

(h) Dictating and putting undue pressure on his current employer (Lewisham and Greenwich NHS Trust) on 17 September by putting unnecessary requirements purporting to rely on the terms of his forced undertakings.
(Race discrimination, Harassments and Victimisation)

(i) Deliberate failure to arrange or communicate with him in relation to the assurance/performance assessment following 10 April 2019 decision to carry out performance assessment thus perpetuating investigations.
(Race discrimination, Harassment and Victimisation)

(j) Continuing unnecessary threats with sanction for breach of his undertakings on 11 January 2018, 17 September 2019 and 24 January 2020.
(Race discrimination, Harassment, and Victimisation)

(k) cancellation of assurance/performance assessment reluctantly arranged following Pre-action letter from the Claimant's Legal Representative on excuse of due to COVID-19 on 18 March 2020; without any further arrangement or alternative form of assessment such as telephone, skype or other form of objective assessment
(Race discrimination, Harassment and Victimisation)

(l) By the Respondent's 3 May 2019 and 16 April 2020 decisions refusing to remove restrictions attached to undertaking following the Claimant's application under the rules despite provision of alternative objective evidence requested.

(Race discrimination, Harassment and Victimisation)

(m) By the Respondent's decision of 16 April 2020 refusing to remove the undertakings despite the performance assessments, Appraisals, carried out by 3 Hospital professionals in the specific area of medicine practised by the Claimant.

(Race discrimination, Victimisation and Harassment)

(n) By the Respondent's decisions of 10 June and 16 June 2020 refusing to remove undertakings despite the Claimant having provided evidence in respect to various claims

4. The factual matters relied upon as particulars of discrimination against the Second Respondent are:

(Race discrimination)

(a) Decision refusing to investigate Ian Martin on ground of no fitness to practice grounds.

(Race discrimination including Harassment)

(b) Decision of 20 April 2018 continuing refusal to investigate documents and information supplied by Ian Martin which were false/misleading.

(Race discrimination, Harassment and Victimisation)

(c) Threat of Sanction of breach on 11 January 2018 and 13 February 2018.

(Race discrimination Harassment and Victimisation)

(d) Decision of 10 April and 3 May 2019 imposing other criterion for revoking the undertakings namely an assurance/performance assessment.

(Race discrimination, Victimisation and Harassment)

(e) Decision of 16 April 2020 refusing to remove the undertakings, and insistence on unnecessary assessments in the light of already assessments

by relevant professionals. (Paragraphs 4(a)-(e), acts by First and Second Respondent)

5. The factual matters relied upon as particulars of discrimination against the Third Respondent are:

   (Victimisation & Race discrimination)

   (a) As Investigation officer, failure to investigate the authenticity and genuine nature of documents & information supplied by Ian Martin which the Claimant alerted him and provided correct and original documents to him. (Race discrimination and Victimisation)

   (b) Failure to alert the GMC of the damaging risks of relying upon the false CHSK upon which the GMC relied upon to sanction and damage the Claimant's professional career as a Surgeon.

   (Victimisation)

   (c) allowing significant and inexplicable delays in his investigations amounting to torture and inhumane treatment. (Paragraphs 5(a) to (c), acts by Third Respondent and First Respondent)

6. The Claimant identifies his race as Black British.

7. In relation to the claim of direct discrimination and harassment, the Claimant relies on the matters listed at 3(a)-(n), 4(a)-(e) and 5(a)-(b) as particulars of discrimination/harassment. In relation to the claim of direct discrimination he compares his treatment to that of Mr Martin/Hypothetical comparator.

8. In relation to the claim of indirect race discrimination, the Claimant relies on:

   - The First Respondent's following provision, criterion or practice:
     - in relation to the assurance assessment which was applied to him on 10 April 2019, 3 May 2019 and 16 April 2020

- delays in investigating/pursuing the fitness to practise case against him between 2014 and 2020;
- in relation to the removal and/or variation of undertakings which was applied to him on 16 April 2019

- and which put him at the following disadvantage(s):

  - loss of employment;
  - career ruin.

9. In relation to the claim of victimisation, the Claimant relies on the following protected act(s):
   (a) Complaints of less favourable treatment to the Fitness to Practise Directorate on 23 February 2015.
   (b) Complaints of race discrimination to Third Respondent on 5 June 2017, 23 September 2018, 17 and 22 November 2018 and 23 July 2018.
   (c) Complaints of less favourable treatment to Jack Gibson 8 and 13 March 2018.
   (d) Complaints of less favourable treatment to Ian McCann of 14 March 2019.
   (e) Complaints of less favourable treatment to Fitness to Practise Directorate 15 & 25 March 2019 and complaint dated 22 March 2019 sent on 12 April 2019.
   (f) Complaints of race, harassment and victimisation in complaints of 23 July 2018, 15 March 2019 (Satisfactory Appraisal) and 25 March 2019 to the Fitness to Practise Directorate & to the Third Respondent.
   (g) Complaints of racism via Application for Rule 12 Review on 26 March 2019.
   (h) Complaints of Race Discrimination of the Third Respondent on 23 July 2018 & 17 November 2018
   (i) Complaints of harassment on 23 January, 5 February 2020 and 3 March 2020 to the Assistant Registrar.
   (j) Race complaint on 13 June 2017 to Lauren Taylor.

10. The Claimant relies on the matters listed at 3(d)-(n), 4(c)-(e) and 5(a)-(c) as particulars of victimisation and 16 April 2020 Case Examiners decision including 10 June 2020 to Jack Gibson decision and 16 June 2020 GMC response.